



## The “Participation Update” and Due Process in Title IX

D. STAFFORD & ASSOCIATES & NACCOP

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ANN TODD, D. STAFFORD & ASSOCIATES

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## A Timeline on the Issue



May 2020 New Regulations (Trump Administration)  
*Says must participate or statements are suppressed*



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## So what are we talking about?

Exclusionary Rule  
Suppression Clause  
Participation Rule  
Preclusion Requirement

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## 2020 Title IX Regulations



- “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.”

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## Clarifications (from the preamble)



- “The Department declines to add exceptions to this provision, such as permitting reliance on statements against a party’s interest.” (*Too hard for non-attorneys*)
- “If a party or witness makes a statement in the video, then the decision-maker may not rely on the statement of that party or witness in reaching a determination regarding responsibility” (*But video without a statement of the incident is admissible*)
- “Even though a party’s statements that are not subject to cross-examination might be admissible in a civil or criminal trial under rules of evidence that apply in those contexts, the Department has determined that such untested statements, whether testimonial or nontestimonial, should not be relied on.” (*Hearsay exceptions in courts don’t apply here*)
- “Police reports, SANE reports, medical reports, and other documents and records may not be relied on to the extent that they contain the statements of a party or witness who has not submitted to cross-examination.” (*Requires attendance of professionals*)

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## Caveats



Only applies to sexual harassment cases

Only required if for higher education (which requires hearing)

Doesn't apply to questions by the decision-maker, just the advisor

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ANYONE  
WITH  
HEARING  
UNDER 2020  
REGS WITH  
ABSENT  
PARTY OR  
WITNESS?

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## A Timeline on the Issue



May 2020      New Regulations (Trump Administration)  
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July 2021      Q and A on Title IX (Biden Administration)  
*Repeats rule and pulls problematic examples from preamble*

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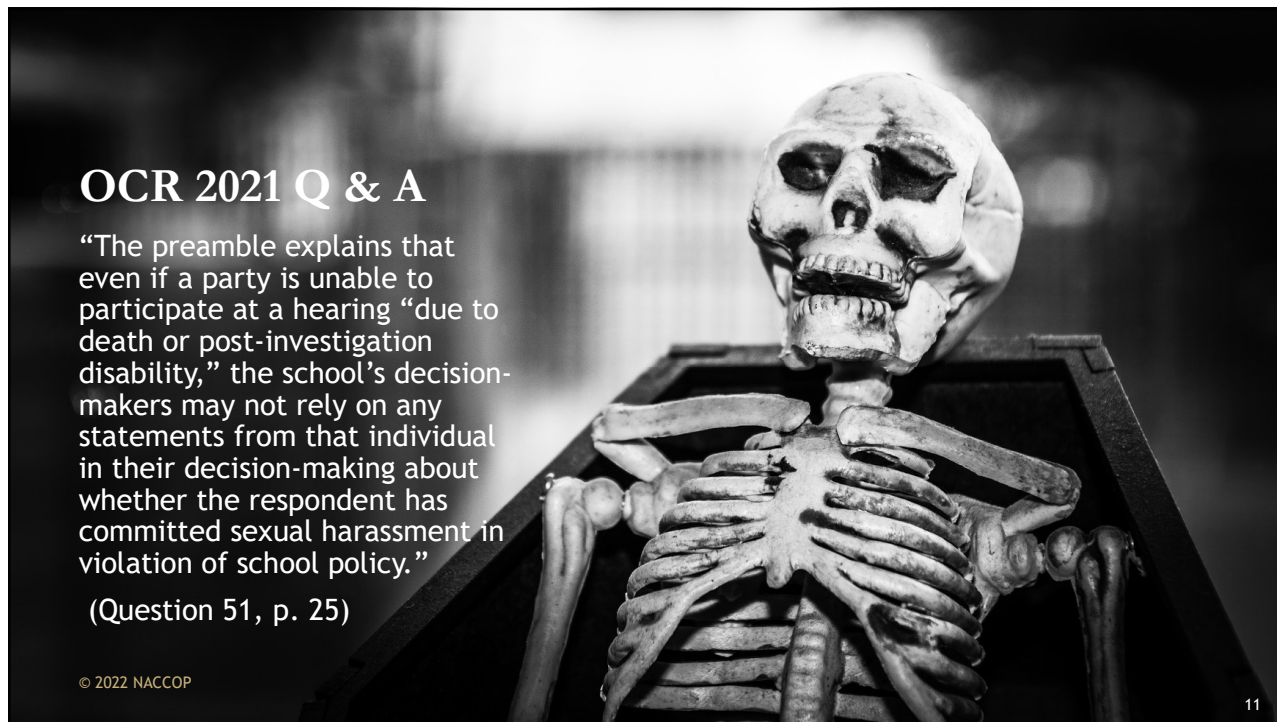
## OCR 2021 Q and A

- Question 42: Are parties and witnesses required to participate in the Title IX grievance process, including submitting to cross-examination during a live hearing at the postsecondary school level? *Answer 42: No. Parties and witnesses are not required to submit to cross-examination or otherwise participate in the Title IX grievance process... FOR INFORMATION ON THE CONSEQUENCES OF NOT PARTICIPATING, SEE QUESTIONS BELOW...*

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**OCR 2021 Q & A**

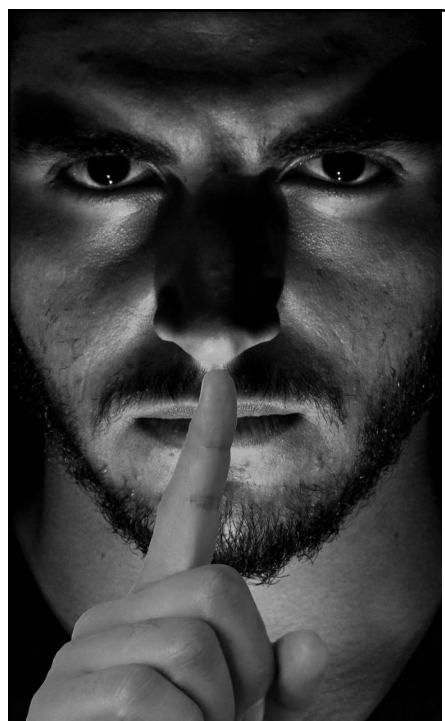
“The preamble explains that even if a party is unable to participate at a hearing “due to death or post-investigation disability,” the school’s decision-makers may not rely on any statements from that individual in their decision-making about whether the respondent has committed sexual harassment in violation of school policy.”

(Question 51, p. 25)

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**Q&A Question 53: Using Statements When the Party Does Not Submit to Cross**

“ . . . evidence in which a party or witness comments on the interaction between the parties without engaging in harassment (e.g., email or text exchanges leading up to the alleged harassment or an admission, an apology, or other comment about the alleged harassment), would be considered statements that could not be considered unless the party or witness is cross-examined.” (Question 53, p. 27)

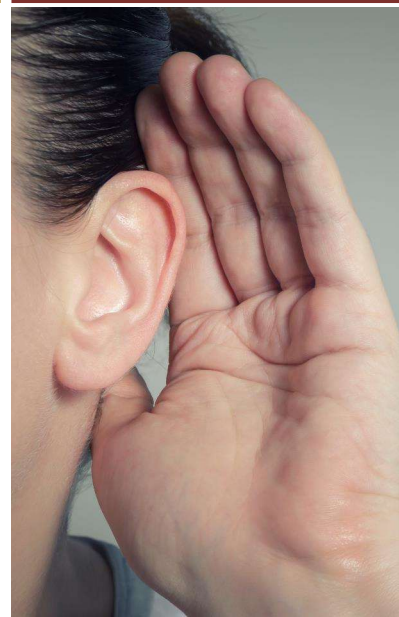
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## Q&A Question 54: Multiple Party Statements

“The preamble explains that in such cases, even if a party or witness in a text message, email, or video does not submit to cross-examination, the decision-maker may still rely on the statements by other people in that text message, email, or video who do submit to cross-examination.” (Question 54, p. 27)



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Jul 28, 2021 Mass. court vacates rule in *VRLC v. Cardona* decision

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## Victims Rights Law Center v. Cardona



- The Department had not “considered or adequately explained why it intended for section 106.45(6)(i) to compound with a respondent's procedural safeguards quickly to render the most vital and ultimate hallmark of the investigation -- the hearing -- a remarkably hollow gesture.”
- This rule created several opportunities for a respondent to “further a disruptive agenda” which could include not attending the hearing to avoid self-incrimination and encouraging other witnesses not to appear for questioning.
- “This is not some extreme outlier or fanciful scenario. No attorney worth her salt, recognizing that -- were her client simply not to show up for the hearing -- an ironclad bar would descend, suppressing any inculpatory statements her client might have made to the police or third parties, would hesitate so to advise.”

[Victims Rights Law Center v. Cardona](#), No. CV 20-11104-WGY, 2021 WL 3185743, (D. Mass. July 28, 2021)

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July 2021      Q and A on Title IX (Biden Administration)  
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Jul 28, 2021    Mass. court vacates rule in VRLC v. Cardona decision  
Aug 10, 2021    Court applied decision nationwide (but case is on appeal)  
Aug 24, 2021    Dept of Education announces will no longer enforce

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ANYONE  
WITH  
HEARING  
POST  
CARDONA?

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Jun 28, 2022 Dept of Education updates Q and A on Title IX  
Removes language in conflict; states CANNOT suppress

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## Revised Q and A (June 28, 2022)



- Question D: Despite the court’s decision, may a postsecondary school choose to maintain the prohibition on considering statements made by a party or witness who does not submit to cross-examination at a live hearing as part of its Title IX grievance process?
- Answer D: No. The 2020 amendments require “an objective evaluation of all relevant evidence.” To the extent that statements made by a party or witness who does not submit to cross-examination at a live hearing satisfy the regulation’s relevance rules, they must be considered in any postsecondary school’s Title IX grievance process that is initiated after July 28, 2021.

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## Really, you should go ahead and change...



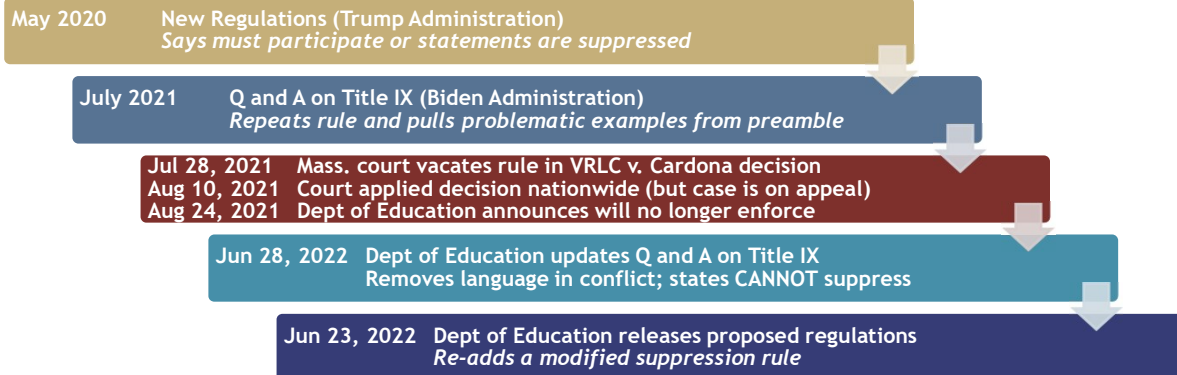
- ~~“If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility”~~
- Victims Rights Law Center et al. v. Cardona, WL 3185743 (D. Mass. July 28, 2021)

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## A Timeline on the Issue



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## 2022 Proposed Title IX Regulations



- **106.46(f)(4) Refusal to respond to questions related to credibility.**

If a party does not respond to questions related to their credibility, the decisionmaker must not rely on any statement of that party that supports that party's position.

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## Credibility Checklist



Truthfulness

Past  
behaviors

Post-  
assaultive  
behaviors

Corroborating  
evidence

Ability to  
perceive

Ability to  
remember

Plausibility

Demeanor

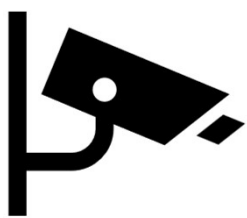
Motivation

Bias

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Other Evidence



Confession

“When credibility is  
not in dispute . . .  
cross-examination is  
unwarranted”

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Waive Right to Hearing

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## From the 2022 preamble...



- “The Department is concerned, however, that placing no limitations on the decisionmaker’s ability to consider statements made by a party who does not submit to a credibility assessment could lead to manipulation by the parties.
- For example...a complainant could write an email to a friend and leave a voicemail for another friend detailing the events. If the complainant refused to submit to a credibility assessment, the decisionmaker would be permitted to consider the email and voicemail for their truth, but the respondent would not have an opportunity to question the complainant, including to assess credibility.”

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## And more from the preamble...



- “It would apply when a party refuses to answer questions related to their own credibility either during the investigation in individual meetings with the decisionmaker or investigator or during the live hearing, if the postsecondary institution holds a live hearing. The Department would propose this change regardless of whether the district court’s vacatur is ultimately upheld on appeal.”

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## ANN'S OPINION

NOT ALL EVIDENCE IS CREATED EQUAL. DECISION-MAKERS SHOULD WEIGH ALL EVIDENCE BASED ON CREDIBILITY ETC.

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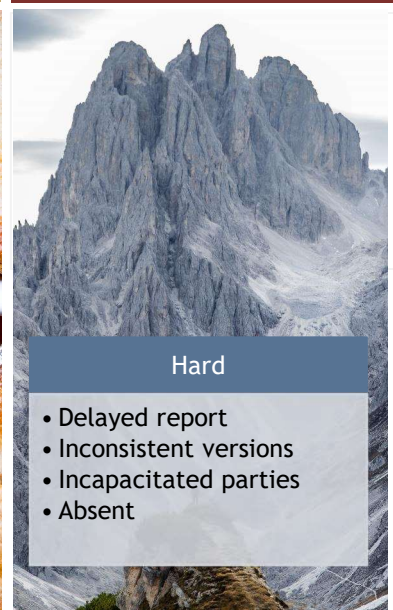
## Decision-Maker Assessments

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### Easy

- Gender
- Status as Complainant/Respondent
- Inadmissible information (rape shield, privileged)



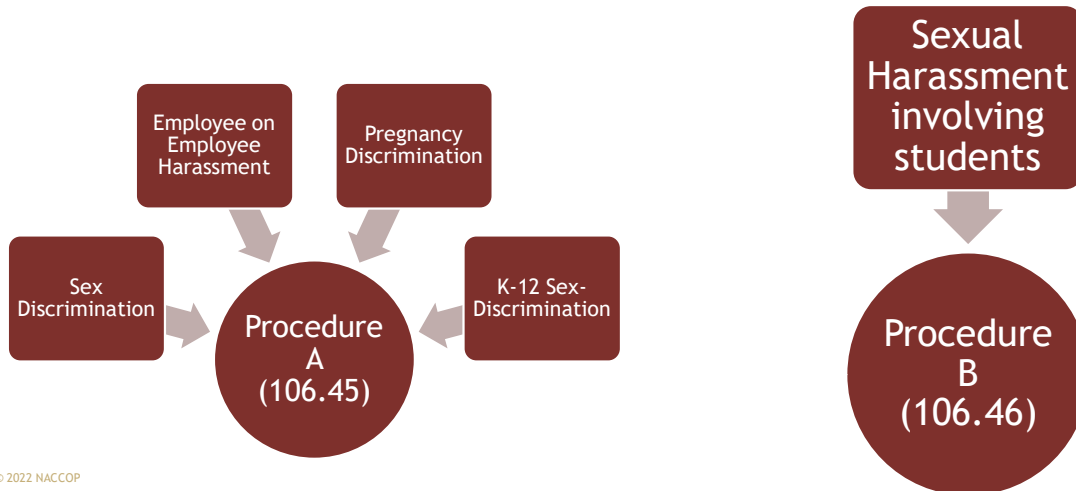
### Hard

- Delayed report
- Inconsistent versions
- Incapacitated parties
- Absent

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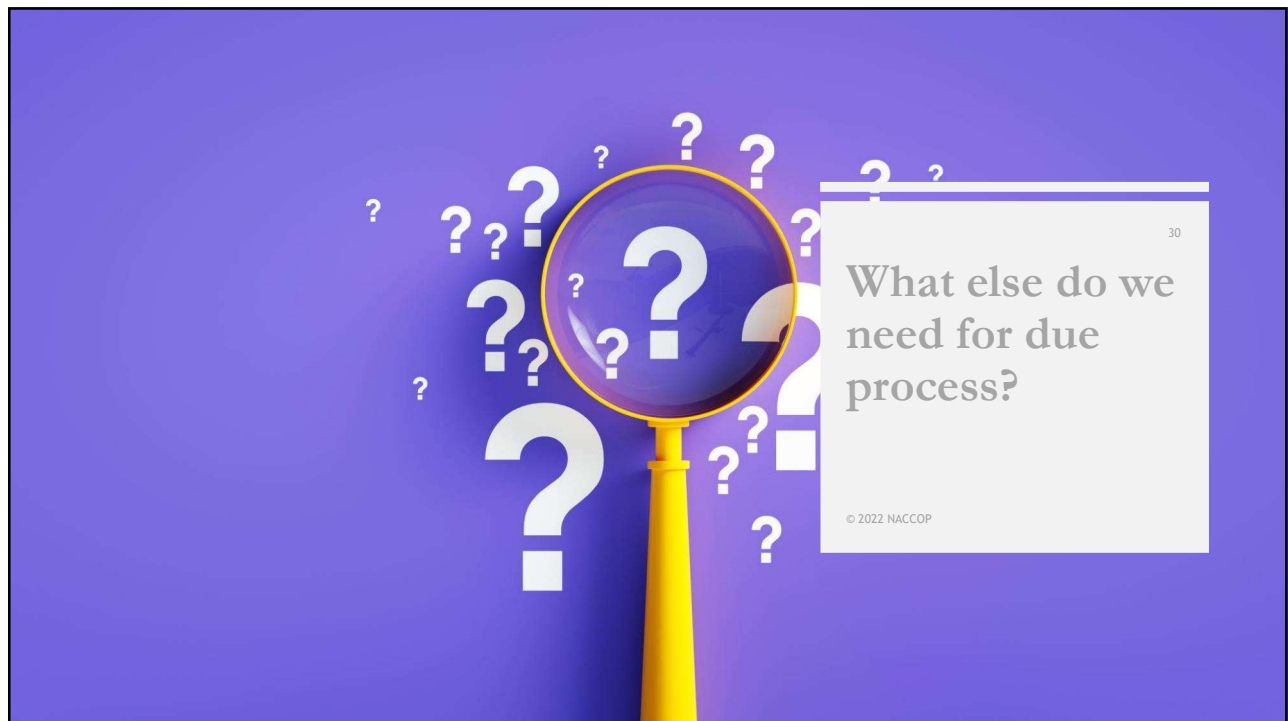
## Two Grievance Procedures



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## The Report



Four students from your college are arrested. They are accused of drugging your school's librarian and stealing \$5 million dollars worth of rare books from your school's library. Your president says, "kick them out." What due process rights should they get before you do so? (And does the librarian have any rights?)

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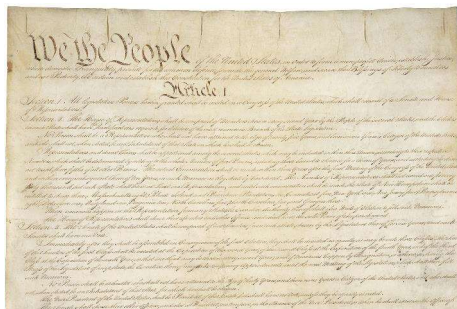
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## What process is due?



Public



Private



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## When do we feel due process is warranted?

- Any discipline
- Academic discipline
- Behavior discipline
- Short-term Suspension
- Long-term Suspension
- Expulsion

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## Comparing Notice



2020	NEW 106.45 (DOES NOT NEED TO BE IN WRITING!!!)	NEW 106.46
Grievance Procedures	YES	YES
"Sufficient details" (parties, conduct, date, location)	YES "Sufficient information"	YES "Sufficient information"
Statement that retaliation prohibited	YES	YES
Respondent is presumed not responsible		YES
Right to advisor of choice		YES
Right to inspect and review evidence		YES (Evidence OR summary in report with evidence by request)
Prohibition on false statements*		YES

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## RULES OF A HEARING (Q43 & Q44)



“ . . . may decide whether or how to place limits on evidence introduced at a hearing that was not gathered and presented prior to the hearing.”

“The preamble adds that a school may adopt a rule stating that duplicative questions are irrelevant.”

“ . . . a postsecondary school could limit the role of advisors to relaying questions drafted by their party.”

“ . . . a school may prohibit advisors from questioning parties or witnesses in an abusive, intimidating, or disrespectful manner.”

“ . . . a school may enforce a rule requiring that relevant questions must be asked in a respectful, non-abusive manner.”

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