NASPA
Student Affairs Administrators in Higher Education

TRAINING MATERIALS Track 2: Title IX Decision-Makers and Student Conduct Administrators

2020 Cohort #3

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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

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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. (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. (internal citation 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. Id. (internal citation omitted).

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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. Id. (internal citation omitted).

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).

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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. Id. (internal citations omitted).

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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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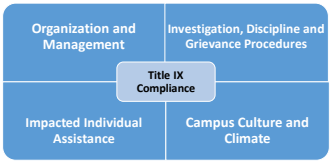
Four Corners Model

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
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Detailed Legal Foundations and the New Regulations

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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.

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Whose View of Title IX Wins in the End?

Showdowns are coming!

CONGRESS

COURTS REGULATORS

→ Court cases are already testing some issues

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Free Speech and Academic Freedom in the New Regulations

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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"

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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)

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

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2018 OCR Statement

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

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

U.S. Dept. of Educ. Office for Civil Rights, *Sex-based Harassment*, https://www2.ed.gov/about/offices/list/ocr/frontpage/pro-students/issues/sex-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 15, 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."

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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."

68

"Due Process"

69

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?

70

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.

72

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.

74

"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).

76

"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.

78

A Review of the New Regulations

Operational considerations will be addressed in separate modules.

79

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

80

§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)

81

§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.

82

§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.

83

§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.

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.

86

§ 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.

88

§ 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?"

92

More on Complainants/Respondents

- *A person may be a complainant, or a respondent, even where no formal complaint has been filed and no grievance process is pending.* *Id.* at 30030.
- *References . . . to a complainant, respondent, or other individual with respect to exercise of rights under Title IX should be understood to include situations in which a parent or guardian has the legal right to act on behalf of the individual.* *Id.*
- ***[T]he definitions of "complainant" and "respondent" do not restrict either party to being a student or employee**, and, therefore, the final regulations do apply to allegations that an employee was sexually harassed by a student.* *Id.* at 30071-72 (internal citations omitted, 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?"

94

"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.

98

"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.

100

§ 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.

104

§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.

106

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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.

110

§ 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;

112

§ 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;

116

§ 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;

118

§ 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

§ 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.

124

§ 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.

128

§ 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.

130

§ 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;

134

§ 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;

136

§ 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.

140

§ 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.

142

§ 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;

145

§ 106.45(b)(7)(ii)(C)

(C) Findings of fact supporting the determination;

146

§ 106.45(b)(7)(ii)(D)

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

147

§ 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:

152

§ 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.

153

§ 106.45(b)(8)(ii)

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

154

§ 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.

158

§ 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.

160

§ 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).

164

§ 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.

165

§ 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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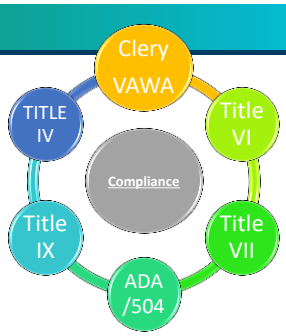

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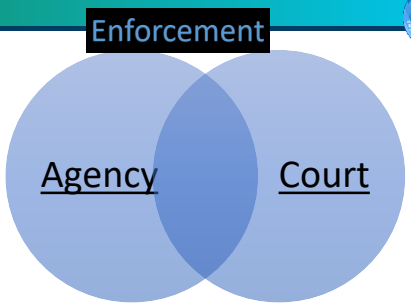

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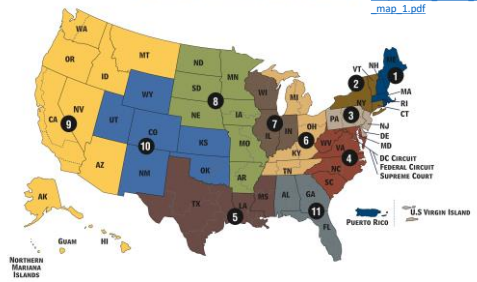
Geographic Boundaries

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

177

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

178

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:

179

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

180

Title VI

Title VI

- Civil Rights Act of 1964
- Race, Color, National Origin
- Statute = 42 U.S.C. 2000d
- Regulations = 34 C.F.R. 100
- Office of Civil Rights

181

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

183

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

184

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

186

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

189

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

195

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.

199

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

201

Interpretation

202

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

203

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."

210

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

216

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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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

221

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

Developing Policies, Procedures and Practices

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This Module is Designed for:

TRACK 1 – Title IX Coordinators

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

228

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).

229

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.

230

Operationalizing the new Title IX regulations requires making certain choices.

"Tuning" is important.

231

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.

232

"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).

233

Policy Basics:
What Should be Included?

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Policy Basics

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

235

Policy Elements

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

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Policy Elements

- 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!

238

"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)

239

"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.

240

"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)

241

"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)

242

"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)

243

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

244

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?

247

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.

248

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.

250

"Actual Knowledge," Notice, "Mandatory Reporters"

251

"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)

252

"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).

253

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.*

254

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).

255

"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).

256

"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?

257

"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).

258

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.

259

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.

260

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).

261

Scope, Jurisdiction, and Tuning with Other Campus Policies

262

"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).

263

"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).

264

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)

265

§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.

266

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?

267

"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.

268

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?

269

§ 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.

270

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?

271

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).

272

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).

273

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.

274

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).

275

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?

276

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).

277

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).

278

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

279

Prompt, Equitable, Reasonable

280

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).

281

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)

282

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.

283

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).

284

Law Enforcement Activity/ Criminal Proceedings

285

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).

286

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).

287

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.

288

Confidentiality

289

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.]

290

"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.*

291

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).

292

Complainant Autonomy/Desire to Move Forward in a Formal Process

293

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.

294

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).

295

[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).

296

Moving Forward Against the Wishes of a Complainant

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

297

Implementing Supportive Measures

298

§ 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.

299

§ 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.

300

§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)

301

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).

302

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.*
    Id. at 30521.
- Moving classes?
- 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.]

303

Emergency Removal/Administrative Leave

304

§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.

305

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).

306

§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.

307

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?

308

A Closer Look at Formal Complaints

309

§ 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)

310

"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).

311

"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).

312

§ 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.

313

§ 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.

314

§ 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.

315

Dismissal of Complaint

[I]f a respondent is no longer enrolled or employed by a recipient, or if specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein, then the recipient may dismiss the formal complaint or any allegations therein. *Id.* at 30087.

[I]f a recipient dismisses a formal complaint or any allegations in the formal complaint, the complainant should know why any of the complainant's allegations were dismissed and should also be able to challenge such a dismissal by appealing on certain grounds. *Id.* at 30053.

316

§ 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.

317

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?

318

§ 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)

319

§ 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)

320

Advisors and Hearings

[Hearings and evidence are addressed in separate modules.]

321

§ 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;

322

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).

323

"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.

324

"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).

325

"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.

326

"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.

327

§ 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.

328

§ 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)

329

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?

330

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).

331

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).

332

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).

333

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).

334

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).

335

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).

336

Cross-Examination

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

337

"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.

338

Standard of Evidence to Determine Responsibility

339

§ 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;

340

"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?

341

Sanctions and Remedies

342

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).

343

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.

344

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.

345

§ 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)

346

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).

347

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?

348

Appeals

349

§ 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:

350

§ 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.

351

§ 106.45(b)(8)(ii)

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

352

§ 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.

353

Points on Appeals

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

354

Informal Resolution

[Separate module on informal resolution.]

355

§ 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—

356

§ 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;

357

§ 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.

358

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.

359

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

360

A Closer Look at Retaliation

361

§ 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.

362

§ 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).

363

§ 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.

364

§ 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.

365

Bias, Impartiality, Conflicts of Interest, Sex Stereotypes

366

Bias/Prejudice/Stereotypes/Prejudgment/Conflicts of Interest

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

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

367

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).

368

"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).

369

"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).

370

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).

371

Conflict of Interest

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

merriam-webster.com

372

Impartial

Not partial or biased: treating or affecting all equally

merriam-webster.com

373

Prejudgment

A judgment reached before the evidence is available

webster-dictionary.org

374

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

375

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

376

"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!

377

Conclusion

378

Policy should reflect practice and practice should reflect policy.

379

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*

380

Whose side are you on?

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

381

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.

382

Thank You...

Assessment will follow.

383

NASPA
Student Affairs Administrators in Higher Education

Title IX Evidence Issues

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384

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

385

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

386

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

387

Let's examine some language from the final regulations…

388

§ 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)

389

§ 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)

390

§ 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)

391

§ 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)

392

§ 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)

393

§ 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)

394

§ 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)

395

*. . . § 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)

396

§ 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)

397

§ 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)

398

§ 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)

399

§ 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)

400

§ 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)

401

§ 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)

402

§ 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)

403

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

404

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.

405

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.

406

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

407

[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

408

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).

409

§ 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.

410

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.

411

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.

412

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.

413

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).

414

[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.

415

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).

416

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 30247 n. 1018.

417

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.

418

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.

419

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.

420

[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.

421

[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.

422

Considerations for Applying Regulatory Requirements

423

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).

424

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

425

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.

426

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.

427

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.

428

Title IX Regulations – Relevance

- Require an "objective evaluation of all relevant evidence" 106.45(b)(1)(ii)
- ***The Department declines to define 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

429

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?

430

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.

431

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).

432

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."

433

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.*
6) A Recipient may fairly deem repetition of the same question to be irrelevant.

434

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

435

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).

436

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.

437

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*

438

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

439

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

440

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

441

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

442

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

443

Exculpatory Evidence

Evidence tending to establish a defendant's Innocence.

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

444

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.

445

Title IX Regulations – Expert Witnesses

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

446

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)*

447

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

448

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.

449

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)

450

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)

451

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.*

452

Thank You!

Assessment to follow...

453

NASPA
Student Affairs Administrators in Higher Education

Imagining Title IX Hearing Proceedings Under the New Regulations

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This Module is Designed for

TRACK 1 – Title IX Coordinators

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

455

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).

456

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.]

457

Live Hearings and Decision-Makers

458

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).

459

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).

460

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.

461

§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.

462

§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)

463

§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.

464

§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.

465

§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.

466

§ 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)

467

§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)

468

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?

469

Relevance and Rape Shield Protections

470

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.

471

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).

472

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).

473

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).

474

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.

475

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).

476

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.

477

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.

478

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).

479

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).

480

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.

481

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.

482

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.

483

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.

484

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).

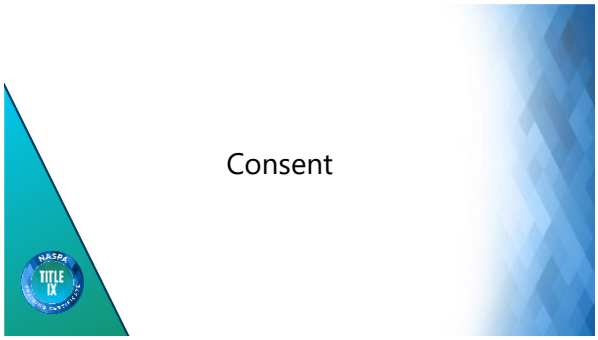
485

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).

486



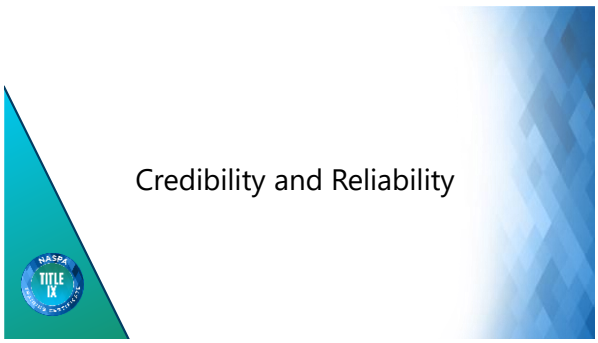
487

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.

488



489

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).

490

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.

491

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.

492

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).

493

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.

494

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.

495

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.

496

Role of Lawyers and Advisors

497

§ 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;

498

"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?

499

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).

500

"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.

501

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).

502

Cross-Examination

503

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).

504

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.

505

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).

506

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).

507

"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).

508

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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.

509

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

510

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.

511

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

512

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.

513

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.

514

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).

515

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).

516

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).

517

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.

518

"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.

519

"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.

520

Technology

521

[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.

522

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

Id. at 30348.

523

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.

524

*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 t**he recipient to troubleshoot technology to facilitate a virtual hearing**, may constitute good cause to postpone a hearing.*

Id. at 30361-62 (emphasis added).

525

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

526

Safety and Security

527

"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.

528

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.

529

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?

530

Standard of Evidence and Written Determination

531

§ 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).

532

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)

533

§ 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.

534

§ 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.]

535

Appeals

536

§ 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:

537

§ 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.

538

Serving Impartially and Without Bias

539

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).

540

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*

541

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*

542

Thank You!

Assessment Will Follow…

543

NASPA
Student Affairs Administrators in Higher Education

Informal Resolution, Restorative Justice and Mediation

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This Module is Designed for:

TRACK 1 – Title IX Coordinators

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

545

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 30088.

546

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.

547

§ 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)

548

§ 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)

549

§ 106.45(b)(9)(i) (Written Notice)

Parties must be provided written notice that outlines

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

(emphasis and bullets added)

550

§ 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)

551

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.

552

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

553

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?

554

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

555

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

556

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

557

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

558

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

559

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

560

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).

561

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

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

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

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

562

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

563

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)

564

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).

565

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).

566

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).

567

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.

568

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

Brookes & McDonough, *The Differences Between Mediation and Restorative Justice Practice*, https://ovcg.gov.jm/sites/default/files/cj/Mediation_versus_Restorative_Practice.pdf.

Restorative Justice Victoria, *How is Restorative Justice Different than Mediation*, http://www.rjvictoria.com/sites/19/how-is-restorative-justice-different-than-mediation/

569

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).

570

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).

571

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.

572

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.

573

Thank you!

Assessment to follow…

574

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Bricker & Eckler LLP

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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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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).

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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

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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.

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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

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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.

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Exceptions – Disclosure without Consent

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

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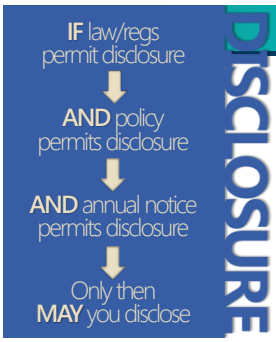

But just because you **CAN** doesn't mean you **SHOULD.**

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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).

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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.

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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

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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

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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).

595

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."

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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

598

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)

599

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.

600

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

602

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.

603

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.

604

"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.

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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.

Final Regulations at 30304.

606

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]

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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:
    - 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

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Thank you!

Assessment to follow…

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NASPA
Student Affairs Administrators in Higher Education

Adjudication for Non-Title IX Conduct Officers

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

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This Module is Designed for:

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

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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).

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Title IX's Influence on Work Under Codes of Conduct

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Interconnectedness

[T]he 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.***

The Department notes that recipients retain the flexibility to employ supportive measures in response to allegations of conduct that does not fall under Title IX's purview, as well as to investigate such conduct under the recipient's own code of conduct at the recipient's discretion.

Id. at 30289 (emphasis added).

616

Interconnectedness

[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).

617

Dismissal of Complaint

[I]f a respondent is no longer enrolled or employed by a recipient, or if specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein, then the recipient may dismiss the formal complaint or any allegations therein. *Id.* at 30087.

[I]f a recipient dismisses a formal complaint or any allegations in the formal complaint, the complainant should know why any of the complainant's allegations were dismissed and should also be able to challenge such a dismissal by appealing on certain grounds. *Id.* at 30053.

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§ 106.45(b)(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.

619

§ 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.

621

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)

622

Three-Pronged Definition

A three-pronged definition of sexual harassment recognizing *quid pro quo* harassment by any recipient employee (first prong), unwelcome sexual conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to education (second prong), and sexual assault (third prong).

623

Equal Access Denied

This three-part definition in § 106.30 adopts the Supreme Court's formulation of actionable sexual harassment, yet adopts the formulation for administrative enforcement in furtherance of Title IX's broad non-discrimination mandate by adding other categories (quid pro quo; sexual assault and three other Clery Act/WAVA offenses) that, unlike the Davis formulation, do not require elements of severity, pervasiveness, or object offensiveness. The Department assumes that a victim of quid pro quo sexual harassment or the sex offenses included in the Clery Act, as amended by VAWA, has been effectively denied equal access to education.

Id. at 30141-42.

624

"Consent"—Not Defined in New Regulations

- What will your definition be?
  - Affirmative consent?
  - Will distribute across multiple offenses
- Elements
  - consent is a voluntary agreement to engage in sexual activity;
  - someone who is incapacitated cannot consent;
    - (such as due to the use of drugs or alcohol, when a person is asleep or unconscious, or because of an intellectual or other disability that prevents the student from having the capacity to give consent)
  - past consent does not imply future consent;
  - silence or an absence of resistance does not imply consent;
  - consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another;
  - consent can be withdrawn at any time; and
  - coercion, force, or threat of either invalidates consent.

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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

626

"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)

627

"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)

628

"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)

629

Scope

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).

630

Grooming

While the sexual harassment definition does not identify "grooming behaviors" as a distinct category of misconduct, some of the conduct identified by commenters and experts as constituting grooming behaviors may constitute §106.30 sexual harassment, and behaviors that do not constitute sexual harassment may still be recognized as suspect or inappropriate and addressed by recipients outside Title IX obligations.

Id. at 30145.

631

Code of Conduct consideration

- What will you call things referred to the Conduct office that do not rise to the level of Sexual Harassment? Sexual Misconduct? Conduct of a Sexual Nature not Rising to Title IX?
- For this Code item are there any "other" carryovers from the Title IX grievance process besides the Support Measures? Role of advisor? Time frames?
- Does this warrant a panel hearing (if you have those) or Administrative Hearing?
- Would you outsource these referrals? Advantages/disadvantages?
- Does this part of the Code also include definitions on your campus not captured in the new regulations? (sexual exploitation)(intimidation)
- If you include sexual assaults not required in Title IX, do you detail that in your Title IX policy and your Code of Conduct? (cross-reference them)
- Same for outside program or activity.
- Can students serve on the boards that hear these cases (why or why not?)

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Code of Conduct considerations

- Can offer support measures for Title IX and no—Title IX alleged misconduct, include that language (are those different/same)
- Repeating language about emergency removal in Code
- Student and Organizational Conduct implications
- Disability Services accommodations
- Safety and Security considerations
- Threat Assessment overlap
- Bias Incident Reporting components
- Care Team Reports

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Intersection with CARE/Threat Assessment/or BIT teams

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State Law Considerations

- What do your state laws say – about stalking, or dating/domestic violence
- Are there specific roles and rules for threat assessment (i.e., Virginia)
- If state law requires specific actions or assessments to be made by CARE/Threat Assessment/BIT teams, by law, how does that intersect with the regulations?
- Law enforcement investigations concurrent with Title IX investigations or CARE/Threat Assessment/BIT teamwork
- Supportive Measures implications
- Restraining Orders/ Criminal Trespass Orders/No Contact Orders
- Online Sexual Harassment charges
- Felony level stalking (or other felonies)
- Consider all these overlaps when reviewing policies and procedures to make sure the language reflects the necessary steps as defined in the regulations

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Concurrent Law Enforcement delay

The final regulations only permit "temporary" delays or "limited" extensions of time frames for good cause such as concurrent law enforcement activity, this provision does not result in protracted or open-ended investigations in situations where law enforcement's evidence collection (e.g. processing rap kits) occurs over a long time period that extends more than briefly beyond the recipient's designated time frames.

Id. at 30271.

636

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).

637

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).*

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

638

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).

639

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.

640

No Contact Orders

- *The Department reiterates that sexual harassment allegations presenting a risk to the physical health or safety of a person may justify emergency removal of a respondent in accordance with 106.44(c) emergency removal provision, which could include a no-trespass or other no-contact order issued against a respondent.*
- *The final regulations do not require recipients to initiate administrative proceedings (i.e., a grievance process) in order to determine and implement appropriate supportive measures.*

Id. at 30184.

641

Emergency Removal

642

§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.

643

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).

644

Investigations

645

Referral from Dismissal of Title IX Incident

- A formal complaint has been dismissed from the Title IX office for a sexual misconduct incident. In its dismissal, the process determines it does not rise to the level/definition for sexual harassment.
- The conduct office receives a referral from the Title IX office for possible adjudication under the code of student conduct for the alleged sexual misconduct.
- How does your Code respond?
- What does your process say?

646

Investigation

- In many student conduct cases there is very little "true" investigative work, as compared to the Title IX investigation structure.
- Will your code say to investigate these cases?
- Will you provide the investigation expectation or structure for these cases?
- What are the procedures and notices processes for these non-Title IX, Sexual Misconduct alleged violations?
- Are the range of outcomes the same? Different?

647

Mandatory Dismissal

§106.45(b)(3) effectively requires recipients to make an initial determination as to whether the alleged conduct satisfies the definition of sexual harassment in § 106.30 and whether it occurred within the recipient's education program or activity, and to dismiss complaints based on that initial determination, leaving recipients, complainants, and respondents unclear about whether dismissed allegations could be handled under a recipient's non-Title IX code of conduct.

648

§ 106.45(b)(3)(i)

- "[T]he 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.*
- The Department notes that recipients retain the flexibility to employ supportive measures in response to allegations of conduct that does not fall under Title IX's purview, as well as to investigate such conduct under the recipient's own code of conduct at the recipient's discretion.

649

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)

650

§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.

651

Non-Title IX Conduct Investigation Language

- Review your existing (pre-regulations language)
- Do you have existing language you can implement into a non-Title IX misconduct section?
- It should detail how students will be notified, investigated, summarized, and adjudicated. It will likely be different from the Title IX process and the Code of Conduct process.
- This could be part of your general code or a separate section within your code (like Student Organizations, or Hazing)
- Don't forget timeframes (next slide)

652

"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).

653

"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).

654

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).

655

§ 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.

656

Evidence

657

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

658

Evidence

- The students may have already gathered their evidence and submitted it with the (now dismissed) Title IX formal complaint.
- In those instances, the Title IX Coordinator could dismiss and send the collected documentation provided by parties with the dismissal.
- It is also likely that the formal complainant was dismissed before the evidence gathering portion of the process began.
- You will need to state your evidentiary standard in your Code of Conduct (preponderance of the evidence or clear and convincing)

659

Evidence

- Once established, you will need to ask parties for any evidence they have of the alleged sexual misconduct, as well as any witnessed who might be able to speak to the allegations being made.
- Advisors in the conduct process are still permissible (though their roles are substantially different, you may need to review with advisors)
- Also, unless your Code allows for expert witnesses, you will need to explain that as well.
- A visual of the differences (once referred from TIX to Conduct would be helpful for the parties and advisors involved)

660

Inculpatory/Exculpatory/Relevance

- Again, since this is different, you need to articulate what you will accept and consider in your non-Title IX investigation
- You still want the information/evidence to be relevant (for this, and other Code of Conduct cases) and as such, it could be beneficial to include a statement about relevant evidence in Code of Conduct investigations.
- Don't be surprised if students want more of the elements, protections, and guarantees in the Title IX process – you need to think of these elements and make Code determinations on them.

661

Relevant Evidence

- Any evidence submitted should be subject to the conduct administrator investigating this non-Title IX sexual misconduct allegation regarding relevance to the allegations
- The conduct administrator must determine if the evidence submitted is relevant to the allegations, and if the evidence is credible.
- If credibility assessments are new for the non-Title IX conduct administrators, review this with the Title IX Coordinator or conduct supervisor. Necessary for review with all relevant evidence and parties

662

The Role of Incident Reports and Police Reports

663

For Conduct Hearings

- Again, unlike the Title IX process, if you are relying on incident reports from residence life (RA's or professional staff) or the University (or local) Police Department (or Public Safety Office), since cross-examination in your Code of Conduct is an unlikely element, you may or may not need to speak with the authors of the reports about the content of those narratives.
- This should also be captured on the "what's different" guide you organize for parties and their advisors.

664

Interviewing Report Authors

- Written reports are supposed to be objective. Often, in speaking with the individual who wrote the report, you can learn some of the more subjective elements of an incident that is lost in the report. While you are interested in facts, you are also interested in how the situation evolved and sometimes that is missed in the report.
- Clarifying what people remember about an incident can be an important investigative element, even in non-Title IX allegations.

665

Training Tip

- This is and important distinction when you are doing RA training (or Resident Director/Area Coordinator training for professional staff) as well as for the Police Department/Public Safety.
- They need to understand when you are calling, about a non-Title IX sexual misconduct referral, the procedures are different. Those in law enforcement may not be permitted to participate in a Title IX process (with cross-examination) but if they understand the difference, they may be more likely to assist with your code of conduct investigation.

666

In-person and Video Interview of Parties, Witnesses, etc.

667

Non-Title IX Interviews

- For Title IX hearings, you are required to audio or video record the proceedings. Cross-examination is also required. It would reason that you would also want to audio or video record the interviews with complainant, respondents, and witnesses, to provide the factual record of what testimony was provided and summarized.
- You would have the transcript/recording for review as relevant evidence provided by the investigator and the parties.
- Do you need that for non-title IX sexual misconduct cases?

668

Video or Virtual Interviews

- During a pandemic, they just make good health sense.
- Makes it much easier to record the interview as well.
- If you decide to record, make sure you notify the party with whom you are speaking. (Yes, even if you are a one-person permission required state. Optics matter.)
- This is helpful when you summarize. Someone could say they didn't say something, and you can refer them to the video and/or transcript.
- The more people involved (witnesses) the better the idea to record.

669

Credibility Assessments

670

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).

671

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.

U.S. Equal Employment Opportunity Commission, *Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors*, EEOC-CVG-1999-2 (June 18, 1999) (online at https://www.eeoc.gov/laws/guidance/enforcement-guidance-vicarious-liability-unlawful-harassment-supervisors).

672

Credibility Assessments

- For each party interviewed
- If you take a written (or emailed) statement from a witness or party, you still need to be able to ask them questions about the statement they provided (in the Title IX process, this is cross-examination. In the investigative process for non-Title IX sexual misconduct, you need to be able to ask questions about the written statement to assess credibility)

673

Implementing Supportive Measures

674

§ 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.

Supportive measures follow a complaint after the dismissal of a formal complaint when referred to student conduct for a non-Title IX sexual misconduct allegation.

675

§ 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.

676

§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)

677

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).

678

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.*

Id. at 30521.

- Moving classes?
- Housing changes?
- Two students in the same student organization, club, or team?
- Burden on one party but not the other?

679

§ 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;

680

"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
- Will this carry over for non-Title IX sexual misconduct?
- You can still set parameters like for all other conduct cases
- You will need to clarify how advisors participate in these hearings differently.

681

Conduct Hearings

682

§ 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.

683

§ 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)

684

Hearings

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

685

Non-Title IX Sexual Misconduct Hearing

- What are the differences in your regular code of conduct hearings and your non-Title IX sexual misconduct hearings?
- Process differences?
- Administrative Hearing?
- Committee or panel adjudication? (employees only? Student?)
- Advisor role in the process?
- Any sanctioning differences?

686

Stay the course

- As much as possible, you want the non-Title IX sexual misconduct hearings to mimic the regular code of conduct hearing process.
- It differs from the Title IX hearing process (no cross-examination by the advisors) but should be like most of your other conduct process.
- To keep in line with the elimination of the single adjudicator model, you might want to consider having on staff member in the conduct office "conduct the investigation and write up summary findings of the evidence gathered" and submit that to the adjudication panel or hearing officer to consider – so it separates those processes.

687

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).

688

Registered Student Organization and Greek Life Management

689

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).

690

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 registered student organization recognition?
- Will registered student organizations choose to leave?
- Relationship Agreements with student groups
- Study Abroad? (what does this section look like in the code of conduct?)

691

RSO's/Greek Life/Hazing

[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).

What if the sexual harassment allegations is part of a hazing allegation?

Which set of procedures trumps the other? You need language that addresses this.

What if the hazing allegations allege "sexual misconduct" and not sexual harassment. What if it alleges hazing, sexual misconduct and sexual harassment?

692

Hazing and Sexual Harassment/Misconduct

- Many hazing allegations involve sexual elements. Sometimes it is sexual harassment. Other times it is sexual misconduct. Many states have specific procedures and well-established protocols for how to conduct hazing investigations.
- Consulting with your Title IX coordinator and general counsel is a good idea. Do the allegations of sexual harassment/misconduct need to outweigh the other hazing elements (i.e., forced alcohol consumption, calisthenics, paddling or hitting) or does their presence automatically push this into a Title IX proceeding for a formal complaints and a live hearing with cross-examination.

693

Sanctions and Remedies

694

Sanctions and Remedies

- Do you need to carry over remedies from Title IX for your non-Title IX Sexual Misconduct hearing? A few slides on remedies…
- Again, this can be an extension of the Support Measures and then an additional educational or disciplinary element, if found responsible.
- The range of sanctions and remedies should be the same for sexual misconduct as for the other code of conduct violations
- Should you allow for the carryover of impact statements in non-Title IX sexual misconduct hearings? To hear from the parties on impact?

695

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).

696

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?

697

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).

698

§ 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)

699

Appeals

700

§ 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:

701

§ 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.

702

§ 106.45(b)(8)(ii)

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

703

§ 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.

704

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).

705

Appeals for Non-Title IX Sexual Misconduct

- What do you have now in your Code?
- What do your policies say? Can either party appeal? On what grounds?
- Who can hear appeal? Since these are different, do they need addition training?
- What needs to change? Anything?
- Where can your recruit additional appellate officers?

706

Intersectionality

707

Where overlap exists

708

Intersectionality Defined

- [T]he *Oxford English Dictionary* in 2015, which calls it a sociological term meaning "The interconnected nature of social categorizations such as race, class, and gender, regarded as creating overlapping and interdependent systems of discrimination or disadvantage; a theoretical approach based on such a premise."
- Merriam-Webster's definition is a little less academic: "the complex, cumulative way in which the effects of multiple forms of discrimination (such as racism, sexism, and classism) combine, overlap, or intersect especially in the experiences of marginalized individuals or groups."

The origin of the term intersectionality. Perlman, M. Columbia Journalism Review. October 28, 2018. https://www.cjr.org/language_corner/intersectionality.php

709

Intersectionality in Conduct

- In a non-Title IX sexual misconduct space, the allegation could be about verbal harassment (that did not rise to the level of sexual harassment) but, perhaps this is because it is about sex, and race, and gender, and sexual orientation, and because you are poor. Just because it doesn't rise to the level, doesn't mean that it is just about one thing – sexual harassment (that didn't rise to the level). It could harassment – that hasn't settled on one reason why they are harassing you.
- This is an easy point to miss. Be mindful. Be present. Ask specific questions.

710

Specific Questions

- What was said, exactly.
- Were any gestures used? What led up to the comments (what was the conversation just before the concerning comments).
- How had your interactions been previously?
- What class is it that you are in together? How have previous classroom discussions been on these kinds of topics?
- How has the faculty member led those discussions?
- Have you had any prior issues with any other students in that class?

711

Don't Assume You Know

- If there are compounding issues of discrimination or harassment at play, then it is likely the code of conduct is still the best avenue for investigation
- It is important to let the student talk about what was troubling about the interaction. In the scenario here, you would want to speak with other students in the class – and, if there isn't a student with all of those same identities – who had lived similar experiences, the perception of the interaction could be lost on them. Make sure the allegations adequately address the comments and interaction.

712

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Bias, Impartiality, Conflicts of Interest, Sex Stereotypes

713

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).

714

"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.

715

Final thought…

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.

716

Thank You…

Assessment will follow.

717

NASPA
Student Affairs Administrators in Higher Education

LIVE SESSION on Title IX Grievance Procedures/Sexual Misconduct Procedures

October 23, 2020

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

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718

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This Live Session is Designed for…

TRACK 1 – Title IX Coordinators

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

719

What we hope to accomplish…

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

720

Definitive Answers vs. Choice Points

721

Recent Withdrawal of Prior Guidance

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

722

Special Issues Highlight #1
Relationships of Decision-Makers to Other Title IX Operatives

723

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?

724

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?

725

Special Issues Highlight #2
Revisiting Consent

726

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.

727

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.

728

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.

729

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).

730

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).

731

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).

732

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.

733

Special Issues Highlight #3
Revisiting "Tuning"

734

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?

735

"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.

736

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?

737

§ 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.

738

Special Issues Highlight #4 Revisiting Advisors and Cross-Examination

739

"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.*

Id. at 30313 (internal citations omitted, bullets added).

740

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.

741

"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).

742

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).

743

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.

744

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).

745

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.

746

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.

747

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).

748

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).

749

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).

750

Special Issues Highlight #5
Creating a Hearing Agenda

751

§ 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)

752

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.

753

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.

Id. at 30361.

754

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

755

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.

756

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.

757

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).

758

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).

759

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).

760

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.

761

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.

762

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.

763

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.

764

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.

765

"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.

766

"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.

767

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

768

§ 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).

769

§ 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)

770

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).

771

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).

772

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

773

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

774

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).

775

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.

776

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.

777

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).

778

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).

779

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).

780

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.

781

Special Issues Highlight #8
Written Determination

782

§ 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).

783

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)

784

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IRAC: Basic content of a report

- Issue(s)/Procedural Posture
- Rule (Policies/Allegations)
- Analysis (Rationales)
- Conclusion(s)

785

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

786

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).

787

Special Issues Highlight #9
Supportive Measures, Sanctions and Remedies

788

§ 106.45(b)(7)(iv)

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

- Remedies
- Sanctions
- Continuation of Supportive Measures

789

Special Issues Highlight #10
Revisiting Appeals

790

§ 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:

791

§ 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.

792

§ 106.45(b)(8)(ii)

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

793

§ 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.

794

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?

795

Tabletop Exercises and Breakout Groups

796

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.

797

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.

798

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?

799

Special Issues Highlight #11 Designation of "Hearing Officers" and "Decision-Makers"

800

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?

801

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**

802

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).

803

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!"

804

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?

805

Special Issues Highlight #12
Rules of Decorum

806

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

807

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).

808

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?"

809

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."

810

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?

811

Special Issues Highlight #13
Lawyers as Advisors

812

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?

813

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).

814

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?"

815

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?

816

Special Issues Highlight #14
Relevance & Rape Shield Protections

817

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.

818

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).

819

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).

820

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.

821

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.

822

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).

823

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.

824

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).

825

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).

826

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).

827

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?"

828

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.

829

Special Issues Highlight #15 Counterclaims

830

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).

831

Closing Thoughts

832

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

833

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)

834

OCR Title IX website launched on August 14, 2020.

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

835

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*

836

- All module assessments must be completed by November 13

837

Thank You…

Questions?

838