

University of Texas System

Annual Title IX
Training
August 5-6, 2020

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Title IX Regulations Overview

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Agenda

- Status of Final Regulations
- Title IX Jurisdiction
- Response Obligations to Actual Notice and the Formal Complaint Rule
- Implementing a Compliant Hearing Model
- Alternative Resolution
- Implementation
- Q&A

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Status of Final Regulations

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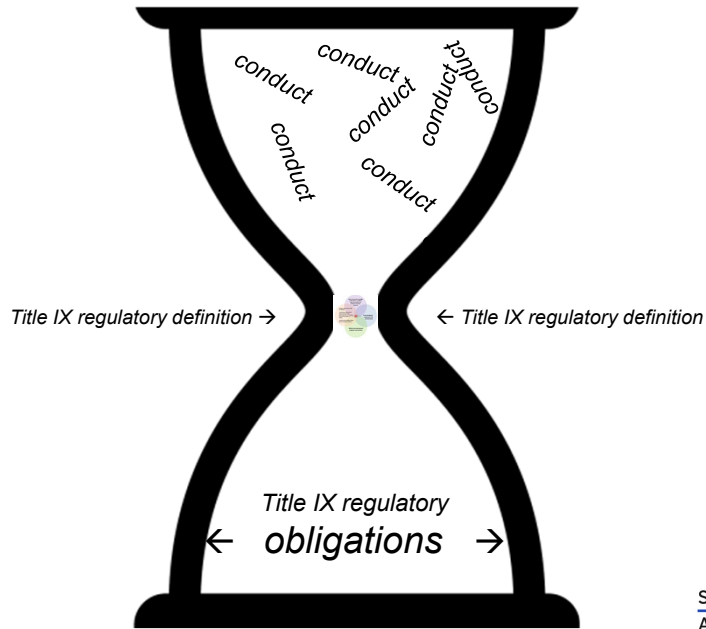
Status of Final Regulations

When and How?

- Final rule released by ED informally on its website on May 6, 2020
 - (2000+ double-spaced pages)
- Published in the Federal Register on May 19, 2020 (34 CFR Part 106)
 - (550+ tight single-spaced pages)
- OCR Blog:
<https://www2.ed.gov/about/offices/list/ocr/blog/index.html>
- Effective date: August 14, 2020
 - ED has publicly articulated an intent to begin enforcement on that date
 - No “grace period”

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Title IX Jurisdiction

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Title IX Jurisdiction

Four Elements → Response Obligations

A recipient with

- [1] ***actual knowledge*** of
- [2] ***sexual harassment***
- [3] in ***an education program or activity*** of the recipient
- [4] against ***a person in the United States***

→ must ***respond*** in a manner that is

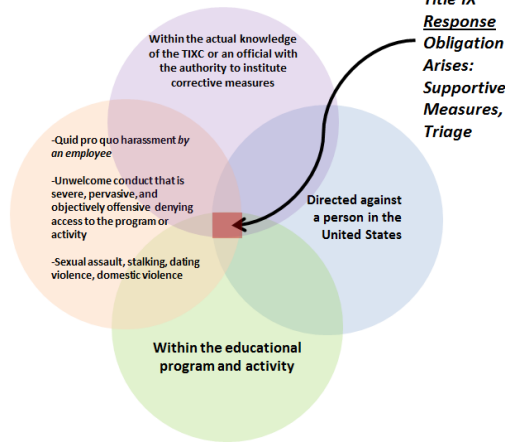
→ not deliberately indifferent.

§ 106.44(a)

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Title IX Jurisdiction



*Title IX
Response
Obligation
Arises:
Supportive
Measures,
Triage*

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Title IX Jurisdiction

Actual Knowledge and Responsible Employees

“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

Concept of “responsible employees” is gone. They are permitted, but not required, and serve no purpose re institutional obligations

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Title IX Jurisdiction

***Sexual Harassment* means: conduct on the basis of sex that satisfies one or more of the following –**

- 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;
- 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
- "sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 1229(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

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Title IX Jurisdiction

"Education program or activity" is:

All operations of the institution, including . . .

- "[L]ocations, 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."
- ***Applies to employees***, including employee on employee conduct

§ 106.44(a)

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Response Obligations to Actual Notice and the Formal Complaint Rule

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Process Overview and Roles

1. Report // Supportive Measures (Title IX Coordinator)
2. Formal Complaint (Title IX Coordinator)
3. Notice of Allegations (Title IX Coordinator)
4. Investigation (Investigator) - *or* – Informal Resolution (Facilitator)
5. Hearing (Decision-maker(s))
6. Appeal (Appeal Decision-maker)

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Response Obligations

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 the authority to institute corrective measures on behalf of the recipient...”

§ 106.30

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Response Obligations

Actual Knowledge -- What now?

To a report

- *Offer of supportive measures*
- *Explain formal complaint process*

To a formal complainant

- *Investigation followed by*
- *Live hearing/compliant grievance process*

Unless facts require or permit dismissal

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Response Obligations

Actual Knowledge -- Supportive Measures

“The Title IX Coordinator must

[1] promptly contact the complainant to discuss the availability of supportive measures. . .

[2] consider the complainant’s wishes with respect to supportive measures,

[3] inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and

[4] explain to the complainant the process for filing a formal complaint.”

§ 106.44(a)

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Response Obligations

Actual Knowledge -- Supportive Measures

May include:

- Counseling
- Extension of deadlines or other course-related adjustments
- Modification of work or class schedules
- Campus escort services
- Restrictions on contact between the parties
- Changes in work or housing locations
- Voluntary leaves of absence
- Increased security and monitoring of certain areas of the campus
- Others

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Response Obligations

Actual Knowledge -- Emergency Removals

We may remove respondent on an emergency basis only if we:

- 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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Response Obligations

Formal Complaints

A school must follow procedures prescribed in the final regulations in response to a formal complaint

- **Formal Complaint:** *a document signed by the complainant or by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.*

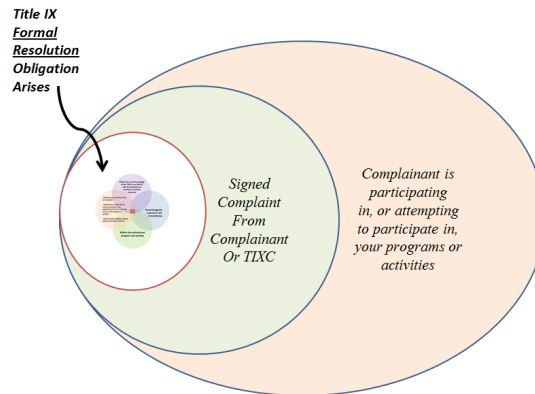
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Response Obligations

Formal Complaints



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Response Obligations and Title IX Jurisdiction

If the conduct alleged by the complainant . . .

- would not constitute sexual harassment even if proved,
- did not occur against a person in the United States, or
- did not occur within the recipient's program or activity, or
- the complainant was not participating, or attempting to participate in the P&A *at the time of the complaint*

we must terminate the grievance process with regard to that conduct for the purposes of sexual harassment under Title IX.

However, such a dismissal does not preclude action under another provision of the recipient's code of conduct. § 106.45(b)(3)

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Response Obligations and Title IX Jurisdiction

We “may dismiss” if:

- Complainant requests to withdraw their complaint
- Respondent is no longer enrolled or employed
- When specific circumstances prevent gathering evidence sufficient to reach a determination

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Implementing a Compliant Hearing Model

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Hearings

Live Hearings Required at Post-Secondary Institutions

- For postsecondary institutions, the recipient's grievance process must provide for a live hearing. § 106.45(b)(6)(i)
- *but see* recipients that are not postsecondary institutions may, but need not, provide for a hearing. § 106.45(b)(6)(ii)
 - *With or without a hearing, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.*

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Hearings

Live Hearings Required – Evidence

- A recipient “must make all [inculpatory and exculpatory evidence] . . . available at any hearing to give each party equal opportunity to refer to such evidence during the hearing . . .” giving each party at least ten days to submit a written response.
- § 106.45(b)(5)(vi)

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Hearings

Live Hearings Required – Advisors (Applies throughout investigation process)

- Parties have the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney,
- May not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding;
- We may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.

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Hearings

Live Hearings Required – Cross Examination

- 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.
- Cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice.
 - *If a party does not have an advisor present at the live hearing, the recipient must provide an advisor of the recipient's choice to conduct cross-examination on behalf of that party.*

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Hearings

Live Hearings Required – Cross Examination – What?

- Where one party appears at the hearing and ***the other party does not***, the non-appearing party's advisor may appear and conduct cross-examination even when the party whom they are advising does not appear.
 - Where one party does not appear and that party's advisor of choice does not appear, ***a recipient-provided advisor must still cross-examine the other, appearing party "on behalf of" the non-appearing party***, resulting in consideration of the appearing party's statements but not the non-appearing party's statements (without any inference being drawn based on the non-appearance).

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Hearings

Live Hearings Required – Hearsay

- If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility.
 - The decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions

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Hearings

Live Hearings Required – Relevance

- 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.
 - Only exceptions to relevance standard:
 - *Rape shield protection;*
 - *Legally-recognized privilege; and*
 - *Hearsay*

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Hearings

Live Hearings Required – Virtual and Remote

- At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology.
 - 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.

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Hearings

Hearing Officers

- The decision-maker “cannot be the same person(s) as the Title IX Coordinator or the investigator(s).” §106.45(b)(7)(i)
- 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)

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Hearings

Written Determination

Decision-makers must “issue a written determination regarding responsibility” that must include:

- Identification of conduct code sections alleged to have been violated;
- A description of the procedural steps taken from the receipt of the complaint through the determination;
- Findings of fact supporting the determination;
- Conclusions regarding the application of the code of conduct to the facts;
- Statement of rationale for, the result as to each allegation, including any findings of responsibility and sanctions;
- Remedies provided to the complainant; and
- The recipient’s procedures and permissible bases for the parties to appeal.

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Hearings

Outcome Notification

“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 [the Title IX regulations], including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.”

§106.71(a)

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Hearings

Records

All records pertaining to our responses to reports, including our responsive supportive measures and resolutions materials, must be retained for seven years.

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Process Generally

Training

We are required to train all participants in our processes – Title IX staff, investigators, hearing officers, those who facilitate alternative resolution – *everyone* – on the following topics:

- 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.

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Process Generally

Training

In addition,

- **Decision-makers** must receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant; and
- **Investigators** must receive training on issues of relevance to create an investigative report.

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Process Generally

Training – Meta Slide

All materials used to train Title IX personnel must be publicly available on the school's website.

- This may mean that the school has to secure permission from the training's copyright holder to publish the training materials on the school's website.
- If a school is unable to secure permission from a third party to post copyrighted training materials, then the school must create or obtain training materials that can lawfully be posted on the school's website.

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Standards of Evidence and Appeals

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Standards of Evidence and Appeals

Burden of Proof

- Permitted to use either clear and convincing evidence standard or preponderance of the evidence standard
- *But* recipients 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)

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Standards of Evidence and Appeals

Appeal Standards

- Must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint. Required 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 equally to both parties on additional bases.

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Informal (*Alternative*) Resolution

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Informal Resolution

Alternative Resolutions Available

- At any time prior to reaching a determination regarding responsibility, we may facilitate an informal resolution process that does not involve a full investigation and adjudication
 - May not require the parties to participate in an informal resolution process and
 - *May not offer an informal resolution process unless a formal complaint is filed*

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Informal Resolution

Alternative Resolution Requirements

To facilitate an alternative resolution, we must:

- Obtain the parties' voluntary written consent; and
- Provide written notice to the parties 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,
 - Any consequences resulting from participating in the informal resolution process, including records that will be maintained or could be shared.

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Alternative Resolution

Alternative Resolution Requirements

A written consent form to participate in informal resolution might include e.g., agreement that:

- Successful completion of preparatory meetings is a precondition to participation in informal resolution
- The parties are bound by the terms of any final informal resolution agreement, cannot return to formal resolution after an agreement, and consequences for failing to comply with agreement terms
- How and for how long records will be kept

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Alternative Resolution

Alternative Resolution Requirements

- Any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint
- *May not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student*

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University of Texas System

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August 5-6, 2020

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Texas State Law Regarding Title IX Policies and Procedures

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SB212 - Mandatory Reporting for University Employees

- Codified as Texas Education Code Chapter 51, Subchapter E-2.
- Went into effect January 1, 2020.

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What does SB212 say?

- “An employee of a postsecondary educational institution who, **in the course and scope of employment, witnesses or receives information** regarding the occurrence of an incident that the employee **reasonably believes** constitutes sexual harassment, sexual assault, dating violence, or stalking and is alleged to have been committed by or against a person who was **a student** enrolled at or **an employee** of the institution at the time of the incident **shall promptly report** the incident to the institution's Title IX coordinator or deputy Title IX coordinator.” Sec. 51.252.

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Who must report?

- **ALL university employees** must report knowledge of incidents of sexual misconduct to the Title IX Coordinator, subject to **4 defined exceptions.**

What must they report?

- **ALL relevant information** about the sexual misconduct incident known by the employee
 - Including any information the employee witnessed, overheard, or learned about second-hand.

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Consequences of Not Reporting

- Mandatory termination
- Potential criminal penalties:
 - **Class B misdemeanor** (punishable by a maximum of 180 days in jail and/or a maximum fine of \$2,000) for a person who “is required to make a report under Section 51.252 and **knowingly fails to make the report**” or “with the intent to harm or deceive, knowingly makes a report . . . that is false.”
 - **Class A misdemeanor** (punishable by up to one year in jail and/or a maximum fine of \$4,000) “if it is shown on the trial of the offense that the actor **intended to conceal the incident.**”

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HB1735

- Codified as Texas Education Code Chapter 51, Subchapter E-3.
- Adds new requirements for institutional policies on sexual misconduct.
- Went into effect August 1, 2020.

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Sec. 51.282. POLICY ON SEXUAL HARASSMENT, SEXUAL ASSAULT, DATING VIOLENCE, AND STALKING

- Each postsecondary educational institution shall adopt a policy on sexual harassment, sexual assault, dating violence, and stalking applicable to **each student enrolled at** and **each employee of** the institution. The policy must: (1) include:
 - (A) **definitions** of prohibited behavior;
 - (B) **sanctions** for violations;
 - (C) the **protocol for reporting and responding** to reports of sexual harassment, sexual assault, dating violence, and stalking;
 - (D) **interim measures** to protect victims of sexual harassment, sexual assault, dating violence, or stalking during the pendency of the institution's disciplinary process, including protection from retaliation, and any other accommodations available to those victims at the institution;

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Policy must also include...

- (E) A statement regarding:
 - (i) the importance of a victim of sexual harassment, sexual assault, dating violence, or stalking **going to a hospital for treatment and preservation of evidence**, if applicable, as soon as practicable after the incident;
 - (ii) the right of a victim of sexual harassment, sexual assault, dating violence, or stalking to report the incident to the institution and **to receive a prompt and equitable resolution** of the report; and
 - (iii) the right of a victim of a crime **to choose whether to report** the crime to law enforcement, **to be assisted** by the institution in reporting the crime to law enforcement, or **to decline to report** the crime to law enforcement.

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Sec. 51.286. DISCIPLINARY PROCESS FOR CERTAIN VIOLATIONS.

The institution's disciplinary proceedings must:

- (1) provide to the student and the alleged victim **a prompt and equitable opportunity** to present witnesses and other evidence relevant to the alleged violation during the disciplinary process;
- (2) ensure that both the student and the alleged victim have **reasonable and equitable access to all evidence relevant to the alleged violation in the institution's possession**, including any statements made by the alleged victim or by other persons, information stored electronically, written or electronic communications, social media posts, or physical evidence, redacted as necessary to comply with any applicable federal or state law regarding confidentiality; and
- (3) take **reasonable steps** to protect the student and the alleged victim from **retaliation and harassment** during the pendency of the disciplinary process.

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Further Policy Mandates

- Institutions must require each freshman or undergraduate transfer student to attend **an orientation** on the institution's sexual misconduct policy.
- Institution's sexual misconduct policy must be **clearly visible and easily found**:
 - In student and employee codes of conduct or handbooks
 - Have its own webpage
 - Clearly identifiable link on the institution's homepage

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Penalties for Noncompliance

- If the Texas Higher Education Coordinating Board (THECB) finds an institution is not in substantial compliance with either of these new laws, they may assess an administrative penalty **up to \$2 million**.

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Sexual Harassment Definitions

Title IX

- “Sexual harassment” is 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 (quid pro quo);
 - (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...

Texas Laws

- “Sexual harassment” means unwelcome, sex-based verbal or physical conduct that:
 - A) **in the employment context**, unreasonably interferes with a person’s work performance or creates an intimidating, hostile, or offensive work environment;
 - (B) **in the education context**, is sufficiently severe, persistent, or pervasive that the conduct interferes with a student’s ability to participate in or benefit from educational programs or activities at a postsecondary educational institution.

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Overlap of Title VII and Title IX

For College/University
Employers

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Title VII


- Makes it unlawful for an **employer** to discriminate against any **current or prospective employee** on the **basis of race, color, religion, sex or national origin.**
- Employee must file a claim with the EEOC before going into court.

Title IX

- Makes it unlawful to discriminate against **any person** on the **basis of sex** in any **educational program or activity** receiving federal financial assistance.
- No requirements before proceeding to court.

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- If a **student or school employee** makes a claim of gender discrimination or sexual misconduct against **another student, the school or a school employee** 

Title IX is implicated.

- If a **school employee** makes a claim of gender discrimination or of a hostile work environment



BOTH Title VII and Title IX may be implicated.

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Title IX or Title VII Sexual Misconduct

- Sexual misconduct, that does not rise to the level of sexual harassment under Title IX, may be addressed through other codes of conduct and supportive measures.

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Employees and the Grievance Process

- Employees that go through the Title IX grievance process must receive written notice of determination.

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Title IX

When are you obligated to Act?

- Actual knowledge of harassment and individuals with actual authority
- In order to avoid being deemed “deliberately indifferent” to the harassment

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Avoiding Deliberate Indifference

The Deliberate Indifference standard applies to both **informal** and **formal** complaints.

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Clery Act/VAWA

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The Clery Act

- The Clery Act requires institutions to disclose campus crime statistics and security information about certain criminal offenses, including sexual assault, that occur **in a particular geographic area**, including the public property immediately adjacent to a facility that is owned or operated by the institution for educational purposes.
- It also requires institutions to report information about additional criminal offenses, including domestic violence, dating violence, and stalking.

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Clery Act/VAWA Offenses

- Clery Act/ VAWA offenses **automatically trigger** a recipient's response obligations Under Title IX.

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CSAs and Individuals with Authority

Q: Campus Security Authority (CSAs) → are they officials with authority?

A: **Not necessarily.**

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Title IX and Clery Act Record Retention

- Title IX and the Clery Act have the same seven (7) year recordkeeping requirement

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Title IX and Clery Act- Sanctions and Protective Measures

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Title IX and Clery Act- Emergency Removals and

- The process for determining whether an emergency removal is appropriate under Title IX is different than the Emergency Notification/Timely Warning processes prescribed by the Clery Act.

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Title IX and Clery Act -- Cross Examination

- Clery Act: **Does not** require an advisor be permitted to conduct a cross-examination
- Title IX: Cross-examination by an advisor **is required**

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Title IX and Clery Act- Written Determination

- Under both the Title IX **and** the Clery Act, both parties must receive **written notification** of the results of any disciplinary proceeding within a **reasonably prompt** timeframe

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University of Texas System

Annual Title IX Training
August 5-6, 2020

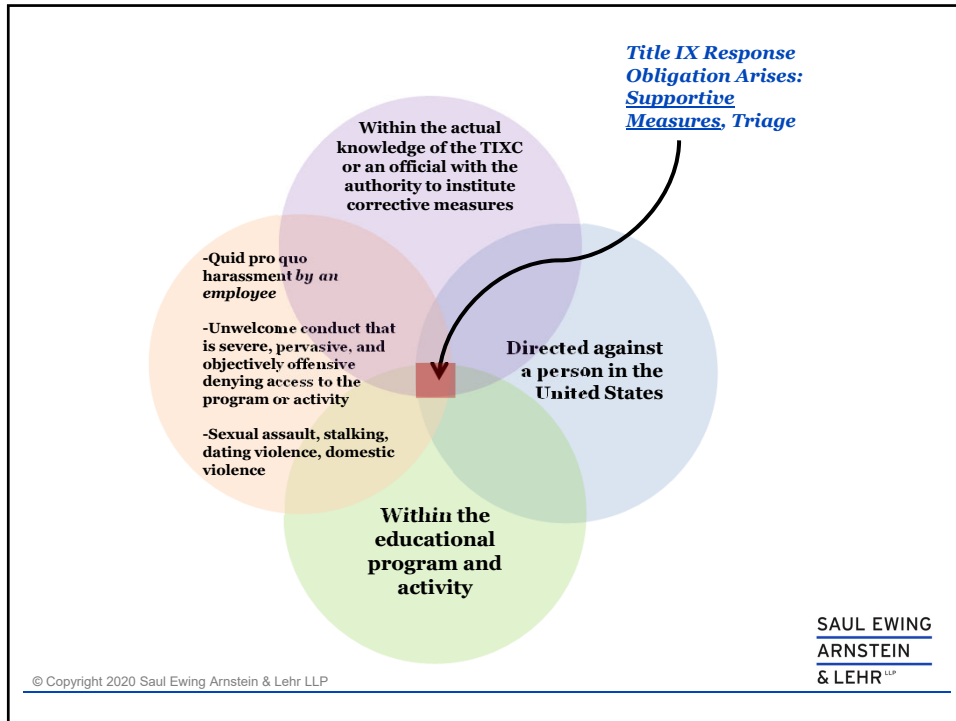
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Reports Received & Supportive Measures

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Obligation to Respond

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 in a manner that is *not deliberately indifferent.*

§ 106.44(a)

Obligation to Respond

“***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(a)

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What Constitutes Notice?

- “Notice results whenever . . . any Title IX Coordinator, or any official with authority: **Witnesses** sexual harassment; **hears about** sexual harassment or sexual harassment allegations from a complainant . . . or third party; **receives a written or verbal complaint** about sexual harassment or sexual harassment allegations; or **by any other means.**” 85 FR 30040
- “‘Notice’ . . . includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator” § 106.30(a)

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Notice*



Response**

**Notice includes a Report*
*** The response obligation is the same*

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REPORTING

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Reporting (Alleged) Sexual Harassment

The Title IX Coordinator

- Students/employees must have a “**clear channel** through the Title IX Coordinator” to report
- Ensure that “complainants and third parties have **clear, accessible ways to report** to the Title IX Coordinator”
- Must “[n]otify all students and employees (and others) of the Title IX Coordinator’s contact information”

§ 106.8; 85 FR 30106

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Reporting (Alleged) Sexual Harassment

Who can report?

- “**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(a)
 - Complainant
 - Third Party (“such as an alleged [complainant’s] friend or a bystander witness”; “e.g., the complainant’s parent, friend, or peer”)

85 FR 30108; 85 FR 30040

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Reporting (Alleged) Sexual Harassment

Who can report?

- Institutions may permit anonymous/blind reporting
 - “[N]otice conveyed by an anonymous report may convey actual knowledge to the recipient to trigger a recipient’s response obligations”
 - “Nothing in the final regulations precludes a recipient from implementing reporting systems that facilitate or encourage an anonymous or blind reporting option”
- Note: ability to respond, i.e. offer supportive measures, or to consider initiating a grievance process will be affected by whether the report disclosed the identity of the complainant or respondent

85 FR 30132-33

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Reporting (Alleged) Sexual Harassment

Who must report?

- ~~Responsible employees~~
 - “[R]ecipients have discretion to determine which of their employees should be mandatory reporters, and which employees may keep a postsecondary student’s disclosure about sexual harassment confidential.” 85 FR 30108
- But . . . **SB212** - Mandatory Reporting for University Employees

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Reporting (Alleged) Sexual Harassment

How to Report

- In person
- Mail
- Telephone
- Email
- Electronic/online portal
- Using Title IX Coordinator's published contact information

Any means that results in the Title IX Coordinator receiving a verbal or written report

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Responding to a Report

Once the institution has **actual knowledge** of allegations of sexual harassment the Title IX Coordinator **must**:

- 1. promptly contact the complainant to discuss the availability of supportive measures,**
- 2. consider the complainant's wishes with respect to supportive measures,**
- 3. inform the complainant of the availability of supportive measures with or without the filing of a formal complaint,**
and
4. explain to the complainant the process for filing a formal complaint.

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§ 106.44(a)

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SUPPORTIVE MEASURES

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What are Supportive Measures?

- Non-disciplinary, non-punitive individualized services,
- offered as appropriate, as reasonably available, and without fee or charge,
- to the complainant or the respondent,
- including as 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.

§ 106.45(a)(3)

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Process & Oversight

- Flexibility to determine *how* to process requests for supportive measures
- The burden of arranging & enforcing supportive measures remains on the institution not on a party
- Title IX Coordinator must remain responsible for coordinating effective implementation . . .

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Process & Oversight

- Title IX Coordinator must:
 - serve as the point of contact for parties
 - Ensure that the burden of navigating administrative requirements does not fall on the parties
- Title IX Coordinator may:
 - Rely on other campus offices/administrators to *actually provide* supportive measures

How can you best serve the parties through coordination & planning?

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Process & Oversight

- Select & implement measures:
 - Meet one or more of the stated purposes (i.e. restore/preserve equal access; protect safety; deter sexual harassment)
 - Within the stated parameters (i.e. not punitive/disciplinary/unreasonably burdensome)
- Flexibility based on (1) specific facts and circumstances; and (2) unique needs of the parties in individual situations

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What are Supportive Measures?

- Non-disciplinary, non-punitive individualized services,
- offered as appropriate, as reasonably available, and without fee or charge,
- **to the complainant or the respondent,**
- including as 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.

§ 106.45(a)(3)

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To Whom and When?

The Complainant

- Must be discussed/offered to every complainant promptly upon receipt of actual notice (including a report) § 106.44(a); 85 FR 30180
 - “Section 106.44 *obligates* a recipient to offer supportive measures to every complainant” 85 FR 30266
 - If you do not provide supportive measures to the Complainant, you must document why that response was not clearly unreasonable in light of the known circumstances (e.g. because complainant did not wish to receive supportive measures or refused to discuss measures with the Title IX Coordinator”) 85 FR 30266
- Discretion to continue providing measures after a finding of non-responsibility

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To Whom and When?

The Respondent

- “There is no corresponding obligation to offer supportive measures to respondents [at reporting], rather, recipients *may* provide supportive measures to respondents.” 85 FR 30266
- *Permitted* before or after a formal complaint is filed. 85 FR 30185
 - Recommended discussion after formal complaint
 - Consider also that the respondent may request supportive measures at any point
- Discretion to continue providing after a finding of non-responsibility

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Supportive Measures

- Non-disciplinary, non-punitive,
- **individualized services offered as appropriate, as reasonably available, and without fee or charge,**
- to the complainant or the respondent,
- including as 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.

§ 106.45(a)(3)

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Individualized & Reasonably Available

- Complainant's wishes must be considered after a report
- Case-by-case basis
- "Reasonable efforts" standard from Clery/VAWA might be helpful

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Supportive Measures

- **Non-disciplinary, non-punitive,**
- individualized services offered as appropriate, as reasonably available, and without fee or charge,
- to the complainant or the respondent,
- including as 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.

§ 106.45(a)(3)

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Non-disciplinary & Non-punitive

- Institutions cannot “treat a Respondent as though accusations are true before the accusations have been proved” 85 FR 30267
- “The final regulations prohibit a recipient from taking disciplinary action, or other action that does not meet the definition of a supportive measure, against a respondent without following a [compliant] grievance process” 85 FR 30267, n.1097

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Supportive Measures

- Non-disciplinary, non-punitive,
- individualized services offered as appropriate, as reasonably available, and without fee or charge,
- to the complainant or the respondent,
- including as **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.**

§ 106.45(a)(3)

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Designed to Restore/Preserve Equal Access

“Designed to” ≠ “Do”

- Measures should be intended to help a party retain equal access to education
- Protection against unfair imposition of liability (e.g. where “underlying trauma from a sexual harassment incident still results in a party's inability to participate in an education program or activity”)

85 FR 30182

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Goals / Purpose

- Restore or preserve equal access to the recipient’s education program or activity:
 - E.g., help to stay in school, stay on track academically (85 FR 30088)
 - Protect the safety of all parties or the recipient’s educational environment
 - Deter sexual harassment

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No “unreasonable burden”

- Protect each party from a request from the other for “measures that would unreasonably interfere with either party’s educational pursuits” 85 FR 30180
- “Does not bar all measures that place *any* burden on a respondent” 85 FR 30267; 85 FR 30180 (or complainant)

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No “unreasonable burden”

- **Does not mean** “proportional to the harm alleged”
- **Does not mean** “least burdensome measures” possible
- **May be** (un)reasonable to make housing/schedule adjustments or to remove a party from an extracurricular/athletic pursuit (85 FR 30182)
 - Fact-specific determination
 - Take into account the nature of the educational programs, activities, opportunities, and benefits in which a party is participating . . . not limited to academic pursuits

Document the reasons why a particular supportive measure was not appropriate, even though requested. . . including by documenting the assessment of burden

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Punitive + Unreasonably Burdensome

- The possible sanctions described/listed in a grievance procedure constitute actions the institution considers “disciplinary”
- Those sanctions thus cannot be supportive measures

Supportive Measures ≠ Sanctions

- Certain actions are inherently disciplinary/punitive/unreasonably burdensome even if not listed as sanctions in grievance procedure:

Suspension, Expulsion, Termination ≠ Supportive Measures

85 FR 30182 (*but see* emergency removal & administrative leave)

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Examples

Possible supportive measures include (but are not limited to):

- counseling;
- extensions of deadlines or other course-related adjustments;
- modifications of work or class schedules;
- campus escort services;
- mutual contact restrictions;
- changes in work or housing locations;
- leaves of absence; and
- increased security and monitoring of certain areas of campus.

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One-Way No Contact Orders

- Require a fact-specific inquiry
- Must be carefully crafted
- For example:
 - Help enforce a restraining order, preliminary injunction, or other order of protection issued by a court
 - Doesn't unreasonably burden the other party

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Mutual No Contact Orders

- Limit interactions, communications, contact between the parties
- No communication:
 - Likely would not unreasonably burden either party
 - May avoid more restrictive orders (or measures)
- No physical proximity:
 - Requires a fact-specific analysis to assess, among other things, the burden
 - Consider alternatives to a no contact order

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Confidentiality

Must be kept confidential unless confidentiality would impair provision

- Complainant thus may obtain supportive measures while keeping identity confidential from respondent (and others)
 - Unless disclosure is necessary to provide the measures (e.g. where a no-contract order is appropriate)

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Formal Complaint through Investigation Stage

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Formal Complaint

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Formal Complaint: How we get there

Once the institution has **actual knowledge** of allegations of sexual harassment the Title IX Coordinator **must**:

- 1. promptly contact the complainant to discuss the availability of supportive measures**
2. consider the complainant's wishes with respect to supportive measures,
3. inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and
- 4. explain to the complainant the process for filing a formal complaint.**

§ 106.44(a)

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Regardless of whether Formal Complaint is Filed . . .

- Even **before** a Formal Complaint is filed, Complainants and Respondents may seek (and the Title IX Coordinator must discuss with the complainants the opportunity to seek) **supportive measures**:
 - Measures 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
 - A complainant who requests Supportive Measures retains the right to file a Formal Complaint. § 106.30(a)

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Process for Filing Formal Complaint: the “what”

• **What is a “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

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Process for Filing Formal Complaint: the “who”

- **Complainant or Title IX Coordinator**

- Complainant may file Formal Complaint by signing document; or
 - University *must* investigate when Complainant desires the action
- Title IX Coordinator may sign Formal Complaint
 - If the Title IX Coordinator has determined on behalf of the University that an investigation is needed

§ 106.30; 85 FR 30131 n. 580

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Process for Filing Formal Complaint: the “who”

- In other words, **complainant must assent** or the **Title IX Coordinator must believe it is necessary**.
 - “The formal complaint requirement ensures that a grievance process is the result of an intentional decision on the part of either the complainant or the Title IX Coordinator.”

85 FR 30130

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Process for Filing Formal Complaint: the “who”

- **If the Title IX Coordinator signs the Formal Complaint**

- Title IX Coordinator is not a complainant or otherwise a party
- Complainant remains the party to the action
- Complainant has right to refuse to participate in grievance process § 106.71

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Process for Filing Formal Complaint: the “who”

- **No anonymous filing**

“A complainant...**cannot file a formal complaint anonymously** because § 106.30 defines a formal complaint to mean a document or electronic submission...that contains the complainant’s physical or digital signature or otherwise indicates that the complainant is the person filing the formal complaint. The final regulations require a recipient to send written notice of the allegations to both parties upon receiving a formal complaint. The written notice of allegations under § 106.45(b)(2) must include certain details about the allegations, including the identity of the parties, if known.” 85 FR 30133.

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Process for Filing Formal Complaint: the “how”

• **How to File**

“A formal complaint may be filed with the Title IX Coordinator **in person, by mail, or by electronic mail**, by using the contact information required to be listed for the Title IX Coordinator under § 106.8(a), and by **any additional method designated by the recipient.**”

§ 106.30

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Process for Filing Formal Complaint: the “where”

• **Where to File**

“A formal complaint may be filed with the Title IX Coordinator”

- At the Title IX Office
- Online submission system
- Via email or mail to the Title IX Coordinator’s contact address/email

*Must consist of a *written document*

85 FR 30137

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Process for Filing Formal Complaint: the “when”

• Time for Filing

- No set time limit from date of allegations to filing (no statute of limitations)
- “[The Department] decline[s] to impose a requirement that formal complaints be filed ‘without undue delay’”
 - Doing so would be “unfair to complainants” because “for a variety of reasons complainants sometimes wait various periods of time before desiring to pursue a grievance process in the aftermath of sexual harassment”

85 FR 30127

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Process for Filing Formal Complaint: the “when”

• Time for Filing

- At the time the complaint is filed, the complainant **must be participating in or attempting to participate in** the recipient’s education program or activity.

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Process for Filing Formal Complaint: the “why”

- **Commence grievance procedure–**
 - A Formal Complaint must be filed before the University can commence an investigation or the Informal Resolution process

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Process for Filing Formal Complaint: the “why”

- **Fulfill Title IX obligation**
 - Recipients’ **obligation to respond** to reports of sexual harassment promptly in a way that is not clearly unreasonable in light of the known circumstances **extends to recipients’ processing of a formal complaint**, or document or communication that purports to be a formal complaint.

85 FR 30135-30136

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Evaluating Formal Complaint: Mandatory Dismissal

- When a Formal Complaint is filed, the Title IX Coordinator **evaluates** the Formal Complaint
- If one (or more) of the following conditions is **not met**, the Title IX Coordinator **must dismiss** the Formal Complaint for Title IX purposes:
 - Conduct alleged, if true, does not meet § 106.30 sexual harassment definition;
 - Conduct alleged did not take place within the University's educational program or activity; . . .

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Evaluating Formal Complaint: Mandatory Dismissal

- **[CONT.]**
 - Conduct alleged is not perpetrated against a person in the United States; **or**
 - At time of filing Formal Complaint, Complainant is not participating in or attempting to participate in the University's programs or activities

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Evaluating Formal Complaint: Dismissal

“[A mandatory] dismissal does **not preclude** action under another provision of the recipient’s code of conduct”

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Evaluating Formal Complaint: Discretionary Dismissal

- If one (or more) of the following conditions is **not met**, the Title IX Coordinator **may dismiss** the Formal Complaint for Title IX purposes:
 - Complainant withdraws Formal Complaint or allegations in writing;
 - Respondent is no longer enrolled or employed by the University; or
 - Specific circumstances prevent the University from gathering evidence sufficient to reach a determination regarding responsibility.

§ 106.45(b)(3)(ii)

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Evaluating Formal Complaint: Consolidation

- University **may consolidate** multiple Formal Complaints
- Consolidation may involve:
 - Same facts or circumstances involving multiple respondents or multiple complainants;
 - Allegations of conduct that are temporally or logistically connected.

§ 106.45(b)(4).

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Evaluating Formal Complaint: Notice & Opportunity to Appeal

- **Dismissal Notice & Right to Appeal**
 - Upon a mandatory or discretionary dismissal, the University must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties. 106.45(b)(3)(iii).
 - Both parties must be provided equal right to appeal a dismissal decision. 106.45(b)(8).

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Formal Complaint: Written Notice

- After a Formal Complaint is filed, the University must **simultaneously send both parties written notice of allegations, containing the following:**
 - Notice that the informal and formal resolution processes **comply with the requirements of Title IX;**
 - Notice of the **allegations potentially constituting sexual harassment**, providing sufficient detail for a response to be prepared before any initial interview, including (1) identities of the parties, if known; (2) the conduct allegedly constituting sexual harassment; and (3) the date and location of the alleged incident, if known;

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Formal Complaint: Written Notice

- **[CONT.]**
 - A statement that the respondent is **presumed not responsible** for the allegations and a determination regarding responsibility is made at the conclusion of the grievance process;
 - Notice that each party **may have an advisor** of their choice who may be, but is not required to be, an attorney and who may inspect and review evidence;

106.45(b)(2)(i)(A), (B)

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Formal Complaint: Written Notice

- ***If your code otherwise provides for addressing false statements in conduct proceedings...***
 - **Warning about false statements** if the recipient's code of conduct prohibits students from making false statements or submitting false statements during a disciplinary proceeding.
 - Notice that **punishing a party** for making a false statement is permitted when the recipient has concluded that the party made a materially false statement in **bad faith**. The University may not conclude that a complainant made a false statement solely because there was a determination of no responsibility.

106.45(b)(2)(i)(B), 85 FR 30576

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Emergency Removal / Administrative Leave

- The University may employ an **emergency removal process** if there is an **immediate threat to the physical health or safety** of any students or other individuals arising from the allegations of sexual harassment.
- The University may place a non-student employee on **administrative leave** during the pendency of a grievance process.
 - ****Employee may not be placed on administrative leave unless and until a Formal Complaint is filed**

§ 106.44(c), (d)

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Formal Complaint

Investigation

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Investigation

- The University **must investigate** allegations of in a **Formal Complaint**
 - Formal Complaints **request that the “recipient investigate the allegation of sexual harassment.”**

§ 106.30

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Investigation: Burden with the Institution

- The **burden of proof** and the **burden of gathering evidence** sufficient to reach a determination regarding responsibility rests on the recipient and not on the parties.

§ 106.45(b)(5)(i)

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Investigation: Gathering Evidence

- The Investigator must gather **all evidence sufficient to reach a determination regarding responsibility**.
- Evidence gathered may **not** include a party's medical or treatment records **unless** that party provides voluntary, written consent to do so. This includes:
 - The 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.

§ 106.45(b)(5)(i)

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Investigation: Gathering Evidence

- During the investigation process, each party must have an **equal opportunity to present witnesses**, which includes both fact witnesses and expert witnesses.
- Additionally, each party must have an equal opportunity to present **inculpatory and exculpatory** evidence.

§ 106.45(b)(5)(ii).

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Investigation: Parties Rights to Discuss Investigation

- The institution may **not restrict** either party's ability to discuss the allegations or to gather and present relevant evidence.

§ 106.45(b)(5)(iii)

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Investigation: Advisors Participation in Investigation

- Both parties must have the same opportunity to be **accompanied** by the advisor of their choice to any meeting or proceeding during the investigation process. The institution may **not** limit the **presence or choice** of an advisor at any meeting.

§ 106.45(b)(5)(iv)

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Investigation: Advisors Participation in Investigation

- The institution **may** establish restrictions regarding the extent to which the parties' advisors may **participate** in the meetings or other parts of the proceeding, so long as any restrictions apply equally to both parties. However, the institution may not restrict the advisor's role in cross-examination

§ 106.45(b)(5)(iv)

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Investigation: Notice of Investigation Meetings

- Parties must be given **written notice** of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings where the party's participation in such meetings is invited or expected. The written notice to the parties of such meetings must be provided with sufficient time for the party to prepare to participate.

§ 106.45(b)(5)(v)

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Investigation: Inspect and Review Evidence

- Both parties must be given equal opportunity to **inspect and review** all evidence that is obtained as part of the investigation (including the evidence that the recipient does not intent to rely upon in reaching a responsibility determination)

§ 106.45(b)(5)(vi)

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Investigation: Investigative Report

- Recipients must create an **investigative report** that **fairly summarizes relevant evidence** and provide a copy to the parties and the parties' advisor(s) at least 10 days prior to a hearing (if a hearing is required) or other time of determination regarding responsibility to allow for their review and written response.

§ 106.45(b)(5)(vii)

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Impartial and Unbiased Investigations

- A recipient's grievance process must require that the investigator **not have a conflict of interest or bias** for or against complainants or respondents generally or an individual complainant or respondent.
- A recipient must ensure that investigators **receive training** on how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

§ 106.45(b)(1)(iii)

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Impartial and Unbiased Investigations

- The Department does not define “bias” or “conflict of interest”

“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[.]” 85 FR 30248.

Recipients also “enjoy [] discretion to determine what may constitute a specific conflict of interest” 85 FR 30527.

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Impartial and Unbiased Investigations

- **The follow is defined as bias in the preamble:**
 - Treating a party differently on the basis of the party’s **sex or stereotypes** about how men or women behave with respect to sexual violence. 85 FR 30238-40.
 - Treating any individual differently on the basis of an individual’s **protected characteristic**, including sex, race, ethnicity, sexual orientation, gender identity, disability or immigration status, financial ability, socioeconomic status, or other characteristic. 85 FR 30084.

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Impartial and Unbiased Investigations

The following is not defined as bias in the preamble:

1. Outcomes of the grievance procedure

The Department cautions parties and recipients from concluding bias based **solely on the outcome of the grievance procedure.**

“[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.” 85 FR 30252

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Impartial and Unbiased Investigations

The following is not defined as bias in the preamble:

2. Title IX Coordinator Signs Formal Complaint

When a Title IX Coordinator signs a formal complaint, it does not render the Coordinator biased or pose a conflict of interest.

The Department has clarified that this **does not place the Title IX Coordinator in a position adverse to the respondent** because the decision is made on behalf of the recipient and not in support of the complainant or in opposition of the respondent. 85 FR 30372.

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Impartial and Unbiased Investigations

The following is not defined as bias in the preamble:

3. Professional experiences or affiliations: not *per se* bias - The following are “generalizations that might unreasonably conclude that bias exists”:

- A “self-professed feminist”
- A “self-described survivor”
- History of working in a field of sexual violence
 - Prior work as a victim advocate
 - Prior work as a defense attorney
 - Solely being a male or female
 - Supporting women’s or men’s rights
- Having a personal or negative experience with men or women

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Impartial and Unbiased Investigations

- However, whether a Title IX administrator has a bias and/or conflict of interest is determined on a **case-by-case basis**, and any combination of the experiences or affiliations on the prior slide **may** constitute bias and/or conflict of interest, depending on the circumstances

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Impartial and Unbiased Investigations

- It is **not** a conflict of interest for the **Title IX Coordinator** to be the same person as the investigator.
- However, **it is** a conflict of interest for the investigator and/or the **Title IX Coordinator** to serve as the decision-maker or appeal decision-maker.

85 FR 30367

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Impartial and Unbiased Investigations

- It is **not** a conflict of interest for a **recipient to fill Title IX personnel positions with its own employees**
 - Recipients are not required to use outside, unaffiliated Title IX personnel. 85 FR 30252.
 - Any recipient, *irrespective of size*, may use existing employees to fill Title IX roles, “as long as these employees do not have a conflict of interest or bias and receive the requisite training[.]” 85 FR 30491-92.
 - Even a student leader of the recipient may serve in a Title IX role. 85 FR 30253.

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Impartial and Unbiased Investigations

- It is **not** a conflict of interest for a recipient to have a co-worker from the same office as the hearing officer serve as an investigator
- Recipients may have *different individuals* from the *same office* serve separate Title IX roles

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Impartial and Unbiased Investigations

- **Serving impartially includes “avoiding prejudice of the facts at issue” –**
 - Cannot **pass judgment** on the allegations presented by either party or witnesses
 - Cannot **jump to any conclusions** without fully investigating the allegations and gathering all of the relevant facts and evidence from all parties involved.

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Impartial and Unbiased Investigations

Investigators and other personnel **may not “believe”** one party or the other

Doing so would violate the requirement to “serve impartially.” 85 FR 30254.

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Impartial and Unbiased Investigations

The regulations necessitate a broad prohibition on **sex stereotypes**

Decisions **must** be based on individualized facts, and not on stereotypical notions of what “men” and “women” do or not do

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Impartial and Unbiased Investigations

To avoid the prejudice of the facts at issue ...

- Any and all stereotypes about gender norms must be set aside.
 - Leave behind any prior experiences, whether that be from past Title IX proceedings or personal experiences.
- Approach the allegations (of both parties) with neutrality at the outset
- Treat both parties equally and provide an equal opportunity to present evidence, witnesses, and their versions of the story.

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Impartial and Unbiased Investigations

- The Department **permits** institutions to apply trauma-informed practices, so long as it does not violate the requirement to serve impartiality and without bias
- The preamble acknowledges that applying trauma-informed practices, such as taking certain steps when interviewing a Complainant, is possible to be done in an impartial, non-biased manner “albeit challenging.” 85 FR 30323
- Apply any trauma-informed techniques must be applied equally to all genders

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Impartial and Unbiased Investigations

Bottom Line: The fact that an individual is “male”, “female”, or “non-binary” should not, and cannot, have any bearing on the credibility of the party or witness or how Title IX personnel approach the situation.

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University of Texas System

Annual Title IX Training
August 5-6, 2020

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Triaging & Taking Case- By-Case Action

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Dismissals

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Mandatory Dismissal of Formal Title IX Complaints

If the conduct alleged in the Formal Complaint:

- would not constitute sexual harassment as defined by § 106.30 even if proven;
- did not occur within the recipient's education program or activity; or
- did not occur against a person in the United States

then the institution **must terminate** its grievance process with regard to that alleged conduct for the purposes of sexual harassment under Title IX. § 106.45(b)(3)(i)

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Mandatory Dismissals of Formal Title IX Complaints

- The institution must dismiss the Formal Complaint for Title IX purposes if:
 - At the time of the filing or signing of the Formal Complaint, the Complainant is not participating in or attempting to participate in the recipient's programs or activities. § 106.30

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Mandatory Dismissals of Formal Title IX Complaints

*However, such a dismissal of the Formal Complaint for Title IX purposes **does not** preclude action under **another** provision of the recipient's code of conduct.*

§ 106.45(b)(3)(i)

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Discretionary Dismissals of Formal Title IX Complaints

- The recipient **may dismiss** the Formal Complaint (or any allegations therein) under additional grounds, which are not required, but permissible.

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Discretionary Dismissals of Formal Title IX Complaints

- For discretionary dismissal regarding circumstances preventing gathering evidence . . .
 - Significant length of time may be a permissive reason to dismiss

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Discretionary Dismissals of Formal Title IX Complaints

- However, “[A] recipient should not apply a discretionary dismissal in situations where the recipient does not know whether it can meet the burden of proof under § 106.45(b)(5)(i).”

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Discretionary Dismissals of Formal Title IX Complaints

- “The Department declines to authorize a discretionary dismissal for ‘frivolous’ or ‘meritless’ allegations . . .

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Notice Upon Dismissal

- If the recipient dismisses the Formal Complaint for Title IX purposes, the recipient **must** promptly send **written notice** of the dismissal, and reason(s) therefore, ***simultaneously to both parties***.

§ 106.45(b)(3)(iii)

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Right to Appeal a Dismissal

- If the recipient dismisses a Formal Complaint for Title IX purposes, **either party** may appeal that decision.

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Right to Appeal a Dismissal

- Recipients have the discretion to provide **additional grounds** for appealing the determination to dismiss a Formal Complaint for Title IX purposes, but they **must offer such appeals equally to both parties.**

§ 106.45(b)(8)

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Recordkeeping of Dismissals

Even when dismissed, an institution must still maintain for seven (7) years records of:

- a) Each sexual harassment investigation, including
 - i. Determinations of responsibility;
 - ii. Recordings or transcripts;
 - iii. Disciplinary sanctions for the Respondent; and
 - iv. Remedies provided to the Complainant
- b) Any appeal and the result therefrom;
- c) Any informal resolution and the result therefrom; and
- d) All materials used to train Title IX Coordinators, investigators, decision makers, and any person who facilitates an informal resolution process. § 106.45(b)(10)(i).

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Informal Resolution

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Informal Resolution Under 34 C.F.R. § 106.45(b)(9)

- Section § 106.45(b)(9), entitled “Informal resolution,” provides:

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

- (i) Provides to the parties a **written notice** disclosing: The allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;
- (ii) Obtains the parties’ **voluntary, written consent** to the informal resolution process; and
- (iii) Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.”

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The Permissive Nature Of Informal Resolution

- When complainants do decide to initiate a grievance process, or participate in a grievance process, recipients also may choose to offer informal resolution processes as alternatives to a full investigation and adjudication of the formal complaint, with the **voluntary consent of both the complainant and respondent**, which may encourage some complainants to file a formal complaint where they may have been reluctant to do so if a full investigation and adjudication was the only option.” 85 F.R. 30083.

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The Purpose Of Informal Resolution

- “The Department believes that informal resolution may empower complainants and respondents to address alleged sexual misconduct incidents through a process that is most appropriate for them... Informal resolution also enhances recipient and party autonomy and flexibility to address unique situations.” 85 F.R. 30400.
- “However, the Department also believes that the more formal grievance process under § 106.45 may be an appropriate mechanism to address sexual misconduct under Title IX in many circumstances because these provisions establish procedural safeguards providing a fair process for all parties, where disputed factual allegations must be resolved.” 85 F.R. 30400.

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Methods Of 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**. 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.” 85 F.R. 30401.
- “[I]nformal resolutions . . . may result in disciplinary measures designed to punish the respondent” 85 F.R. 30401.

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Required Training For Persons Who Facilitate Informal Resolutions

- “It is not the intent of the Department in referring to resolution processes under § 106.45(b)(9) as ‘informal’ to suggest that personnel who facilitate such processes need not have **robust training and independence**, or that recipients should take allegations of sexual harassment less seriously when reaching a resolution through such processes. Indeed, the Department acknowledges the concerns raised by some commenters regarding the training and independence of individuals who facilitate informal resolutions. In response to these well-taken comments, **we have extended the anti-conflict of interest, anti-bias, and training requirements of § 106.45(b)(1)(iii) to these personnel in the final regulations.**” 85 F.R. 30401.

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Restrictions On Institutions' Ability To Offer Informal Resolution

- “A recipient may not require **as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right**, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section.” 34 C.F.R. § 106.45(b)(9).

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Restrictions On Institutions' Ability To Offer Informal Resolution

- “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.**” 34 C.F.R. § 106.45(b)(9).
- “This ensures that the parties understand the allegations at issue and the right to have the allegations resolved through the formal grievance process and the right to voluntarily consent to participate in informal resolution.” 85 F.R. 30406.

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Institutions Must Issue **Written Notice** To The Complainant and Respondent

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

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

34 C.F.R. § 106.45(b)(9)(i).

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Confidentiality Associated With Informal Resolution

- “[T]he recipient . . . [must] . . . [p]rovide[] to the parties a written notice disclosing . . . any consequences resulting from participating in the informal resolution process, **including the records that will be maintained or could be shared**” 34 C.F.R. § 106.45(b)(9)(i).
- “Section 106.45(b)(9)(i) provides that the written notice given to both parties before entering an informal resolution process must indicate what records would be maintained or could be shared in that process. Importantly, records that could potentially be kept confidential could include the written notice itself, which would not become a public record. The Department leaves it to the discretion of recipients to make these determinations. The Department believes this requirement effectively puts both parties on notice as to the confidentiality and privacy implications of participating in informal resolution. Recipients remain free to exercise their judgment in determining the confidentiality parameters of the informal resolution process they offer to parties.” 85 F.R. 30402.

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Withdrawing From The Informal Resolution Process

- “[T]he final regulations explicitly permits either party to withdraw from an informal resolution **at any time before agreeing to a resolution**, and resume the [formal] grievance process under § 106.45. 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. The Department believes the cumulative effect of these provisions will help to ensure that informal resolutions such as mediation are conducted in good faith and that these processes may reach reasonable outcomes satisfactory to both parties.” 85 F.R. 30405.

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Informal Resolution When A Party Is An Employee Of The Institution

- “[T]he recipient may facilitate an informal resolution process . . . provided that the recipient . . . (iii) Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.” 34 C.F.R. § 106.45(b)(9)(iii).
- “[A] recipient may offer an informal resolution process to resolve sexual harassment allegations as between two employees under § 106.45(b)(9). A recipient, however, cannot offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student because . . . **the power dynamic and differential between an employee and a student may cause the student to feel coerced into resolving the allegations.**” 85 F.R. 30446.

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Legal Liability Arising Out Of Informal Resolutions

- “With respect to recipients’ potential legal liability **where the respondent acknowledges commission of 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.” 85 F.R. 30407.

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August 5-6, 2020

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Threat Assessment & Emergency Removals

August 5, 2020

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Where we are in the process

“[I]n situations where a respondent poses an immediate threat to the physical health and safety of any individual **before an investigation into sexual harassment allegations concludes (or where no grievance process is pending)**, a recipient may remove the respondent from the recipient’s education programs or activities.”

85 F.R. 30224

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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”

§ 106.44(c)

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Emergency Removal

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§ 106.44(c)

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“Individualized Safety and Risk Analysis”

- “The ‘individualized safety or risk analysis’ requirement ensures that . . . there is **more than a generalized, hypothetical, or speculative belief** that the respondent may pose a risk to someone’s physical health or safety.” 85 F.R. 30233.
- Likewise, “the analysis cannot be based on general assumptions about sex, or research that purports to profile characteristics of sex offense perpetrators, or statistical data about the frequency or infrequency of false or unfounded sexual misconduct allegations.” 85 F.R. 30233.

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Who Can Be Involved in Threat Assessments?

“Recipients may choose to provide specialized training to employees or convene **interdisciplinary threat assessment teams**, . . . and § 106.44(c) leaves recipients flexibility to decide how to conduct an individualized safety and risk analysis, as well as who will conduct the analysis.” 85 F.R. 30233.

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Who Can Be Involved in Threat Assessments?

- Potential officials or offices to draw from:
 - Medical staff
 - Counseling center/mental health resources
 - Campus Security
 - Student Affairs/Dean of Students
 - Residential Life
 - Legal counsel
 - Human Resources
 - Disability services

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Emergency Removal

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§ 106.44(c)

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“Immediate Threat To Physical Health Or Safety Of Any Student Or Other Individual”

- “[A]dding the word ‘physical’ before ‘health or safety’ will help ensure that **the emergency removal provision is not used inappropriately to prematurely punish respondents by relying on a person’s mental or emotional ‘health or safety’ to justify an emergency removal**, as the emotional and mental well-being of complainants may be addressed by recipients via supportive measures as defined in § 106.30.” 85 F.R. 30225.
- “[T]his provision **does encompass a respondent’s threat of self-harm** (when the threat arises from the allegations of sexual harassment)[.]” 85 F.R. 30228.

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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”

§ 106.44(c)

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“Arising from the Allegations of Sexual Harassment”

“[E]mergency removals arising from allegations of sexual harassment must meet a higher standard than when a threat arises from conduct allegations unrelated to Title IX sexual harassment.” 85 F.R. 30226.

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Particular Situations: Interpersonal Violence

Dating Violence: “Abuse or violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. . . . Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.”

(UT Austin Policy On Sex Discrimination, Sexual Harassment, Sexual Assault, Sexual Misconduct, Interpersonal Violence, And Stalking)

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Particular Situations: Stalking

“A course of conduct directed at a specific person that would cause a reasonable person to fear for his or her own safety or the safety of others, or suffer substantial emotional distress.”

(UT Austin Policy On Sex Discrimination, Sexual Harassment, Sexual Assault, Sexual Misconduct, Interpersonal Violence, And Stalking)

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Interplay with Disability Law Protections

“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.”
34 C.F.R. 106.44(c).

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Interplay with Disability Law Protections

- Key Obligations Under the ADA and Section 504
 - No discrimination against individuals on the basis of their disability in their full and equal enjoyment of goods, services and privileges.
 - Provide “reasonable accommodations” to students or other program participants that are needed to enable an otherwise qualified individual with a disability to participate in the programs and services.

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Interplay with Disability Law Protections

- A **direct threat** is
 - a *significant risk of substantial harm* to health or safety of self or others
 - that cannot be eliminated or reduced to below the level of a direct threat through reasonable accommodations
- Should consider
 - the *duration* of the risk;
 - the *nature and severity* of the potential harm;
 - the *likelihood* and the *imminence* that the potential harm will occur

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Carrying Out an Emergency Removal

“We reiterate that . . . the purpose of an emergency removal is to protect the physical health or safety of any student or other individual to whom the respondent poses an immediate threat, arising from allegations of sexual harassment, **not to impose an interim suspension or expulsion on a respondent**, or penalize a respondent by suspending the respondent from, for instance, playing on a sports team or holding a student government position, while a grievance process is pending.” 85 F. R. 30232.

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Notice to Respondent and Immediate Opportunity to Challenge

- School must “provide[] the respondent with notice and an opportunity to challenge the decision immediately following the removal.” 34 C.F.R. § 106.44(c)
- “§ 106.44(c) does not require a recipient to provide the respondent with any pre-deprivation notice or opportunity to be heard, so requiring post-deprivation due process protections ‘immediately’ after the deprivation ensures that a respondent’s interest in access to education is appropriately balanced against the recipient’s interest in quickly addressing an emergency situation” 85 F.R. 30229-30.

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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.”
34 C.F.R. § 106.44(d).
- “[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).” 85 F.R. 30236.

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Administrative Leave for Student-Employees

- “[P]lacing a student-employee respondent on administrative leave with pay **may be permissible as a supportive measure . . .** and may be considered by the recipient as part of the recipient's obligation to respond in a non-deliberately indifferent manner” 85 F.R. 30237.
- “If a recipient places a party who is a student-employee on administrative leave with pay as a supportive measure, then such administrative leave must be **non-disciplinary, non-punitive, not unreasonably burdensome**, and otherwise satisfy the definition of supportive measures in § 106.30.” *Id.*

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Investigation Reports

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Basics

- In order to prepare an investigative report, a recipient must –
 - Step One: Obtain evidence from the parties and witnesses as well as other available sources;
 - Step Two: Provide both parties the opportunity to inspect and review all evidence obtained that is directly related to the allegations (send evidence to both parties and advisors for written responses); and
 - Step Three: Create an investigative report that **fairly summarizes relevant evidence** before sending the report to both parties and their advisors.

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Step One: Obtaining Evidence

- When investigating a Formal Complaint, the Investigator must obtain evidence, ensuring that:
 - Both parties have an equal opportunity to present witnesses, including fact and expert witnesses, and
 - Both parties have an equal opportunity to present other inculpatory and exculpatory evidence.

§ 106.45(b)(5)(ii)

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Step Two: Inspecting and Reviewing Evidence

After the Investigator has obtained evidence:

- Both parties must have 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 evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence.

§ 106.45(b)(5)(vi)

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Step Two: Inspecting and Reviewing Evidence

- Evidence subject to inspection and review includes all evidence obtained “that is **directly related** to the allegations raised in a formal complaint.”
- “‘Directly related’ may sometimes encompass a broader universe of evidence than evidence that is ‘relevant’”:
 - “For example, an investigator may discover during the investigation that evidence exists in the form of communications between a party and a third party . . . If the investigator decides that such evidence is irrelevant . . . , the other party should be entitled to know of the existence of that evidence so as to argue about whether it is relevant.”

85 FR 30304

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Step Two: Inspecting and Reviewing Evidence

- 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)(5)(vi)

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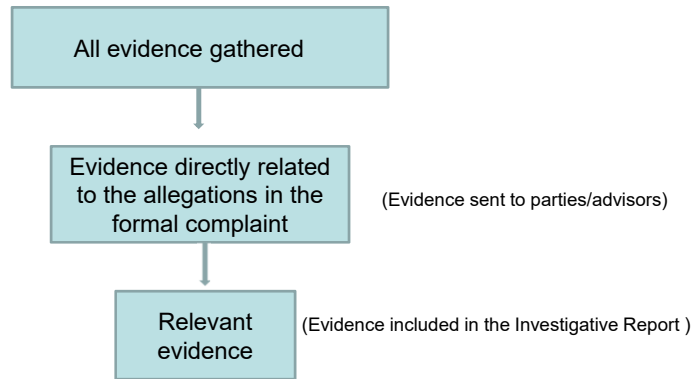
Step Two: Inspecting and Reviewing Evidence

- Investigator sends all evidence “**directly related**” to the allegations raised in a formal complaint” to both parties and advisors (**recall this is broader than just “relevant” evidence**)
- Parties may provide written responses focused on:
 - Clarifying ambiguities or correcting where the party believes the investigator did not understand
 - **Asserting which evidence is “relevant” and should therefore be included in the Investigative Report**

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Step Two: Inspecting and Reviewing Evidence



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Step Three: Creating Investigative Report

- After the parties have had the opportunity to inspect and review the evidence, the Investigator must –
 - Create an investigative report that **fairly summarizes relevant evidence** and, at least 10 days prior to a hearing, send to each party and the party's advisor, if any, the investigative report in an electronic formal or a hard copy, for their review and written responses.

§ 106.45(b)(5)(vii)

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Step Three: Creating Investigative Report

- Creating an investigative report that “fairly summarizes relevant evidence” does not require making credibility determinations, proposing findings, or a recommending an outcome.

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Contents of Investigative Report

- “[T]hese final regulations do not prescribe the contents of the investigative report **other than specifying its core purpose of summarizing relevant evidence.**”

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Purpose of Requirement to Summarize Relevant Evidence

- “The requirement for recipients to summarize and evaluate relevant evidence, . . . 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).”

85 FR 30294

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Relevant Evidence: Training Required

- Investigators must receive training on **issues of relevance** to create an investigative report that “fairly summarizes relevant evidence”

§ 106.45(b)(1)(iii)

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What is Relevant Evidence?

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

85 FR 30247 n. 1018

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What is Relevant Evidence?

rel·e·vant | \ 're-lə-vənt \ adj.

a: having significant and demonstrable bearing on the matter at hand

b: affording evidence tending to prove or disprove the matter at issue or under discussion

// *relevant* testimony

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What is Relevant Evidence?

- “The Department does not believe that determinations about whether certain questions or evidence are relevant or directly related to the allegations at issue requires legal training and that such factual determinations reasonably can be made by layperson recipient officials impartially applying **logic and common sense.**”

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What is Relevant Evidence?

- “Evidence may be relevant whether it is inculpatory or exculpatory.”

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What is Irrelevant Evidence?

- The Preamble and Final Rule provide some insight into what is deemed “irrelevant.”
- It may include:
 - Duplicative questions and evidence.

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What is Irrelevant Evidence?

- The following evidence is considered also per se not relevant for purposes of an investigation report:
 - Complainant’s sexual predisposition or prior sexual behavior (subject to two exceptions);
 - Any party’s medical, psychological, and similar treatment records without the party’s voluntary, written consent; and
 - Any information protected by any other legally recognized privilege without voluntary, written consent.

85 FR 30293 n. 1147

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Rape Shield and Investigative Reports

- “[Q]uestions and evidence subject to the rape shield protections are ‘not relevant,’ and therefore the rape shield protections apply wherever the issue is whether evidence is relevant or not. [The regulation] requires review and inspection of the evidence ‘directly related to the allegations’ that universe of evidence is *not screened for relevance*, but rather is measured by whether it is ‘directly related to the allegations.’ However, the investigative report must summarize ‘relevant’ evidence, and thus **at that point the rape shield protections would apply to preclude inclusion in the investigative report of irrelevant evidence.**”

85 FR 30353

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Prohibition on Excluding Relevant Evidence

- “[A] recipient may not adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice; although such a rule is part of the Federal Rules of Evidence, the Federal Rules of Evidence constitute a complex, comprehensive set of evidentiary rules and exceptions designed to be applied by judges and lawyers, while Title IX grievance processes are not court trials and are expected to be overseen by layperson officials of a school, college, or university rather than by a judge or lawyer.”

85 FR 30294

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Challenging Investigator's Relevancy Determinations

- “A party who believes the investigator reached the wrong conclusion about the relevance of the evidence may argue again to the decision-maker (i.e., as part of the party's response to the investigative report, and/or at a live hearing) about whether the evidence is actually relevant[.]”

85 FR 30304

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Bias/Conflict of Interest

- A recipient's grievance process must –
- “Require that any 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, not have a conflict of interest or bias
 - [1] for or against complainants or respondents generally or
 - [2]an individual complainant or respondent.”

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Bias/Conflict of Interest

- “A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on . . . how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.”

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Bias

- bi·as | \ 'bī-əs\ **noun**
- **1a:** an inclination of temperament or outlook *especially* : a personal and sometimes unreasoned judgment : PREJUDICE

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Bias

“Treating a party differently on the basis of the party’s sex or **stereotypes about how men or women behave** with respect to sexual violence constitutes impermissible bias.”

85 FR 30238-40

A “recipient that ignores, blames, or punishes a student **due to stereotypes** about the student violates the final regulations[.]”

85 FR 30496

“The Department’s conception of bias is broad **and includes bias against** an individual’s sex, race, ethnicity, sexual orientation, gender identity, disability or immigration status, financial ability, socioeconomic status, or other **characteristic**.”

85 FR 30084

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Bias

- Fundamentally about making a decision based on something about the characteristics of the parties, instead of based on the facts.

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University of Texas System

Annual Title IX Training
August 5-6, 2020

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Understanding Consent, Coercion, and Incapacitation in Sexual Assault Cases

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What We'll Cover

- This presentation covers:
 - UT System Title IX policies that pertain to consent, coercion, and incapacitation
 - Takeaways and practical considerations for identifying and investigating these conditions
 - Impacts of the recent Title IX Regulations on these concepts

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Know your policy!

- Title IX policies across the University of Texas System are similar, but not identical
- We will note a few differences, but be sure to reference your school's specific Title IX policy and definitions

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Consent

- “A **voluntary, mutually understandable** agreement that **clearly indicates** a willingness to engage in **each** instance of sexual activity.
- Consent to **one act** does **not** imply consent to **another**. **Past** consent does **not** imply **future** consent.
- Consent to engage in sexual activity with **one person** does not imply consent to engage in sexual activity with **another**.
- Consent can be withdrawn at **any time**.
- **Any** expression of an unwillingness to engage in any instance of sexual activity establishes a **presumptive** lack of consent.”

(UT Austin policy)

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Consent

- “An individual’s **manner of dress** or the **existence of a current or previous dating or sexual relationship** between two or more individuals does **not**, in and of itself, constitute consent to engage in a particular sexual activity.
- **Even in the context of a relationship**, there must be a voluntary, mutually understandable agreement that clearly indicates a willingness to engage in each instance of sexual activity.”

(UT Austin policy)

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Consent

“Consent is **not** effective if it results from:

- (a) the use of physical force,
- (b) a threat of physical force,
- (c) intimidation,
- (d) coercion,
- (e) incapacitation, or
- (f) any other factor that would eliminate an individual’s ability to exercise **free will** to choose whether or not to engage in sexual activity.”

(UT Austin policy)

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Incapacitation

- “A state of being that **prevents** an individual from **having the capacity** to give consent” (UT Austin)
- “Incapacitation is the inability, **temporarily or permanently**, to give consent” (UT Arlington, Dallas, El Paso)
- Clear examples: asleep, unconsciousness, certain disabilities

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Incapacitation and Intoxication

- Intoxication can *lead* to incapacitation, but does *not necessarily* equate to incapacitation
- School policies ask whether respondent knew/reasonably should have known of complainant’s incapacitation:

Yes	No
Arlington, Dallas, El Paso, Rio Grande Valley, and San Antonio	Austin, Permian Basin, Tyler

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Incapacitation and Intoxication

- Potential physical signs that intoxication has amounted to incapacitation:
 - slurred speech
 - stumbling or falling over
 - vomiting
 - disorientation
 - unusual or outrageous behavior
 - unresponsiveness
 (not an exhaustive list)

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Coercion

- Arlington, Dallas, El Paso, Rio Grande Valley, and San Antonio:
 - “The use of pressure to compel another individual to initiate or continue sexual activity against an individual's will. Coercion can include a wide range of behaviors, including **psychological or emotional pressure, physical or emotional threats, intimidation, manipulation, or blackmail that causes the person to engage in unwelcome sexual activity**”
- Not defined by Austin, Permian Basin, or Tyler

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Relevant Considerations from the New Title IX Regulations

- **No** federal definition of consent (or coercion or incapacitation) (34 CFR § 106.30(a))
- But:
 - “[R]ecipients must clearly define consent and must **apply that definition consistently**, including as between men and women and as between the complainant and respondent in a particular Title IX grievance process because to do otherwise would indicate bias for or against complainants or respondents generally, or for or against an individual complainant or respondent” (85 CFR 30125)

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Relevant Considerations from the New Title IX Regulations

- “When investigating a formal complaint and throughout the grievance process, a recipient must . . . Ensure that the **burden of proof** . . . rest[s] on the recipient and not on the parties” (34 CFR § 106.45(b)(5)(i))
- All UT System policies apply a **preponderance of the evidence standard**

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Relevant Considerations from the New Title IX Regulations

- “When investigating a formal complaint and throughout the grievance process, a recipient must . . . Ensure that . . . the **burden of gathering evidence** sufficient to reach a determination regarding responsibility . . . **rest[s] on the recipient and not on the parties**” (34 CFR § 106.45(b)(5)(i))
- “Relevance” understood in its “**ordinary meaning**” (85 FR 30247 n.1018)
- Grievance process will “[r]equire an objective evaluation of all relevant evidence – **including both inculpatory and exculpatory evidence** – and provide that credibility determinations may not be based on a person’s status as a complainant, respondent, or witness.” (34 CFR § 106.45(b)(1)(ii))

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Relevant Considerations from the New Title IX Regulations

- Exceptions to Relevance
 - Privileged Information (34 CFR § 106.45(b)(1)(x))
 - Medical, Psychological, Psychiatric or similar treatment records (34 CFR § 106.45(b)(5)(i))
 - Rape Shield (34 CFR § 106.45(b)(6)(i))

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Relevant Considerations from the New Title IX Regulations

- During investigation, recipient must “[p]rovide both parties an **equal opportunity to inspect and review any evidence obtained as part of the investigation** that is directly related to the allegations raised in a formal complaint, **including the evidence upon which the recipient does not intend to rely** in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. **Prior to completion of the investigative report**, the recipient must send to each party and the party’s advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and **the parties must have at least 10 days to submit a written response**, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject to the parties’ inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.” (34 CFR § 106.45(b)(5)(vi))

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Decision-Maker's Responsibilities

August 6, 2020

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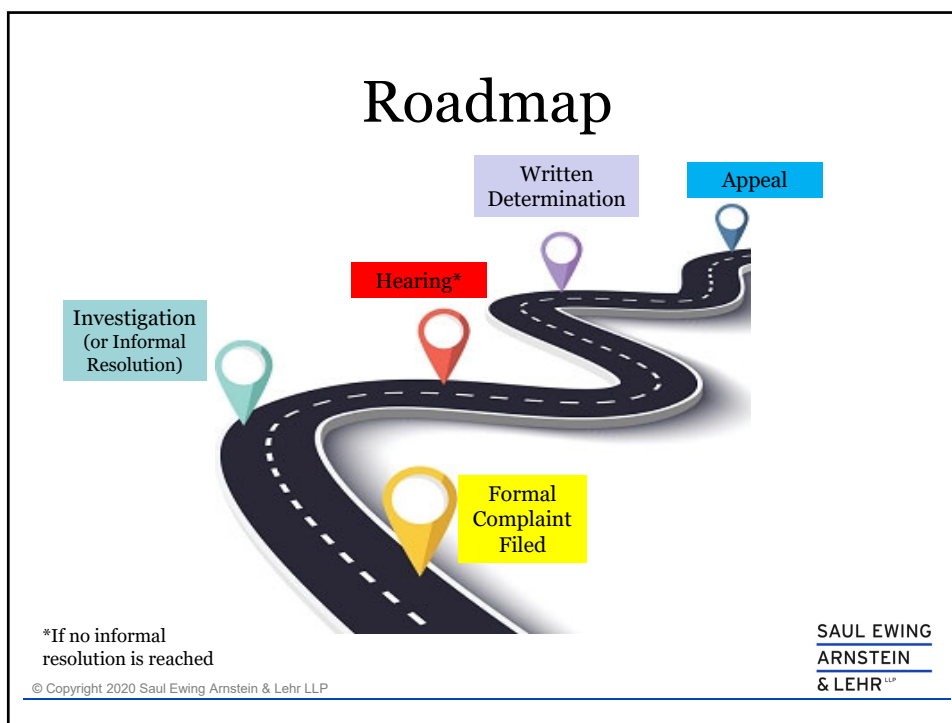
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How did we get here?

REFRESHER

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Refresher: Formal Complaint

• Initiating the Grievance Procedure: 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

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Refresher: Investigation

- Investigator:
 - Obtains **evidence** from the parties, witnesses, and other available sources;
 - Provides both parties the **opportunity to inspect and review** all evidence obtained that is directly related to the allegations (send evidence to both parties and advisors for written responses); and
 - Creates an **investigative report** that fairly summarizes relevant evidence before sending the report to both parties and their advisors.

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Refresher: Informal Resolution

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

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.

§106.45(b)(9)

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Role and Responsibilities

THE DECISION-MAKERS

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The Decision-Makers

- **Hearing Officer/Panel Members**
 - *Make relevance determinations at the hearing*
 - *Decide the outcome of the hearing*
 - *Serve impartially – avoid prejudgment of the facts at issue, bias, and conflict of interest*
- **Appellate Officer**
 - *Decide appeals of Formal Complaint dismissals*
 - *Decide appeals of hearing outcomes*
 - *Serve impartially – avoid prejudgment of the facts at issue, bias, and conflict of interest*

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The Hearing Officer

- Serve impartially
 - Avoid prejudgment of the facts at issue, bias, and conflict of interest
- Oversee the hearing
- Objectively evaluate all relevant evidence
 - Inculpatory & exculpatory
- Independently reach a determination regarding responsibility
 - Cannot give deference to an investigation report

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Location, purpose, process

THE HEARING

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The Hearing

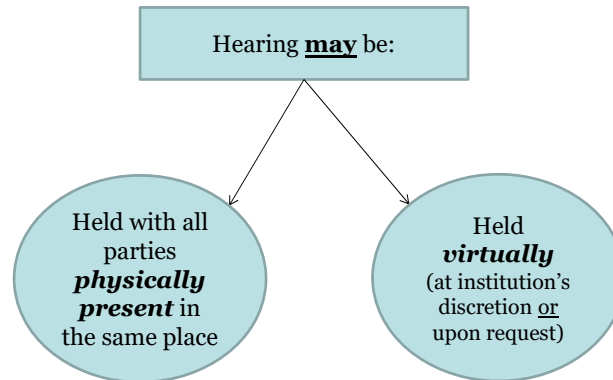
- Live
- With Cross-Examination
Opportunity for Hearing Officer to ask questions of parties/witnesses, and to observe how parties/witnesses answer questions posed by the other party
- Results in a determination of responsibility

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Hearings: Location

Hearing must be live



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Live Hearing: Location

- If the hearing is virtual, institution must use technology that allows all parties to simultaneously **see and hear** each other.
 - No telephonic appearances.

§ 106.45(b)(6)(i)

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Live Hearing: Technology

- Thoughts to consider if hearing is **virtual**:
 - Break-out rooms
 - Decision-maker retains ability to mute participants when necessary
 - Pausing when necessary (e.g. relevancy determination)
 - Recording hearing

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Living Hearing: Recording

- Institutions must create an **audio or audiovisual recording, or transcript**, of the live hearing. § 106.45(b)(6)(i).
- The recording or transcript must be made available to the parties for inspection and review.
 - “Inspection and review” **does not** obligate an institution to send the parties a copy of the recording or transcript. 85 FR 30392.

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Parties' roles, cross-examination

PRESENTATION OF RELEVANT EVIDENCE

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Presentation of Relevant Evidence

“[T]hroughout the grievance process, a recipient must not restrict the ability of either party . . . to gather and present relevant evidence.”

§106.45(b)(5)(iii).

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Presentation of Relevant Evidence

“The recipient must make **all evidence** [directly related to the allegations] 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)(5)(vi)

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Decision-Maker's Questions

- Decision-maker may ask questions & elicit testimony from parties/witnesses

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Cross-Examination

- Decision-maker must permit each party's **advisor** to **conduct cross-examination** of the other party and all witnesses
- Cross-examination may **not** be conducted by the parties themselves
- If a party does not have an advisor present at the hearing to conduct cross-examination, the institution must provide an advisor without fee or charge

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Cross-Examination

- **Cross-examination**: Advisor asks other party and witnesses **relevant questions** and follow-up questions, including those challenging credibility

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Relevance Determinations

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

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Relevance Determinations

- The final regulations do not define relevance.
 - “Ordinary meaning of relevance should be applied throughout the grievance process.” 85 FR 30247, n. 1018.
 - Relevant evidence must include both inculpatory and exculpatory evidence. 85 FR 30314.

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Relevance Determination

“The Department does not believe that determinations about whether certain questions or evidence are relevant or directly related to the allegations at issue requires legal training and that such factual determinations reasonably can be made by layperson recipient officials impartially applying **logic and common sense.**”

85 FR 30343

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Relevance Determination

rel·e·vant | \ 're-lə-vənt \ adj.

a: having significant and demonstrable bearing on the matter at hand

b: affording evidence tending to prove or disprove the matter at issue or under discussion

// *relevant* testimony

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Relevance Determinations

The Preamble and Final Rule provide some insight into what is “**irrelevant.**”

- *May* include:
 - Duplicative questions and evidence.

85 FR 30331

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Relevance Determinations

- The following evidence is always considered “**irrelevant**” (or otherwise not admissible):
 - Any party’s medical, psychological, and similar treatment records without the party’s voluntary, written consent;
 - Any information protected by a legally recognized privilege without waiver;
 - Complainant’s sexual predisposition or prior sexual behavior (subject to two exceptions); and
 - Party or witness statements that have not been subjected to cross-examination at a live hearing.

85 FR 30293 n. 1147

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Rape Shield Provision

- Prohibits questions or evidence about a complainant’s prior **sexual behavior**, with two exceptions. *See* 34 CFR § 106.45(b)(6).
- Deems all questions and evidence of a complainant’s **sexual predisposition** irrelevant, with no exceptions. *See* 85 FR 30352.

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Rape Shield Provision

- Intended to protect **complainants** from harassing, irrelevant questions.
- Does not apply to respondents
 - Questions and evidence about a respondent's sexual predisposition or prior sexual behavior are not subject to any special consideration, but rather must be evaluated based on relevancy, like any other question or evidence.

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Rape Shield Provision

- What is “**sexual predisposition**”?
 - No definition in regulations or preamble
 - Advisory comment to Fed. R. Evidence 412 defines sexual predisposition as “the victim’s mode of dress, speech, or life-style.”

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Rape Shield Provision

- What is “sexual behavior”?
 - No definition in final regulations or preamble.
 - Advisory comments to Fed. R. Evid. 412 explains that sexual behavior “connotes all activities that involve actual physical conduct, i.e., sexual intercourse and sexual contact, or that imply sexual intercourse or sexual contact.”

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Rape Shield Provision

- There are two exceptions where questions or evidence of past sexual behavior are allowed:
- **Exception 1:** Evidence of prior sexual behavior is permitted if offered to prove someone other than the respondent committed the alleged offense.

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“When a respondent has evidence that someone else committed the alleged sexual harassment, a respondent must have opportunity to pursue that defense, or else a determination reached by the decision-maker may be an erroneous outcome, mistakenly identifying the nature of sexual harassment occurring in the recipient’s education program or activity.”

85 FR 30353.

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Rape Shield Provision

- **Exception 2:** Evidence of prior sexual behavior is permitted if it is specifically about the complainant and the respondent **and** is offered to prove consent. 34 CFR § 106.45(b)(6).
- Does not permit evidence of a complainant’s sexual behavior with anyone other than the respondent.

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Rape Shield Provision

- No universal definition of “consent.”
- Each institution is permitted to adopt its own definition of “consent.”
- Thus, the scope of the second exception to the rape shield provision will turn, in part, on the definition of “consent” adopted by the institution.



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Relevance: In Conclusion

- “The final regulations do not allow [institutions] to impose rules of evidence that result in exclusion of relevant evidence” 85 FR 30336-37
- “The decision-maker must consider relevant evidence and must not consider irrelevant evidence” 85 FR 30337

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Relevance: In Conclusion

- The decision-maker may apply “[logic and common sense](#)” to reach any conclusions [but must explain their rationale](#)
- No “lengthy or complicated explanation” is necessary
 - For example, “the question is irrelevant because it calls for prior sexual behavior information without meeting on of the two exceptions”
 - For example, “the question asks about a detail that is not probative of any material fact concerning the allegations”

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Challenging Relevancy Determinations

- Parties **must** be afforded the opportunity to [challenge relevance determinations](#). 85 FR 30249.
 - Erroneous relevancy determinations, if they affected the outcome of the hearing, may be [grounds for an appeal](#) as a “procedural irregularity”
- Institutions **may** (but are not required to) allow parties or advisors to discuss the relevance determination with the decision-maker [during the hearing](#). 85 FR 30343.

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“Hearsay”

- If a party or witness does not submit to cross-examination at the live hearing, then the **decision-maker cannot rely on any statement** of that party or witness in reaching a determination regarding responsibility.
- But, decision-maker cannot draw an inference as to responsibility based on a party’s or witness’s absence or refusal to answer.

106.45(b)(6)(i).

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“Statements”

- Not limited to statements made during the hearing
- Doesn’t apply to evidence that doesn’t contain statements
- “Statements” has its ordinary meaning
- “Statements” do not include evidence (such as videos) that do not constitute a person’s intent to make factual assertions
- Police reports, SANE reports, medical reports, other documents and records may not be relied upon to the extent they contain statements of a party who has not been cross-examined

85 FR 30349

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“Hearsay”

- Hearsay prohibition does not apply if the respondent’s statement, itself, constitutes the sexual harassment at issue.
 - The verbal conduct does not constitute the making of a factual assertion to prove or disprove the allegations of sexual harassment because the statement itself is the sexual harassment.

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“Hearsay”

Exclusion of statements does not apply to a party’s or witness’s refusal to answer questions *posed by the decision-maker*.
85 FR 30349.

If a party or witness refuses to respond to a decision-maker’s questions, the decision-maker is not precluded from relying on that party or witness’s statements (may not rely only if the party or witness does *not submit to cross-examination* which is done by the advisors)

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Retaliation

- A party cannot “wrongfully procure” another party’s absence
 - If institution has notice of that misconduct, it must remedy retaliation, which may include rescheduling the hearing with safety measures.

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The Hearing Decision-Maker’s Determination

THE OUTCOME

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Outcome Determination

At the conclusion of the hearing, the Decision-maker must make a determination regarding responsibility

- Based on (at institution's discretion): Either the preponderance of the evidence or clear and convincing evidence standard. ***Your policy informs!***
 - Must apply the same standard to all Formal Complaints of sexual harassment – including those involving students, employees, faculty, and third parties. §106.45(b)(1)(vii), §106.45(b)(7)(i)

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Assessing Evidence

- Decision-maker assigns weight & credibility to evidence
 - Ex. Where a cross-examination question is relevant, but concerns a party's character, the decision-maker *must consider* the evidence, but may proceed to *objectively evaluate* it by analyzing whether the evidence *warrants a high or low level of weight or credibility*
 - Evaluation must treat the parties equally by not, for instance, automatically assigning higher weight to exculpatory character evidence than to inculpatory character evidence

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Outcome Determination

- **Important considerations:**
 - The Respondent must be **presumed not responsible** for the alleged conduct until the determination regarding responsibility is made. §106.45(b)(1)(iv).
 - Outcome must be based on an objective evaluation of all **relevant evidence**—including both inculpatory and exculpatory—and not taking into account the relative “skill” of the parties’ advisors. §106.45(b)(1)(ii); 85 FR 30332
 - **Credibility determinations** may not be based on a person’s status as a Complainant, Respondent, or witness. §106.45(b)(1)(ii).

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Presumption of Non-Responsibility

- The respondent is **presumed 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).
- The decision-maker cannot draw any inference about the responsibility or non-responsibility of the respondent solely based on a party’s failure to appear or answer cross-examination questions at a hearing. §106.45(b)(6)(i).

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Notice of Decision

- Decision-maker must issue a **written determination regarding responsibility** and provide the written determination to the parties *simultaneously*.
§106.45(b)(7)(ii)-(iii)
- The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely. §106.45(b)(7)(iii)

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Notice of Decision

- The notice of decision must include:
 - Identification of the **allegations** potentially constituting sexual harassment;
 - 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;
 - **Findings of fact** supporting the determination;
 - **Conclusions** regarding the application of the recipient's code of conduct to the facts;

§106.45(b)(7)(ii)

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Notice of Decision

[cont.]

- A statement of, and **rationale** for, the **result as to each allegation**, including a determination regarding responsibility, **any disciplinary sanctions** the recipient imposes on the respondent, and **whether remedies** designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and
- The institution's procedures and permissible bases for the complainant and respondent to **appeal**.

§106.45(b)(7)(ii)

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After the Hearing & Notice of Decision

APPEALS

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Mandatory & Equal Appeal Rights

- Institutions must offer both parties an appeal from a **determination regarding responsibility** and from an institution's **dismissal of a formal complaint** or any allegations therein (whether or not it is a mandatory or discretionary dismissal).
§106.45(b)(8)(i)
- Parties must have an equal opportunity to appeal any dismissal decision

§ 106.45(b)(8)(i)-(ii)

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Requirements of Appeal

- Institutions must:
 - Notify the other party, in writing, when an appeal is filed and implement appeal procedures equally for both parties;
 - Ensure that the decision-maker for the appeal is not the same person as the decision-maker that reached the initial determination, the investigator, or the Title IX Coordinator;
 - The decision-maker must render an independent decision.

§106.45(b)(8)(iii)

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Requirements of Appeal

[Cont.]

- Institutions must:
 - Ensure that the decision-maker for the appeal is free from bias, conflicts of interest, and trained to serve impartially;
 - Provide both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;

§106.45(b)(8)(iii)

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Requirements of Appeal

[Cont.]

- Institutions must:
 - Issue a written decision describing the result of the appeal and the rationale for the result; and
 - Provide the written decision simultaneously to both parties.

§106.45(b)(8)(iii)

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Live Hearing: Role of Advisors

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Basics: Advisor Required

- Parties may have advisors throughout the process, and must have them at the hearing.
 - Advisor of choice
 - If a party does not select an advisor of choice, institution must assign an advisor for purposes of the hearing. 34 CFR § 106.45(b)(6)(i).

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Advisor Required

- Institutions cannot:
 - impose any limit on whom a party selects as an advisor of choice;
 - set a cost “ceiling” for advisors selected by parties; or
 - charge a party a cost or fee for an assigned advisor. 85 FR 30341.

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Qualifications of Advisor

- Regs **do not** impose any particular expectation of skill, qualifications, or competence. 85 FR 30340.
- Advisors are **not** subject to the same impartiality, conflict of interest, or bias requirements as other Title IX personnel. *Id.*

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Qualifications of Advisors

- Institutions may not impose training or competency assessments on advisors of choice. 85 FR 30342.
- Regulations do not preclude institution from training and assessing the competency of its own employees whom it appoint as assigned advisors. *Id.*

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Assigning Advisors

- Institutions are not required to pre-screen a panel of assigned advisors for a party to choose from at the live hearing. 85 FR 30341.
- Institution is not required to (but may) train assigned advisors. *Id.*

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Qualifications of Advisors

- If you decide you want to offer to train advisors of choice (whether internal or external) or require training of assigned advisors, topics to consider include:
 - *Scope of role*
 - *Relevance (incl. exceptions)*
 - *How questions are formulated*
 - *Hearing procedures*
 - *Rules of Decorum*

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Qualifications of Advisor

- Department will not entertain ineffective assistance of counsel claims. 85 FR 30340.
- Department does not view advisors conducting cross as engaging in the unauthorized practice of law.

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Basics: Assigned Advisor

- Assigned advisor may be, but is not required to be, an attorney (even if other party's advisor is an attorney). *Id.*; 85 F.R. 30332.
- *Questions of equity?*

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Scope of Duty of Advisor

- “Whether a party views an advisor of choice as ‘representing’ the party during a live hearing or not, [34 CFR § 106.45(b)(6)(i)] only requires recipients to permit advisor participation on the party’s behalf *to conduct cross-examination*; not to ‘represent’ the party at the live hearing.”

85 CFR 30342

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Scope of Duty of Advisor

“ . . . the right to select an advisor of choice does not align with the constitutional right of criminal defendants to be provided with effective representation. The more rigorous constitutional protection provided to criminal defendants is not necessary or appropriate in the context of administrative proceedings held by an educational institution rather than by a criminal court.”

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Advisor Required

- Regs **do not** preclude a rule regarding advance notice from parties about intent to bring an advisor of choice to the hearing. 85 FR 30342.

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Alternate Advisor Required

- If a party arrives at the hearing without an advisor, then the institution would need to stop the hearing as necessary to assign an advisor to that party. *Id.*

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Role of Advisor

- Advisor must conduct **cross-examination** on behalf of party. 34 CFR § 106.45(b)(6)(i).
 - Whether advisors also may conduct **direct examination** is left institution's discretion, but any rule to this effect must apply equally to both parties. 85 FR 30342.
- Cross must be conducted directly, orally, and in real time by the party's advisor and never by a party personally. 34 CFR § 106.45(b)(6)(i).

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Role of Advisor

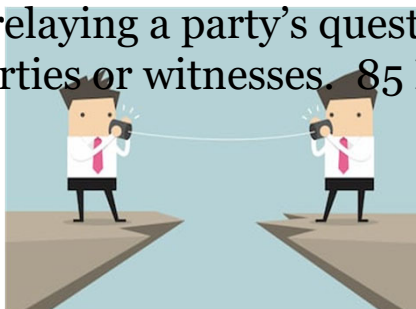
- Advisor may serve as proxy for party, advocate for party, or neutrally relay party's desired questions. 85 FR 30340.

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Role of Advisor

- Cross “on behalf of that party” is satisfied where the advisor poses questions on a party’s behalf. 85 FR 30340.
- Regulations impose no more *obligation* on advisors than relaying a party’s questions to the other parties or witnesses. 85 FR 30341.



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Role of Advisor

- Assigned advisors are not required to assume that the party’s version of events is accurate, but still must conduct cross-examination on behalf of the party. 85 FR 30341.

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Mechanics of Questioning

- Questions asked → Must be **relevant**
 - “Ordinary meaning of relevance.” 85 FR 30247, n. 1012.
- Decision-maker determines whether question is relevant
 - And must explain its reasoning if a question is deemed not relevant. 85 FR 30343.

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Questioning In Practice

- **Step 1, Question:** Advisor asks the question.
- **Step 2, Ruling:** Decision-maker determines whether question is relevant.
 - If not relevant, decision-maker must explain reasoning to exclude question.
 - If relevant, **Step 3:** Question must be answered.

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Advisor at the Live Hearing

- Party cannot “fire” an assigned advisor during the hearing. 85 FR 30342.
- If assigned advisor refuses to conduct cross on party’s behalf, then institution is obligated to:
 - Counsel current advisor to perform role; or
 - Assign a new advisor. *Id.*

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Advisor at the Live Hearing

- If a party refuses to work with an assigned advisor who is willing to conduct cross on the party’s behalf, then that party has waived right to conduct cross examination. 85 FR 30342.

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Limiting Advisor's Role

- Institutions may apply rules (equally applicable to both parties) restricting advisor's active participation in non-cross examination aspects of the hearing or investigation process. 34 CFR § 106.45(b)(5)(iv).
 - Department declines to specify what restrictions on advisor participation may be appropriate. 85 FR 30298.

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Options for Streamlining Hearing/Cross

- Decision-maker may conduct direct exam
- Pre-hearing meeting to discuss/resolve hearing procedures in advance, e.g.:
 - Scheduling;
 - Identifying advisors and witnesses;
 - Witness and advisor participation at the live hearing;

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Options for Streamlining Hearing/Cross

- Determining relevance of questions/evidence in advance as option for parties;
- Decorum rules to be followed at the hearing;
- Technology that will be used, and how to use that technology;
- Timing of the hearing and each subpart.

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Decorum

- An institution cannot forbid a party from **conferring** with the party's advisor. 85 FR 30339.
- *But* institution does have discretion to adopt rules governing the conduct of hearings.

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Rules of Decorum

- Purpose is to make the hearing process respectful and professional

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Examples of Optional Rules of Decorum

- Rules governing the timing and length of breaks requested by parties or advisors.
- Instructions that the parties and advisors remain seated at all times during the hearing, including during cross-examination.

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Examples of Optional Rules of Decorum

- Requiring any participants in the hearing not involved in current questioning to refrain from disrupting the hearing, making gestures, facial expressions, audible comments, or the like, as manifestations of approval or disapproval during any testimony.

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Examples of Optional Rules of Decorum

- Prohibiting a list of behaviors like yelling, verbal abuse, disruptive behavior, interrupting or talking over one another, name calling, or using profane or vulgar language (except where such language is relevant).

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Examples of Optional Rules of Decorum

- Setting a rule that when cross-examining a party or witness, advisors shall not repeat, characterize, editorialize, or otherwise state any response to the answer given by the party or witness except to ask a follow up question to elicit relevant evidence.

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Decorum

- *As you consider how you may implement rules of decorum, think as well about the potential need to adapt these rules in a remote context as well.*

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Decorum

- If **advisor of choice** refuses to comply with a recipient's rules of decorum → institution may provide that party with an assigned advisor to conduct cross. 85 FR 30342.
- If **assigned advisor** refuses to comply with a recipient's rules of decorum → institution may provide that party with a different assigned advisor to conduct cross. *Id.*

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Decorum

- Institutions are free to enforce their own codes of conduct with respect to conduct other than Title IX sexual harassment. 85 FR 30342.
- If a party or advisor breaks code of conduct during a hearing, then the institution retains authority to respond in accordance with its code, so long as the recipient is also complying with all obligations under § 106.45. *Id.*

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Other Support Roles at Hearing

With respect to allowing parties to be accompanied by a confidential advisor or advocate in addition to a party's chosen or assigned advisor, the Department notes that § 106.71 states "The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute or regulations, 20 U.S.C. 1232g and 34 CFR part 99, or as required by law, or to carry out the purposes of [34 CFR part 106], including the conduct of any investigation, hearing, or judicial proceeding arising thereunder" and this restriction may limit a recipient's ability to authorize the parties to be accompanied at the hearing by persons other than advisors. For example, a person assisting a party with a disability, or a language interpreter, may accompany a party to the hearing without violating § 106.71(a) because such a person's presence at the hearing is required by law and/or necessary to conduct the hearing. The sensitivity and high stakes of a Title IX sexual harassment grievance process weigh in favor of protecting the confidentiality of the identity and parties to the extent feasible (unless otherwise required by law), and **the Department thus declines to authorize that parties may be accompanied to a live hearing by persons other than the parties' advisors, or other persons for reasons "required by law" as described above.**

85 FR 30339

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Decision-Maker's Written Determination

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Decision-Maker's Written Determination

- To promote **transparency and impartiality** in the Title IX grievance process, the decision-maker must issue a written determination regarding responsibility.
- This decision-maker must be **someone other than** the Title IX Coordinator or investigator.

§ 106.45(b)(7)

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Decision-Maker's Written Determination

- The decision-maker/author of the written determination must be sufficiently **trained and knowledgeable** of the **recipient's grievance process**.

§ 106.45(b)(1)(iii)

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Decision-Maker's Written Determination

Essentials of Written Determinations

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Written Determination - Key Elements

1. **Identification of the allegations** alleged to constitute sexual harassment as defined in § 106.30;
2. **The procedural steps taken** from receipt of the formal complaint through the determination regarding responsibility;
3. **Findings of fact** supporting the determination;
4. **Conclusions** regarding the application of the **recipient's code of conduct** to the facts;
5. The decision-maker's **rationale for the result** of each allegation, including rationale for the determination regarding responsibility;
6. **Any disciplinary sanctions** the recipient imposes on the respondent, and whether the recipient will provide **remedies** to the complainant; and
7. Information regarding the **appeals process**. § 106.45(b)(7)(iii)

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Essentials of Written Determinations

Identification of the Allegations

- The recipient must **provide written notice of the allegations with sufficient details** to permit parties to prepare for an initial interview, which the recipient must send to both parties “upon receipt of a formal complaint.” § 106.45(b)(2)
- Fundamental fairness and due process principles require that a respondent knows the details of the allegations made against the respondent, **to the extent the details are known**, to provide adequate opportunity for the respondent to respond. This includes the identity of the complainant. 85 CFR 30133

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Essentials of Written Determinations

Description of Procedural Steps

- Explanations of the procedural steps taken in an investigation must be **sufficiently specific** to further the purpose of promoting **transparency and consistency**, and ensuring that **both parties** have a **thorough understanding** of how the complainant’s allegations were resolved.

§ 106.45(b)(7)(ii)(B), 85 FR 30390

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Essentials of Written Determinations

Description of Procedural Steps

- The description of procedural steps should demonstrate the steps taken **from the receipt of the formal complaint through the determination**, including notification to the parties, interviews with parties and witnesses, site visits, and methods used to gather other evidence.

§ 106.45(b)(7)(ii)(B), 85 FR 30390

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Essentials of Written Determinations

Description of Procedural Steps

- Procedural steps may include those taken to address certain **threats to fair and equitable treatment** of parties in the grievance process.

See §§ 106.45(b), 106.45(b)(5)(iv), 85 FR 30243

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Essentials of Written Determinations

Findings of Fact

- The facts described in the written determination must be the **facts that support the results** as to **each** allegation.

85 FR 30389

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Essentials of Written Determinations

Recipient's Code of Conduct

- The written determination should explain how the conduct under investigation “**matches up**” against particular portions of a recipient's code of conduct.

§ 106.45(b)(7)(ii)(D), 85 FR 30391

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Essentials of Written Determinations

Rationale for the Result

- The written determination must describe the decision-maker's **rationale for the result** of **each allegation**, including rationale for the determination regarding responsibility.

106.45(b)(7)(ii)(E)

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Essentials of Written Determinations

Simultaneous Delivery of the Written Determination

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

106.45(b)(7)(iii)

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Essentials of Written Determinations

Procedure & Basis for Appeal

- Parties may appeal a written determination on the basis of
 - **Procedural irregularity,**
 - **Newly discovered evidence,**
 - **Or conflict of interest or bias on the part of Title IX personnel. § 106.45(b)(8)**
- The decision-maker on appeal cannot be the Title IX Coordinator or any investigator or decision-maker that reached the determination regarding responsibility. 106.45(b)(7)(ii)(F)

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Objective Evaluation Of All Relevant Evidence

- The decision-maker is obligated to **objectively evaluate all relevant evidence**, including inculpatory and exculpatory evidence (and to avoid credibility inferences based on a person's status as a complainant, respondent, or witness), under § 106.45(b)(1)(ii).

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“Record” Evidence

- Remember: Before evidence is permitted at the live hearing, the decision-maker must determine whether it is **relevant**. 34 CFR § 106.45(b)(6)(i).

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Record Evidence

- Also recall that the following specific evidence is deemed **not relevant** at the live hearing:
 - Hearsay; and
 - Evidence protected by the rape shield provision. 34 CFR § 106.45(b)(6).

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Weight of Evidence

- The § 106.45 grievance process does not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by a recipient's decision-maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with § 106.45 and apply equally to both parties. 85 FR 30294

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Standard of Evidence

- The decision-maker, who is not the same person as the Title IX Coordinator or the investigator, must reach a determination by applying the SOE described in §106.45 (b)(1)(vii). § 106.45(b)(7)(ii).
- Must state whether the SOE to determine responsibility is preponderance of the evidence or clear and convincing evidence standard.

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Standard of Evidence - Union Contracts and CBAs

- We acknowledge that many employee [collective bargaining agreements] CBAs mandate the **clear and convincing evidence standard**. The Department believes that giving recipients the choice between the preponderance of the evidence standard and the clear-and-convincing evidence standard, along with the requirement contained in § 106.45(b)(1)(vii) that the same standard of evidence apply to complaints against students as to complaints against employees and faculty, helps to ensure consistency in recipients' handling of Title IX proceedings. 85 F.R. 30074.
- [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. 85 F.R. 30298

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Evidentiary Basis

- § 106.45(b)(7)(ii) requires that decision-maker(s) lay out the evidentiary basis for conclusions reached in the case, in a written determination regarding responsibility. 85 FR 30248

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Written Determination - Sanctions and Remedies

- The grievance process must treat complainants and respondents **equitably** by providing **remedies to a complainant** where a determination of responsibility for sexual harassment has been made; *and* by following a compliant grievance process before imposing any **disciplinary sanctions** or other actions that are not supportive measures as defined in § 106.30, **against a respondent**.
§106.45(b)(1)(i).

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Equitable treatment ≠ “Strictly equal treatment”

- “[W]ith respect to remedies and disciplinary sanctions, strictly equal treatment of the parties does not make sense . . .” 85 FR 30242.
- To treat the parties **equitably**, a complainant must be provided with remedies where the outcome shows the complainant was victimized by sexual harassment; and a respondent must be afforded a fair grievance process before disciplinary sanctioning. *Id.*

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Remedies – Purpose

- Remedies must be designed to “restore or preserve equal access to the recipient’s education program or activity.”
§106.45(b)(1)(i).

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Remedies v. Sanctions

- The Department does not require or prescribe disciplinary sanctions after a determination of responsibility and leaves those decisions to the discretion of recipients, but recipients must effectively implement remedies. 85 FR 30063

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Remedies Defined

- Final regs. do not provide a definition of “remedies.”
- May include the same services described as “supportive measures.” *See* 34 CFR § 106.30.
 - Unlike supportive measures, though, remedies may in fact burden the respondent, or be punitive or disciplinary in nature. § 106.45(b)(1)(i); 85 FR 30244.

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Types of Remedies

- Beyond pointing to the supportive measures described in §106.30, the Department believes recipients should have the flexibility to offer remedies as they deem appropriate to the individual facts and circumstances of each case. 85 FR 30391.

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Types of Remedies

- Department declined to require prevention and community educational programming, as suggested by one commentator.
- “[T]he final regulations are focused on governing a recipient’s response to sexual harassment incidents, leaving additional education and prevention efforts within a recipient’s discretion.” 85 FR 30190.

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Types of Remedies

- The Department has declined to **require** remedies for respondents in situations where a complainant is found to have brought a false allegation. 85 FR 30426.

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Sanctions and Remedies - Notice

- The grievance process must either
 - (1) *describe* the range of possible disciplinary sanctions and remedies *or*
 - (2) *list* the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility.

34 CFR § 106.45(b)(1)(vi).

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Written Determination – Sanctions and Remedies

- The decision-maker(s) written determination **must** include *inter alia* a statement of, and rationale for, the result as to each allegation, including any **disciplinary sanctions imposed on the respondent**, and ***whether* remedies** will be provided by the recipient **to the complainant**. §106.45 (b)(7)(ii)(E).

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Written Determination – Sanctions and Remedies

- But, acknowledging privacy concerns expressed by commentators regarding the inclusion of remedies in the written determination of responsibility, the Department noted that ***the nature of remedies*** provided will not appear in the written determination. 85 FR 30391-92; 85 FR 30394.

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Implementing Remedies

- The Title IX Coordinator is responsible for the “effective implementation of remedies.” 85 FR 30276.
- When remedies are included in the final determination, the complainant then communicates ***separately*** with the Title IX Coordinator to discuss appropriate remedies. 85 FR 30392.

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Implementing Remedies

- This approach permits a complainant to work with the Title IX Coordinator to select and effectively implement remedies designed to restore or preserve the complainant's equal access to education. 85 FR 30276.

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Disclosure of Remedies

- A remedy that does not directly affect the respondent must not be disclosed to the respondent.

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Evaluation of Remedies

- 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. 85 FR 30244.

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Timing; Simultaneous Provision

- Section 106.45(b)(7)(iii) requires that this written determination be provided to the parties simultaneously.

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Sanctions and Remedies – Recordkeeping

- A recipient is required to maintain for a period of 7 years records of any disciplinary sanctions imposed on the respondent and any remedies provided to the complainant designed to restore or preserve equal access to the recipient’s education program or activity. 34 CFR §106.45 (b)(10)(ii).

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Appeals & Documentation

August 6, 2020

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Formal Complaint: Mandatory Dismissal

- Dismissal is **mandatory** where the allegations, if true, would not meet the Title IX jurisdictional conditions (i.e., § 106.30 definition of sexual harassment, against a person in the United States, in the recipient's education program or activity), which reflects the same conditions that trigger an institution's response under section 106.44(a). § 106.45(b)(3)(i).
- Dismissal does not preclude an institution from taking action under another provision of its code of conduct. 85 CFR 30289.

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Formal Complaint: Discretionary Dismissal

- An institution is **permitted, but not required, to dismiss** a formal complaint:
 - (1) where a complainant notifies the Title IX Coordinator, in writing, that the complainant would like to withdraw the formal complaint or any allegations therein;
 - (2) where the respondent is no longer enrolled or employed by the institution; or
 - (3) where specific circumstances prevent the institution from gathering evidence sufficient to reach a determination as to the allegations contained in the formal complaint (such as where a complainant refuses to participate in the grievance process but has not sent formal notice withdrawing the complaint, or where the respondent is not under the authority of the school).

§ 106.45(b)(3)(ii)

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Notice of Dismissal

- Institutions must promptly send the parties written notice of a dismissal, describing the reason for dismissal.
 - Notice must be simultaneous
- Intent is to promote fair process, clarity, and transparency.

§ 106.45(b)(3)(iii)

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Mandatory & Equal Appeal Rights

Complainant's Interests

- The Department has stated that complainants have significant, life-altering interests at stake, and that they “have a right, and are entitled to expect, that they may attend [school] without fear of sexual assault or harassment.” 85 CFR 30396

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Mandatory & Equal Appeal Rights

Respondent's Interests

- The Department has also stated that being found responsible for sexual misconduct under Title IX may carry a significant social stigma and life-altering consequences that could impact the respondent's future educational and economic opportunities. 85 FR 30396

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Mandatory & Equal Appeal Rights

- Parties must have equal appeal rights (both from dismissals and from determinations of responsibility)
- Appeal rights should not be limited to “blatant errors.” 85 FR 30399

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Grounds for Appeal

(1) Procedural irregularity that affected the outcome of the matter. §106.45(b)(8)(i)(A)

- “[P]rocedural irregularity . . . could include a recipient’s failure to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence.” 85 FR 30249
- Parties may appeal a hearing officer’s “erroneous relevance determination” if the determination affected the outcome. 85 FR 30343

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Grounds for Appeal

(2) 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.

§106.45(b)(8)(i)(B)

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Grounds for Appeal

(3) 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)(i)(C)

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Grounds for Appeal

- Institutions are given discretion to craft additional grounds for appeal but must offer them equally to both parties. §106.45(b)(8)(ii)
 - For example, the final regulations leave to an institution's discretion whether severity or proportionality of sanctions is an appropriate basis for appeal. 85 CFR 30396

Rationale: The Department acknowledges that institutions are in the best position to know the unique values and interests of their educational communities.

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Requirements for Appeals

Requirements for Appeals:

- Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
- 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;
- Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of this section;
- Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome [of the initial determination];
- Issue a written decision describing the result of the appeal and the rationale for the result; and
- Provide the written decision simultaneously to both parties.

§106.45(b)(8)(iii)

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Documenting Decisions & Record Keeping

DOCUMENTATION

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Documentation: The Requirements

An institution **must** create and maintain records of any actions taken in response to a report or formal complaint of sexual harassment.

§106.45(b)(10)(ii)

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Documentation: The Requirements

- Document . . .
 - the basis for conclusion that response was not deliberately indifferent; and
 - that measures taken were designed to restore or preserve equal access to the education program or activity.

§106.45(b)(10)(ii)

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Documentation: Supportive Measures

- Requirement extends to decisions re: provision of supportive measures
- If an institution does not provide a complainant with supportive measures, then the institution must document the reasons why such a response was not “clearly unreasonable in light of the known circumstances.”
- Documentation of certain bases/measures does not limit the institution from providing additional explanations or detailing additional measures taken in the future.

§106.45(b)(10)(ii)

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Document Retention

- The Department extended the three-year retention period to seven years. §106.45(b)(10)(i)
 - **Date of creation begins the seven-year period.**
85 FR 30411
- Harmonizes recordkeeping requirements with the Clery Act. 85 CFR 30410
- Institutions are permitted to retain records for a longer period of time.
 - E.g. seven years from creation of the last record pertaining to the case

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Document Retention

Must maintain records of:

- | | |
|---|---|
| <ul style="list-style-type: none"> • Investigation; • Any determination regarding responsibility; • Audio or visual recording or transcript; • Any disciplinary sanctions imposed on the respondent; and • Any remedies provided to the complainant designed to restore or preserve equal access to the institution's educational program or activity. <p>§106.45(b)(10)(i)(A)</p> | <ul style="list-style-type: none"> • Any appeal and the result. • Any informal resolution and the result. <p>§106.45(b)(10)(i)(B)-(C)</p> <ul style="list-style-type: none"> • All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. <p>§106.45(b)(10)(i)(D)</p> |
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Document Retention: Investigations

- Any record the institution creates to investigate an allegation, regardless of later dismissal or other resolution of the allegation, must be maintained.
 - Even those records from “truncated investigations” that led to no adjudication because the acts alleged did not constitute sex discrimination under Title IX (dismissal)

§106.45(b)(10)(i)(A); 85 FR 30411

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Publication

- An institution must make training materials publicly available on its website.
 - If the institution does not maintain a website, the institution must make the materials available upon request for inspection by members of the public.
- *Goal:* Increase transparency and integrity of grievance process.

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