NASPA
Student Affairs Administrators in Higher Education

TRAINING MATERIALS Track 3: Title IX Investigators

Spring 2023

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NASPA
Student Affairs Administrators in Higher Education

Introduction: Critical Issues in Title IX and Sexual Misconduct

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This Module is Designed for:

TRACK 1 – Title IX Coordinators

TRACK 2 – Title IX Decision-Makers and Student Conduct Administrators

TRACK 3 – Title IX Investigators

Structure of the NASPA Title IX Training

- Why three tracks?
- Why combine Title IX decision-makers and student conduct administrators in the second track?
- Why will Title IX coordinators receive all of the Title IX investigator training?
- Combination of asynchronous pre-recorded videos and live virtual sessions.
- Quizzes, questions and assessment.
- Certificate of completion.

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Nothing presented in any module in the NASPA Title IX Training Certificate is, or should be considered, legal advice!

Know when to consult legal counsel.

A Few Initial Thoughts on the New Regulations

- First new regulations in a very long time.
- Institutional response requirement—Supportive measures, sanctions, remedies
- Potentially unfamiliar dynamics with the Department of Education—Guidance, commentary, blogs
- Status of preexisting guidance and resolutions
- Expect enforcement if regulations survive legal challenges in court

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Some Key Features of the New Regulations

- Title IX redefines sexual harassment and creates special grievance procedures for sexual harassment.
  - What does this mean for your existing policies and Title IX compliance more generally?
- Term "hostile environment" disappears/"balancing test" with it.
- Allows for recipients to offer informal resolution (mediation). Can be used in most instances if parties (complainant and respondent) consent voluntarily when a formal complaint is filed.
  - Informal resolution cannot be used when a student alleges sexual harassment by an employee
- "Formal complaints" and "allegations"
- Live hearing with cross-examination by advisors

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Some Key Features of the New Regulations

- Choice in evidentiary standard preserved
  - "Preponderance of the evidence" or "clear and convincing"
- "Mandated reporters" supplants "responsible employees"
- Changes in jurisdiction and scope of Title IX
  - Off campus; study abroad
- Emphasis on "impartial" processes free from bias and conflicts of interest
- "Supportive measures" supplants "interim measures"
- Separation of the decision-maker from other tasks
  - No more single-investigator model, but single decision-maker permitted.
- Appeals required
- Training mandates
- "Not a court"/ "Not a criminal justice system"

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Training Mandates Specific to the New Regulations

"Schools must ensure that Title IX personnel [Title IX Coordinator, any investigator, any decision-maker, and any person who facilities an informal resolution (such as mediation)] receive training as follows:

- On Title IX's definition of "sexual harassment"
- On the scope of the school's education program or activity
- On how to conduct an investigation and grievance process
- On how to serve impartially, including by avoiding prejudgment of the facts at issue
- On how to avoid conflicts of interest and bias
- Decision-makers must receive training on any technology to be used at a live hearing, and on issues of relevance of questions and evidence, including when questions and evidence about a complainant's sexual predisposition or prior sexual behavior are not relevant
- Investigators must receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence"

U.S. Dept. of Educ. Office for Civil Rights, Blog (May 18, 2020), https://www2.ed.gov/about/offices/list/ocr/blog/20200518.html

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Posting Training Materials to Your Website

"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 7 years,
- Must be publicly available on the school's website; 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."

"Schools must publish training materials that are up to date and reflect the latest training provided to Title IX personnel."

"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**."

U.S. Dept. of Educ. Office for Civil Rights, Blog (May 18, 2020), https://www2.ed.gov/about/offices/list/ocr/blog/20200518.html (emphasis added).

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Permission from NASPA and Speakers

TRAINING MATERIALS

We will give each institution permission to post training materials (PowerPoint slide handouts, other handouts) to their website upon request. This permission must be granted from NASPA in writing before posting any training materials to your institution's website.

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Training Time Estimated by the Department

We assume all recipients will need to take time to review and understand these final regulations. . . . At the IHE level, we assume eight hours for the Title IX Coordinator and 16 hours for an attorney. Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) (final rule) (online at www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf) at 30567.

We assume that all recipients will need to revise their grievance procedures. . . . At the IHE level, we assume this will take 12 hours for the Title IX Coordinator and 28 hours for an attorney with an additional four hours for an administrator to review and approve them. Id.

We assume that all recipients will need to train their Title IX Coordinators, an investigator, any person designated by a recipient to facilitate an informal resolution process (e.g., a mediator), and two decision-makers (assuming an additional decision-maker for appeals). . . . We assume this training will take approximately eight hours for all staff at the . . . IHE level. Id.

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Personnel

- **Title IX coordinator**
  - Every institution must designate one
- **Title IX investigator**
  - Can be the Title IX coordinator, cannot be a decision-maker or appellate officer (thus no single-investigator model)
- **Title IX decision-maker**
  - Cannot be the investigator (thus no single-investigator model) or Title IX coordinator
- **Appellate officer**
  - Cannot be the original decision-maker or investigator
- **Anyone implementing an informal process such a mediation, case management, records management, etc.**

Budgetary and operational concerns?

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Prevalence Data

See generally Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (final rule) at 30075-83.

Postsecondary Institutions

One in five college women experience attempted or completed sexual assault in college; some studies state one in four. One in 16 men are sexually assaulted while in college. One poll reported that 20 percent of women, and five percent of men, are sexually assaulted in college. id. at 30076 (internal citations omitted).

62 percent of women and 61 percent of men experience sexual harassment during college. id. at 30076 (internal citation omitted).

Among undergraduate students, 23.1 percent of females and 5.4 percent of males experience rape or sexual assault; among graduate and undergraduate students 11.2 percent experience rape or sexual assault through physical force, violence, or incapacitation; 4.2 percent have experienced stalking since entering college.

A study showed that 63.3 percent of men at one university who self-reported acts qualifying as rape or attempted rape admitted to committing repeat rapes.

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Prevalence Data – Postsecondary Institutions Cont'd

More than 50 percent of college sexual assaults occur in August, September, October, or November, and students are at an increased risk during the first few months of their first and second semesters in college; 84 percent of the women who reported sexually coercive experiences experienced the incident during their first four semesters on campus.

Seven out of ten rapes are committed by someone known to the victim; for most women victimized by attempted or completed rape, the perpetrator was a boyfriend, ex-boyfriend, classmate, friend, acquaintance, or coworker. id. (internal citations omitted).

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Prevalence Data – Postsecondary Institutions Cont'd

Of college students in fraternity and sorority life, 48.1 percent of females and 23.6 percent of males have experienced nonconsensual sexual contact, compared with 33.1 percent of females and 7.9 percent of males not in fraternity and sorority life. id. (internal citation omitted).

Fifty-eight percent of female academic faculty and staff experienced sexual harassment across all U.S. colleges and universities, and one in ten female graduate students at most major research universities reports being sexually harassed by a faculty member. Id. (internal citation omitted).

Twenty-one to 38 percent of college students experience faculty/staff-perpetrated sexual harassment and 39 to 64.5 percent experience student-perpetrated sexual harassment during their time at their university.

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The Controversial Science of Sexual Predation

- Lisak D, Miller PM. Repeat rape and multiple offending among undetected rapists. *Violence Vict*. 2002;17(1):73-84. doi:10.1891/vivi.17.1.73.33638
- Swartout KM, Koss MP, White JW, Thompson MP, Abbey A, Bellis AL. Trajectory Analysis of the Campus Serial Rapist Assumption. *JAMA Pediatr.* 2015;169(12):1148–1154. doi:10.1001/jamapediatrics.2015.0707
- Johnson & Taylor, *The Campus Rape Frenzy: The Attack on Due Process at America's Universities* (Encounter Books, 2017).
- Foubert, J.D., Clark-Taylor, A., & Wall, A. (2019). "Is campus rape primarily a serial or single time problem? Evidence from a multi-campus study." Violence Against Women. DOI: 10.1177/1077801219833820.

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Trauma-Based Approaches

Avoid or Use?

- Some schools and training entities have moved away from using trauma-informed techniques for fear of appearing victim-leaning.
- Trauma can impact anyone in a grievance process or seeking supportive measures: Use research without stereotypes or gender bias.
- Credibility v. Reliability
- Read DOE's thoughts on trauma carefully…

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Trauma

The Department is sensitive to the effects of trauma on sexual harassment victims and appreciates that choosing to make a report, file a formal complaint, communicate with a Title IX Coordinator to arrange supportive measures, or participate in a grievance process are often difficult steps to navigate in the wake of victimization.

Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) (final rule) (online at www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf) at 30064 (emphasis added).

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Trauma Cont'd

The Department understands from anecdotal evidence and research studies that sexual violence is a traumatic experience for survivors. The Department is aware that the neurobiology of trauma and the impact of trauma on a survivor's neurobiological functioning is a developing field of study with application to the way in which investigators of sexual violence offenses interact with victims in criminal justice systems and campus sexual misconduct proceedings. The final regulations require impartiality in investigations and emphasize the truth-seeking function of a grievance process. The Department wishes to emphasize that treating all parties with dignity, respect, and sensitivity without bias, prejudice, or stereotypes infecting interactions with parties fosters impartiality and truth-seeking.

Id. at 30069 (internal citation omitted).

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Trauma Cont'd

Further, the final regulations contain provisions specifically intended to take into account that complainants may be suffering results of trauma; for instance, § 106.44(a) has been revised to require that recipients promptly offer supportive measures in response to each complainant and inform each complainant of the availability of supportive measures with or without filing a formal complaint. To protect traumatized complainants from facing the respondent in person, cross-examination in live hearings held by postsecondary institutions must never involve parties personally questioning each other, and at a party's request, the live hearing must occur with the parties in separate rooms with technology enabling participants to see and hear each other.

Id. (internal citation omitted).

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"Victim"/"Survivor" or "Perpetrator"

When the Department uses the term "victim" (or "survivor") or "perpetrator" to discuss these final regulations, the Department assumes that a reliable process, namely the grievance process described in § 106.45, has resulted in a determination of responsibility, meaning the recipient has found a respondent responsible for perpetrating sexual harassment against a complainant.

Id. at 30031.

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Our Mission Has Not Changed…

Enacted by Congress, Title IX seeks to reduce or eliminate barriers to educational opportunity caused by sex discrimination in institutions that receive federal funding.

This is the unchanged mission of Title IX!

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Title IX: FINAL RULE

34 CFR Part 106 *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*

The final regulations obligate recipients to respond promptly and supportively to persons alleged to be victimized by sexual harassment, resolve allegations of sexual harassment promptly and accurately under a predictable, fair grievance process that provides due process protections to alleged victims and alleged perpetrators of sexual harassment, and effectively implement remedies for victims.

Id. at 30026.

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Summary of Basic Requirements for a Grievance Process

A summary of the 10 elements of § 106.45(b)(1)(i-x) *Basic Requirements for a Grievance Process.*

1. Equitable treatment of parties/provision of remedies
2. Objective evaluation of evidence
3. No bias or conflicts of interest/training of Title IX personnel
4. Presumption of non-responsibility of respondent until process is complete
5. Reasonably prompt time frames
6. Articulate and publish the range of possible sanctions
7. Choose then evenly apply the evidentiary standard
8. Provide procedures and standards for appeal
9. Describe supportive measures
10. Legally-privileged information can only be used if privilege is waived

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Tuning

- *Recipients may continue to address harassing conduct that does not meet the § 106.30 definition of sexual harassment, as acknowledged by the Department's change to § 106.45(b)(3)(i) to clarify that dismissal of a formal complaint because the allegations do not meet the Title IX definition of sexual harassment, does not preclude a recipient from addressing the alleged misconduct under other provisions of the recipient's own code of conduct.* *Id.* at 30037-38 (emphasis added).
- *Similarly, nothing in these final regulations prevents a recipient from addressing conduct that is outside the Department's jurisdiction due to the conduct constituting sexual harassment occurring outside the recipient's education program or activity, or occurring against a person who is not located in the United States.* *Id.* at 30038 n.108 (emphasis added).

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"Staying in Your Lane"

§ 106.45 may not be circumvented…

. . . by processing sexual harassment complaints under non-Title IX provisions of a recipient's code of conduct. The definition of "sexual harassment" in § 106.30 constitutes the conduct that these final regulations, implementing Title IX, address. . . . [W]here a formal complaint alleges conduct that meets the Title IX definition of "sexual harassment," a recipient must comply with § 106.45.

Id. at 30095.

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Retaliation

- Against complainant, respondent, witnesses, advisors
- Against employees
- Vigilantism—Digital or otherwise

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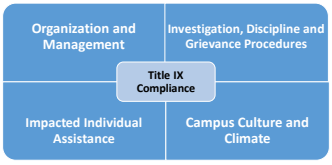
Four Corners Model

Lake's Four Corners of Title IX Regulatory Compliance



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Timing

These regulations slated to go into effect on August 14, 2020. This date is potentially subject to modification. Consult your attorneys.

The Dept. of Education has stated they will not enforce these regulations retroactively.

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The Social Context

COVID-19

- Virtual hearings
- More online learning
  - More Clery/VAWA-type offenses?
- Budget cuts, hiring freezes, furloughs, etc. due to the pandemic

Social Justice Issues

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Further training recommended…

- Training specific to your institution's policies.
  - There is not one universal policy for sex discrimination; differences exist in procedures, definitions, etc. from campus to campus.
  - Your campus policies may be in transit now.
- Training on technology usage for live hearings on your campus.
  - Especially important for decision-makers.
- Additional and continued training on bias is always a good idea.
- Continuing education at regular intervals.
- REMEMBER—It's always good to hear from multiple voices!

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Thank You…

- to NASPA
- to my fellow presenters
- to YOU!!!!

Post-Module Questions

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NASPA
Student Affairs Administrators in Higher Education

Legal Foundations for Title IX Investigators Under the New Regulations

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This Module is Designed for:

TRACK 1 – Title IX Coordinators

TRACK 3 – Title IX Investigators

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Why does this module combine these two tracks?

- Under the new Title IX regulations, Title IX coordinators are permitted to be investigators.
  - It is important Title IX coordinators receive investigator training.
- Title IX coordinators, as a part of their overall oversight function, must understand the investigative process and how it has shifted under the new regulations, irrespective of whether they ever serve as the actual investigator.
- Title IX investigators should have working knowledge of the Title IX grievance system overall and understand their role within the system.

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What is Title IX? What is its mission?

- Enacted by Congress, Title IX seeks to reduce or eliminate barriers to educational opportunity caused by sex discrimination in institutions that receive federal funding. *This is the mission of Title IX!*
- Other federal laws also address sex discrimination. There are complex interactions with other federal laws, such as the Clery Act, the Family Educational Rights and Privacy Act (FERPA), and the Violence Against Women Act (VAWA).
- Title IX is concerned with *institutional response* to discrimination.

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Title IX: FINAL RULE

34 CFR Part 106 *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*

The final regulations specify how recipients of Federal financial assistance covered by Title IX, including elementary and secondary schools as well as postsecondary institutions, (hereinafter collectively referred to as "recipients" or "schools"), must respond to allegations of sexual harassment consistent with Title IX's prohibition against sex discrimination. These regulations are intended to effectuate Title IX's prohibition against sex discrimination by requiring recipients to address sexual harassment as a form of sex discrimination in education programs or activities.

Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) (final rule) (online at www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf) at 30026 (emphasis added).

38

Title IX: FINAL RULE

The final regulations obligate recipients to respond promptly and supportively to persons alleged to be victimized by sexual harassment, resolve allegations of sexual harassment promptly and accurately under a predictable, fair grievance process that provides due process protections to alleged victims and alleged perpetrators of sexual harassment, and effectively implement remedies for victims.

Id. (emphasis added).

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Title IX: FINAL RULE

The final regulations also clarify and modify Title IX regulatory requirements regarding remedies the Department may impose on recipients for Title IX violations, the intersection between Title IX, Constitutional protections, and other laws, the designation by each recipient of a Title IX Coordinator to address sex discrimination including sexual harassment, the dissemination of a recipient's non-discrimination policy and contact information for a Title IX Coordinator, the adoption by recipients of grievance procedures and a grievance process, how a recipient may claim a religious exemption, and prohibition of retaliation for exercise of rights under Title IX.

Id.

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Special Issues in Investigation*

- Definitions Under the New Regulations
- Familiarity with Specific Campus Policies
- The Investigation Process Itself
- Relevance and Rape Shield Rules
- The *Minimum* and *Maximum* Role of the Investigator
- The Tie to the Adjudication Process
- Who should serve as an investigator?

Note: These concepts will be covered in this module, subsequent modules, and in the live virtual session.

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A Review of the New Regulations

Operational considerations will be addressed in separate modules.

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Is "sex" defined in the new regulations?

The word "sex" is undefined in the Title IX statute. ***The Department did not propose a definition of "sex" in the NPRM and declines to do so in these final regulations.*** *The focus of these regulations remains prohibited conduct.*

Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) (final rule) (online at www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf) at 30177 (emphasis added).

Important to look at campus policy and other relevant laws. Seek advice of counsel.

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§ 106.30(a) *Definitions.*

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"Actual Knowledge"

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

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"Complainant"

Complainant means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.

What is "alleged?"

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"Respondent"

Respondent means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

Allege = "report?"

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More on Complainants/Respondents

- *A person may be a complainant, or a respondent, even where no formal complaint has been filed and no grievance process is pending.* *Id.* at 30030.
- *References . . . to a complainant, respondent, or other individual with respect to exercise of rights under Title IX should be understood to include situations in which a parent or guardian has the legal right to act on behalf of the individual.* *Id.*
- *[T]he definitions of "complainant" and "respondent" do not restrict either party to being a student or employee, and, therefore, the final regulations do apply to allegations that an employee was sexually harassed by a student.* *Id.* at 30252 (emphasis added).

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"Consent"

The Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault, as referenced in this section.

This has been a central issue in fairness/consistency.
How does "consent" fit into the new framework for "sexual harassment?"

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"Consent"—Not Defined in New Regulations

- **What will your campus definition be?**
  - Affirmative consent?
  - Will distribute across multiple offenses
- **Elements**
  - consent is a voluntary agreement to engage in sexual activity;
  - someone who is incapacitated cannot consent;
    - (such as due to the use of drugs or alcohol, when a person is asleep or unconscious, or because of an intellectual or other disability that prevents the student from having the capacity to give consent)
  - past consent does not imply future consent;
  - silence or an absence of resistance does not imply consent;
  - consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another;
  - consent can be withdrawn at any time; and
  - coercion, force, or threat of either invalidates consent.

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"Formal Complaint"

Formal complaint *means 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 under § 106.8(a), and by any additional method designated by the recipient.*

(emphasis added)

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"Formal Complaint" Cont'd

As used in this paragraph, the phrase "document filed by a complainant" means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint. Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party under this part or under § 106.45, and must comply with the requirements of this part, including § 106.45(b)(1)(iii).

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"Sexual Harassment" [Three-Prong Test]

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;

(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; or*

(3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

(emphasis added)

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First Amendment and the Second Prong

[P]rotection of free speech and academic freedom was weakened by the Department's use of wording that differed from the Davis definition of what constitutes actionable sexual harassment under Title IX . . . these final regulations return to the Davis definition verbatim, while also protecting against even single instances of quid pro quo harassment and Clery/ VAWA offenses, which are not entitled to First Amendment protection.

Id. at 30155 n.680.

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"Stalking" (Clery Act Definition)

Stalking. (i) Engaging in a course of conduct directed at a specific person that would cause a reasonable person to—

(A) Fear for the person's safety or the safety of others; or

(B) Suffer substantial emotional distress.

(ii) For the purposes of this definition—

(A) *Course of conduct* means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.

(B) *Reasonable person* means a reasonable person under similar circumstances and with similar identities to the victim.

(C) *Substantial emotional distress* means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

34 C.F.R § 668.46(a)

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"Domestic Violence" (Clery Act Definition)

Domestic violence. (i) A felony or misdemeanor crime of violence committed—

(A) By a current or former spouse or intimate partner of the victim;

(B) By a person with whom the victim shares a child in common;

(C) By a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner;

(D) 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, or

(E) 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 C.F.R § 668.46(a)

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"Dating Violence" (Clery Act Definition)

Dating violence. Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.

(i) 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.

(ii) For the purposes of this definition—

(A) Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.

(B) Dating violence does not include acts covered under the definition of domestic violence.

34 C.F.R § 668.46(a)

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Remember state law and policy specific considerations!

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"Supportive Measures"

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

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"Supportive Measures" Cont'd

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

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§ 106.44 *Recipient's response to sexual harassment.*

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§106.44(a) *General response to sexual harassment.*

A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances. For the purposes of this section, §§ 106.30, and 106.45, "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 sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

(emphasis added)

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§106.44(a) Cont'd

A recipient's response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.

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§106.44(a) Cont'd

The Department may not deem a recipient to have satisfied the recipient's duty to not be deliberately indifferent under this part based on the recipient's restriction of rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment.

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§106.44(b) *Response to a formal complaint.*

(1) In response to a formal complaint, a recipient must follow a grievance process that complies with § 106.45. With or without a formal complaint, a recipient must comply with § 106.44(a).

(2) The Assistant Secretary will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient, or otherwise evidence of discrimination under title IX by the recipient, solely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence.

65

§106.44(c) *Emergency removal.*

Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.

66

§106.44(d) *Administrative leave.*

Nothing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45. 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.

67

§ 106.45 *Grievance process for formal complaints of sexual harassment.*

68

§ 106.45(a) Discrimination on the basis of sex.

A recipient's treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX.

69

§ 106.45(b) *Grievance process.*

For the purpose of addressing formal complaints of sexual harassment, a recipient's grievance process must comply with the requirements of this section. Any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in § 106.30, must apply equally to both parties.

70

§ 106.45(b)(1)(i)

(1) Basic requirements for grievance process. A recipient's grievance process must—

(i) Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. Remedies must be designed to restore or preserve equal access to the recipient's education program or activity. Such remedies may include the same individualized services described in § 106.30 as "supportive measures"; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent;

71

§ 106.45(b)(1)(ii)

(ii) Require an objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence— and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness;

(emphasis added)

72

§ 106.45(b)(1)(iii)

(iii) Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decisionmaker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

(emphasis added)

73

§ 106.45(b)(1)(iii) Cont'd

A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on

- *the definition of sexual harassment in § 106.30,*
- *the scope of the recipient's education program or activity,*
- *how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and*
- *how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. . . .*

(bullets added, emphasis added)

74

§ 106.45 (b)(1)(iii) Cont'd

A recipient must ensure that decision-makers receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section.

A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section.

Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment;

(emphasis added)

75

§ 106.45(b)(1)(iv)

(iv) Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process;

(emphasis added)

76

§ 106.45(b)(1)(v)

(v) Include reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes, and a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities;

(emphasis added)

77

§ 106.45(b)(1)(vi)

(vi) Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility;

78

§ 106.45(b)(1)(vii)

(vii) State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment;

79

§ 106.45(b)(1)(viii)

(viii) Include the procedures and permissible bases for the complainant and respondent to appeal;

80

§ 106.45(b)(1)(ix)

(ix) Describe the range of supportive measures available to complainants and respondents; and

81

§ 106.45(b)(1)(x)

(x) Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

(emphasis added)

82

§ 106.45(b)(2)(i)

(2) Notice of allegations—

(i) Upon receipt of a formal complaint, a recipient must provide the following written notice to the parties who are known:

83

§ 106.45(b)(2)(i)(A)

(A) Notice of the recipient's grievance process that complies with this section, including any informal resolution process.

84

§ 106.45(b)(2)(i)(B)

(B) Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in § 106.30, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment under § 106.30, and the date and location of the alleged incident, if known. The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process. The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section. The written notice must inform the parties 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.

85

§ 106.45(b)(2)(ii)

(ii) If, in the course of an investigation, the recipient decides to investigate allegations about the complainant or respondent that are not included in the notice provided pursuant to paragraph (b)(2)(i)(B) of this section, the recipient must provide notice of the additional allegations to the parties whose identities are known.

(emphasis added)

86

§ 106.45(b)(3)(i)

(3) Dismissal of a formal complaint—

(i) The recipient must investigate the allegations in a formal complaint. If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; such a dismissal does not preclude action under another provision of the recipient's code of conduct.

(emphasis added)

87

§ 106.45(b)(3)(ii)

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

(emphasis added)

88

§ 106.45(b)(3)(iii)

(iii) Upon a dismissal required or permitted pursuant to paragraph (b)(3)(i) or (b)(3)(ii) of this section, the recipient must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties.

89

§ 106.45(b)(4)

(4) Consolidation of formal complaints. A recipient may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances. Where a grievance process involves more than one complainant or more than one respondent, references in this section to the singular "party," "complainant," or "respondent" include the plural, as applicable.

(emphasis added)

90

§ 106.45(b)(5)

(5) Investigation of a formal complaint. When investigating a formal complaint and throughout the grievance process, a recipient must—

(emphasis added)

91

§ 106.45(b)(5)(i)

(i) Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties provided that the recipient 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 acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for a grievance process under this section (if a party is not an "eligible student," as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a "'parent," as defined in 34 CFR 99.3);

(emphasis added)

92

§ 106.45(b)(5)(ii)

(ii) Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;

(emphasis added)

93

§ 106.45(b)(5)(iii)

(iii) Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;

(emphasis added)

94

§ 106.45(b)(5)(iv)

(iv) Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties;

(emphasis added)

95

§ 106.45(b)(5)(v)

(v) Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate;

(emphasis added)

96

§ 106.45(b)(5)(vi)

(vi) Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.

(emphasis added)

97

§ 106.45(b)(5)(vi) Cont'd

Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination; and

(emphasis added)

98

§ 106.45(b)(5)(vii)

(vii) Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.

(emphasis added)

99

§ 106.45(b)(6)(i)

(6) Hearings.

(i) For postsecondary institutions, the recipient's grievance process must provide for a live hearing. At the live hearing, the decisionmaker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings.

100

§ 106.45(b)(6)(i) Cont'd

At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions. Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant. If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.

101

§ 106.45(b)(6)(i) Cont'd

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

102

§ 106.45(b)(6)(i) Cont'd

Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other. Recipients must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

103

§ 106.45(b)(7)(i)

(7) Determination regarding responsibility.

(i) The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the recipient must apply the standard of evidence described in paragraph (b)(1)(vii) of this section.

104

§ 106.45(b)(7)(ii)(A)

(ii) The written determination must include—

(A) Identification of the allegations potentially constituting sexual harassment as defined in § 106.30;

105

§ 106.45(b)(7)(ii)(B)

(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;

106

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§ 106.45(b)(7)(ii)(C)

(C) Findings of fact supporting the determination;

107

§ 106.45(b)(7)(ii)(D)

(D) Conclusions regarding the application of the recipient's code of conduct to the facts;

108

§ 106.45(b)(7)(ii)(E)

(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; and

109

§ 106.45(b)(7)(ii)(F)

(F) The recipient's procedures and permissible bases for the complainant and respondent to appeal.

110

§ 106.45(b)(7)(iii)

(iii) 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.

111

§ 106.45(b)(7)(iv)

(iv) The Title IX Coordinator is responsible for effective implementation of any remedies.

112

§ 106.45(b)(8)(i)

(8) Appeals.

(i) A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:

113

§ 106.45(b)(8)(i)(A-C)

(A) Procedural irregularity that affected the outcome of the matter;

(B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and

(C) 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.

114

§ 106.45(b)(8)(ii)

(ii) A recipient may offer an appeal equally to both parties on additional bases.

115

§ 106.45(b)(8)(iii)(A-F)

(iii) As to all appeals, the recipient must:

(A) Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;

(B) Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;

(C) Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of this section;

(D) Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;

(E) Issue a written decision describing the result of the appeal and the rationale for the result; and

(F) Provide the written decision simultaneously to both parties.

116

§ 106.45(b)(9)

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

117

§ 106.45(b)(9)(i)

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

118

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§ 106.45(b)(9)(ii-iii)

(ii) Obtains the parties' voluntary, written consent to the informal resolution process; and

(iii) Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

119

§ 106.45(b)(10)(i)(A)

(10) Recordkeeping.

(i) A recipient must maintain for a period of seven years records of—

(A) Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required under paragraph (b)(6)(i) of this section, 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;

(emphasis added)

120

§ 106.45(b)(10)(i)(B-D)

(B) Any appeal and the result therefrom;

(C) Any informal resolution and the result therefrom; and

(D) All materials used to train Title IX Coordinators, investigators, decisionmakers, 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.

(emphasis added)

121

§ 106.45(b)(10)(ii)

(ii) For each response required under § 106.44, a recipient must create, and maintain for a period of seven years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity. If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.

122

§ 106.71 *Retaliation.*

123

§ 106.71(a)

(a) Retaliation prohibited. No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part. Intimidation, threats, coercion, or discrimination, including 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 a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation.

124

§ 106.71(a) Cont'd

The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).

(emphasis added)

125

§ 106.71(b)(1)

(b) Specific circumstances.

(1) The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under paragraph (a) of this section.

126

§ 106.71(b)(2)

(2) Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

127

Law Enforcement Activity/ Criminal Proceedings

128

Concurrent Law Enforcement Activity

Section 106.45(b)(1)(v) provides that the recipient's designated reasonably prompt time frame for completion of a grievance process is subject to temporary delay or limited extension for good cause, which may include concurrent law enforcement activity. Section 106.45(b)(6)(i) provides that the decision-maker cannot draw any inference about the responsibility or non-responsibility of the respondent solely based on a party's failure to appear or answer cross-examination questions at a hearing; this provision applies to situations where, for example, a respondent is concurrently facing criminal charges and chooses not to appear or answer questions to avoid self-incrimination that could be used against the respondent in the criminal proceeding.

Id. at 30099 n.466 (emphasis added).

129

Concurrent Law Enforcement Activity Cont'd

Further, subject to the requirements in § 106.45 such as that evidence sent to the parties for inspection and review must be directly related to the allegations under investigation, and that a grievance process must provide for objective evaluation of all relevant evidence, inculpatory and exculpatory, nothing in the final regulations precludes a recipient from using evidence obtained from law enforcement in a § 106.45 grievance process. § 106.45(b)(5)(vi) (specifying that the evidence directly related to the allegations may have been gathered by the recipient "from a party or other source" which could include evidence obtained by the recipient from law enforcement) (emphasis added); § 106.45(b)(1)(ii).

Id. at 30099 n.466 (emphasis added).

130

Law Enforcement Cannot Be Used to Skirt Title IX Process

[A] recipient cannot discharge its legal obligation to provide education programs or activities free from sex discrimination by referring Title IX sexual harassment allegations to law enforcement (or requiring or advising complainants to do so), because the purpose of law enforcement differs from the purpose of a recipient offering education programs or activities free from sex discrimination. Whether or not particular allegations of Title IX sexual harassment also meet definitions of criminal offenses, the recipient's obligation is to respond supportively to the complainant and provide remedies where appropriate, to ensure that sex discrimination does not deny any person equal access to educational opportunities. Nothing in the final regulations prohibits or discourages a complainant from pursuing criminal charges in addition to a § 106.45 grievance process.

Id. at 30099 (internal citation omitted, emphasis added).

131

Police Investigations

The 2001 Guidance takes a similar position: "In some instances, a complainant may allege harassing conduct that constitutes both sex discrimination and possible criminal conduct. Police investigations or reports may be useful in terms of fact gathering. However, because legal standards for criminal investigations are different, police investigations or reports may not be determinative of whether harassment occurred under Title IX and do not relieve the school of its duty to respond promptly and effectively."

Id. at 30099 n. 467.

132

Confidentiality

133

Confidentiality and FERPA Protections

Section 106.71(a) requires recipients to keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness (unless permitted by FERPA, or required under law, or as necessary to conduct proceedings under Title IX), and § 106.71(b) states that exercise of rights protected by the First Amendment is not retaliation. Section 106.30 defining "supportive measures" instructs recipients to keep confidential the provision of supportive measures except as necessary to provide the supportive measures. These provisions are intended to protect the confidentiality of complainants, respondents, and witnesses during a Title IX process, subject to the recipient's ability to meet its Title IX obligations consistent with constitutional protections.

[Separate module addresses FERPA, recordkeeping and confidentiality.]

Id. at 30071 (emphasis added).

134

Special Issues for Investigations

135

Who Should Serve as an Investigator?

- Attorneys?
- Outside Investigator?
- Campus Safety/Security?
- Student Conduct Officers?
- Title IX Coordinator/Deputy Title IX Coordinator?
- Human Resources?
- Co-investigators?

136

Job Description

- Required Competencies
- Reporting Structure
- Full Time vs. Part Time
  - Time Requirements
- Potential Conflicts of Interest
- Soft skills

137

Requirements

- No conflict of interest or bias; undue institutional interference.
- No sexual stereotypes
- Detail oriented
- Ability to write a quality investigative report
- Documentation is everything
- Organized
- Analytical skills
- Time to devote to investigation
- Listening skills
- Understand basics of Title IX evidence rules

138

Requirements (cont'd)

- Comfortable with subject matter
- Able to apply policies and think critically
- Comfortable with conflict
- Ability to build rapport
- Collaborative
- Ability to remain objective and neutral

139

"Adversarial in Nature"

In the context of sexual harassment that process is often inescapably adversarial in nature where contested allegations of serious misconduct carry high stakes for all participants.

Id. at 30097.

140

The Investigation Process Itself

- Planning
- Interviewing
- Report Writing
- Tie to the hearing process

141

The *Minimum* and *Maximum* Role of the Title IX Investigator

- Campuses are no longer permitted to have a "single" or "pure" investigator model under Title IX.
- A separate decision-maker (or panel of decision-makers) must make a final determination of responsibility.
  - This will be a shift in the function of the investigator on some campuses.
- What, then, is the scope of the investigative report?
  - Purpose? Tone? Format?
- Will the investigator become a witness in the hearing or play other roles?

142

The *Minimum* and *Maximum* Role of the Investigator Cont'd

- Gather <u>all</u> *relevant* information regarding an allegation of sexual harassment.
- Interview all *relevant* parties
- Collect and organize *relevant* evidence
- Credibility Assessments?
- Weighing Evidence?
- Write a detailed investigative report
  - [Separate module on writing an investigative report.]
- Make recommendations for interim measures or accommodations?
- Findings of Responsibility→ Remember: There must be a separate decision-maker.

143

Sample Policy Elements

- Introduction
- Scope
- Support services, supportive measures, and how to access
- Title IX Coordinator's contact information (and deputy coordinators) and how to report
- Mandated reporters
- Definitions of key terms, such as sexual harassment and consent
- Timeframes, both for reporting and for resolution

144

Sample Policy Elements Continued

- Confidentiality of information generally
- Requests for confidentiality
- Opportunity to provide/access to information
- Prohibition against retaliation
- Sanction and remedies, and how they will be determined
- Formal complaints
- Grievance process
- Evidentiary standard
- Notification of outcome
- Appeal process

145

Scope/Off-Campus Jurisdiction

While such situations may be fact specific, recipients must consider whether, for example, a sexual harassment incident between two students that occurs in an off-campus apartment (i.e., not a dorm room provided by the recipient) is a situation over which the recipient exercised substantial control; if so, the recipient must respond to notice of sexual harassment that occurred there.

Id. at 30093.

146

"Involvement in an education program or activity"

. . . [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 as provided in the revised definition of "formal complaint" in § 106.30; this provision tethers a recipient's obligation to investigate a complainant's formal complaint to the complainant's involvement (or desire to be involved) in the recipient's education program or activity so that recipients are not required to investigate and adjudicate allegations where the complainant no longer has any involvement with the recipient while recognizing that complainants may be affiliated with a recipient over the course of many years and sometimes complainants choose not to pursue remedial action in the immediate aftermath of a sexual harassment incident. . . .

Id. at 30086-87 (emphasis added).

147

§106.44(a) *General response to sexual harassment*

. . . For the purposes of this section, §§ 106.30, and 106.45, "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 sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

(emphasis added)

148

§106.8(d) *Application outside the United States*

The requirements of paragraph (c) of this section apply only to sex discrimination occurring against a person in the United States.

149

Relevance

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

Id. at 30247 n. 1018.

150

Relevance Cont'd

The new Title IX regulations specifically . . .

. . . require investigators and decision-makers to be trained on issues of relevance, including how to apply the rape shield provisions (which deem questions and evidence about a complainant's prior sexual history to be irrelevant with two limited exceptions).

Id. at 30125 (emphasis added).

[Also covered in a separate module.]

151

Prior Sexual History/Sexual Predisposition

Section 106.45(b)(6)(i)-(ii) protects complainants (but not respondents) from questions or evidence about the complainant's prior sexual behavior or sexual predisposition, mirroring rape shield protections applied in Federal courts.

Id. at 30103 (emphasis added).

152

Rape Shield Language

[T]he rape shield language in § 106.45(b)(6)(i)-(ii) bars questions or evidence about a complainant's sexual predisposition (with no exceptions) and about a complainant's prior sexual behavior subject to two exceptions:

*1) if offered to **prove that someone other than the respondent committed the alleged sexual harassment**, or*

*2) if the question or evidence concerns sexual behavior between the complainant and the respondent and is offered to prove **consent**.*

Id. at 30336 n. 1308 (emphasis added).

153

Consent and Rape Shield Language

[A] recipient selecting its own definition of consent must apply such definition consistently both in terms of not varying a definition from one grievance process to the next and as between a complainant and respondent in the same grievance process. The scope of the questions or evidence permitted and excluded under the rape shield language in § 106.45(b)(6)(i)-(ii) will depend in part on the recipient's definition of consent, but, whatever that definition is, the recipient must apply it consistently and equally to both parties, thereby avoiding the ambiguity feared by the commenter.

Id. at 30125.

154

Rape Shield Language

[T]he rape shield language in this provision:

- *considers all questions and evidence of a complainant's sexual predisposition irrelevant, with no exceptions;*
- *questions and evidence about a complainant's prior sexual behavior are irrelevant unless they meet one of the two exceptions;*
- *and **questions and evidence about a respondent's sexual predisposition or prior sexual behavior are not subject to any special consideration but rather must be judged like any other question or evidence as relevant or irrelevant to the allegations at issue.***

Id. at 30352 (emphasis added).

155

Rape Shield Protections and the Investigative Report

[T]he investigative report must summarize "relevant" evidence, and thus at that point the rape shield protections would apply to preclude inclusion in the investigative report of irrelevant evidence.

Id. at 30353-54.

156

Bias, Impartiality, Conflicts of Interest, Sex Stereotypes

157

Bias/Prejudice/Stereotypes/Prejudgment/Conflicts of Interest

[S]ome complainants, including or especially girls of color, face school-level responses to their reports of sexual harassment infected by bias, prejudice, or stereotypes. *Id.* at 30084.

§ 106.45(b)(1)(iii) [prohibits] Title IX Coordinators, investigators, and decision-makers, and persons who facilitate informal resolution processes from having conflicts of interest or bias against complainants or respondents generally, or against an individual complainant or respondent, [and requires] training that also includes "how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias."

158

Bias/Conflicts of Interest

Section 106.45(b)(1)(iii) requires Title IX Coordinators, investigators, decision-makers, and individuals who facilitate any informal resolution process to be free of bias or conflicts of interest for or against complainants or respondents and to be trained on how to serve impartially.

Id. at 30103 (emphasis added).

159

"Bias" in *Ikpeazu v. University of Nebraska*

With respect to the claim of bias, we observe that the committee members are entitled to a presumption of honesty and integrity unless actual bias, such as ***personal animosity, illegal prejudice, or a personal or financial stake in the outcome*** *can be proven. . . . The allegations Ikpeazu makes in support of his bias claim are generally insufficient to show the kind of actual bias from which we could conclude that the committee members acted unlawfully.*

Ikpeazu v. University of Nebraska, 775 F.2d 250, 254 (8th Cir. 1985) (internal citations omitted).

160

"Bias"

- Personal animosity
- Illegal prejudice
- Personal or financial stake in the outcome
- Bias can relate to:
  - *Sex, race, ethnicity, sexual orientation, gender identity, disability or immigration status, financial ability or other characteristic*

Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) (final rule) (online at www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf) at 30084 (emphasis added).

161

Does DOE require "Implicit Bias" training?

The Department declines to specify that training of Title IX personnel must include implicit bias training*; the nature of the training required under § 106.45(b)(1)(iii) is left to the recipient's discretion so long as it achieves the provision's directive that such training provide instruction on how to serve impartially and avoid prejudgment of the facts at issue, conflicts of interest, and bias, and that materials used in such training avoid sex stereotypes.*

Id. at 30084.

162

Conflict of Interest

A conflict between the private interests and the official responsibilities of a person in a position of trust.

merriam-webster.com

163

Impartial

Not partial or biased: treating or affecting all equally

merriam-webster.com

164

Prejudgment

A judgment reached before the evidence is available

webster-dictionary.org

165

Prejudice

An opinion or judgment formed without due examination; prejudgment; a leaning toward one side of a question from other considerations than those belonging to it; and unreasonable predilection for, or objection against, anything; especially an opinion or leaning adverse to anything, without just grounds, or before sufficient knowledge.

webster-dictionary.org

166

Stereotype

something conforming to a fixed or general pattern; a standardized mental picture that is held in common by members of a group and that represents an oversimplified opinion, prejudiced attitude, or uncritical judgment.

merriam-webster.com

167

"Sex Stereotypes"

- What is a *sex* stereotype? What does DOE mean by this term?
- What are some examples of sex stereotypes?
- An example of a scholarly paper on stereotypes:
  - S. Kanahara, *A Review of the Definitions of Stereotype and a Proposal for a Progressive Model*, Individual Differences Research. Vol. 4 Issue 5 (Dec. 2006).
- Sex stereotypes are to be avoided in training and in actual practice.
- Be especially careful when doing case studies of any kind.
- Anyone can be a complainant or respondent, and all are individuals!

168

All Title IX personnel should serve in their roles impartially.

All Title IX personnel should avoid

- *prejudgment of facts*
- *prejudice*
- *conflicts of interest*
- *bias*
- *sex stereotypes*

169

Whose side are you on?

You have no "side" other than the integrity of the process.

170

You now have the legal foundations to take the next step in the NASPA Title IX Training Certificate program!

171

Thank You!

Assessment to follow…

172

NASPA Student Affairs Administrators in Higher Education

Title IX Evidence Issues

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This Module is Designed for

TRACK 1 – Title IX Coordinators

TRACK 2 – Title IX Decision-Makers and Student Conduct Administrators

TRACK 3 – Title IX Investigators

174

Overview

"Evidence" in Regulations

- Credibility
- Relevance
- Evidentiary Standard
- Inculpatory & Exculpatory Evidence
- Expert Testimony
- Hearsay, Character Evidence, Prior Bad Acts, Lie Detectors,
- Statements Not subject to Cross Examination

175

Evidence Resources

- Title IX Regulations & OCR Guidance
- Federal Rules of Evidence
- Everyday Evidence: A Practical Approach, Charles H. Rose III 2nd Edition 2016
- John Henry Wigmore, WIGMORE ON EVIDENCE (Chadbourn rev. eds. 1972, 1975)
- Dictionaries

176

Let's examine some language from the final regulations…

177

§ 106.45 (1)(iii) Grievance process for formal complaints of sexual harassment.

"A recipient must ensure that decision-makers receive training on . . . issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant . . ."

"A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence . . ."

(emphasis added)

178

§ 106.45 (1)(ii) Grievance process for formal complaints of sexual harassment.

"(1)Basic requirements for grievance process. A recipient's grievance process must—

. . .

(ii) Require an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence – and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness . . ."

(emphasis added)

179

§ 106.45 (1)(iv) Grievance process for formal complaints of sexual harassment.

"(1)Basic requirements for grievance process. A recipient's grievance process must—

. . .

(iv) Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process . . ."

(emphasis added)

180

§ 106.45 (1)(vii) Grievance process for formal complaints of sexual harassment.

"(1)Basic requirements for grievance process. A recipient's grievance process must—

. . .

(vii) State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment . . ."

(emphasis added)

181

§ 106.45 (1)(x) Grievance process for formal complaints of sexual harassment.

"(1)Basic requirements for grievance process. A recipient's grievance process must—

. . .

(x) Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege."

(emphasis added)

182

§ 106.45 (5)(i) Grievance process for formal complaints of sexual harassment.

"(5) Investigation of a formal complaint. When investigating a formal complaint and throughout the grievance process, a recipient must—

(i) Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties provided that the recipient 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 acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for a grievance process under this section (if a party is not an "eligible student," as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a "parent," as defined in 34 CFR 99.3) . . ."

(emphasis added)

183

§ 106.45 (5)(ii) Grievance process for formal complaints of sexual harassment.

"(5) Investigation of a formal complaint. When investigating a formal complaint and throughout the grievance process, a recipient must—

. . .

(ii) Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence . . ."

(emphasis added)

184

. . . § 106.45 does not set parameters around the "quality" of evidence that can be relied on, § 106.45 does prescribe that all relevant evidence, inculpatory and exculpatory, whether obtained by the recipient from a party or from another source, must be objectively evaluated by investigators and decision-makers free from conflicts of interest or bias and who have been trained in (among other matters) how to serve impartially.

(emphasis added)

185

§ 106.45 (5)(iii) Grievance process for formal complaints of sexual harassment.

"(5) Investigation of a formal complaint. When investigating a formal complaint and throughout the grievance process, a recipient must—

. . .

(iii) Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence . . ."

(emphasis added)

186

§ 106.45 (5)(vi) Grievance process for formal complaints of sexual harassment.

"(5) Investigation of a formal complaint. When investigating a formal complaint and throughout the grievance process, a recipient must—

. . .

(vi) Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal 2024 complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination . . ."

(emphasis added)

187

§ 106.45 (5)(vii) Grievance process for formal complaints of sexual harassment.

"(5) Investigation of a formal complaint. When investigating a formal complaint and throughout the grievance process, a recipient must—

. . .

(vii) Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response. "

(emphasis added)

188

§ 106.45 (6)(i) Grievance process for formal complaints of sexual harassment.

"(6) Hearings.

(i) For postsecondary institutions, the recipient's grievance process must provide for a live hearing. At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. . . . Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant."

(emphasis added)

189

§ 106.45 (6)(i) Grievance process for formal complaints of sexual harassment. [Cont'd]

"(6) Hearings.

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. . . ."

(emphasis added)

190

§ 106.45 (6)(i) Grievance process for formal complaints of sexual harassment. [Cont'd]

"(6) Hearings.

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

(emphasis added)

191

§ 106.45 (6)(ii) Grievance process for formal complaints of sexual harassment.

"(6) Hearings.

(ii). . . With or without a 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. The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant."

(emphasis added)

192

Let's Look at Some of the Comments in the Regulations

193

The Department desires to prescribe a grievance process adapted for an educational environment rather than a courtroom, and declines to impose a comprehensive, detailed set of evidentiary rules for resolution of contested allegations of sexual harassment under Title IX. . . . the Department has determined that recipients must consider relevant evidence with the following conditions: a complainant's prior sexual behavior is irrelevant (unless questions or evidence about prior sexual behavior meet one of two exceptions, as noted above); information protected by any legally recognized privilege cannot be used; no party's treatment records may be used without that party's voluntary, written consent; and statements not subject to cross-examination in postsecondary institutions cannot be relied on by the decision-maker. The Department notes that where evidence is duplicative of other evidence, a recipient may deem the evidence not relevant.

Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) (final rule) (online at www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf) at 30337.

194

In order to preserve the benefits of live, back-and-forth questioning and follow-up questioning unique to cross-examination, the Department declines to impose a requirement that questions be submitted for screening prior to the hearing (or during the hearing); the final regulations revise this provision to clarify that cross-examination must occur "directly, orally, and in real time" during the live hearing, balanced by the express provision that questions asked of parties and witnesses must be relevant, and before a party or witness answers a cross-examination question the decision-maker must determine relevance (and explain a determination of irrelevance). This provision does not require a decision-maker to give a lengthy or complicated explanation; it is sufficient, for example, for a decision-maker to explain that a question is irrelevant because the question calls for prior sexual behavior information without meeting one of the two exceptions, or because the question asks about a detail that is not probative of any material fact concerning the allegations.

Id. at 30343.

195

The Department believes the protections of the rape shield language remain stronger if decision-makers are not given discretion to decide that sexual behavior is admissible where its probative value substantially outweighs the danger of harm to a victim and unfair prejudice to any party. If the Department permitted decision-makers to balance ambiguous factors like "unfair prejudice" to make admissibility decisions, the final regulations would convey an expectation that a non-lawyer decision-maker must possess the legal expertise of judges and lawyers. Instead, the Department expects decision-makers to apply a single admissibility rule (relevance), including this provision's specification that sexual behavior is irrelevant with two concrete exceptions. This approach leaves the decisionmaker discretion to assign weight and credibility to evidence, but not to deem evidence inadmissible or excluded, except on the ground of relevance (and in conformity with other requirements in §106.45, including the provisions discussed above whereby the decisionmaker cannot rely on statements of a party or witness if the party or witness did not submit to cross-examination, a party's treatment records cannot be used without the party's voluntary consent, and information protected by a legally recognized privilege cannot be used).

Id. at 30351-52

196

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[T]he Department declines to import a balancing test that would exclude sexual behavior questions and evidence (even meeting the two exceptions) unless probative value substantially outweighs potential harm or undue prejudice, because that open-ended, complicated standard of admissibility would render the adjudication more difficult for a layperson decision-maker competently to apply. Unlike the two exceptions in this provision, a balancing test of probative value, harm, and prejudice contains no concrete factors for a decision-maker to look to in making the relevance determination.

Id. at 30353

197

In response to commenters' concerns that the proposed rules did not provide a recipient sufficient leeway to halt investigations that seemed futile, the final regulations revise § 106.45(b)(3)(ii) to provide that a recipient may (in the recipient's discretion) dismiss a formal complaint, or allegations therein, in certain circumstances including where a complainant requests the dismissal (in writing to the Title IX Coordinator), where the respondent is no longer enrolled or employed by the recipient, or where specific circumstances prevent the recipient from meeting the recipient's burden to collect sufficient evidence (for example, ***where a postsecondary institution complainant has ceased participating in the investigation and the only inculpatory evidence available is the complainant's statement in the formal complaint or as recorded in an interview by the investigator****).*

Id. at 30282 (emphasis added).

198

§ 106.45(b)(5)(vi) [emphasizes] that the evidence gathered and sent to the parties for inspection and review is evidence "directly related to the allegations" which must specifically include "inculpatory or exculpatory evidence whether obtained from a party or other source." Such inculpatory or exculpatory evidence (related to the allegations) may, therefore, be gathered by the investigator from, for example, law enforcement where a criminal investigation is occurring concurrently with the recipient's Title IX grievance process.

Id. at 30303.

199

The Department therefore believes it is important that at the phase of the investigation where the parties have the opportunity to review and respond to evidence, the universe of that exchanged evidence should include all evidence (inculpatory and exculpatory) that relates to the allegations under investigation, without the investigator having screened out evidence related to the allegations that the investigator does not believe is relevant. The parties should have the opportunity to argue that evidence directly related to the allegations is in fact relevant (and not otherwise barred from use under § 106.45), and parties will not have a robust opportunity to do this if evidence related to the allegations is withheld from the parties by the investigator.

Id. at 30304.

200

The Department emphasizes that the decision-maker must not only be a separate person from any investigator, but the decision-maker is under an obligation to objectively evaluate all relevant evidence both inculpatory and exculpatory, and must therefore independently reach a determination regarding responsibility without giving deference to the investigative report.

Id. at 30314.

201

Regardless of whether certain demographic groups are more or less financially disadvantaged and thus more or less likely to hire an attorney as an advisor of choice, decision-makers in each case must reach determinations based on the evidence and not solely based on the skill of a party's advisor in conducting cross-examination. The Department also notes that the final regulations require a trained investigator to prepare an investigative report summarizing relevant evidence, and permit the decision-maker on the decision-maker's own initiative to ask questions and elicit testimony from parties and witnesses, as part of the recipient's burden to reach a determination regarding responsibility based on objective evaluation of all relevant evidence including inculpatory and exculpatory evidence. Thus, the skill of a party's advisor is not the only factor in bringing evidence to light for a decision-maker's consideration. *Id.* at 30332.

202

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Unlike court trials where often the trier of fact consists of a jury of laypersons untrained in evidentiary matters, the final regulations require decision-makers to be trained in how to conduct a grievance process and how to serve impartially, and specifically including training in how to determine what questions and evidence are relevant. The fact that decision-makers in a Title IX grievance process must be trained to perform that role means that the same well-trained decision-maker will determine the weight or credibility to be given to each piece of evidence, and the training required under § 106.45(b)(1)(iii) allows recipients flexibility to include substantive training about how to assign weight or credibility to certain types or categories of evidence, so long as any such training promotes impartiality and treats complainants and respondents equally. Thus, for example, ***where a cross-examination question or piece of evidence is relevant, but concerns a party's character or prior bad acts, under the final regulations the decision-maker cannot exclude or refuse to consider the relevant evidence, but may proceed to objectively evaluate that relevant evidence by analyzing whether that evidence warrants a high or low level of weight or credibility, so long as the decisionmaker's evaluation treats both parties equally by not, for instance, automatically assigning higher weight to exculpatory character evidence than to inculpatory character evidence.*** *Id.* at 30337 (emphasis added).

203

[A] recipient must objectively evaluate all relevant evidence (inculpatory and exculpatory) but retains discretion, to which the Department will defer, with respect to how persuasive a decision-maker finds particular evidence to be.

Id. at 30337.

204

While the proposed rules do not speak to admissibility of hearsay, prior bad acts, character evidence, polygraph (lie detector) results, standards for authentication of evidence, or similar issues concerning evidence, the final regulations require recipients to gather and evaluate relevant evidence, with the understanding that this includes both inculpatory and exculpatory evidence, and the final regulations deem questions and evidence about a complainant's prior sexual behavior to be irrelevant with two exceptions and preclude use of any information protected by a legally recognized privilege (e.g., attorney-client).

Id. at 30247-48 (internal citations omitted).

205

While not addressed to hearsay evidence as such, § 106.45(b)(6)(i), which requires postsecondary institutions to hold live hearings to adjudicate formal complaints of sexual harassment, states that the decision-maker must not rely on the statement of a party or witness who does not submit to cross-examination, resulting in exclusion of statements that remain untested by cross-examination.

Id. at 30247 n. 1017.

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

206

The Department understands that courts of law operate under comprehensive, complex rules of evidence under the auspices of judges legally trained to apply those rules of evidence (which often intersect with other procedural and substantive legal rules, such as rules of procedure, and constitutional rights). Such comprehensive rules of evidence admit hearsay (generally, out-of-court statements offered to prove the truth of the matter asserted) under certain conditions, which differ in criminal and civil trials. Because Title IX grievance processes are not court proceedings, comprehensive rules of evidence do not, and need not, apply. Rather, the Department has prescribed procedures designed to achieve a fair, reliable outcome in the context of sexual harassment in an education program or activity where the conduct alleged constitutes sex discrimination under Title IX. While judges in courts of law are competent to apply comprehensive, complicated rules of evidence, the Department does not believe that expectation is fair to impose on recipients, whose primary function is to provide education, not to resolve disputes between students and employees.

Id. at 30347.

207

While commenters correctly observe that the Confrontation Clause is concerned with use of testimonial statements against criminal defendants, even if use of a non-testimonial statement poses no constitutional problem under the Sixth Amendment, the statement would still need to meet a hearsay exception under applicable rules of evidence in a criminal court. For reasons discussed above, the Department does not wish to impose a complex set of evidentiary rules on recipients, whether patterned after civil or criminal rules.

Id. at 30347.

208

The Department understands commenters' concerns that a blanket rule against reliance on party and witness statements made by a person who does not submit to cross-examination is a broader exclusionary rule than found in the Federal Rules of Evidence, under which certain hearsay exceptions permit consideration of statements made by persons who do not testify in court and have not been cross-examined.

Id. at 30348.

209

[W]here a party or witness does not appear and is not cross-examined, the statements of that party or witness cannot be determined reliable, truthful, or credible in a non-courtroom setting like that of an educational institution's proceeding that lacks subpoena powers, comprehensive rules of evidence, and legal professionals. . . . [R]ecipients are educational institutions that should not be converted into de facto courtrooms. The final regulations thus prescribe a process that simplifies evidentiary complexities while ensuring that determinations regarding responsibility result from consideration of relevant, reliable evidence. The Department declines to adopt commenters' suggestion that instead the decision-maker should be permitted to rely on statements that are not subject to cross-examination, if they are reliable; making such a determination without the benefit of extensive rules of evidence would likely result in inconsistent and potentially inaccurate assessments of reliability. Commenters correctly note that courts have not imposed a blanket rule excluding hearsay evidence from use in administrative proceedings. However, cases cited by commenters do not stand for the proposition that every administrative proceeding must be permitted to rely on hearsay evidence, even where the agency lacks subpoena power to compel witnesses to appear.

Id. at 30348.

210

[R]elevance is the sole gatekeeper evidentiary rule in the final regulations, but decision-makers retain discretion regarding the weight or credibility to assign to particular evidence. Further, for the reasons discussed above, while the final regulations do not address "hearsay evidence" as such, § 106.45(b)(6)(i) does preclude a decision-maker from relying on statements of a party or witness who has not submitted to cross-examination at the live hearing.

Id. at 30354.

211

Considerations for Applying Regulatory Requirements

212

Recipients may not…

. . . adopt evidentiary rules of admissibility that contravene those evidentiary requirements prescribed under § 106.45 . . .

. . . adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice . . .

. . . adopt rules excluding certain types of relevant evidence (e.g., lie detector test results, or rape kits) where the type of evidence is not either deemed "not relevant" (as is, for instance, evidence concerning a complainant's prior sexual history) or otherwise barred from use under § 106.45 (as is, for instance, information protected by a legally recognized privilege) . . .

Id. at 30294 (internal citations omitted).

213

1) Credibility Determinations
2) Issues of Relevance
3) Setting the Evidentiary Standard
4) Inculpatory & Exculpatory Evidence
5) Expert Testimony
6) Hearsay & Character
7) Federal Court on Title IX Evidence

214

Credibility Determinations

- Often these cases are "word against word," so what exists to corroborate claims?
- Reports to law enforcement, medical assistance, contemporaneous reports or conversations, journal entries, witness accounts, etc. can be viewed as corroborating (if medical or mental health reports exist you can ask the complainant for access to those records).
- In cases where medical or mental health records exist and panel members gain access, it's a good idea to enlist the help of medical/mental health experts to interpret.
- Avoid expectations or assumptions about behaviors or responses by either complainant or respondent. Avoid stereotypes; prevent bias, implicit or otherwise.

215

Credibility Determinations

- Assess demeanor: Does the person appear credible? Look at body language, eye contact, level of nervousness, defensiveness, evasiveness, etc.
- Is the person's account inherently believable? Plausible? What is his or her potential bias?
- Does the person have a motive to be untruthful?
- Are there past acts that could be relevant (although past acts are not determinative of the issue before you, they can be relevant for some purposes).
- Pay attention to inconsistencies, but remember that in cases of trauma, inconsistencies can occur. Inconsistencies alone may not determine credibility or lack thereof.
- Look out for attempts to derail the hearing, deflect away from questions, and/or bog down the hearing with irrelevant information.
- Check your own bias at the door. Do not pre-judge your findings until all relevant information is heard. Do not be lured towards confirmation bias.

216

Relevance

The new Title IX regulations "specifically . . . require investigators and decision-makers to be trained on issues of relevance, including how to apply the rape shield provisions."

The decision-maker is required to make relevance determinations regarding cross-examination in real time during the hearing.

217

Title IX Regulations – Relevance

- Require an "objective evaluation of all relevant evidence" 106.45(b)(1)(ii)
- *The Department declines to define certain terms in this provision such as "upon request," "relevant," or "evidence directly related to the allegations," as these terms should be interpreted using their plain and ordinary meaning.*

https://www.federalregister.gov/d/2020-10512/p-3515

218

FRE 401 – Court Room Test for Relevant Evidence

Evidence in federal court is relevant if:

a) It has any tendency to make a fact more or less probable than it would be without the evidence; and

b) The fact is of consequence in determining the action.

- Irrelevant Evidence – Evidence not tending to prove or disprove a matter in issue. Bryan A. Gardner, Black's Law Dictionary 10, (2014). Pg. 676
- Does the question call for an answer that makes an issue of material fact more or less likely?

219

Merriam Webster Definition of Relevant

- Having significant and demonstrable bearing on the matter at hand.
- Tending logically to prove or disprove a fact of consequence or to make the fact more or less probable and thereby aiding the trier of fact in making a decision

"Relevant." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/relevant. Accessed 12 Jul. 2020.

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What is Probative?

- Title IX Regulations do not define Probative
- Evidence that tends to prove or disprove a point in Issue.

Bryan A. Gardner, Black's Law Dictionary 10, (2014). Pg. 677

- "Each single piece of evidence must have a plus value."

1 JOHN H. WIGMORE, EVIDENCE 410 (1940).

221

FRE 403 = Court Room Exclusions Not Applied to Title IX Hearings

- "The Court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: Unfair Prejudice, Confusing the Issues, Misleading the jury, Undue delay, Wasting time, Needlessly presenting cumulative evidence."
- Need to apply
- "A recipient may not adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice."

222

What Exclusions do Apply in Title IX Hearings

1) Legally Recognized Privileged Information -> (Attorney/Client & Dr./Client)
2) Complainant's Sexual Predisposition (always) & Prior Sexual History Unless… Two Exceptions
3) Treatment Records without the parties written voluntary consent
4) A recipient may adopt rules of order or decorum to forbid badgering a witness.
5) OCR Blog Post: *The decision-maker must not rely on the statement of a party or witness who does not submit to cross-examination, resulting in exclusion of statements that remain untested by cross-examination.* https://www.federalregister.gov/d/2020-10512/p-3896 .
6) A Recipient may fairly deem repetition of the same question to be irrelevant.

223

Relevant but Hostile

Where the substance of a question is relevant, but the manner in which an advisor attempts to ask the question is harassing, intimidating, or abusive (for example, the advisor yells, screams, or physically "leans in" to the witness's personal space), the recipient may appropriately, evenhandedly enforce rules of decorum that require relevant questions to be asked in a respectful, non-abusive manner. https://www.federalregister.gov/d/2020-10512/p-3779

224

Rape Shield Language

[T]he rape shield language in § 106.45(b)(6)(i)-(ii) bars questions or evidence about a complainant's sexual predisposition (with no exceptions) and about a complainant's prior sexual behavior subject to two exceptions:

1) if offered to ***prove that someone other than the respondent committed the alleged sexual harassment****, or*

2) if the question or evidence concerns sexual behavior between the complainant and the respondent and is offered to prove ***consent****.*

Id. at 30336 n. 1308 (emphasis added).

225

Title IX Hearing – FRE 412 Rape Shield Protections

(a) Prohibited Uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:

(1) evidence offered to prove that a victim engaged in other sexual behavior; or

(2) evidence offered to prove a victim's sexual predisposition.

(b) Exceptions.

(1) *Criminal Cases.* The court may admit the following evidence in a criminal case:

(A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and

(C) evidence whose exclusion would violate the defendant's constitutional rights.

(2) *Civil Cases.* In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

(c) Procedure to Determine Admissibility.

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Relevance Litany…Making the Determination

1) What is at Issue?
2) Admissibility Versus Probative
3) What does the offered evidence go to prove? Not does it prove this at point of admissibility
4) Apply the Regulatory standards as applicable…Title IX hearings not governed by FRE *per se*

227

Cross Examination & Relevance Determinations

- The decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.
- "[T]his provision does not require a decision-maker to give a lengthy or complicated explanation; it is sufficient, for a decision-maker to explain that a question is irrelevant because…. the question asks about a detail that is not probative of any material fact concerning the allegations." https://www.federalregister.gov/d/2020-10512/p-3896
- "[D]irectly, orally, and in real time" precluding a requirement that cross examination questions be submitted or screened prior to the live hearing. https://www.federalregister.gov/d/2020-10512/p-3897
- "The recipient may adopt a rule that prevents parties and advisors from challenging the relevance determination (after receiving the decision-maker's explanation) during the hearing." https://www.federalregister.gov/d/2020-10512/p-3892

228

Evidentiary Standards

"State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment;"

https://www.federalregister.gov/d/2020-10512/p-6468

1) Clear & Convincing

2) Preponderance of the Evidence

229

Standard of Proof - Preponderance of the Evidence

Using a **preponderance of the evidence standard**, and considering relevant definitions in the Policy, the hearing panel weighs the evidence to determine whether the Respondent violated the Policy.

50.01% likelihood or 50% and a feather

Which side do you fall on?

"The Greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force, superior evidentiary weight that, though not sufficient to free the mind wholly from all reasoanble doubt, is still sufficient to incline a mind to one side of the issue rather than the other." Bryan A. Gardner, Black's Law Dictionary 10, (2014). , 1373

230

Standard of Proof – Clear and Convincing

- Evidence indicating that the thing to be proved is highly probable or reasonably certain. Bryan A. Gardner, Black's Law Dictionary 10, (2014). 674
- Certain facts must be proved by clear and convincing evidence, which is a higher burden of proof. This means the party must persuade you that it is highly probable that the fact is true. CACI No. 201. More Likely True—Clear and Convincing Proof https://www.justia.com/documents/trials-litigation-caci.pdf

231

Inculpatory Evidence

Evidence showing or tending to show one's involvement in a crime or wrong.

Bryan A. Gardner, Black's Law Dictionary 10, (2014). Pg. 676

232

Exculpatory Evidence

Evidence tending to establish a defendant's Innocence.

Bryan A. Gardner, Black's Law Dictionary 10, (2014). Pg. 675

233

Court Room Expert Testimony Requirements– FRE 702

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

A) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

B) The Testimony is based on sufficient facts or data

C) The Testimony is the product of reliable principles and methods

D) The expert has reliably applied the principles and methods to the facts of the case.

234

Title IX Regulations – Expert Witnesses

- Must provide the parties equal opportunity to present fact and expert witnesses.
- Exert witness evidence must be relevant.

235

Hearsay, Character, etc..

- *While the proposed rules do not speak to admissibility of hearsay, prior bad acts, character evidence, polygraph (lie detector) results, standards for authentication of evidence, or similar issues concerning evidence, the final regulations require recipients to gather and evaluate relevant evidence*

https://www.federalregister.gov/d/2020-10512/p-2947

(internal citations omitted)

- *Within these evidentiary parameters recipients retain the flexibility to adopt rules that govern how the recipient's investigator and decision-maker evaluate evidence and conduct the grievance process (so long as such rules apply equally to both parties)*

236

FRE 801 – Hearsay

(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay. "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement

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FRE 801 - Exclusions From Hearsay

- (d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:
- (1) *A Declarant-Witness's Prior Statement.* The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
- (A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;
- (B) is consistent with the declarant's testimony and is offered:
- (i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
- (ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or
- (C) identifies a person as someone the declarant perceived earlier.
- (2) *An Opposing Party's Statement*. The statement is offered against an opposing party and:
- (A) was made by the party in an individual or representative capacity;
- (B) is one the party manifested that it adopted or believed to be true;
- (C) was made by a person whom the party authorized to make a statement on the subject;
- (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
- (E) was made by the party's coconspirator during and in furtherance of the conspiracy.

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FRE 803 – Exceptions to the Rule Against Hearsay

(1) *Present Sense Impression*. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

(2) *Excited Utterance*. A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

(3) *Then-Existing Mental, Emotional, or Physical Condition.* A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

(4) *Statement Made for Medical Diagnosis or Treatment*. A statement that:

(A) is made for — and is reasonably pertinent to — medical diagnosis or treatment; and

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

(Not Entire Rule)

239

Statements Not Subject to Cross Exam

OCR Blog Post -> https://www2.ed.gov/about/offices/list/ocr/blog/20200522.html

If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility, provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.
Section 106.45(b)(6)(i)

240

Potential Federal Court Rulings on Evidence

Haidak v. University of Massachusetts-Amherst, 933 F.3d 56 (1st Cir. App. 8/6/2019)

"The rules that govern a common law trial need not govern a university disciplinary proceeding. But the rules of trial may serve as a useful benchmark to guide our analysis." *Id.* at 67.

For example, even in a full-blown federal trial, "extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness." Fed. R. Evid. 608(b). And extrinsic evidence aside, the court has ample discretion to exclude evidence "if its probative value is substantially outweighed by a danger of ... undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. Because a federal district court would have been well within its discretion in excluding the transcript, it follows a fortiori that an identical decision by the Hearing Board did not violate Haidak's right to due process. *Id.*

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Thank You!

Assessment to follow...

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NASPA
Student Affairs Administrators in Higher Education

Interview Techniques for Title IX Investigators Under the New Regulations

Dr. Jennifer R. Hammat
Dean of Students
University of Southern Indiana

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This Module is Designed for

TRACK 1 – Title IX Coordinators
TRACK 3 – Title IX Investigators

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Reference

Unless otherwise noted, source: Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020)(final rule) (online at https://www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf).

245

Decisions and Flexibility

The Department has given you some flexibility here. As you draft your policies and procedures, you have a decision to make about how you conduct your investigations. This is largely based on your staffing level and if you intend to have your investigator make any determinations of credibility of evidence and/or parties (Obama era investigations). It is one of the decisions you will need to make as a campus. If you stay the course, and continue to have investigators determine credibility and relevance, very little changes. If you decide they will not do this, investigations change significantly.

246

Outsourcing Is an Option

The Department notes that nothing in the final regulations precludes a recipient from carrying out its responsibilities under § 106.45 by outsourcing such responsibilities to professionally trained investigators and adjudicators outside the recipient's own operations. The Department declines to impose a requirement that Title IX Coordinators, investigators, or decision-makers be licensed attorneys (or otherwise to specify the qualifications or experience needed for a recipient to fill such positions), because leaving recipients as much flexibility as possible to fulfill the obligations that must be performed by such individuals will make it more likely that all recipients reasonably can meet their Title IX responsibilities.

Id. at 30105.

247

A note about §106.45(b)(7)

Section 106.45(b)(7) specifies that the decision-maker must be a different person from the Title IX Coordinator or investigator, but the final regulations do not preclude a Title IX Coordinator from also serving as the investigator.

Id. at 30135 n.596.

248

§ 106.45(b)(5)(i)-(vii)

Requires recipients to investigate formal complaints in a manner that:

- *Keeps the burden of proof and burden of gathering evidence on the recipient 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 and other inculpatory and exculpatory evidence;*
- *Does not restrict the parties from discussing the allegations or gathering evidence;*

Id. at 30053.

249

106.45(b)(5)(i)-(vii) continued

- *Gives the parties equal opportunity to select an advisor of the party's choice (who may be, but does not need to be, an attorney);*
- *Requires written notice when a party's participation is invited or expected for an interview, meeting, or hearing;*
- *Provide both parties equal opportunity to review and respond to the evidence gathered during the investigation; and*
- *Sends both parties the recipient's investigative report summarizing the relevant evidence, prior to reaching a determination regarding responsibility.*

Id. at 30053.

250

Training

251

§ 106.45(b)(1)(i)-(x)

- *Treats complainants and respondents equitably by recognizing the need for complaints to receive remedies where a respondent is determined responsible and for respondents to face disciplinary sanctions only after a fair process determines responsibility;*
- *Objectively evaluates all relevant evidence both inculpatory and exculpatory, and ensures that rules voluntarily adopted by a recipient treat the parties equally;*

Id. at 30053.

252

§ 106.45(b)(1)(i)-(x) continued

- *Requires Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions to be free from conflicts of interest and bias and trained to serve impartially without prejudging the facts at issue;*
- *Presumes the non-responsibility of respondents until conclusions of the grievance process;*
- *Includes reasonably prompt time frames for the grievance process;*

Id. at 30053 (emphasis added).

253

§ 106.45(b)(1)(i)-(x) continued

- *Informs all parties of critical information about 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; and*
- *Protects any legally recognized privilege from being pierced during a grievance process.*

Id. at 30053.

254

Training

- "Best practices"/"Experts"/Certification
- Impartiality of Title IX operatives
- No bias
- No conflicts of interest
- No sexual stereotypes in training materials
- Training on the institution's specific policies, procedures and processes
- Training on "relevance" of evidence for investigations and hearings
- Training on technology used in hearings
- *We assume that all recipients will need to train their Title IX Coordinators, an investigator, any person designated by a recipient to facilitate an informal resolution process (e.g., a mediator), and two decision-makers (assuming an additional decision-maker for appeals). We assume this training will take approximately eight hours for all staff at the . . . IHE level.*

Id. at 30567.

255

Investigations

256

What has happened?

- A formal complaint has been received (and signed).
- An initial meeting with the Title IX Coordinator has happened to provide support measures.
- A notice of investigation has gone out to both parties.
- The case has been assigned to you (the investigator) or as the Title IX Coordinator, you are the investigator, or you have outsourced the investigation.
- The investigator has read the formal complaint.
- Which route for investigations has your school opted for?
  - Investigations with or without credibility assessments?

257

Preparing your questions pre-interview

- Read the Formal Complaint
  - Write out the questions you have about the report on first read.
- Read the Formal Complaint again.
  - What additional questions do you have about the incident narrative.
  - Who is identified in the Formal Complaint you feel you need to interview.
  - What questions do you have for those individuals?
- Have all of these typed out ahead of the first interview.
- Revise and update with additional questions and witnesses as you go.

258

§ 106.45(b)(5)(iv)

(iv) Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties;

259

Crossover interview techniques

- Title IX investigation framework is good practice for other kinds of investigations:
- Code of Conduct violations
- Threat assessment or BIT concerns investigations
- Educational conversations with student
- Academic Integrity case investigations
- Hazing investigations

260

Fact Finding and Data Collection (with credibility assessment)

261

How to start an interview

- Introduce yourself
- Is small talk appropriate? Build rapport. Establish baseline responses*
- Explain your role
- Explain you will be note/taking/recording the interview for notes
- Ask interviewee to share their recollections of the incident.
  - Do not interrupt the narrative
  - Let them talk until they are done
  - Follow up questions later

262

Remember your role

You are NOT a party's lawyer, advisor, counselor, parent, or friend
You ARE an investigator and a facilitator
You ARE free from bias
You ARE free from prejudgment
You ARE interested in finding out fact about the incident
You ARE interested in the truth

Being Impartial ≠ Being a Robot
You can be a neutral fact-finder and still show empathy and kindness.
Investigation spaces should be judgement free zones

263

Follow-up questions

- When seeking clarification after the party's initial recollection of the event, try to ask questions that build confidence and put them at ease.
- "You said you left the party around 1am, is that correct?"
- "You said you recalled having three cups of 'red solo cup' punch, is that right?"
- If they are describing a location, it might be helpful to ask them to sketch out the room for you (if it is a residence hall, you should have those schematics on your computer to pull up/print out).

264

Clarifications

- When asking harder questions about the order of events, or specifics about the conversation or activities, you may run into a series of "I don't know" or "I can't remember" statements. That's ok.
- Reassure the party its ok that they cannot remember or don't know.
- You can move to another question or kind of questioning.
- If you hit a memory gap, ask them some sensory questions to see if it triggers any memories. Often there are memories they cannot access unless you ask the question from a different lens.

265

Sense and Feel questions

- "Can you draw what you experienced?"
- "What were you feeling when XYZ occurred?"
- "What did you smell?"
- "Can you show me?"
- "What were you feeling when you were kissing?"
- "Tell me more about that."
- "What did you hear?"
- "Tell me about his/her eyes."
- "What can you not forget?"

Source: Russell Strand, Frontline Training Conference, 2018

266

A word about trauma

- Anyone you speak with about alleged sexual harassment (complainant, respondent, or witnesses) could have experienced or still be experiencing trauma as a result of the alleged situation.
- Be cognizant that talking to you may be very difficult for the parties.
- Remember to document their experience with as little interruption as possible. Follow-up questions should be limited.
- Ideally, you want the party being interviewed to do most of the speaking.

Modified from: Russell Strand, Frontline Training Conference, 2018

267

Meet the student where they are:

- Baseline knowledge =
  - How to evaluate risk
  - Factors to consider in decision-making
  - Medically accurate knowledge of sex, reproduction, sexual health
  - Ability to navigate interpersonal relationships
  - Communication skills
  - Conflict resolution skills
  - Emotional intelligence
- Not all students know the same thing about the same things

268

Gathering and Evaluating Evidence (with Credibility Assessment)

269

Types of Evidence

VERBAL

- Interviews with:
  - Parties
  - Witnesses
  - Others with relevant information

PHYSICAL

- Images (photos and videos)
- Text messages
- Screen shots
- Documents
- E-mails
- Security footage
- Medical records

270

Ask them for evidence they want reviewed

- Inculpatory evidence
- Exculpatory evidence
- Relevant to the allegations
- Rape shield law protections
- Witnesses to interview
- If they know of others with similar experiences
- Character testimony is permitted

271

Credibility of the Parties and Evidence

- Credibility = "the accuracy and reliability of evidence."
- A credibility assessment is necessary for each piece of evidence considered in the investigation.

Source: Nedda Black, J.D., et al., *The ATIXA Playbook: Best Practices for the Post-Regulatory Era* at 101 (ATIXA, 2017).

272

Credibility: EEOC Guidance

- If there are conflicting versions of relevant events, the employer will have to weigh each party's credibility. Credibility assessments can be critical in determining whether the alleged harassment in fact occurred. Factors to consider include:
- Inherent plausibility: Is the testimony believable on its face? Does it make sense?
- Demeanor: Did the person seem to be telling the truth or lying?
- Motive to falsify: Did the person have a reason to lie?
- Corroboration: Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?
- Past record: Did the alleged harasser have a history of similar behavior in the past?
- None of the above factors are determinative as to credibility. For example, the fact that there are no eye-witnesses to the alleged harassment by no means necessarily defeats the complainant's credibility, since harassment often occurs behind closed doors. Furthermore, the fact that the alleged harasser engaged in similar behavior in the past does not necessarily mean that he or she did so again.

273

Investigative relevance

- *"The investigator is obligated to gather evidence directly related to the allegations whether or not the recipient intends to rely on such evidence (for instance, where evidence is directly related to the allegations but the investigator does not believe the evidence to be credible and thus does not intend to rely on it).*
- *The parties may then inspect and review the evidence directly related to the allegations. The investigator must take into consideration the parties' responses and then determine what evidence is relevant and summarize the evidence in the investigative report."*

Id. at 30248.

274

Investigative relevance continued

"The parties then have equal opportunity to review the investigative report; if a party disagrees with an investigator's determination about relevance, the party can make that argument in the party's written response to the investigative report under § 106.45(b)(5)(vii) and to the decision-maker at any hearing held; either way the decision-maker is obligated to objectively evaluate all relevant evidence and the parties have the opportunity to argue about what is relevant (and about the persuasiveness of relevant evidence)."

Id. at 30249.

275

§ 106.45(b)(7)

Section 106.45(b)(7) also helps prevent injection of bias into Title IX sexual harassment grievance processes, by requiring transparent descriptions of the steps taken in an investigation and explanation of the reasons why objective evaluation of the evidence supports findings of facts and conclusions based on those facts.

Id. at 30389 (emphasis added).

276

An Investigative Note about Rape Shield Laws

The final regulations permit exchange of all evidence "directly related to the allegations in a formal complaint" during the investigation, but require the investigator to only summarize "relevant" evidence in the investigative report (which would exclude sexual history information deemed by these final regulations to be "not relevant"), and require the decision-maker to objectively evaluate only "relevant" evidence during the hearing and when reaching the determination regarding responsibility.

Id. at 30352.

277

Rape Shield Continued

To further reinforce the importance of correct application of the rape shield protections, we have revised § 106.45(b)(6)(i) to explicitly stat that only relevant questions may be asked, and the decision-maker must determine the relevance of each cross-examination questions before a party or witness must answer.

Id. at 30352.

278

Obligations

"The investigator is obligated to gather evidence directly related to the allegations whether or not the recipient intends to rely on such evidence (for instance, where evidence is directly related to the allegations but the recipient's investigator does not believe the evidence to be credible and thus does not intend to rely on it). The parties may then inspect and review the evidence directly related to the allegations. The investigator must take into consideration the parties' responses and then determine what evidence is relevant and summarize the relevant evidence in the investigative report."

Id. at 30352 (internal citations omitted).

279

Obligations Continued

"The parties then have equal opportunity to review the investigative report; if a party disagrees with an investigator's determination about relevance, the party can make that argument in the party's written response to the investigative report under § 106.45(b)(5)(vii) and to the decision-maker at any hearing held; either way the decision-maker is obligated to objectively evaluate all relevant evidence and the parties have the opportunity to argue about what is relevant (and about the persuasiveness of relevant evidence)."

Id. at 30248-49.

280

Without Credibility Assessment

281

Why would you consider this?

- Cross purpose. The purpose of the hearing is to determine credibility of all the parties and all the evidence. If the investigator does this, one could later assert bias against the investigator for making their assessment of the parties and/or the evidence.
- Time. Investigations that accept information, gather documents, and statements, and provide a relevance review of said documents would make for an effective summary of the investigative materials presented for the hearing to sort through.
- Repetition. Anything anyone says to you, they will have to say again at the hearing and be subject to cross-examination, or it won't be considered.

282

Bias, Impartiality, Conflicts of Interest, Sex Stereotypes

283

Bias/Conflict of Interest

Section 106.45(b)(1)(iii) requires Title IX Coordinators, investigators, decision-makers, and individuals who facilitate any informal resolution process to be free of bias or conflicts of interest for or against complainants or respondents and to be trained on how to serve impartially.

Id. at 30103 (emphasis added).

284

"Bias" in *Ikpeazu v. University of Nebraska*

With respect to the claim of bias, we observe that the committee members are entitled to a presumption of honesty and integrity unless actual bias, such as personal animosity, illegal prejudice, or a personal or financial stake in the outcome can be proven. . . . The allegations Ikpeazu makes in support of his bias claim are generally insufficient to show the kind of actual bias from which we could conclude that the committee members acted unlawfully.

Ikpeazu v. University of Nebraska, 775 F.2d 250, 254 (8th Cir. 1985) (internal citations omitted, emphasis added).

285

Bias

- Personal animosity
- Illegal prejudice
- Personal or financial stake in the outcome
- Bias can relate to:
  - *Sex, race, ethnicity, sexual orientation, gender identity, disability or immigration status, financial ability or other characteristic*

Id. at 30084 (emphasis added).

286

Does DOE require "Implicit Bias" training?

The Department declines to specify that training of Title IX personnel must include implicit bias training; the nature of the training required under § 106.45(b)(1)(iii) is left to the recipient's discretion so long as it achieves the provision's directive that such training provide instruction on how to serve impartially and avoid prejudgment of the facts at issue, conflicts of interest, and bias, and that materials used in such training avoid sex stereotypes.

Id. at 30084 (emphasis added).

287

Final Thought

Remember, other modules in the NASPA Title IX Training Certificate curriculum address student conduct, Title IX hearings, Title IX investigations, report writing, informal resolution, FERPA/records management, evidence, etc.

288

Thank You…

Assessment will follow.

289

NASPA
Student Affairs Administrators in Higher Education

Constructing a Report

Dr. Jennifer R. Hammat
Dean of Students
University of Southern Indiana

290

This Module is Designed for

TRACK 1 – Title IX Coordinators
TRACK 3 – Title IX Investigators

291

Reference

Unless otherwise noted, source: Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020)(final rule) (online at https://www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf).

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Outsourcing Is an Option

The Department notes that nothing in the final regulations precludes a recipient from carrying out its responsibilities under § 106.45 by outsourcing such responsibilities to professionally trained investigators and adjudicators outside the recipient's own operations. The Department declines to impose a requirement that Title IX Coordinators, investigators, or decision-makers be licensed attorneys (or otherwise to specify the qualifications or experience needed for a recipient to fill such positions), because leaving recipients as much flexibility as possible to fulfill the obligations that must be performed by such individuals will make it more likely that all recipients reasonably can meet their Title IX responsibilities.

Id. at 30105.

293

Bias/Conflict of Interest

Section 106.45(b)(1)(iii) requires Title IX Coordinators, investigators, decision-makers, and individuals who facilitate any informal resolution process to be free of bias or conflicts of interest for or against complainants or respondents and to be trained on how to serve impartially.

Id. at 30103 (emphasis added).

294

Investigation Obligations

295

§ 106.45(b)(5)(i)-(vii)

Requires recipients to investigate formal complaints in a manner that:

- *Keeps the burden of proof and burden of gathering evidence on the recipient 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 and other inculpatory and exculpatory evidence;*
- *Gives the parties equal opportunity to select an advisor of the party's choice (who may be an attorney, but does not need to be, an attorney);*

Id. at 30053.

296

§ 106.45(b)(5)(i)-(vii) continued

- *Requires written notices 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.*

Id. at 30053.

297

Report Purpose

We agree that the final regulations seek to provide strong, clear procedural protections to complainants and respondents, including apprising both parties of the evidence the investigator has determined to be relevant, in order to adequately prepare for a hearing (if one is required or otherwise provided) and to submit responses about the investigative report for the decision-maker to consider even when I hearing is not required or otherwise provided.

Id. at 30309.

298

Report purpose and combining continued

- *A valuable part of this process is giving parties (and advisors who are providing assistance to the parties) adequate time to review, assess, and respond to the investigative report in order to fairly prepare for the live hearing or submit arguments to a decision-maker where a hearing is not required or otherwise provided.*
- *In the context of a grievance process that involves multiple complainants, multiple respondents, or both, a recipient may issue a single investigative report.*

Id. at 30309.

299

Findings or Conclusions in Report?

The Department does not wish to prohibit the investigator from including recommended findings or conclusions in the investigative report. However, the decision-maker is under an independent obligation to objectively evaluate relevant evidence, and thus cannot simply defer to recommendations made by the investigator in the investigative report.

Id. at 30308.

300

Elements of the Investigative Report

301

No Position

The Department takes no position here on such elements beyond what is required in these final regulations; namely, that the investigative report must fairly summarize relevant evidence. We note that the decision-maker must prepare a written determination regarding responsibility that must contain certain specific elements (for instance, a description of procedural steps taken during an investigation) and so a recipient may wish to instruct the investigator to include such matters in the investigative report, but these final regulations do not prescribe the contents of the investigative report other than specifying its core purpose of summarizing relevant evidence. *Id.* at 30310.

302

Why review the report?

- *Allowing the parties to review and respond to the investigative report is important to providing the parties with notice of the evidence the recipient intends to rely on in deciding whether the evidence supports the allegations under investigation.*
- *These final regulations do not prescribe a process for the inclusion of additional support information or for amending or supplementing the investigative report in light of the parties' responses after reviewing the report.*

Id. at 30310.

303

Discretion

- *Recipients enjoy discretion with respect to whether and how to amend and supplement the investigative report as long as any such rules and practices apply equally to both parties, under the revised introductory sentences of § 106.45(b).* *Id.* at 30310.
- *A recipient may require all parties to submit any evidence that they would like the investigator to consider prior to the finalization of the investigative report thereby allowing each party to respond to the evidence in the investigative report sent to the parties under § 106.45(b)(5)(vii).* *Id.* at 30310-11.

304

Discretion continued

A recipient also may provide both parties with an opportunity to respond to any additional evidence the other party proposes after reviewing the investigative report. If a recipient allows parties to provide additional evidence in response to the investigative report, any such additional evidence will not qualify as new evidence that was reasonably available at the time the determination regarding responsibility was made for purposes of appeal under § 106.45(b)(8)(i)(B).

Id. at 30311.

305

Reminders

- *"The investigator is obligated to gather evidence directly related to the allegations whether or not the recipient intends to rely on such evidence (for instance, where evidence is directly related to the allegations but the investigator does not believe the evidence to be credible and thus does not intend to rely on it).*
- *The parties may then inspect and review the evidence directly related to the allegations. The investigator must take into consideration the parties' responses and then determine what evidence is relevant and summarize the evidence in the investigative report."* *Id.* at 30248.

306

Reminders continued

"The parties then have equal opportunity to review the investigative report; if a party disagrees with an investigator's determination about relevance, the party can make that argument in the party's written response to the investigative report under § 106.45(b)(5)(vii) and to the decision-maker at any hearing held; either way the decision-maker is obligated to objectively evaluate all relevant evidence and the parties have the opportunity to argue about what is relevant (and about the persuasiveness of relevant evidence)."

Id. at 30248-49.

307

§ 106.45(b)(7)

Section 106.45(b)(7) also helps prevent injection of bias into Title IX sexual harassment grievance processes, by requiring transparent descriptions of the steps taken in an investigation and explanation of the reasons why objective evaluation of the evidence supports findings of facts and conclusions based on those facts.

Id. at 30389 (emphasis added).

308

Report Sections to Consider

309

Background

I. BACKGROUND AND REPORTED CONDUCT

- Summary of allegation goes here. Identify the names of the CP and RP here and the Investigator. [One paragraph summary].

310

Jurisdiction

II. JURISDICTION

- This office houses the Title IX Office which has campus-wide responsibility for investigating alleged violations of the Sexual Harassment Policy. This office responds to claims of harassment (including sexual assault), stalking, dating violence, domestic violence, and retaliation brought forward by students, employees or third parties.

311

Scope

III. SCOPE OF THE INVESTIGATION

- [This is the timeline and details pertinent to the case. It is the record of when it was reported. If a No Contact Order was issued. When parties were notified, interviewed, submitted evidence, asked for additional parties to be interviewed, and if they rescheduled or didn't respond.
- This is the accounting for the time it took for the investigation. It will match what is in the file, (in emails and in phone logs). (1-2 paragraphs).]

312

Scope continued

- Parties interviewed:
- Complainant Name, in-person interviews on February 7, 2019
- Respondent Name, in-person interview on February 8, 2019
- Witness 1 Name, in-person interview on February 9, 2019
- Witness 2 Name, in-person interview on February 10, 2019
- Witness 3 Name, in-person interview on February 11, 2019
- Witness 4 Name, in-person interview on February 12, 2019

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Scope continued

- Documentary evidence acquired:
- Written statement of Complainant Name, dated February 5, 2019
- Text message correspondence between CP Name and Witness 1 Name (received February 21, 2019)
- Text message correspondence between CP Name and Witness 2 Name (received February 21, 2019)
- Text message correspondence between Witness 2 Name and Witness 3 Name (received February 18, 2019)
- Video shared by Witness 4, February 20, 2019
- Photographs shared by Witness 3 and Witness 4, February 21, 2019

314

Relevant policies**

IV. RELEVANT POLICY AND LAW PROHIBITING SEXUAL HARASSMENT (INCLUDING SEXUAL ASSAULT) AND RETALIATION

- This is straight from your policy. What are the relevant policy prohibitions you have published with regard to sexual harassment (the definitions and why it is being investigated).
- In this new format, this section could be optional, we included it to make the investigative report complete.

315

Investigation SUMMARY

V. INVESTIGATION SUMMARY

A. Statement Summary of the Parties

Complainant:

Respondent:

B. Documentary Evidence:

Below is the list of the documentary evidence reviewed for this report:

- Documentation and investigative files obtained by the Title IX Investigator;
- The written statement provided by the COMPLAINANT and evidence;
- The written statement provided by the RESPONDENT and evidence; and
- University policies.

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Analysis (this could be relevance or credibility)**

VI. ANALYSIS

A. Standard of Evidence: Preponderance of the Evidence

Findings in this investigative report are based on a "preponderance of the evidence" standard. In other words, after reviewing all of the evidence, including the relative credibility of the parties and their statements during interviews, whether it is more likely than not that the conduct occurred as alleged. If the conduct did occur as alleged, then an analysis is completed to determine whether the conduct violated University policy. (Please note: the report's findings do not reach conclusions whether the alleged conduct violated state or federal laws, but instead address whether the University's policies were violated).

B. Fact Finding

a) A list of the facts discovered during the investigation

b) A summary of the facts/details agreed and disagreed upon by the CP and RP

c) This is the nuts and bolts of what happened

317

Summary of the Analysis**

C. Summary of the Analysis

- In the instant case… (This is the narrative of the information learned, from all parties, in a summary presentation of what was learned, and the analysis applied to that factual information)

[If Affirmative Consent is in Question:] if something like this is in your policy…

- In evaluating Affirmative Consent in cases of alleged incapacitation, the University asks two questions:
- 1) Did the person initiating sexual activity know that the other party was incapacitated? If not,
- 2) Should a sober, reasonable person in the same situation have known that the other party was incapacitated?
- If the answer to the first question is "YES," Affirmative Consent was absent, and the conduct is likely a violation of this policy.

318

Credibility Assessment**

- D. Credibility Assessment
- According to the Equal Employment Opportunity Commission's *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors* dated June 18, 1999:
- If there are conflicting versions of relevant events, the employer will have to weigh each party's credibility. Credibility assessments can be critical in determining whether the alleged harassment in fact occurred. Factors to consider include:
- Inherent plausibility: Is the testimony believable on its face? Does it make sense?
- Demeanor: Did the person seem to be telling the truth or lying?
- Motive to falsify: Did the person have a reason to lie?
- Corroboration: Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?
- Past record: Did the alleged harasser have a history of similar behavior in the past?
- None of the above factors are determinative as to credibility. For example, the fact that there are no eye-witnesses to the alleged harassment by no means necessarily defeats the complainant's credibility, since harassment often occurs behind closed doors. Furthermore, the fact that the alleged harasser engaged in similar behavior in the past does not necessarily mean that he or she did so again.

319

Credibility Assessment**

- These factors will now be assessed for the purposes of this investigation.
- The Complainant…
- The Respondent…
- The Witnesses…

320

Relevant Evidence

- List of the evidence provided
- Summary of whether determined to be relevant or not
- Can break this out by inculpatory and exculpatory
- One party may provide more than the other
- Make sure you assign who provided the evidence in the summary of evidence (and the dates received in the timeline of events – evidence is often sent after interviews with the investigator).

321

Conclusions and/or Recommendations**

VII. CONCLUSION

- The investigator finds that the credible evidence evidence supports a possible violation(s) of the University's *Sexual Harassment policy.* This report will be forwarded to the decision-maker. OR
- The investigator finds the credible evidence does not support a possible violation(s) of the University's *Sexual Harassment policy.* This report will be forwarded to the decision-maker.

VII. RECOMMENDATIONS

- As a Title IX matter, the University has the authority to evaluate the allegations and make findings as applied to students and employees for disciplinary purposes. The investigator recommends that the Respondent should go through the live hearing process for possible violations of the University Sexual Harassment Policy. In similarly situated cases of this nature, a common outcome has been Suspension from the University. OR
- As a Title IX matter, the University has the authority to evaluate the allegations and make findings as applied to students and employees for disciplinary purposes. The investigator does not recommend the Respondent should go through the live hearing process for possible violations of the University Sexual Harassment Policy.

322

Involve your colleagues

- Draft up a template that works for your school
- Draft it together
- Have counsel review it
- Have students review it
- Have academics review it
- You want this template to be the blueprint all investigator use
- Modify as you need. Keep it simple.

323

Bias, Impartiality, Conflicts of Interest, Sex Stereotypes

324

Bias/Conflict of Interest

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328

Final Thought

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329

Thank You...

Assessment will follow.

330

NASPA
Student Affairs Administrators in Higher Education

Title IX Update: Spring 2023

Peter Lake
Professor of Law, Charles A. Dana Chair, and Director of the Center for Excellence in Higher Education Law and Policy
Stetson University College of Law

331

This Module is Designed for:

TRACK 1 – Title IX Coordinators

TRACK 2 – Title IX Decision-Makers and Student Conduct Administrators

TRACK 3 – Title IX Investigators

332

Nothing in these training materials should be considered legal advice.

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The 3-Track NASPA Title IX Training Certificate focuses on the 2020 Title IX regulations, which are currently in effect.

Proposed new Title IX regulations were released in June 2022 and are currently in the final stages of promulgation. There is indication that the final regulations may be published in May 2023. The date of implementation for campuses is not yet known.

We will examine some of the language in the proposed new regulations at the end of this module. Remember that the proposed language will change, (potentially in major or minor ways), in the final version.

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The Title IX Landscape

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Before We Dig in Let's Consider the "Landscape"...

- Enforcement context
- Cultural/Legal issues
- American Law Institute project—*congruence*

336

Examples of Title IX Regulatory Enforcement Under Biden

LSU

- Title IX-related DOE investigation (also under investigation for Clery Act)
- LSU Law Firm Report
- NASA
- Voluntary Resolution Agreement (March 22, 2021)

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Examples of Title IX Regulatory Enforcement Under Biden

San Jose State

- Resolution agreement with U.S. Dept of Justice and U.S. Attorney's Office for the Northern District of California
- Female student-athletes were abused by an athletic trainer and SJSU failed to appropriately respond to reports of the abuse
- SJSU will pay $1.6 million to victims and will reform Title IX system
- SJSU's President stepped down

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Examples of Title IX Regulatory Enforcement Under Biden

Univ. of Maryland Baltimore County

- The U.S. Department of Justice is investigating the potential mishandling of sexual harassment cases
- The civil rights investigation, which is ongoing, was opened in 2020
- The school was previously investigated by the U.S. Dept. of Education in 2016.

U.S. Justice Department is investigating UMBC's Title IX compliance and response to sexual misconduct – Baltimore Sun - Ocean City Weather

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Examples of Title IX Regulatory Enforcement Under Biden

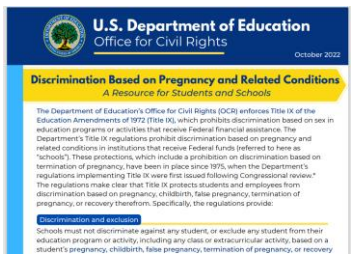
Troy University

The U.S. Department of Education Office for Civil Rights investigated Troy University under Title IX for potential violations relating to accommodation for a pregnant student. They entered into a resolution agreement in January 2023.

- "OCR has a concern that the University did not make reasonable and responsive adjustments in response to the Complainant's pregnancy-related requests. At the time of the incidents at issue here, the University provided pregnant students no information, either in its 2020- 2021 Student Handbook or on its website about how students could seek adjustments related to pregnancy, and one professor interviewed by OCR had not received training regarding Title IX's application to pregnant students."
- "Moreover, the Title IX Coordinator did not consistently intervene when the Complainant contacted him about issues with certain classes and, when he did so, he was not always prompt."
- "The evidence to date also suggests that the University did not engage in an interactive process with the Complainant or otherwise attempt to determine what adjustments would be appropriate for each of her courses based on the information she provided about her pregnancy. Although the Complainant appears to have received some pregnancy adjustments from some professors, OCR is concerned that these efforts were ad hoc and uncoordinated and dependent on each professor's individual interpretation of the Title IX Coordinator's . . . email. "
- "Although the University has updated its Title IX webpage to include policies and information for pregnant students, it is unclear whether the University has provided faculty and staff training concerning its obligations under the Title IX regulations regarding pregnant students who request adjustments."

Troy University (PDF) (ed.gov)

340



U.S. Department of Education
Office for Civil Rights
October 2022

Discrimination Based on Pregnancy and Related Conditions
A Resource for Students and Schools

The Department of Education's Office for Civil Rights (OCR) enforces Title IX of the Education Amendments of 1972 (Title IX), which prohibits discrimination based on sex in education programs or activities that receive Federal financial assistance. The Department's Title IX regulations prohibit discrimination based on pregnancy and related conditions in institutions that receive Federal funds (referred to here as "schools"). These protections, which include a prohibition on discrimination based on termination of pregnancy, have been in place since 1975, when the Department's regulations implementing Title IX were first issued following Congressional review.* The regulations make clear that Title IX protects students and employees from discrimination based on pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom. Specifically, the regulations provide:

Discrimination and exclusion

Schools must not discriminate against any student, or exclude any student from their education program or activity, including any class or extracurricular activity, based on a student's pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery

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Title IX— Cultural and Legal Issues

Tinder Points

The Department generally uses the term "LGBTQI+" to refer to students who are lesbian, gay, bisexual, transgender, queer, questioning, asexual, intersex, nonbinary, or describe their sex characteristics, sexual orientation, or gender identity in another similar way.

- LGBTQI+ [NPRM at 23 n. 4] →
- Pronouns
- Transgender Athletes/ Bathrooms
  - *BPJ v. West Virginia State Board of Educ.*
  - "A federal judge . . . upheld the constitutionality of a West Virginia law that bars transgender athletes at public colleges and high schools from participating on teams that match their gender identity."

    (U.S. Judge Upholds WV Law on Trans Participation in Sports (insidehighered.com)
  - State legislatures enacting new laws: ex. adult cabaret bans or regulation

LOCAL

ETSU removes references that Title IX law protects LGBTQ students at lawmaker's behest

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Title IX— Cultural and Legal Issues

- Think Tanks including Manhattan Institute propose model legislation banning DEI efforts (New College of Florida)
- Expressive Freedoms—Note focus on "conduct"
- Due Process—single investigator, cross-examination— "college court"?
- ***Reproductive rights***
- Men's rights
- Training/costs of compliance/ "reliance interest"
- Sexual violence prevention/intervention
- Transparency/FERPA
- Efficacy—Note DOE comments on supportive services

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Title IX— Cultural and Legal Crossfire

- Efficiency
- Authenticity and mission
- Mental health
- Red blue purple affinity…and travel/enrollment management
- Prevention/*Pro*vention
- Role of alcohol and other drugs…only mentioned with amnesty. SDFSCA guidance?
- Reporting structures// criminal justice interface
- Consumer focus: No contact and supportive measures
- Field position football fatigue
- DOE's role in education—DeVos comments in Florida

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American Law Institute (ALI) Document (2022)

Principles of the Law, Student Sexual Misconduct: Procedural Frameworks for Colleges and Universities

- This document is extraordinary and forward thinking.
- First effort by ALI to articulate principles of due process for student conduct administration in its history.
- Crafted by members of ALI, in consultation with others, the principles are likely to be influential to both jurists and educators—and indeed have been, as evidenced by newly proposed Title IX regulations that are noticeably consistent.
- All schools should review Title IX policies in consultation with this document.
- student-misconduct-td1-black-letter.pdf (ali.org)

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Title IX- Some Observations on Related Litigation and Legal Issues

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Title IX Updates—Court Watch

SCOTUS—Winds of change

- Faith protection—*Guadalupe, etc.*
- "Sex"—*Bostock, etc.*
- Damages Limits—*Cummings v. Premier Rehab Keller*
- Privacy/ Substantive Due Process—*Dobbs v. Jackson Women's Health Organization* (overturning *Roe*)
- Limits of Regulatory Authority—*State Farm, West Virginia v. Environmental Protection Agency*
- True Threats/Online Harassment—*Counterman v. Colorado* *WATCH THIS CASE IN SCOTUS DOCKET*

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Title IX Updates—Court Watch

SCOTUS Cont'd

- Athletes—*NCAA v. Alston*
- First Amendment and "harassment"—Clues from *Mahoney (Fenves)//Elonis*
- No major Title IX focus as such on the docket but…
  - Justice Comey Barrett now sits on the high court, author of *Purdue* in a 7th *Circuit case* in 2019—focus on due process and a relaxed standard to plead sex discrimination—a prognosticator?
  - NOTE: Intersection of proposed Title IX regulations and *Dobbs* Democrats ask for extra guidance on pregnant students and Title IX (insidehighered.com)
    "… Title IX covers discrimination based on medical conditions related to or caused by pregnancy, childbirth, **termination of pregnancy**, or lactation …" (NPRM at 461).
    -- A group of 60 Congressional Democrats has asked for clarification on Title IX protections for students who are pregnant, parenting, or seeking an abortion.
  - 2022- allowed cases to proceed such as *Fairfax County*: "The U.S. Supreme Court . . . turned away bids by a public school district in Virginia and the University of Toledo in Ohio to avoid sexual harassment lawsuits brought by female students under a law that prohibits sex discrimination at schools that receive federal funds." U.S. Supreme Court lets sexual harassment suits proceed against schools | Reuters

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Title IX Updates—Court Watch

Judicial activism in lower federal courts and state courts on due process and compliance error// inactivism of SCOTUS

Examples

- 6th Circuit in *Baum*
- 7th Circuit in *Purdue*
- Colorado Court of Appeals in *Doe v. University of Denver*
- 3rd Circuit in *University of Sciences*
  - "Plausible allegations supporting the reasonable inference that USciences discriminated against him [plaintiff] on account of his sex." (Male plaintiff drank alcohol at levels similar to female complainants but only male plaintiff's actions were investigated.)
  - "USciences's contractual promises of 'fair' and 'equitable' treatment to those accused of sexual misconduct require at least a real, live, and adversarial hearing and the opportunity for the accused student or his or her representative to cross-examine witnesses—including his or her accusers."

Billion Dollar Exposure; e.g., Univ. of Southern California—$852 million settlement in case regarding abuse by campus gynecologist

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Dimensions of Title IX-Related Litigation

- Florida "Stop WOKE" act (banning certain aspects of DEI training) declared unconstitutional
  - In *Honeyfund.com, Inc. v. DeSantis,* Judge Walker writes:

"In the popular television series Stranger Things, the "upside down" describes a parallel dimension containing a distorted version of our world. . . . Recently, Florida has seemed like a First Amendment upside down. Normally, the First Amendment bars the state from burdening speech, while private actors may burden speech freely. But in Florida, the First Amendment apparently bars private actors from burdening speech, while the state may burden speech freely."

- "Gender dysphoria" now considered a disability under the ADA in Fourth Circuit in *Williams v. Kincaid* Fourth Circuit Holds Gender Dysphoria as an ADA disability (natlawreview.com)
- *Adams v. School Board of St. Johns County, Florida* – Eleventh Circuit of Appeals (7-4 en banc)ruled that public schools have the right to segregate locker rooms and bathrooms by biological sex.

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Dimensions of Title IX-Related Litigation

- Athletic Equity
- Deliberate Indifference
- Due Process
- Retaliation
- Erroneous Outcome
- Selective Enforcement
- Plausible Inference
- "Preventable" Sexual Assault Claims – State Negligence Claims
- Hazing/Student Suicide
- Breach of Contract
- Negligent Investigation?
- Tortious failure to provide fair process?

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Civil Action Under Title IX

- The US Supreme Court allows actions in court to pursue damages for Title IX (but with many limitations).
  - *Gebser v. Lago Vista Independent School District,* 118 S. Ct. 1989, 141 L. Ed. 2d 277 (1998).
  - *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629 (1999).
    - *"[S]chool administrators will continue to enjoy the flexibility they require in making disciplinary decisions so long as funding recipients are deemed "deliberately indifferent" to acts of student-on-student harassment only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances."*
    - *See Fairfax County, supra.*
  - *Cummings v. Premier Rehab Keller*
- Victims as "plaintiffs" face tough standards
  - Knowledge (Reporting)
  - Pattern
  - Objective
  - Deliberate indifference
  - Emotional distress damages
- The Supreme Court has hesitated to:
  - Apply Title IX to a "single act"
  - Broadly protect LGBTQ rights, but see the recent *Bostock* Title VII decision (more to come on this…)

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"Gebser/Davis Framework" for Evaluating Institutional Compliance (with Some Twists)

3-Part Framework

1. *A definition of actionable sexual harassment*
2. *The school's actual knowledge*
3. *The school's deliberate indifference*

Department of Education, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026 (May 19, 2020) (final rule) (online at www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf) at 30030 (numeration and emphasis added).

4. Promptness
5. Equitableness
6. Reasonableness

- 2020 regs re: grievance procedures well beyond *Gebser*
- Roadmap for litigation?
- Risk of DOE enforcement?

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From the 2020 Regulations:

The Department believes that the Davis definition in § 106.30 provides a definition for non-quid pro quo, non-Clery Act/VAWA offense sexual harassment better aligned with the purpose of Title IX than the definition of hostile environment harassment in the 2001 Guidance or the withdrawn 2011 Dear Colleague Letter.

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"Deliberate Indifference"

As the Supreme Court reasoned in Davis, a recipient acts with deliberate indifference only when it responds to sexual harassment in a manner that is "clearly unreasonable in light of the known circumstances." Id. at 30091 (internal citation omitted).

[U]nless the recipient's response to sexual harassment is clearly unreasonable in light of the known circumstances, the Department will not second guess such decisions. Id. at 30092 (internal citation omitted

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"Deliberate Indifference" Cont'd

[T]he final regulations apply a deliberate indifference standard for evaluating a recipient's decisions with respect to selection of supportive measures and remedies, and these final regulations do not mandate or scrutinize a recipient's decisions with respect to disciplinary sanctions imposed on a respondent after a respondent has been found responsible for sexual harassment. Id. at 30064 n.162.

[T]he Department will not deem a recipient not deliberately indifferent based on the recipient's restriction of rights protected under the U.S. Constitution, including the First Amendment, the Fifth Amendment, and the Fourteenth Amendment. Id. at 30091.

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Athletic Equity

Balow et al v. Michigan State et al, No. 1:21-cv-44 (6th Cir. 2022).

- MSU discontinued its men's and women's diving programs in 2020
- Members of the women's team sued, claiming the move violated Title IX by providing less opportunities for female athletes
- A U.S. district court judge ruled in August 2022 that MSU was not in compliance with Title IX
- The school must complete a Title IX compliance plan.

Federal Judge Rules Michigan State in Violation of Title IX (insidehighered.com)

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Deliberate Indifference

Kollaritsch v. Michigan State Univ. Bd. of Trustees, 944 F.3d 613 (6th Cir. 2019).

*In 2011, Michigan State University (MSU) student John Doe sexually assaulted fellow student Emily **Kollaritsch**. Kollaritsch reported the assault, and the university opened an **investigation**. The investigation lasted over six **months**. During that time, MSU placed no restrictions on Doe and made no accommodations for Kollaritsch, even though the two lived in the same **dormitory**. The school concluded that Doe had violated MSU's sexual harassment policy, placing him on probation and issuing an order that prohibited him from contacting **Kollaritsch**. Doe proceeded to violate the order on at least nine occasions by "stalking, harassing, and intimidating" Kollaritsch, who had a panic attack on each **encounter**. She reported the violations and then filed a complaint for retaliatory harassment with **MSU**. During its investigation, MSU provided no interim safety measures, and Kollaritsch obtained a protection order from a local **court**. MSU concluded that no retaliatory harassment had **occurred**.*

Kollaritsch v. Michigan State University Board of Trustees, Harvard Law Review 133 Harv. L. Rev. 2611 *(June 10, 2020).*

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Deliberate Indifference

Kollaritsch v. Michigan State Univ. Bd. of Trustees, 944 F.3d 613 (6th Cir. 2019).

For "causation," Judge Batchelder pointed to language in Davis that a school may not be liable for damages unless its "deliberate indifference 'subject[ed]' its students to harassment." She noted that Davis understood the verb "subject[s]" to mean that "deliberate indifference must, at a minimum, cause students to undergo harassment or make them liable or vulnerable to it." In the Sixth Circuit's view, the fact that Davis linked the verb "subject[s]" to harassment, not injury, was critical; it necessarily meant that a deliberate indifference claim requires further actionable harassment. Thus, "a plain and correct reading" of causation in Davis dictates two ways the school's response can result in further harassment: (1) through action that instigates harassment, or (2) through inaction that renders the victim unprotected from harassment. Either way, Davis "presumes that post-notice harassment has taken place." The court thus rejected the plaintiffs' interpretation that the phrase "or . . . make [students] . . . vulnerable to [harassment]" established a separate basis for liability. On these facts, Judge Batchelder concluded that Kollaritsch failed to show that her subsequent encounters with John Doe were severe, pervasive, or objectively offensive. Similarly, the mere fact that MSU allegedly left the other plaintiffs vulnerable to encountering their assailants was insufficient to establish actionable further harassment. The students thus failed to satisfy the causation element under Davis; the school's response had not caused them to suffer a second instance of actionable harassment.

Kollaritsch v. Michigan State University Board of Trustees, Harvard Law Review 133 Harv. L. Rev. 2611 *(June 10, 2020).*

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Due Process

- "Due Process" - a complex and multidimensional concept
  - More than dialectic between "complainants" and "respondents"
  - The college as bystander or neutral: Citizens United?
    - Peter Lake, *Colleges Are Legally Pummeled From All Sides. It's Time They Fought Back.* In Chron. of Higher Educ., The New Risk Management: A Multilayered Strategy for Today's Legal Threats (Jan. 2021). [This special report is available in the Chronicle store.]
  - Is this the way to create college court?
- What about resource imbalances between institutions or complainants/respondents?
- *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018).
- *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56 (1st Cir. 2019).
  John Doe v. Purdue University, Case No. 17-3565 (7th Cir. June 28, 2019).

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Erroneous Outcome

***Yusuf v. Vassar College*, 35 F.3d 709 (2d Cir. 1994).**

A plaintiff must show facts both casting doubt on the outcome of the disciplinary proceeding and connecting that outcome to gender bias.

Samantha Harris, *Third Circuit: Private Universities that Promise Basic Fairness Must Provide Hearing, Cross-Examination to Students Accused of Sexual Misconduct*, FIRE Newsdesk (June 1, 2020).

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Selective Enforcement

***Yusuf v. Vassar College*, 35 F.3d 709 (2d Cir. 1994).**

A plaintiff must plead facts showing that the institution treated a similarly situated individual differently on the basis of sex (e.g., that in a case where both parties were alleged to have had sex while heavily intoxicated and unable to consent, the university took action against one student but not the other).

Samantha Harris, *Third Circuit: Private Universities that Promise Basic Fairness Must Provide Hearing, Cross-Examination to Students Accused of Sexual Misconduct*, FIRE Newsdesk (June 1, 2020).

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Selective Enforcement

***Radwan v. Manuel,* No. 20-2194 (2d Cir. Nov. 30, 2022).**

"Radwan presented multiple forms of evidence related to discriminatory intent, including: evidence of similarly situated male athletes in multiple misconduct incidents who were not disciplined as harshly, inconsistent reasoning for the level of punishment by different administrators at the University, varying assessments over time regarding the consequences of her misconduct, the failure of the University to properly apply its own student conduct policy, and giving conflicting dates to Radwan for her to appeal the termination of her athletic scholarship."

"Second Circuit reversed the District Court's grant of summary judgment for the University and the case will be remanded back to the District Court for further proceedings."

Title IX Claim: Selective Enforcement In, Same Decision Maker Rule Out (Part 3) (bricker.com)

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Plausible Inference

Doe v. Purdue Univ., 928 F.3d 652 (7th Cir. 2019).

"[T]o state a claim under Title IX, the alleged facts, if true, must support a plausible inference that a federally-funded college or university discriminated against a person on the basis of sex."

**Amy Comey Barrett*

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"Preventable" Sexual Assault Claims – State Negligence Claims

***Karasek v. Regents of Univ. of California*, 956 F.3d 1093 (9th Cir. 2020).**

1. a school maintained a policy of deliberate indifference to reports of sexual misconduct,
2. which created a heightened risk of sexual harassment,
3. in a context subject to the school's control, and
4. the plaintiff was harassed as a result.

Karasek v. Regents of the University of California, No. 18-15841 (9th Cir. 2020) – Justia

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Hazing/Student Safety

Gruver v. LSU

- Max Gruver died in a fraternity hazing incident.
- His parents allege a novel Title IX complaint: "that LSU discriminated against male students by policing hazing in fraternities more leniently than hazing in sororities."
- Trial date has yet to be set…

McCluskey v. Univ. of Utah

- Lauren McCluskey was shot and killed by a man she had dated (she broke off the relationship after finding out he was a convicted sex offender).
- Her family had repeatedly asked the University to intervene after he stalked and extorted her.
- The University admitted they could have done more to intervene and did not handle the situation properly. The University settled for $13.5 million.

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Breach of Contract

Doe v. University of the Sciences, No. 19-2966 (3d Cir. May 31, 2020).

> *Here, the fairness promised by the Student Handbook and the Policy relates to procedural protections for students accused of sexual misconduct, and Doe alleges that he did not receive a "fair and impartial hearing." In this context, a "fair hearing" or "fair process" "is a term of art used to describe a 'judicial or administrative hearing conducted in accordance with due process.'" [Internal citations omitted.]*
>
> *We hold that USciences's contractual promises of "fair" and "equitable" treatment to those accused of sexual misconduct require at least a real, live, and adversarial hearing and the opportunity for the accused student or his or her representative to cross-examine witnesses—including his or her accusers.*

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Breach of Contract

Stiles v. Brown University and *Smith v. Brown University*

- Plaintiffs in both cases allege breach of contract.
- Both cases involved male athletes suspended after sexual misconduct allegations. Both were suspended days after allegations were made against them and before the conclusion of a full Title IX investigation.
- *In Stiles* the judge ruled the University must reinstate Stiles "until the investigation concludes or a more thorough threat assessment warrants removal."
- In Smith, both parties agreed to dismiss the lawsuit.

Suspended athletes facing sexual assault allegations sue University - The Brown Daily Herald

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SCOTUS/*Bostock* and Implications for Title IX

Bostock v. Clayton County (June 15, 2020)

A consolidation of three cases of employment discrimination under **Title VII**.

Holding: An employer who fires an individual merely for being homosexual or transgender violates Title VII of the Civil Rights Act of 1964.

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Bostock: Critical Language

"These terms generate the following rule: An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It makes no difference if other factors besides the plaintiff's sex contributed to the decision or that the employer treated women as a group the same when compared to men as a group."

"Few facts are needed to appreciate the legal question we face. Each of the three cases before us started the same way: An employer fired a long-time employee shortly after the employee revealed that he or she is homosexual or transgender—and allegedly for no reason other than the employee's homosexuality or transgender status."

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Bostock: Critical Language

"An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."

"… homosexuality and transgender status are inextricably bound up with sex."

"We agree that homosexuality and transgender status are distinct concepts from sex. But, as we've seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second."

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The *Bostock* Caveats

"The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today."

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The *Bostock* Caveats

"As a result of its deliberations in adopting the law, Congress included an express statutory exception for religious organizations… this Court has also recognized that the First Amendment can bar the application of employment discrimination laws "to claims concerning the employment relationship between a religious institution and its ministers."

"Because the Religious Freedom Restoration Act (RFRA) operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases." "But how these doctrines protecting religious liberty interact with Title VII are questions for future cases too."

"So while other employers in other cases may raise free exercise arguments that merit careful consideration, none of the employers before us today represent in this Court that compliance with Title VII will infringe their own religious liberties in any way."

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Battleground: Bostock and the New Dept. of Education Position on LGBTQ Protections

"OCR has long recognized that Title IX protects all students, including students who are lesbian, gay, bisexual, and transgender, from harassment and other forms of sex discrimination. OCR also has long recognized that Title IX prohibits harassment and other forms of discrimination against all students for not conforming to stereotypical notions of masculinity and femininity. But OCR at times has stated that Title IX's prohibition on sex discrimination does not encompass discrimination based on sexual orientation and gender identity. To ensure clarity, the Department issues this Notice of Interpretation addressing Title IX's coverage of discrimination based on sexual orientation and gender identity in light of the Supreme Court decision discussed below."

U.S. Dept. of Education, Office for Civil Rights, *The Department's Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County*, June 2021

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Bostock and the New Dept. of Education Position on LGBTQ Protections Cont'd

In 2020, the Supreme Court in Bostock v. Clayton County, 140 S. Ct. 1731, 590 U.S. ___ (2020), concluded that discrimination based on sexual orientation and discrimination based on gender identity inherently involve treating individuals differently because of their sex. It reached this conclusion in the context of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., which prohibits sex discrimination in employment. As noted below, courts rely on interpretations of Title VII to inform interpretations of Title IX.

The Department issues this Notice of Interpretation to make clear that the Department interprets Title IX's prohibition on sex discrimination to encompass discrimination based on sexual orientation and gender identity . . ."

U.S. Dept. of Education, Office for Civil Rights, *The Department's Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County*, June 2021

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The New Dept. of Education Position on LGBTQ Protections visible before June 23, 2022

"The Supreme Court has upheld the right for LGBTQ+ people to live and work without fear of harassment, exclusion, and discrimination – and our LGBTQ+ students have the same rights and deserve the same protections. I'm proud to have directed the Office for Civil Rights to enforce Title IX to protect all students from all forms of sex discrimination.

Today, the Department makes clear that all students—including LGBTQ+ students—deserve the opportunity to learn and thrive in schools that are free from discrimination."

U.S. Secretary of Education Miguel Cardona

U.S. Department of Education Confirms Title IX Protects Students from Discrimination Based on Sexual Orientation and Gender Identity

[Press release]

JUNE 16, 2021

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Bostock Pushback

- 21 State Attorneys General pushed back in a letter to Pres. Biden
- 20 States Sue Biden Administration
  - *Tennessee et al v. United States Department of Education et al*, Tennessee Eastern District Court, Case No. 3:21-cv-00308
  - On July 15, 2022, plaintiff's motion for injunction was granted and defendants motion to dismiss was denied.
    - Federal judge blocks Ed. Dept Title IX guidance for trans students (insidehighered.com)
    - Court temporarily halts Ed Dept from enforcing LGBTQ protections under Title IX | Higher Ed Dive
- FL House Bill 7 "Stop WOKE" sought to ban certain aspects of DEI training; was recently declared unconstitutional by a Florida judge
  - Florida Passes Stop WOKE Bill Prohibiting Diversity Training (natlawreview.com)

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Faith and Trifurcation?

Our Lady of Guadalupe School v. Morrissey-Berru (July 8, 2020)

- "Ministerial exception": application to Title VII and Title IX.
- Employees vs. Students
- "When a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow."
- Nonsectarian "tenets" or "teachers"? Viewpoint discrimination?
- What may be next for students?

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Some Reflections on *Bostock* and Title IX?

"Title IX's broad prohibition on discrimination "on the basis of sex" under a recipient's education program or activity encompasses, at a minimum, discrimination against an individual because, for example, they are or are perceived to be male, female, or nonbinary; transgender or cisgender; intersex; currently or previously pregnant; lesbian, gay, bisexual, queer, heterosexual, or asexual; or gender-conforming or gender-nonconforming. All such classifications depend, at least in part, on consideration of a person's sex. The Department therefore proposes to clarify in this section [§ 106.10] that, consistent with *Bostock* and other Supreme Court precedent, Title IX bars all forms of sex discrimination, including discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity."(NPRM at 522.)

- **How will campuses define "sex" going forward right now?**
- **Title VII =Title IX? Proposed rules aim to facilitate both processes.**
- **LGBTQI+ rights and *Bostock*…note the Court's emphasis on the specific issues raised. "On the basis of sex" //"Because of… sex"**
- **Spending v. Commerce clause…the "notice issue" …addressed at some length in NPRM**
- **How are religious institutions impacted? Title IX's " religious tenets" exception and its date of origin.**
  - Yeshiva University recent emergency request to SCOTUS to block a LGBTQ student club. Yeshiva University asks Supreme Court to let it block LGBTQ student club - CNNPolitics

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AREAS TO WATCH: ATHLETICS AND MEDICAL

***Snyder-Hill et al. v. The Ohio State University*, Ohio Southern District Court, Case No. 2:18-cv-00736-MHW-EPD**

- 93 plaintiffs sued The Ohio State University as a result of alleged sexual abuse they suffered as students at the hands of Dr. Strauss
- Title IX claims include:
  - Hostile environment/heightened risk
  - Deliberate indifference to both prior sexual harassment and reports of sexual harassment
- Judge granted Ohio State's motion to dismiss on the grounds of the statute of limitations (Sept. 22, 2021)
- Open cases against Ohio State are still pending
- Ohio State has previously settled with over 200 men

Kantele Franco, *Ohio State sex abuse survivors plan appeals, defend motives*, Associated Press, Sept. 28, 2021.

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Concluding Thoughts: Litigation

- Litigation potential always exists
- Follow your own policy
  - Do what you say and say what you do.
- Do not be afraid to consult with your attorney
- Documentation/Privacy
  - Recently a court in Pennsylvania ruled Title IX investigative files be protected against publication in a lawsuit involving Penn State
    Federal Court Grants Penn State's Motion to Protect Title IX Documents, Sacks Student Athlete's Call for Unfettered Disclosure - Lexology
- Equity, bias, impartiality
- Think "contractual fairness"
  - Peter Lake, *From Discipline Codes to Contractual Respect*, Chron. of Higher Educ. (Nov. 26, 2017).

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Aspect of 2020 Regulations Struck Down

34 CFR § 106.45(b)(6)(i) Vacated in *Victim Rights Law Center et al. v. Cardona*

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34 CFR § 106.45(b)(6)(i)

(6) Hearings.

(i) For postsecondary institutions, the recipient's grievance process must provide for a live hearing. At the live hearing, the decisionmaker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings.

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§ 106.45(b)(6)(i) Cont'd

At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions. Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant. If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.

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§ 106.45(b)(6)(i) Cont'd

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

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§ 106.45(b)(6)(i) Cont'd

Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other. Recipients must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

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Victim Rights Law Center et al. v. Cardona

The court vacated the part of 34 C.F.R. § 106.45(b)(6)(i) that prohibits a decision-maker from relying on statements that are not subject to cross-examination during the hearing: "If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility . . ." Please note that all other provisions in the 2020 amendments, including all other parts of 34 C.F.R. § 106.45(b)(6)(i), remain in effect. The affected provision at 34 C.F.R. § 106.45(b)(6)(i) is only applicable to postsecondary institutions and does not apply to elementary or secondary schools, which are not required to provide for a live hearing with cross-examination.

U.S. Dept. of Education, Office for Civil Rights, *Letter re Victim Rights Law Center et al. v. Cardona* (Aug. 24, 2021) at 1.

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Victim Rights Law Center et al. v. Cardona

In accordance with the court's order, the Department will immediately cease enforcement of the part of § 106.45(b)(6)(i) regarding the prohibition against statements not subject to cross-examination. Postsecondary institutions are no longer subject to this portion of the provision.

In practical terms, a decision-maker at a postsecondary institution may now consider statements made by parties or witnesses that are otherwise permitted under the regulations, even if those parties or witnesses do not participate in cross-examination at the live hearing, in reaching a determination regarding responsibility in a Title IX grievance process.

Id.

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Victim Rights Law Center et al. v. Cardona

For example, a decision-maker at a postsecondary institution may now consider statements made by the parties and witnesses during the investigation, emails or text exchanges between the parties leading up to the alleged sexual harassment, and statements about the alleged sexual harassment that satisfy the regulation's relevance rules, regardless of whether the parties or witnesses submit to cross-examination at the live hearing. A decision-maker at a postsecondary institution may also consider police reports, Sexual Assault Nurse Examiner documents, medical reports, and other documents even if those documents contain statements of a party or witness who is not cross-examined at the live hearing.

Id. at 1-2.

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The 2022 Proposed Title IX Regulations:

Highlights from DOE in Their Own Words

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Some Key Features of Proposed Title IX Regulations:

Sex stereotypes, Pregnancy, Sexual orientation, Gender identity are covered under Title IX

The Department's proposed regulations clarify that Title IX's prohibition of discrimination based on sex includes protections against discrimination based on sex stereotypes and pregnancy. The Department is also clarifying that Title IX's protections against discrimination based on sex apply to sexual orientation and gender identity. This clarification is necessary to fulfill Title IX's nondiscrimination mandate.

FACT SHEET: U.S. Department of Education's 2022 Proposed Amendments to its Title IX Regulations

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Proposed Title IX Regulations:

Hostile Environment Sexual Harassment

The proposed regulations will restore vital protections for students against all forms of sex-based harassment. Under the previous Administration's regulations, some forms of sex-based harassment were not considered to be a violation of Title IX, denying equal educational opportunity. The proposed regulations would cover all forms of sex-based harassment, including unwelcome sex-based conduct that creates a hostile environment by denying or limiting a person's ability to participate in or benefit from a school's education program or activity.

FACT SHEET: U.S. Department of Education's 2022 Proposed Amendments to its Title IX Regulations

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Obama-Era Definition of Hostile Environment

In determining whether this denial or limitation [to access to educational benefits] has occurred, the United States examines all the relevant circumstances from an objective and subjective perspective, including:

1. *the type of harassment (e.g., whether it was verbal or physical);*
2. *the frequency and severity of the conduct;*
3. *the age, sex, and relationship of the individuals involved (e.g., teacher-student or student-student);*
4. *the setting and context in which the harassment occurred;*
5. *whether other incidents have occurred at the college or university;*
6. *and other relevant factors*

U.S. Dept. of Educ. Office for Civil Rights and U.S. Dept. of Justice Civil Rights Division, *University of Montana Letter of Findings*, at 4 (May 9, 2013), https://www.justice.gov/sites/default/files/crt/pages/2013/05/09/um-ltr-findings.pdf

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Trump-Era Definition "Sexual Harassment" [Three-Prong Test]

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;

(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; or*

(3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

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Biden-Era Definition of Sex-Based Harassment

Sex-based harassment prohibited by this part means sexual harassment, harassment on the bases described in § 106.10, and other conduct on the basis of sex that is:

(1) Quid pro quo harassment. An employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient's education program or activity explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct;

(2) *Hostile environment harassment.* Unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from the recipient's education program or activity (i.e., creates a hostile environment). Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following:

(i) The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;

(ii) The type, frequency, and duration of the conduct;

(iii) The parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the alleged unwelcome conduct;

(iv) The location of the conduct, the context in which the conduct occurred, and the control the recipient has over the respondent; and

(v) Other sex-based harassment in the recipient's education program or activity.

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A Note on "Unwelcome Conduct"

The Department proposes retaining the requirement that the conduct in categories one and two of the definition of "sex-based harassment" must be unwelcome. Although the Department does not propose revising this requirement, the Department understands it is important to provide recipients with additional clarity on how to analyze whether conduct is unwelcome under the proposed regulations. Conduct would be unwelcome if a person did not request or invite it and regarded the conduct as undesirable or offensive. Acquiescence to the conduct or the failure to complain, resist, or object when the conduct was taking place would not mean that the conduct was welcome, and the fact that a person may have accepted the conduct does not mean that they welcomed it. For example, a student may decide not to resist the sexual advances of another student out of fear, or a student may not object to a pattern of sexually harassing comments directed at the student by a group of fellow students out of concern that objections might cause the harassers to make more comments. On the other hand, if a student actively participates in sexual banter and discussions and gives no indication that they object, then that would generally support a conclusion that the conduct was not unwelcome, depending on the facts and circumstances. In addition, simply because a person willingly participated in the conduct on one occasion does not prevent that same conduct from being unwelcome on a subsequent occasion. Specific issues related to welcomeness may also arise if the person who engages in harassment is in a position of authority. For example, because a teacher has authority over the operation of their classroom, a student may decide not to object to a teacher's sexually harassing comments during class; however, this does not mean that the conduct was welcome because, for example, the student may believe that any objections would be ineffective in stopping the harassment or may fear that by making objections they will be singled out for harassing comments or retaliation. (NPRM at 82-83.)

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Proposed Title IX Regulations:

Emphasis on Pregnancy and Parenting Students

The proposed regulations would update existing protections for students, applicants, and employees against discrimination because of pregnancy or related conditions. The proposed regulations would strengthen requirements that schools provide reasonable modifications for pregnant students, reasonable break time for pregnant employees, and lactation space.

FACT SHEET: U.S. Department of Education's 2022 Proposed Amendments to its Title IX Regulations

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NOTABLE

U.S. Department of Education's Office for Civil Rights Announces Resolution of Pregnancy Discrimination Investigation of Salt Lake Community College

OCR determined that the college violated both Title IX of the Education Amendments of 1972 (Title IX) and Section 504 of the Rehabilitation Act of 1973 (Section 504) after investigating allegations that Salt Lake Community College encouraged a pregnant student to drop a course because she was pregnant, did not engage in an interactive process to provide her with academic adjustments or necessary services during her pregnancy, and did not excuse her pregnancy-related absences or allow her later to submit work following those absences.

OCR found that the college violated Title IX and its implementing regulations by failing: (1) to respond promptly and equitably to the student's complaint of pregnancy discrimination, (2) to engage in an interactive process with the student to determine the appropriate special services and/or academic adjustments to provide in light of her pregnancy, and (3) to excuse her absences related to pregnancy, provide her the opportunity to make up work missed due to these pregnancy-related absences, or provide her with alternatives to making up missed work at a later date.

U.S. Department of Education's Office for Civil Rights Announces Resolution of Pregnancy Discrimination Investigation of Salt Lake Community College (govdelivery.com)

398

Proposed Title IX Regulations:

Broadens Mandated Reporters on Campus

The proposed regulations would promote accountability and fulfill Title IX's nondiscrimination mandate by requiring schools to act promptly and effectively in response to information and complaints about sex discrimination in their education programs or activities. And they would require that schools train employees to notify the Title IX coordinator and respond to allegations of sex-based harassment in their education programs or activities.

FACT SHEET: U.S. Department of Education's 2022 Proposed Amendments to its Title IX Regulations

399

Note:

"Employee with responsibility for administrative leadership, teaching, or advising"

It is the Department's current understanding that employees with responsibility for administrative leadership would include deans, coaches, public safety supervisors, and other employees with a similar level of responsibility, such as those who hold positions as assistant or associate deans and directors of programs or activities. The Department anticipates that employees with teaching responsibilities would include any employee with ultimate responsibility for a course, which could include full-time, part-time, and adjunct faculty members as well as graduate students who have full responsibility for teaching and grading students in a course. It is the Department's current understanding that employees with responsibility for advising would include academic advisors, as well as employees who serve as advisors for clubs, fraternities and sororities, and other programs or activities offered or supported for students by the recipient. When a person is both a student and an employee, the Department expects that the person would be required to notify the Title IX Coordinator only of information that may constitute sex discrimination under Title IX that was shared with the person while they were fulfilling their employment responsibilities (e.g., receiving information about sex discrimination from a student during class or office hours). Similar to employees who have the authority to institute corrective measures on behalf of the recipient, the Department now believes that whether an employee has responsibility for administrative leadership, teaching, or advising is a fact-specific determination to be made by the recipient taking into account the types of factors just discussed and any others that may be relevant in the recipient's educational environment.

NPRM at 184-181.

400

A Note on Barriers to Reporting and Prevention

"It is the Department's current view that a recipient must identify and address barriers to reporting information that may constitute sex discrimination under Title IX in order to fulfill this obligation." NPRM at 168.

The Department has long emphasized the importance of a recipient's efforts to prevent sex discrimination. For example, in the preamble to its 2020 amendments to the Title IX regulations, the Department repeatedly acknowledged the importance of efforts to prevent sex discrimination. . . . The Department also added requirements related to training for certain employees in the 2020 amendments to the Title IX regulations . . . that serve a prevention function and thus are crucial to the fulfillment of Title IX."

NPRM at 168 (internal citations omitted).

"The Department notes that under this proposed requirement, a recipient may use various strategies to identify barriers, such as conducting regular campus climate surveys, seeking targeted feedback from students and employees who have reported or made complaints about sex discrimination, participating in public awareness events for purposes of receiving feedback from student and employee attendees, or regularly publicizing and monitoring an email address designated for receiving anonymous feedback about barriers to reporting sex discrimination." NPRM at 171.

401

Proposed Title IX Regulations:

Outlines Key Grievance Procedure Requirements

- *All schools must treat complainants and respondents equitably.*
- *Schools have the option to offer informal resolution for resolving sex discrimination complaints.*
- *Title IX Coordinators, investigators, decisionmakers, and facilitators of an informal resolution process must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.*
- *A school's grievance procedures must give the parties an equal opportunity to present relevant evidence and respond to the relevant evidence of other parties.*
- *The school's decisionmakers must objectively evaluate each party's evidence.*

FACT SHEET: U.S. Department of Education's 2022 Proposed Amendments to its Title IX Regulations

402

A Note on "Bias" and "Impartiality"…

ALI states:

§ 4.1. Inquiries to Be Impartial, Fair, and Context-Sensitive
Colleges and universities should strive in all inquiries and investigations to be impartial, fair, and sensitive to context.

§ 6.3. Impartiality
Colleges and universities should adopt procedures and criteria for selecting impartial decisionmakers.

§ 6.3c. Challenges for Bias
Colleges and universities should provide a simple procedure for complainants or respondents to challenge the participation of an investigator or adjudicator in their case.

403

ALI on "Bias" and "Impartiality":

- "One sense of impartiality is structural, the idea that the judge of a case should not be chosen for the case because of his or her likely views on the outcome."
- "Another aspect of impartiality is the avoidance of financial or other forms of self-interest in the adjudication: an impartial adjudicator is one who does not have a financial interest in the outcome."
- "A third sense of impartiality means that the person has not prejudged the facts and is not likely to have difficulty maintaining an open mind and deciding based on the evidence presented."
- "Prior involvement in or knowledge of the facts at issue may create the appearance or reality of bias."
- "Still another sense of impartiality is decisionmakers' freedom to decide without fearing repercussions from the influence of 'mob' passions."
- "One source of potential bias may arise when a decisionmaker has a preexisting relationship with one or more parties."

See ALI, Student Sexual Misconduct: Procedural Frameworks for Colleges and Universities | American Law Institute (ali.org)., at 179-193.

404

"Bias"

Ikpeazu v. University of Nebraska, 775 F.2d 250, 254 (8th Cir. 1985):

"With respect to the claim of **bias**, we observe that the committee members are entitled to a presumption of honesty and integrity unless actual bias, such as **personal animosity, illegal prejudice, or a personal or financial stake in the outcome** can be proven."

NPRM at 281:

"To ensure that the grievance procedures are equitable, a recipient must ensure that the procedures are administered impartially. The Department therefore proposes retaining—in proposed § 106.45(b)(2)—the requirement that any person designated as a Title IX Coordinator, investigator, or decisionmaker must not have a conflict of interest or bias regarding complainants or respondents generally or regarding a particular complainant or respondent."

405

Proposed Title IX Regulations:

Outlines Key Grievance Procedure Requirements

• The proposed regulations would not require a live hearing for evaluating evidence, meaning that if a school determines that its fair and reliable process will be best accomplished with a single-investigator model, it can use that model.

• A school must have a process for a decisionmaker to assess the credibility of parties and witnesses through live questions by the decisionmaker. The proposed regulations would not require cross-examination by the parties for this purpose but would permit a postsecondary institution to use cross-examination if it so chooses or is required to by law.

FACT SHEET: U.S. Department of Education's 2022 Proposed Amendments to its Title IX Regulations

406

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Proposed Title IX Regulations:

Outlines Key Grievance Procedure Requirements

• In evaluating the parties' evidence, a school must use the preponderance-of-the-evidence standard of proof unless the school uses the clear-and-convincing-evidence standard in all other comparable proceedings, including other discrimination complaints, in which case the school may use that standard in determining whether sex discrimination occurred.

• A school must not impose disciplinary sanctions under Title IX on any person unless it determines that sex discrimination has occurred.

FACT SHEET: U.S. Department of Education's 2022 Proposed Amendments to its Title IX Regulations

407

NOTE: Standard of Proof Alignment with ALI

"The Department notes that the American Law Institute (ALI) membership, at its May 2022 Annual Meeting, approved the following principle as part of its project on procedural frameworks for resolving campus sexual misconduct cases in postsecondary institutions:

§ 6.8. Standard of Proof

Colleges and universities should adopt the same standard of proof for resolving disciplinary claims of sexual misconduct by students as they use in resolving other comparably serious disciplinary complaints against students. Standards that require proof either by a "preponderance of the evidence" or by "clear and convincing evidence" can satisfy the requirements of procedural due process and fair treatment. Whatever standard of proof is adopted, decisions that the standard of proof is met should always rest on a sound evidentiary basis.

The Department's proposed regulations would align with the ALI position, providing that for sex discrimination complaints a recipient can use either the preponderance of evidence or the clear and convincing evidence standard of proof but must not use a higher standard of proof for evaluating evidence of sex discrimination than for other forms of discrimination or other comparable proceedings." NPRM at 353-354 (internal citations omitted).

408

NOTE: Discipline v. Punishment

While punishment focuses on making a child suffer for breaking the rules, discipline is about teaching him how to make a better choice next time.

The Difference Between Punishment and Discipline (verywellfamily.com).

409

Proposed Title IX Regulations:

Supportive Measures for Any Sex Discrimination

Require schools to provide supportive measures to students and employees affected by conduct that may constitute sex discrimination, including students who have brought complaints or been accused of sex-based harassment.

Under the proposed regulations, schools would be required to offer supportive measures, as appropriate, to restore or preserve a party's access to the school's education program or activity. The current regulations require this support only when sexual harassment, rather than any form of sex discrimination, might have occurred.

FACT SHEET: U.S. Department of Education's 2022 Proposed Amendments to its Title IX Regulations

410

Proposed Title IX Regulations:

Retaliation

The proposed regulations would make clear that schools must not intimidate, threaten, coerce, or discriminate against someone because they provided information about or made a complaint of sex discrimination or because they participated in the school's Title IX process – and that schools must protect students from retaliation by other students.

FACT SHEET: U.S. Department of Education's 2022 Proposed Amendments to its Title IX Regulations

411

What's next for the proposed regulations?

- 60 day notice and comment period has ended.
  - Last notice and comment period garnered nearly 125,000 comments.
  - This go around the proposed regs garnered 235,000. Thousands weigh in on new Title IX rules (insidehighered.com)
- It is possible the new regulations will be released in May 2023 and will go into effect later in 2023 or 2024.
- There will be a separate process for student athletes/transgender issues. Expect more on informal resolutions, Clery and Ferpa interpretation to come?

412

Where is Title IX headed?

413

What does the future hold for Title IX? Take-aways....

- LGBTQI+ protections: transgender athletes' rights issues
  - Several states have laws that prevent transgender individuals from playing on female sports teams
- March 2021, class action lawsuit filed against the Dept. of Education in Oregon federal court by 33 LGBTQI+ plaintiffs from 30 institutions.
  - Is the religious exemption in Title IX constitutional?
- *Speech First, Inc. vs. Fenves; Speech First, Inc. vs. Cartwright*
- State law pushbacks
- Rewrite Codes....again? And when? Notice and comment likely to change proposed rules
- Apply Title IX practices to other conduct codes?
- Time for preventative audits: lessons from LSU, USC.
- Nuclear weapons??? and Reproductive Rights—Title IX makes significant pivot...
  - SCOTUS overturns *Roe v. Wade* in *Dobbs*

414

What does the future hold for Title IX? Take-aways….

- Political landscape 2024 :::SCOTUS
- End game for Title IX and detailed grievance regulation…what is ultimately sustainable? Will what we know of Title IX today devolve to state variances, subject to federal court oversight?
- Reporting and reporters…do we want this much flexibility?
- Training means assessment, especially on reporting and definitions.
- Culture intervention—rise , or return, of "remedies"
- New Clery manual?—prevention and reporting on it.
- Let's get Constitutional…What about *Citizens United*? Even *Gebser/Davis? Mathews v Eldridge? Textualism, Originalism, and the Title IV trojan horse.* ALI and "mission sensitivity."
- SCOTUS → limits of federal regulatory power

415

What does the future hold for Title IX? Take-aways….

- Does education culture have better solutions? Can we be, must we be, impartial in relation to our own mission? What are the limits of rooting out bias? Are the legal rules themselves a Title IX problem? *Fenves ::: NPRM on bias/// "Defamation by Litigation":::FERPA restrictions*
- Budgets and industry challenges. DOE cost estimates are perhaps "aspirational."
- College court becomes more like family court—supportive services and review.
- Protections for Title IX operatives….2015 guidance.
- Lawyers and legalisms….Student conduct dominated by law, lawyers and legalisms? Law as competitor?
- The Transparency Dilemma:: a)revise FERPA or b)create more detailed hearing and notice procedures….(DOE goes with b.)

416

What does the future hold for Title IX? Take-aways….

- Title IX and the "new tenure"… mid-twentieth century deference over? ALI project signals a bleed over effect….? The pursuit of happiness as a protected interest?
- Trifurcation?
- Congressional action in light of SCOTUS rulings…..Title IX implications
- Vectoring…where are we headed?
- Culture impact…how do we explain the proposed regulations to our stake holders and "shapeholders"::Active monitoring required…
- Courts are inventing many new ways to hold colleges accountable for decisions on sexual misconduct? Compliance in the process of attempting compliance---meta-compliance issues dominate.
- The single investigator model as lightning rod.
- Arbitration and no cause dismissal?
- Flexibility==Title IX looks different across the country
- Updated training will be required after the final regulations are published this summer.

417

Thank You…

Assessment to follow…

418

NASPA
Student Affairs Administrators in Higher Education

LIVE SESSION on Title IX Investigations

March 10, 2023

Peter Lake, Professor of Law, Charles A. Dana Chair, and Director of the Center for Excellence in Higher Education Law and Policy, Stetson University College of Law

Dr. Jennifer R. Hammat, Dean of Students University of Southern Indiana

419

This Live Session is Designed for…

TRACK 1 – Title IX Coordinators

TRACK 3 – Title IX Investigators

420

What we hope to accomplish…

- Highlight of Select Issues (~75 minutes)
- Tabletop Exercises in Breakout Groups (60 minutes)
- Discuss Tabletop Exercises in the Larger Group (~75 minutes)
- Open time for Questions (~30 minutes)
  - Please send questions in a message directly to Jennifer Hammat.
  - We will not read your name.
  - We will stay slightly past the end time if needed to answer questions but if you need to leave at the exact ending time, that's ok.
- This session is being recorded.
  - However, discussion in your breakout session will not be recorded.

421

Definitive Answers vs. Choice Points

422

Special Issues Highlight #1 Relationships of Investigator to Other Title IX Operatives

423

Title IX Investigator ←→ Title IX Coordinator

The final regulations do not preclude a Title IX Coordinator from also serving as the investigator.

Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) (final rule) (online at www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf) at 30135 n.596.

Does the Title IX coordinator "supervise" investigators?
Make hiring/firing decisions regarding investigators?
Should the Title IX coordinator offer input on the investigation in any way if not serving as the investigator?
- Input on gathering evidence?
- Input on the final report?

What conflicts of interest could arise?

424

Title IX Investigator ←→ Title IX Decision-Maker

The Department emphasizes that the decision-maker must not only be a separate person from any investigator, but the decision-maker is under an obligation to objectively evaluate all relevant evidence both inculpatory and exculpatory, and must therefore independently reach a determination regarding responsibility without giving deference to the investigative report. *Id.* at 30314 (emphasis added).

Should the investigator be called as a first witness routinely in a hearing?

425

Special Issues Highlight #2 Written Notification Prior to an Investigation

426

Written Notification to Parties BEFORE Any Initial Interview with the Respondent

- Notice of the school's grievance process
- The opportunity, if any, to engage in an informal resolution process
- Key details of the alleged sexual harassment
  - Who was involved in the incident
  - Date and time of the incident, if known
  - Location, if known
  - The alleged misconduct that constitutes sexual harassment
- A statement that the respondent is presumed not responsible at the outset of the process and can only be found responsible after the grievance concludes
- A statement that the parties are entitled to an advisor of their choice
- A statement that the parties can request to inspect and review certain evidence
- Any conduct rules, if they exist, that prohibit providing knowingly false information or statements during the grievance process

Notice should be provided to allow the respondent enough time to prepare before the initial interview.

427

Remember the Presumption of Non-Responsibility

A recipient's grievance process must—

Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.

§ 106.45(b)(1)(iv)(emphasis added).

428

July 2021 Q&A

- Question #36—Respondent should presumed not responsible but that doesn't mean a complainant should be presumed to be lying.
  - *Schools that have relied on this presumption to decline services to a complainant or to make assumptions about a complainant's credibility have done so in error.* Dept. of Education, Office for Civil Rights, *Questions and Answers on the Title IX Regulations on Sexual Harassment* (July 2021), at 20.

429

Special Issues Highlight #3 Concurrent Law Enforcement Investigation/Police Reports

430

Concurrent Law Enforcement Activity

Further, subject to the requirements in § 106.45 such as that evidence sent to the parties for inspection and review must be directly related to the allegations under investigation, and that a grievance process must provide for objective evaluation of all relevant evidence, inculpatory and exculpatory, nothing in the final regulations precludes a recipient from using evidence obtained from law enforcement in a § 106.45 grievance process. § 106.45(b)(5)(vi) (specifying that the evidence directly related to the allegations may have been gathered by the recipient "from a party or other source" which could include evidence obtained by the recipient from law enforcement) (emphasis added); § 106.45(b)(1)(ii).

Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) (final rule) (online at www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf) at 30099 n.466.

431

Police Investigations

The 2001 Guidance takes a similar position: "In some instances, a complainant may allege harassing conduct that constitutes both sex discrimination and possible criminal conduct. Police investigations or reports may be useful in terms of fact gathering. However, because legal standards for criminal investigations are different, police investigations or reports may not be determinative of whether harassment occurred under Title IX and do not relieve the school of its duty to respond promptly and effectively."

Id. at 30099 n. 467 (emphasis added).

432

Is it possible to be told to "stand down" in regards to conducting your Title IX investigation by police or other legal authority? What about pending litigation?

What should you do?

433

Special Issues Highlight #4 Definition of "Sexual Harassment"

434

"Sexual Harassment" [Three-Prong Test]

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;

(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; or*

(3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

(emphasis added)

435

Special Issues Highlight #5 Definition of "Consent"

436

Consent

[T]he Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault.

Id. at 30125.

You should be well-versed on the definition of consent contained within your specific campus policies. Address specific issues of consent related to the new definition of sexual harassment.

437

Consent

The Department believes that the definition of what constitutes consent for purposes of sexual assault within a recipient's educational community is a matter best left to the discretion of recipients, many of whom are under State law requirements to apply particular definitions of consent for purposes of campus sexual misconduct policies.

Id. at 30124.

438

Consent

The third prong of the § 106.30 definition of sexual harassment includes "sexual assault" as used in the Clery Act, 20 U.S.C. 1092(f)(6)(A)(v), which, in turn, refers to the FBI's Uniform Crime Reporting Program (FBI UCR) and includes forcible and nonforcible sex offenses such as rape, fondling, and statutory rape which contain elements of "without the consent of the victim."

Id. at 30124.

439

Elements to Consider

- Elements
  - consent is a voluntary agreement to engage in sexual activity;
  - someone who is incapacitated cannot consent;
    - (such as due to the use of drugs or alcohol, when a person is asleep or unconscious, or because of an intellectual or other disability that prevents the student from having the capacity to give consent)
  - past consent does not imply future consent;
  - silence or an absence of resistance does not imply consent;
  - consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another;
  - consent can be withdrawn at any time; and
  - coercion, force, or threat of either invalidates consent.

Role, if any, of affirmative consent? REMEMBER: State laws.

440

Special Issues Highlight #6
Scope

441

§106.44(a) *General response to sexual harassment.*

A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent. . . . "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 sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

What does your campus policy state specifically regarding the scope of "education programs or activities?"

(emphasis added)

442

Example of "Scope" in a Policy

This policy applies to ABC University students, employees, and third-parties located within the United States both on and off campus, as well as in the digital realm. Off-campus coverage of this policy is limited to incidents that occur on employee-led trips, at internship or service learning sites, and college-owned properties (including buildings operated by Registered Student Organizations), or in any context where the University exercised substantial control over both alleged harassers and the context in which the alleged harassment occurred.

443

Special Issues Highlight #7
Dismissals

444

§ 106.45(b)(3)(i)

(3) Dismissal of a formal complaint—

(i) The recipient must investigate the allegations in a formal complaint. If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under Title IX or this part; such a dismissal does not preclude action under another provision of the recipient's code of conduct.

(emphasis added)

445

§ 106.45(b)(3)(ii)

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

(emphasis added)

446

§ 106.45(b)(3)(iii)

(iii) Upon a dismissal required or permitted pursuant to paragraph (b)(3)(i) or (b)(3)(ii) of this section, the recipient must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties.

447

*Whether sexual harassment occurs in a recipient's education program or activity **is a fact-specific inquiry**. The key questions are whether the recipient exercised substantial control over the respondent and the context in which the incident occurred.*

Id. at 30204 (emphasis added).

448

More on Dismissals

Example: the Title IX Coordinator receives a formal complaint for alleged sexual misconduct that occurred between two students in an off-campus apartment complex where the university had no substantial control over the context or the alleged harasser.

Is this within the scope of the policy example described above? If not, who dismisses? Regulations say the "recipient." Who specifically?

- Remember, a formal complaint must be investigated.
- Will there be a "pre-investigation" inquiry/"fact-specific" inquiry by an investigator to determine?
- What "level" of investigation is required here?
- Will a decision-maker have to make a determination?

449

Special Issues Highlight #8 Investigating New Issues That Arise In an Investigation

450

§ 106.45(b)(2)(ii)

(ii) If, in the course of an investigation, the recipient decides to investigate allegations about the complainant or respondent that are not included in the notice provided pursuant to paragraph (b)(2)(i)(B) of this section, the recipient must provide notice of the additional allegations to the parties whose identities are known.

(emphasis added)

451

Special Issues Highlight #9
Preparing for an Interview

452

What has happened?

- A formal complaint has been received (and signed).
- An initial meeting with the Title IX Coordinator has happened to provide support measures.
- A notice of investigation has gone out to both parties.
- The case has been assigned to you (the investigator) or as the Title IX Coordinator, you are the investigator, or you have outsourced the investigation.
- The investigator has read the formal complaint.
- Which route for investigations has your school opted for?
  - Investigations with or without credibility assessments?

453

Preparing your questions pre-interview

- Read the Formal Complaint
  - Write out the questions you have about the report on first read.
- Read the Formal Complaint again.
  - What additional questions do you have about the incident narrative.
  - Who is identified in the Formal Complaint you feel you need to interview.
  - What questions do you have for those individuals?
- Have all of these typed out ahead of the first interview.
- Revise and update with additional questions and witnesses as you go.

454

Crossover interview techniques

- Title IX investigation framework is good practice for other kinds of investigations:
- Code of Conduct violations
- Threat assessment or BIT concerns investigations
- Educational conversations with student
- Academic Integrity case investigations
- Hazing investigations

455

Special Issues Highlight #10
Fact Finding and Data Collection

456

How to start an interview

- Introduce yourself
- Is small talk appropriate? Build rapport. Establish baseline responses*
- Explain your role
- Explain you will be note/taking/recording the interview for notes
- Ask interviewee to share their recollections of the incident.
  - Do not interrupt the narrative
  - Let them talk until they are done
  - Follow up questions later

457

Remember your role

You are NOT a party's lawyer, advisor, counselor, parent, or friend
You ARE an investigator and a facilitator
You ARE free from bias
You ARE free from prejudgment
You ARE interested in finding out fact about the incident
You ARE interested in the truth

Being Impartial ≠ Being a Robot
You can be a neutral fact-finder and still show empathy and kindness.
Investigation spaces should be judgement free zones

458

Follow-up questions

- When seeking clarification after the party's initial recollection of the event, try to ask questions that build confidence and put them at ease.
- "You said you left the party around 1am, is that correct?"
- "You said you recalled having three cups of 'red solo cup' punch, is that right?"
- If they are describing a location, it might be helpful to ask them to sketch out the room for you (if it is a residence hall, you should have those schematics on your computer to pull up/print out).

459

Clarifications

- When asking harder questions about the order of events, or specifics about the conversation or activities, you may run into a series of "I don't know" or "I can't remember" statements. That's ok.
- Reassure the party its ok that they cannot remember or don't know.
- You can move to another question or kind of questioning.
- If you hit a memory gap, ask them some sensory questions to see if it triggers any memories. Often there are memories they cannot access unless you ask the question from a different lens.

460

Sense and Feel questions

- "Can you draw what you experienced?"
- "What were you feeling when XYZ occurred?"
- "What did you smell?"
- "Can you show me?"
- "What were you feeling when you were kissing?"
- "Tell me more about that."
- "What did you hear?"
- "Tell me about his/her eyes."
- "What can you not forget?"

Source: Russell Strand, Frontline Training Conference, 2018

461

A word about trauma

- Anyone you speak with about alleged sexual harassment (complainant, respondent, or witnesses) could have experienced or still be experiencing trauma as a result of the alleged situation.
- Be cognizant that talking to you may be very difficult for the parties.
- Remember to document their experience with as little interruption as possible. Follow-up questions should be limited.
- Ideally, you want the party being interviewed to do most of the speaking.

Modified from: Russell Strand, Frontline Training Conference, 2018

462

Meet the student where they are:

- **Baseline knowledge =**
  - How to evaluate risk
  - Factors to consider in decision-making
  - Medically accurate knowledge of sex, reproduction, sexual health
  - Ability to navigate interpersonal relationships
  - Communication skills
  - Conflict resolution skills
  - Emotional intelligence
- **Not all students know the same thing about the same things**

463

Ask them for evidence they want reviewed

- **Inculpatory evidence**
- **Exculpatory evidence**
- **Relevant to the allegations**
- **Rape shield law protections**
- **Witnesses to interview**
- **If they know of others with similar experiences**
- **Character testimony is permitted**

464

Why would you consider conducting an investigation without assessing credibility?

- **Cross purpose. The purpose of the hearing is to determine credibility of all the parties and all the evidence. If the investigator does this, one could later assert bias against the investigator for making their assessment of the parties and/or the evidence.**
- **Time. Investigations that accept information, gather documents, and statements, and provide a relevance review of said documents would make for an effective summary of the investigative materials presented for the hearing to sort through.**
- **Repetition. Anything anyone says to you, they will have to say again at the hearing and be subject to cross-examination, or it won't be considered.**

465

Tabletop Exercises and Breakout Groups

466

Breakout Groups

- **You will be placed into a random breakout group with about 4-6 other people.**
  - Please send a chat message to Jill Dunlap if you need to be placed in the group with closed-captioning.
- **Discuss the scenarios that were previously emailed.**
  - You can start with either scenario.
- **Please spend about 60 minutes discussing the scenarios as a group.**
- **Please share how you plan to address these issues on your campus. This is a time to learn from each other!**
- **We will come back together as a group and Peter & Jennifer will go over the scenarios.**
- **Breakout rooms are not recorded.**
- **Please make sure you are unmuted and video is on.**

467

Scenario #1

In response to the new Title IX regulations, ABC University is moving from a single-investigator model to a hearing panel model. The Title IX coordinator has called a zoom meeting with all Title IX personnel to discuss making changes to the institution's policies and procedures. The Title IX coordinator begins to discuss the role of the investigators under the new grievance procedures and suggests that the investigator's role will be changing in some significant ways and some decisions must be made as to the role of the investigators.

468

Scenario #1—Questions

- What significant changes to the investigative function, if any, should be considered?
- Should the investigator address credibility of parties and witnesses in the final investigative report? Why or why not?
- Should the investigator make recommendations on findings of responsibility in the final investigative report? Why or why not?
- Should the investigator make recommendations as to the sanctions/remedies that should be imposed? Why or why not?
- Should the Title IX coordinator have any input in the investigation process and/or report writing? Why or why not?
- Should the investigator be called as a routine, or first, witness in Title IX hearings? Why or why not?

469

Special Issues Highlight #11 Minimum and Maximum Role of Investigators

470

The *Minimum* and *Maximum* Role of the Title IX Investigator

- Campuses are no longer permitted to have a "single" or "pure" investigator model under Title IX.
- A separate decision-maker (or panel of decision-makers) must make a final determination of responsibility.
  - This will be a shift in the function of the investigator on some campuses.
- What, then, is the scope of the investigative report?
  - Purpose? Tone? Format?
- Will the investigator become a witness in the hearing or play other roles?
- **2021 Q&A**: Question #7—Addressing Conduct that Does Not Meet Definition of Sexual Harassment
  - *Yes. . . . A school has discretion to respond appropriately to reports of sexual misconduct that do not fit within the scope of conduct covered by the Title IX grievance process.*

471

The *Minimum* and *Maximum* Role of the Investigator Cont'd

- Gather <u>all</u> *relevant* information regarding an allegation of sexual harassment.
- Interview all *relevant* parties
- Collect and organize *relevant* evidence
- Credibility Assessments?
- Weighing Evidence?
- Write a detailed investigative report
- Make recommendations for interim measures or accommodations?
- Findings of Responsibility?

472

Remember § 106.45(b)(1)(x)

A recipient's grievance process must—

Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

(emphasis added)

473

Scenario #2

You are an investigator for ABC University investigating an allegation of non-consensual sexual contact between Complainant and Respondent, two Freshmen students at ABC. Complainant alleges Complainant was intoxicated and unable to give consent at the time the sexual contact occurred. Complainant submits as evidence a letter from a high school that Respondent and Complainant both attended. The letter from the high school shows a finding of responsibility against Respondent for sending nude photos of Complainant while Complainant was passed out at a party via text message to a friend. Complainant also submits a letter from a juvenile court showing a judgement against Respondent for the "sexting" act and penalties imposed on Respondent including a fine, mandatory counseling and community service.

474

Scenario #2—Questions

- Should this evidence be included in the "universe of evidence" given to both parties and their advisors for their response prior to the finalization of the final investigative report?
- Is this relevant evidence that should be included in the final report? Why or why not? How would you determine this?

475

Special Issues Highlight #12 "Universe of Evidence," "Relevance" and Rape Shield Protections

476

§ 106.45(b)(5)(vi)

(vi) Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.

(emphasis added)

477

§ 106.45(b)(5)(vi) Cont'd

Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination; and

(emphasis added)

478

§ 106.45(b)(5)(vii)

(vii) Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.

(emphasis added)

479

"Universe of Evidence"

*[T]he **universe of evidence** given to the parties for inspection and review under § 106.45(b)(5)(vi) must consist of all evidence directly related to the allegations; determinations as to whether evidence is "relevant" are made when finalizing the investigative report, pursuant to § 106.45(b)(5)(vii) (requiring creation of an investigative report that "fairly summarizes all relevant evidence").*

Id. at 30248 n.1021 (emphasis added).

Is this essentially a "mini notice-and-comment" process?

480

Submission of Evidence and Sharing of Responses

A recipient may require all parties to submit any evidence that they would like the investigator to consider ***prior to when the parties' time to inspect and review evidence begins.*** *Alternatively,* ***a recipient may choose to allow both parties to provide additional evidence in response to their inspection and review of the evidence under § 106.45(b)(5)(vi) and also an opportunity to respond to the other party's additional evidence****. Similarly,* ***a recipient has discretion to choose whether to provide a copy of each party's written response to the other party to ensure a fair and transparent process and to allow the parties to adequately prepare for any hearing that is required or provided under the grievance process****.* *Id.* at 30307 (emphasis added).

481

Not Allowing Parties to Respond to Additional Evidence

If a recipient chooses not to allow the parties to respond to additional evidence provided by a party in these circumstances, the parties will still receive the investigative report that fairly summarizes relevant evidence under § 106.45(b)(5)(vii) and will receive an opportunity to inspect and review all relevant evidence at any hearing and to refer to such evidence during the hearing, including for purposes of cross-examination at live hearings under § 106.45(b)(5)(vi).

Id. at 30307 (emphasis added).

482

If a recipient allows parties to provide additional evidence after reviewing the evidence under § 106.45(b)(5)(vi), any such additional evidence that is summarized in the investigative report will not qualify as new evidence that was reasonably available at the time the determination regarding responsibility was made for purposes of an appeal under § 106.45(b)(8).

Id. at 30307 (emphasis added).

483

Should investigators incorporate any party's responses to the "universe of evidence" (in whole or in part) into the final report?

484

Paring Down the "Universe" to "Relevant"

"[D]irectly related" may sometimes encompass a broader universe of evidence than evidence that is "relevant." *Id.* at 30304.

Non-treatment records and information, such as a party's financial or sexual history, must be directly related to the allegations at issue in order to be reviewed by the other party under § 106.45(b)(5)(vi), and all evidence summarized in the investigative report under § 106.45(b)(5)(vii) must be "relevant" such that evidence about a complainant's sexual predisposition would never be included in the investigative report and evidence about a complainant's prior sexual behavior would only be included if it meets one of the two narrow exceptions stated in § 106.45(b)(6)(i)-(ii) . . . *Id.* at 30304.

485

Relevance

[R]elevance is the sole gatekeeper evidentiary rule in the final regulations, but decision-makers retain discretion regarding the weight or credibility to assign to particular evidence. Further, for the reasons discussed above, while the final regulations do not address "hearsay evidence" as such, § 106.45(b)(6)(i) does preclude a decision-maker from relying on statements of a party or witness who has not submitted to cross-examination at the live hearing.

Id. at 30354.

486

Relevance

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

Id. at 30247 n. 1018.

487

Relevance Cont'd

The new Title IX regulations specifically . . .

. . . require investigators and decision-makers to be trained on issues of relevance, including how to apply the rape shield provisions (which deem questions and evidence about a complainant's prior sexual history to be irrelevant with two limited exceptions).

Id. at 30125 (emphasis added).

488

Rape Shield Protections and the Investigative Report

[T]he investigative report must summarize "relevant" evidence, and thus at that point the rape shield protections would apply to preclude inclusion in the investigative report of irrelevant evidence.

Id. at 30353-54 (emphasis added).

489

Prior Sexual History/Sexual Predisposition

Section 106.45(b)(6)(i)-(ii) protects complainants (but not respondents) from questions or evidence about the complainant's prior sexual behavior or sexual predisposition, mirroring rape shield protections applied in Federal courts.

Id. at 30103 (emphasis added).

490

Rape Shield Language

[T]he rape shield language in § 106.45(b)(6)(i)-(ii) bars questions or evidence about a complainant's sexual predisposition (with no exceptions) and about a complainant's prior sexual behavior subject to two exceptions:

*1) if offered to **prove that someone other than the respondent committed the alleged sexual harassment**, or*

*2) if the question or evidence concerns sexual behavior between the complainant and the respondent and is offered to prove **consent**.*

Id. at 30336 n.1308 (emphasis added).

491

Possible Format for the Final Investigative Report

I. BACKGROUND AND REPORTED CONDUCT

II. JURISDICTION

III. SCOPE OF THE INVESTIGATION

IV. RELEVANT POLICY AND LAW PROHIBITING SEXUAL HARASSMENT (INCLUDING SEXUAL ASSAULT AND RETALIATION):

V. INVESTIGATION AND SUMMARY OF RELEVANT EVIDENCE

A. Statements of Parties and Witnesses

B. Documentary Evidence

VI. ANALYSIS?

VII. CONCLUSION

Covered in-depth in the module on report-writing.

492

Scenario #3

You, a Title IX investigator, are conducting an interview with a party in a Title IX grievance process. This party is a faculty member who is accompanied to the interview by a union representative and a personal attorney. You find it very difficult to interview the party because of the back and forth talk between the party and the party's advisors, who at times audibly offer conflicting advice to the party. The campus allows both parties to have two advisors present at the interviews and subsequent hearing (the other party in this matter will have a disability advocate and a personal attorney). Eventually the interview process becomes untenable because of interchanges among the advisors and party; you stop the interview mid-way through.

Scenario #3—Questions

- What should be done at this point in the investigation?
- Who can you reach out to for assistance?
- What rules for advisors can be put in place with regards to interviews? What will you do if advisors refuse to cooperate with such rules?

Special Issues Highlight #13
Advisors

§ 106.45(b)(5)(iv)

(iv) Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties;

(emphasis added)

The Department believes that requiring recipients to allow both parties to have ***an advisor of their own choosing accompany them throughout the Title IX grievance process, and also to participate within limits set by recipients****, is important to ensure fairness for all parties.*

Id. at 30298 (emphasis added).

Advisors

- Advisor of party's choice
  - Could be a parent, friend, an attorney, an employee of the college
  - Could even be a witness in the investigation
- Schools cannot require a particular type of advisor, nor can they require an advisor to have a specific type of training
- Schools may provide resources to advisors to better understand the process
- Schools may implement limits for participation by advisors in meetings and rules of decorum for hearings as long as they are applied equally

Scenario #4

Complainant has filed and signed a formal complaint alleging sexual misconduct by Respondent. In an interview with you, the Title IX Investigator, the Respondent claims that someone other than Respondent committed the alleged sexual assault against Complainant on the night in question, and that Complainant has deliberately filed a complaint against Respondent to "get even with Respondent." The alleged assault occurred at an off-campus building owned by a recognized student organization during a party where everyone was engaged in heavy alcohol use. Respondent, who is unable to afford an attorney, asks you, the Investigator, to help Respondent determine what evidence would help demonstrate that Respondent is not the actual perpetrator.

499

Scenario #4—Questions

- Who bears the burden of evidence in this situation?
- What type of exculpatory evidence could support Respondent's claims? What type of inculpatory evidence might undermine Respondent's claims?
- In light of "rape shield" protections, how might Complainant be questioned regarding this information in a follow-up interview?
- May you "help" the Respondent? How will you respond to Respondent's request?
- Might you now have actual notice that the Respondent is a Complainant?

500

Special Issues Highlight #14 Burden of Gathering Evidence and Burden of Proof…Thinking Ahead to the Hearing

501

§ 106.45(b)(7)

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 procedures 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) . . .

Id. at 30054 (emphasis added).

502

§ 106.45(b)(1)(ii)

(ii) Require an objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence— and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness;

(emphasis added)

503

Recipient Bears the Burden of Gathering Evidence

[I]t is the recipient's burden to impartially gather evidence and present it ***so that the decision-maker can determine whether the recipient (not either party) has shown that the weight of the evidence reaches or falls short of the standard of evidence*** *selected by the recipient for making determinations.*

Id. at 30292 (emphasis added).

504

Burden to Gather Inculpatory and Exculpatory Evidence

The Department agrees with commenters that even so-called "he said/she said" cases often involve evidence in addition to the parties' respective narratives, and the § 106.45 grievance process ***obligates recipients to bear the burden of gathering evidence and to objectively evaluate all relevant evidence, both inculpatory and exculpatory, including the parties' own statements as well as other evidence.***

Id. at 30319 (emphasis added).

505

Objective Evaluation of Evidence

§ 106.45 does not set parameters around the "quality" of evidence that can be relied on, § 106.45 does prescribe that ***all relevant evidence, inculpatory and exculpatory, whether obtained by the recipient from a party or from another source, must be objectively evaluated by investigators*** *. . .*

Id. at 30105 (emphasis added).

506

Data Gaps

[E]vidence subject to inspection and review must include inculpatory and exculpatory evidence whether obtained from a party or from another source. ***The Department does not believe it is necessary to require investigators to identify data gaps in the investigative report, because the parties' right to inspect and review evidence, and review and respond to the investigative report, adequately provide opportunity to identify any perceived data gaps*** *and challenge such deficiencies.*

Id. at 30248 (emphasis added).

507

Burden of Proof

Whether the evidence gathered and presented by the recipient (i.e., gathered by the investigator and with respect to relevant evidence, summarized in an investigative report) does or does not meet the burden of proof, the recipient's obligation is the same: To respond to the determination regarding responsibility by complying with § 106.45 (including effectively implementing remedies for the complainant if the respondent is determined to be responsible).

Id. at 30291 (emphasis added).

508

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Standard of Evidence - Preponderance of the Evidence

Using a **preponderance of the evidence standard**, and considering relevant definitions in the policy, the hearing panel weighs the evidence to determine whether the respondent violated the policy.

50.01% likelihood or 50% and a feather

Which side do you fall on?

The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force, superior evidentiary weight that, though not sufficient to free the mind wholly from all reasoanble doubt, is still sufficient to incline a mind to one side of the issue rather than the other.

Bryan A. Gardner, Black's Law Dictionary 10, (2014), 1373

509

Standard of Evidence – Clear and Convincing

- *Evidence indicating that the thing to be proved is highly probable or reasonably certain.* Bryan A. Gardner, Black's Law Dictionary 10, (2014). 674
- *Certain facts must be proved by clear and convincing evidence, which is a higher burden of proof. This means the party must persuade you that it is highly probable that the fact is true.* CACI No. 201. More Likely True—Clear and Convincing Proof https://www.justia.com/documents/trials-litigation-caci.pdf

510

Special Issues Highlight #15
Counterclaims

511

Counterclaims

The Department cautions recipients that some situations will involve counterclaims made between two parties, such that a respondent is also a complainant, and in such situations the recipient must take care to apply the rape shield protections to any party where the party is designated as a "complainant" even if the same party is also a "respondent" in a consolidated grievance process.

Id. at 30352 (internal citation omitted, emphasis added).

512

Closing

513

Closing Thought

"You have no "side" other than the integrity of the process."

514

Watch YouTube for Videos from OCR

515

- *The First Amendment and Title IX: An OCR Short Webinar* (July 29, 2020)
- *OCR Short Webinar on How to Report Sexual Harassment under Title IX* (July 27, 2020)
- *Conducting and Adjudicating Title IX Hearings: An OCR Training Webinar* (July 23, 2020)
- *OCR Webinar on Due Process Protections under the New Title IX Regulations* (July 21, 2020)
- *OCR Webinar on New Title IX Protections Against Sexual Assault* (July 7, 2020)
- *OCR Webinar: Title IX Regulations Addressing Sexual Harassment* (May 8, 2020)

OCR Title IX website launched on August 14, 2020.

https://sites.ed.gov/titleix/

516

A Reminder…

All Title IX personnel should serve in their roles impartially.

All Title IX personnel should avoid

- *prejudgment of facts*
- *prejudice*
- *conflicts of interest*
- *bias*
- *sex stereotypes*

517

All module assessments must be completed by March 24th!

518

Thank You…

Questions?

519