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Title IX Toolkit
Two-Part Training
on
U.S. Department of Education
Office of Civil Rights
Final Regulations
Issued May 2020

FINAL VERSION (8-6-2020)

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Training Content

This full-day training will address the purpose of Title IX, federal requirements and the roles of the Title IX Coordinator, the investigator, the decision-maker and the informal resolution facilitator.

Our presentation will cover key definitions, the available standards of proof, the grievance process, notification and documentation requirements along with what is needed in conducting an investigation, a hearing, issuing an outcome determination letter and executing the appeals process.

Agenda

Part I: Understanding The New Regulations

- **Morning Session:** **8:30 a.m. – Noon**
- What is Title IX?
- What Is Its Purpose?
- Key Personnel and Their Roles
- Key Definitions Part I
- What Do the Regulations State?
- Decisions to be made: Identifying the Personnel – internal vs. external support, the standard of proof, live hearing vs. administrative outcome determination, panel decision-makers or sole decision maker, to include informal resolution process option in the policy

Part II: Effectively Implementing the New Regulations

- **Afternoon Session:** **1 p.m. – 4:30 p.m.**
- From Incident Report to Formal Complaint to Investigation
- Key Definitions Part II: Credibility, Relevance, Rape Shield, Standard of Proof
- How to Conduct an Investigation: Notice, Fact Finding, Effective Communication and Impartiality. What Is Trauma and Being Trauma Informed?
- Post Investigation and Pre-Hearing: What Needs to Happen and When?
- Hearing or Administrative Outcome Determination Process
- Outcome Determination Letter: Content and Sanction Considerations
- Appeal Process

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Title IX Final Regulations
Part I: Understanding the New Regulations

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Title IX Key Questions

- What is Title IX?
- What do the new regulations require?
- Who is responsible?
- How do you effectively implement what is required?

Title IX Key Questions (Cont'd)

- What is Title IX?

  A federal civil rights law that prohibits discrimination based on sex in education.

- What do the new regulations require?

  They require all recipients (schools, LEAs, IHEs) to ensure that no student, employee or third party participating in or attempting to participate in an education activity or program is discriminated against based on sex. They do this by creating or revising Title IX procedures, identifying a Title IX Coordinator and other key personnel, training all key personnel, alerting all members of the school community about Title IX policies, and publishing the name of the Title IX Coordinator, policies, procedures and training materials on their website.

- Who is responsible?

- **Schools. They need to have the necessary key personnel (Title IX Coordinator, (possibly) Deputy Coordinators/Liaison, Investigators, Decision-Makers/Adjudicators, Informal Resolution Facilitators) identified, trained and in place to effectively respond to a Title IX Complaint.**

- How do you effectively implement what is required?

  Ongoing training, publishing and publicizing to all members of the school community about Title IX.

Examples of Terms

- U.S. Department of Education – "Department"
- **Preamble** – How the Department defines the text of the new regulations
- **Recipient** – School, LEA or institution of higher education
- **Complainant** – Individual who is alleged to be the victim of sexual harassment
- **Respondent** – Individual who is reported/alleged to be the perpetrator of sexual harassment.

- §106 (Chapter 34 of Code of Federal Regulations) is identified as covering the following topics:
  - Education
  - Sex discrimination
  - Civil rights
  - Sexual harassment
- §106 includes definitions such as:
  - Actual knowledge
  - Formal complaint
  - Sexual harassment
  - Supportive measures

Key Personnel in Title IX Process

- Title IX Coordinator
  - Depending on the size of the school, may need to designate “Deputy Title IX Coordinator” and/or “Title IX liaison/investigators” in each school building
- Investigator
- Decision Maker(s) (or panel of decision makers)
- Advisor (only applicable when using a “live” hearing)
- Informal Resolution Facilitator
- Appeal Decision Maker
- Possible other involved personnel:
  - HR Director
  - School Counselor
  - School Resource Officer

What Must the Key Personnel Know?

- Schools must ensure that Title IX coordinators, investigators, decision makers and any person who facilitates a formal process or informal resolution receive training on:
  - The definition of sexual harassment
  - The jurisdiction/scope of Title IX: Who and what is covered
  - How to conduct an investigation and an equitable grievance process
  - How to serve in impartially
  - How to assess credibility
  - How to determine issues of relevance

§106.45(b)(1)(iii)

What Else Must Schools Consider?

Costs of Implementation

- Determining how to allocate in the school district's budget what is fiscally required to implement the Department's directives means that schools must consider:
  - Hiring or reassignment of personnel
  - Possibly needing to hire external support (consultants, trainers, counselors)
  - Creating or updating IT to improve and preserve detailed record-keeping

Statement & History of Title IX

What is 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."

20 USCA Sec. 1681

To enforce Title IX, the U.S. Department of Education maintains an Office for Civil Rights, with headquarters in Washington, DC, and regional offices across the United States.

Duty to Prohibit Discrimination in Education

Educational institutions have a responsibility to protect every student's right to learn in a safe environment free from unlawful discrimination and to prevent unjust deprivations of that right. The Office for Civil Rights enforces several federal civil rights laws that prohibit discrimination in programs or activities that receive federal financial assistance from the Department of Education. It is the mission of the Office for Civil Rights to ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights.

History of Title IX

- It is a civil rights statute enacted in 1972 to prohibit discrimination based on sex in education programs and activities.
  - Historically, people have commonly thought of Title IX as addressing **gender equity in sports** but Title IX has always had a *mandate* to address sex discrimination in hiring, admissions and other aspects of a school's education programs or activities.
  - Today, Title IX's reach is much broader.

History of Title IX (Cont'd)

- **Past Guidance Issued by the Department**:
  - In 1997, the Department began to address sexual harassment as a form of sex discrimination under Title IX through a series of guidance documents.
    - https://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html#skipnav2
  - In 2001, the Department issued updated guidance:
    - https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html
    - https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf
  - In 2011, the Department issued updated guidance aka the "Dear Colleague" Letter (Guidance withdrawn by OCR in 2017)
    - https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf
  - In 2014, the Department issued a Q&A document on Title IX
    - https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf
  - In 2017, the Department issued updated Q&A document on "Campus Sexual Misconduct"
    - https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf

History of Title IX (Cont'd)

- The current federal administration withdrew the 2011 "Dear Colleague" Letter that had been issued regarding Title IX.

- The 2017 Q&A, along with the 2001 Guidance, and not the withdrawn 2011 "Dear Colleague" Letter, remain the baseline against which the final regulations make further changes to the enforcement of Title IX obligations.

History of Title IX (Cont'd)

- The final regulations **represent the Department's interpretation of a recipient's legally binding obligations, rather than best practices, recommendations or guidance.**

  "These final regulations focus on precise legal compliance requirements governing recipients. The final regulations leave recipients the flexibility to choose to follow best practices and recommendations contained in the Department's guidance or, similarly, best practices and recommendations made by non-Department sources, such as Title IX consultancy firms, legal and social science scholars, victim advocacy organizations, civil libertarians and due process advocates, and other experts." (pg.18)

History of Title IX (Cont'd)

There are significant cases that the Department of Education highlighted in the preamble of the Final Regulations that are referenced as the basis for the amendments on how schools should implement Title IX.

- *Cannon v. University of Chicago*, 441 U.S. 677 (1979)
- *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992)
- *Gebser v. Lago Vista Independent School District (Gebser),* 524 U.S. 274 (1998)
- *Davis v. Monroe County Board of Education (Davis),* 526 U.S. 629 (1999)

History of Title IX (Cont'd)

- The court in *Cannon* stated:

  Title IX has two primary objectives :

  - ✓ To avoid use of federal funds to support discriminatory practices
  - ✓ To provide individuals with effective protection against discriminatory practices

- ***Enforcement***: Those two purposes are enforced both by administrative agencies that disburse federal financial assistance to recipients, and by courts in private litigation.
- The *Cannon* court recognized that **judicial and administrative** enforcement both help ensure "the orderly enforcement of the statute" to achieve Title IX's purposes.

History of Title IX (Cont'd)

The Supreme Court in *Franklin* acknowledged that sexual harassment and sexual abuse of a student by a teacher may mean the **school itself** engaged in intentional sex discrimination.

History of Title IX (Cont'd)

- In *Gebser v. Lago Vista Independent School District,* the Supreme Court analyzed the conditions under which a school district will be liable for money damages for an employee sexually harassing a student.

- The *Gebser* court began its analysis by stating that while *Franklin* acknowledged that a school employee sexually harassing a student may constitute the school itself committing intentional discrimination on the basis of sex, the *Gebser* court held that where a school has **actual knowledge** of an employee sexually harassing a student **but responds with deliberate indifference** to such knowledge, **the school itself has engaged in discrimination**, subjecting the school to money damages in a private lawsuit under Title IX.

History of Title IX (Cont'd)

Davis is a case concerning sexual harassment of a fifth-grade student by another student.

- The Supreme Court ***did not adopt*** the Title VII definition of sexual harassment (severe, persistent, **or** pervasive) for use under Title IX, defining actionable sexual harassment for Title IX purposes as conduct that is "severe, pervasive **and** objectively offensive."
- The Department stated that it's persuaded by the Supreme Court's reasoning that elementary and secondary "[S]chools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults… The Department does not wish to apply the same definition of actionable sexual harassment under Title VII to Title IX because such an application would equate workplaces with educational environments."

New Final Regulations

The New Title IX Regulations

- On May 6, 2020, the U.S. Department of Education issued the 2,033 page document that amended the regulations implementing the Title IX of the Education Amendments of 1972 and which contained the new **Final Regulations.**

- Steps that led to the Final Regulations:

  - In November 2018, the U.S. Department of Education issued proposed changes to Title IX procedures as called the Notice of Proposed Rulemaking or NPRM.

  - U.S. Department of Education received over 124,000 comments during a 6 month public comment period following release of the NPRM.

  - 18 months later, the final regulations were issued.

34 CFR Part 106

Prelude to the New Regulations for K-12 Schools

- On February 26, 2020, U.S. Dept. of Education issued a press release about a renewed focus on combating sexual assault and sex harassment in K-12 schools.
- In fact, according to the most recent available Civil Rights Data Collection (CRDC) for the 2015-2016 school year, there were approximately **9,700 incidents of sexual assault, rape or attempted rape reported in public elementary and secondary schools**.
- According to the Department, "The number of K-12 sexual harassment and violence complaints filed with OCR is **nearly 15 times greater** than it was a decade ago. This disturbing change is a matter of serious concern and requires immediate attention."

https://www.ed.gov/news/press-releases/secretary-devos-announces-new-civil-rights-initiative-combat-sexual-assault-k-12-public-schools?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=

Why Did the Department Issue the New Final Regulations?

- The new Title IX regulation holds schools accountable for failure to respond **equitably and promptly** to sexual misconduct incidents and ensures a more reliable adjudication process that is fair to all students.
- Secretary of Education Betsy DeVos stated:

> "Too many students have lost access to their education because their school inadequately responded when a student filed a complaint of sexual harassment or sexual assault…This new regulation requires schools to act in meaningful ways to support survivors of sexual misconduct, without sacrificing important safeguards to ensure a fair and transparent process. We can and must continue to fight sexual misconduct in our nation's schools, and this rule makes certain that fight continues."

https://www.ed.gov/news/press-releases/secretary-devos-takes-historic-action-strengthen-title-ix-protections-all-students#:~:text=Key%20provisions%20of%20the%20Department,on%20the%20basis%20of%20sex

What Are the Final Regulations?

- These Final Regulations specify how recipients (defined as schools, LEAs, postsecondary institutions) of federal financial assistance **must** respond to allegations of sexual harassment consistent with Title IX's prohibition against sex discrimination.

- Final Regulations, *unlike past guidance* issued in 2011 and 2014 from the Office of Civil Rights (OCR) within the Department, **have the full effect of law and override any past guidance.**

  "These Final Regulations impose, for the first time, legally binding rules on recipients with respect to sexual harassment."

  https://www.ed.gov/news/press-releases/secretary-devos-takes-historic-action-strengthen-title-ix-protections-all-students#:~:text=Key%20provisions%20of%20the%20Department,on%20the%20basis%20of%20sex

What Do the Final Regulations Require?

Final Regulations require schools to:

1. Respond **Promptly** and **Supportively** to persons alleged to have been victimized by sexual harassment

2. Resolve allegations of sexual harassment **promptly and accurately** under a **predictable, fair grievance process** that provides **due process** protections to the alleged victim and alleged perpetrators of sexual harassment

3. Effectively implement remedies for victims

Key Terms Repeated in the Regulations

- Prompt
- Equitable
- Supportive Measures
- Due Process
- Remedies

Schools must keep these terms in mind as they create and implement their policies and procedures.

Highlights: Key Provisions in the Final Regulations

- Defines sexual harassment to include sexual assault, dating violence, domestic violence and stalking as unlawful discrimination on the basis of sex
- Requires schools to offer clear, accessible options for any person to report sexual harassment
- Requires the school to offer survivors supportive measures, such as class or dorm reassignments or no-contact orders
- Requires elementary and secondary schools to respond promptly when ***any*** school employee has notice of sexual harassment
- Holds colleges responsible for off-campus sexual harassment at houses owned or under the control of school-sanctioned fraternities and sororities
- Restores fairness on college and university campuses by upholding all students' right to written notice of allegations, the right to an advisor, and the right to submit, cross-examine and challenge evidence at a live hearing
- Requires the ability for cross-examination of the parties during a live hearing by an advisor for the other party
- Requires schools to select one of two standards of evidence, *the preponderance of the evidence standard or the clear and convincing evidence standard* – and to apply the selected standard evenly to proceedings for all students and employees, including faculty
- Provides “rape shield” protections and ensures survivors are not required to divulge any medical, psychological or similar privileged records
- Requires schools to offer an equal right of appeal for both parties to a Title IX proceeding
- Permits schools the ability to use technology to conduct Title IX investigations and hearings remotely

https://www.ed.gov/news/press-releases/secretary-devos-takes-historic-action-strengthen-title-ix-protections-all-students#:~:text=Key%20provisions%20of%20the%20Department,on%20the%20basis%20of%20sex

Compliance With New Regulations

- Effective August 14, 2020, every school that has a website must post important information about the school's Title IX policies and procedures on their website.
- The new Title IX regulations specifically require schools to post on their websites:

1. The contact information for the school's Title IX Coordinator(s)
2. The school's non-discrimination policy
3. All training materials used to train the school's Title IX personnel

Compliance With New Regulations (Cont'd)

1. **Notice:** Requires schools to designate **at least one employee** as the Title IX Coordinator and **"prominently display"** the Title IX Coordinator's contact information (office address, telephone number and an e-mail address) on the school's website
2. **Non-Discrimination Policy:** Requires schools to notify students, employees, applicants, parents and guardians, and others that the school does not discriminate on the basis of sex, and that Title IX requires the school not to discriminate. This non-discrimination policy must also be prominently displayed on the school's website
3. Schools must ensure that reports **can be made at any time, including during non-business hours,** by using the Title IX Coordinator's listed telephone number or e-mail address, "or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report."

§106.8(a), §106.8(b)(2)(i), §106.8(b)(1)

Purpose and Scope of Title IX

The Purpose of Title IX

"Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance"

- It is a civil rights statute protecting those in the education setting

- It is "designed primarily to prevent recipients of Federal financial assistance from using the funds in a discriminatory manner"

Understanding Title IX

What Title IX Does

- **Prohibits discrimination** on the basis of sex in:
  - Education programs and activities
  - Employment (similar to other federal and state laws)

Consequences/Risks for Non-Compliance

- Injury to Student/Complainant
- Potential civil liability
- OCR investigation and possible lengthy oversight
- Potential loss of some, part or all of a recipient's federal funding
- Decrease in public perception of the safety of the school

Understanding Title IX (Cont'd)

Who Must Follow:	• All recipients of federal financial assistance
Who It Protects:	• Protects students, employees, and third parties from sex discrimination, sexual harassment and violence by any institution employee, another student, or a non-employee third party.

Who Can Report:	• Any person
	  • A harassed student or employee
	  • The student's parent or guardian
	  • A third party

Understanding Title IX (Cont'd)

How Can a Person Report?

- A report, verbal or written, can be received in any manner
  - In person
  - By mail
  - By e-mail

When Can a Person Report?

- A person can report at any time
- The capability must exist for a person to report at any time.

Understanding Title IX (Cont'd)

Scope of responsibilities when responding to an incident

Question: Is this something we can and must act on/respond to?

Answer: Yes, but to what extent?

Step 1: Determine the relationship of the parties to the school and then jurisdiction.

- Schools must process **all** reported incidents of discrimination or harassment, to determine whether the conduct:
  - Falls under Title IX and if so,
  - Jurisdiction question: Did the reported incident occur against a person in the United States?
  - Scope question: Did the reported incident occur in the context of an education program or activity which includes locations, events or circumstances over which the school/recipient exercised substantial control over both the Respondent and the context in which the sexual harassment occurs?
- The school may need to gather additional information in order to make such a determination.

Conduct Covered Under Title IX

- **Sexual Harassment**
  - Quid pro quo
  - Verbal
  - Physical
  - Electronic
- **Sexual Assault**
  - Rape
  - Fondling
  - Incest
  - Statutory rape
- **Stalking**
- **Dating violence**
  - Includes, but is not limited to, sexual or physical abuse OR the threat of such abuse
- **Domestic Violence**
- **Retaliation***

***(see pg. 96, footnote 257 in Final Regulations)**

Federal Financial Assistance

A school's federal financial assistance is terminated by the Department only after three conditions are met:

1. The Department advises the school of a Title IX violation
2. The Department attempts to secure voluntary compliance
3. The school refuses to come into compliance

The "Do Both" Requirement

- Title IX requires schools to "do both:"
  - Respond meaningfully to allegations of sexual harassment (including sexual assault)
  - Provide due process protections for both parties
- The Department believes that recipients **can and must** "do both."

Response Obligations

Actual knowledge of sexual harassment or a report of sexual harassment triggers the recipient's response obligations:

- Must be prompt
- Must not be deliberately indifferent
- Must provide supportive measures
- Must be confidential
- Must initiate grievance process
- Must conduct an investigation

Notice on How To Report

- School policy **must state how** to report sex discrimination, sexual harassment or violence.

- The name and contact information for the Title IX Coordinator and the policy must be published on the **school district website and in each catalog or handbook** that the school provides to people who are entitled to notice (i.e. students, employees, parents).

School's Duty to Respond to Sexual Harassment

- An elementary and secondary school **must respond** whenever any employee has notice of sexual harassment or allegations of sexual harassment.
  - ➢Students are not expected to have to identify to whom they should report an incident
  - ➢Employees in an ESE are mandatory reporters
  - ➢Employees in an ESE sit "in loco parentis" or "in the place of parents"

§106.44(a)

Jurisdiction

- Protects any person for conduct that takes place "**in the United States**" and
- **An "education 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 harassment occurs" and also includes "any building owned or controlled by a student organization that is officially recognized by a postsecondary institution."

§106.44(a)

Jurisdiction (Cont'd)

- Title IX obligations extend to sexual harassment incidents that occur off campus **if any** of three conditions are met:
  1. If the off-campus incident occurs as part of the school's "operations" pursuant to 20 U.S.C. 1687 and 34 CFR 106.2(h)
  2. If the school exercised substantial control over the respondent and the context of the alleged sexual harassment that occurred off campus pursuant to §106.44(a)
  3. If a sexual harassment incident occurs at an off-campus building owned or controlled by a student organization officially recognized by a postsecondary institution pursuant to §106.44(a)

Pgs. 624-625

Jurisdiction (Cont'd)

- **Exception:** Nothing in these final regulations prevents a school from addressing conduct that is outside the Department's jurisdiction due to the conduct constituting sexual harassment occurring outside the school's education program or activity, or occurring against a person who is not located in the United States.
- Dismissal of a formal complaint because the allegations do not meet the Title IX definition of sexual harassment, **does not preclude** a school from addressing the alleged misconduct under other provisions of the **school's own code of conduct**.

§106.45(b)(3)

Title IX Definitions
34 CFR §106

Definitions

- Sexual Harassment
- Actual Knowledge
- Supportive Measures
- Formal Complaint
- Deliberate Indifference
- Grievance Process
- Standard of Proof: Preponderance of the evidence or clear and convincing
- Formal Resolution
- Informal Resolution: Mediation and/or Restorative Justice
- Due Process
- Outcome Determinations
- Appeal

Sexual Harassment

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

(1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct (also known as ***quid pro quo*** harassment)

(2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, **and** objectively offensive that it effectively denies a person equal access to the recipient's education program or activity

(3) "Sexual assault" as defined in the 20 U.S.C. 1092(f)(6)(A)(v)

(4) "Dating violence" as defined in 34 U.S.C. 12291(a)(10)

(5) "Domestic violence" as defined in 34 U.S.C. 12291(a)(8)

(6) "Stalking" as defined in 34 U.S.C. 12291(a)(30)

Definition (2) uses the Davis standard not the Title VII standard

Definitions for (3)-(6) are found in the Clery Act and Violence Against Women Act (VAWA)

Sexual Harassment (Cont'd)

- Elementary and secondary schools are not subject to the Clery Act
- However, elementary and secondary school recipients **must** look to the definitions of sexual assault, dating violence, domestic violence and stalking as defined in the Clery Act and VAWA in order to address those forms of sexual harassment under Title IX

https://clerycenter.org/https://clerycenter.org/

Sexual Assault

Sexual assault is defined as an offense that meets the definition of rape, fondling, incest or statutory rape as defined in the FBI's Uniform Crime Reporting System.

20 U.S.C. 1092(f)(6)(A)(v)

Dating Violence

- Dating violence is defined as violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. The existence of such a relationship shall be determined based on the reporting party's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.
- For the purposes of this definition dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
- Dating violence does not include acts covered under the definition of domestic violence.

34 U.S.C. 12291(a)(10)

Domestic Violence (Cont'd)

- A felony or misdemeanor crime of violence committed:
  - By a current or former spouse or intimate partner of the victim
  - By a person with whom the victim shares a child in common
  - By a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner
  - By a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred
  - By any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred

34 U.S.C. 12291(a)(8)

Stalking

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

- Fear for the person's safety or the safety of others
- Suffer substantial emotional distress

34 U.S.C. 12291(a)(30)

Retaliation

Retaliation against any person for exercising their rights under Title IX **is prohibited.**

- **"[N]o recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or its implementing regulations, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under Title IX or its implementing regulations."**

- If the individual engaging in retaliatory acts is a student or third party, the recipient may take discipline against the student and issue a no-trespass order against the third party.
- The final regulations seek to prohibit retaliation in a broad manner and not only to the Complainant.
- The retaliation prohibition applies to acts against complainants, witnesses or any other individual involved in any manner with the investigation, proceeding or hearing.

§ 106.71

Consent

The regulations do not require recipients/schools to adopt a particular definition of consent with respect to sexual assault.

- No specific definition other than that included in the Clery Act*. Schools can look to their local jurisdiction for a definition.
- The definition must apply equally to both parties.

*https://codes.findlaw.com/us/title-20-education/20-usc-sect-1092.html

*https://clerycenter.org/wp-content/uploads/2017/01/handbook-2.pdf

Complainant/Respondent

- **Complainant:** Individual alleged to be the victim of conduct that could constitute sexual harassment
  - Does not require a formal complaint to use this designation

- **Respondent:** Alleged perpetrator of conduct that could constitute sexual harassment
  - Does not need to be adjudicated or a formal complaint filed to use this designation

Actual Knowledge

Is defined as **notice** of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to **any employee of an elementary or secondary school**.

*Past OCR Guidance: Schools had a responsibility to respond promptly and effectively if the school (i.e. a Responsible Employee) **knew or should have known** about the sexually harassing behavior.*

Notice

Is whenever any elementary and secondary school employee, any Title IX Coordinator, or any official with authority:

- Witnesses sexual harassment
- Hears about sexual harassment or sexual harassment allegations from a Complainant (i.e., a person alleged to be the victim) or a third party (e.g., the Complainant's parent, friend, or peer)
- Receives a written or verbal complaint about sexual harassment or sexual harassment allegations
- By any other means

Educational Program or Activity

Locations, events or circumstances over which the school exercises **substantial control** over both the respondent and the context in which the harassment occurs and

Includes “any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

- Must be in the United States
- Can be on campus or off campus
- For IHEs, includes fraternity or sorority houses

“Program or activity” encompasses “all of the operations” of a recipient, which may include computer and internet networks, digital platforms and computer hardware or software owned, operated by or used in the operation of the recipient.

Deliberate Indifference

> "A recipient (school) acts with deliberate indifference only when it responds to sexual harassment in a manner that is "***clearly unreasonable in light of the known circumstances***… because for a recipient with actual knowledge to respond in a clearly unreasonable manner constitutes the recipient committing intentional discrimination."

- A school's liability is premised on the school's **actual knowledge *and* deliberate choice** to permit sexual harassment.

- A school's decision not to investigate when the complainant does not wish to file a formal complaint will be evaluated by the Department under the deliberate indifference standard.

§106.44(a)

Supportive Measures

- The Final Rule defines "supportive measures" as **individualized services reasonably available that are non-punitive, non-disciplinary, and not unreasonably burdensome** to the other party while designed to ensure equal educational access, protect safety, or deter sexual harassment.
- Such measures are designed to **restore or preserve equal access** to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.
- Supportive measures may include **counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures**.
- The school must **maintain as confidential** any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures.

§106.3

Supportive Measures

- The final regulations do prescribe that a recipient's Title IX Coordinator **must** remain responsible for coordinating the effective implementation of supportive measures.

  "The Title IX Coordinator must serve as the point of contact for the affected students to ensure that the supportive measures are effectively implemented so that the burden of navigating paperwork or other administrative requirements within the recipient/school's own system does not fall on the student receiving the supportive measures".

- Section 106.45(b)(1)(ix) requires the recipient's grievance process to describe the range of supportive measures available to complainants.
  - May or may not continue after a finding of non-responsibility
- **Document:** If a recipient/school **does not provide** a complainant with supportive measures, then they **must** document the reasons why such a response was not clearly unreasonable in light of the known circumstances. Thus, if a recipient determines that a particular supportive measure was not appropriate even though requested by a complainant, the recipient must document why the recipient's response to the complainant was not deliberately indifferent.

Emergency Removal Process

- Final regulations expressly **authorize** schools to remove a respondent from the school's education programs or activities on an emergency basis, with or without a grievance process pending, as long as [following removal] ***notice and opportunity to challenge*** the removal is given to the respondent.
- ***Standard of Review***: A recipient's decision to initiate an emergency removal will also be evaluated under the deliberate indifference standard.

Emergency Removal Process (Cont'd)

A respondent can be removed if there is an immediate threat to the **physical health or safety of any students or other individuals** arising from the allegations of sexual harassment.

Prior to the emergency removal, a school must:

1. Conduct an individualized safety and risk analysis
   - Must be more than a "generalized, hypothetical, or speculative belief that the respondent may pose a risk to someone's physical health or safety" and
   - Must be individualized with respect to the particular respondent and must examine the circumstances "arising from the allegations of sexual harassment"
2. Determine that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal
3. Provide the respondent with notice and an opportunity to challenge the decision immediately following the removal

This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act

Administrative Leave

A school can place a **non-student employee respondent** on administrative leave during the pendency of a grievance process.

This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.

Formal Complaint

Formal complaint is 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.

- At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.
- A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator.
- The Department will hold schools responsible for a recipient's failure or refusal to investigate a formal complaint.

- A formal complaint is NOT required in order for a school to have actual knowledge of sexual harassment or allegations of sexual harassment
- Actual knowledge activates a school's legal obligation to respond promptly
  - By offering **supportive measures** to a complainant
  - And explaining to the complainant the process for filing a formal complaint
- A parent or guardian has the legal right to act on behalf of a complainant or respondent (e.g. as an Advisor or filing a formal complaint)

§106.30

Due Process

- The U.S. Department made the revisions and enacted these final rules because

> *"[D]ue process principles of **notice and a meaningful opportunity to be heard** and the importance of an **impartial** process before **unbiased** officials, set forth the procedures adapted for the practical realities of sexual harassment allegations in an educational context that are most needed to (i) improve perceptions that Title IX sexual harassment allegations are resolved fairly and reliably, (ii) avoid intentional or unintentional injection of sex-based biases and stereotypes into Title IX proceedings, and (iii) promote accurate, reliable outcomes, all of which effectuate the purpose of Title IX to provide individuals with effective protection from discriminatory practices."*

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Grievance Process

- A consistent and transparent process of adjudication of a complaint:
  - Must treat both parties equitably
  - Must be free of conflicts of interest or bias for or against either party
  - Must provide Complainant with remedies
  - Must not impose disciplinary sanction against Respondent without following grievance process and only if there is a finding of responsibility
  - Reasonably prompt
  - Process must not rely on or seek to destroy legally recognized privileges
  - School must identify the standard for evidence: Preponderance of the evidence vs. clear and convincing
  - Any provisions, rules, or practices that a school entity adopts as part of its grievance process for handling formal complaints of sexual harassment, **must apply equally** to both parties.

Informal Resolution Process

Mediation or restorative justice may be offered so long as both parties give voluntary, informed written consent to participate in informal resolution. A party can decide at any time before final determination to no longer proceed with the IRP.

- This option is not available and cannot be used for sexual harassment claims involving employees against students.
- School cannot require waiver of formal investigation as condition of enrollment.
- It must be managed by an Informal Resolution Facilitator who must be trained, unbiased and impartial.

§§106.45(b)(9) and 106.45(b)(10)

Standard of Proof

Each institution/school must determine which standard of proof they will require for claims of sexual harassment.

- *Clear and convincing evidence*: This is a higher standard than preponderance of the evidence but less than beyond a reasonable doubt. The truth of the facts asserted is “highly probable.”
- *Preponderance of the evidence*: “More likely than not” standard of proof. This is met when there is a greater than 50% chance of the fact(s) being true.

Roles & Responsibilities

Title IX Coordinators, Investigators, Decision Makers & Informal Resolution Facilitators

- Responsible for the effective implementation of Title IX protections and the grievance process
- Must be trained on Title IX policies and procedures
  - All training must be posted on school's website
- Title IX Coordinators, investigators and decision makers, and persons who facilitate informal resolution processes are prohibited from having **conflicts of interest or bias** and retaliation is prohibited.

Title IX Coordinator

Employee designated to ensure compliance with regulations and to receive complaints

- Must identify the name, title, office address, email address and telephone number of this employee on the school's website and post all Title IX materials (policy and training)

What is the Role of the Title IX Coordinator?

- Monitoring the schools/recipients compliance with Title IX
- Ensuring appropriate education and training is provided
- Coordinating the investigations, responses and resolutions of all reports under this policy
- Ensuring appropriate actions to eliminate sexual harassment, prevent its recurrence and remedy its effects
- Reviewing regularly the effectiveness of the efforts of the recipient to ensure that the educational setting is free from sexual harassment

Duties of Title IX Coordinator

- ❑ Contacts each complainant (i.e., person who is alleged to be the victim of sexual harassment) to discuss supportive measures
- ❑ Considers the complainant's wishes regarding supportive measures
- ❑ Informs the complainant of the availability of supportive measures with or without the filing of a formal complaintExplains to the complainant the process for filing a formal complaint.
- ❑ Must treat complainants and respondents equitably, meaning for a respondent, the recipient must follow a grievance process that ensures due process before imposing any disciplinary sanctions, if respondent is found responsible
- ❑ If a respondent is found to be responsible for sexual harassment, the school must effectively implement remedies for the complainant, designed to restore or preserve the complainant's equal educational access
- ❑ May impose disciplinary sanctions

§106.44(a)

What is the Role of the Title IX Coordinator? (Cont'd)

- The Title IX Coordinator should make themselves:
  - Accessible
  - Available to meet with any student, employee or third party to discuss this policy or the accompanying procedures
  - Visible
- Title IX Coordinator should have a trained designee or designees who are equipped with the same skills and abilities to execute the duties of the Title IX Coordinator and the office when the Coordinator is unable to do so or when there is a need.
- All Title IX Coordinators must:
  - Receive appropriate training to discharge their responsibilities
  - Deliver continuous and updated training to the school community

Who Can Be a Title IX Coordinator vs. Who Should Not Be a Title IX Coordinator

- Title IX does not categorically preclude particular employees/individuals from serving as Title IX Coordinators. Anyone who is properly trained can be the Title IX Coordinator.
- However, Title IX Coordinators should not have other job responsibilities that **may create a conflict of interest**. Because some complaints may raise issues as to whether or how well the school has met its Title IX obligations, designating the same employee to serve both as the Title IX Coordinator and the general counsel (which could include representing the school in legal claims alleging Title IX violations) poses a serious risk of a conflict of interest.
- Designating a full-time Title IX Coordinator will minimize the risk of a conflict of interest.

Multiple Reports of Alleged Conduct

- Title IX Coordinator **is not required** to file a formal complaint after receiving multiple reports about the same respondent, considering the following:
  - Potential effects on complainants, including the right to forego a formal complaint and confidentially seek supportive measures
  - Would remove Title IX Coordinator's discretion and could affect neutrality
  - Would require Title IX Coordinator to make credibility determinations
  - Would create tension with respondent's right to confront witnesses and requirement that decision maker disregard any statement by a witness who is not subject to cross-examination

Investigator

- Assigned by the Title IX Coordinator
  - Title IX Coordinator can serve as the Investigator
- Must be impartial, unbiased and free from conflicts
- Oversees the prompt, thorough gathering of all facts based on the filing of formal complaint
- Effectively communicates with all participants throughout and involved in the investigation
- Provide notice of any good faith delays
- Understands relevance to create an investigative report that fairly summarizes relevant evidence

Decision Maker

- Oversees the hearing or administrative determination proceeding or, when applicable, reviews appeals
  - Must be impartial, unbiased and free from conflicts
  - Must receive training on any technology to be used at a live hearing, and on issues of relevance of questions and evidence, including when questions and evidence about a complainant's sexual predisposition or prior sexual behavior are not relevant
  - Title IX Coordinator and Investigators cannot serve as the Decision Maker

Informal Resolution Facilitator

- Serves as a mediator and oversees the informal resolution process seeking a resolution to a formal complaint that both parties agree, in writing, to resolve using restorative justice or mediation practices
- Must be impartial, unbiased and free from conflict

Impartiality

- Recipients are not required to use outside unaffiliated Title IX personnel to avoid conflicts and may use their own employees to comply with the final regulations.
- Administrative hierarchy, employment relationships and professional experiences or affiliations (such as a self-described survivor or feminist) are not automatically prohibited conflicts of interest.
- Recipients have discretion to decide how best to implement the prohibition on conflicts of interest and bias, including providing a process for parties to assert claims of conflict of interest or bias during the investigation.

§106.45(b)(1)(iii)

Department Rationale & Data: The Basis for the Final Regulations

Personal Stories, Opposition & Data

1. Personal Stories – The U.S. Department of Education considers the personal accounts of victims, accused and people supporting complainants and respondents.
2. Opposition – The Department considers opposition from multiple sources and sets forth changes to the final regulations ("Regulations") that are responsive to the opposition.
3. Data – The Department acknowledges data provided by commenters that demonstrate the prevalence, impact, cost and lack of reporting of sexual harassment.

Personal Stories
Overview of Comments Highlight Title IX's Impact on Complainants and Respondents and Their Families

	Complainants	Respondents
Demographics	Survivors or victims included females, males, LGBTQ individuals, persons of color, individuals who grew up in urban or rural settings, at all stages or life and occurring at different educational institutions	Accused persons included females, males and individuals with disabilities (e.g., autism, OCD). Title IX disproportionately affects males, males of color, males of lower socioeconomic status and students with disabilities.
Emotional Impact	Survivors carried pain and victimization with them for life; PTSD; loneliness; lack of trust; constant fear of seeing their attacker; and suicidal thoughts	Accused persons suffered from anxiety; PTSD; lack of sleep; changed eating habits; suicide attempts; and severe emotional distress

Personal Stories (Cont'd)
Overview of Comments Highlight Title IX's Impact on Complainants and Respondents and Their Families

	Complainants	Respondents
Impact on Educational Experience	Affected ability to learn and led to dropping out of school	Affected grades, academic performance and ability to concentrate
Financial Toll	Medical costs exceeding $200,000; decreased earnings if dropped out of school	Legal bills and medical bills (e.g., one family put their house up for sale to exonerate their son)
Frustrations with Substance and Length of the Process	Institutions failed them; told them no one would believe them Left university without a degree because of the length of the process (loss of $75,000 in taxpayer money funding degree that was not completed)	General sense that proceedings were unfair; no notice of charges against them; procedural advantage to complainants; never told their side of the story before being expelled or fired 8-12 month process before clearing their name and throughout the process were banned from school

Personal Stories (Cont'd)
Overview of Comments Highlight Title IX's Impact on Complainants and Respondents and Their Families

	Complainants	Respondents
Frustrations With the Outcome of the Process	Forced to see attacker even after a finding of responsibility on the part of the attacker; experienced retaliation Concerns that new rules lack confidentiality and allow for cross-examination, which could re-traumatize a victim	Punishment seemed disproportionate to the conduct; sense of false accusations; loss of faith in the system; requests for autism accommodations denied or disability accommodations never offered
Faith in Process	Title IX delivered justice; Title IX Coordinator allowed them to stay in school; stalkers were excluded from campus; support for the withdrawn 2011 "Dear Colleague" Letter	No faith in process

Personal Stories (Cont'd)

- The Final Regulations are intended to ensure the following:
  - The right of every survivor to be taken seriously
  - The right of every accused person to know guilt is not predetermined
- The Department believes these goals are met by offering supportive measures to complainants regardless of participation in the grievance process and by prohibiting punishment of respondents until the end of the grievance process.

General Support for the Regulations

- Commenters noted concerns about the rules, but also indicated some general support for the Regulations, noting they:
  - ✓ Provide clarity and flexibility for institutes of higher education (IHE)
  - ✓ Provide IHEs the option to use a high evidentiary standard (clear and convincing evidence vs. preponderance of the evidence)
  - ✓ Clarify the definition of sexual harassment
  - ✓ Require supportive measures to be offered to complainants
  - ✓ Require fairness and due process for both parties
  - ✓ Address systemic bias in favor of complainants
- Regulations will not be enforced retroactively to try to redress pass matters that have already been decided. (See footnote 290 pg. 127)
- Title IX will (continue to) cover peer to peer harassment.

Prevalence Data

Commenters highlighted data reflecting the impact of sexual harassment on various groups at various institutions:

Prevalence Data	
Elementary and Secondary Schools	51% of high school girls and 26% of high school boys experienced adolescent peer on peer sexual assault victimization Sexual harassment impacted one quarter to one third of all students grades 7-12 in the 2010-2011 academic year
Post-Secondary Schools	1 in 5 women and 1 in 16 men are sexually assaulted in college, with more risk in the first four semesters 1 in 10 female graduate students were harassed by a faculty member
Women	84% of sexual assaults and rape victims are female; highest rate occurs between ages of 16-24
Men	Men are more likely to be assaulted than falsely accused of assault
LGBTQ	LGBTQ individuals experience higher lifetime prevalence of sexual violence than their heterosexual counterparts
Persons of Color	31% of girls between the ages of 14-18 with a focus on Black, Latina, Asian, Native American, and LGBTQ individuals who were surveyed survived sexual assault
Individuals with Disabilities	2.9 times as likely as peers to be sexually assaulted. More than 90% of all people with developmental disabilities will experience sexual assault
Immigrants	Immigrant girls are twice as likely as non-immigrant peers to have experienced incidents of sexual assault

Prevalence Data (Cont'd)

The Department acknowledged the prevalence data cited by commenters and responded as follows:

> "When sexual harassment constitutes sex discrimination covered by Title IX, the final regulations hold schools accountable for responding in ways that restore or preserve a complainant's equal access to education."

Impact Data: Comment/Response

- Bullying, sexual harassment and sexual assault contribute to mental health problems
- Detrimental impact on victims is vast
  - 87% of sexual harassment victims report a negative effect
  - 37% of girls and 25% of boys do not want to return to school
- Victims suffer decreased productivity, increased absenteeism, difficulty studying, and difficulty sleeping, dropping classes and changing majors
- Rape victims suffer long term negative outcomes

Final Regulations address these concerns by requiring supportive measures be offered to complainants irrespective of whether the complainant files a formal complaint and requires remedies when respondent is found responsible.

Regulations seek to avoid non-supportive response or institutional betrayal.

Cost Data: Comment/Response

- Rape and sexual assault survivors incur significant financial costs, such as costs of medical and psychological treatment and lost time at work.
  - A single rape costs a victim between $87,000 – $240,776
  - Rape survivors lose an average of 8 days of pay work per assault

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The Department believes that the supportive measures and remedies to the complainant when the result of the grievance process is a finding that respondent is responsible will help avoid costs the flow from lost educational opportunities.

School Entities That Are K-12 Schools

- K-12 school entities have flexibility to apply the procedures that fit the needs of the school's educational environment.
- Rules adopted for the Title IX grievance procedure, including those that apply to any hearing process, must apply equally to both parties.
- Within this restriction, K-12 school entities retain discretion to decide how to conduct hearing, if the school entity selects that option.
- Parents and guardians retain all legal rights to act on behalf of a party.
- School entities can adopt rules of decorum that apply to the grievance process.

Department of Education: Comments on Hearings for K-12 School Entities

- *"In order to leave school districts as much flexibility as possible while creating a consistent, predictable grievance process framework, the Department declines to foreclose the option of holding hearings (whether "live" or otherwise) in elementary and secondary schools. Local school officials, for example, could determine that their educational community is best served by holding live hearings for high school students, for students above a certain age, or not at all." FN 1395*

Department of Education: Comments on Hearings for K-12 School Entities (Cont'd)

- (FN 1395) The Department notes that this provision states that non-postsecondary . . . grievance processes **may, but need not, provide for a hearing. Therefore, the school entity has flexibility to make a hearing available on a case by case basis, for example where the Title IX Coordinator determines a hearing is needed, so long as the grievance process clearly identifies the circumstances under which a hearing may, or may not, be held** . . .
- Any rules adopted must apply equally to both parties. Thus, a grievance process could not, for example, state that a hearing will be held only if a respondent requests it, or only if a complainant agrees to it, but could state that a hearing will be held only if both parties request it or consent to it.

Should the K-12 School Entity Offer a Hearing Opportunity as Part of Its Title IX Grievance Process? If So, What Will It Look Like?

- This is a determination to be made locally with your administration, school board and solicitor.
- There are disadvantage and advantages to introducing the hearing process at the K-12 level.
- There will be instances where, after a Title IX determination, an employee is entitled to a local agency hearing, has rights under an Act 93 agreement or may pursue grievance arbitration under a collective bargaining agreement.
- Similarly, a student would be entitled to a hearing in connection with an expulsion proceeding or an athletic code of conduct may require other collateral proceedings.

Questions

Title IX Final Regulations
Part II: Policy, Procedures & Training

Implementing the New Regulations

Investigations, Administrative Outcomes & Appeals

Processing Steps to Keep in Mind

- Notification
- Publication
- Implementation
- Communication
- Documentation
- Conclusion

Policies & Procedures

- Schools must create or revise policies and procedures that:

1. Meet the directives issued under the final rules
2. Comply with state law
3. Are tailored to the needs and/or culture or climate of the district

Training: Purpose and Goals

- Training is key to a successful response to reports of alleged sex discrimination or harassment.
- Training is **required by the federal government** to ensure institutional practice consistent with key laws and guidance:
  - On policies, procedures
  - For anyone who is responsible for Title IX in the schools: Title IX Coordinator, Investigator, decision makers and informal resolution facilitators
- **Intent**: Under the Title IX Rule, students, employees, the Department and the public **will be able to examine** a school's training materials, providing a necessary safeguard to improve the impartiality, reliability and legitimacy of Title IX proceedings. This requirement will improve the overall **transparency and integrity** of a school's Title IX policies and procedures.

§106.45(b)(1)(iii) & §106.45(b)(10)(i)(D)

Training: Materials

- A school must post on its website: "*All materials used to train* Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process."
- Posting anything less than "all materials" on the website is insufficient.
- Merely listing topics covered by the school's training of Title IX personnel, or merely summarizing such training materials is not the same as posting "all materials."
- If a school's current training materials are copyrighted or otherwise protected as proprietary business information (for example, by an outside consultant), the school still must comply with the Title IX Rule. This may mean that the school has to secure permission from the copyright holder to publish the training materials on the school's website.

§106.45(b)(10)(i)(D)

Training: Materials (Cont'd)

- All materials used to train Title IX personnel:
  - Must **not** rely on sex stereotypes
  - Must **promote impartial investigations and adjudications** of formal complaints of sexual harassment
  - Must be maintained by the school **for at least seven years**
  - If the school does not maintain a website the school must make the training materials available upon request for inspection by members of the public

§106.45(b)(1)(iii) & §106.45(b)(10)(i)(D)

Training

The recipient must ensure these roles are clear of conflict before individuals begin serving in their roles:

- Title IX Coordinators
- Investigators
- Decision makers
- Facilitators of informal resolution processes

The recipient has discretion to impose additional training as needed, including training of other personnel and students.

§106.45(b)(1)(iii)

Implementation

- Following training – There must be successful and consistent **implementation** of the policies and procedures
  - **Recommended that schools create forms to assist in:**
    - Making sure information is properly recorded/memorialized
    - Making sure required information is given to the recipients
    - Ensure consistency and transparency in the process
  - **Examples of the types of forms:**
    - Incident reporting form
    - Internal incident/risk assessment form
    - Complainant information brochure on supportive measures and informal resolution or formal complaint options
    - Mutual no contact order
    - Formal complaint form
    - Notice of Investigation Letter
    - Notice of Hearing
    - Outcome Determination Letter
    - Right to Appeal

Documentation

Document, Document, Document

- It cannot be overstated that school MUST keep accurate records.

- The Who, What, When, How and Why
  - Who received the report
  - Who made the report
  - When was the report received and when any other steps were taken
  - What steps were taken: Notice to Title IX Coordinator, call to parents/legal guardians of student, call to law enforcement, call to Childline
  - What support was provided to the complainant (person reporting)
    - For example, applying interim measures (i.e. putting a safety plan in place) to make sure the complainant is safe in school and not restricted in participating in schools programs and activities

- Schools **must** also document their reasons why each response to sexual harassment was not deliberately indifferent– clearly unreasonable in light of known circumstances.

Definitions: Part II

- Relevance
- Credibility
- Rape shield
- Hearing proceeding
- Outcome determination
- Appeal
- Recordkeeping

Relevance

This term requires that the evidence or testimony directly relate to the issues disputed or discussed.

- Inculpatory and exculpatory evidence is considered relevant.
- Information protected by a legally recognized privilege is not relevant.
- Questions about a Complainant's prior sexual behavior or sexual predisposition are not relevant, unless:
  - Offer to prove someone other than Respondent is responsible
  - Offer to prove the Complainant provided Respondent with prior consent

§106.45(b)(1)(ii) & §106.45(b)(6)

Inculpatory Evidence

- Inculpatory evidence is evidence that shows, or tends to show, a person's involvement in an act, or evidence that can establish guilt.

Exculpatory Evidence

- Evidence that tends to show a person's innocence is considered exculpatory evidence.

Credibility

That quality in a witness which renders their testimony worthy of belief.

Factors used to assess credibility:

- Observation of a witness or participant's general demeanor
- Opportunity for the witness/ participant to observe and provide the information they are giving
- Noting consistencies or inconsistencies in their narrative
  - Compare or document any prior inconsistent statements
- Any bias or motive to lie
- Probability or improbability of the person's description of the event: Does it have the ring of truth or make sense?

> "**A decision-maker may judge credibility based on, for example, factors of plausibility and consistency in party and witness statements. Specialized legal training is not a prerequisite for evaluating credibility, as evidenced by the fact that many criminal and civil court trials rely on jurors (for whom no legal training is required) to determine the facts of the case including the credibility of witnesses.**" (pg. 1238)

Rape Shield

Depending on the particular state law, no testimony or evidence of a Complainant's past sexual behavior shall be permitted in the live hearing.

> "Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent." (pg. 2025)

Administrative Outcome Proceeding

- **Hearings are optional and not required** in Elementary and Secondary Schools. If a K-12 school decides to hold a "live hearing", there is no cross examination. Parties must be given the opportunity to submit written questions.

"The Department appreciates commenters' support for § 106.45(b)(6)(ii) **making hearings optional for elementary and secondary schools while providing opportunity for the parties to submit written questions and follow-up questions to other parties and witnesses with or without a hearing**. The Department agrees that this provision ensures due process protections and fairness while taking into account that students in elementary and secondary schools are usually under the age of majority. Thus, the Department declines to mandate hearings and cross examination for elementary and secondary schools, including only as applied to allegations of peer-on-peer harassment, or to high schools."

"The Department disagrees that the written submission of questions procedure in this provision exposes students to hostile proceedings, unnecessarily limits the discretion of local school officials, or obligates school districts to expend resources in an unwarranted manner. While due process of law is a flexible concept, at a minimum it requires notice and a meaningful opportunity to be heard, and the Department has determined that with respect to sexual harassment allegations under Title IX, both parties deserve procedural protections that translate those due process principles into meaningful rights for parties and increase the likelihood of reliable outcomes. **This provision prescribes written submission of questions prior to adjudication, a procedure that benefits the truth-seeking purpose of the process even when the rights of a young student are exercised by a parent or legal guardian**."

Administrative Outcome Proceeding

- With or without a hearing, after the school has sent the investigative report to the parties and before reaching a determination regarding responsibility, the decision-maker(s) must:
  - Afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness,
  - Provide each party with the answers, and
  - Allow for additional, limited follow-up questions from each party. The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.

- Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

Outcome Determination

- Issued by the decision maker(s) who oversees and manages the administrative outcome proceeding or live hearing
- Must be a written determination regarding responsibility
- To reach this determination, the decision maker must apply the standard of evidence
- The recipient must provide the written determination to the parties simultaneously. The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

Outcome Determination (Cont'd)

- The written determination must include:
  - (A) Identification of the allegations potentially constituting sexual harassment
  - (B) 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
  - (C) Findings of fact supporting the determination
  - (D) Conclusions regarding the application of the recipient's code of conduct to the facts
  - (E) A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant
  - (F) The recipient's procedures and permissible basis for the complainant and respondent to appeal

Appeals

Parties are entitled to appeal

- An outcome determination
- A dismissal of a formal complaint
- Dismissal of any allegation in the formal complaint

The (3) three bases for an appeal are:

1. Procedural irregularity that affected the outcome of the matter
2. New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter
3. The Title IX Coordinator, investigator(s) or decision maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter

Recordkeeping

- A school must maintain for a period of **seven years** records of:
  - Each sexual harassment investigation including any determination regarding responsibility and any required audio or audiovisual recording or transcript, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity
  - Any appeal and the result therefrom
  - Any informal resolution and the result therefrom
  - All materials used to train Title IX Coordinators, investigators, decision makers and any person who facilitates an informal resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.

Step by Step: Incident Report to Final Outcome Determination

Step by Step:
Incident Report to Final Outcome

- **Step One**: Incident Report received by Title IX Coordinator

- **Step Two**: Report reviewed and contact made with
  - Complainant, if known
  - Parent/legal guardian
  - If applicable, statewide child abuse reporting agency and/or law enforcement

  N.B. If the complainant is unknown but the reporter is known, contact that individual

Step by Step:
Incident Report to Final Outcome (Cont'd)

Step Three:

- The Title IX Coordinator must promptly contact the complainant confidentially to discuss:
  1. The availability of supportive measures
  2. Consider the complainant's wishes with respect to supportive measures
  3. Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint
  4. Explain to the complainant the process for filing a formal complaint
  5. Also, review and any other applicable policy, such as grievance process for employees under employee contract or student code of conduct disciplinary process
  6. Recommend giving the complainant a brochure or "one pager" that contains all the information that was explained and/or how to access it on the district's website

Step by Step:
Incident Report to Final Outcome

Step Four:

- Conduct a team internal assessment (i.e. Title IX Coordinator, Deputy Title IX Coordinator, Compliance Director, Principal or Asst. Principal, School Resource Officer). Use a checklist to determine what information is known.
- Is Complainant known or unknown?
- Is alleged perpetrator/respondent known or unknown?
- Has Complainant requested confidentiality or anonymity?
- If Respondent is known, based on content of report, what emergency measures need to be taken to keep parties safe (i.e. no contact order, change of classes).
- If **No Contact Order** is requested by Complainant or determined to be a necessary supportive safety measure, inform the Complainant in advance to note that confidentiality cannot be maintained by virtue of the nature of a no contact directive.
- If a report was made to a child abuse hotline or law enforcement, document if there is any directive or restriction from either entity directing the school to not proceed with outlined procedural next steps under Title IX.
- Notify school personnel who are in “need to know” roles of only the necessary information needed to ensure the safety of the parties and school community.
- Follow up with Complainant in person and via email to check in on their well -being.
- Follow up with parents of Complainant via phone, in person or email to check in on well-being of Complainant to receive any further concerns.
- Additional follow up with Complainant should be at regular intervals and with ongoing consultation with parents to make sure welcomed and not-intrusive.

Step by Step:
Incident Report to Final Outcome (Cont'd)

Step Five:

- If a formal complaint is received by the school from the Complainant or Complainant's parent, the school should:

  – Jurisdiction/Scope Question:
    - Review the allegations and if the allegations in a formal complaint **do not meet** the definition of sexual harassment in the Final Rule, or **did not occur** in the school's education program or activity against a person in the United States, the school must dismiss such allegations for purposes of Title IX *but may still address the allegations in any manner the school deems appropriate under the school's own code of conduct or any other non-Title IX disciplinary policy*.

  – If there is sufficient information available to the school to conclude that the allegations do meet the definition of sexual harassment and did occur in the school's education program or activity against a person in the United States, then the Coordinator should re-discuss with Complainant and their parents the grievance process and explain the informal resolution process as an option.

Step by Step:
Incident Report to Final Outcome (Cont'd)

- **Step Six:**
  - Notify the Respondent and the Respondent's parents of the filing of a formal complaint
  - Explain grievance process and the informal resolution process
  - Offer supportive measures
  - Discuss no contact directive/orders

Step by Step:
Incident Report to Final Outcome (Cont'd)

Step Seven:

- If Complainant or Respondent wants to pursue the informal resolution process, determine if the other party wants to voluntarily engage in the informal resolution process as well
- If so, then identify an impartial, neutral, trained party to serve as the informal resolution facilitator and assign the matter
- Provide the name and information about the informal resolution facilitator to see if either party can state if there is a basis as to why the person selected cannot be fair and impartial or is biased

Step by Step:
Incident Report to Final Outcome (Cont'd)

Step Eight:

- If neither party wants to pursue the informal resolution process, then begin the formal investigation into the incident and issue a Notice of Investigation that states the nature of the complaint, when the complaint was received, what school district policies are alleged to have been violated and who is conducting the investigation.
- Identify an impartial, neutral, trained party to serve as the investigator and assign the matter.
- Provide the name and information about investigator to see if either party can state if there is a basis as to why the person selected cannot be fair and impartial or is biased.

Step by Step:
Incident Report to Final Outcome (Cont'd)

Step Nine:

- Provide the Investigator with access to all relevant information and contact information for witnesses.
- Make sure the Investigator, if external, has all necessary child abuse/FBI clearances in order to meet with students and be in the school building.
- Get periodic updates from Investigator and update parties and their parents at the same time as to the status of the investigation.
- Once completed, share the draft Investigation report at the same time with the parties. Allow 10 days for parties to provide a response.
- Issue final investigation report, hard copy or electronic format contemporaneously to the parties at least 10 days prior to a hearing or administrative outcome proceeding.

Step by Step:
Incident Report to Final Outcome (Cont'd)

Step 10:

- Identify a decision maker who is unbiased, neutral and trained to either conduct a live hearing on the complaint or render a decision based on their review of the investigation report and all other relevant evidence.
- A live hearing is NOT required in K-12 schools. With or without a hearing, schools should provide the investigative report in advance to each party and the decision maker must provide each party the opportunity to submit written questions to the other party and witnesses and receive an answer before a determination regarding responsibility is reached.
- A live hearing is required in post-secondary institutions with cross examination by an advisor of choice, who may be an attorney (one must be provided if the party does not have an advisor).
- Advisor should be knowledgeable about the school's Title IX policies and procedures and expectations of their role during the hearing.

Step by Step:
Incident Report to Final Outcome (Cont'd)

Step 11:

Receive from the decision maker the Outcome Determination letter and deliver it to the Complainant and Respondent. Delivery should be contemporaneous to both parties.

- The Outcome Determination should include the decision maker's findings of fact, application of the standard of proof outlined in the policy, rationale, conclusion and sanction.
- Review the school code to determine if, based on sanction recommendation, the school board must review and vote to approve or reject the Outcome Determination and sanction recommendation.

Step by Step:
Incident Report to Final Outcome (Cont'd)

Step 12:

- Provide information to both parties about their right to appeal the decision, the basis for the appeal and when the party must file their appeal.

Step 13:

- If a timely appeal is filed, the appeal decision maker(s) must be identified, notice given to the parties of who is handling the appeal and the timeframe for when the appeal decision would be made.
- The decision maker on appeal must be trained, impartial and unbiased.

Step by Step:
Incident Report to Final Outcome (Cont'd)

Step 14:

- Notify parties in writing of the appeal decision and that the decision is final.

Step 15:

- Secure all documents and information gathered and preserve all information for seven years.

Grievance Process

Grievance Process

- The grievance process must provide notice and meaningful opportunity to be heard.

- Some examples of what should be contained in the grievance process:

  - Presumes the non-responsibility of respondents until conclusion of the grievance process
  - Includes reasonably prompt time frames for the grievance process
  - Informs all parties of critical information about the recipient's procedures including the range of remedies and disciplinary sanctions a recipient may impose, the standard of evidence applied by the recipient to all formal complaints of sexual harassment under Title IX (*which must be either the preponderance of the evidence standard, or the clear and convincing evidence standard*), the recipient's appeal procedures, and the range of supportive measures available to both parties.

§106.45

Grievance Process (Cont'd)

- Requires **written notice** of the allegations to both parties
- Keeps the burden of proof and burden of gathering evidence on the (school) while protecting every party's right to consent to the use of the party's own medical, psychological and similar treatment records
- Provides the parties equal opportunity to present fact and expert witnesses
- Does not restrict the parties from discussing the allegations or gathering evidence
- Requires schools to:
  - Investigate formal complaints
  - Describe when a formal complaint is subject to mandatory or discretionary dismissal
  - Notify the parties of any dismissal
  - Authorize discretionary consolidation of formal complaints when allegations of sexual harassment arise out of the same facts or circumstances

§§106.45(b)(2) and (b)(5)(i)-(vii);Sections 106.45(b)(3)-(b)(4)

Grievance Process (Cont'd)

- Requires a decision maker who is not the same person as the Title IX Coordinator or the Investigator to reach a determination regarding responsibility by applying the standard of evidence the recipient has designated in the recipient's grievance process for use in all formal complaints of sexual harassment (which must be either the preponderance of the evidence standard or the clear and convincing evidence standard), and the recipient must simultaneously send the parties a written determination explaining the reasons for the outcome.

- Requires recipients to offer appeals equally to both parties, on the basis of:
  - Procedural deficiencies
  - Newly discovered evidence
  - Bias or conflict of interest affected the outcome

§§106.45(b)(6)- (b)(8)

Grievance Process (Cont'd)

- Gives the parties equal opportunity to have an advisor for live hearings (who may be, but does not need to be, an attorney) who can conduct cross examination in IHE. If an ESE conducts a live hearing, the parties have an equal opportunity to submit written questions for the other parties and witnesses to answer before a determination regarding responsibility is reached.
- Requires written notice when a party's participation is invited or expected for an interview, meeting or hearing
- Provides both parties equal opportunity to review and respond to the evidence gathered during the investigation
- Sends both parties the recipient's investigative report summarizing the relevant evidence, prior to reaching a determination regarding responsibility

§§106.45(b)(2) and (b)(5)(i)-(vii)

Grievance Process in K-12

- U.S. Department of Education stated:
  - "As to live hearings with cross-examination, we have clarified the language in the final regulations to emphasize that ESE recipients are not required to use a hearing model to adjudicate formal complaints of sexual harassment under these final regulations. **Moreover, if an ESE recipient chooses to use a hearing model, that recipient does not then need to comply with the provisions in §106.45(b)(6)(i), which applies only to postsecondary institution recipients**.
  - Nothing prevents schools from counseling students as to how the grievance procedures will work, or aiding and assisting the parties, on an equal basis, with additional supports as they go through the process. Additionally, many provisions of the final regulations require only that schools provide an equal opportunity to the parties, leave the recipient flexibility to the extent that a recipient would prefer to make the grievance process less formal or intimidating for students.
  - We have also added §106.6(g) in the final regulations, acknowledging the legal rights of parents or guardians to act on behalf of complainants, respondents, or other individuals with respect to exercising rights under Title IX, including participation in a grievance process."

No Contact Orders

Mutual vs. One Way

- Mutual No Contact Orders are permissible an on the lists of possible supportive measures
  - Dept. of Education does not see a mutual no contact order as retaliatory

- However, the inclusion of "mutual restrictions on contact between the parties" on the list of possible supportive measures **does not mean** that one-way no-contact orders are never appropriate.
- One Way No Contact Orders are permissible and may be appropriate. A fact-specific inquiry **is required** into whether a carefully crafted no-contact order restricting the actions of only one party would meet the definition of supportive measures.
  - If a recipient/school issues a one-way no-contact order to help enforce a restraining order, preliminary injunction, or other order of protection issued by a court
  - Restore or preserve equal access to educational activity or program
  - Must not unreasonably burden the other party

Transparency, Confidentiality & FERPA

- Final regulations were enacted to ensure that recipients respond to sexual harassment by offering supportive measures designed to restore or preserve a complainant's equal educational access without treating a respondent as responsible until after a fair grievance process.
- The Department clarifies that schools (and, as applicable, parties) must follow relevant state and federal health care privacy laws throughout the grievance process. Nothing in the notice should divulge the complainant's (or respondent's) medical information or other sensitive information, nor does §106.45(b)(2) require disclosure of such information.
- Family Educational Rights and Privacy Act
  - Schools must have written permission from the parent or eligible student in order to release any information from a student's education record. However, FERPA allows schools to disclose those records, without consent, to the certain parties or under the specifically conditions outlined by the Department (34 CFR §99.31).

Confidentiality

- §106.71(a) also **mandates confidentiality of the identity of anyone who makes a report or complaint about sex discrimination**. Includes: anyone who makes the report, the complainant, any witness, any person who is reported to be the perpetrator, and the respondent (except as permitted by FERPA).
- As explained more fully in the "§106.6(e) FERPA" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble, we note that §106.6(e) **of the final regulations makes it clear that the final regulations should be interpreted to be consistent with a recipient's obligations under FERPA**.
- Schools **may require** advisors to use the evidence received for inspection and review under §106.45(b)(5)(vi) as well as the investigative report under §106.45(b)(5)(vii) only for purposes of the grievance process under §106.45 and **require them not to further disseminate or disclose these materials. Additionally, these final regulations do not prohibit a recipient from using a non-disclosure agreement** that complies with these final regulations and other applicable laws.

Formal Complaint Dismissal

- Schools may dismiss a formal complaint if:
  - The complainant notifies the Title IX Coordinator in writing that the complainant wishes to withdraw
  - The conduct did not take place in the United States
  - The respondent is no longer enrolled or employed by recipient
  - The specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination

Dismissal of a Formal Complaint: Appeal

- If a school dismisses a formal complaint or any allegations in the formal complaint, the complainant should:
  - Know why any of the complainant's allegations were dismissed **and**
  - Be able to challenge such a dismissal by appealing on certain grounds

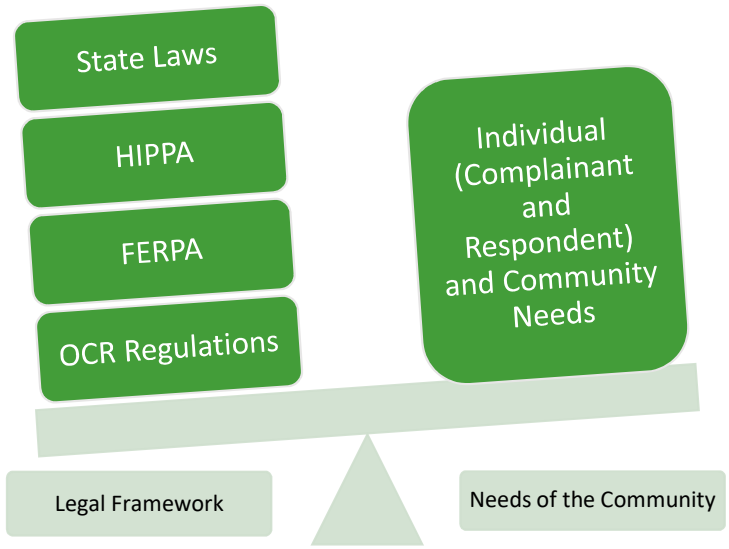
Study Abroad Programs

- Title IX does not have extraterritorial application.
  - Department reinforces this by noting that a recipient may face difficulties in interviewing witnesses and gathering evidence in foreign locations where sexual misconduct may have occurred
- This jurisdictional issue does not prevent a recipient from initiating a student conduct proceeding or offering supportive measures.
  - §106.45(b)(3) revised to state that even if a recipient must dismiss a formal complaint because the alleged conduct did not occur against a person in the United States, such dismissal is only for purpose of Title IX
- Note that Title IX does apply to international or foreign exchange students while they are in the United States.

Parallel Processes/Other Federal or State Obligations

- Law enforcement
- Unions/Collective bargaining agreements
- HR/EEOC
- Special education

Key Elements in Enforcing Title IX



Title IX & Law Enforcement: Two Distinct Systems

"A law enforcement investigation **does not relieve the school of its independent Title IX obligation** to investigate the conduct" and "resolve complaints promptly and equitably."

"Police investigations may be useful for fact-gathering, but because the standards for criminal investigations are different, **police investigations or reports are not determinative of whether sexual harassment or violence violates Title IX**."

"Conduct **may constitute unlawful sexual harassment** under Title IX **even if the police do not have sufficient evidence** of a criminal violation."

Delays: Law Enforcement Investigation

- The Department **does not require** a school to delay Title IX grievance during a law enforcement investigation.
  - Recipient must respond promptly to every complainant, with or without the filing of a grievance. The duty to respond is triggered when recipient is on notice .
- Recipient **may only delay short-term** based on "good cause," which may include concurrent law enforcement investigation, but it should not be a long or indefinite delay.

Title IX Protections & Other Federal, State and Local Laws

- **Constitutional protections:**
  - Nothing in §106 requires a school to:
    1. Restrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution
    2. Deprive a person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and 14th Amendments of the U.S. Constitution
    3. Restrict any other rights guaranteed against government action by the U.S. Constitution
- To the extent that these final regulations provide the same protections as state laws governing student discipline already provide, these final regulations pose no challenge for recipients (schools); **to the extent that a recipient (school) cannot comply with both state law and these final regulations, these final regulations, as federal law, would control.**
- Conflicts with state laws: To the extent there is a conflict that cannot be resolved, the regulations control.

State Law vs. Regulations

- "The Department appreciates commenters' concerns that State laws already govern disciplinary proceedings, especially with respect to exclusionary discipline. **The Department has determined that the procedural protections in §106.45 best serve the interests implicated in resolution of allegations of sexual harassment under Title IX,** a Federal civil rights law, and discipline for non-Title IX matters does not fall under the purview of these final regulations."
  - **Exercise of rights by parents or guardians:** Nothing in §106 may be read in derogation of any legal right of a parent or guardian to act on behalf of a "complainant," "respondent," "party" or other individual, including but not limited to filing a formal complaint.
  - **Preemptive effect:** To the extent of a conflict between state or local law and Title IX as implemented by §§106.30 (Definitions), 106.44 (Schools Response to sexual harassment), and 106.45 (Grievance Process), **the obligation to comply** with §§106.30, 106.44 and 106.45 **is not obviated or alleviated by any state or local law**.

State Laws Governing Disciplinary Proceedings

- The Public School Code and its regulations deal with the due process and hearing requirements to expel students and the termination of most school employees.
- The Title IX grievance procedure is mandatory for the resolution of all allegations of sexual harassment under Title IX.
- In some cases, the Title IX grievance procedure may provide the same protections as state law.
- Often, school entitles will run parallel disciplinary proceedings to address the requirements of disciplinary policies, collective bargaining agreements and state law.

State Laws Governing Disciplinary Proceedings (Cont'd)

- To the extent the school entity cannot comply with both state law and the Title IX regulations, the Title IX regulations would control.
- The area of special education and student rights under the IDEA and Section 504 requires a careful analysis.
- This is an area where a school entity should consult with its local solicitor or special counsel.

Individuals With Disabilities

- In response to commenters' concerns, the final regulations revised §106.44(a) to require recipients to offer supportive measures as part of the recipient's prompt, non-deliberately indifferent response.
- The prompt response **must** include:
  - Title IX Coordinator promptly contacting complainant to discuss available supportive measures
  - Inform the complainant of the supportive measures available with or without the filing of a formal complaint
  - Explain the process for filing a formal complaint
- Recipients must meet these requirements while also complying with disability laws (IDEA, Section 504, ADA). These regulations do not address a recipient's obligations under applicable disability laws.
- To the extent that there is an overlap between supportive measures with Title IX and disability laws, the Title IX Coordinator is responsible for the implementation of such supportive measure.

Individuals With Disabilities (Cont'd)

- The Department responded to concerns re: students with disabilities having difficulty in comprehending sexual harassment and communicating to a recipient about an incident.
- Recipients are free to provide educational information to students to help with these concerns.
- The Department believes the expansion of actual knowledge to include notice to any ESE employee will aid in the communication.
- Recipients must react to complainants with impartiality and without bias.
- §106.45(b)(1)(iii) prohibits Title IX Coordinators, investigators, decision-makers and anyone involved in informal resolution process from having conflicts of interest or bias against complainants or respondents by requiring training that includes: "how to serve impartially, including by avoiding prejudgment of the facts at issue conflicts of interest, and bias."

Individuals With Disabilities (Cont'd)

- To guard against concerns that stereotypes may lead to a recipient unfairly punishing a student with disabilities for reporting a sexual harassment, the final regulations added §106.71, which prevents retaliation:
  - §106.71 stated that "charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or report of formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX or its implementing regulations, constitutes retaliation."
    - Bullying can be a form of retaliation

Individuals With Disabilities (Cont'd)

- Any disability of Respondent or Complainant is part of the "surrounding circumstances" to be taken into considering when determining if conduct rises to sexual harassment.
- When the conduct of a Respondent with a disability is determined to be sexual harassment, the recipient has flexibility to impose consequences for action. The Department "does not second guess whether the recipient imposes a disciplinary sanction."
  - Keep in mind:
    - Complainant is still entitled to remedies that restore or preserve the right to equal educational access
    - There can be no disciplinary sanctions without following the grievance process in §106.45

Special Education Considerations

- Notify Special Education Director and/or 504 Coordinator as soon as possible if a special education student is involved in any way in an investigation – whether an accused, accuser, witness, etc.
- Impact on IEP Team and Offers of FAPE
  - Special Ed team should be aware of any Title IX implications in the event the actions at issue prompt the need for changes to a student's IEP – FBA and other behavioral supports, schedule or program changes, a new evaluation, etc.
  - If your Title IX investigation of unidentified students produces information that could be relevant to a school's child find obligations, share the concern with the special education team to see if it warrants an IDEA and/or 504 Evaluation.

Special Education Considerations (Cont'd)

- Disciplinary Protections:
  - Schools cannot change the placement of a student (removal for more than 10 consecutive school days or a pattern of shorter removals cumulating to 10-15 school days) in response to an offense that is a manifestation of the student's disabilities. This applies to students eligible for services or protection under the IDEA and Section 504.
  - Schools can generally remove students for shorter periods of time that do not amount to a "change in placement" and should use those days strategically throughout the investigatory process.
  - Consulting special education administrators will ensure your investigatory procedures and ultimate determinations do not run afoul of these protections for identified students, while also honoring its obligations under Title IX.
- The two processes can likely run parallel to each other when coordination occurs early on in the process.

Title IX & Unions

- **Conflicts of interest, confidentiality and union concerns:**
- Other commenters expressed concern that §106.45(b)(5)(iv) may conflict with a union's duty of providing fair representation in the grievance process. One commenter stated that federal labor law and many state labor laws already provide that an employee subject to investigatory interviews may have a union representative present for a meeting that might lead to discipline.
- **Discussion:** The Department acknowledges the concerns raised by commenters regarding potential conflicts of interest and confidentiality issues arising from permitting the presence or participation of advisors of a party's choice in Title IX proceedings, and potential conflict with labor union duties in grievance processes. With respect to potential conflicts of interest, we believe that parties are in the best position to decide which individuals should serve as their advisors. ***Advisors, for example, may be friends, family members, attorneys or other individuals with whom the party has a trusted relationship.*** The Department believes it would be inappropriate for it to second guess this important decision.

Title IX & Unions (Cont'd)

"It is not the intent of the Department to undermine the important role that union advisors may play in grievance proceedings. However, we wish to clarify that in the event of an actual conflict between a union contract or practice and the final regulations, then the final regulations would have preemptive effect."

We note that the final regulations **do not preclude** a union lawyer from serving as an advisor to a party in a proceeding**.**

Section 106.45
Recipient's Response to Formal Complaints
How to Serve Impartially and Free from Bias

Complainant's Viewpoint

Respondent's Viewpoint

Treatment of Complainants or Respondents

Treatment of a complainant or respondent in response to a formal complaint *may* constitute sex discrimination under Title IX.

- Any person, regardless of sex, may be a victim or perpetrator of sexual harassment.
- Allegations of sexual harassment present inherent risks of sex-based biases, stereotypes and generalizations that could impact the grievance process.
- Different treatment of victims and perpetrators due to sex-based stereotypes about how men or women behave with respect to sexual violence violates Title IX's non-discrimination mandate.

§106.45(a)

Equitable Treatment of Complainants & Respondents

- Any rules a recipient chooses to adopt that are not already required under Title IX **must be applied equally to both parties**.

- Equitable treatment of the parties:
  - Equitable treatment of a **Complainant**
    - Providing remedies where a respondent has been determined to be responsible
  - Equitable treatment of a **Respondent**
    - Imposing disciplinary sanctions only after following the §106.45 grievance process or other actions that are not "supportive measures"

§106.45(b)(1)(i)

Reasonably Prompt Time Frames

Recipients **must** designate a reasonable time frame for each phase of the grievance process.

- The reasonableness of the time frame is evaluated based on the recipient's operation of an education program or activity.
- The time frame **must** include the time for appeals and any informal resolution process.
- Open-ended or indefinite grievance processes are **prohibited.**

Delays or extensions of the designated timeframes are permitted, but not required, so long as they are:

- Temporary and limited
- Supported by good cause (i.e., concurrent police activity or absence of a witness)
- Communicated in writing to the parties with an explanation for the delay

§106.45(b)(1)(v)

Describing Possible Disciplinary Sanctions & Remedies

A recipient has discretion to:

- **List** the possible disciplinary sanctions and remedies the recipient may implement following a determination of responsibility
- **Describe the range** of possible disciplinary sanctions and remedies the recipient may implement following a determination of responsibility

§106.45(b)(1)(vi)

Privileged Information

Cannot require, allow or rely upon or otherwise use questions or evidence or seek disclosure of any information protected by a legally-recognized privilege during the grievance process, unless the person holding the privilege has waived it.

Section 106.45(b)(1)(x) & § 106.45(b)(1)(ii)

Written Notice of Allegations

After receiving a formal complaint, a recipient must provide written notice to the parties of the recipient's grievance procedures and the allegations. Such notice also requires:

- Sufficient details
  - The parties involved, date, and location of incident (if known at the time)
  - The section of the recipient's code of conduct allegedly violated (if applicable), and
  - The alleged conduct constituting sexual harassment
- Sufficient time for the respondent to prepare a response before any initial interview
  - What constitutes "sufficient time" will be determined by the circumstances
- A statement that the respondent is presumed not responsible and that a determination regarding responsibility is made at the conclusion of the grievance process.

§106.45(b)(2)

Written Notice of Allegations (Cont'd)

- The notice **must also** inform the parties:
  - That they may request to inspect and review evidence
  - That each party has a right to an advisor of choice
  - Of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process
    - If the recipient's code of conduct is silent on false statements and/or submitting false information, this reference is not required in the written notice.
- If the school decides later to investigate allegations not included in the original notice, the school must provide notice of the additional allegations to the parties.

§106.45(b)(2)

Written Notice of Allegations (Cont'd)

- Notice from the recipient is not required where other forms of "notice" (i.e., a report or other disclosure) charge the recipient with knowledge that does not consist of receipt of a formal complaint filed by a complainant or signed by the Title IX Coordinator.
- Recipients may choose the method of delivery for the initial written notices and subsequent notices.
- The notice should not contain any party's medical or other sensitive information.
- Recipients are free to phrase the written notice as they please but should employ age-appropriate methods, common sense and good judgment in choosing how to convey the information required in the written notice.
- Title IX Coordinators may, but are not required to, communicate with a young student's parent about the process via telephone or in person in addition to sending the written notice.
- Temporary delays based on good cause apply ***only after*** the parties have received written notice of the allegations.

§106.45(b)(2), §106.45(b)(1)(v) & §106.30

Written Notice of Allegations (Cont'd)

- The recipient **must** send notice to the parties regarding essential case developments, such as where:
  - Additional allegations become part of the investigation
  - Allegations or the entire formal complaint have been dismissed
  - Any short-term delay or time frame extension has been granted
  - The determination regarding responsibility has been made

§106.45(b)(2)

Mandatory Dismissal of Formal Complaints

A recipient **must dismiss** the allegations where, if true, the allegations would not qualify as sexual harassment under Title IX.

- Dismissal under Title IX does not prevent action under a recipient's code of conduct or other provision.

§106.45(b)(3)(i)

Discretionary Dismissal of Formal Complaints

- Recipients are allowed, but not required, to dismiss formal complaints under three circumstances:
  1. Where a complainant notifies the Title IX Coordinator, in writing, that they would like to withdraw the formal complaint or any allegations
  2. Where the respondent is no longer enrolled or employed by the recipient
  3. Where specific circumstances prevent the recipient from gathering sufficient evidence to reach a determination on the allegations in the formal complaint

Discretionary dismissals are not appropriate in situations where the recipient does not know whether it can meet the burden of proof.

§106.45(b)(3)(ii)

Notice of Dismissal

- Recipients **are required** to send the parties written notice of any dismissal decision.
  - Recipients are also **required** to promptly send the parties written notice so the parties know when a formal complaint (or allegations) has been dismissed including the reason for the dismissal.
  - Notice is **required** for both mandatory and discretionary dismissals, including the reason for the dismissal.

§106.45(b)(3)(iii)

Consolidation of Formal Complaints

Recipients may consolidate formal complaints in situations that arise out of the same facts or circumstances and involve more than one complainant, more than one respondent, or what amounts to counter-complaints by one party against the other.

Each party maintains their individual rights under Title IX.

§106.45(b)(4)

Investigations

What Should a Title IX Investigation Include?

The specific steps in a school's Title IX investigation will vary depending on the nature of the allegation, the age of the student or students involved, the size and administrative structure of the school, state or local legal requirements (including mandatory reporting requirements for schools working with minors), and what it has learned from past experiences.

- Definition:
  - The term *"investigation"* refers to the process the school uses to resolve sexual violence complaints.
- This includes the fact-finding investigation and any hearing and decision-making process the school uses to determine: (1) whether or not the conduct occurred; and, (2) if the conduct occurred, what actions the school will take to end the sexual violence, eliminate the hostile environment, and prevent its recurrence, which may include imposing sanctions on the perpetrator and providing remedies for the complainant and broader student population.
- The investigation must be adequate, reliable, impartial and prompt and include an opportunity for both parties to present witnesses and other evidence

Burdens of Proof and Gathering Evidence

It is the recipient's burden to impartially gather evidence and present it so that the decision-maker can determine whether the recipient has shown that the weight of the evidence is sufficient to reach the selected standard of proof.

- **There is no burden of proof on complainants or respondents.**

§ 106.45(b)(5)(i)

Objective Evaluation of All Relevant Evidence

- An investigator must gather evidence directly related to the allegations even if the recipient does not intend to rely on such evidence.
  - The recipient must objectively evaluate evidence that is available in a particular case. The evidence itself need not be “objective” (i.e., corroborating evidence).
  - Recipients must not base evaluations of testimony based on inferences of a person’s status as a complainant, respondent or witness.

§106.45(b)(1)(ii)

Presumption of Non-Responsibility

The respondent is presumed **not responsible** for the alleged conduct until a determination has been made at the end of the grievance process.

Purpose of the presumption:

- To ensure the burden of proof remains on the recipient (not on the respondent or complainant)
- To ensure the applicable standard of evidence is correctly applied
- To ensure the recipient does not treat the respondent as responsible until the conclusion of the grievance process

§106.45(b)(1)(iv)

Investigation: Interviewing

Sample of general questioning:

- What happened?
- When did it happen?
- Where did it happen?
- If a witness, do you know what is alleged to have happened?
  - If so, where were you when it happened?
- If a witness, do you know the respondent and complainant?
  - If so, how long have you known them and how would you describe them (friend, acquaintance)?
- Have to talked to others about what happened? Who and when?
- Did you write down what happened? (diary [video or otherwise], notes, blog)
- Have you posted or seen anything posted on social media about this incident?

Equal Opportunity to Present Witnesses & Other Inculpatory/Exculpatory Evidence

Each party must have the opportunity to present fact and expert witnesses.

- Recipients may adopt rules governing how admissible relevant evidence is evaluated for weight or credibility by the decision maker.
  - Any rules adopted must be applied equally to both parties

§106.45(b)(5)(ii)

Recipients Must Not Restrict Ability of Either Party to Discuss Allegations or Gather and Present Relevant Evidence

- This applies to discussions of “the allegations under investigation,” which means a formal complaint has been filed.
- The regulations do not require recipients to give respondents a copy of the formal complaint.

§106.45(b)(5)(iii)

Advisors of Choice

Each party is entitled to an advisor throughout the grievance process.

- The recipient **may not limit the choice or presence** of an advisor.
- The advisor of choice may be, but is not required to be, a lawyer.
- Recipients may impose certain requirements on advisors:
  - Require advisors to use the evidence received for inspection and review as well as the investigative report only for purposes of the grievance process
  - Require advisors not to further disseminate or disclose these materials
  - Recipients may use a non-disclosure agreement that complies with the final regulations and other applicable laws

§106.45(b)(5)(iv)

Advisors of Choice (Cont'd)

- **Union Representative**: Where an advisor is a union representative and there is a conflict between a union contract or practice and the final regulations, the **final regulations will have preemptive effect.**
- The prohibition on having conflicts of interest or bias does *not* apply to party advisors.
  - For example, the existence of a possible conflict of interest where an advisor is assisting one party and also expected to give a statement as a witness does not violate the final regulations.

§106.45(b)(5)(iv)

Inspection & Review of Evidence Directly Related to the Allegations

Complainants and Respondents must have an equal opportunity to inspect and review the relevant and potentially relevant evidence.

- Both parties must be given sufficient time to meaningfully prepare arguments based on the evidence that further each party's view of the case
  - The parties may also present additional relevant facts and witnesses that the decision-maker should objectively evaluate before reaching a determination on responsibility.
- A recipient may require parties and advisors to refrain from disseminating the evidence reviewed
- A recipient may also permit or require the investigator to redact information not directly related to the allegations or that is barred from use

§106.45(b)(5)(vi)

Inspection & Review of Evidence Directly Related to the Allegations (Cont'd)

The recipient is **required** to provide *at least 10 days* for inspection and review, but may give the parties more than 10 days to respond

- The recipient must still conclude the grievance process within the reasonably prompt time frames to which they have committed.
- The recipient may decide whether the number of days provided are counted as business days, school days, calendar days or otherwise.

- A school may require all parties to submit any evidence that they would like the investigator to consider prior to the time for inspection
- A school may also choose to allow both parties to provide additional evidence in response to their inspection and review of the evidence as well as an opportunity to respond to the other party's additional evidence
- Similarly, a recipient may choose whether to provide a copy of each party's written response to the other party to ensure fairness, transparency, and allow the parties to adequately prepare for any hearing

§106.45(b)(5)(vi)

An Investigative Report That Fairly Summarizes Relevant Evidence

The school entity must send the parties and their advisors **an investigative report that fairly summarizes relevant evidence,** in an electronic format or a hard copy, **for their review and written response, with at least 10 days for the parties to respond before any hearing** (if a hearing is provided) **or the determination of responsibility.**

- Where there are multiple complainants, respondents, or both, a recipient may issue a single investigative report

- A party can request that the report not be sent to their advisor, but **the default practice** should be to send it to the advisor to avoid shortening the 10-day review period

§106.45(b)(5)(vii)

Informal Resolution Process

Informal Resolution: §106.45(b)(9)

- Final regulations support and expand informal resolution:
- **Pros:** Benefits of informal resolution
  - Empowers victims to pursue a grievance without the possible discomfort of a full formal process
  - Increases flexibility to address unique situations
  - Increases choice by allowing both parties to choose the option that is right for them to resolve the grievance.
  - Can enhance party anonymity
- **Cons:** Limitations of informal resolution
  - Lacks procedural safeguards of a more formal grievance process
  - Less appropriate mechanism to address allegations of sexual misconduct than a more formal grievance process
- No requirement that recipients establish or offer an informal resolution process

Informal Resolution: When Available?

- §106.45(b)(9) was revised to state that informal resolution is only available after a formal complaint has been filed.
  - The "default" is that a formal complaint must be investigated and adjudicated by the recipient
  - Under §106.45(b)(9), the recipient *may* choose to offer the parties an informal process to resolve the complaint without completing the investigation and adjudication
- Informal resolution available when:
  - Formal complaint has been filed
  - Recipient determines that informal resolution is appropriate
  - Both parties provide fully informed written consent for informal resolution

Informal Resolution: Voluntary Consent

- Voluntary consent can only be obtained after written notice is provided to each party of the allegations, the process of the informal resolution, the confidentiality implications, potential punishments or consequences, and that either party can withdraw at any time prior to the final resolution.
  - Consent cannot be the product of coercion or undue influence
  - Parties need not confer with an advisor prior to providing consent to entering an informal resolution process
  - Recipients are prohibited from requiring the parties participate in informal resolution

Informal Resolution: When Unavailable?

- Informal resolution is never available to resolve a formal complaint that an employee sexually harassed a student.

- Either party can withdraw their consent for the informal resolution process at any time and resume the grievance process with respect to a formal complaint.

- Recipients are prohibited from forcing students or employees to waive their right to a formal grievance process or requiring the parties to participate in an informal resolution process.

Informal Resolution: How Does it Work?

- After a formal complaint is filed, written notice of the allegations is sent to both parties.
- The written notice must include the informal resolution processes the recipient has chosen to make available.
- The written notice must provide details such as:
  - The allegations
  - The requirements of the informal resolution process
  - The privacy and/or confidentiality implications of participating in informal resolution
  - Any consequences that may result from participation in the informal process
  - The explicit right to withdraw from the informal resolution prior to the final determination at any time
- Both parties must provide informed and voluntary written consent.

Informal Resolution: Who May Facilitate?

- Individuals facilitating informal resolution must be free from conflicts of interest, bias and trained to serve impartially.
- Must have completed the anti-conflict of interest, anti-bias and all training requirements under §106.45(b)(1)(iii)
- Note: An individual facilitating an informal resolution may become a witness in a subsequent formal grievance proceeding
  - Provided that possibility was explained to the parties in the written notice and the parties provided their prior express consent. (p. 1367)

Informal Resolution: Greater Sense of Autonomy

- Nothing in the informal process requires that the parties confront each other or even be in the same room.
- Mediation often involves the parties in separate rooms and the mediator conversing with each party separately.
- Increased confidentiality
  - Recipients must fulfill recordkeeping and disclosure requirements of Title IX
  - Recipients must disclose to the parties prior to obtaining their express consent of the records that will be maintained and those that can and cannot be shared
  - And the possibility of confidentiality requirements as a condition of the final agreement

Informal Resolution: Restorative Justice

- Nothing in the regulations prohibit recipients from using restorative justice as an information resolution process to address sexual misconduct incidents.
- Generally, the respondent admits responsibility at the start of the restorative justice process.
- Nothing in the final regulations dictates the form of disciplinary sanctions a recipient may or must impose on a respondent.

Decision Making: Objective & Unbiased

- The school entity's decision maker needs to objectively evaluate the relevant evidence and reach conclusions about whether the respondent is responsible for the alleged sexual harassment.
- Decision makers need to use independent judgment and be free from conflicts of interest and bias.
- Decision makers will weigh the relevant evidence and decide whether it meets the standard of evidence for sexual harassment allegations.
- Who are appropriate decision makers within your school entity?

Final Outcome Decisions

- A “final” decision/determination means the written determination containing the information required in §106.45(b)(7):
  - A determination regarding responsibility
  - The specific disciplinary sanctions imposed on the respondent, and
  - *Whether* remedies were provided to the complainant to restore equal access to education (NOT what those remedies were).
    - EX: If Complainant is provided a remedy of modified class schedule and a change in housing, these remedies should not be specifically listed in the Final Determination

Final Outcome Decisions: When "Final"?

- **A Written Determination becomes "final" only after:**
  - The time period to file an appeal has expired, or
  - If a party does file an appeal, after the appeal decision has been sent to the parties
- **Timing of appeal**:
  - Final regulations require recipients designate "reasonably prompt" time frames for concluding appeals
- **Final outcome decision becomes final when:**
  - The date on which written determination of appeal is simultaneously provided to both parties; or
  - The date on which the appeal rights lapse if no appeal is taken

Appeals: §106.45(b)(8)

- Recipients MUST offer both parties an appeal from the following decisions/determinations:
  - Determination regarding responsibility, or
  - Recipient's dismissal of formal complaint, or
  - Recipient's dismissal of any allegations contained in a formal complaint.

Appeals: Must Provide to Both Parties

- A meaningful and equal opportunity to submit written statements supporting or challenging the outcome
- A reasoned written determination, provided simultaneously to both parties, explaining the appeal results and the rationales on which the results are based
- Under the final regulations, the appeal rights for complainants and respondents are identical

Appeals: Decision Maker Requirements

- The individuals hearing an appeal must meet the following requirements:
  - Must be different from the Title IX Coordinator, investigators or decision makers that reached the initial determination
    - Strict separation of the appeal decision makers from the individuals who investigated and adjudicated the underlying case is critical to maintain neutrality.
  - Must satisfy the robust anti-bias training requirements of §106.45(b)(1)(iii) that includes training on:
    - The definition of sexual harassment in §106.30
    - How to conduct an investigation, a hearing and an appeal
    - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest and bias
    - Issues of relevance to create an investigative report that fairly summarizes relevant evidence
  - A third party, independent of recipient, is not required to handle an appeal (1363)

Appeals: Grounds for Appeal

- Recipients MUST offer appeals on AT LEAST the following three grounds:
  - Procedural irregularity that affected the outcome
  - Newly obtained evidence that was not reasonably available when the determination of responsibility was made
  - The title IX Coordinator, investigator, or decision-maker had a general or specific conflict of interest or bias against either party that affected the outcome

- Recipients *may* offer appeals equally to both parties on additional grounds.
  - Example: May offer appeal based on severity of punishment

Appeals: Severity of the Sanction

- Whether the parties can appeal based solely on the severity of the sanctions is left to the recipient's discretion.
- If recipient does allow for appeals based upon the severity of the sanction, both parties must have equal opportunity to appeal on that basis.
- Department will not second guess recipient's disciplinary decisions.
  - See also *Davis v. Monroe Cnty. Bd. Of Educ.* 526 U.S. 629 (1999)

Appeals: Timing

- The deadline to file an appeal after an initial determination is left to the discretion of the recipients, but must apply equally to both complainant and respondent

- The appeal process must be concluded under "designated and reasonably prompt time frames" (pg.1356)

- Goal is for the final determination in a Title IX grievance to be both 1) accurate and 2) reasonably prompt

Appeals: While an Appeal Is Pending

- While initial determination is on appeal, but prior to the final determination:
- Supportive measures remain available to restore or preserve either parties either parties equal access to education:
  - Mutual no-contact order
  - Academic course adjustment
- Respondent likely to continue to enjoy the presumption of non-responsibility until final determination after appeal. (pg.1357)
  - §106.45(b)(1)(iv): presumption of non-responsibility is intended to ensure that respondents are not treated as responsible until ultimate resolution of grievance process

Disclosure of Disciplinary Decisions

- Regulation discuss interplay between recipients obligations under the Family Education Rights and Privacy Act (FERPA) and Title IX . (pg.1475)
- FERPA addresses the conditions permitting a recipient's disclosure, without an alleged victims consent, to publically make available the final results of a disciplinary proceeding without .
  - Recipients have discretion to disclose personally identifiable information regarding student respondents who have been found responsible for violating Title IX, without the respondents' consent.
  - Such disclosures are permissible and not mandatory
- The Department **does not regulate what information schools must share with one another when a student transfers to a different school** and declined to do so in these regulations.

Sanctions on Respondents

- The department believes that recipients should have the flexibility and discretion to suspend or expel a Respondent from campus as a disciplinary sanction.
- Expulsion or suspension may follow a determination of the Respondent's responsibility following informal resolution or the formal grievance process.

Medical Records

- A school cannot access, consider, disclose or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional capacity **unless with recipient obtains the party's voluntary written consent.**
- If a party would like the school to consider, access or otherwise use medical records in a grievance process, the party must give the recipient prior written consent.
- If a Complainant or Respondent provides sensitive records such as medical records as part of an investigation, then both parties must have equal opportunity to inspect and review the information directly related to the investigation.

Medical Records: Redactions

- Information contained in medical records to be used in an investigation that is not relevant to the investigation should be redacted.
- Example:
  - Perhaps medical records contain an examination that occurred on the night of an alleged rape, but the rest of the records may include a wealth of information that is totally irrelevant to the complaint. The irrelevant information contained in the medical records should be redacted.

Amnesty Provisions

Nothing in the final regulations prevents recipients from instituting “amnesty” policies that encourage individuals to report sexual harassment by not punishing them for any code violations relating to the incident.

Severability

“[T]hese final regulations are designed to operate independently of each other and to convey the Department’s intent that the potential invalidity of one provision should not affect the remainder of the provisions”

Sexual Assault, Trauma & Title IX

Medical Treatment in Sexual Assault Cases

Sexual Assault Nurse Examiners (SANE)

- Registered Nurses with two or more years of experience in areas that require advanced physical assessment skills who have completed specialized education and clinical preparation in the medical forensic care of the patient who has experienced sexual assault or abuse.
- The SANE offers comprehensive medical forensic examinations that are composed of forensic history, a detailed physical and emotional assessment, written/electronic and photographic documentation, collection and management of forensic samples, and providing emotional and social support and resources.
- The SANE also testifies in any legal proceedings related to the examination and ensures the proper chain of custody and integrity of the samples is maintained so that the evidence will be admissible in court.

Physical Evidence Recovery Kit (P.E.R.K.)

- The health care provider can check you for injuries and talk to you about possible pregnancy concerns and/or sexually transmitted infections. If you think you may want to report the assault, the health care provider can also collect evidence of the assault from your body. This is called a P.E.R.K. exam.
- This is a special exam given to people who have been sexually assaulted to collect evidence that may be helpful in the investigation and prosecution of the sexual assault.
- A P.E.R.K. exam often will not be done if more than three days have passed since the assault.
- You may have evidence collected by a P.E.R.K. exam even if you are not ready to report the assault or talk to the police.

The Institution should inform the victim of their right to seek medical treatment, and explain the importance of obtaining and preserving forensic (sexual assault examination) and other evidence (clothing, sheets or other materials, electronic exchanges, photographs, voice-mail messages and other physical, documentary and/or electronic data that might be helpful or relevant in an investigation.

DNA & Forensic Exams

- Even when there is intimate contact, no DNA may be recovered
- If DNA is recovered, does not correlate to consent
- Injuries or lack of injuries can add information but does not prove a theory or hypothesis about what happened

Injuries & Corroboration

- Lack of physical evidence, visible injuries or forensic evidence is NOT uncommon in cases of sexual violence. The failure to find any physical evidence does not equate to a report being unfounded or false.
  - 67% of rape victims reported no physical injuries in addition to the rape. Only 6% sustained severe physical injuries.
- Office of Justice Programs, National Crime Victimization Survey, Injuries from Violent Crimes (June 2001)

  - Over 70% of rape victims reported no physical injuries in addition to the rape. Only 4% sustained serious physical injuries.
- Crime Victims Research & Treatment Center, National Victims Center, Rape in America (Apr. 23, 1992)

What is Trauma?

"Trauma is an emotional response to a terrible event like an accident, rape or natural disaster. Immediately after the event, shock and denial are typical. Longer term reactions include unpredictable emotions, flashbacks, strained relationships, and even physical symptoms like headaches or nausea."

Source: *Trauma*, American Psychological Association, http://www.apa.org/topics/trauma.index.aspx

Trauma: Informed Care & Intervention

A trauma-informed approach can be implemented in any type of service setting or organization and is distinct from trauma-specific interventions or treatments that are designed specifically to address the consequences of trauma and to facilitate healing.

Trauma-Specific Intervention

- Complainant's need to be respected, informed, connected and hopeful regarding their recovery
- Interrelation between trauma and symptoms of trauma such as substance abuse, eating disorders, depression, and anxiety
- Work in a collaborative way with complainants, family and friends of the complainant, and other human services agencies in a manner that will empower them.

Common Cognitive Reactions

- ❑ Difficulty concentrating
- ❑ Difficulty making decisions
- ❑ Memory disturbances
- ❑ Flashbacks/preoccupations
- ❑ A sense that things aren't real
- ❑ Amnesia
- ❑ Worrying

Source: Common reactions to traumatic events, MITMedical, http://medweb.mitedu/mentalhealth/mh-reactions.html

Common Responses to Trauma

- Lack of physical resistance
- Crying, laughing, flat affect
- Calm or unemotional response
- Inconsistent memories
- Delayed disclosure
- Piecemeal disclosure
- Self-blame
- Shame/embarrassment

Trauma: Common Responses (Cont'd)

- Minimization
- Continued contact with offender
- Returning to "normal" behaviors
- Reluctance/refusal to participate in the process
- Recantation
- Testifying for the accused (in criminal court matters)

See, e.g., Edna B. Foa At Al., Common Reactions to Trauma, National Center for Posttraumatic Stress Disorder

Trauma & Memory: Cause and Effect

- Memories of rape are less clear and vivid than memories of other intense life experience.
  - Koss, et al. 1996

- Others also rated rape narratives as disorganized.
  - Halligan, et al., 2003

- In 17 studies of memories of traumatic events, there were inconsistencies over time in all studies.
  - Van Glezen, et al. 2005; Patricia Frazier, PhD. Understanding Victim Impact and Trauma, Department of Psychology, University of Minnesota

Trauma & Memory: Cause and Effect (Cont'd)

Inconsistency in Statements/Narrative: There is no script in relaying a traumatic event. A disjointed narrative is NOT uncommon.

Victim may be experiencing:

- Embarrassment
- Fear of getting in trouble
- Fear of retaliation if they report
- Confusion
- Isolation
- Depression

All of the above are factors that effect how, when and in what way a complainant discloses a sexual assault.

U.S. Department of Education Resources

- OCR Summary of Major Title IX provisions - https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf
- OCR Video Presentation on New Title IX Regulations - https://www.youtube.com/watch?v=TdfT5R8ibm4&feature=youtu.be
- OCR Final Rule Overview of Title IX Regulations - https://www2.ed.gov/about/offices/list/ocr/docs/titleix-overview.pdf
- U.S. Department of Education Press Release on Sexual Assault in K-12 schools https://www.ed.gov/news/press-releases/secretary-devos-announces-new-civil-rights-initiative-combat-sexual-assault-k-12-public-schools?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=

U.S. Department of Education Resources

The Department will continue to provide technical assistance after these regulations become effective, including during the investigation of a complaint, a compliance review or a directed investigation by OCR, if the recipient requests technical assistance.

Resources on Sexual Harassment

- https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf

Questions