

**Title IX and the Career Center**

Warren County Career Center  
June 14 and 16, 2023

with Beverly Meyer, Bricker Graydon LLP



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**Presenter: Beverly Meyer**

[bmeyer@brickergraydon.com](mailto:bmeyer@brickergraydon.com) | 937.224.1849

Beverly is a partner in Bricker Graydon's Public Sector Industry Group and has been practicing law for 25+ years. During this time, she has helped K-12 and Higher Ed institutions comply with their civil rights responsibilities, including those arising under Title IX. Beverly conducts impartial investigations of discrimination and harassment complaints and also advises and represents school districts and colleges responding to such complaints. She regularly assists K-12 schools with their policy development, investigations processes, and staff trainings.



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**Disclaimers**

*I just can't help myself. After all, I'm a lawyer.*

- I'm not giving you legal advice
- Consult with legal counsel regarding how best to address a specific situation (you are not in this alone)
- I will send you as many copies of these slides as you need
- Feel free to ask questions as they arise
- Let me know if we need a break (really)

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### Posting These Training Materials?

- Yes!
- Your Title IX Coordinator is required by 106.45(b)(10)(i)(D) to post materials used to train Title IX personnel on its website
- We know this and will make this packet available to you electronically to post

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### Agenda – Part One *The “New” Title IX*

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|---|--|
| <ul style="list-style-type: none"> <li>• General overview</li> <li>• Definition of sexual harassment</li> <li>• Jurisdiction</li> </ul> | <ul style="list-style-type: none"> <li>• Retaliation</li> <li>• Grievance process</li> </ul> |
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### Introduction

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### Sex Discrimination and Harassment

- Title VII and Title IX
- “No person in the United States shall, **on the basis of sex**, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance...”

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### Sex Discrimination under Title IX

- Treat one person **differently** from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;
- Provide **different** aid, benefits, or services or provide aid, benefits, or services in a different manner;
- Deny any person any such aid, benefit, or service;
- Subject any person to separate or **different** rules of behavior, sanctions, or other treatment

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### Sex Discrimination under Title IX

- Apply any rule concerning the domicile or residence of a student or applicant;
- Aid or perpetuate discrimination against any person by **providing significant assistance to any agency, organization, or person which discriminates on the basis of sex** in providing any benefit or service to students or employees; or
- Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity. 34 C.F.R. § 106.31(b).

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### What Does "Sex" Mean?

- Biological Sex
- Gender
- Sex Stereotyping
- Sexual Orientation and Gender Identity\*\*
- "Sex" as a verb

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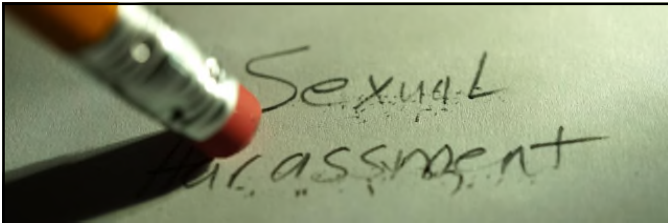
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**Sexual Harassment Definitions under the New Title IX Regulations**

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### New Definition of Sexual Harassment under Title IX

- **Sexual harassment** means conduct on the basis of sex that satisfies one or more of the following:
  - **Quid pro quo** – An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct
  - **Hostile environment** – 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
  - **Clery crimes** – Sexual assault, dating violence, domestic violence, or stalking [Clery regulatory definition cites omitted]

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**Jurisdiction**

- Under the new regulations, if you do not have jurisdiction you must dismiss the Title IX complaint
- This does not preclude supportive measures or other Code of Conduct violations

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**Jurisdiction – Practical Considerations**

Sometimes it will be immediately clear whether there is jurisdiction

Sometimes you will not know until after the grievance process starts

TIXCs should be thinking about jurisdiction from the outset and revisiting throughout the process

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**No Jurisdiction If:**

- Alleged conduct would not be sexual harassment if proved
- Occurred outside of the US or
- Occurred outside of WCCC's education program or activity

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### Alleged conduct would not be sexual harassment if proved

For purposes of jurisdiction, **assume the allegations are true**

- Examples
  - Not “on the basis of sex”
  - Not pervasive (but where is the line?)

Most often, you have to conduct an investigation to determine this threshold question

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### Definition of “Educational Program or Activity”

“Educational program or activity” includes **locations, events, or circumstances over which** the recipient exercised **substantial control** over **both the respondent and the context** in which the sexual harassment occurs...

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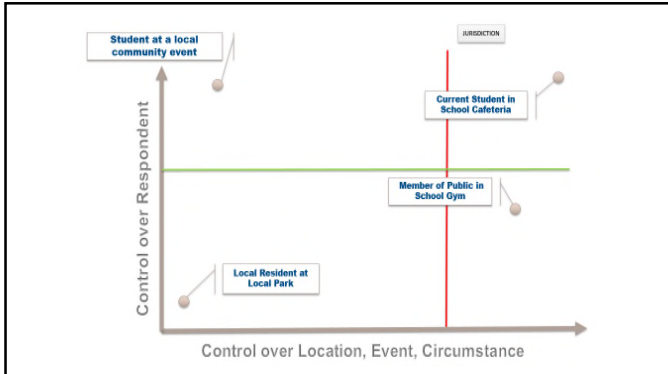
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**Retaliation**

- Retaliation section added to new Title IX regs at 34 C.F.R § 106.71
- Retaliation defined in part: “No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part”...

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**Retaliation**

- Report this **immediately** to the Title IX Coordinator
- Is there already a no-contact order and if not, do you want one?
- Adverse action against an individual
- Abuse, violence, threats, and intimidation
- More than just someone expressing their opinion

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**Career Center Obligations**

- Update policies (po2266; ag2266)
- Address complainant and provide supportive measures
- Mandatory reporting
- Informal resolution
- Investigation
- Formal grievance process: notice, report, decision, appeal

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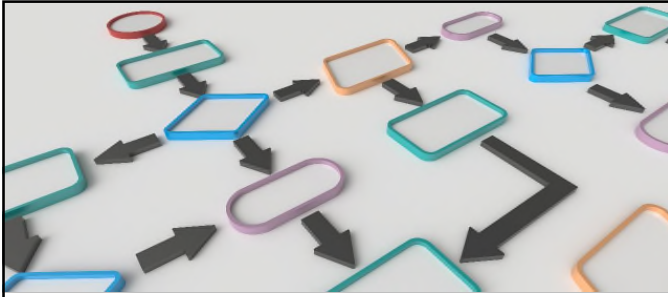
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Grievance Procedures

Horizontal lines for notes.

Formal Complaint

- Formal Complaint – “a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment”
Complainant – “an individual who is alleged to be the victim of conduct that could constitute sexual harassment”

Horizontal lines for notes.

General Requirements: Due Process/ Fundamental Fairness

- No sanctions until grievance process is completed
Treat complainants/respondents equitably; no sanctions until process complete
No conflict of interest or bias; trained staff
Presumption that respondent is not responsible
Reasonably prompt timeframes
Range of possible sanctions/remedies

Horizontal lines for notes.



**General Requirements: Due Process/  
Fundamental Fairness**

- Evidentiary Standard – Preponderance or Clear and Convincing
  - Same standard applicable to complaints against students and employees
  - Same standard applicable to all complaints of sexual harassment
- Describe supportive measures
- Exclude privileged information

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**Notice to Parties**

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| <ul style="list-style-type: none"> <li>• Grievance Process</li> <li>• Allegations           <ul style="list-style-type: none"> <li>○ Sufficient details known at the time               <ul style="list-style-type: none"> <li>– Identity of parties; date and location of alleged incident; alleged conduct</li> </ul> </li> <li>○ Sufficient time to prepare response</li> </ul> </li> </ul> | <ul style="list-style-type: none"> <li>• Statement that respondent is presumed not responsible and that determination will be made at conclusion of grievance process</li> <li>• May have advisor of choice</li> <li>• May inspect/review evidence</li> <li>• Inform of Code of Conduct prohibiting false statements</li> <li>• Notice of any additional allegations that may arise</li> </ul> |
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**Dismissal and Consolidation**

**Dismissal of Formal Complaints**

- Mandatory
  - Alleged conduct, even if proved, would not fall within the scope of Title IX
  - Does not preclude action under other Code of Conduct provision
- Permissive
  - Complainant withdraws formal complaint
  - Respondent is no longer enrolled/employed
  - Specific circumstances prohibit gathering sufficient evidence
- Must provide notice of dismissal to parties

**Consolidation of Formal Complaints**

- Permissive – where allegations arise out of same facts/circumstances

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### Investigation Process

- Burden of proof and burden of gathering evidence is on recipient
- Equal opportunity to present witnesses
- May not prohibit parties from discussing allegations or gathering/presenting evidence
- Provide same opportunity to have others present including advisor of choice
- Written notice of any hearings/interviews/meetings

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### Investigation Process

#### Provide All Evidence to Parties

- Allow 10 days to review
- Allow parties to submit a written response before completion of Investigative Report

#### Prepare Investigative Report

- Provide to parties 10 days prior to determination of responsibility
- Allow parties to submit written response

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### Hearings and Cross Examination

#### Live Hearings

- Optional for K-12\*\*
- K-12 program hearing does not have to provide the right to cross examination
- BUT under the new Title IX regulations, "post-secondary institutions" who receive federal funds must provide live cross-examination hearings before any determination and discipline can be issued against a respondent for sexual harassment accusations under Title IX

A post-secondary institution is defined as "an institution of graduate higher education as defined in section 106.2(l), and institutions of undergraduate higher education as defined in 106.2(m), an institution of professional education as defined in section 106.2(n) or an institution of vocational education as defined in section 106.2(o)." 34 C.F.R. § 106.30(b).

Vocational education defined in 34 CFR Section 106.2(o) "means a school or institution (except an institution of professional or graduate or undergraduate higher education) which has as its primary purpose preparation of students to pursue a technical, skilled or semi-skilled occupation or trade, or to pursue study in a technical field, whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers fulltime study."

(See Policy 2266 and its use of the word "may")

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## Hearings and Cross Examination

### With or Without Hearing

- Allow parties to submit written questions of other parties/witnesses
- After distribution of Investigative Report; before determination regarding responsibility
- Provide answers and allow limited follow up
- Questions and evidence regarding complainant's sexual predisposition or prior sexual behavior prohibited (very limited exceptions)

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## Written Determination of Responsibility

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|---|---|
| <ul style="list-style-type: none"> <li>• Note: Decision maker cannot be investigator or Title IX Coordinator</li> <li>• Identification of the allegations</li> <li>• Description of procedural steps</li> <li>• Findings of fact</li> </ul> | <ul style="list-style-type: none"> <li>• Conclusions</li> <li>• Statement of result as to each allegation, including determination, sanctions, and remedies</li> <li>• Procedures and bases for appeal</li> <li>• Provided to parties simultaneously</li> </ul> |
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## Appeals

### Required bases:

- Procedural irregularity that affected the outcome
- New evidence not reasonably available at time determination was made that could affect the outcome
- Conflict of interest/bias

**Additional bases permitted -**  
Offered to both parties equally

### Appeals process:

- Notify other party in writing when appeal is filed
- New decision maker
- Allow opportunity for both parties to submit written statement
- Written decision with result and rationale
- Provided to both parties simultaneously

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**Informal Resolution**

**Procedures may include informal resolution process**

- May not be mandatory
- May not be offered unless formal complaint is filed
- May not be offered in allegation by student against employee

**Requirements**

- Written notice of: allegations; requirements of process; right to withdraw from process and resume formal grievance process; consequences of participation including the records that will be maintained or could be shared
- Obtain voluntary, written consent from both parties

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**Recordkeeping – Maintain for 7 Years**

Investigation Records (including determination, recordings, transcripts, sanctions, remedies)

Appeal Records

Record of any Informal Resolution

Training materials – posted on website/available upon request

Documentation of recipient’s response to all reports and formal complaints

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**Agenda – Part Two      *The TIXC***

- Expectations of the Title IX Coordinator
  - Initial Implementation Actions
  - When There Has Been a Report or Complaint
  - Overview of Grievance Procedure Requirements From the TIXC Perspective
  - Other Responsibilities for Title IX Coordinator

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**Initial Implementation Requirements**

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**Designate Title IX Coordinator**  
**§106.8(a)**

- Designate at least one employee – Title IX Coordinator – to coordinate compliance
- Inform the following persons of the identity of the Title IX Coordinator:
  - Applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding CBAs or professional agreements with the recipient (i.e., WCCC)

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**What must notice include?**  
**§106.8(a)**

- Notice of the TIXC **must** include, for the employee or employees designated as the Title IX Coordinator:
  - The name or title
  - Office address
  - Electronic mail address
  - Telephone number

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**Revise/Adopt TIX Grievance Procedures**  
**§106.8(c)**

- Implementation Date – August 14, 2020 (so in theory, these steps should already be complete!)
- Engage relevant parties
  - HR, unions, key administrators (e.g., principals, SPED director)
- Identify the TIX Team
  - Investigators, decision-makers, appeal entities, informal resolution facilitators

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**Revise/Adopt TIX Grievance Procedures**  
**§106.8(c)**

- Make grievance procedure “elections”:
  - All protected classes anti-discrimination policy vs. separate sex discrimination policy?
  - Standard of evidence election – preponderance of the evidence or clear and convincing?
    - Standard must be consistent across CBAs and/or Employee Handbooks that address sexual harassment
  - Incorporating the live hearing

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**Revise/Adopt TIX Grievance Procedures**  
**§106.8(c)**

- Ensure that the Code of Conduct and Handbooks are reconciled with the new procedure
  - How will WCCC address conflicts arising between the grievance procedure and established staff/student disciplinary frameworks?
  - Does the Code of Conduct require an update?

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**Additional Steps**

- Disseminate the policy, grievance procedure, and contact information for the TIX Coordinator (§106.8(b))
- May want to facilitate and/or schedule training for **all** WCCC employees
- Will need to facilitate and/or schedule specific and targeted training for the TIX Team Members (§ 106.45(b)(1)(iii))

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**Training Requirements – All TIX Team Members**

- Definition of sexual harassment
- Scope of WCCC’s education program or activity
- How to conduct investigation and grievance process, including hearings, appeals, and informal resolution processes

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**Training Requirements – All TIX Team Members**

- How to serve impartially
  - Avoiding prejudice of the facts
  - Conflicts of interest
  - Bias (use reasonable person/”common sense” approach)
  - Not relying on sex stereotypes

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**Training Requirements – Decision-Makers**

- Technology to be used at a live hearing
- If live hearings provided for as part of the grievance procedure:
  - Issues of relevance of questions and evidence
  - Including applicability of rape shield laws

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**Training Requirements – Decision Makers**

Note that if your institution is subject to the Clery Act, your decision-maker must receive **annual** training on:

- Issues related to sexual assault, domestic violence, dating violence, stalking – *not* covered here; and
- How to conduct an investigation and hearing process that protects the safety of victims and promotes accountability

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**Training Requirements – Investigators**

- Issues of relevance to create an investigative report that fairly summarizes relevant evidence

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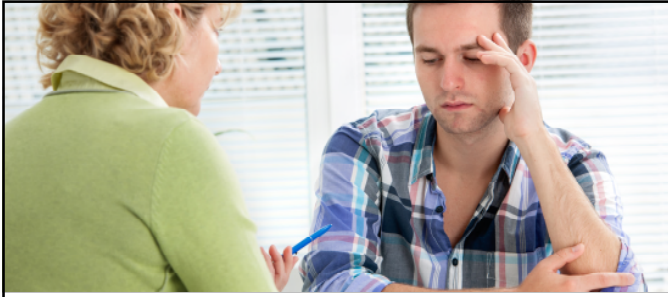
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**Process and Implementation Considerations**

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**“Actual Notice”**

**§ 106.30(a)**

- TIX Coordinator responsible for receiving reports of conduct that **could** constitute sex discrimination or harassment
- Also responsible for receiving **formal** complaints that are signed by complainant
- Actual notice imputed not just when TIX Coordinator is notified, **but also** when someone with authority to correct the harassment is notified, **or** when **any** elementary/secondary school employee has knowledge

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**Career Center’s Response to Sexual Harassment**

**§ 106.44(a) and (b)**

- **WCCC must respond promptly in a manner that is not deliberately indifferent**
- WCCC must treat complainants and respondents equitably by offering supportive measures
- In response to formal complaint, WCCC must follow a grievance process
- **Reminder: no sanctions until process is complete**

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**Specific Required Responses**

§ 106.44(a)

- The TIX Coordinator has certain **specific required responses** to sexual harassment
  - Promptly contact complainant to discuss availability of supportive measures
  - Consider complainant's wishes with respect to supportive measures
  - Inform complainant of availability of supportive measures with or without the filing of a formal complaint
  - Explain to complainant the process for filing formal complaint

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**Voluntary Informal Resolution**

§ 106.45(b)(9)

- TIX Coordinator may need to facilitate scheduling and participation, if elected by complainant
- Informal resolution may occur, provided the career center gives written notice to the parties of the allegations, and that they can withdraw at any time and resume formal grievance process
- **May not** be used to resolve employee-student harassment allegations
- Could include mediation, restorative justice practices

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**Jurisdictional Determinations**

§ 106.45(b)(3)

- **Mandatory Dismissals**
  - Would not constitute sexual harassment even if proved
    - Quid pro quo, hostile environment, Clery crimes
  - Did not occur in the recipient's education program or activity
  - Did not occur against a person in the United States

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**Definition of “Educational Program or Activity”**

“Educational program or activity” includes **locations, events, or circumstances over which** the recipient exercised **substantial control** over **both the respondent and the context** in which the sexual harassment occurs...

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**Teacher’s Sexual Relationship with Student**

Control over respondent, but what about context?  
“[A] teacher’s sexual abuse of a student ‘undermines the basic purposes of the educational system’ thereby implicitly recognizing that a **teacher’s sexual harassment of a student is likely to constitute sexual harassment ‘in the program’ of the school even if the harassment occurs off campus**”

- Preamble at p. 30200 quoting *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 US 274 (1998)

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**Jurisdictional Determinations**  
§ 106.45(b)(3)

- **Discretionary Dismissals**
  - Complainant notifies TIX Coordinator in writing they would like to withdraw the formal complaint
  - Respondent is no longer enrolled or employed by the recipient
  - Specific circumstances prevent the recipient from gathering sufficient evidence

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**Jurisdictional Determinations**

§ 106.45(b)(3)

- Preamble: Permitting recipient to dismiss because they deem allegation meritless or frivolous without following grievance procedure would defeat the purpose of the regulations
- Must promptly send written notice of dismissal/reasons simultaneously to the parties
- Jurisdictional issues can arise at any time, even during the investigation

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**Hypothetical – Jurisdictional Issues**

- Student trip to France
- French teacher and parents chaperone
- Students leave hotel and go to a bar near the Moulin Rouge
- Allegation of forced sexual contact between students
- Respondent transfers to another school after the trip

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**Notice of Allegations to Parties**

§ 106.45(b)(2)

- Must include sufficient details known at the time, and with sufficient time to prepare a response before any initial interview
- Sufficient details include:
  - Identities of the parties
  - Conduct allegedly constituting sexual harassment
  - Date/location of alleged incident

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**Notice of Allegations to Parties**

§ 106.45(b)(2)

- Needs to be supplemented if new allegations are to be included
- Must include statement that respondent is presumed not responsible for alleged conduct and that determination regarding responsibility is made at the conclusion of the grievance process
- Must inform the parties that they may have advisor of their choice who may be an attorney and who may inspect and review evidence

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**Implement Supportive Measures**

§ 106.30(a)

- TIX Coordinator “is responsible for coordinating effective implementation of supportive measures” to the parties
- **Preamble:** TIXC “must serve as the point of contact for the affected student to ensure that the supportive measures are effectively implemented so that the burden of navigating paperwork or other administrative requirements” does not fall on the student receiving the supportive measures.

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**Supportive Measures**

§ 106.30(a)

- **Elements:** Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, without fee or charge to the parties
- **Availability?** Before or after filing formal complaint, or where no formal complaint is filed
- **Purpose:**
  - Designed to restore or preserve equal access to recipient’s program/activity
  - Protect safety of all parties or recipient’s educational environment, or deter sexual harassment

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**Supportive Measures Defined within Regulation**

- 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/housing locations
- Leaves of absence
- Increased security/ monitoring of certain areas on campus

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**Hypothetical – Supportive Measures**

- 17yo student allegedly commits multiple off-campus sexual assaults against classmates over the summer
- Criminal investigation ongoing; court issued protective order requiring student to stay at least 15 feet away from complaining students at all times
- Complainants scared to be around respondent
- Respondent maintains innocence; fears harassment or retaliation

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**Thoughts on Hypothetical**

- Raises the issue of off-campus conduct and on-campus climate.
- Under R.C. §3313.66, you must have a connection to campus to discipline under your student code of conduct (Extracurricular codes of conduct can generally be broader than this)
- Need to evaluate whether the off-campus misconduct has created hostile environment on campus is affecting access to your program.

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**Supportive Measures – More Requirements and Some Best Practices**

- Must consider the complainant’s wishes
- The school should follow up with both parties regarding the efficacy of the supportive measures
- Supportive measures may be appropriate to offer regardless of whether the allegation has been substantiated or fully investigated because it preserves access and deters harassment
- If OCR doesn’t discuss supportive measures in non-TIX guidance, should we provide them for non-TIX cases?

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**Supportive Measures – Confidentiality & Recordkeeping**

- Requirement to maintain as confidential any supportive measures provided. 34 CFR §106.30
- Requirement to create and maintain records, for period of seven years, regarding any actions taken in response to report or formal complaint of sexual harassment **includes supportive measures**. 34 CFR §106.45(b)(10)(ii)
- If recipient does not provide complainant with supportive measures, it must document the reasons why this was not clearly unreasonable in light of known circumstances.

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**Emergency Removal**  
§ 106.44(c)

- WCCC can issue emergency removals, provided that it:
  - Undertakes **individualized** safety and risk analysis
  - Determines that an **immediate threat** to **physical** health or safety of **any student/individual** arising from the allegations justifies removal
  - Provides respondent with **notice and opportunity to challenge decision immediately**
- Does not modify IDEA, Section 504, or ADA rights

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**Emergency Removal**

§ 106.44(c)

- When available?
  - During an investigation or when no grievance is pending
  - Not limited to violent offenses
- Safety and risk analysis
  - More than a generalized or speculative belief of threat
  - Based on facts, not assumptions
  - Threat must be immediate and one that justifies removal
  - Conducted by someone impartial – may need training

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**Emergency Removal**

§ 106.44(c)

- Notice and opportunity to challenge determination after removal
  - No requirement of written notice, but recommended
  - Notice must describe reasons for finding a threat
  - WCCC has discretion to
    - o Determine who conducts hearing
    - o Establish hearing procedures
- Timeline for challenge
  - Immediately after removal (without delay / as soon as possible given the circumstances)

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**Emergency Removal**

§ 106.44(c)

- Removal v. Supportive Measure
  - Consider whether the action is disciplinary or punitive
  - Would it cause an unreasonable burden on the respondent?
  - Fact specific analysis
- Consider scope of removal (all or part of program)

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**Considerations – Emergency Removal**

- Risk can be to anyone
- Alignment with general emergency removal/discipline procedures
- Implications for reassignment to alternative programs
- Considerations for students with disabilities

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**Emergency Removal – Employees**

§ 106.44(d)

- Administrative leave for employees remains available
- Nothing in the regulations dictates whether such leave is paid or unpaid

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**Basic Requirements for Formal Grievance Process**

§ 106.45(b)(1)

- Treating complainants and respondents equitably
- Remedies designed to restore or preserve equal access to Career Center’s education program or activity
- Objective evaluation of all relevant evidence and credibility determinations
- Presumption that respondent is not responsible for alleged conduct

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**Basic Requirements for Formal Grievance Process**

**§ 106.45(b)(1)**

- Reasonably prompt timeframes for filing and resolving appeals and informal resolution processes
- Providing a list, or describing a range, of possible disciplinary sanctions and remedies
- Describing standard of evidence to be used to determine responsibility
- Describing procedures and permissible bases for appeal
- Describing range of available supportive measures

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**Facilitate Inspection/Review of Evidence**

**§ 106.45(b)(5)(vi)**

- **During** investigation, TIX Coordinator (or Investigator) may need to facilitate parties' opportunity to inspect and review any evidence obtained as part of the investigation
- Parties are to be provided **at least 10 days** to submit a written response to the evidence before completion of report
- Review process may be managed by TIX Coordinator

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**Providing Written Investigative Report**

**§ 106.45(b)(5)(vii)**

- After **completion** of investigation, TIX Coordinator (or Investigator) **may** be responsible for providing the parties a copy of the written investigative report
- Parties are to be sent the report **at least 10 days** in advance of reaching a determination of responsibility
- Review process and exchange of written questions may also be coordinated by TIX Coordinator

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**Submission of Written Questions (K-12)**  
§ 106.45(b)(6)(ii)

However, **the decision-maker must** afford each party “the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party” and also to **explain any decision to “exclude a question as not relevant.”**

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**Live Hearing (Adult Education)**  
§ 106.45(b)(6)(ii)

- **If provided**, TIX Coordinator will need to facilitate scheduling and completion of a live hearing

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**Determination and Remedies**  
§ 106.45(b)(7)(iii), (b)(7)(iv)

- TIX Coordinator (or possibly the decision-maker) will need to disseminate the written determination to the parties simultaneously
- TIX Coordinator is responsible for effective implementation of any remedies
- TIX Coordinator will want to offer both parties an equal opportunity to appeal determination regarding responsibility, or dismissal of formal complaint or any allegations therein

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**Offer Opportunity to Appeal**

§ 106.45(b)(8)

- TIX Coordinator will want to offer both parties an equal opportunity to appeal determination regarding responsibility, or dismissal of formal complaint or any allegations therein
  - Procedural irregularity that would affect the outcome
  - New evidence that was not available at the time of the determination that would affect the determination
  - Member of TIX Team had conflict of interest or bias that affected the outcome

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**Other Title IX Coordinator Responsibilities**

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**TIXC May File Formal Complaint**

§ 106.30(a)

- After receiving multiple reports about same respondent
- Must remain free from conflicts of interest and bias, and must serve impartially
- Is not acting as complainant
  - Not participating in the investigation
  - Not submitting questions or cross examining on behalf of the complainant

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**Recordkeeping**

§ 106.45(b)(10)(i)(A), (B), (D)

- TIX Coordinator will want to develop a process for required recordkeeping, including:
  - Maintaining all investigatory and appeal records for a period of seven years
  - Collecting and publicly posting on its website **all** materials used to train TIX Team

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**Intersection of Employee Issues with Title VII**

- USDOE states Title IX and Title VII have “no inherent conflict” (i.e., employees have same rights as students), **but...**
- Title VII “severe **or** pervasive” vs. Title IX “severe, pervasive, **and** objectively offensive”
- Title VII doesn’t require 10 days to review evidence and 10 days to respond to report
- And what about student employees?

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**Intersection of Employee Issues with Title VII**

- USDOE states that complaint and/or disciplinary measures in CBAs or employee handbooks may need to be revisited/renegotiated to comply with Title IX
- Board Policy may also need to be revisited

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**Hypothetical – Employee-Student Allegations**

- Teacher's suggestive statements make student so uncomfortable she wants to drop the class
- Her parent complains to the superintendent
- Student is insistent that she wants nothing more than to drop the class

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**Hypothetical – Employee-Student Allegations**

- If TIX issue, informal resolutions not available
- **Make sure the student is safe** – remedy any effects – remove teacher, possibly run TIX investigation **and** parallel conduct investigation (unprofessional behavior, boundary violations)
- Professional misconduct report?

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**Prohibition Against Retaliation**  
§ 106.71

- Retaliation prohibited, including intimidation, threatening, coercion, or discrimination against any individual:
  - For purpose of interfering with any right or privilege secured by Title IX
  - Because an individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing
  - Includes charges for code of conduct violations that do not involve sex discrimination/harassment but arise out of the same facts/circumstances

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**Agenda – Part Three *The Investigator***

- Bias and conflicts of interest
  - More bias and conflicts of interest
  - The effects of trauma in TIX
  - Relevancy
- Consent
  - Investigative techniques
  - Takeaways
  - *Note: These concepts also apply in the decision-making process*

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**Make No Assumptions: Being Impartial, Avoiding Conflicts of Interest, and Bias**

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**Being Impartial, Unbiased, without Conflict of Interest, and Avoiding Pre-Judgment of Facts**

- We will discuss each of these individually and provide examples, but some of the factors for each overlap.
- For example, being impartial is greatly aided by not pre-judging facts.
- Discussed in preamble on pp. 821-843; 1720-1726

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**Being Impartial**

- The preamble discussion appears to indicate that being impartial means being free from bias
- “The Department believes that keeping this provision focused on ‘bias’ paired with an expectation of impartiality helps appropriately focus on bias that impedes impartiality.”

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**Bias: Concerns Raised in Comments in Preamble**

- Preamble concerns about all paid staff members being biased in favor of institution
- Institutional bias: cover-ups
- Past tweets that appear to support complainants or respondents
- Being a feminist
- “Appearance of bias” v. actual bias

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**Conflict of Interest: Concerns Raised in Comments in Preamble**

- Decision-maker and financial and reputational interest aligned with institution (or to protect institution)
- Co-mingling of administrative and adjudicative roles
- Title IX Coordinator supervisor of decision-maker
- Past advocacy for victims’ or respondents’ rights (example also for bias)
- “Perceived conflict of interest” v. actual conflict of interest

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**Preamble Discussion: Bias and Conflict of Interest**

- 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 functions free from conflicts of interest and bias.”
- No *per se* prohibited conflicts of interest under 106.45(b)(1)(iii) in using employees or administrative staff. (p. 826)
- No *per se* violations of 106.45(b)(1)(iii) for conflict of interest or bias for professional experiences or affiliations of decision-makers and other roles in the grievance process. (p. 827)

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**Preamble Discussion: Bias and Conflict of Interest**

- Discretion to institutions on how to comply with providing decision-maker role (and other roles in the grievance process) without bias or conflict of interest
- Notes that excluding certain professionals out of fear of bias would improperly exclude experienced, knowledgeable individuals who are capable of serving impartially (citing history of working in the field of sexual violence). (p. 827)

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**Discussion Recommendation for Assessing Bias**

“Whether bias exists requires examination of the particular facts of a situation and the Department encourages recipients to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased, exercising caution not to apply generalizations that might unreasonably conclude that bias exists...bearing in mind that the very training required by 106.45(b)(1)(iii) is intended to provide Title IX personnel with the tools needed to serve **impartially** and without bias such that the prior professional experience of a person whom a recipient would like to have in a Title IX role need not disqualify the person from obtaining the requisite training to serve impartially in a Title IX role.”

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**Examples in Discussion for Unreasonable Conclusion that Bias Exists**

“For example, assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents.”

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**Examples in Discussion for Unreasonable Conclusion that Bias Exists**

- Department also cautioned parties and recipients from concluding bias or possible bias “based solely on the outcomes of grievance processes decided under the final regulations.”
- Explained that this means, the “mere fact that a certain number of outcomes result in determinations of responsibility, or non-responsibility, does not necessarily indicate bias.”

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**Avoiding Pre-Judgment of Facts at Issue**

- A good way to avoid bias and ensure impartiality: avoiding prejudgment of facts
- Keep an open mind and actively listen to all the facts presented
- Each case is unique and different

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### Avoiding Sex Stereotypes

- "Must" not rely on sex stereotypes: Also helpful to avoiding pre-judgment of facts, remaining unbiased and impartial
- Pp. 831-837 in the preamble
- Comments include examples of sex stereotypes in comments (e.g., Women have regret about sex and lie about sexual assaults, men are sexually aggressive or likely to perpetrate sexual assault)
- Discussion – prohibition against sex stereotypes, but not feasible to list them (p. 835)
  - Different from evidence-based information or peer-reviewed scientific research, including impact of trauma
  - Cautions against an approach of "believing" one party over the other and notes 106.45(b)(1)(ii) precludes credibility determinations based on a party's status as a complainant or respondent

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### Avoiding Sex Stereotypes

- Consideration of marginalized groups: people with disabilities, people of color, people who identify in the "LGBTQ" community (pp. 1723-25; 1732-1737)
- Preamble discusses concerns by commentators about stereotypes and accommodations for individuals with disabilities under the ADA, and individuals with developmental and cognitive disabilities
  - Preamble discusses concerns from people of color for cultural and racial stereotypes
  - Preamble discusses concerns regarding stereotypes of the "LGBTQ" community

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### Considerations: Potential Responses to Trauma

- Delayed reporting
- Difficulty remembering specifics (could also be due to drugs/alcohol)
- Reluctant reporting
- Remaining in a relationship or living arrangement with the respondent
- Being calm and composed after an assault
- Failing to identify the accused

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**Disclaimer**

- This section uses the terms “rape,” “assault,” “victim,” and “perpetrator” – CRIMINAL, not POLICY
- This section is about rape myths and trauma as **context for what may or may not be someone’s internal dialogue**, to help you ask sensitive questions
- Both parties may be traumatized – and the trauma may be **completely unrelated** to the incident you’re investigating

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**Disclaimer**

- Do **not** assume that because there are signs of trauma, the trauma was caused by the respondent and therefore the respondent violated the policy
- Do **not** assume that because there are not signs of trauma, therefore nothing bad happened

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**Know the Facts**

- Most rapes and assaults are committed by perpetrators that know their victims
- Rapes and assaults can happen in a committed relationship
- Rapes and assaults can happen between individuals of any gender
- Victims of intimate partner violence may return to their perpetrator for a variety of reasons that may not seem rational to outsiders looking in

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### Know the Facts

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- Drug-facilitated sexual assault is common, and the most common drug used is alcohol
- Being drunk doesn't excuse a perpetrator's own behavior
- A wide variety of responses are normal for a victim of trauma (e.g., calm, hysterical, angry, in denial, detached, withdrawn, or in shock) – don't make assumptions about how they "should act"

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### Trauma and the Brain

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- Trauma affects the way the brain **encodes and decodes memories** of what occurred
- Fight, flight, or freeze

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### Why Don't People Tell Right Away?

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- Fear of retaliation
- Fear of not being believed

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### Why Is Being Trauma Informed Important?

How you handle a person in your first meeting can make the difference between:

- Cooperation in the investigation **vs.** refusal to cooperate
- Retraumatization **vs.** supportive environment
- Putting off other potential complainants or witnesses from coming forward **vs.** encouraging future reports
- Lawsuit or OCR complaint (or both) **vs.** supportive and cooperative relationship

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### Words Have Power

- Victim vs. survivor vs. complainant
- **Stick with policy language** to the extent possible
  - Complainant
  - Respondent

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### Culture Affects Response

- |   |   |
|---|---|
| <ul style="list-style-type: none"> <li>• Age of consent</li> <li>• Dating vs. arranged marriages</li> <li>• Attitudes towards homosexuality</li> <li>• Attitudes towards intimate partner violence</li> </ul> | <ul style="list-style-type: none"> <li>• Cooperating with investigations</li> <li>• Sharing personal information</li> <li>• Reactions toward authority figures</li> <li>• Reactions toward male vs. female</li> </ul> |
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**Culture Affects Response**

- I won't report it if it doesn't feel wrong
- I'll admit it because I don't understand it's prohibited
- I won't report it if I would be a snitch
- It's impolite to look you in the eye, so I'll look down the whole time
- I deserved it, it's normal
- Reporting this would result in serious consequences at home

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**The Bottom Line**

**Be Human & Be a Blank Slate**

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**Issues of Relevancy (NOT Rules of Evidence)**

- The Rules of Evidence do **NOT** apply and **CANNOT** apply (p. 1135)
- "The Department appreciates the opportunity to clarify here that the final regulations do not allow a recipient to impose rules of evidence that result in the exclusion of relevant evidence; the decision-maker must consider relevant evidence and must not consider irrelevant evidence."

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### Issues of Relevancy

**Relevant unless expressly touched upon in Regulations (p. 980):**

- Information protected by a legally recognized privilege
- Evidence about complainant's prior sexual history – unless such questions/ evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct or if the questions/evidence concern specific incidents of the complaint's prior sexual behavior with respect to the respondent and are offered to prove consent
- Party's medical, psychological, and similar records unless voluntary written consent
- Party or witness statements that have not been subjected to cross-examination at a live hearing\*

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### Issues of Relevancy

**The process allows both parties to submit all relevant evidence:**

- Similarly 106.45(b)(6)(i)-(ii) directs the decision-maker to allow parties to ask witnesses all relevant questions and follow-up questions (p. 980)
- A recipient may not adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice (p. 981)

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### Issues of Relevancy

- "[D]oes not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by recipient's decision-maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with 106.45 and apply equally to both parties." (p. 981)

**BUT**

- "[I]f a recipient trains Title IX personnel to evaluate, credit, or assign weight to types of relevant, admissible evidence, that topic will be reflected in the recipient's training materials." (p. 978)

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**Relevancy: Legally Privileged Information**

Section 106.45(b)(5)(i): when *investigating* a formal complaint, recipient:

- “[C]annot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party’s voluntary, written consent to do so **for a grievance process under this section.**”

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**Relevancy: Legally Privileged Information**

Section 106.45(b)(1)(x):

- A recipient’s grievance process **must...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.

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**Relevancy: Legally Privileged Information**

- Preamble identifies medical and treatment records.
- Other typical privileges recognized across jurisdictions but with variations (will want to involve your legal counsel for definitions in your jurisdiction):
  - Attorney-client communications
  - Implicating oneself in a crime
  - Confessions to a clergy member or other religious figures
  - Spousal testimony in criminal matters
  - Some confidentiality/trade secrets

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**Consent: Left to Schools to Define**

- No required definition in law, regs, or guidance
- Policy language is going to be critical to your analysis
- We will use standard language for discussion purposes

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**Who Can Never Give Consent?**

- Under age 13 (varies by state)
- Between the ages of 13 and 16, if the other person is over 18 (varies by state)
- A student if the offender is a teacher, administrator, coach, or other person in authority employed by or serving in their school
- Severely cognitively disabled persons
- Those who are incapacitated
- Those who are by law unable to give consent

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**Consent: Some Policies Require...**

- **Clear** – verbal (or non-verbal?) communication
- **Knowing** – Mutually understood as willingness to participate in a sexual activity and the conditions of that sexual activity
- **Voluntary** – Freely and actively given

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**Consent: Some Policies Include...**

- May be withdrawn with clear communication
- Consent for one activity is not consent for everything
- Silence or failure to resist does not constitute consent
- Previous consent does not constitute consent for future activities

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**When Does Consent *Not* Exist?**

- Use of physical force, threats of physical force, physically intimidating behavior, or coercion
- Individual from whom consent is required is incapacitated

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**Evidence of Consent?**

- What words or actions did complainant use to convey consent/non-consent?
  - Must examine sexual contacts, acts in detail
- Was complainant capable of consenting? (Asleep? Passed out? Not understanding what was happening?)

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**Evidence of Consent?**

- Who took off what clothes?
- Who initiated physical contact?
- Who touched who where?
- "They gave consent" = What did you say to them, and what did they say to you?

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**Evidence of Consent?**

- [Ask the respondent] What did complainant say to you and/or what actions did they take to show consent?
  - "How did you know they wanted to have sex?"
- If applicable, what role, if any, did respondent play in complainant's intoxication/incapacitation?

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**Introduction to Investigative Techniques**

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**Initial Review**

- Review notes and information collected by the Title IX Coordinator
- Review Notices to Complainant and Respondent
- Review Policy/Code of Conduct
- Know the Definitions
- Define Scope of Investigation
  - What elements do you think will be disputed?
  - Agreed upon?

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**Begin Evidence List**

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|--|---|
| <ul style="list-style-type: none"> <li>• If there is a criminal investigation, work with law enforcement to collect and preserve evidence</li> </ul> <p><b>Types of evidence</b></p> <ul style="list-style-type: none"> <li>• Electronic communications</li> <li>• Security information</li> </ul> | <ul style="list-style-type: none"> <li>• Pictures, videos, audio</li> <li>• Police reports</li> <li>• Personnel files</li> <li>• Prior complaints against respondent</li> </ul> |
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**Begin Witness List**

- If there is a criminal investigation, work with law enforcement to ensure permission to question witnesses
- Who should be included?
- Who should NOT be included?
- In what order should the witnesses be interviewed?
- Be flexible

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**Craft Questions for Each Witness**

- Refer to the policy
- Consider what information they are likely to have related to each element
- Consider what information they are likely to have that may assist the decision-maker in determining credibility
- Be flexible

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**Organizing for the Interview**

- What should you have with you?
  - Allegations
  - Investigation log
  - Investigation notes cover sheet
  - Pre-prepared questions
  - Evidence you may need to reference or show witness
  - Policy or Handbook

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**Note-taking Tips**

- Use predictable symbols in the margin to easily skim during the interview:
  - ? ← Follow-up questions
  - \* ← Potential evidence
  - W ← Potential witness
- Try to record exact quotes when possible

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**Setting Up the Interview**

- Identify yourself, your role, and a general outline of what you're investigating
- Consider requesting the TIX Coordinator check in with those who fail to respond or refuse to participate
- Don't give up on the interview till you've tried at least 3 times, using at least 2 different methods

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**Set the Stage**

- Make introductions
- Be hospitable
- Give overview of why they are being interviewed
- Explain retaliation policy
- Invite questions

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**Begin Broadly**

- Elicit a monologue about the incident
  - What happened earlier that day before the incident?
  - What happened with regard to the incident?
  - What happened next?

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**Freeze Frames**

- Ask the witness to “freeze” on the moment and describe details
  - What could they see? Feel? Smell? Taste? Hear?
  - Where was the other person? How were they positioned?
  - Where were you? How positioned?
  - What did you say to the other person? Them to you?
  - Describe other person’s tone, demeanor, body language

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**Ask Follow-Up Questions**

- Re-review your notes
- Re-review the elements of each charge
  - Have you elicited all of the information this witness might have about each element?
  - Do you have an understanding of how the witness obtained the information they shared?

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**Credibility**

- Gather facts to assist **decision-maker**
- Ask questions to test memory
- Identify where the witness may corroborate or contradict their testimony, or other witnesses, and physical evidence
- Be sensitive to potential trauma experienced by witnesses

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**When Consent is at Issue**

- Consider the wording and tone of your questions
- Utilize “freeze frame” strategy
- Ask questions about what happened to determine whether there was unspoken consent
- Ask questions to identify whether alcohol/drugs may have played a role regarding consent

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**Closing the Interview**

- Closing questions
- Request copies of all evidence potentially available to the witness
- Discuss confidentiality - but do not prohibit a party from discussing allegations
- Inform the witness of next steps and how to reach you

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**After the Witness Leaves**

- Update investigation log
- Review notes, make corrections/clarifications
- Update witness list
- Update list of evidence to be obtained
- Write down questions to ask other witnesses
- Consider whether appropriate to send email

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**Physical Evidence**

- Follow up on anything identified during interviews
- Is law enforcement involved? Could they be?
- Ensure physical evidence is in a secure location and documented in the investigation log

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**Inspection and Review of Evidence**

**Provide ALL Evidence to both parties and advisors**

- Include everything directly related to allegations, even if you don't expect decision-maker to rely on it
- Allow 10 days to review
- Allow written response
- Follow up where necessary
- Consider responses when preparing report

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**Create Investigative Report**

- Summarize **facts**
- No determination
- Provide to parties and advisors
- Allow 10 days to review

(Need help? Report-writing training and other supports are available!)

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**Key Takeaways for Investigators**

- Study your updated grievance procedures
- Know the definition of sexual harassment and keep the policy language in mind as you interview parties and witnesses
- Identify when/if another policy such as anti-bullying is in play

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**Key Takeaways for Investigators**

- Make sure you understand potential biases (actual or perceived)
- Trauma may affect how someone responds to an incident
- Prepare for your interview with questions and statements
- Start with open-ended questions
- Obtain any documentary evidence that you can

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**Agenda – Part Four *Report Writing***

- Interview summaries
- The investigative report

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**Writing the Interview Summaries**

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**What is your role as investigator?**

As you write a report keep in mind that you are **NOT** the decision-maker

- Remain neutral
- Reach no conclusions
- Make no recommendations

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**Goals**

- Write your interview summaries in narrative form so you can drop them into your report
- Be consistent in terminology
- Be clear as to the source of information – compare:
  - “Bob stated that this happened”
  - “This happened”

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**Structure of an Interview Summary**

- Who, when, where, via what medium?
- Did they have an advisor?
- Did you discuss your role? Their role?
- Did you discuss the prohibition on retaliation?

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**Structure of an Interview Summary**

- Background
  - How does this person connect with the parties and witnesses?
  - Age, year in school
  - Length of employment, position

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**Structure of an Interview Summary**

- Background
  - Monologue
  - Follow-up questions you asked, including responses
  - Evidence requested, evidence provided
  - Witnesses suggested

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**Complete**

- Include screenshots and other reference material directly in summary when possible
- Don't paraphrase a document when you can use direct quotes

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**Unambiguous**

- Could my mother pick up the document and understand what happened?
- Make no assumptions that the reader will understand certain aspects of the community
- Write for a judge and jury to understand with no prior background

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**Relevant**

- Is there extraneous information that is unnecessary to resolve the charges or credibility disputes?
- Is the extraneous information nevertheless appropriate to include?
- Does your report contain any information you are prohibited from including?
- Will the parties read this, and if so, with they focus on the wrong things?

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**Sensitive**

- Will the parties feel heard?
- Will the parties feel blamed?
- Will the parties feel vilified?
- Will the tone otherwise inflame the parties unnecessarily?

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**Empathetic**

- Maintain a non-judgmental tone
- Stay away from charged words of advocacy:
  - Clearly/obviously
  - Innocent/guilty
  - Victim/perpetrator
- Watch your adjectives and adverbs – unless they are in a quote
- Recognize the impact of your words

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**Specific**

- Set the scene visually (will help identify inconsistencies in stories)
- Use quotation marks carefully
- Include details to the level that you can thoroughly understand what it looked like

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**Just the Facts: Synthesizing Evidence Into an Investigative Report**

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**Report Process and Timelines**

- Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint
  - **Include the evidence you don't intend to rely on**
  - **Include inculpatory or exculpatory evidence whether obtained from a party or other source**
  - Purpose: allow each party to meaningfully respond to the evidence prior to conclusion of the investigation.

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**Report Process and Timelines**

- **Prior to completion of the investigative report**, you must send the evidence subject to inspection and review to **each party and the party's advisor**
- You must give the parties at least **10 days to submit a written response**
- **You must consider the responses prior to completion of the investigative report**

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**Report Process and Timelines**

- Create an investigative report that fairly summarizes relevant evidence
- Send it to each party and the party’s advisor for review and a written response **at least 10 days prior issuing the determination regarding responsibility**

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**Disclaimer**

“This document is intended to be a summary of evidence and a description of what was learned through an investigation. Please refer to the full record, including the contents of the evidence packet.”

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**Basic Information**

- Complainant
- Respondent
- Investigator
- When was the complaint made?

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**Basic Information**

- Basic description of charges
- How did the complaint make its way to an investigation?
- Witnesses Interviewed
- Witnesses Not Interviewed (and why)
- Any procedural anomalies that need explained?

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**Applicable Policy Provisions**

- Definition of prohibited conduct alleged
- Related definitions as appropriate (e.g. consent, substantial incapacitation)
- Include verbatim, in entirety

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**Summary of Information**

- Ways to arrange:
  - Chronologically
  - By witness summary
  - By allegation/topic

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**Summary of Information**

- Explain your structure
  - Example: "The information in this report is a summary of the facts. Where there is a difference in the accounts, it is noted in the report. For the sake of clarity, the report is organized chronologically and by subject matter when appropriate."

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**Summary of Information**

- Tell the story chronologically
  - How did the relationship start?
- Citations to the record – always
  - Be helpful for your fact-finders!
- Hearing packet or exhibits – helpful to number the pages sequentially for easy citation

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**When your Report is Finished**

- Send it to each party and the party's advisor for review and written response and to initiate the 10 day questioning phase

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**Agenda – Part Five *The Hearing***

- Cross examination through the questioning phase (K-12)
- Cross examination and the live hearing (Adult Ed.)
- Relevancy
- Hearing processes

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The Questioning Phase

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**After the Investigative Report**

- After the Coordinator sends the investigative report to the parties, they have 10 days to provide a written response. 34 CFR 106.45(b)(5)(vii)

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**After the Investigative Report**

- Before reaching a determination regarding responsibility, the decision maker must:
  - Afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness
  - The decision-maker must explain to the party proposing the question any decision to exclude a question as not relevant. 34 CFR 106.45(b)(6)(ii)

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**After the Investigative Report**

- Questions go to the decision-maker for review prior to being given to parties/witnesses.
- Allow for additional, limited follow-up questions from each party
  - WCCC can set reasonable limits (85 FR 30364)
  - The 10-day response period can overlap with the period for follow-up questions, so schools do not need to extend timelines (85 FR 30365)

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**The Live Hearing**

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### Cross Examination – Live Hearing

Traditionally, cross examination questions are those that try to elicit “yes” or “no” answers, not explanations.

Examples:

- You were at the party that night, weren't you?
- You'd agree with me that you had three beers, wouldn't you?
- You didn't call an Uber, did you?

They aren't required to be asked this way in our hearings, however.

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### Cross Examination (Live)

- Theory: live cross examination is essential for truth seeking (85 FR 30313)
- Provides opportunity of both parties to **test “consistency, accuracy, memory, and credibility** so that the decision-maker can better assess whether a [party's] narrative should be believed” (85 FR 30315)

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### Cross Examination (Live)

- Provides parties with the opportunity to “direct the decision-maker’s attention to **implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility**” in the other party’s statements. (85 FR 30330)
- Promotes transparency and equal access (85 FR 30389)
- WCCC must audio record, audio-video record or provide a transcript of the hearing

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**Cross Examination (Live)**

According to the Department, the process in 106.45 best achieves the purposes of:

- (1) effectuating Title IX's non-discrimination mandate by ensuring **fair, reliable outcomes** viewed as **legitimate** in resolution of formal complaints of sexual harassment so that victims receive remedies
- (2) **reducing and preventing sex bias** from affecting outcomes; and
- (3) ensuring that Title IX regulations are consistent with **constitutional due process and fundamental fairness** (85 FR 30327)

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**Cross Examination (Live)**

**How should it look?**

"[C]onducting cross-examination consists simply of posing questions intended to advance the asking party's perspective with respect to the specific allegation at issue." (85 FR 30319)

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**Cross Examination (Live)**

For these purposes:

- Decision-maker must permit each party's advisor to ask the other party and any witnesses **all relevant** questions and follow-up questions, including those challenging **credibility**
- Must be conducted directly, orally, and in real time by the party's advisor, but never by party personally
- Only relevant cross-examination and other questions may be asked of a party or witness

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**Cross Examination (Live)**

For these purposes: Advisors

If a party does not have an advisor present at the live hearing, the **recipient must provide** without fee or charge to that party, an advisor **of the recipient's choice**, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party. (34 CFR 106.45(b)(6)(i) and 85 FR 30339)

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**Cross Examination (Live)**

Advisors

- Advisors do not require Title IX Training, however a recipient may train its own employees whom the recipient chooses to appoint as party advisors (85 FR 30342)
- A party cannot "fire" an appointed advisor (85 FR 30342)
- "But, if the party correctly asserts that the assigned advisor is refusing to 'conduct cross-examination on the party's behalf' then the recipient is obligated to provide the party an advisor to perform that function, whether counseling the advisor to perform the role or stopping the hearing to assign a different advisor." (85 FR 30342)

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**Cross Examination and Relevancy**

- Per 34 C.F.R. 106. 45(b)(6)(i):
  - "Only relevant cross-examination and other questions may be asked of a party or witness."
 "[C]ross examination must focus only on questions that are relevant to the allegations in dispute." (85 FR 30319)

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### Cross Examination (Live)

For these purposes:

- Before a party or witness may answer a question, the decision-maker must first determine whether the question is relevant and explain the reason if not relevant
- Requires decision-maker to make an on the spot determination

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### Cross Examination and Relevancy

Decisions regarding relevancy do not have to be lengthy or complicated:

“... it is sufficient... to explain that a question is irrelevant because it calls for prior sexual behavior information without meeting one of the two exceptions, **or because the question asks about a detail that is not probative of any material fact concerning the allegations.**” (85 FR 30343)

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### Cross Examination and Relevancy

Is it probative?

- Does this question, topic, evidence help move the dial under the standard of evidence?
  - **Preponderance of the evidence:** a fact is more likely than not to be true (30373 fn. 1409)
  - **Clear and convincing:** a fact is highly probable to be true (30373 fn. 1409)

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### Cross Examination and Relevancy

Under the **preponderance of the evidence** standard:

- Does this help me in deciding if there was more likely than not a violation?
- Does it make it more or less likely?
- Why or why not?

If it doesn't move this dial: likely not relevant.

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### Cross Examination and Relevancy

Bonus info for other recipients' processes:

Under the **clear and convincing** standard of evidence

- Does this help me in deciding if a fact is highly probable to be true?
- Does it make it more or less probable?
- Why or why not?

If it doesn't move this dial: likely not relevant.

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### Cross Examination and Relevancy

Reminder regarding rape shield laws:

- According to 34 C.F.R. 106. 45(b)(6)(i), Cross-examination **must exclude** evidence of the **Complainant's** "sexual behavior or predisposition" UNLESS
  - its use is to prove that someone other than the Respondent committed the conduct, OR
  - it concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent
  - Note: Rape shield protections do not apply to Respondents

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### Cross Examination and Relevancy

**Reminder regarding treatment records:**

"[C]annot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and **which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent** to do so for a grievance process under this section."

Section 106.45(b)(5)(i).

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### Cross Examination (Live)

The preamble discussion provides some additional information on protecting the neutrality of the decision-maker:

"To the extent that **a party wants the other party questioned in an adversarial manner** in order to further the asking party's views and interests, that questioning is conducted by the party's own advisor, **and not by the recipient**. Thus, no complainant (or respondent) need feel as though the recipient is "taking sides" or otherwise engaging in cross-examination to make a complainant feel as though the recipient is blaming or disbelieving the complainant." (85 FR 30316)

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### Cross Examination (Live)

Take this into consideration if you, as decision-maker, are eliciting questions:

- "[O]n the **decision-maker's initiative** [can] ask questions and elicit testimony from parties and witnesses,
- **as part of the recipient's burden to reach a determination regarding responsibility** based on objective evaluation of all relevant evidence including inculpatory and exculpatory evidence.
- **Thus, the skill of a party's advisor is not the only factor in bringing evidence to light for a decision-maker's consideration.**" (85 FR 30332)

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**When a party doesn't participate**

When parties do not participate:

- "If a party or witness does not submit to cross-examination at the live hearing...the decision-maker(s) cannot draw an inference about the determination regarding responsibility **based solely** on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions." 34 C.F.R. 106.45(b)(6)(i).

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**When a party doesn't participate**

When parties elect not to participate, a recipient cannot retaliate against them (85 FR 30322)

No inference can be drawn from the non-participation.

What if a party or witness gave a statement during the investigation but is not participating in cross-examination?

- o **"Must not rely on any statement of that party or witness in reaching a determination"**
- o **No reliance on prior statements that have not been tested through cross examination**

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**When a party doesn't participate**

If a party does not testify about their own statement and submit to cross-examination, **the decision-maker will not have the appropriate context for the statement**, which is why the decision-maker cannot consider that party's statement. (85 FR 30349)

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### When a party doesn't participate

"[A] party's advisor may appear and conduct cross-examination even when the party whom they are advising does not appear." (85 FR 30346)

"Similarly, where one party does not appear and that party's advisor does not appear, **a recipient-provided advisor must still cross-examine the other appearing party**, resulting in consideration of the appearing party's statements (without any inference being drawn based on the non-appearance)." (85 FR 30346)

However, third party cross-examination of what a non-appearing party stated does not count as statements tested on cross-examination. (85 FR 30347) (provides examples of family and friends showing up on behalf of the non-appearing party)

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### When a party doesn't participate

"[E]ven though the refusing party's statement cannot be considered, the decision-maker may reach a determination based on the remaining evidence so long as no inference is drawn based on the party or witness's absence from the hearing or refusal to answer cross-examination (or other) questions." (85 FR 30322)

Example: "[W]here a complainant refuses to answer cross-examination questions but video evidence exists showing the underlying incident, a decision-maker may still consider the available evidence and make a determination" (85 FR 30328)

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### When a party doesn't participate

The words that allegedly constitute sexual harassment are not a "statement" that must be rejected if there is no cross examination of it.

"Thus, a respondent's alleged verbal conduct, that itself constitutes the sexual harassment at issue, is not the respondent's "statement" as that word is used in § 106.45(b)(6)(i), because the verbal conduct does not constitute the making of a factual assertion to prove or disprove the allegations of sexual harassment; instead, the verbal conduct constitutes part or all of the underlying allegation of sexual harassment itself."

- <https://www2.ed.gov/about/offices/list/ocr/blog/index.html>
- But if a party or witness does not submit to cross examination and makes a statement in a video/police report/medical report/etc., the decision-maker cannot consider that statement to reach a decision on responsibility (30346)

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### Practicing Relevancy Determinations

“Bob(R), isn’t it true you were accused of violating appropriate instructor/student boundaries with a student last year too?”

“Jennifer(C), isn’t it true you texted Bob(R) last week and signed off ☺ Jenn?”

“Jennifer, didn’t you get into trouble last year for having sex on school grounds?”

“Jennifer, isn’t it true you received a bad grade on the test, and that made you angry?”

“Bob, did your counselor tell you that you have anger issues?”

“Jennifer, your witness, Carrie, didn’t even show up today, right?”

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### Confidentiality of the Hearing

- 34 CFR 106.71 requires recipients to keep party and witness identities confidential except as permitted by law or FERPA, and as needed to conduct an investigation or hearing (85 FR 30316)
- Prevents anyone in addition to the advisor to attend the hearing with the party, unless otherwise required by law (85 FR 30339)
  - i.e., parent, non-advisor attorney, witnesses who are not testifying at present (can be in a waiting room, though, to provide support during breaks)
  - Consider required ADA accommodations and CBA provisions that may create exceptions to this general rule

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### Decorum at the Hearing

The preamble to the Title IX Regulations contains many discussions of an institution’s discretion to set rules to maintain decorum throughout hearings and to remove non-complying advisors, parties, or witnesses.

“Recipients may adopt rules that govern the **conduct and decorum of participants at live hearings** so long as such rules comply with these final regulations and **apply equally to both parties**... These final regulations aim to ensure that the truth-seeking value and function of cross-examination applies for the benefit of both parties while minimizing the discomfort or traumatic impact of answering questions about sexual harassment.” (85 FR 30315)

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### Decorum at the Hearing

As an example:

"[W]here the **substance of a question is relevant**, but the manner in which an advisor attempts to ask the question is **harassing, intimidating, or abusive (for example, the advisor yells, screams, or physically 'leans in' to the witness's personal space)**, the recipient may appropriately, evenhandedly enforce rules of decorum that require relevant questions to be asked in a respectful, non-abusive manner." (85 FR 30331)

Nothing in this rule prevents recipient from enforcing decorum rules in the hearing and "the recipient may require the party to use a different advisor" if the advisor does not comply and may provide a different advisor to conduct cross examination on behalf of that party (85 FR 30320)

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### Decorum at the Hearing

Why?:

"The Department acknowledges that predictions of **harsh, aggressive, victim-blaming** cross-examination may dissuade complainants from pursuing a formal complaint out of fear of undergoing questioning that could be perceived as interrogation. However, recipients retain discretion under the final regulations to educate a recipient's community about what cross-examination during a Title IX grievance process will look like, including developing rules and practices **(that apply equally to both parties)** to oversee cross-examination to **ensure that questioning is relevant, respectful, and non-abusive.**" (85 FR 30316)

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### Helpful Hints for Running a Hearing

- WCCC's decision-maker must record the hearing (audio, AV, or transcript)
- "At recipient's discretion, can allow any or all participants to participate in the live hearing virtually" (85 FR 30332, see also 85 FR 30333, 30346 explaining 34 CFR 106.45(b)(6)(i))
- Same or separate rooms permitted for the hearing
- Decision-maker may hold a prehearing conference to help inform/educate parties and establish expectations – may hold separately with each party and the party's advisor or collectively with all
  - Helpful to discuss evidence and witness presentation and role of advisor

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### Helpful Hints for Running a Hearing

- **Hearing process:**
  - Statement of rules and process by decision-maker (use a script for this!)
  - Opening statements by parties permitted
  - Questioning (usually): C (direct and cross); CWs (direct and cross); R (direct and cross); RWs (direct and cross); C (rebuttal)
    - Decision-maker may/should ask questions (cross-examine) in a neutral manner to obtain relevant evidence for decision (85 FR 30330 and 30331)
    - Allowing parties' arguments about relevancy and objections are at the discretion of the decision-maker, so long as consistent; make real-time ruling
  - Closing statements by parties permitted

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### Helpful Hints for Running a Hearing

- Allow for breaks as needed (remind about confidentiality)
- An advisor of choice may be an attorney or a parent (or witness) (85 FR 30319)
- Decision-maker/Hearing Officer has the discretion to require advisors to be "potted plants" outside of their roles cross-examining parties and witnesses. (85 FR 30312)

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### Hearing Reminders

- Individual cases are not about statistics
- Decision in every case must be based on preponderance of evidence or clear and convincing evidence presented
- Cannot fill in evidentiary gaps with statistics, personal beliefs or information about trauma
- Process must be fair and impartial to each party
- Institution may proceed without active involvement of one or both parties; base conclusions on impartial view of evidence presented

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**Hearing Reminders**

- Withhold pre-judgment because the parties may not act as you expect them to
- Be aware of your own biases as well as those of the complainant, respondent, and witnesses
- Let the available facts and standard of proof guide your role in overseeing the live cross-examination hearing, not unfair victim-blaming or societal/personal biases

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**Hearing Reminders**

- Burden of gathering the evidence on the recipient, not the parties (85 FR 30333)
- Should be an issue with investigation, but **might** be something you see as the decision-maker

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**Agenda – Part Six**  
***The Decision-Maker’s Determination***

- |   |  |
|---|--|
| <ul style="list-style-type: none"> <li>• The role of the decision-maker</li> <li>• Principles for decision-making</li> <li>• Analyzing the elements</li> <li>• Resolving conflicts</li> </ul> | <ul style="list-style-type: none"> <li>• Crafting the written decision</li> <li>• Appeals</li> </ul> |
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**The Written Determination**

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**What is your role as decision-maker?**

- Conduct an objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence. 34 CFR 106.45(b)(1)(ii)
- Mandatorily dismiss Title IX complaint that does not rise to the level of “sexual harassment,” did not occur in the recipient’s education program or activity, or did not occur against a person in the USA. 34 CFR 106.45(b)(3)(i)

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**What is your role as decision-maker?**

- Afford each party the opportunity to submit relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions for each party [34 C.F.R. 106.45(b)(6)(ii)]
- Explain to the party proposing the questions any decision to exclude a question as not relevant [34 C.F.R. 106.45(b)(6)(ii)]

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**What is your role as decision-maker?**

- Issue a written determination regarding responsibility by applying the standard of evidence chosen by the recipient (either “preponderance of the evidence” or “clear and convincing”). 34 CFR 106.45(b)(7)
- Consider appeals

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**1) Keep an Open Mind**

- Keep an open mind until all relevant evidence has been heard (and tested at the live hearing, if applicable)
- Don’t come to any judgment, opinion, conclusion or belief about any aspect of this matter until you’ve reviewed or heard all of the evidence AND consider only the evidence that is permissible and relevant

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**2) Make Sound, Reasoned Decisions**

- You must render a sound, reasoned decision on every charge
- You must determine the facts in this case based on the information presented
- You must determine what evidence to believe, the importance of the evidence, and the conclusions to draw from that evidence

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**3) Consider All/Only Evidence**

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- You must make a decision based solely on the relevant evidence obtained in this matter
- You may consider nothing but this evidence

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**4) Be Impartial**

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- You must be impartial when considering evidence and weighing the credibility of parties and witnesses
- You should not be swayed by prejudice, sympathy, or a personal view that you may have of the claim or any party
- Identify any actual or perceived conflict of interest

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**5) Weight of Evidence**

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- The quality of evidence is not determined by the volume of evidence or the number of witnesses or exhibits.
- It is the **weight** of the evidence, or its **strength**, in tending to prove the issue at stake that is important.
- You must evaluate the evidence as a whole based on your own judgment.

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**6) Evaluate Witness Credibility**

- You must give the testimony and information of each party or witness the degree of importance you reasonably believe it is entitled to receive.
- Identify all conflicts and attempt to resolve those conflicts and determine where the truth (**standard of review/proof**) lies.

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**6) Evaluate Witness Credibility**

- Consider the reasonableness or unreasonableness, or probability or improbability, of the testimony.
- Does the witness have any motive?
- Is there any bias?
- The Regulations' commentary provides consideration of consistency, accuracy, memory, credibility (85 FR 30315), implausibility, inconsistency, unreliability, ulterior motives, lack of credibility (85 FR 30330)

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**6) Evaluate Witness Credibility**

- Credibility is determined fact by fact, not witness by witness
  - The most earnest and honest witness may share information that turns out not to be true

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**7) Draw Reasonable Inferences**

- Inferences are sometimes called “circumstantial evidence.”
- It is the evidence that you infer from direct evidence that you considered.
- Inferences only as warranted and reasonable.

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**8) Standard of Evidence**

- Use the standard of evidence as defined by your policy when evaluating whether someone is responsible for a policy violation
  - ALWAYS start with presumption of no violation.
- Preponderance of the evidence: Is it more likely than not true that the respondent engaged in the alleged misconduct?

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**8) Standard of Evidence**

- Look to all the evidence in total, make judgments about weight and credibility, and then determine whether or not the burden has been met
- Whenever you make a decision, apply your standard of evidence

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**9) Don't Consider Impact**

- Don't consider the potential impact of your decision on either party when determining if the charges have been proven
- Focus only on the allegations and whether the evidence presented is sufficient to persuade you that the respondent is responsible for a policy violation

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**Analyzing the Elements**

- To find a policy violation, there must be evidence to show, using the standard of evidence in your policy (preponderance of the evidence or clear and convincing), that each and every element of a policy violation has been met
- How do you do this?

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**Analyzing the Elements**

- Review the definition
- Break down the definition into elements by making a checklist
- Re-read the definition. Have you accounted for all of the language in the definition?
- Are there any definitions that should be included in your element checklist? (e.g. state law definition of domestic violence)
- Sort evidence according to element

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### Analyzing the Elements

- If you have a preponderance of the evidence that each element is present, you have a policy violation
- If you do not have a preponderance of the evidence that each element is present, you do **not** have a policy violation
- If you have a preponderance of the evidence that one or more elements is **not** present, you do **not** have a policy violation

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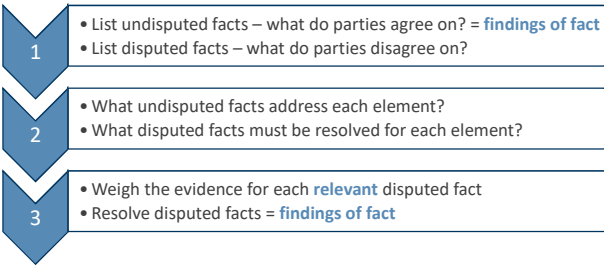
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### The Fact Finding Process




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### Objectively Evaluating Relevant Evidence

- Preamble indicates that the decision-maker should be looking at consistency, accuracy, memory, credibility (p. 85 FR 30315), implausibility, inconsistency, unreliability, ulterior motives, lack of credibility (85 FR 30330)
- Again, not making relevancy determinations beyond those expressly included in regulations (as specified by policy)
- Use your standard of proof to guide decision-making

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### Standard of Proof

- Standard of Evidence: Preponderance of the Evidence or Clear & Convincing
- Must use same standard for formal Title IX complaints against both students and employees (including teachers) for all policies and procedures with adjudication for sexual harassment complaints (e.g., union grievances procedures, teacher conduct)
- Must begin with a **presumption of no violation** by Respondent

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### Regulatory Definitions

- Preponderance of the Evidence – “Concluding that a fact is more likely than not to be true”
- Clear and convincing – “concluding that a fact is highly probable to be true”

(85 FR 30373 at fn 1409)

Recipients cannot use “beyond a reasonable doubt” standard, which is used in criminal cases. (85 FR 30373)

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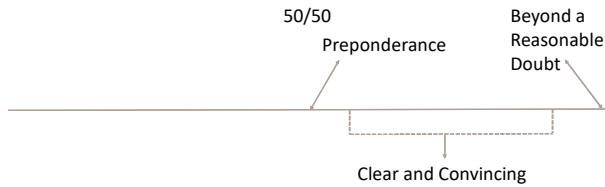
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### Standards of Evidence

What are our choices?




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**Applies to Every Fact and Every Decision**

- When you make a determination as to a disputed fact, use your standard of evidence
- When you make a determination as to whether an element exists, use your standard of evidence
- If you are using “preponderance of the evidence” and the evidence is exactly 50/50, you do not have a preponderance, so you have *insufficient evidence* to support the existence of the fact/element

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**Recommended Considerations for Resolving Conflicts**

- Statements by any witnesses to the alleged incident
- Evidence about the relative credibility of the complainant/respondent
  - The level of detail and consistency of each person’s account should be compared in an attempt to determine who is telling the truth
  - Is corroborative evidence lacking where it should logically exist?

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**Recommended Considerations for Resolving Conflicts**

- Evidence of the complainant’s reaction or behavior after the alleged harassment
  - Were there witnesses who saw that the complainant was upset?
  - Changes in behaviors? Work-related? School? Concerns from friends and family? Avoiding certain places?
    - May not manifest until later

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**Recommended Considerations for Resolving Conflicts**

- Evidence about whether the complainant filed the complaint or took other action to protest the conduct soon after the alleged incident occurred
  - But: failure to immediately complain may merely reflect a fear of retaliation, a fear that the complainant may not be believed, etc. rather than that the alleged harassment did not occur

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**Recommended Considerations for Resolving Conflicts**

- Other contemporaneous evidence:
  - Did the complainant write about the conduct and reaction to it soon after it occurred (e.g. in a diary, email, blog, social media post)?
  - Did the student tell others (friends, parents) about the conduct and their reaction soon after it occurred?

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**Written Determination in 106.45(b)(7)(ii) – Parts of the Decision**

- Written determination **must** include:
  - 1) Identification of the allegations potentially constituting sexual harassment
  - 2) 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

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**Written Determination in 106.45(b)(7)(ii) – Parts of the Decision**

3) A statement of, and rationale for, the results as to each allegation, including 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

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**Written Determination in 106.45(b)(7)(ii) – Parts of the Decision**

4) Institution’s procedures and permissible bases for complainant and respondent to appeal  
5) Provided to both parties in writing contemporaneously (106.45(b)(7)(ii))

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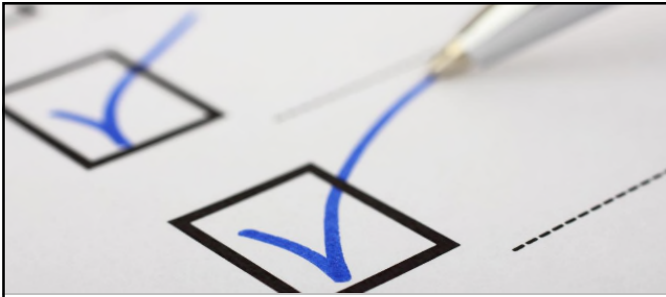
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Final Checklist for the Decision Maker

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**Final Checklist**

1. Are there any additional procedural anomalies to be explained?



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**Final Checklist**

2. Is every element of every charge accounted for?



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**Final Checklist**

3. Is every relevant disputed fact resolved in the analysis?



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**Final Checklist**

4. Is there a clear connection between the **charges**, the **investigation**, the **evidence**, and the **conclusions**?



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**Final Checklist**

5. Would an unfamiliar reader be able to connect the dots?



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**Final Checklist**

6. Is the tone appropriate?



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**Identity of the Appeals Officer**

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- You cannot hear an appeal of your own decisions
  - The Appeals Officer cannot be the same investigator, Title IX Coordinator, or decision-maker that worked on the case
- The Appeals Officer must be trained in the same manner as the Decision-Maker

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**Bases for Appeal**

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- Procedural irregularity that affected the outcome of the matter
- New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter
- The Title IX Coordinator/investigator/decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome
- A recipient may offer an appeal equally to both parties on additional bases

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## Appeals

- As to all appeals, the recipient must:
  - Offer the appeal to either party
  - Let both parties know when an appeal has been filed
  - Give both parties a reasonable and equal opportunity to submit a written statement in support of or challenging the appealed decision
  - Issue a written decision describing the result of the appeal and the rationale for the result
  - Provide the written decision simultaneously to both parties.

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## Introducing your new best friend: Bricker Graydon's Title IX Toolkit

**Model Sexual Harassment Intake Form**

Employee Completing Intake: \_\_\_\_\_  
 First Name Last Name Po

Complainant(s): **[Complete and attach an intake form for each Complainant]**

- Name: \_\_\_\_\_  
 First Name Last Name
- Student: Age \_\_\_\_\_ Grade in school \_\_\_\_\_
- Employee: Position \_\_\_\_\_ Building \_\_\_\_\_
- Contact Information (and parent/guardian contact information if minor student)

Person(s) Reporting **[if different from Complainant(s)]**:  
 \_\_\_\_\_  
 First Name Last Name

## Title IX Flowchart




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Thank you!

Questions?

Beverly Meyer  
bmeyer@brickergraydon.com  
937.224.1849




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