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Overview of the Title IX Regulations (Summary and Comments + Investigator Practice Points)

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On May 6, 2020, the United States Department of Education (“DOE”) issued final regulations regarding the obligations of U.S. colleges, universities, secondary and other schools to address incidents of sexual harassment under Title IX. (*34 Code of Federal Regulations Part 106*)

These regulations supersede previous guidance issued by DOE regarding sexual harassment and sexual assaults on college campuses.

The preamble to the final regulations discusses many of the comments submitted regarding the proposed regulations and DOE’s response to those comments.

The DOE, Office for Civil Rights (“OCR”) has issued subsequent guidance regarding the regulations. See “Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021) (“July 2021 Q&A”); OCR’s Title IX and Sex Discrimination Webpage; and OCR’s Sex Discrimination FAQ Webpage.

On April 6, 2021, the DOE OCR announced that it planned to review the May 2020 regulations. Public comments were submitted orally and in writing during the week of June 7, 2021 and are now included as part of the OCR’s review of the current regulations.

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Summary of Regulations

I) Introduction

- A) The final Title IX Regulations (34 CFR Part 106) (the “regulations”) cover postsecondary institutions of higher education, including graduate, undergraduate, vocational and professional schools, as well as elementary and secondary schools, including preschools as well as private elementary and secondary schools. §106.30(b)

Some portions of the regulations apply equally to both postsecondary schools as well as elementary and secondary schools, while other provisions differentiate the requirements imposed upon each type of institution. For example, different standards apply as to when a school is considered to have “notice” of sexual harassment, and the requirement of live hearings with cross-examination only applies to secondary schools.

- B) “Recipient” is defined as a recipient of Federal financial assistance covered by Title IX of the Education Amendments of 1972 (“Title IX”). *Preamble p. 1*
- C) The effective date for all schools to come into compliance with the new regulations is August 14, 2020. *Preamble p. 13*

The new regulations apply to incidents of sexual harassment occurring on or after August 14, 2020. *July 2021 Q&A, Question 13*

- D) Schools must comply with the requirements of Title IX as outlined under the regulations. §106.8(c); §106.44(b)(1); §106.45(b)

Subject to compliance with the regulations, schools may provide guidelines, policies or protocols through their codes of conduct beyond the scope of the regulations, and/or provide details regarding policies or procedures which are not addressed in the regulations. §106.45 (b) (3). *Preamble p. 481-482*

For example, the regulations only apply to sexual discrimination against a person “in the United States” based upon DOE’s analysis of the statutory language of Title IX. However, a school may, within its code of conduct and sexual misconduct policy, address issues related to students while studying abroad. *Preamble p. 660*

Similarly, the regulations may only apply to sexual harassment related to activities on campus or sponsored by a school or in a facility occupied by an organization which is endorsed by the school. The institution’s code of conduct may expand this scope of coverage.

Further, the regulations do not specify timelines or procedures for parties to submit exculpatory or inculpatory evidence following issuance of an investigative report. Consequently, the school may establish timelines and protocols for such submissions.

Practice Point: It is important for investigators at the initiation of any alleged incident of sexual misconduct to:

- 1. Review the allegations**
 - 2. Review the school’s policy regarding incidents which come within the scope of Title IX “sexual harassment”**
 - 3. Review the school’s policy regarding incidents of sexual misconduct which are outside of the scope of Title IX “sexual harassment”**
 - 4. Review the school’s policy regarding behavior which comes within the scope of Title VII sex discrimination**
 - 5. Determine which policies may apply (this is the role of the Title IX Coordinator)**
 - 6. Review the procedures for investigation and the total process under the applicable policy**
 - 7. Confirm with the Title IX Coordinator (and appropriate school personnel if Title VII policy may be involved)**
- E) Recipients must have “prompt and equitable” grievance procedures for complaints of sex discrimination and must have in place a grievance process that complies with § 106.45 for formal complaints of sexual harassment. *Preamble p. 1629*
- While a recipient is free to apply the § 106.45 grievance process to resolve complaints of non-sexual harassment sex discrimination, the final regulations only require a recipient to use the § 106.45 grievance process with respect to formal complaints of sexual harassment. *Preamble p. 1634*
- F) The final regulations describe sexual harassment as actionable when it “denies a person equal access to education” rather than the former definition of sexual harassment as creating a “hostile environment.” *Preamble p. 529*
- G) The Title IX Regulations apply equally to all persons regardless of sexual orientation or gender identity. *Preamble p. 430*
- H) A guiding principle throughout the regulations is that a school must treat both parties equitably and equally throughout the process including supportive measures, investigations, and the grievance process. *§106.44(a) and §106.45(b)(1)(i)*
- I) § 106.45 (b)(1)(iii) requires:
- i) “...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 for or against complainants or respondents generally or an individual complainant or respondent.”

- J) Recipients should have objective rules for determining when an adjudicator (or Title IX Coordinator, investigator, or person who facilitates an informal resolution process) is biased, and the Department leaves recipients discretion to decide how best to implement the prohibition on conflicts of interest and bias, including whether a recipient wishes to provide a process for parties to assert claims of conflict of interest of bias during the investigation. *Preamble p. 820*
- K) The final regulations leave recipients flexibility to use their own employees, or to outsource Title IX investigation and adjudication functions, and the Department encourages recipients to pursue alternatives to the inherent difficulties that arise when a recipient’s own employees are expected to perform these functions free from conflicts of interest and bias. *Preamble p. 825*
- L) The Department understands that despite 34 CFR 106.9 having required, for decades, recipients to adopt and publish prompt and equitable grievance procedures (and designate an employee to coordinate the recipient’s efforts to comply with Title IX), some recipients have not “adopted and published” grievance procedures for handling sex discrimination complaints, and have not designated a Title IX Coordinator. The Department intends to enforce these final regulations vigorously for the benefit of all students and employees in recipients’ education programs or activities, and any person may file a complaint with the Department alleging that a recipient is non-compliant with these final regulations. *Preamble p. 1637*

II) Definitions of “Sexual Harassment”—34 CFR §106.30(a)

- A) “Sexual Harassment” is defined as conduct on the basis of sex that satisfies one or more of three types of behavior:
 - i) A recipient’s employee conditioning provision of an aid, benefit or service of the recipient on an individual’s participation in unwelcome sexual conduct (“quid pro quo” harassment);
 - ii) 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
 - iii) “Sexual assault,” “dating violence,” “domestic violence” or “stalking” as defined in referenced statutes.
- B) “Quid pro quo” harassment may be express or implied and need not be “severe” or “pervasive” as a single incident is inherently “offensive” and jeopardizes equal educational access. *Preamble p. 446-447*

C) “Sexual Assault” is defined as:

Forcible or nonforcible sex offenses under the FBI’s Uniform Crime Reporting (U.C.R) program. *U.S.C. 1092 (f)(6)(A)(v)*

The U.C.R. contains the following definitions:

- i) Sex Offenses, Forcible: Any sexual act directed against another person, without the consent of the victim including instances where the victim is incapable of giving consent.
 - (a) Forcible Rape: (Except Statutory Rape) The carnal knowledge of a person, forcibly and/or against that person’s will or not forcibly or against the person’s will in instances where the victim is incapable of giving consent because of his/her temporary or permanent mental or physical incapacity.
 - (b) Forcible Sodomy: Oral or anal sexual intercourse with another person, forcibly and/or against that person’s will or not forcibly or against the person’s will in instances where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.
 - (c) Sexual Assault with an Object: To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, forcibly and/or against that person’s will or not forcibly or against the person’s will in instances where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.
 - (d) Forcible Fondling: The touching of the private body parts of another person for the purpose of sexual gratification, forcibly and/or against that person’s will or not forcibly or against the person’s will in instances where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.
- ii) Sex Offenses, Nonforcible: (Except Prostitution Offenses) Unlawful, nonforcible sexual intercourse.
 - (a) Incest: Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
 - (b) Statutory Rape: Nonforcible sexual intercourse with a person who is under the statutory age of consent.

D) “Dating Violence” is defined as:

i) Violence committed by a person:

(a) who is or has been in a social relationship of a romantic or intimate nature with the victim; and

(b) where the existence of such a relationship shall be determined based on a consideration of the following factors:

(1) The length of the relationship.

(2) The type of relationship.

(3) The frequency of interaction between the persons involved in the relationship.
34 U.S.C. 12291 (a)(10)

E) “Domestic Violence” is defined as:

i) Felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction. *34 U.S.C. 12291 (a)(8)*

F) “Stalking” is defined as:

i) Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

(a) Fear for his or her safety or the safety of others; or

(b) Suffer substantial emotional distress. *34 U.S.C. 12291 (a)(30)*

G) The regulations do not include a definition of consent and do not require recipients to adopt a particular definition of consent, including “affirmative consent,” with respect to sexual assault. *34 CFR §106.30(a)*

H) Recipients must clearly define consent and must apply that definition consistently between men and women, generally, and complainant and respondents in particular cases. *Preamble p. 364*

- I) Some states have statutes directed to sexual assault which contain definitions of “consent” that a school will necessarily include within its sexual misconduct policy. *Preamble p. 363*
- J) **Comment:** Note the “consent” requirement under the definitions of sexual assault. (See II. B. above). This “consent” criteria will continue to focus, as under prior DOE guidelines, on the victim’s ability to give consent, and inability to give such consent if impaired by alcohol, drugs or mental incapacity.
- K) **Comment:** Note the subjective and conjunctive standards referenced under Paragraph II.A.2. above, which is based upon the Supreme Court decision *Davis vs. Monroe County Board of Education 526 U.S. 629 (1999)*:

Unwelcome conduct determined by a reasonable person that is so severe, pervasive and objectively offensive that it effectively denies a person equal access to the school’s education program or activity.

Each factor in this paragraph must be met in order for an alleged incident or behavior to constitute “sexual harassment” subject to the requirements under the regulation. The question of what conduct is “severe”, “pervasive” and “objectively offensive” as determined under the “reasonable person” standard will be unique to virtually every situation and educational institution and the source of potential litigation in every case.

For instance, a single unwelcome act by a student against another student may not equate to “pervasive” conduct on a college campus. Consequently, that act may not give rise to any obligation on the college to investigate or respond to the victim’s complaint under the regulation guidelines.

On the other hand, if similar acts of sexual harassment involving different students is routine on a college campus the behavior may rise to the level of being “pervasive.”

Similar questions regarding the definitions of “severe” and “objectively offensive” may arise in many cases, ultimately posing the potential for litigation in these incidents.

- L) Online sexual harassment, if part of a recipient’s educational program or activity, may be subject to the regulations. The preamble notes this is fact specific. A recipient may also cover such harassment under its code of conduct, even if not subject to the regulations. *Preamble p. 643-64; July 2021 Q&A, Questions 11 & 12*

III) Recipient’s General Response—Threshold Criteria –34 CFR §106.44(a)

- A) Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person’s verbal or written

report. Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator. *§106.8(a); July 2021 Q&A, Question 16*

B) §106.44(a) provides:

i) A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.

C) The regulations set forth specific and limiting threshold criteria in which a school is required to respond to an alleged incident of sexual harassment:

i) The incident constitutes “sexual harassment” within the definitions outlined in Paragraph II. above.

ii) The school must have “actual knowledge” of an allegation of the incident of sexual harassment.

iii) The conduct must have occurred within the school’s own “education program or activity.”

iv) The alleged harassment must occur “in the United States.”

D) Note that all four criteria must be met to constitute an incident of sexual harassment which is subject to the requirements of the regulations. A dismissal of a formal complaint due to failure to meet the requirements of Title IX does not preclude an action under other provisions of the school’s code of conduct. *§106.45(b)(3)*

E) “Actual knowledge” is defined as:

i) Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient or to any employee of an elementary and secondary school. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is the respondent. The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient. “Notice” as used in this paragraph includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator as described in §106.8(a). *§106.30(a); July 2021 Q&A, Question 14, 15 & 17*

Practice Point: If the report of the alleged incident was initially received by a person other than the Title IX Coordinator, investigators may consider: 1.)

reviewing that individual’s report or notes about their initial contact with the complainant; and/or 2.) interviewing that individual during the investigation.

F) The manner by which a recipient receives actual knowledge need not be a written statement, much less a formal complaint; actual knowledge may be conveyed on a recipient via “notice” from any person – not only from the complainant (i.e., person alleged to be the victim) – regardless of whether the person who reports does so anonymously. The notice may be written or oral, by observation, via a newspaper article or other means. *Preamble p. 378; July 2021 Q&A, Question 14 & 16*

G) At a postsecondary institution reporting sexual harassment to a Title IX coordinator always constitutes “actual knowledge.” Reporting to a person “with authority to take corrective action” also constitutes “actual knowledge.” §106.30(a)

This determination is fact-specific though a school may designate and publicize employees with that authority. *July 2021 Q&A, Question 14*

A postsecondary institution may also designate “mandated reporters” (though reporting to them will not constitute “actual knowledge”), who are required to report incidents to the Title IX Coordinator and “confidential employees,” who may maintain reports in confidence. *July 2021 Q&A, Question 19*

H) At an elementary or secondary institution reporting to “any employee” constitutes “actual knowledge.” §106.30(a); *July 2021 Q&A, Question 14*

I) Under the regulations the reporting of an incident to a resident assistant, professor, or campus counselor or advisor, does not rise to the definition of “actual knowledge.” §106.30(a)

J) “Education program or activity” includes:

i) Locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. §106.44(a)

ii) Even if the sexual harassment occurred outside of the school’s education program or activity, the school may still offer supportive measures. *July 2021 Q&A, Question 9*

K) This third criteria limits a school’s responsibility to school related services, locations and activities. Outside locations, even involving students of a college, are outside of actionable events under the regulations though they may be subject to the school’s code of conduct.

L) The school must make a fact-specific determination as to whether the school had substantial control over the respondent and the context in which the alleged sexual harassment occurred. *July 2021 Q&A, Question 10*

- M) Sexual harassment may occur in computer or internet settings owned or operated by a school and the issue is fact specific. *July 2021 Q&A, Question 12*
- N) Incidents involving students in programs outside of the United States, i.e. exchange or study-abroad programs, are not subject to the regulation requirements, though the school may address sexual harassment involving students studying abroad, including supportive measures, in its code of conduct. *Preamble p. 660*
- O) **Comment:** These threshold criteria are significantly more limited than under previous DOE guidelines and will presumably result in many incidents falling outside of the requirements of a school taking any responsive action. For instance, an incident of sexual assault (which would constitute sexual harassment under Paragraph II.A.3. above) by one student against a fellow student during a party at a privately rented home off campus would apparently not meet the second requirement under Paragraph III.A.3. above and the college would have no obligation to investigate or take any responsive action, even if the incident was reported to the Title IX Coordinator.

However, in the July 2021 Q&A Question 10, OCR notes that this scenario is not prima facie outside of the scope of the Regulations and is a fact-specific determination.

Practice Point: In some cases, the investigator may need to consider the “jurisdictional issues” as part of the investigation. Questions regarding jurisdiction may be discussed with the Title IX Coordinator.

IV) Recipient’s Response—Deliberately Indifferent—34 CFR §106.44(a)-(b)

- A) Under the proposed regulations a school will be held liable for violating its obligations under Title IX if it is found that the school’s response was “deliberately indifferent” which is defined as “clearly unreasonable in light of the known circumstances.” §106.44(a)
- B) Regulation §106.44(b)(2) provides:
- i) The Assistant Secretary will not deem a recipient’s determination regarding responsibility to be evidence of deliberate indifference by the recipient, or otherwise evidence of discrimination under Title IX by the recipient, solely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence.
- C) As noted above, only alleged incidents meeting the threshold criteria noted under Paragraph III above require a response by the institution.

V) Recipient's Response to Qualifying Incidents of Sexual Harassment—34 CFR §106.44

- A) If an incident meets the criteria of: (1) constituting sexual harassment (as defined in Paragraph II.A. above); (2) the school has actual knowledge (as defined in Paragraph III.D above); and (3) the incident falls within the required jurisdictional criteria (as defined in paragraphs III.A.3. and 4. above) the school has a duty to respond as provided under the regulations. A school is required to respond if alleged facts would constitute sexual harassment, even if not certain that the alleged incident occurred. *§106.44(a); July 2021 Q&A, Question 18*
- B) Regulation §106.44(a) provides:
- i) A recipient's response must treat complainants and respondents equitably by offering supportive measures as defined in §106.30 to a complainant, and by following a grievance process that complies with §106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in §106.30, against a respondent.
- C) If a formal complaint is filed, the recipient must follow its grievance process. *§106.44(b)(1)*
- D) Even if no formal complaint is filed (and consequently the school is not required to investigate) the school must offer the complainant supportive measures. *§106.44(b)(1)*
- E) Regulation §106.44(a) provides:
- i) The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in §106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. *July 2021 Q&A, Question 32*
- F) Regulation §106.30(a) describes supportive measures as:
- i) *Supportive measures* means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment. *§106.30(a)*
- G) Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services,

mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. §106.30(a); July 2021 Q&A, Question 33

- H) The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the institution to provide the supportive measures. §106.30(a)
- I) The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures. §106.30(a)

Practice Point: Investigators should be familiar with supportive measures available to the parties and in effect during the grievance process. Investigators should respect and follow supportive measures in effect throughout the investigation.

VI) Recipient’s Response—Emergency Removal—34 CFR §106.44(c)

- A) The regulations do not preclude a recipient from removing a respondent from the recipient’s education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act. July 2021 Q&A, Question 35

VII) Recipient’s Response—Administrative Leave—34 CFR §106.44(d)

- A) The regulations do not preclude a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45. This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act. July 2021 Q&A, Question 35

VIII) Grievance Process—Formal Complaint—34 CFR §106.30(a) and §106.45(b)

- A) A “formal complaint” is defined as:
 - i) 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. July 2021 Q&A, Question 22

- ii) A parent or guardian who has a legal right to act on behalf of an individual may file a complaint on behalf of that individual. *July 2021 Q&A, Question 22*
 - iii) 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. *July 2021 Q&A, Question 23*
 - iv) 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.
 - v) As used in this paragraph, the phrase “document filed by a complainant” means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint. *July 2021 Q&A, Question 22*
 - vi) Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party under this part or under §106.45, and must comply with the requirements of this part, including §106.45(b)(1)(iii). *§106.30(a)*
- B) There is no time limit on a complainant’s filing of a formal complaint. *Preamble p. 385*
- C) In response to a formal complaint, a recipient must follow a grievance process that complies with §106.45. With or without a formal complaint, a recipient must comply with §106.44(a). *§106.44(b)(1)*
- D) The recipient must investigate the allegations in a formal complaint. *§106.45(b)(3)(i); July 2021 Q&A, Question 20*
- E) Even if a complainant does not file a complaint or wish to participate in a Title IX grievance process, the Title IX Coordinator may, and may be obligated to, file a complaint in light of the school’s obligation to provide an education environment that does not discriminate based upon sex. *July 2021 Q&A, Question 24*
- F) Dismissal of a formal complaint:
- i) The recipient must dismiss a formal complaint if the conduct alleged in the formal complaint:
 - (a) Would not constitute sexual harassment as defined in §106.30 even if proved;

- (b) Did not occur in the recipient's education program or activity; or
 - (c) Did not occur against a person in the United States. §106.45(b)(3)(i)
 - (d) Such a dismissal does not preclude action under another provision of the recipient's code of conduct. §106.45(b)(3)(i)
- ii) The recipient may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing:
- (a) A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein;
 - (b) The respondent is no longer enrolled or employed by the recipient; or *July 2021 Q&A, Question 27*
 - (c) Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein. §106.45(b)(3)(ii)

Practice Point: If any of these situations arise during an investigation, an investigator should immediately discuss the issues with the Title IX Coordinator.

- iii) Upon a dismissal required or permitted pursuant to §106.45(b)(3)(i) or (b)(3)(ii) of this section, the recipient must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties. §106.45(b)(3)(iii)
- G) A complaint will not be dismissed because a complainant remains or leaves the school. *July 2021 Q&A, Question 24*
- H) Consolidation of formal complaints:
- i) A recipient may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances. Where a grievance process involves more than one complainant or more than one respondent, references in the regulations to the singular "party," "complainant," or "respondent" include the plural, as applicable. §106.45(b)(4)

IX) Grievance Process—Process for Formal Complaints—34 CFR §106.45(b)

- A) In addressing formal complaints of sexual harassment, a recipient’s grievance process must comply with the requirements of the regulations. *§106.45(b)*
- B) Any provisions, rules, or practices other than those required by the regulations that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in §106.30, must apply equally to both parties. *§106.45(b)*
- C) A recipient’s grievance process must:
 - i) Treat complainants and respondents equitably by:
 - (a) Providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent; and
 - (b) By following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in §106.30, against a respondent.

Remedies must be designed to restore or preserve equal access to the recipient’s education program or activity. Remedies may include the same individualized services described in §106.30 as “supportive measures”; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent

- ii) Require an objective evaluation of all relevant 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;
- iii) 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 for or against complainants or respondents generally or an individual complainant or respondent.
- iv) A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training. See Paragraph XIX below.
- v) Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process;

- vi) Include reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes;
 - vii) Include a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities;
 - viii) Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility;
 - ix) State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment;
 - x) Include the procedures and permissible bases for the complainant and respondent to appeal;
 - xi) Describe the range of supportive measures available to complainants and respondents; and
 - xii) Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege. §106.45(b)(1)(i)-(x)
- D) A recipient's treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under Title IX. §106.45(a)
- E) **Comment:** Note that the "same standards" requirements noted under Paragraph IX. C.ix. above may necessitate a school's applying the higher standard of "clear and convincing evidence" due to the school's general code of conduct or employee/faculty contract criteria.
- F) A recipient must establish a reasonably prompt and "set" time frame for the grievance process. *Preamble p. 894; July 2021 Q&A, Question 37*
- G) While it is presumed that the respondent is not responsible for the alleged misconduct until a determination is reached at the conclusion of the grievance process, this does not lead to an assumption that the complainant is lying or that the alleged harassment did not occur.

The preamble notes that this requires that Investigators and decision-makers are to serve impartially and not prejudge that the respondent is responsible. *July 2021 Q&A, Question 36*

Practice Point: Investigators should carefully and conscientiously understand and follow this “presumption” guideline”.

X) Grievance Process—Notice—34 CFR §106.45(b)(2)

- A) In response to a formal complaint a school must give written notice of the allegations to the parties. This notice is to include:
- i) Notice of the school’s grievance process.
 - ii) Sufficient details of the allegations known at the time, including:
 - (a) Identities of the parties involved.
 - (b) The conduct allegedly constituting sexual harassment as defined in the regulation.
 - (c) The date and location of the alleged incident.
 - iii) A sufficient time period for the parties to prepare a response before an initial interview.
 - iv) That the respondent is presumed to not be responsible until a final determination is made.
 - v) That a determination of responsibility will be made at the conclusion of the grievance process.
 - vi) That each party may have an advisor of their choice who may, but need not be, an attorney.
 - (a) The school may elect to pay for the advisor throughout the grievance process but is only required to ensure that a party has an advisor at the hearing. See Preamble p. 992. See Paragraph XII below
 - vii) The right of each of the parties to inspect and review all evidence gathered during the investigation.

viii) Reference to any policy in the school's code of conduct which prohibits knowingly making false statements or submitting false information during the grievance process. §106.45(b)(2)(i)

B) If the investigation is expanded, then notice must be given. §106.45(b)(2)(ii)

C) See Paragraph VIII above regarding handling, dismissal, and consolidation of complaints.

XI) Grievance Process—Investigation of Formal Complaints—34 CFR §106.45(b)(5)

Practice Point: Before beginning an investigation, the investigator should be thoroughly familiar with the school's entire Title IX policy (and non-Title IX policy, if applicable). Because the investigator may be presenting the investigative report at the hearing, or the school's policy may set out a detailed format for the investigative report, early familiarity with the policy is often critical.

A) A recipient must investigate a formal complaint. §106.45(b)(3)

B) The Title IX Coordinator also may serve as the investigator. *Preamble p. 1257 & 1957*

C) The burden of proof and gathering of evidence is on the recipient. §106.45(b)(5)(i)

Practice Point: Note that the burden is on the school to develop facts and meet the burden of proof.

D) Medical and similar privileged records are not available unless the party (or parent) gives written consent. §106.45(b)(5)(i)

E) Both parties must be given the equal opportunity to present fact and expert witnesses and evidence during the grievance process. §106.45(b)(5)(ii)

F) Neither party may be restricted in their ability to discuss the allegations or gather and present relevant evidence. §106.45(b)(5)(iii)

G) Both parties have the right to an advisor (including an attorney) throughout the grievance process though the recipient may establish restrictions on the advisor's participation in proceedings provided the restrictions are equally applied. §106.45(b)(5)(iv)

Practice Point: Investigators should be familiar with the school's guidelines for advisors participating in Title IX cases.

- H) The school must give written notice of any interview, meeting or hearing at which a party is to participate, including date, time, location and purpose, with sufficient time for the party to prepare. *§106.45(b)(5)(v)*
- I) All parties and their advisors must be given equal access to inspect and review all evidence gathered during the investigation that is directly related to the allegations raised in the formal complaint, including evidence upon which the recipient does not intend to rely in reaching a determination and inculpatory as well as exculpatory evidence, regardless of source. The evidence must be provided in electronic format or hard copy. *§106.45(b)(5)(vi)*

Practice Point: Note that the full investigation file that is directly related to the allegations in question must be provided to both parties.

- J) The parties must be given at least 10 days to file a written response regarding the investigation evidence and the investigator must consider those responses prior to completion of the investigative report. The recipient may elect to use calendar or business days (Preamble p. 1963). *§106.45(b)(5)(vi)*
- K) A school may require the parties to submit any additional evidence prior to the investigator finalizing the investigator report or after the report and prior to the hearing. A school may provide a copy and allow the other party to respond. *Preamble p. 1042-1043*
- L) The evidence provided to the parties must also be available at the hearing with each party having equal access to refer to the evidence or use it in cross examination. *§106.45(b)(5)(vi)*
- M) The investigator must complete an investigative report that fairly summarizes relevant information at least 10 days prior to a scheduled hearing and provide copies to each party and their advisors, in electronic or hard format, for their review and written response. *§106.45(b)(5)(vii)*
- N) The investigator may include recommended findings or conclusion in the investigative report, but the decision-maker is under an independent obligation to objectively evaluate relevant evidence in making a determination. *Preamble p. 1031*

Practice Point: Investigators should review this part of the school policy and carefully adhere to it. Many schools now expressly provide that the investigator will or will not include a conclusion or recommendation in the investigative report.

- O) **Comment:** The rights of the parties to access investigative reports and evidence, and the obligation of a decision-maker in issuing a written determination (see Paragraph XIII.C. below), illustrates the need to have well-planned and implemented investigations, with organized and detailed evidentiary files, recordings, virtual interviews, etc.

- P) **Comment:** Note the importance of the school’s code of conduct expressly setting forth: the type of conduct which constitutes sexual harassment; the definition of consent; the standards of evidence; the prohibition upon making false statements or submitting false information; and timelines for responses (which may be longer than 10 days).
- Q) **Comment:** The school’s code of conduct should also clearly set forth the investigation and grievance process.

XII) Grievance Process—Hearings—34 CFR §106.45(b)(6)

- A) The decision-maker(s) in a hearing cannot be the same person(s) as the Title IX Coordinator or the investigator(s). *§106.45(b)(7)(i)*
- B) A postsecondary school must provide for a live hearing. *§106.45(b)(6)(i); July 2021 Q&A, Question 38*
- C) A live hearing is optional for elementary and secondary schools, though the parties must be given the opportunity to review the investigative report, submit written relevant questions of any party or witness to the decision-maker, receive answers to those questions, and submit limited follow-up questions prior to a determination by the decision-maker. The decision-maker must explain the exclusion of any question as not being relevant. *§106.45(b)(6)(ii); July 2021 Q&A, Question 40*
- D) The recipient may consolidate cases when allegations arise out of the same facts or circumstances. *Preamble p. 1038; §106.45(b)(4)*
- E) Live hearings may be conducted either with all parties physically present at the same location or, at the recipient’s election, any or all parties, witnesses and other participants may appear at the live hearing virtually, provided all participants can simultaneously see and hear each other. *§106.45 (b)(6)(i)*
- F) The recipient must create an audio or audiovisual recording or transcript and make it available to both parties for inspection and review. *§106.45(b)(6)(i)*
- G) Either party may request that a hearing be held with the parties in separate rooms with technology enabling the parties and the decision-maker(s) to see and hear witnesses. *§106.45(b)(6)(i)*
- i) Webcams, laptops or cell phones, utilizing available software will meet this requirement. *Preamble p. 1968*
- H) If a party does not have an advisor at the live hearing, the recipient must provide an advisor of the recipient’s choice, without charge to the party, who may be an attorney, to conduct cross examination. *§106.45(b)(6)(i); July 2021 Q&A, Question 40 & 41*

- I) A parent or guardian may act on behalf of a complainant or respondent throughout the grievance process, including the hearing. *July 2021 Q&A, Question 40*
- J) At the hearing each party must be given the opportunity for relevant questions and cross-examination to be conducted by the party's advisor of the other party and any witnesses, including challenging credibility. The cross examination must be conducted directly, orally and in real time and only by the party's advisor, never by the party. *§106.45(b)(6)(i)*
- K) Only relevant questions may be asked of a party or witness in cross examination or other questions and before a question is answered the decision-maker must first determine whether the question is relevant and explain any decision to exclude a question as not relevant. *§106.45(b)(6)(i); July 2021 Q&A, Question 46*
- L) The regulations focus on the investigator and decision-maker considering relevant evidence. A recipient may not adopt evidentiary rules of admissibility that might serve to exclude relevant information (i.e., lie detector results or rape kits), or because it may be unduly prejudicial, relate to prior bad acts, or constitute character evidence. *Preamble p. 811 and 981*
- M) Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless offered to prove someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. *§106.45(b)(6)(i); July 2021 Q&A, Question 47*
- N) The May 2020 regulations stated that if a party or witness does not submit to or participate in 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 of responsibility. Some policies may still contain this language.

In August 2021, the DOE rescinded this section of the regulations regarding the prohibition against statements not subject to cross-examination, and schools are no longer required to include this provision in the policy.

Therefore, decision-makers may now consider statements made by parties or witnesses that are otherwise permitted under the regulations, even if those parties or witnesses do not participate in cross-examination at the live hearing, in reaching a determination regarding responsibility in a Title IX grievance process. However, not all schools have updated their policies to reflect this change to the regulations, so refer to the policy and consult with the Title IX Coordinator about the school's requirements regarding cross-examination and participation. *August 2021, Letter to Students, Educators and Other Stakeholders re Victim Rights Law Center et al. v. Cardona p. 3*

Regardless, the decision-maker(s) cannot draw an inference regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions. *§106.45(b)(6)(i); July 2021 Q&A, Question 51*

- O) A school may implement rules for the conduct of the hearing provided they comply with the requirements of the regulations and are applied equally to both parties. *July 2021 Q&A, Question 43 & 44*

XIII) Grievance Process—Determinations—34 CFR §106.45(b)(7)

- A) The determination must be made by a decision-maker(s) who is/are not the Title IX Coordinator or investigator, and who does not have a conflict of interest or bias. *§106.45(b)(7)(i)*

- B) In reaching a determination the recipient must apply the standard of evidence adopted by the school. *§106.45(b)(7)(i)* and *§106.45(b)(1)(vii)*. See Paragraph XIV below.

- C) Following the hearing the decision-maker must issue a written determination which must include:

- i) Identification of the allegations potentially constituting sexual harassment as defined in §106.30;
- ii) A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;

Practice Point: The investigator's organization of the investigation file and investigative report as well as an investigation history will be most helpful in this part of the determination.

- iii) Findings of fact supporting the determination;
- iv) Conclusions regarding the application of the recipient's code of conduct to the facts;
- v) 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
- vi) The recipient's procedures and permissible bases for the complainant and respondent to appeal. *§106.45 (b)(7)(ii)*

- D) The recipient must provide the written determination to the parties simultaneously. *§106.45(b)(7)(iii)*
- E) The determination is final either: 1) on the date the recipient provides the parties with written determination of an appeal if an appeal was filed; or 2) the date for filing an appeal expires without an appeal having been filed. *§106.45(b)(7)(iii)*
- F) The regulations do not dictate particular remedies upon a determination of responsibility. Each school is left to set its own remedies but must describe the range of possible disciplinary sanctions or remedies or list possible sanctions or remedies in its policy. *July 2021 Q&A, Question 21*
- G) The Title IX Coordinator is responsible for implementation of any remedies. *§106.45(b)(7)(iv)*
- H) **Comment:** In light of the requirement that the decision-maker must not have a conflict of interest or bias, schools should consider using an independent outside party as the decision-maker rather than a school employee or administrator who may be conflicted or biased, or perceived as being so.
- I) **Comment:** Note that the decision-maker is charged with determining relevance of questions during the hearing.

XIV) Grievance Process—Standard of Evidence—34 CFR §106.45(b)(1)(vii)

- A) A school may elect to apply either:
 - i) The preponderance of evidence (“more likely than not”); or
 - ii) The clear and convincing evidence (“highly probable) standard of evidence. *July 2021 Q&A, Question 56*
- B) The same standard of evidence must be used for formal complaints against students as is used for formal complaints against employees, including faculty, and the same standard must be applied to all formal complaints of sexual harassment. *§106.45(b)(1)(vii); July 2021 Q&A, Question 57*
- C) **Comment:** Note that the “same standards” requirements noted under Paragraphs XIV. B. above may necessitate a school’s applying the higher standard of “clear and convincing evidence” due to the school’s general code of conduct or employee/faculty contract criteria.
- D) Neither standard requires corroborating evidence. The decision-maker can make a determination of responsibility based on objective evaluation of party statements with or without corroborating evidence. *Preamble p. 1295*

XV) Grievance Process—Appeals—34 CFR §106.45(b)(8)

- A) Recipients must offer an appeal process to both parties from a) a determination regarding responsibility, and b) from a recipient’s dismissal of a formal complaint or any allegations therein on several bases:
- i) Procedural irregularity that affected the outcome. *§106.45(b)(8)(i)(A)*
 - ii) New evidence that was not reasonably available at the time of the determination or the dismissal, that could affect the outcome of the matter. *§106.45(b)(8)(i)(B)*
 - iii) The Title IX Coordinator, investigator or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or in the case that affected the outcome. *§106.45(b)(8)(i)(C)*
- B) The recipient may offer additional bases to appeal provided they are equally available to both parties. *§106.45(b)(8)(ii)*
- C) The appeal decision-maker(s) must also be free of bias or a conflict of interest; cannot be the Title IX Coordinator, investigator or decision-maker; and have required training. *§106.45(b)(8)(iii)(B)* and *§106.45(b)(8)(iii)(C)*
- D) The recipient must notify the other party in writing of a party’s appeal and implement equal rights to both parties on the appeal. *§106.45(b)(8)(iii)(A)*
- E) Both parties must be offered a reasonable, equal opportunity to submit written arguments. *§106.45(b)(8)(iii)(D)*
- F) The decision-maker(s) must issue a written decision simultaneously to both parties describing the result and the rationale of the decision. *§106.45(b)(8)(iii)(E) and (F)*
- G) **Comment:** Schools should consider independent third parties to consider the appeal.

XVI) Grievance Process—Informal Resolutions—34 CFR §106.45(b)(9)

- A) If a formal complaint is filed a school may offer informal resolutions of alleged incidents such as mediation, restorative justice, or other forms of alternative dispute resolution, without a full investigation or adjudication. Schools may make fact-specific determinations whether to offer informal resolution in Title IX cases. *§106.45(b)(9); July 2021 Q&A, Question 85*
- B) Informal resolution must be voluntary, with the parties being fully informed of the process and options and the parties must consent in writing to the process. *§106.45(b)(9)(i) and (ii)*

- C) Informal resolutions cannot be offered or facilitated by a recipient in a case involving an employee’s sexual harassment of a student. *§106.45(b)(9)(iii)*
- D) **Comment:** Schools should consider the use of trained and experienced mediators for informal resolution of cases.
- E) **Comment:** In mediation three parties will be involved – the complainant, the respondent, and the school. Such situations may entail careful and comprehensive consideration of each party’s role, concerns and responsibilities.
- F) **Comment:** Consider whether such informal proceedings might extend to encompass claims between the complainant and respondent in lieu of civil litigation.

**XVII) Title IX Coordinator, Investigators and Decision-Makers—Training—
34 CFR §106.45(b)(1)(iii) and (b)(10)**

- A) Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the “Title IX Coordinator.” *§106.8*
- B) The Title IX Coordinator may also be the investigator. The decision-maker(s) in a hearing cannot be the Title IX Coordinator or investigator. The decision-maker(s) in an appeal cannot be the Title IX Coordinator, investigator or decision-maker(s). *Preamble p. 1257 & 1957; §106.45(b)(7)(i); §106.45(b)(8)(iii)(B)*
- C) The regulation requires 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 for or against complainants or respondents generally or an individual complainant or respondent. *§106.45(b)(1)(iii)*
- D) A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on:
 - i) The definition of sexual harassment in § 106.30;
 - ii) The scope of the recipient’s education program or activity;
 - iii) How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable; and
 - iv) How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. *§106.45(b)(1)(iii)*

- E) 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, as set forth in Regulation 106.45(b)(6). *§106.45(b)(1)(iii)*
- F) Investigators must receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth Regulation 106.45(b)(5)(vii). *§106.45(b)(1)(iii)*
- G) Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment. *§106.45(b)(1)(iii)*
- H) All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process must be maintained for 7 years by the recipient. *§106.45(b)(10)(i)(D)*
- I) A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public. *§106.45(b)(10)(i)(D)*
- J) Training is to be 8 hours with additional training annually. *Preamble p. 1958*
- K) Training need not be live and may be online or virtual. *Preamble p. 1961*
- L) **Comment:** As noted in Paragraph XI above, the investigative report, as well as all evidence gathered during an investigation must be made available to both parties for review prior to any determination. This requirement emphasizes the importance of designing and conducting comprehensive investigations which are well-documented and organized.

XVIII) Recordkeeping—34 CFR §106.45(b)(10)

- A) Schools must maintain records of every Title IX sexual harassment investigation and determinations of responsibility, including informal resolutions. *§106.45(b)(10)(i)(A)-(C)*
- B) Schools must keep records of responses to every allegation of sexual harassment under 106.44 even if no formal complaint was filed, and any response, including supportive measures offered and implemented. *§106.45(b)(10)(ii)*
- C) Schools must document the facts upon which it was determined that they were “not deliberately indifferent” to the allegations of sexual harassment. *§106.45(b)(10)(ii)*

D) Schools must maintain all materials used to train Title IX Coordinators, investigators, decision-makers and any person who facilitates an informal resolution process, and post such materials on the school's website. *§106.45(b)(10)(i)(D)*

E) Records must be maintained for 7 years. *§106.45(b)(10)*

XIX) Remedial Action—34 CFR §106.3

A) DOE may require a recipient to take remedial action for discriminating in violation of Title IX or the regulations. *§106.3*

B) DOE will not assess monetary damages against a school as a result of violations of the regulations. *Preamble p. 1412 et seq.*

C) DOE reserves the right to terminate Federal financial assistance as a “severe” remedy. *Preamble p. 1418-1419*

D) **Comment:** Under the new guidelines the threat of monetary damages from a school in violation is not an available sanction.

XX) Dissemination of Policy and Grievance Procedures—34 CFR §106.8

A) Each school must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the school (collectively referred to in this Paragraph XX as “Notice Parties”) that it does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by Title IX and the regulations not to discriminate in such a manner. Such notification must state that the requirement not to discriminate in the education program or activity extends to employment and admissions (unless Subpart C does not apply to the institution) and that inquiries about the application of Title IX and the regulations to the school may be referred to the Title IX Coordinator or to the Assistant Secretary of DOE, or both. *§106.8(b)(1)*

B) A recipient must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited under the regulations and a grievance process that complies with § 106.45 for formal complaints as defined in § 106.30. A recipient must provide to Notice Parties notice of the recipient's grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond. *§106.8(c)*

- C) A recipient must notify the Notice Parties of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator. *§106.8(a)*
- D) A recipient must prominently display the contact information required to be listed for the Title IX Coordinator under Paragraph XX.C) above and the policy described in Paragraph XX.A) above on its website, if any, and in each handbook or catalog that it makes available to Notice Parties. *§106.8(b)(2)*
- E) Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report. Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator. *§106.8(a)*
- F) All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process must be publicly available on the recipient's website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public. *§106.45(b)(10)(D)*

XXI) Retaliation and Amnesty—34 CFR §106.71

- A) No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or the regulations, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under the regulations. Any such act constitutes retaliation. *§106.71(a)*
- B) Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination. *§106.71(a)*
- C) Exercise of First Amendment rights does not constitute retaliation. *§106.71(b)(1)*
- D) Charging a party with a Code of Conduct violation for making a materially false statement in bad faith in connection with the grievance process does not constitute retaliation. A determination regarding responsibility, alone, is not sufficient to conclude that an individual made a materially false statement in bad faith *§106.71(b)(2); Preamble p. 854; July 2021 Q&A, Question 63*

- E) Schools may adopt an amnesty policy which may grant amnesty from violations of other school policies (i.e., underage drinking) to encourage reporting of sexual misconduct. *July 2021 Q&A, Question 62*

XXII) Confidentiality—34 CFR §106.71

- A) The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. *§106.71(a)*

XXIII) Exemption for Educational Institutions Controlled by Religious Organizations—34 CFR §106.12

- A) An educational institution controlled by a religious organization may apply for exemption from application of part or all of the regulations that conflict with the tenet of the organization. *§106.12(b); July 2021 Q&A, Question 66 & 67*

Overview of the Title IX Regulations for Investigators

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Introduction

- Effective date for compliance: August 14, 2020
- Treat both parties equitably and equally
- “Prompt & equitable” grievance procedures
- Sexual harassment actionable when it “denies a person equal access to education”
- Schools may decide how to best implement the prohibition on conflicts of interest and bias
- Flexibility to outsource Title IX investigation & adjudication functions



Practice Point

At the beginning of a Title IX investigation, investigators should:

- Review the allegations
- Review relevant policies, including:
 - Title IX harassment policies
 - Sexual misconduct policies (may be called “non-Title IX sexual harassment”)
 - Title VII policy, if applicable
- Determine which policy or policies may apply
- Review procedures for investigation and grievance process under appropriate policy
- Confirm with Title IX Coordinator

Definitions of "Sexual Harassment"

Sexual harassment is defined as conduct on the basis of sex that satisfies one or more of the three types of behavior:

Definitions of "Sexual Harassment"

1. A school's employee conditioning provision of an aid, benefit or service of the school on an individual's participation in unwelcome sexual conduct ("quid pro quo" harassment;
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 school's education program or activity; or
3. Sexual assault, dating violence, domestic violence, or stalking, as defined in the referenced statutes

Definitions of "Sexual Harassment"

- "Quid pro quo" harassment
 - May be express or implied
 - Need not be "severe" or "pervasive" as a single incident is inherently "offensive" and jeopardizes equal educational access

Definitions of "Sexual Harassment"

- Sexual Assault includes forcible and non-forcible sex offenses
 - Rape, sodomy, sexual assault with an object, forcible fondling
 - Incest, statutory rape
- Dating Violence
- Domestic Violence
- Stalking

* Important to consider the definition of consent

Definitions of "Sexual Harassment"

- 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 school's education program or activity

Recipient's General Response - Threshold Criteria

- Four threshold criteria
 - Incident constitutes "sexual harassment" under Title IX
 - School has "actual knowledge"
 - Conduct occurred within school's own "education program or activity"
 - Alleged harassment occurred within the United States

Recipient's General Response - Threshold Criteria

Actual Knowledge

- Notice of sexual harassment or allegations of sexual harassment to the school's Title IX Coordinator or any official of the school who has the authority to institute corrective measures (or to any employee of an elementary or secondary school)

Practice Point

If report of the alleged incident was initially received by someone other than the Title IX Coordinator, investigators may consider:

1. Reviewing that individual's report or notes about initial contact with the Complainant; and
2. Interviewing that individual during the investigation.

Recipient's General Response - Threshold Criteria

Actual Knowledge continued:

- Notice may be written or oral, by observation, via newspaper article, or other means
- Reporting of sexual harassment to Title IX
Coordinator always constitutes "actual knowledge"
- Mandated reporters are optional

Recipient's General Response - Threshold Criteria

Education Program or Activity

- Locations, events, or circumstances over which the school exercises substantial control over both the respondent and the context in which the sexual harassment occurs
 - Includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution
- Incidents that occur outside of the school's education program or activity may still be subject to the school's code of conduct, and the school may still offer supportive measures

Recipient's General Response - Threshold Criteria

Incidents outside of the United States

- Includes study abroad programs
- Although not subject to the Title IX regulations, incidents may be addressed via the school's code of conduct or other relevant policies
- Supportive measures may still be offered

Practice Point

In some cases, the investigator may need to consider the “jurisdictional issues” as part of the investigation.

Questions regarding jurisdiction may be discussed with the Title IX Coordinator.

Recipient's Response – Deliberately Indifferent

School will be held liable for violating its obligations under Title IX if it is found that a school is “deliberately indifferent,” which is defined as “clearly unreasonable in light of the known circumstances.”

Only alleged incidents meeting the threshold criteria require a response by the institution.

Recipient's Response to Qualifying Incidents of Sexual Harassment

- A school has a duty to respond if an incident meets the four threshold criteria
- Schools must treat complainants and respondents equitably
- Schools must follow their grievance process
- If no formal complaint is filed, the school must offer the complainant supportive measures

Recipient's Response to Qualifying Incidents of Sexual Harassment

Supportive measures

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

Recipient's Response to Qualifying Incidents of Sexual Harassment

Supportive measures

- May include counseling, extensions of deadlines or other course-related adjustments, modifications to work or class schedules, campus escort services, mutual restrictions on contact between parties, changes in work or housing locations, leaves of absence, increased security of certain areas on campus, etc.

Practice Point

Investigators should be familiar with supportive measures available to the parties and in effect during the grievance process.

Investigators should respect and follow those supportive measures during investigation.

Recipient's Response – Emergency Removal

Title IX does not prohibit a school from removing a respondent from the school's education program or activity on an emergency basis, provided that the school:

- Undertakes an individualized safety & risk analysis;
- Determines that an immediate threat to the physical health or safety of any student or individual arising from the allegations of sexual harassment justifies removal; and
- Provides respondent with notice & an opportunity to challenge the decision immediately following removal.

Recipient's Response – Administrative Leave

Title IX does not prohibit a school from placing a non-student employee respondent on administrative leave during the pendency of a Title IX grievance process.

Grievance Process - Formal Complaint

Formal Complaint

- Filed by a complainant or signed by the Title IX Coordinator
- Alleges sexual harassment against a respondent
- Requests the school investigate the alleged incident of sexual harassment
- Must be filed with the Title IX Coordinator in person, by mail, or by email
- No time limit on a complainant's filing of a formal complaint
- School must respond to a formal complaint (i.e., follow the Title IX grievance process and investigate the allegations)

Grievance Process - Formal Complaint

Dismissal of a Formal Complaint

- MUST dismiss a formal complaint if the alleged incident:
 - Would not constitute sexual harassment under Title IX, even if proved;
 - Did not occur in the school's education program or activity; or
 - Did not occur against a person in the United States.

Grievance Process - Formal Complaint

Dismissal of a Formal Complaint

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

Practice Point

If a situation involving dismissal arises during an investigation, an investigator should immediately discuss with the Title IX Coordinator.

Grievance Process - Formal Complaint

Dismissal of a Formal Complaint

- Dismissal does not preclude action under another relevant school policy (i.e., Code of Conduct)
- Upon dismissal, the school must promptly notify the parties

Grievance Process - Formal Complaint

Consolidation of Formal Complaints

- A school may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances

Grievance Process - Process for Formal Complaints

A school's grievance process must:

- Treat complainants and respondents equally
- Require objective evaluation of relevant evidence, including inculpatory and exculpatory evidence, and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness
- Require that any individual designated by the school as a Title IX Coordinator, investigator, investigator, decision-maker, or informal resolution facilitator not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent

Grievance Process - Process for Formal Complaints

A school's grievance process must:

- Ensure Title IX Coordinators, investigators, decision-makers, and informal resolution facilitators receive training
- Include a presumption that the respondent is not responsible for the alleged conduct until a determination is made at the conclusion of the grievance process
- Include reasonably prompt time frames for conclusion of the grievance process
- Include a process that allows for temporary delay of the grievance process or the limited extension of time frames with good cause and written notice

Grievance Process - Process for Formal Complaints

A school's grievance process must:

- Describe the range or list of possible disciplinary sanctions and remedies
- State the standard of evidence
- Include procedures and permissible bases for appeals
- Describe range of supportive measures
- Not require, allow, rely upon or otherwise use privileged information without permission



Practice Point

While it is presumed that a respondent is not responsible for the alleged misconduct until a determination is reached at the conclusion of the grievance process, this does not lead to an assumption that the complainant is lying or that the alleged harassment did not occur.

Investigators and decision-makers must remain impartial and not prejudge that the respondent is responsible.

Investigators should carefully and conscientiously understand and follow this “presumption” guideline.

Grievance Process - Notice

In response to a formal complaint, a school must give written notice of the allegations to the parties.

Notice includes:

- Notice of school's grievance process
- Sufficient details of allegations known at the time, including:
 - Identities of the parties involved, conduct constituting sexual harassment, and date and location of the alleged incident
- Sufficient time period for parties to prepare a response before an initial interview

Grievance Process - Notice

Notice requirements continued:

- Statement that respondent is presumed not responsible until final determination is made
- Statement that the determination of responsibility will be made at the conclusion of the grievance process
- Right to an advisor of their choice
- Right to inspect and review all evidence gathered during the investigation
- Reference school policy that prohibits knowingly making false statements or submitting false information

 Practice Point

Before beginning an investigation, investigators should be familiar with the school's entire Title IX policy and understand the expectations of an investigator.

Grievance Process - Investigation of Formal Complaints

- Schools must investigate formal complaints
- Title IX Coordinator may serve as the investigator
- Burden of proof and gathering of evidence is on the school

Practice Point

Note that the burden is on the school to develop facts and meet the burden of proof.

Grievance Process - Investigation of Formal Complaints

- Medical and similar privileged records are not available unless the party or parent gives written consent
- Both parties must be given the equal opportunity to present fact and expert witnesses and evidence during the grievance process

Grievance Process - Investigation of Formal Complaints

- Neither party may be restricted in their ability to discuss the allegations or gather and present relevant evidence
- Both parties have the right to an advisor
 - School may establish restrictions on the advisor's participation in the grievance process, provided the restrictions are equally applied

Practice Point

Investigators should be familiar with the school's guidelines for advisors participating in Title IX cases.

Grievance Process - Investigation of Formal Complaints

- School must provide written notice of any interview, meeting or hearing at which a party is expected to participate
 - Include date, time, location & purpose of meeting with sufficient time to prepare
- All parties and advisors must have equal access to inspect and review all evidence gathered during the investigation that is directly related to the allegations

Practice Point

Note that the full investigation file, which includes evidence that is directly related to the allegations, must be provided to both parties.

Grievance Process - Investigation of Formal Complaints

- The parties have at least 10 days to respond in writing to the investigation evidence and (preliminary) investigative report
- The investigator must consider those responses prior to finalizing the investigative report
- School may require parties to submit any additional evidence prior to finalization of the investigative report or after the report and prior to the hearing

Grievance Process - Investigation of Formal Complaints

- Evidence provided to the parties must be available at the hearing for reference or use in cross-examination
- Investigative report fairly summaries relevant evidence
- Investigative report must be completed at least 10 days prior to the hearing
- Copies of the investigative report must be provided to the parties and their advisors for review and written response
- Investigators MAY include recommended findings or conclusions in the report, but the decision-maker must objectively evaluate the relevant evidence to make a determination

Practice Point

Investigators should carefully review the section of the Title IX policy referencing investigative reports.

The policy may expressly state that the investigator will or will not include recommendations or conclusions in the investigative report.

Adhere to the school's policy.

Grievance Process - Hearings

- The decision-maker cannot be the Title IX Coordinator
- A postsecondary school must provide a live hearing.
- Hearings may be conducted with all parties physically present or virtually
- If a party does not have an advisor at the live hearing, the recipient must provide an advisor of the party's choice, without charge to the party
- A parent or guardian may act on behalf of party

Grievance Process - Hearings

- Each party must be given opportunity for relevant questions and cross-examination
 - Cross-examination is conducted directly, orally, and in real time only by the party's advisor
- Only relevant questions may be asked during cross-examination
 - Before a question is answered, the decision-maker will rule on relevance and explain any decision to exclude a question as not relevant

Grievance Process - Hearings

Not relevant under Title IX:

- Questions and evidence about a complainant's sexual predisposition
- Questions and evidence about a complainant's prior sexual behavior, except when:
 - Questions & evidence are offered to prove someone other than the Respondent committed the alleged conduct; or
 - Questions & evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent & are offered to prove consent.
- Medical and similar privileged records unless the party has provided written consent

Grievance Process - Hearings

Cross-examination

- May 2020 Regulations: If a party or witness does not submit to or participate in cross-examination, the decision-maker(s) **must not rely** on any statement of that party or witness in reaching a determination
- August 2021 Letter from the DOE: Rescinded the statement regarding the prohibition against statements not subject to cross-examination, and schools are no longer required to include the above provision in the policy.
- However, the 2021 change has not been reflected in all policies. Consult with your Title IX Coordinator about the school's approach to cross-examination.

Grievance Process - Determinations

- Decision-maker applies the standard of evidence adopted by the school to make and issue a written determination, which includes:
 - Identification of allegations
 - Description of procedural steps during the Title IX process
 - Findings of facts supporting the determination
 - Conclusions regarding application of code of conduct to the facts
 - Statement of, and rationale for, the result as to each allegation, including a determination of responsibility, any disciplinary sanctions, and whether remedies will be provided
 - Procedures and permissible bases for appeal

Practice Point

The investigator's organization of the investigation file and investigative report will be useful as the decision-maker drafts a description of the procedural steps.

Grievance Process - Standard of Evidence

- Preponderance of the evidence (“more likely than not”)
- Clear and convincing evidence (“highly probable”)
- Same standard must be used for formal complaints against students as is used for formal complaints against employees
- Same standard must be applied to all formal complaints of sexual harassment

Grievance Process - Appeals

- An appeal process must be offered to both parties
- Parties may appeal on several bases:
 - Procedural irregularity that affected the outcome
 - New evidence that was not reasonably available at the time of the determination or dismissal that could affect the outcome of the matter
 - Title IX Coordinator, investigator or decision-maker had a conflict of interest or bias that affected the outcome
- Appeal decision-maker issues a written determination

Grievance Process – Informal Resolution

- Mediation, restorative justice, other forms of alternative dispute resolution may be available to the parties after a formal complaint is filed
- Must be voluntary and parties must consent in writing to the process
- Cannot be offered or facilitated by a school in a case involving an employee's sexual harassment of a student

Training for Title IX Coordinators, Investigators & Decision-Makers

- Title IX Coordinators, investigators, decision-makers and informal resolution facilitators must receive training on:
 - Definition of sexual harassment under Title IX
 - Scope of the school's education program or activity
 - How to conduct an investigation and grievance process
 - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
 - Investigators must receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence
- Training materials must be maintained for 7 years and made publicly available on the school's website

Miscellaneous

- Recordkeeping
- Remedial Action
- Dissemination of Policy & Grievance Procedures
- Retaliation and Amnesty
 - Retaliation is prohibited under Title IX
 - Investigators should understand the school's amnesty provisions
- Confidentiality
- Exemption for educational institutions controlled by religious organizations

Thank you!

Send questions or comments to

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