National Association of College and University Attorneys

Presents:

Title IX: The Department of Education's Final Rule on Sexual Harassment

Webinar

May 18, 2020

12:00 PM – 2:00 PM Eastern
11:00 AM – 1:00 PM Central
10:00 AM – 12:00 PM Mountain
9:00 AM – 11:00 AM Pacific

Presenters:

Amy Foerster
Partner, Pepper Hamilton LLP

Pamela Heatlie
Director of the Office for Institutional Equity at the University of Michigan, Dearborn, University of Michigan

Joshua Richards
Partner, Saul Ewing Arnstein & Lehr, LLP

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NACUA WEBINAR SERIES

Monday, May 18, 2020

TITLE IX: THE DEPARTMENT OF EDUCATION'S FINAL RULE ON SEXUAL HARRASSMENT

SPEAKER BIOGRAPHIES

Amy C. Foerster is a partner with Pepper Hamilton LLP, where she co-chairs the firm's Higher Education Practice Group and also is a member of the Trial and Dispute Resolution Practice Group. Amy provides litigation, counseling and investigative services to colleges, universities and schools across the country, leveraging her broad higher education experience to provide practical advice in the myriad complex matters facing institutions of higher education. She has provided extensive advice to colleges, universities and K-12 schools in areas such as Title IX and the Clery Act, employee and student misconduct, fundraising and major gift agreements, federal and state regulatory compliance, governing board activities and shared governance. From 2013-2019, Amy was general counsel and chief of staff at Bucknell University. In this role, she was responsible for all legal affairs of the university, served as parliamentarian for the board of trustees, and oversaw the institution's risk management program. As chief of staff, she worked closely with the university's president to advance Bucknell's mission and strategic vision. Before joining Bucknell's leadership team, Amy was a litigation partner at Saul Ewing LLP, where she co-chaired the firm's higher education group. She previously served as a senior deputy attorney general with the Civil Litigation Section of the Pennsylvania Office of Attorney General and was an assistant counsel with the Pennsylvania Department of Education's Office of Chief Counsel, where she was primary counsel to the Office of Postsecondary and Higher Education. Amy received her B.A., magna cum laude, from Saint Mary's University of Winona, Minnesota, and her J.D. from the Dickinson School of Law of the Pennsylvania State University. Amy served as an at-large member of the Board of Directors of NACUA from 2013-2016 and was a 2012 recipient of NACUA's First Decade Award.

Pamela Heatlie is the Director of the Office for Institutional Equity at the University of Michigan - Dearborn. She previously served as an Associate Vice Provost for Academic and Faculty Affairs, Senior Director of the Office for Institutional Equity and Title IX Coordinator at the University of Michigan, Ann Arbor. Her work focuses on creating a welcoming, respectful and inclusive campus environment. Pam's particular areas of expertise include civil rights law and related investigations, DEI initiatives, and legal and compliance issues related to affirmative action. She has also taught the course "Title IX and Higher Education" at the University of Michigan Law School. Prior to becoming an administrator, Pam worked for fifteen years as in-house legal counsel to public universities. Her legal practice was wide-ranging, with a particular emphasis on employment law and student-related legal issues. She also taught "Legal Issues in Higher Education" at the University of Vermont and Eastern Michigan University. Pam received her BA with highest distinction from Wayne State University and her JD from the University of Michigan Law School.

Joshua W. B. Richards is a partner in the Philadelphia office of Saul Ewing Arnstein & Lehr, where he is the Vice-Chair of the firm's Higher Education Practice. Josh helps colleges and universities address legal issues through counseling, litigation, appeals and strategic responses to government enforcement, providing advice to his clients on a wide range of matters involving Title IX and the Clery Act, employment disputes, student conduct, faculty relations, board governance, financial exigency, data security, accreditation, minors on campus, and civil tort claims, including student death and abuse matters. Prior to joining Saul Ewing, Josh served as a Litigation Associate at Dechert LLP and was a Law Clerk for The Honorable Norma L. Shapiro, United States District Judge for the Eastern District of Pennsylvania. Josh is a Trustee of Peirce College in Philadelphia, PA. He currently serves on the Committee on Program for the NACUA Annual Conference and in the past served two years as a member of the NACUANOTES Editorial Board. He has attended twelve NACUA programs, speaking at three and he also served as a speaker for a NACUA webinar as well as a NACUA briefing. Josh received his B.A. from Middlebury College and his J.D. from the University of Pennsylvania.

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CERTIFICATE OF ATTENDANCE

- **Attorneys from MD, MA, MI, SD, or DC:** These jurisdictions do not have CLE requirements and therefore require no report of attendance or filing.
- **Attorneys from AK, AZ, CA, CO, CT, DE, HI, IN, IA, KY, MN, MO, MT, NH, NJ, NY, TN, VT, WI, or WY:** Do not return this form to NACUA. Please keep this form for your records to submit directly to your state CLE commission or in case your state bar audits you for CLE compliance. Please also remember to sign the site roster, indicating your attendance, before you leave.
- **Attorneys from all other states:** Please complete and return this form no later than TODAY to NACUA (clecredit@nacua.org). Please also remember to sign the site roster, indicating your attendance, before you leave.

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CERTIFICATION

By signing below, I certify that I attended the above activity and request 120 minutes of CLE credits.

Name _____ State & Bar Number _____

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Authorized By:

Meredith L. McMillan

Meredith McMillan, CMP
NACUA: Meetings and Events Planner

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Monday, May 18, 2020

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ATTENDANCE RECORD

Organization: _____

All participants are asked to sign-in, but if you are an attorney applying for Continuing Legal Education credits (CLEs), you ***must*** sign this attendance sheet to verify your attendance at this seminar. After completion, please return this form to NACUA (clecredit@nacua.org). ***Total CLE Credits = 120 minutes**

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Title IX: The Department of Education's Final Rule on Sexual Harassment

Presented by:

National Association of College and University Attorneys

in Cooperation with :

American Council on Education

NASPA, Student Affairs Administrators in Higher Education

Amy Foerster, *Partner*, *Pepper Hamilton LLP*

Pamela Heatlie, *Director of the Office for Institutional Equity at the University of Michigan - Dearborn, University of Michigan*

Joshua Richards, *Partner*, *Saul Ewing Arnstein & Lehr*

NACUA Webinar *May 18, 2020*

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Presenters

Amy C. Foerster
Partner
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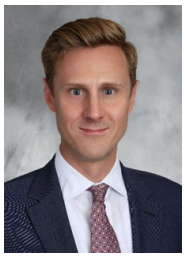
Pamela Heatlie
Director of the Office for Institutional Equity at the University of Michigan – Dearborn
University of Michigan



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STATUS OF THE REGULATIONS

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STATUS OF THE REGULATIONS

- Released by ED informally on its website on May 6, 2020
- As of this morning, it is set to be published in the Federal Register on May 19, 2020
- Effective date: August 14, 2020

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STATUS OF THE REGULATIONS

- *Will the regulations really go into effect on August 14, though?*
  - ED has publicly articulated an intent to begin enforcement on that date; no express "grace period"

STATUS OF THE REGULATIONS

- *Will the regulations really go into effect on August 14, though?*
  - But what about an injunction?
    - Likelihood?
    - Scope and effect?
      - (*Nationwide injunction? Part of the rule or all?)*
    - Duration?
    - *What would an injunction mean for compliance?*

JURISDICTION

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GEBSER/DAVIS FRAMEWORK

OCR will use this three part framework to assess potential violations:

- Whether the institution had actual knowledge
- Definition of actionable sexual harassment
- Whether the institution's response demonstrated deliberate indifference

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INSTITUTIONAL RESPONSE

- To a "report"
  - Offer of supportive measures
  - Explanation of formal complaint process
- To a "formal complainant"
  - Must investigate
  - Grievance process must be consistent with the regs
  - Unless circumstances requires (or permits) dismissal

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JURISDICTIONAL ISSUES

1. When does the institution have "actual knowledge"?
2. What is a "program or activity"?
3. Who can be a complainant?
4. When a Title IX Coordinator must dismiss a formal complaint (and when they may)

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ISSUE 1: "ACTUAL KNOWLEDGE"

- If one of these people know:
  - the Title IX Coordinator or
  - "any official…who has authority to institute corrective measures on behalf of the recipient"
- Information can come from any source
- Respondents don't give you "actual knowledge" even if they are an official with authority (Title IX only, not Title VII)

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WHO IS AN OFFICIAL WITH AUTHORITY?

- Institutions determine for themselves
- Supervisors and deans (*see* p. 344)
- Who else has authority to institute corrective measures? (check your list of sanctions)
- Not required to list OWAs in your policy (only have to list Title IX Coordinator)(p. 300)

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WHAT ABOUT RESPONSIBLE EMPLOYEES?

- May still use this term
- May still require a broader set of employees to report, including all employees (and state law may require)
- But OCR will determine you have "actual knowledge" only when the person reporting is an "official with authority"
- Be mindful that your policy may create contractual liability

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ISSUE 2: PROGRAM OR ACTIVITY

- Locations, events, or circumstances in which an institution exercises substantial control over both the respondent and the context in which the sexual harassment occurs
- Locations include buildings owned or controlled by officially recognized student organizations. §106.44(a)

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PROGRAM OR ACTIVITY

- Decision:

  Do you narrow the scope of your policy to exclude other student organizations (assuming the institution doesn't otherwise have substantial control over the event)?
- Will your community accept that?
- How will students know which organizations are which?

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PROGRAM OR ACTIVITY

- Training Required:

  Title IX Coordinator, investigator, decision-maker, those who facilitate informal resolution must be trained on "the scope of the recipient's education program or activity"
- That training must be posted on the institution's website

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ISSUE 2: WHO CAN BE A COMPLAINANT?

- Student, employee or third party (including patients)
- A complainant must be participating in, or attempting to participate in, the institution's education program or activity at the time of filing a formal complaint.
- Attempting to participate –
  - Attending, on leave, graduated but intended return for another program/degree
  - Participation in alumni activities(?)

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HOW ABOUT RESPONDENTS?

- [A]ny "individual" can be a respondent, whether such individual is a student, faculty member, another employee of the recipient, or other person with or without any affiliation with the recipient. p. 416

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ISSUE 4: DISMISSAL

- Determined after formal complaint is received
- Sometimes dismissal is required
- Sometimes dismissal is permitted
- Dismissal can occur at any time during the investigation/hearing process

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"MUST DISMISS"

- Complaint must be dismissed if conduct:
  1. Would not constitute sexual harassment even if proved
  2. Did not occur in institution's program/activity
  3. Did not occur against a person in the United States

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"MAY DISMISS"

1. If complainant requests to withdraw their complaint
2. If respondent is no longer enrolled or employed
3. When specific circumstances prevent gathering evidence sufficient to reach a determination

IF YOU DISMISS

- Parties must receive simultaneous written notice of dismissal with reason(s) to the parties
- Parties must have an opportunity to appeal the dismissal
- Dismissal does not preclude other institutional action

CONSIDERATIONS

- Do you want to use the same (Title IX reg) process for all sexual misconduct?
- Do you use parallel/branched processes?
- Serial processes:
  - Potential double jeopardy concerns for public institutions?
  - A subsequent process not based on sex discrimination/harassment may be retaliation

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QUESTIONS?

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FORMAL GRIEVANCE PROCESS

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EMERGENCY REMOVALS

§106.44(c): May remove respondent from *education program or activity* if:

- Conduct an individualized safety and risk analysis,
- Determine that respondent poses an immediate [imminent] threat to the *physical* health or safety of *anyone* justifying removal,
- The threat arises from the allegations of sexual harassment, and
- Provide opportunity for respondent to challenge removal immediately thereafter.

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EMERGENCY REMOVALS

Preamble:

- Not limited to instances of sexual assault.
- Removal cannot be based on generalized, hypothetical or speculative concerns.
- Recipient can determine the scope of removal.
  - Only certain aspects of the institution's programs or activities?
  - To suspend or not?
- No specific timeframes – may (not required to) reassess.

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EMERGENCY REMOVALS

Other Points to Consider:

- Who will conduct the assessment?
- Who will make the decision?
- Beyond verbalized threats, what information will be considered?
- Where is the line between suspension and accommodating ongoing participation?
- What about removal from other programs and activities?
- What will respondent's ability to challenge it look like?

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CROSS-EXAMINATION / ADVISORS

§106.45(b)(6)(i): Cross-examination must:

- Be conducted by each party's advisor – directly, orally and in real time.
  - Allow all relevant questions and follow-up questions, including those challenging credibility.
  - If the party does not have an advisor, recipient must provide one at no cost.

Preamble:

- May not require that questions be in writing.
- May require advance notice of advisor.

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CROSS-EXAMINATION / ADVISORS

- Advisor provided by institution need not be an attorney.
  - Need not be of "equal competency."
  - Role is to relay the party's questions (per Briefing).
- May remove disruptive advisors … *carefully*.
- Decision-maker should evaluate cross-examination responses in context, including consideration of stress.
  - "Because decision-makers must be trained to serve impartially without prejudging the facts at issue, the final regulations protect against a party being unfairly judged due to inability to recount each specific detail of an incident in sequence …."

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CROSS-EXAMINATION / ADVISORS

Other Points to Consider:

- Require parties to provide advance notice of their advisor's attendance?
  - What if they are a no-show?
- Who will serve as advisors provided by the recipient?
  - Attorneys?
  - How will they be trained?
- To what extent should the recipients "prepare" parties for cross-examination?

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RELEVANCY DETERMINATIONS

§106.45(b)(6)(i): Decision-maker must determine whether questions are relevant and explain any decision to exclude.

- Questions and evidence about complainant's sexual predisposition or prior sexual behavior, unless to prove that someone other than respondent committed the conduct alleged or, if concerning specific incidents of complainant's conduct with respondent, offered to prove consent, are not relevant.
- Decision-makers [and investigators] must be trained on relevance.

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RELEVANCY DETERMINATIONS

Preamble:

- May only exclude questions based on relevance.
  - Not because unduly prejudicial, concerning prior bad acts, or constituting character evidence.
  - May be deemed not relevant when duplicative of other evidence.
  - Exclude medical, etc. records without written consent and statements not subject to cross.
- May have rules or providing training on how to assign weight to a given type of relevant evidence.

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RELEVANCY DETERMINATIONS

Preamble (con'd):

- Enough to say the question is not probative of any material fact.
- May have rules:
  - Precluding parties from challenging decision during the hearing.
  - Allowing decision-maker to revise explanation post-hearing.

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RELEVANCY DETERMINATIONS

Other Points to Consider:

- Who will be (and advise) the decision-maker?
- How will the decision-maker be trained to navigate relevancy issues?
- What will it look like in practice?

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STATEMENTS/ADMISSIONS

§106.45(b)(6)(i): If a party is not subject to cross-examination, then:

- No reliance on their statement in determining responsibility.
- No inference as to responsibility.

Preamble:

- Doesn't matter if it's a statement against interest.
- Doesn't matter if the witness is unavailable due to death or disability.

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STATEMENTS/ADMISSIONS

Preamble (con'd):

- May not rely on an account of the statement from a friend.
- May not rely on police or SANE reports to the extent they include statements not subject to cross-examination.

Other Points to Consider:

- How can you work with a witness to get them there?
- How will you train decision-makers to deal with developments concerning statements?
- What if the statement is the alleged harassment?

HEARING DECORUM

Preamble: May have rules that:

- Require advisors be respectful.
- Prohibit abusive or intimidating questioning.
- Deem repetition of the same question irrelevant.
- Specify any objection process.
- Govern the timing and length of breaks to confer.
  - Prohibit loud or disruptive conferring.
- Allow for the removal of advisors.
- Require that *parties* make any openings and closings.

HEARING DECORUM

Other Points to Consider:

- Require parties and advisors to acknowledge the rules of decorum?
- Who will enforce the rules of decorum?
  - How will you train decision-makers?

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PROCESS – STANDARD OF EVIDENCE

- A recipient's grievance process must—
  - State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard ***or*** the clear and convincing evidence standard;
  - Apply the ***same standard of evidence*** for formal complaints against students as for formal complaints against employees, including faculty; and
  - Apply the same standard of evidence to all formal complaints of sexual harassment.

§ 106.45(b)(1)(vii)

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PROCESS – STANDARD OF EVIDENCE

- Simpler than the NPRM, but watch out for:
  - State laws setting standards of evidence
  - CBAs or faculty handbooks that set standards of evidence
    - These may have dispositive effect if not renegotiated
  - Collateral faculty processes (especially re tenure revocation)
    - Do these resolve conduct falling into the definition of Sexual Harassment?
    - Potential issues re procedures used in those processes and whether the standard of evidence ratchets into Sexual Harassment resolutions
    - "These final regulations only prescribe a recipient's mandatory response to conduct that does meet the[ir] definition of sexual harassment[.]"

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PROCESS – APPEALS

- 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:

  - *Procedural irregularity that affected the outcome of the matter*;
  - *New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter*; and
  - *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.
- A recipient may offer an appeal *on additional bases* so long as it does so equally to both parties, *e.g.* as to severity of the sanctions.

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PROCESS – APPEALS – BIAS

- 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.
- What does bias mean here?
  - OCR recognizes that our Title IX staff have careers prior to working at institutions, and often those careers may involve advocacy work;
  - *But* ED also has essentially told us we're on our own to figure this out:
    - "The Department further notes that the Clery Act regulations do not further elaborate on what may constitute a conflict of interest or bias and further declines to do so in these final Title IX regulations. Recipients of Federal student financial aid have been able to determine what constitutes a conflict of interest or bias without definitions in the regulations implementing the Clery Act."
- Some suggestions:
  - Focus on the "that affected the outcome of the matter" language
  - Simply having authored an op-ed will not be enough in most cases
  - Nevertheless, there is some risk tolerance involved in staff members or third-party personnel with outspoken backgrounds

PROCESS – OTHER

- Institutions are free to adopt additional processes so long as they are offered on an equal basis
  - *E.g.* to help streamline the relevancy determinations during questioning
- Obligation to create and maintain a recording or transcript of the hearing

PROCESS – OTHER

- Outcome notification must be simulataneous, in writing, and must:
  - Identify the allegations potentially constituting sexual harassment;
  - Describe the procedural steps taken from the receipt of the formal complaint through the determination;
  - Contain findings of fact;
  - Describe conclusions regarding the application of the institution's code of conduct to the facts;
  - Make a determination as to responsibility, remedies, and sanctions; and
  - List the available bases for appeal.

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PROCESS – VIRTUAL HEARINGS

- Live hearings 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.
  - *Audio only does not pass muster*
  - *In theory, an institution could transition to a virtual-only hearing process (within the bounds of state and circuit-specific federal law)*
  - *What about access issues for students or employees who do not have access to hardware to participate virtually?*

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THE REGS AND EMPLOYEES

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EMPLOYMENT

- Applies to:
  - At will employees
  - Union employees
  - Employees in state employment systems
  - Patient complaints against medical professionals
- HR and labor and employment attorneys should be involved ASAP

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EMPLOYMENT

1. Title IX vs. Title VII – knowledge and definition
2. Addressing a "formal complaint" (or lack of "formal complaint") in the employment context
3. Extraterritoriality
4. Patient complaints against employees
5. The "confidentiality" aspect of retaliation

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ISSUE 1: TITLE IX VS. TITLE VII

- Title VII defines sexual harassment as "severe or pervasive" not "severe and pervasive."
- Title VII "knew or should have known" versus "actual knowledge"
- Title VII vicarious liability for acts of supervisors, no exception when the supervisor is the one engaging in the harassment

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ISSUE 2: "FORMAL COMPLAINT" (OR NOT)

- No "formal complaint" is required under Title VII. You must address the matter if you "knew or should have known."
- Ensure your policies and procedures:
  - Allow you to address matters when you learn of them, regardless of whether a "formal complaint" is received
  - If you prefer, to use a different procedure (e.g, no cross-examination, etc.) when no formal complaint is received or a formal complaint is dismissed

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"FORMAL COMPLAINT" (OR NOT)

- Ensure that your training programs are synced to give a consistent message

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orking abroad are protected by Title VII

ISSUE 3: EXTRATERRITORIALITY

- Title IX – "must dismiss" a formal complaint if conduct is not against a person in the United States
- Title VII – applies to United States citizens working abroad
- Ensure your policies appropriately address employees working outside of the United States (and consider whether you should expand to include students and employees who are not US citizens), but your process does not have to comply with the Title IX regs.

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ISSUE 4: ACADEMIC MEDICAL CENTERS

- Academic medical centers are not postsecondary institutions, even if affiliated with or considered a part of the same entity as the postsecondary institution (p. 1538)
- Patients may be offered informal resolution (p. 1540)
- Academic medical centers can use the live hearing process, but it is not required, and may use the written questions process established for K-12
- Applies to all complainants, not just patients

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ISSUE 5: RETALIATION & CONFIDENTIALITY

"The recipient must keep confidential the identity of…any individual who has been reported to be the perpetrator of sex discrimination, any respondent…except as may be permitted by…FERPA…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." §106.71(a)

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RETALIATION AND CONFIDENTIALITY

- Employment references?
- Obligations under NSF, NASA (and Simons Foundation) grant terms and conditions?
- Obligations to report to licensing boards?
- Other obligations that may not be "required by law"?

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ADDITIONAL ISSUES

- Cannot use informal resolution for concerns brought by students against employees
- You can place non-student employees on administrative leave
- Some initial indication that a referral to tenure revocation process will be considered a remedy, versus removal of tenure (i.e., you may not have to rewrite your tenure revocation process)

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TECHNICAL ASSISTANCE

- Via email: OPEN@ed.gov
- OCR blog: www2.ed.gov/about/offices/list/ocr/blog/index.html

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QUESTIONS?

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IMPLEMENTATION

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COMMUNICATING WITH STAKEHOLDERS

- Current students
- Prospective / incoming students
- Parents
- Board
- Faculty and staff
- Advocacy groups
- Development staff

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IMPLEMENTATION

- We are more consumed with *other* issues surrounding core functions, safety, re-opening to students, financial distress (and so on) than we have *ever* been
- Addressing COVID is a full time job for everyone, but there are only eighty-eight days from today until August 14

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IMPLEMENTATION – RECOMMENDATIONS

1. Convene a working group comprised of stakeholders necessary to make changes that are as broad reaching as those required by the regulations. A start at suggested representation on the working group:
   - OGC and/or outside counsel
   - TIXC and Office of Institutional Equity staff
   - Student affairs, student conduct
   - Human resources, labor relations
   - Provost's office

   If you are on a large campus, consider creating sub-working groups for discrete issues like labor, faculty, etc.

IMPLEMENTATION – RECOMMENDATIONS

2. Gather all materials that may need to be revised or considered:
   - CBAs
   - Student and faculty handbooks
   - State laws that bear on investigations, adjudications, including the standard of evidence and limitations/prescriptions regarding the role of advisors and outcome notification
     - If you identify conflicts with state law, bring on government relations, and, depending on your state, consider looping in your state AG's office

IMPLEMENTATION – RECOMMENDATIONS

3. Identify community stakeholders that must, or should, weigh in on the new policy prior to implementation, and develop a communications plan with respect to each. *E.g.*:

- Governing board
- Office of the President
- Faculty senate
- Student government/press
- Campus advocacy groups

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IMPLEMENTATION – RECOMMENDATIONS

4. As a working group, draft and adopt a timeline:

- To have a final policy on August 14, when must key steps be accomplished to make sure drafting, input, revisions, and a final draft are rolled out?
- Communicate with all of the groups you identified on the prior slide
- Let them know *now* when to expect to be asked for feedback and that you will be on a tight schedule.

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Title IX: The Department of Education's Final Rule on Title IX and Sexual Misconduct

NACUA Webinar
May 18, 2020

1. Holly Peterson, Associate Director of Legal Resources, "Title IX Grid with Preamble Content" (NACUA, May 18, 2020) (attached).

2. U.S. Department of Education, Title IX Regulations Addressing Sexual Harassment (May 6, 2020) (unofficial copy) (link only).

3. U.S. Department of Education, "Title IX: U.S. Department of Education Title IX Final Rule Overview" (May 6, 2020) (link only).

4. U.S. Department of Education, "Title IX: Summary of Major Provisions of the Department of Education's Title IX Final Rule" (May 6, 2020) (link only).

5. U.S. Department of Education, "Title IX: Summary of Major Provisions of the Department of Education's Title IX Final Rule and Comparison to the NPRM" (May 6, 2020) (link only).

National Association of College and University Attorneys

The Title IX Regulations

Unofficial Version Published on the U.S. Department of Education Website on May 6, 2020

Definitions Jurisdiction What Triggers an Institution's Obligations Dismissals Prior to Formal Grievance Process General Requirements for Formal Grievance Process Pre-Hearing Investigation Live Hearing Appeals Informal Resolution Retaliation Application to Employees Record Keeping Preemption and Intersection with Laws Notifications Training Exemptions Effective Date

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
Definitions			
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…."		§106.30
	"This [actual knowledge] standard is not met when the only official of the recipient with actual knowledge is the respondent."		§106.30
	"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."		§106.30

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
	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).		§106.8
Clear and Convincing Evidence		No Regulatory Definition: The Department declines to provide definitions of the "preponderance of the evidence" standard and the "clear and convincing evidence" standard. The Department believes that each standard of evidence referenced in the final regulations has a commonly understood meaning in other legal contexts and intends the "preponderance of the evidence" standard to have its traditional meaning in the civil litigation context and the "clear and convincing evidence" standard to have its traditional meaning in the subset of civil litigation and administrative proceedings where that standard is used.	p. 1319
		Preamble Definition: [H]aving confidence that a conclusion is based on facts that are highly probable to be true.	p. 1314
		Preamble Definition: A clear and convincing evidence standard of evidence is understood to mean concluding that a fact is highly probable to be true. *E.g.*, *Sophanthavong v. Palmateer*, 378 F.3d 859, 866-67 (9th Cir. 2004) (a clear and convincing evidence standard requires "sufficient evidence to produce in the ultimate factfinder an abiding conviction that the truth of its factual contentions are [*sic*] highly probable.") (internal quotation marks and citation omitted; brackets in original).	p. 1314, n. 1473
Complainant	"[A]n individual who is alleged to be the victim of conduct that could constitute sexual harassment"		§106.30

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
		Complainant Connection to Education Program or Activity: [A] complainant must be participating in, or attempting to participate in, the recipient's education program or activity at the time of filing a formal complaint.	p. 411 *See also* p. 708
		Alumni Complainants: A complainant who has graduated may still be "attempting to participate" in the recipient's education program or activity; for example, where the complainant has graduated from one program but intends to apply to a different program, or where the graduated complainant intends to remain involved with a recipient's alumni programs and activities.	p. 411 *See also* p. 709
		Complainants on Leaves of Absence: [A] complainant who is on a leave of absence may be "participating or attempting to participate" in the recipient's education program or activity.	p. 411 *See also* p. 709
		Prospective Enrollees: [A] complainant who has left school because of sexual harassment, but expresses a desire to re-enroll if the recipient appropriately responds to the sexual harassment, is "attempting to participate" in the recipient's education program or activity.	p. 411 *See also* p. 709
Consent	The Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault.		§106.30
		Definition Required: Recipients must clearly define consent and must apply that definition consistently[.]	p.364 *See also* p. 365
		Discretion to Craft Definition: 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.	p. 363 *See also* pps. 545, 1195

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
		Absence of or Negation of Consent: [T]he Department leaves flexibility to recipients to define consent as well as terms commonly used to describe the absence or negation of consent (e.g., incapacity, coercion, threat of force).	p. 487 *See also* p. 541-42
		Burden of Proof: [T]o the extent recipients "misuse affirmative consent" (or any definition of consent) by applying an instruction that the respondent must prove the existence of consent, such a practice would not be permitted.	p.364
		Burden of Proof: 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.	p. 365
		Intersection with Rape Shield Protections: The second of the two exceptions to the rape shield protections refers to "if offered to prove consent" and thus the scope of that exception will turn in part on the definition of consent adopted by each recipient.	p. 1195
Days		[B]ecause the Department does not require a specific method for calculating "days," recipients retain the flexibility to adopt the method that works best for the recipient's operations; for example, a recipient could use calendar days, school days, or business days, or a method the recipient already uses in other aspects of its operations.	p. 591 *See also* pps. 1043, 1105, 1480
Deliberate Indifference	A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.		§106.44(a)
Directly Related		The Department declines to define certain terms in this provision such as …"evidence directly related to the allegations," as these terms should be interpreted using their plain and ordinary meaning.	p. 1017

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
		We note that "directly related" in § 106.45(b)(5)(vi) aligns with requirements in FERPA, 20 U.S.C. 1232g(a)(4)(A)(i).	p. 1017
Education Program or Activity	"[E]ducation 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.		§106.44(a)
Final Determination		A "final" determination means the written determination containing the information required in § 106.45(b)(7), as modified by any appeal by the parties.	p. 1340
Formal Complaint	[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		§106.30
	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.		§106.30

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
Informal Resolution		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.	p. 1370
Preponderance of the Evidence		No Regulatory Definition: The Department declines to provide definitions of the "preponderance of the evidence" standard and the "clear and convincing evidence" standard. The Department believes that each standard of evidence referenced in the final regulations has a commonly understood meaning in other legal contexts and intends the "preponderance of the evidence" standard to have its traditional meaning in the civil litigation context and the "clear and convincing evidence" standard to have its traditional meaning in the subset of civil litigation and administrative	p. 1319
		Preamble Definition: [The] conclusion is based on facts that are more likely true than not.	p. 1314
		Preamble Definition: A preponderance of the evidence standard of evidence is understood to mean concluding that a fact is more likely than not to be true. *E.g.*, *Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622 (1993) (a preponderance of the evidence standard "requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence") (internal quotation marks and citation omitted).	p. 1314, n. 1472
Respondent	[A]n individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.		§106.30

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
		Student, Employee, and Faculty Respondents: [A]ny "individual" can be a respondent, whether such individual is a student, faculty member, another employee of the recipient, or other person with or without any affiliation with the recipient.	p. 416
Remedies	Remedies must be designed to restore or preserve equal access to the recipient's education program or activity. Such remedies may include the same individualized services described in § 106.30 as "supportive measures"; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent.		§106.45(b)(1)(i)
Sex (i.e. "Because of Sex")		No Regulatory Definition: The Department did not propose a definition of "sex" in the NPRM and declines to do so in these final regulations.	p. 553 *See also* pps. 556, 557, 560
		Anyone May Experience Discrimination: Anyone may experience sexual harassment, irrespective of gender identity or sexual orientation.	p. 556 *See also* pps. 554, 558, 561
		Sex Stereotyping: Nothing in these final regulations, or the way that sexual harassment is defined in § 106.30, precludes a theory of sex stereotyping from underlying unwelcome conduct on the basis of sex.	p. 557

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
Sexual Harassment	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 2015 (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).		§106.30
Supportive Measures	[N]on-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.		§106.30

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
	[Supportive] measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.		§106.33
	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.		§106.33

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
Jurisdiction			
Jurisdiction	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.		§106.44 (a)
Actual Knowledge	*See* regulatory definition *supra* p. 1.		
		Fact-Specific Inquiry: [D]etermining which employees may be officials with authority is fact-specific.	p. 311
		Designate Officials with Authority to Implement Corrective Measures: A recipient also may empower as many officials as it wishes with the requisite authority to institute corrective measures on the recipient's behalf, and notice to these officials with authority constitutes the recipient's actual knowledge and triggers the recipient's response obligations. Recipients may also publicize lists of officials with authority.	p. 300 *See also* p. 320
		Designating Mandatory Reporters: [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.	p. 300 *See also* pps. 316, 320, 604

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
		Mandatory Reporter ≠ Employee with Authority to Implement Corrective Measures: [T]he 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.	p. 321
		No Formal Complaint Required: [A] recipient may have actual knowledge of sexual harassment even where no person has reported or filed a formal complaint about the sexual harassment.	p. 673
Sexual Harassment	*See* regulatory definition *supra* p. 8.		
		Quid Pro Quo and *Per Se* Harassment: [The] other categories (*quid pro quo*; sexual assault and three other Clery Act/VAWA offenses) . . . do not require elements of severity, pervasiveness, or objective offensiveness.	p. 425 *See also* pps. 432, 461, 469
		Verbal Harassment: The three-pronged definition of sexual harassment in § 106.30 captures physical and verbal conduct serious enough to warrant the label "abuse[.]"	p. 476
		Evaluating Severity, Pervasiveness, and Objective Offensiveness: Elements of severity, pervasiveness, and objective offensiveness must be evaluated in light of the known circumstances and depend on the facts of each situation, but must be determined from the perspective of a reasonable person standing in the shoes of the complainant.	p. 477
		No Showing of Intent Required: The *Davis* standard does not require an "intent" element; unwelcome conduct so severe, pervasive, and objectively offensive that it denies a person equal educational opportunity is actionable sexual harassment regardless of the respondent's intent to cause harm.	pps. 515-16
		Sexual Exploitation: [S]exual exploitation constitutes sexual harassment as defined in § 106.30.	p. 559

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
Education Program or Activity	*See* regulatory definition *supra* p. 5.		
		Off Campus ≠ Outside Institution's Education Program or Activity: "[O]ff campus" does not automatically mean that the incident occurred outside the recipient's education program or activity.	p. 630 *See also* p. 636
		Key Questions: Whether sexual harassment occurs in a recipient's education program or activity is a fact specific inquiry. The key questions are whether the recipient exercised substantial control over the respondent and the context in which the incident occurred. There is no bright-line geographic test, and off-campus sexual misconduct is not categorically excluded from Title IX protection under the final regulations.	p. 654 *See also* pps. 624, 625-26
		Factors to Consider: whether the recipient funded, promoted, or sponsored the event or circumstance where the alleged harassment occurred	p. 625
		Factors to Consider: [N]o single factor is determinative to conclude whether a recipient exercised substantial control over the respondent and the context in which the harassment occurred, or whether an incident occurred.	p. 624 *See also* p. 644
		Recognized, Off-Campus Student Organizations: [W]here a postsecondary institution has officially recognized a student organization, the recipient's Title IX obligations apply to sexual harassment that occurs in buildings owned or controlled by such a student organization, irrespective of whether the building is on campus or off campus, and irrespective of whether the recipient exercised substantial control over the respondent and the context of the harassment outside the fact of officially recognizing the fraternity or sorority that owns or controls the building.	p. 625-26

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
		Recognized, Off-Campus Student Organizations: Where a postsecondary institution has officially recognized a student organization, and sexual harassment occurs in an off campus location *not* owned or controlled by the student organization yet involving members of the officially recognized student organization, the recipient's Title IX obligations will depend on whether the recipient exercised substantial control over the respondent and the context of the harassment, or whether the circumstances.	p. 627
		Cyber Harassment: "[P]rogram or activity" encompass "all of the operations of" such recipients, and such "operations" may certainly include computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of, the recipient.	p. 644
		Off-Campus Conduct that has Effects in Education Program or Activity: [A] recipient may be deliberately indifferent to sexual harassment that occurred outside the recipient's control where the complainant has to interact with the respondent in the recipient's education program or activity, or where the effects of the underlying sexual assault create a hostile environment in the complainant's workplace or educational environment.	p. 636 *See also* p. 632
		Discretion to Levy Separate Conduct Charges for Misconduct Outside Education Program or Activity: [N]othing in the final regulations precludes the recipient from choosing to also address allegations of conduct outside the recipient's education program or activity.	p. 631 *See also* p. 634
		Complainant Connection to Education Program or Activity: [A] complainant must be participating in, or attempting to participate in, the recipient's education program or activity at the time of filing a formal complaint.	p. 411 *See also* p. 708.

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
Against a Person in the United States		No Extraterritorial Application: Title IX does not have extraterritorial application.	p. 658
		Study Abroad: We acknowledge the concerns raised by many commenters that the final regulations would not extend Title IX protections to incidents of sexual misconduct occurring against persons outside the United States, and the impact that this jurisdictional limitation might have on the safety of students participating in study abroad programs. However, by its plain text, the Title IX statute does not have extraterritorial application.	Pps. 656-67
		Study Abroad: We emphasize that nothing in these final regulations prevents recipients from initiating a student conduct proceeding or offering supportive measures to address sexual misconduct against a person outside the United States.	p. 660
Deliberate Indifference	*See* regulatory definition *supra* p. 4.		
		[Even in the absence of a Formal Complaint signed by the complainant], some circumstances may require a recipient (via the Title IX Coordinator) to initiate an investigation and adjudication of sexual harassment allegations in order to protect the recipient's educational community or otherwise avoid being deliberately indifferent to known sexual harassment.	p. 389
What triggers an institution's obligations?			
General Obligations: Actual Knowledge	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		§106.44(a)

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
	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.		
Obligation to Initiate a Formal Grievance Process: Formal Complaint	In response to a formal complaint, a recipient must follow a grievance process that complies with §106.45.		§106.44 (b)(1)
	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.		§106.30
		Institutional Form Prohibited: [E]ven if a recipient desires for complainants to only use a specific form for filing formal complaints, these final regulations permit a complainant to file a formal complaint by either using the recipient-provided form (or electronic submission system such as through an online portal provided for that purpose by the recipient), or by physically or digitally signing a document and filing it as authorized (i.e., in person, by mail, or by e-mail) under these final regulations.	p. 1638
		Detailed Facts Not Required: The § 106.30 definition of "formal complaint" requires a document "alleging sexual harassment against a respondent," but contains no requirement as to a detailed statement of facts.	p. 384

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
		No Statute of Limitations: [T]here is no time limit on a complainant's decision to file a formal complaint.	p. 385 *See also* p. 372, 689, 708
		Consolidation of Formal Complaints: [R]ecipients have discretion to consolidate formal complaints in situations that arise out of the same facts or circumstances and involve more than one complainant, more than one respondent, or what amount to counter-complaints by one party against the other.	pps. 968-69
		Consolidation of Formal Complaints: If there are multiple complainants and one respondent, then the recipient may consolidate the formal complaints where the allegations of sexual harassment arise out of the same facts or circumstances, under § 106.45(b)(4). The requirement for the same facts and circumstances means that the multiple complainants' allegations are so intertwined that their allegations directly relate to all the parties.	p. 1498
		Filing by Title IX Coordinator: When a Title IX Coordinator believes that with or without the complainant's desire to participate in a grievance process, a non-deliberately indifferent response to the allegations requires an investigation, the Title IX Coordinator should have the discretion to initiate a grievance process.	p. 386 *See also* pps. 389 707
		Filing by Title IX Coordinator: The Title IX Coordinator may consider a variety of factors, including a pattern of alleged misconduct by a particular respondent, in deciding whether to sign a formal complaint.	p. 701
		Filing by Title IX Coordinator: [T]he Title IX Coordinator may take circumstances into account such as whether a complainant's allegations involved violence, use of weapons, or similar factors.	p. 702

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
		Filing by Title IX Coordinator (Limitations): [The decision of the Title IX Coordinator to file a Formal Complaint] should be reached thoughtfully and intentionally by the Title IX Coordinator, not as an automatic result that occurs any time a recipient has notice that a complainant was allegedly victimized by sexual harassment.	p. 387
		Filing by Title IX Coordinator (Limitations): The Title IX Coordinator's decision to sign a formal complaint may occur only after the Title IX Coordinator has promptly contacted the complainant (i.e., the person alleged to have been victimized by sexual harassment) to discuss availability of supportive measures, consider the complainant's wishes with respect to supportive measures, and explain to the complainant the process for filing a formal complaint. Thus, the Title IX Coordinator's decision to sign a formal complaint includes taking into account the complainant's wishes regarding how the recipient should respond to the complainant's allegations.	p. 701
		Third Parties Cannot File Formal Complaints: Other than a Title IX Coordinator, third parties cannot file formal complaints.	p. 354
		Anonymous Complaints: Where a complainant desires to initiate a grievance process, the complainant cannot remain anonymous or prevent the complainant's identity from being disclosed to the respondent (via the written notice of allegations).	p. 394
		Anonymous Complaints: When a formal complaint is signed by a Title IX Coordinator rather than filed by a complainant, the written notice of allegations in § 106.45(b)(2) requires the recipient to send both parties details about the allegations, including the identity of the parties if known . . . . [T]he grievance process may proceed if the Title IX Coordinator	Pps. 395-96

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
		determines it is necessary to sign a formal complaint, even though the written notice of allegations does not include the complainant's identity.	
		Unwilling Complainant: If the Title IX Coordinator signs a formal complaint against the wishes of the complainant, then the recipient likely will have difficulty obtaining evidence from the complainant that is directly related to the allegations in a formal complaint.	p. 1477
		Unknown Respondent: A recipient must investigate a complainant's formal complaint even if the complainant does not know the respondent's identity, because an investigation might reveal the respondent's identity, at which time the recipient would be obligated to send both parties written notice.	p. 413
Obligation to Provide Supportive Measures: Actual Knowledge, With or Without Formal Complaint	The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.		§106.44(a)
	With or without a formal complaint, a recipient must comply with §106.44.		§106.44(b)(1)
		Examples of Supportive Measures: 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	p. 1370

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
		absence, increased security and monitoring of certain areas of the campus, and other similar measures.	
		Oral or Written Notice: No written document is required to put a school on notice (i.e., convey actual knowledge) of sexual harassment triggering the recipient's response obligations under § 106.44(a).	p. 384
		Third Party Reports: [A]ny person (including third parties) can report[.]	p. 351 *See also* pps. 605, 614
		Anonymous Reports: [T]he final regulations do not prohibit recipients from implementing anonymous (sometimes called "blind") reporting.	p.391
		Fact-Specific Analysis: [T]he determination of appropriate supportive measures in a given situation must be based on the facts and circumstances of that situation.	p. 569
		Interactive Process: A recipient should engage in a meaningful dialogue with the complainant to determine which supportive measures may 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.	p. 669 *See also* p. 880, 921, 1022
		Confidentiality: If a complainant desires supportive measures, the recipient can, and should, keep the complainant's identity confidential (including from the respondent), unless disclosing the complainant's identity is necessary to provide supportive measures for the complainant (e.g., where a no-contact order is appropriate and the respondent would need to know the identity of the complainant in order to comply with the no-contact order, or campus security is informed about the no-contact order in order to help enforce its terms).	p. 393 *See also* p. 614, 921, 1469

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
		Burden on Parties: The plain language of the § 106.30 definition does not state that a supportive measure provided to one party cannot impose *any* burden on the other party; rather, this provision specifies that the supportive measures cannot impose an *unreasonable* burden on the other party.	p. 565
		Burden on Parties: [T]he [supportive] measure cannot punish, discipline, or unreasonably burden the respondent.	p. 566
		Burden on Parties (Examples): Removal from sports teams (and similar exclusions from school-related activities) also require a fact-specific analysis, but whether the burden is "unreasonable" does not depend on whether the respondent still has access to academic programs; whether a supportive measure meets the § 106.30 definition also includes analyzing whether a respondent's access to the array of educational opportunities and benefits offered by the recipient is unreasonably burdened. Changing a class schedule, for example, may more often be deemed an acceptable, reasonable burden than restricting a respondent from participating on a sports team, holding a student government position, participating in an extracurricular activity, and so forth.	p. 570
		Burden on Parties (Examples): [W]here both parties are athletes and sometimes practice on the same field, consideration must be given to the scope of a no-contact order that deters sexual harassment, without unreasonably burdening the other party, with the goal of restricting contact between the parties without requiring either party to forgo educational activities. It may be unreasonably burdensome to prevent respondents from attending extra-curricular activities that a recipient offers as a result of a one-way no contact order prior to being determined responsible; similarly, it may be unreasonably burdensome to	p. 578 *See also* p. 750

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
		restrict a complainant from accessing campus locations in order to prevent contact with the respondent.	
		Burden on Parties (Examples): A school may conclude that transferring the respondent to a different section of that class (e.g., that meets on a different day or different time than the class section in which the complainant and respondent are enrolled) is a reasonably available supportive measure that preserves the complainant's equal access and protects the complainant's safety or deters sexual harassment, while not constituting an unreasonable burden on the respondent (because the respondent is still able to take that same class and earn the same credits toward graduation, for instance). If, on the other hand, that class in which both parties are enrolled does not have alternative sections that meet at different times, and precluding the respondent from completing that class would delay the respondent's progression toward graduation, then the school may determinate that requiring the respondent to drop that class would constitute an unreasonable burden on the respondent and would not quality as a supportive measure, although granting the complainant an approved withdrawal from that class with permission to take the class in the future, would of course constitute a permissible supportive measure for the recipient to offer the complainant.	p. 754 *See also* p. 881
		Supportive Measures Cannot Amount to Sanctions: If a recipient has listed ineligibility to play on a sports team or hold a student government position, for example, as a possible disciplinary sanction that may be imposed following a determination of responsibility, then the recipient may not take that action against a respondent without first following the § 106.45 grievance process.	p. 570-71

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
		One Way No Contact Order May Be Appropriate in Limited Circumstances: §106.30 does not mean that one-way no-contact orders are never appropriate. A fact-specific inquiry is required into whether a carefully crafted no-contact order restricting the actions of only one party would meet the § 106.30 definition of supportive measures. For example, if a recipient issues a one-way no-contact order to help enforce a restraining order, preliminary injunction, or other order of protection issued by a court, or if a one-way no-contact order does not unreasonably burden the other party, then a one-way no contact order may be appropriate. . . . [E]mergency removal . . . could include a no-trespass or other no-contact order issued against a respondent.	p. 577
		Title IX Coordinator Implements Supportive Measures: [T]he Title IX Coordinator must serve as the point of contact for the affected students to ensure that the supportive measures are effectively implemented so that the burden of navigating paperwork or other administrative requirements within the recipient's own system does not fall on the student receiving the supportive measures.	p. 575 *See also* p. 880
		Documentation Required for *not* Providing Supportive Measures: [I]f 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 under §106.45(b)(10)(ii).	p. 567 *See also* pps. 598-99, 706
		Compliance Standard: A recipient will have sufficiently fulfilled its obligation to offer supportive measures as long as the offer is not clearly unreasonable in light of the known circumstances.	p. 670

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Dismissal of Formal Complaint Prior to Full Resolution			
Grounds for Dismissal (Mandatory)	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 2022 must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; such a dismissal does not preclude action under another provision of the recipient's code of conduct.		§106.45(b)(3)(i)
Grounds for Dismissal (Discretionary)	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		§106.45(b)(3)(ii)

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	the formal complaint or allegations therein.		
		Meritless or Frivolous Allegations: Permitting a recipient to deem allegations meritless or frivolous without following the § 106.45 grievance process would defeat the Department's purpose.	p. 688
		Discretionary Dismissals: By granting recipients the discretion to dismiss in situations where the respondent is no longer a student or employee of the recipient, the Department believes this provision appropriately permits a recipient to make a dismissal decision based on reasons that may include whether a respondent poses an ongoing risk to the recipient's community, whether a determination regarding responsibility provides a benefit to the complainant even where the recipient lacks control over the respondent and would be unable to issue disciplinary sanctions, or other reasons. The final category of discretionary dismissals addresses situations where specific circumstances prevent a recipient from meeting the recipient's burden to collect evidence sufficient to reach a determination regarding responsibility; for example, where a complainant refuses to participate in the grievance process (but also has not decided to send written notice stating that the complainant wishes to withdraw the formal complaint), or where the respondent is not under the authority of the recipient (for instance because the respondent is a non-student, non-employee individual who came onto campus and allegedly sexually harassed a complaint), and the recipient has no way to gather evidence sufficient to make a determination, this provision permits dismissal.	pps. 965-66

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Written Notice Required for Dismissals	Upon a dismissal required or permitted pursuant to paragraph (b)(3)(i) or (b)(3)(ii) of this section, the recipient must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties.		§106.45(b)(3)(iii)
Discretion to Proceed with Conduct Action Pursuant to Institution's Community Standards	[A] dismissal [under this section] does not preclude action under another provision of the recipient's code of conduct.		§106.45(b)(3)(i)
		Discretion to Maintain and Enforce Community Standards: [T]he three-pronged definition of sexual harassment in § 106.30 provides clear requirements for recipients to respond to sexual harassment that constitutes sex discrimination prohibited under Title IX, while leaving recipients flexibility to address other forms of misconduct to the degree, and in the manner, best suited to each recipient's unique educational environment.	p. 432 *See also* pps. 441, 457, 472, 481, 492, 496, 545
		Flexibility in Structuring Non-Title IX Proceedings: [I]f a recipient wishes to use a grievance process that complies with § 106.45 to resolve allegations of misconduct that do not constitute sexual harassment under § 106.30, nothing in the final regulations precludes a recipient from doing so. Alternatively, a recipient may respond to non-Title IX misconduct under disciplinary procedures that do not comply with § 106.45. The final regulations leave recipients flexibility in this regard, and prescribe a particular grievance process only	p. 482 *See also* p. 645, 687, 962, 963

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		where allegations concern sexual harassment covered by Title IX.	
		Behavioral Expectations for Students and Faculty: [A] recipient's own code of conduct that might impose behavioral expectations on students and faculty distinct from Title IX's non-discrimination mandate."	p. 457
		Outside Program or Activity: [N]othing in the final regulations precludes the recipient from choosing to also address allegations of conduct outside the recipient's education program or activity.	p. 631 *See also* p. 633, 635-36, 653
		Outside of U.S.: [N]othing in these final regulations prevents recipients from initiating a student conduct proceeding or offering supportive measures to address sexual misconduct against a person outside the United States.	p. 660
General Requirements of Formal Grievance Process			
Equitable Treatment	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.		§106.44(a)
Equitable Treatment	Treat complainants and respondents equitably by providing remedies to a complainant where a determination of		§106.45 (b)(1)(i)

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	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.		
		Equal vs. Equitable: [W]ith respect to remedies and disciplinary sanctions, strictly equal treatment of the parties does not make sense, and to treat the parties equitably, a complainant must be provided with remedies where the outcome shows the complainant to have been victimized by sexual harassment; similarly, a respondent must be sanctioned only after a fair process has determined whether or not the respondent has perpetrated sexual harassment.	p. 793
Objective Evaluation of Relevant Evidence	[O]bjective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence		§106.45 (b)(1)(ii)
		Different Evidence for Different Circumstances: [T]he type and extent of evidence available will differ based on the facts of each incident.	p. 808
		Evaluating Evidence: "The Department is confident that recipients' desire to provide students with a safe, nondiscriminatory learning environment will lead recipients to evaluate sexual harassment incidents using common sense and taking circumstances into consideration, including the ages, disability status, positions of authority of involved parties, and other factors."	p. 457

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		Privileged Information Excluded: [The regulations] preclude use of any information protected by a legally recognized privilege (e.g., attorney-client).	p. 811
No Conflicts of Interest or Bias	[A]ny individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, [must] not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.		§106.45 (b)(1) (iii)
		Evaluating Bias: Whether bias exists requires examination of the particular facts of a situation and the Department encourages recipients to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased, exercising caution not to apply generalizations that might unreasonably conclude that bias exists.	pps. 827-28
		Initiation of Formal Complaint ≠ Bias: [W]hen a Title IX Coordinator signs a formal complaint, that action does not place the Title IX Coordinator in a position adverse to the respondent; the Title IX Coordinator is initiating an investigation based on allegations of which the Title IX Coordinator has been made aware, but that does not prevent the Title IX Coordinator from being free from bias or conflict of interest with respect to any party.	p. 356 *See also* pps. 399, 400, 697, 1265
		Pursuing Investigation ≠ Bias: Deciding that allegations warrant an investigation does not necessarily show bias or	p. 399

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		prejudgment of the facts for or against the complainant or respondent.	
		No *per se* Conflicts Based on Job Title: [T]he Department declines to define certain employment relationships or administrative hierarchy arrangements as *per se* prohibited conflicts of interest under § 106.45(b)(1)(iii).	p. 826
		Curing Perceived Bias Through Training: The Department acknowledges the concerns expressed both by commenters concerned that certain professional qualifications (e.g., a history of working in the field of sexual violence) may indicate bias, and by commenters concerned that excluding certain professionals out of fear of bias would improperly exclude experienced, knowledgeable individuals who are capable of serving impartially. Whether bias exists requires examination of the particular facts of a situation and the Department encourages recipients to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased, exercising caution not to apply generalizations that might unreasonably conclude that bias exists (for example, assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents), bearing in mind that the very training required by § 106.45(b)(1)(iii) is intended to provide Title IX personnel with the tools needed to serve impartially and without bias such that the prior professional experience of a person whom a recipient would like to have in a Title IX role need not disqualify the	p. 827-28

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		person from obtaining the requisite training to serve impartially in a Title IX role.	
		Statistics Not Determinative of Bias: [T]he mere fact that a certain number of outcomes result in determinations of responsibility, or non-responsibility, does not necessarily indicate or imply bias on the part of Title IX personnel.	p. 829
		Trauma-Informed Approach: [Trauma]-informed practices can be implemented as part of an impartial, unbiased system that does not rely on sex stereotypes, but doing so requires taking care not to permit general information about the neurobiology of trauma to lead Title IX personnel to apply generalizations to allegations in specific cases.	p. 1088
		Trauma-Informed Approach: [E]xperts believe that application of [trauma-informed] practices is possible – albeit challenging – to apply in a truly impartial, nonbiased manner.	p. 842
		Trauma-Informed Approach: Being sensitive to the trauma a complainant may have experienced does not violate § 106.45(b)(1)(i) or any other provision of the grievance process, so long as what the commenter means by "being sensitive" does not lead a Title IX Coordinator, investigator, or decision-maker to lose impartiality, prejudge the facts at issue, or demonstrate bias for or against any party.	p. 842
Adequate and Unbiased Training	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		§106.45(b)(1)(3)

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	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.		
	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.		§106.45(b)(1)(3)
	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.		§106.45(b)(1)(3)
Presumption of Not Responsible	Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process		§106.45 (b)(1)(iv)

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Prompt Timeframe	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		§106.45 (b)(1)(v)
		Institutional Discretion to Set Time Frames: [T]he recipient may select time frames under which the recipient is confident it can conclude the grievance process in most situations, knowing that case-specific complexities may be accounted for with factually justified short-term delays and extensions.	p. 890
		Per se Unreasonable Timeframe: Taking 45 days to respond to a request for access to records would not provide a reasonably prompt time frame for the conclusion of a grievance process.	p. 1471
Prompt Timeframe (Reasons for Delay)	[The process must] allow[] for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities		§106.45 (b)(1)(v)

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		No Specified Number of Days for Delay: [T]he Department declines to specify a particular number of days that constitute "temporary" delays or "limited" extensions of time frames.	p. 900
		Example of Good Cause: [T]he reasons for a party or witness's absence is a factor in a recipient deciding whether circumstances constitute "good cause" for a short-term delay or extension.	p. 902
		Example of Good Cause: [C]oncurrent law enforcement activity *may* constitute good cause for short-term delays.	p. 896 *See also* p. 1484
		Example of Good Cause: [T]he need for parties, witnesses, and other hearing participants to secure transportation, or for the recipient to troubleshoot technology to facilitate a virtual hearing, may constitute good cause to postpone a hearing.	pps. 1227-28
		Not Good Cause: Delays caused solely by administrative needs, for example, would be insufficient to satisfy this standard.	p. 900
		Accommodating Schedules: While recipients must attempt to accommodate the schedules of parties and witnesses throughout the grievance process in order to provide parties with a meaningful opportunity to exercise the rights granted to parties under these final regulations, it is the recipient's obligation to meet its own designated time frames, and the final regulations provide that a grievance process can proceed to conclusion even in the absence of a party or witness.	p. 891
Describe Range of Sanctions and Remedies	Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility		§106.45(b)(1) (vi)
Describe Standard of Evidence	State whether the standard of evidence to be used to determine responsibility is		§106.45(b)(1) (vii)

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	the preponderance of the evidence standard or the clear and convincing evidence standard		
	apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment;		§106.45(b)(1) (vii)
Describe Mandatory Appeals Process and Bases for Appeals	Include the procedures and permissible bases for the complainant and respondent to appeal		§106.45(b)(1) (viii)
Describe Range of Supportive Measures	Describe the range of supportive measures available to complainants and respondents		§106.45(b)(1) (ix)
		Range, not List: [T]he Department is only requiring a recipient's grievance process to describe the *range* of supportive measures available rather than a list of supportive measures available.	p. 917
No Intrusion on Legally-Cognizable Privileges	[The process must] [n]ot 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.		§106.45(b)(1)(x)

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Pre-Hearing Investigation			
Emergency Removal	Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.		§106.44 (c)
		Purpose: [E]mergency removal is for the purpose of addressing imminent threats posed to any person's physical health or safety, which might arise out of the sexual harassment allegations.	p. 727
		When Appropriate: [E]mergency removal is not appropriate in every situation where sexual harassment has been alleged, but only in situations where an individualized safety and risk	p. 728 *See also* pps. 734, 755, 759

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		analysis determines that an immediate threat to the physical health or safety of any student or other individual justifies the removal, where the threat arises out of allegations of sexual harassment as defined in § 106.30.	
		When Appropriate: [T]he recipient should not remove a respondent from the recipient's education program or activity pursuant to § 106.44(c) unless there is more than a generalized, hypothetical, or speculative belief that the respondent may pose a risk to someone's physical health or safety.	p. 758
		Examples: For example, if a respondent threatens physical violence against the complainant in response to the complainant's allegations that the respondent verbally sexually harassed the complainant, the immediate threat to the complainant's physical safety posed by the respondent may "arise from" the sexual harassment allegations. As a further example, if a respondent reacts to being accused of sexual harassment by threatening physical self-harm, an immediate threat to the respondent's physical safety may "arise from" the allegations of sexual harassment and could justify an emergency removal.	pps. 728-29 *See also* p. 954
		Limitations: An emergency removal under § 106.44(c) does not authorize a recipient to impose an interim suspension or expulsion on a respondent *because* the respondent has been accused of sexual harassment. Rather, this provision authorizes a recipient to remove a respondent from the recipient's education program or activity … when an individualized safety and risk analysis determines that an imminent threat to the physical health or safety of any person, *arising from* sexual harassment allegations, justifies removal.	p. 730
		No Specific Procedures Required: We do not believe that prescribing procedures for the post-removal challenge is	p. 744

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		necessary or desirable, because this provision ensures that respondents receive the essential due process requirements of notice and opportunity to be heard while leaving recipients flexibility to use procedures that a recipient deems most appropriate.	
		Length: The Department declines to put any temporal limitation on the length of a valid emergency removal[.]	p. 747
		Deference: OCR will not second guess a recipient's removal decision based on whether OCR would have weighed the evidence of risk differently from how the recipient weighed such evidence.	p. 766
Administrative Leave	Nothing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45. This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.		§106.44 (d)
		With or Without Pay: [T]hese final regulations do not dictate whether administrative leave during the pendency of an investigation under § 106.45 must be with pay (or benefits) or without pay (or benefits).	p. 768
		Student Employees: With respect to student-employee respondents, we explain more fully, below, that these final regulations do not necessarily prohibit a recipient from placing a student-employee respondent on administrative leave if doing so does not violate other regulatory provisions.	p. 771 *See also* p. 773.

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		Student Employees: Administrative leave may jeopardize a student-employee's access to educational benefits and opportunities in a way that a non-student employee's access to education is not jeopardized. Accordingly, administrative leave is not always appropriate for student-employees.	p. 773
		Student Employees: If a recipient removes a respondent pursuant to § 106.44(c) after conducting an individualized safety and risk analysis and determining that an immediate threat to the physical health or safety of any students or other individuals justifies removal, then a recipient also may remove a student-employee respondent from any employment opportunity that is part of the recipient's education program or activity.	p. 774
Notice Requirement	Written notice required		§106.45(b)(2)
Contents of Notice	Notice of the recipient's grievance process that complies with this section, including any informal resolution process		§106.45(b)(2)(A)
	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.		§106.45(b)(2)(B)

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		Exception: The Department notes that the final regulations do not prevent a recipient from questioning an employee-respondent about sexual harassment allegations without disclosing the complainant's identity, provided that the recipient does not take disciplinary action against the respondent without first applying the § 106.45 grievance process (or unless emergency removal is warranted under § 106.44(c), or administrative leave is permitted under §106.44(d)).	pps. 956-57
	[S]tatement 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		§106.45(b)(2)(B)
	The written notice must inform the parties that they may have an advisor of their choice, who may be an attorney		§106.45(b)(2)(B)
	The written notice must inform the parties that they may inspect and review evidence		§106.45(b)(2)(B)
	The written notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process		§106.45(b)(2)(B)

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	Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate		§106.45(b)(5)(v)
Duty to Supplement Notice	If, in the course of an investigation, the recipient decides to investigate allegations about the complainant or respondent that are not included in the notice provided pursuant to paragraph (b)(2)(i)(B) of this section, the recipient must provide notice of the additional allegations to the parties whose identities are known.		§106.45(b)(2)(ii)
Consolidation of Formal Complaints	A recipient may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances. Where a grievance process involves more than one complainant or more than one respondent, references in this section to the singular "party," "complainant," or "respondent" include the plural, as applicable.		§106.45(b)(4)

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		Consolidation of Formal Complaints: [R]ecipients have discretion to consolidate formal complaints in situations that arise out of the same facts or circumstances and involve more than one complainant, more than one respondent, or what amount to counter-complaints by one party against the other.	Pps. 968-69
		Consolidation of Formal Complaints: If there are multiple complainants and one respondent, then the recipient may consolidate the formal complaints where the allegations of sexual harassment arise out of the same facts or circumstances, under § 106.45(b)(4). The requirement for the same facts and circumstances means that the multiple complainants' allegations are so intertwined that their allegations directly relate to all the parties.	p. 1498
Gathering Evidence (Burden Rests with Recipient)	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.		§106.45(b)(5)(i)
		Trauma-Informed Investigations: [N]othing in the final regulations precludes a recipient from applying trauma-informed techniques, practices, or approaches so long as such practices are consistent with the requirements of § 106.45(b)(1)(iii) and other requirements in § 106.45.	p. 591
		Trauma-Informed Investigations: Because cross-examination occurs only after the recipient has conducted a thorough investigation, trauma-informed questioning can occur by a recipient's investigator giving the parties opportunity to make statements under trauma-informed approaches prior to being cross-examined by the opposing party's advisor.	p. 1087

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Gathering Evidence (Restrictions re: Medical Records)	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		§106.45(b)(5)(i)
Gathering Evidence (Equal Opportunity)	Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.		§106.45(b)(5)(ii)
		Recipient Can Also Present Evidence: [T]he Department recognizes that the recipient is not a party to the proceeding, but this does not prevent the recipient from presenting evidence to the decision-maker, who must then objectively evaluate relevant evidence (both inculpatory and exculpatory) and reach a determination regarding responsibility.	p. 971
		Gathering Evidence (Limitations): [P]arties to a Title IX grievance process are not granted the right to depose parties or witnesses, nor to invoke a court system's subpoena powers to compel parties or witnesses to appear at hearings, which are common features of procedural rules governing litigation and criminal proceedings.	pps. 1026-27
Gathering Evidence (No Gag Orders)	Recipient must [n]Not restrict the ability of either party to discuss the		§106.45(b)(5)(iii)

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	allegations under investigation or to gather and present relevant evidence.		
		Prior Restraints: [A] recipient should not, under the guise of confidentiality concerns, impose prior restraints on students' and employees' ability to discuss (i.e., speak or write about) the allegations under investigation, for example with a parent, friend, or other source of emotional support, or with an advocacy organization.	p. 986
		Witness Tampering: As to witness intimidation, such conduct is prohibited under § 106.71(a). As to whether a party approaching or speaking to a witness could constitute "tampering," the Department believes that generally, a party's communication with a witness or potential witness must be considered part of a party's right to meaningfully participate in furthering the party's interests in the case, and not an "interference" with the investigation. However, where a party's conduct toward a witness might constitute "tampering" (for instance, by attempting to alter or prevent a witness's testimony), such conduct also is prohibited under § 106.71(a).	p. 989-90
		Intersection with Retaliation: [T]his provision in no way immunizes a party from abusing the right to "discuss the allegations under investigation" by, for example, discussing those allegations in a manner that exposes the party to liability for defamation or related privacy torts, or in a manner that constitutes unlawful retaliation.	p. 987 *See also* p. 991
Right to an 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		§106.45 (b)(3) (iv)

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	choice, who may be, but is not required to be, an attorney.		
		"Representation" of Parties: A recipient may, but is not required to, allow advisors to "represent" parties during the entire live hearing.	p. 1155
		Advisor of Choice ≠ Right to 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.	p. 992 *See also* p. 1147, 1483-84
		Correspondence with Advisors: The Department appreciates commenters' request that advisors be copied on all correspondence between recipients and the parties, but declines to impose such a rule.	p. 1005
	The recipient may not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding		§106.45 (b)(3) (iv)
	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.		§106.45 (b)(3) (iv)
		Rules of Decorum: [T]he final regulations do not preclude a recipient from adopting and applying codes of conduct and rules of decorum to ensure that parties and advisors, including assigned advisors, conduct cross-examination questioning in a respectful and non-abusive manner, and the decision-maker remains obligated to ensure that only relevant questions are posed during cross-examination.	pps. 1149-50 *See also* pps. 1114, 1114-15, 1145, 1150
		Rules of Decorum: To meet this obligation a recipient also cannot forbid a party from conferring with the party's advisor,	p. 1145

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		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.	
		Misbehaving Advisors: [T]he final regulations do not preclude a recipient from enforcing rules of decorum that ensure all participants, including parties and advisors, participate respectfully and non-abusively during a hearing. 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.	p. 1075
		Misbehaving Advisors: 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 provide that party with an advisor to conduct cross-examination on behalf of that party. If a provided advisor 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.	p. 1155
		Examples of Restrictions on Advisor Participation: Section 106.45(b)(5)(iv) (allowing recipients to place restrictions on active participation by party advisors) and the revised introductory sentence to §106.45(b) (requiring any rules a recipient adopts for its grievance process other than rules required under § 106.45 to apply equally to both parties) 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	p. 997

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		recipient allows at a live hearing, so long as such rules apply equally to both parties. We do not believe that specifying what restrictions on advisor participation may be appropriate is necessary, and we decline to remove the discretion of a recipient to restrict an advisor's participation so as not to unnecessarily limit a recipient's flexibility to conduct a grievance process.	
Right to Inspect and Review (and Respond to) Evidence	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.		§106.45 (b)(3)(vi)
		Directly Related: The Department declines to define certain terms in this provision such as …"evidence directly related to the allegations," as these terms should be interpreted using their plain and ordinary meaning.	p. 1017
		Institutional Discretion: [T]he school has some discretion to determine what evidence is directly related to the allegations in a formal complaint.	p. 1471 *See also* p. 1492
		Directly Related ≠ Relevant: "[D]irectly related" may sometimes encompass a broader universe of evidence than evidence that is "relevant."	p. 1017 *See also* p. 1041

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		Directly Related ≠ Relevant: [T]he 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.	p. 1018
		Illegally Obtained Evidence: If a recipient knows that a recording is unlawfully created under State law, then the recipient should not share a copy of such unlawful recording. The Department is not requiring a recipient to disseminate any evidence that was illegally or unlawfully obtained.	p. 1465-66
		Redactions: [A] recipient may permit or require the investigator to redact information that is not directly related to the allegations (or that is otherwise barred from use under § 106.45, such as information protected by a legally recognized privilege, or a party's treatment records if the party has not given written consent).	p. 1019 *See also* p. 1473
		Obligation to Summarize Relevant Evidence: The requirement for recipients to summarize and evaluate relevant evidence, and specification of certain types of evidence that must be deemed not relevant or are otherwise inadmissible in a grievance process pursuant to § 106.45, appropriately directs recipients to focus investigations and adjudications on evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true (i.e., on what is relevant).	p. 980
		Determining Relevance: [A] layperson's determination that a question is not relevant is made by applying logic and common sense, but not against a backdrop of legal expertise.	p. 1159

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		Not Relevant: information protected by a legally recognized privilege; evidence about a complainant's prior sexual history; any party's medical, psychological, and similar records unless the party has given voluntary, written consent; and (as to adjudications by postsecondary institutions), party or witness statements that have not been subjected to cross examination at a live hearing.	p. 980
		NDAs Permitted: [R]ecipients may impose on the parties and party advisors restrictions or require a non-disclosure agreement not to disseminate any of the evidence subject to inspection and review.	p. 1019 *See also* pps. 1449, 1483 , 1496
	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.		§106.45 (b)(3)(vi)
		Hard or Electronic *Copy* Required: We believe it is important for the parties to receive a copy of the evidence subject to inspection and review.	p. 1025
		Corrections: [T]he parties may make corrections, provide appropriate context, and prepare their responses and defenses before a decision-maker reaches a determination regarding responsibility.	p. 1023 *See also* p. 1015
		Corrections: [I]f relevant evidence seems to be missing, a party can point that out to the investigator, and if it turns out that relevant evidence was destroyed by a party, the decision-maker	p. 1003

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		can take that into account in assessing the credibility of parties, and the weight of evidence in the case.	
	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.		§106.45 (b)(3)(vi)
The Investigative Report	Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.		§106.45 (b)(3)(vii)
		Relevant Evidence Only: [A]ll evidence summarized in the investigative report under § 106.45(b)(5)(vii) must be "relevant."	p. 1017 *See also* p. 815
		Redactions: [A] recipient may permit or require the investigator to redact from the investigative report information that is not relevant.	p. 1020
		May Include Facts and Interview Statements: A recipient may include facts and interview statements in the investigative report.	p. 1498
		May Include Recommended Findings or Conclusions: The Department does not wish to prohibit the investigator from including recommended findings or conclusions in the investigative report. However, the decision-maker is under an	p. 1031

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		independent obligation to objectively evaluate relevant evidence, and thus cannot simply defer to recommendations made by the investigator in the investigative report.	
		May Include Credibility Assessment but not Determination: If a recipient chooses to include a credibility analysis in its investigative report, the recipient must be cautious not to violate § 106.45(b)(7)(i), prohibiting the decision-maker from being the same person as the Title IX Coordinator or the investigator. Section 106.45(b)(7)(i) prevents an investigator from actually making a determination regarding responsibility. If an investigator's determination regarding credibility is actually a determination regarding responsibility, then § 106.45(b)(7)(i) would prohibit it.	p. 1498
		Consolidated Complaints: In the context of a grievance process that involves multiple complainants, multiple respondents, or both, a recipient may issue a single investigative report.	p. 1038
		Corrections: The parties then have equal opportunity to review the investigative report; if a party disagrees with an investigator's determination about relevance, the party can make that argument in the party's written response to the investigative report under §106.45(b)(5)(vii) and to the decision-maker at any hearing held; either way the decision-maker is obligated to objectively evaluate all relevant evidence and the parties have the opportunity to argue about what is relevant (and about the persuasiveness of relevant evidence).	p. 815 *See also* p. 1041
The Live Hearing			
Live Hearing Required	For postsecondary institutions only, the recipient's grievance process must provide for a live hearing.		§106.45 (b)(6)(i)

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		Single Investigator Model Prohibited: [T]he final regulations . . . foreclose[es] recipients from utilizing a "single investigator" or "investigator-only" model for Title IX grievance processes.	p. 1247
		Hearing *Boards* Not Required: [T]he final regulations do not require hearing boards (as opposed to a single individual acting as the decision-maker)[.]	p. 813
		Students in Title IX Roles: [T]he final regulations do not preclude a recipient from allowing student leaders to serve in Title IX roles.	p. 829
Live Hearing (may be Virtual)	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.		§106.45(b)(6)(i)
Live Hearing (Recording or Transcript Required)	Recipients must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.		§106.45(b)(6)(i)
Questioning of Parties and Witnesses by Advisor	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.		§106.45 (b)(6) (i)
		Direct Examination: Whether advisors also may conduct direct examination is left to a recipient's discretion.	p. 1154

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		"Representation" of Parties: A recipient may, but is not required to, allow advisors to "represent" parties during the entire live hearing.	p. 1155
		Rules of Decorum: A recipient may adopt rules of order or decorum to forbid badgering a witness, and may fairly deem repetition of the same question to be irrelevant.	p. 812
		Rules of Procedure: [A] recipient may, for instance, adopt rules that . . . 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.	p. 1226
		"Rules of Evidence": [A] recipient may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence.	p. 812
		"Rules of Evidence": The Department notes that where evidence is duplicative of other evidence, a recipient may deem the evidence not relevant.	p. 1136 *See also* pps. 1114, 1227
		"Rules of Evidence": [W]here 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.	p. 1137
		"Rules of Evidence": 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.	p. 1159

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		"Rules of Evidence": [T]he 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.	p. 1159
		"Rules of Evidence": [A] decision-maker [is not required] to give a lengthy or complicated explanation [of a relevancy determination]; 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.	p. 1161
		Revising Relevancy Determination: [N]othing in the final regulations precludes a recipient from adopting a rule that the decision-maker will, for example, send to the parties after the hearing any revisions to the decision-maker's explanation that was provided during the hearing.	p. 1160
		No Subpoena Power: [R]ecipients have no ability to compel a party or witness to participate.	p. 1083 *See also* pps. 1176, 1178, 1330
Cross-Examination (Direct, in Real Time)	Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings.		§106.45 (b)(6) (i)

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		Rules of Decorum: [R]ecipients 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.	Pps. 1062-63 *See also* pps. 1054, 1059-60, 1065, 1072, 1074, 1075, 1226
		Rules of Decorum: The Department reiterates that recipients retain the discretion to control the live hearing environment to ensure that no party is "yelled" at or asked questions in an abusive or intimidating manner.	p. 1089
		Abusive Questioning (Caution): The Department appreciates commenters who described experiences being questioned by party advisors as feeling like the advisor asked questions in a disempowering, blaming, and condescending way; however, the Department notes that such questioning may feel that way to the person being questioned by virtue of the fact that cross-examination is intended to promote the perspective of the opposing party, and this does not necessarily mean that the questioning was irrelevant or abusive.	p. 1075
		Rules of Procedure (No Waiver of Questions): [T]he Department declines to allow a party or witness to "waive" a question.	p. 1183
		Faulty Memory ≠ Lying: [C]ross examination that may reveal faulty memory, mistaken beliefs, or inaccurate facts about allegations does *not* mean that the party answering questions is necessarily lying or making intentionally false statements.	p. 1053
Cross-Examination (Relevancy Requirement)	Only relevant cross-examination and other questions may be asked of a party or witness.		§106.45 (b)(6) (i)
		Determining Relevance: [A] layperson's determination that a question is not relevant is made by applying logic	p. 1159

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		and common sense, but not against a backdrop of legal expertise.	
		Not Relevant: information protected by a legally recognized privilege; evidence about a complainant's prior sexual history; any party's medical, psychological, and similar records unless the party has given voluntary, written consent; and (as to adjudications by postsecondary institutions), party or witness statements that have not been subjected to cross examination at a live hearing.	p. 980
		Not Relevant: [T]he rape shield language deems irrelevant *all* questions or evidence of a complainant's sexual behavior *unless* [otherwise allowed by these regulations].	p. 1200
		Other Questions: [A] recipient may not adopt evidentiary rules of admissibility that contravene those evidentiary requirements prescribed under § 106.45. For example, a recipient may not adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice.	pps. 980-81
Cross-Examination (On-the-Spot Evidentiary Rulings)	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.		§106.45 (b)(6) (i)
		No Prior Submission of Written Questions: [S]ubmission of written questions [for the purposes of ascertaining relevance], even during a live hearing, is not compliant with § 106.45(b)(6)(i).	p. 1132
		Training on Relevancy Required: In response to commenters' concerns about how to determine "relevance" in the context	p. 810

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		of these final regulations, we have revised § 106.45(b)(1)(iii) specifically to require training on issues of relevance (including application of the "rape shield" protections in § 106.45(b)(6)).	
Cross-Examination: (Conducted by Advisor Only)	If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.		§106.45 (b)(6) (i)
		Personal Representation Prohibited: The Department has revised § 106.45(b)(6)(i) to expressly preclude a party from conducting cross-examination personally; the only method for conducting cross-examination is by a party's advisor.	p. 1132
		Attorney Advisor Not Required: [A] recipient may fulfill its obligation to provide an advisor for a party to conduct cross-examination at a hearing without hiring an attorney to be that party's advisor, and that remains true regardless of whether the other party has hired a lawyer as an advisor of choice.	p. 1150
		Parameters: [A]dvisors conducting cross-examination will be either professionals (e.g., attorneys or experienced advocates) or at least adults capable of understanding the purpose and scope of cross-examination.	p. 1109
		Equal Competency Not Required: The Department understands commenters' desire that both parties have advisors of equal competency during a hearing. However, the Department does not wish to impose burdens and costs on recipients beyond what is necessary to achieve a Title IX grievance process.	p. 1150
		No Fee or Charge Permitted: [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	p. 1120

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		provided without fee or charge to the party, and may be, but is not required to be, an attorney.	
		Advance Notification Permitted: The final regulations do not preclude recipients from adopting a rule that requires parties to inform the recipient in advance of a hearing whether the party intends to bring an advisor of choice to the hearing.	p. 1154
		Advisor "No Shows": [I]f a party . . . appears at a hearing without an advisor the recipient would need to stop the hearing as necessary to permit the recipient to assign an advisor to that party to conduct cross-examination.	p. 1154 *See also* p. 1171
Cross-Examination (Rape Shield Protections Apply)	Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.		§106.45 (b)(6) (i)
		Only Applies to Complainants: The Department declines to extend the rape shield language to respondents.	p. 1191
		Only Applies to Complainants (Caution): [S]ome situations will involve counter-claims made between two parties, such that a respondent is also a complainant.	p. 1191
		Application: [T]he rape shield language deems irrelevant *all* questions or evidence of a complainant's sexual behavior *unless* offered to prove consent (and it concerns specific instances of	p. 1200

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		sexual behavior with the respondent); thus, if "consent" is not at issue – for example, where the allegations concern solely unwelcome conduct under the first or second prong of the § 106.30 definition – then that exception does not even apply, and the rape shield protections would then bar *all* questions and evidence about a complainant's sexual behavior, with no need to engage in a balancing test of whether the value of the evidence is outweighed by harm or prejudice.	
Cross-Examination (Refusal to Submit to Cross)	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.		§106.45 (b)(6) (i)
		General: [O]nly statements that have been tested for credibility will be considered by the decision-maker in reaching a determination regarding responsibility.	p. 1168
		Hearsay Generally: The Department disagrees that this provision needs to be modified so that a party's statements to family or friends would still be relied upon even when the party does not submit to cross-examination. Even if the family member or friend did appear and submit to cross-examination, where the family member's or friend's testimony consists of recounting the statement of the party, and where the party does not submit to cross-examination, it would be unfair and	Pps. 1172-73

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		potentially lead to an erroneous outcome to rely on statements untested via cross-examination.	
		Statements Against a Party's Interest: The Department declines to add exceptions to this provision, such as permitting reliance on statements against a party's interest.	p. 1168
		Death or Disability of Party or Witness: [W]ritten statements cannot be relied upon unless the witness submits to cross-examination, and whether a witness's statement is reliable must be determined in light of the credibility-testing function of cross-examination, even where nonappearance is due to death or post-investigation disability.	p. 1177
		Police or SANE Reports: [P]olice 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.	p. 1181
		Text Messages and Emails: This provision does apply to the situation where evidence involves intertwined statements of both parties (e.g., a text message exchange or e-mail 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.	p. 1182
		Video Evidence: [W]here 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.	p. 1106 *See also* p. 1169
		Video Evidence that Includes Statements: 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	p. 1169

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		without drawing any inference about the determination based on lack of party or witness testimony.	
		Statements of Parties who Decline to Participate: Where a grievance process is initiated because the Title IX Coordinator, and not the complainant, signed the formal complaint, the complainant who did not wish to initiate a grievance process remains under no obligation to then participate in the grievance process, and the Department does not believe that exclusion of the complainant's statements in such a scenario is unfair to the complainant, who did not wish to file a formal complaint in the first place yet remains eligible to receive supportive measures protecting the complainant's equal access to education.	p. 1172
Standard of Evidence	preponderance of the evidence or clear and convincing evidence		§106.45(b)(1)(vii)
		General: [T]he standard of evidence reflects the "degree of confidence" that a decision-maker has in correctness of the factual conclusions reached.	p. 1306
		Preponderance of the Evidence: [A determination] based on facts that are more likely true than not	p. 1314
		Clear and Convincing: having confidence that a conclusion is based on facts that are highly probable to be true	p. 1314
		>50% Required for Showing of Preponderance: Where the evidence in a case is "equal" or "level" or "in equipoise," the preponderance of the evidence standard results in a finding that the respondent is not responsible.	p. 1298
		Choosing Standard of Evidence: The Department expects that recipients will select a standard of evidence based on the recipient's belief about which standard best serves the interests of the recipient's educational community, or because State law requires the recipient to apply one or the other standard, or	p. 1320

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		because the recipient has already bargained with unionized employees for a particular standard of evidence in misconduct proceedings.	
Standard of Evidence (Same for Student and Employee Respondents)	Recipient must "apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment."		§106.45(b)(1)(vii)
Decision Maker	The decision-maker(s) . . . cannot be the same person(s) as the Title IX Coordinator or the investigator(s).		§106.45 (b)(7)
		Title IX Coordinator as Investigator: Section 106.45(b)(7)(i) does not prevent the Title IX Coordinator from serving as the investigator; rather, this provision only prohibits the decision-maker from being the same person as either the Title IX Coordinator or the investigator.	p. 1257 *See also* pps. 1265, 1266
		Separate Decision Maker: [T]he 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.	p. 1056 *See also* p. 1063

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		Role of the Decision Maker: [T]he decision-maker has the right and responsibility to ask questions and elicit information from parties and witnesses on the decision-maker's own initiative to aid the decision-maker in obtaining relevant evidence both inculpatory and exculpatory, and the parties also have equal rights to present evidence in front of the decision-maker so the decision-maker has the benefit of perceiving each party's unique perspectives about the evidence.	p. 1114
		Hearing Officer vs. 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.	p. 1266
Determination of Responsibility	Written determination required		§106.45 (b)(7)(i)
Determination of Responsibility (Content)	Identification of the allegations potentially constituting sexual harassment		§106.45 (b)(7)(ii)
	A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held		§106.45 (b)(7)(ii)
	Findings of fact supporting the determination		§106.45 (b)(7)(ii)

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		Not Required: We decline to expressly require the written determination to address evaluation of contradictory facts, exculpatory evidence, "all evidence" presented at a hearing, or how credibility assessments were reached.	p. 1326
		Weighing Credibility: [A]dmissible, relevant evidence must be evaluated for weight or credibility by a recipient's decision-maker.	p. 981 *See also* p. 1114, 1137
		Weighing Credibility: [T]he degree to which any inaccuracy, inconsistency, or implausibility in a narrative provided by a party or witness should affect a determination regarding responsibility is a matter to be decided by the decision-maker, after having the opportunity to ask questions of parties and witnesses, and to observe how parties and witnesses answer the questions posed by the other party.	p. 1053
		Weighing 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). Cross-examination brings those important factors to a decision-maker's attention.	p. 1081
		Weighing Credibility: [A] party's answers to cross-examination questions can and should be evaluated by a decision-maker in context, including taking into account that a party may experience stress while trying to answer questions. Because decision-makers must be trained to serve impartially without prejudging the facts at issue, the final regulations protect against a party being unfairly judged due to inability to recount each specific detail of an incident in sequence, whether such inability is due to trauma, the effects of drugs or alcohol, or simple fallibility of human memory.	p. 1089

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
		Corroborating Evidence Not Required: [N]either the preponderance of the evidence standard, nor the clear and convincing evidence standard, requires corroborating evidence.	p. 1295 *See also* p. 1306
	Conclusions regarding the application of the recipient's code of conduct to the facts		§106.45 (b)(7)(ii)
		[D]ecisionmakers [must] lay out the evidentiary basis for conclusions reached in the case, in a written determination regarding responsibility.	p. 814
	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		§106.45 (b)(7)(ii)
		Description of Remedies *not* Included: [T]he nature of remedies provided does not appear in the written determination.	p. 1334 *See also* p. 1341
	The recipient's procedures and permissible bases for the complainant and respondent to appeal.		§106.45 (b)(7)(ii)
Determination of Responsibility (Simultaneous Notification)	Simultaneous notification of parties required		§106.45 (b)(7)(iii)
		Finality: [T]he written determination becomes "final" only after the time period to file an appeal has expired, or if a party does	p. 1338

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
		file an appeal, after the appeal decision has been sent to the parties.	
Determination of Responsibility (Agency Deference)	The Assistant Secretary will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient, or otherwise evidence of discrimination under title IX by the recipient, solely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence.		§106.44(b)(2)
		Deference: [T]he Department will refrain from second guessing a recipient's determination regarding responsibility based solely on whether the Department would have *weighed* the evidence differently.	p. 713 *See also* pps. 714, 716, 1138, 1339-40
Sanctions		Specific Sanctions Not Required: The Department does not wish to dictate to recipients the sanctions that should be imposed when a respondent is found responsible for sexual harassment.	p. 1344 *See also* pps. 908. 1346, 1428
		Specific Sanctions Not Required: The Department declines to adopt a rule that would mandate suspension or expulsion as the only appropriate sanction following a determination of responsibility against a respondent; recipients deserve flexibility to design sanctions that best reflect the needs and values of the recipient's educational mission and community.	p. 1392
		Proportionality: [T]hese final regulations do not impose a standard of proportionality on disciplinary sanctions.	p. 908
		Mitigating Considerations: [A] respondent's lack of comprehension that conduct constituting sexual harassment violates the bodily or emotional autonomy and dignity of a	p. 434

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
		victim does not excuse the misconduct, though genuine lack of understanding may (in a recipient's discretion) factor into the sanction decision.	
		Zero Tolerance Policies: [N]othing in these final regulations precludes a recipient from adopting a zero tolerance policy.	p. 1302
		Sanctioning Pedagogy: Because the final regulations do not require particular disciplinary sanctions, the final regulations do not preclude a recipient from imposing student discipline as part of an "educational purpose" that may differ from the purpose for which a recipient imposes employee discipline.	p. 1285
		Restorative Justice as Sanction: [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.	p. 1388
		Transcript Notations: The Department intentionally did not take a position in the NPRM on transcript notations or the range of possible sanctions for a respondent who is found responsible for sexual harassment.	p. 1344 *See also* p. 1428
		Transfers: The Department does not regulate what information schools must share when a student transfers to a different school and declines to do so here.	p. 1476
		Effective Date of Sanction: [T]he final regulations obligate the recipient to offer supportive measures throughout the grievance process (unless failing to do so would not be clearly unreasonable) thus maintaining a status quo through the grievance process that may continue a short time longer while an appeal is being resolved. The Department believes that in order for an appeal, by either party, to be fully effective, the recipient must wait to act on the determination regarding responsibility while maintaining the status quo between the	p. 1338-39

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
		parties through supportive measures designed to ensure equal access to education.	
Remedies	Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made.		§106.45(b)(1)(i)
	Remedies must be designed to restore or preserve equal access to the recipient's education program or activity. Such remedies may include the same individualized services described in § 106.30 as "supportive measures"; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent.		§106.45(b)(1)(i)
		Remedies Evaluated Against Deliberate Indifference Standard: [A] recipient's selection and implementation of remedies will be evaluated by what is not clearly unreasonable in light of the known circumstances.	p. 800
		No Specific Remedies Required: The Department declines to require remedies for respondents in situations where a complainant is found to have brought a false allegation.	p. 804
		Types of Remedies: [R]emedies may consist of the same individualized services listed illustratively in § 106.30 as "supportive measures" but remedies need not meet the limitations of supportive measures (i.e., unlike supportive measures, remedies may in fact burden the respondent, or be punitive or disciplinary in nature).	p. 799 *See also* p. 909
		Types of Remedies: [R]emedies may include the same individualized services described in § 106.30 as "supportive	p. 1333

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
		measures" but that remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent. Beyond this, the Department believes recipients should have the flexibility to offer such remedies as they deem appropriate to the individual facts and circumstances of each case, bearing in mind that the purpose of remedies is to restore or preserve the complainant's equal access to education.	
		Types of Remedies: Whether or not the commenter's understanding of prevention and community education programming would be part of an appropriate remedy for a complainant, designed to restore or preserve the complainant's equal access to education, is a fact-specific matter to be considered by the recipient.	p. 600
		Title IX Coordinator Implements Remedies: [The] Title IX Coordinator is responsible for effective implementation of remedies.	p. 914 *See also* p. 1334
		Title IX Coordinator Implements Remedies: [W]here the final determination has indicated that remedies will be provided, the complainant can then communicate separately with the Title IX Coordinator to discuss what remedies are appropriately designed to preserve or restore the complainant's equal access to education.	p. 1334 *See also* p. 1341
		Disclosure of Remedies to Respondent Prohibited: That remedy (which does not directly affect the respondent) must not be disclosed to the respondent.	p. 1459
Appeals			
Mandatory Appeals	A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient's		§106.45 (b)(8)

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
	dismissal of a formal complaint or any allegations therein		
Grounds for Appeal	(A) Procedural irregularity that affected the outcome of the matter (B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and (C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.		§106.45 (b)(8)
		Procedural Irregularity: [P]rocedural irregularity … could include a recipient's failure to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence.	P. 815
		Erroneous Relevancy Determinations: [P]arties may appeal erroneous relevance determinations, if they affected the outcome.	p. 1159
Grounds for Appeal	A recipient may offer an appeal equally to both parties on additional bases.		§106.45(b)(8)

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
Requirements for the Appeals Process	Requirements for Appeals: (A) Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties; (B) Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator; (C) Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of this section; (D) Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome; (E) Issue a written decision describing the result of the appeal and the rationale for the result; and (F) Provide the written decision simultaneously to both parties.		§106.45(b)(8)

Informal Resolution			
Informal Resolutions Permitted	[T]he recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication [under the circumstances described in the regulations]		§106.45 (b)(9)
		Discretionary: [N]othing in the final regulations requires recipients to offer an informal resolution process.	p. 1382
		Formal Complaint Required: [R]ecipients may not offer informal resolution unless a formal complaint has been filed.	p. 1367 *See also* pps. 1371, 1388, 1391
		Voluntary and *Appropriate*: [A] recipient *may* choose to offer the parties an informal process that resolves the formal complaint without completing the investigation and adjudication, but such a result depends on whether the recipient determines that informal resolution may be appropriate and whether both parties voluntarily agree to attempt informal resolution.	p. 13667
		Advisor Input: [W]e decline to mandate that the parties confer with an advisor before entering an informal resolution process, or to mandate that recipients provide the parties with advisors before entering an informal resolution process.	p. 1374
		Kinds of Informal Resolution: 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.	p. 1370

		Kinds of Informal Resolution (Administrative Disposition): Commenters' descriptions of an administrative disposition model, or a proposed voluntary resolution agreement, are permissible under the final regulations if applied as part of an informal resolution process in conformity with §106.45(b)(9), which requires both parties' written, voluntary consent to the informal process.	p. 1224
		Kinds of Informal Resolution (Cannot Waive Hearing): The Department declines to authorize one or both parties, or the recipient, simply to "waive" a live hearing [as part of an informal resolution].	p. 1224
		Outcome: [I]nformal resolutions . . . may result in disciplinary measures designed to punish the respondent.	p. 1370
		Withdrawal: [W]e have revised § 106.45(b)(9) to expressly allow either party to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint.	p. 1376 *See also* pps. 1384, 1391
		Finality: The Department expects informal resolution agreements to be treated as contracts; the parties remain free to negotiate the terms of the agreement and, once entered into, it may become binding according to its terms.	p. 1384
		Confidentiality: [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.	p. 1379 *See also* p. 1372
		Participants as Fact Witnesses in Later Proceeding: With respect to informal resolution facilitators potentially serving as witnesses in subsequent formal grievance processes, we leave this possibility open to recipients.	p. 1367
		Liability Exposure: With respect to recipients' potential legal liability where the respondent acknowledges commission of	p. 1391-92

		Title IX sexual harassment (or other violation of recipient's policy) during an informal resolution process, yet the agreement reached allows the respondent to remain on campus and the respondent commits Title IX sexual harassment (or violates the recipient's policy) again, the Department believes that recipients should have the flexibility and discretion to determine under what circumstances respondents should be suspended or expelled from campus as a disciplinary sanction, whether that follows from an informal resolution or after a determination of responsibility under the formal grievance process. Recipients may take into account legal obligations unrelated to Title IX, and relevant Title IX case law under which Federal courts have considered a recipient's duty not to be deliberately indifferent by exposing potential victims to repeat misconduct of a respondent, when considering what sanctions to impose against a particular respondent.	
Informal Resolutions (Limitations)	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. . . 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."		§106.45 (b)(9)
Informal Resolution (Written Notice Requirement)	To proceed with informal resolution, the recipient must provide the parties with "written		§106.45 (b)(9)

	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."		
Informal Resolution (Voluntary, Written Consent Required)	To proceed with informal resolution, the recipient must "[o]btain[] the parties' voluntary, written consent to the informal resolution process."		§106.45 (b)(9)
Informal Resolution (Prohibition)	[Recipients may not use] informal resolution to resolve allegations that an employee sexually harassed a student.		§106.45 (b)(9)
Retaliation			
Retaliation Prohibited	No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with		§106.71

	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.		
Per se Retaliation	Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation.		§106.71
		"For the Purpose of Interfering with any Right or Privilege": [I]f a recipient punishes a complainant or respondent for underage drinking, arising out of the same facts or circumstances as the report or formal complaint of sexual harassment, then such punishment constitutes retaliation if the punishment is for the purpose of interfering with any right or privilege secured by Title IX or its implementing regulations. If a recipient always takes a zero tolerance approach to underage drinking in its code of conduct and always imposes the same punishment for underage drinking, irrespective of the circumstances, then imposing such a punishment would	Pps. 1876-77

		not be "for the purpose of interfering with any right or privilege secured by" Title IX or these final regulations and thus would not constitute retaliation under these final regulations.	
		Actual Knowledge Not Applicable: [T]he actual knowledge requirement in these regulations applies to sexual harassment and does not apply to a claim of retaliation.	p. 1878
		Per Se Retaliation (Witness Intimidation): If a respondent reacts to a written notice of allegations by intimidating witnesses, such conduct is prohibited as retaliation.	p. 932 *See also* p. 1223
		Examples (Threatening Visa Status): [T]hreatening to take retaliatory immigration action for the purpose of interfering with any right or privileged secured by Title IX or its implementing regulations may constitute retaliation.	p. 1875
		Responding to Retaliation: A recipient's ability to respond to retaliation will depend, in part, on the relationship between the recipient and the individual who commits the retaliation.	p. 1875
Per Se Retaliation—Exception	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.		§106.71
		Example (False Statements): [I]t could constitute retaliation to punish a party for false statements if that conclusion is reached solely based on the determination regarding responsibility.	p. 928

Application to Employees			
Application to Employees		General: [T]he Department's final regulations apply to employees.	p. 1519 *See also* pps. 1510, 1536, 1556
		Regulations Apply to All Classes of Employees: The Department believes that irrespective of position, tenure, part-time status, or at-will status, no employee should be subjected to sexual harassment or be deprived of employment as a result of allegations of sexual harassment without the protections and the process that these final regulations provide.	p. 1531
		Employees vs. Independent Contractors: The Department defers to State law with respect to employees, and State law will govern whether a person is an employee as opposed to an independent contractor.	p. 1533
		Volunteers: These final regulations also may apply to volunteers, if the volunteers are persons in the United States who experience discrimination on the basis of sex under any education program or activity receiving Federal financial assistance.	p. 1544
		Employee Only Allegations: The Department disagrees that the formal complaint process would be unworkable for cases involving only non-students.	p. 1539
		Employees Entitled to Same Benefits and Protections: Employees should receive the same benefits and due process protections that students receive under these final regulations, and these final regulations, including the due process protections in § 106.45, apply to employees.	p. 1519
		Independent Obligations to Comply with Title IX and Title VII: The Department is aware that Title VII imposes different obligations with respect to sexual harassment, including a different definition, and recipients that are subject to both	p. 1514 *See also* pps. 1515, 1520, 1523, 1524, 1547, 1548, 1551

		Title VII and Title IX will need to comply with both sets of obligations.	
		Parallel Title VII Process: Nothing in these final regulations precludes a recipient-employer from addressing conduct that it is severe or pervasive, and § 106.45(b)(3)(i) provides that a mandatory dismissal under these final regulations does not preclude action under another provision of the recipient's code of conduct. Thus, a recipient employer may address conduct that is severe or pervasive under a code of conduct for employees to satisfy its Title VII obligations.	p. 1524 *See also* pps. 1516, 1547, 1548
		Union Contracts and Faculty Handbooks: These final regulations do not preclude a recipients' obligation to honor additional rights negotiated by faculty in any collective bargaining agreement or employment contract, and such contracts must comply with these final regulations.	p. 1520
		Union Contracts and Faculty Handbooks: [S]ome collective bargaining agreements may need to be renegotiated for a recipient to comply with these final regulations[.]	p. 1527
		Academic Medical Center Employees: The Department understands that academic medical centers are unique entities, but Congress did not exempt academic medical centers that receive Federal financial assistance from Title IX.	p. 1537
Recordkeeping			
Record Keeping (Investigations and Determination)	Maintain for 7 Years: Each sexual harassment investigation including any determination regarding responsibility		§106.45 (b)(10)
Record Keeping (Recordings and Transcripts)	Maintain for 7 Years: and any audio or audiovisual recording or transcript required under paragraph (b)(6)(i) of this section		§106.45 (b)(10)

		No Copy Required: [T]he parties have equal opportunity to inspect and review the recording or transcript of a live hearing, but that inspection and review right does not obligate the recipient to send the parties a copy of the recording or transcript.	p. 1335
Record Keeping (Sanctions)	Maintain for 7 Years: any disciplinary sanctions imposed on the respondent		§106.45 (b)(10)
Record Keeping (Remedies)	Maintain for 7 Years: any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity		§106.45 (b)(10)
Record Keeping (Appeals)	Maintain for 7 Years: Any appeal and the result		§106.45 (b)(10)
Record Keeping (Informal Resolution)	Maintain for 7 Years: Any informal resolution and the result therefrom		§106.45 (b)(10)
Record Keeping (Training Materials)	Maintain for 7 Years: All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.		§106.45 (b)(10)

Record Keeping (Supportive Measures)	Maintain for 7 Years: For each response required under § 106.44, a recipient must create, and maintain for a period of seven years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity. If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.		§106.45 (b)(11)

		Maintenance ≠ Party Access: In response to commenters' concerns that this provision giving the parties access to records might contradict the requirement to keep supportive measures confidential, the Department has revised § 106.45(b)(10)(i) to remove the language making records available to parties.	p. 1406
Start of Retention Period		[T]he date of the record's creation begins the seven year retention period.	p. 1406
Preemption and Intersection with Other Laws			
Preemption	To the extent of a conflict between State or local law and title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.		§106.6(h)
Intersection with Other Laws (First Amendment)	Nothing in this [regulation] requires a recipient to. . . [r]estrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution		§106.6(d)(1)
		Pure Speech may be Harassment: [E]xpressive speech, and not just physical conduct, may be restricted or punished as harassment.	p. 426
		Pure Speech may be Harassment: [T] he § 106.30 definition of sexual harassment is designed to capture non-speech conduct broadly (based on an assumption of the education-denying effects of such conduct), while applying the *Davis* standard to verbal conduct so that the critical purposes of both Title IX and the First Amendment can be met.	p. 507

		Overbreadth: [S]everity and pervasiveness are needed elements to ensure that Title IX's non-discrimination mandate does not punish verbal conduct in a manner that chills and restricts speech and academic freedom.	p. 471
		Prior Restraints: [A] recipient should not, under the guise of confidentiality concerns, impose prior restraints on students' and employees' ability to discuss (i.e., speak or write about) the allegations under investigation, for example with a parent, friend, or other source of emotional support, or with an advocacy organization.	p. 986
Intersection with Other Laws (Due Process)	Nothing in this [regulation] requires a recipient to. . . [d]eprive a person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution		§106.6(d)(2)
Intersection with Other Laws (U.S. Constitution)	Nothing in this [regulation] requires a recipient to. . . Restrict any other rights guaranteed against government action by the U.S. Constitution.		§106.6(d)(3)
		5th Amendment and Self-Incrimination: To make clear that respondents may remain silent in circumstances in which answering a question might implicate a respondent's constitutional right to avoid self incrimination, and to protect other rights of the parties, § 106.6(d)(2) states that nothing in Title IX requires a recipient to deprive a person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and Fourteenth Amendments.	p. 957

		5th Amendment and Self-Incrimination: [T]hese regulations do not require a recipient to restrict any rights that would otherwise be protected from government action under the U.S. Constitution, which includes the Fifth Amendment right against self-incrimination.	Pps. 883-84
Intersection with Other Laws (Title VII)	Nothing in this part may be read in derogation of any individual's rights under title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. or any regulations promulgated thereunder.		§106.6(f)
		There may be incidents of sexual harassment that implicate both Title VII and Title IX, and this Department will continue to administer Title IX and its implementing regulations and to defer to the EEOC to administer Title VII and its implementing regulations. Nothing in these final regulations precludes the Department from giving due weight to the EEOC's determination regarding Title VII under 28 CFR 42.610(a). The Department recognizes that employers must fulfill their obligations under Title VII and also under Title IX. There is no inherent conflict between Title VII and Title IX, and the Department will construe Title IX and its implementing regulations in a manner to avoid an actual conflict between an employer's obligations under Title VII and Title IX.	p. 719 *See also* pps. 1514, 1515, 1520, 1523, 1524, 1547, 1548, 1551

Intersection with Other Laws (FERPA)	The obligation to comply with this part is not obviated or alleviated by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99.		§106.6(e)
		Directly Related (as Defined in FERPA and Applied to Title IX Proceedings): The Department previously stated: "Under this definition, a parent (or eligible student) has a right to inspect and review any witness statement that is directly related to the student, even if that statement contains information that is also directly related to another student, if the information cannot be segregated and redacted without destroying its meaning." The Department made this statement in response to comments regarding impairing due process in student discipline cases in its notice-and-comment rulemaking to promulgate regulations to implement FERPA. The evidence and investigative report that is being shared under these final regulations directly relate to the allegations in a complaint and, thus, directly relate to both the complainant and respondent.	p. 1488
		Direct Conflict: [I]f there is a direct conflict between the requirements of FERPA and the requirements of Title IX, such that enforcement of FERPA would interfere with the primary purpose of Title IX to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions.	p. 1456 *See also* p. 1455, 1461

		Enforcement: As the Department administers both FERPA and Title IX, the Department will not interpret compliance with its regulations under Title IX to violate requirements in its regulations under FERPA.	p. 1468
Intersection with Other Laws (Clery Act)		The Department does not perceive a conflict between a recipient's obligation to comply with reporting obligations under the Clery Act and response obligations under Title IX.	p. 662
Intersection with State Laws (Anonymous Reporting)		Recipients who are obligated under State laws to offer anonymous reporting options may not face any conflict with obligations under the final regulations.	p. 393
Intersection with State Laws (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.	p. 363 *See also* p. 1197
Intersection with State Laws (Emergency Removal)		State or local law may present other considerations or impose other requirements before an emergency removal can occur. To the extent that other applicable laws establish additional relevant standards for emergency removals, recipients should also heed such standards.	p. 731 *See also* p. 771
Intersection with State Laws (Sexual Harassment)		The Department does not view a difference between how "sexual harassment" is defined under these final regulations and a different or broader definition of sexual harassment under various State laws as creating undue confusion for recipients or a conflict as to how recipients must comply with Title IX and other laws. While Federal Title IX regulations require a recipient to respond to sexual harassment as defined in §106.30, a recipient may also need to respond to misconduct that does not meet that definition, pursuant to a State law.	p. 442

		[I]f a recipient is required under State law or the recipient's own policies to investigate sexual or other misconduct that does not meet the § 106.30 definition, the final regulations clarify that a recipient may do so. Similarly, if a recipient wishes to use a grievance process that complies with § 106.45 to resolve allegations of misconduct that do not constitute sexual harassment under § 106.30, nothing in the final regulations precludes a recipient from doing so.	p. 481-82
Intersection with State Laws (Mandatory Reporters)		The final regulations do not contravene or alter any Federal, State, or local requirements regarding other mandatory reporting obligations that school employees have.	p. 606
Intersection with Accrediting Bodies and other Non-Legal Authorities (NCAA Guidelines)		The Department is not under an obligation to conform these final regulations with NCAA compliance guidelines and declines to do so. Any recipient may give coaches and trainers authority to institute corrective measures on behalf of the recipient such that notice to coaches and trainers conveys actual knowledge to the recipient as defined in § 106.30. Additionally, or alternatively, any recipient may train coaches and athletic trainers to report notice of sexual harassment to the recipient's Title IX Coordinator.	p. 330
Conflicts with Union Contracts		[I]n the event of an actual conflict between a union contract or practice and the final regulations, then the final regulations would have preemptive effect.	p. 994

Notifications			
Designation of a Title IX 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.		§106.8(a)
		[A] recipient has discretion to designate more than one employee as a Title IX Coordinator if needed in order to fulfill the recipient's Title IX obligations.	p. 574

Title IX Coordinator Contact Info	(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 2011 or catalog that it makes available to persons entitled to a notification under paragraph (a) of this section.		§106.8(b)(2)
Dissemination of Policy	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.		§106.8(b)(1)

Publication of Grievance Procedures	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.		§106.8(c)
Training Materials	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.		§106.45(b)(10)
		Keep Up to Date: [T]his provision requires the recipient to publish training materials which are up to date and reflect the latest training provided to Title IX personnel.	p. 1408

		Obtain Permission to Post Proprietary Information: To the extent that commenters' concerns that a recipient may be unable to publicize its training materials because some recipients hire outside consultants to provide training, the materials for which may be owned by the outside consultant and not by the recipient itself, the Department acknowledges that a recipient in that situation would need to secure permission from the consultant to publish the training materials, or alternatively, the recipient could create its own training materials over which the recipient has ownership and control.	p. 1409
Training			
Title IX Coordinators, Investigators, Decision-Makers, and Facilitators of an Informal Resolution Process	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.		§106.45(b)(1)(iii)

		Definition of Consent: This includes "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."	p. 365
		Curing Perceived Bias Through Training: The Department acknowledges the concerns expressed both by commenters concerned that certain professional qualifications (e.g., a history of working in the field of sexual violence) may indicate bias, and by commenters concerned that excluding certain professionals out of fear of bias would improperly exclude experienced, knowledgeable individuals who are capable of serving impartially. Whether bias exists requires examination of the particular facts of a situation and the Department encourages recipients to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased, exercising caution not to apply generalizations that might unreasonably conclude that bias exists (for example, assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents), bearing in mind that the very training required by § 106.45(b)(1)(iii) is intended to provide Title IX personnel with the tools needed to serve impartially and without bias such that the prior professional experience of a person whom a recipient would like to have in a Title IX role need not disqualify the person from obtaining the requisite training to serve impartially in a Title IX role.	p. 827-28

Decision Makers	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.		§106.45(b)(1)(iii)
Investigators	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.		
Frequency		No Frequency Requirement: [T]he final regulations do not impose an annual or other frequency condition on the mandatory training required in § 106.45(b)(1)(iii).	p. 833
Neutrality of Materials	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.		§ 106.45(b)(1)(iii)

Make Training Materials Publicity Available on Website	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.		§106.45(b)(10)
		Keep Up to Date: [T]his provision requires the recipient to publish training materials which are up to date and reflect the latest training provided to Title IX personnel.	p. 1408
		Obtain Permission to Post Proprietary Information: To the extent that commenters' concerns that a recipient may be unable to publicize its training materials because some recipients hire outside consultants to provide training, the materials for which may be owned by the outside consultant and not by the recipient itself, the Department acknowledges that a recipient in that situation would need to secure permission from the consultant to publish the training materials, or alternatively, the recipient could create its own training materials over which the recipient has ownership and control.	p. 1409
Exemptions			
Religious 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.		§106.12(b)

	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.		§106.12(b)
		Asserting the Exemption: When the Department notifies a recipient that it is under investigation for noncompliance with this part or a particular section of this part, the recipient identifies the provisions of this part which conflict with a specific tent of the religious organization.	p. 1660
		Burden on Recipient Institution to Show Entitlement to and Scope of Exemption: [R]ecipients are not entitled to any type of formal deference when invoking eligibility for a religious exemption, and recipients have the duty to establish their eligibility for an exemption, as well as the scope of any exemption.	p. 1661

		Limitation: [T]his does not prevent OCR from investigating or making a finding against a recipient if its religious tenets do not address the conduct at issue. In those cases, OCR will proceed to investigate, and if necessary, make a finding on the merits.	p. 1653 *See also* p. 1660
Effective Date			
Effective Date		Effective Date: [T]he final regulations are effective August 14, 2020.	p. 1869
Prospective Application		Prospective Application: These final regulations will apply prospectively to give recipients adequate notice of the standards that apply to them.	p. 1345 *See also* p. 1348

Prepared by NACUA, May 17, 2020.

The content should not be considered to be or used as legal advice. Legal questions should be directed to institutional legal counsel.