

# 2024 Title IX Policy-Drafting Bootcamp

June 21, 2024



## Disclaimers and Basics

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- This presentation does not constitute legal advice.
- Yes, we will send the slides out.
- Watch for an email after this that will include the materials.
- Yes, you may post these slides. (But spoiler: you won't have to starting August 1st!)

## Pending Lawsuits

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- Tennessee, Ohio, Indiana, Kentucky, Virginia, and West Virginia -  
RULE ENJOINED
- Louisiana, Mississippi, Montana, and Idaho - RULE ENJOINED
- Alabama, Florida, Georgia, and South Carolina lawsuit
- Texas lawsuit
- Utah, Kansas, Alaska, Wyoming lawsuit
- Oklahoma lawsuits
- Arkansas, Missouri, Iowa, Nebraska, North Dakota, and South  
Dakota lawsuit

# What to do?

- Be prepared for all outcomes
  - Injunctions may/may not cover your jurisdiction
  - Injunctions may/may not cover the entirety of the regs (may be a subset)
- WORK WITH LEGAL COUNSEL



# Agenda

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- Overview of the 2024 Title IX Regulations
- Recognizing and applying your institution's ethic of care
- Basics for implementing a new Title IX Policy
- Mandated policy components
- Necessary policy components
  - Updated definitions
  - Updated processes
  - New/Updated obligations
- Optional policy components
- Structural considerations
- Language considerations

# ED Resource for Policy Drafting

- <https://www2.ed.gov/about/offices/list/ocr/docs/resource-nondiscrimination-policies.pdf>
- Includes sample Title IX Policy language
- Includes sample "Nondiscrimination Policy"
- Includes sample Notice of Nondiscrimination
- Look for gray "Sample" language throughout these slides

## Resource for Drafting Nondiscrimination Policies, Notices of Nondiscrimination, and Grievance Procedures under 2024 Amendments to the U.S. Department of Education's Title IX Regulations

The U.S. Department of Education's (Department) Office for Civil Rights (OCR) prepared this resource to help recipients of Department funds (recipients) comply with the 2024 amendments to the Department's regulations implementing Title IX of the Education Amendments of 1972 (2024 amendments).<sup>2</sup> The 2024 amendments take effect on August 1, 2024, and obligate recipients to apply the requirements set forth therein to complaints of sex discrimination regarding alleged conduct that occurs on or after that date. This Resource creates no legal rights or responsibilities. It is intended only to help recipients draft Title IX policies that comply with some provisions of the 2024 amendments. Recipients are not obliged to consult this Resource in drafting their policies. The Department remains committed to supporting schools in implementing these regulations, including through additional technical assistance.

Title IX prohibits sex discrimination in education programs and activities that receive Federal financial assistance. Title IX obligates all recipients to comply with Title IX and the Department's Title IX regulations, with some limited exceptions set out in the statute and regulations. When "Title IX" is referenced in this Resource, the term refers to Title IX and the regulations.

The 2024 amendments require recipients to adopt and publish grievance procedures for the prompt and equitable resolution of complaints of sex-based harassment involving a student complainant or student respondent at a postsecondary institution. This Resource addresses only the applicable regulatory requirements in §§ 106.8(b)–(c), 106.45 and 106.46. As described in more detail below:

- Sections 106.8(b) and (c) require all recipients to adopt, publish, and implement a nondiscrimination policy and publish a notice of nondiscrimination.
- Section 106.45 requires all recipients to adopt, publish, and implement grievance procedures for complaints of sex discrimination.
- Section 106.46 requires all postsecondary institutions that are recipients to adopt, publish, and implement grievance procedures for complaints of sex-based harassment involving student complainants or student respondents at postsecondary institutions.

Under Title IX and its implementing regulations, recipients are not obligated to describe all applicable portions of the Title IX regulations in the policies, notices, and procedures required by

# Overview of the 2024 Title IX Regulations

## Basics

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- 423 pages in the official version (16 + 409)
- How do you read these?
  - Start on page 409 (of the electronic version) where the new regulations start.
  - Read the new regulations.
  - Go back to the beginning and read the preamble.
  - Now read the regulations again.
- Effective Date: August 1, 2024



## Things You Can STOP Doing August 1st

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- Posting training materials (though they still must be available for inspection upon request)
- Barring informal resolution in student vs. employee cases
- Permitting advisors in the non-106.46 process (unless Clery requires them)
- Holding hearings?
  - Case law/state law may require this anyway



## Big Picture Changes (1 of 2)

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- Definition of discrimination **on the basis of sex**,
- Definition of sex-based harassment, including hostile environment sex-based harassment
- Definition of "**actual knowledge**,"
- Broader jurisdiction (on/off campus distinction),
- Changes to the duties of the Title IX Coordinator,
- Definitions and procedures for supportive measures and emergency removal...

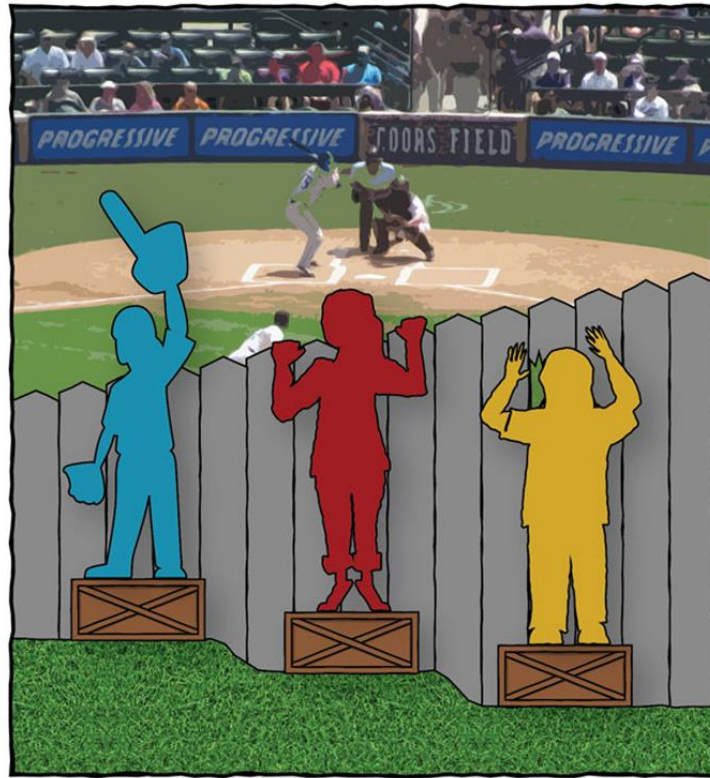
## Big Picture Changes (2 of 2)

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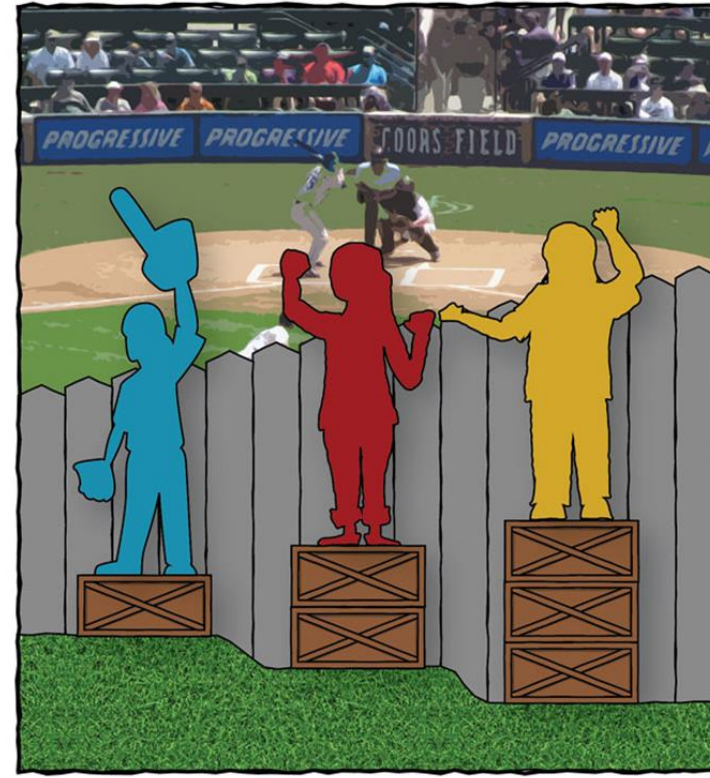
- Working with a student with a disability in your Title IX process,
- Updated information about informal resolution and when it can be used,
- More choices for your **grievance process (you will need to make a decision as to how your institution will use new grievance procedures)**,
- **New training requirements,**
- Definition of retaliation,
- **New reporting and resource requirements for pregnancy and parenting, and**
- New reporting requirements and definition of confidential employees.

**Recognizing and  
applying your  
institution's  
ethic of care**

# Title IX is an Equity Statute



**EQUALITY**



**EQUITY**

# Ethic of Care

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- What does this have to do with my policy?
  - Ex: Live hearings with cross-examination
- What do you think are the top values of your institution's community?
- Do you think institutional values align between administration, faculty, and staff?
- What about your students?
- What about the town or city around your institution?

# Overview of Themes

Access

Protection

Transparency

Evidence

Improvement

No Bias

## Access

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- Title IX is meant to ensure ACCESS to your programs and activities, regardless of sex
- "What we do for one, we do for the other"
  - Or at least consider whether it is appropriate under the circumstances
- Why are you treating someone differently?
  - Can you put your rationale in writing
  - If you can't - reconsider
- Policy considerations related to ACCESS
  - Supportive Measures
  - Decisionmaking Process





# Protection

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- Institutions have an obligation to PROTECT their campus
- "They are all our students"
- Policy considerations related to PROTECTION
  - Training and Education
  - Supportive Measures
  - Decisionmaking Process



# Transparency

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- TRANSPARENCY is key to your community trusting the process
- Know your process
- Help others understand your process
- Policy considerations related to TRANSPARENCY
  - Posting training materials
  - Providing the evidence in a case/providing a summary of the evidence



# Evidence

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- Outcomes must be based on EVIDENCE
- "Don't weigh your gut"
- Make reasonable inferences and credibility determinations, but be mindful of implicit bias, stereotypes, and using our own behavior as a yardstick
- Policy considerations related to EVIDENCE
  - Providing the evidence in a case/providing a summary of the evidence
  - Decisionmaking Process



# Improvement

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- Always be working to IMPROVE:
  - Yourself as a neutral
  - Your campus as a healthy and fair place to be
  - Your policy to provide a better process informed by case law, regulations, guidance, and experience
  - Your resources for all involved
- Policy considerations related to IMPROVEMENT
  - Training and Education
  - Recognizing processes that do and do not work for your community



## No Bias

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- Always be working to avoid actual or perceived:
  - Conflicts of Interest
  - Bias
- Institutional duties and interest vs. Personal interests
  - Take periodic self-inventories
  - Be mindful of your activities, involvements, social media, etc.
  - Check your biases constantly – and talk with others
- Policy considerations related to NO BIAS
  - Training and Education
  - Providing the evidence in a case/providing a summary of the evidence
  - Decisionmaking Process



**Basics for  
Implementing a  
New Title IX  
Policy**

# Start with the Basics – What to do Now

## (1 of 3)

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- Read the regulatory text.** The Preamble (the 100s of pages of information about why the U.S. Dept. of Education made the changes) is helpful, but start with the actual text of the regulations which is found at the end.
- Talk to Legal Counsel** about appropriate next steps in light of pending litigation
- Identify who will be available on campus to assist you with updating policy and scheduling necessary trainings** (more on trainings later); for example, will your directors of human resources and faculty employment be available? Do you know the availability of your internal or external legal counsel? Are there students available to discuss any changes to your policies? The new regulations are more flexible for certain institutions (specifically private universities) and your updated policy will contain these choices.

## Start with the Basics – What to do Now (2 of 3)

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- Does the Board of Trustees or other governing body need to approve your updated Title IX policy? If the answer is yes, identify upcoming Board meetings and alert your Board Chair that you will need Board review or authority to publish an interim policy prior to August 1. **What approvals are required (in addition to Board approval, if necessary) to publishing your policy?**
- Identify all areas where your Title IX policy exists** (both on your website and printed materials) and make a list.
- Solicit support** from your communications department, student affairs, academic affairs, and athletics to ensure that everyone understands the pre-August 1 requirements of the new regulations.



## Start with the Basics – What to do Now (3 of 3)

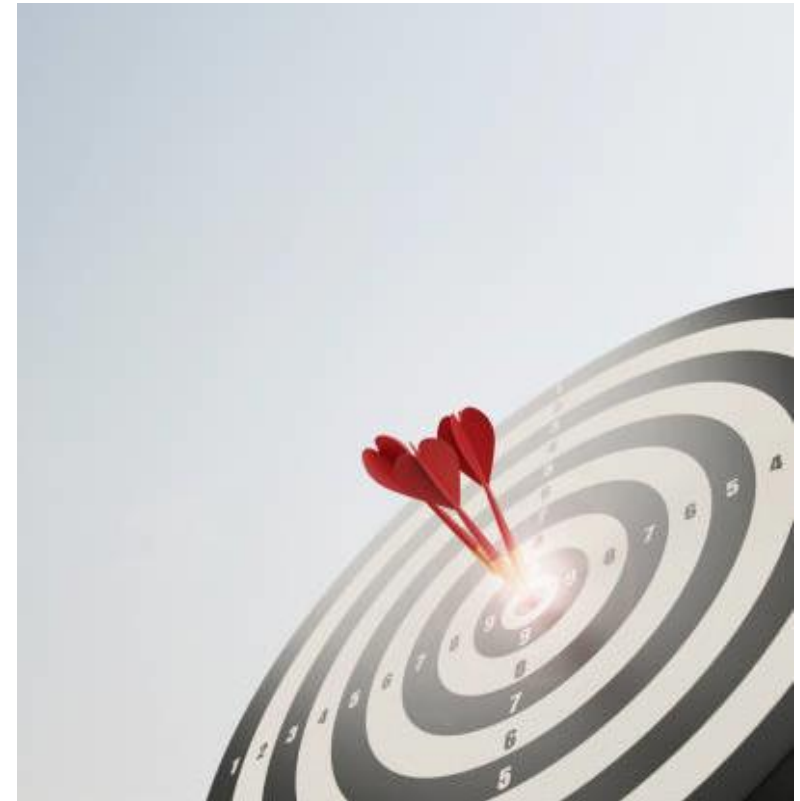
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- Form a working group to assist you.
- Create timelines based on your internal governing policies related to policy development (a policy on policies?).
- Identify any vacancies in key positions that would need to review the policy and identify individuals who are able to act in the interim.

# Aside from Compliance, What Are Your Goals?

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- Change as little as possible?
- Use as few resources as possible?
- Be as trauma-informed as possible?
- Have the best-tested evidence for making a decision?
- Finding a middle ground?



## How Many Procedures?

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- One process that is fully compliant with Heightened Procedures
- A Regular process that is Clery compliant + Heightened Procedures
- A Regular process with Clery overlay + Heightened Procedures
- Multiple options for regular process and multiple options for Heightened Procedures
  - See next slides

## 106.45 - Many Choices under Regular Procedures

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- You could have different procedures for different types of allegations
- You could have different procedures depending on the status of the Respondent
- You could have different procedures depending on whether suspension/dismissal/termination is possible

# 106.46 - Many Choices under Heightened Procedures

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- Three options:
  - Asynchronous hearing
  - Hearing Officer led hearing
  - Cross-Examination hearing (parties must have advisors)
- You could choose one option for all Heightened cases
- You could choose different options depending on different factors:
  - Is Complainant participating?
  - Is Respondent participating?
  - Is there an issue of credibility to be resolved?
  - Has Respondent accepted responsibility for the violation(s)?

## Effective Date & Retroactivity (33840)

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- No retroactive enforcement by ED
  - 2024 regs only apply to conduct that occurs after August 1, 2024
  - "With respect to sex discrimination that allegedly occurred on or after August 1, 2024, **regardless of when the alleged sex discrimination was reported, the Department will evaluate the recipient's compliance against the Title IX statute and the Title IX regulations in place at the time that the alleged sex discrimination occurred.**" (33841)
- Ex:
  - On-campus sexual assault occurs on July 31, 2024
  - Reported on August 10, 2024
  - Must comply with 2020 regs (live hearing, cross-examination)

# Mandated Policy Components

# From the "Resource for Drafting Nondiscrimination Policies..."

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- "This resource addresses the **minimum requirements** contained in the 2024 amendments for a recipient's nondiscrimination policy, notice of nondiscrimination, and grievance procedures."
  - 106.8(b) and (c) - req'd publication of nondiscrimination policy & grievance procedures
  - 106.45 - specific grievance procedures for sex discrimination and sex-based harassment that doesn't involve a student
  - 106.46 - specific grievance procedures for sex-based harassment involving a student
- "As long as the regulatory requirements are satisfied, recipients have discretion regarding level of detail in their Title IX policies and procedures."



# Designation of a Title IX Coordinator – 106.8(a)

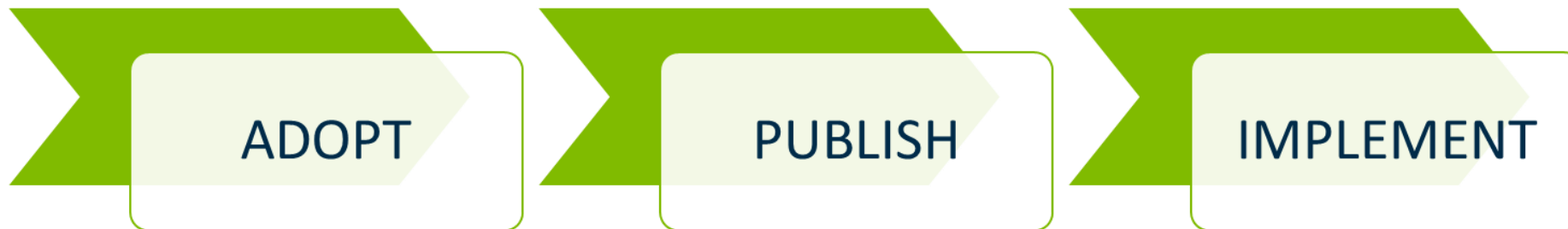
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- Institutions must designate a Title IX Coordinator to coordinate its efforts to comply with its responsibilities under Title IX
- If an institution has more than one TIXC, they must designate one to retain "ultimate oversight"
  - Delegation of duties is permitted – think Deputy Title IX Coordinators (106.8(a)(2))

## Nondiscrimination Policy – 106.8(b)(1)

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- "Each recipient must adopt, publish, and implement a policy stating that the recipient does not discriminate on the basis of sex and prohibits sex discrimination in any education program or activity that it operates, as required by Title IX and this party, including in admission... and employment."



## Sample Nondiscrimination Policy

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The following sample nondiscrimination policy meets the minimum requirements of the 2024 amendments:

[ABC School] does not discriminate on the basis of sex and prohibits sex discrimination in any education program or activity that it operates, as required by Title IX and its regulations, including in admission and employment.

## Publication of Grievance Procedures – 106.8(b)(2)

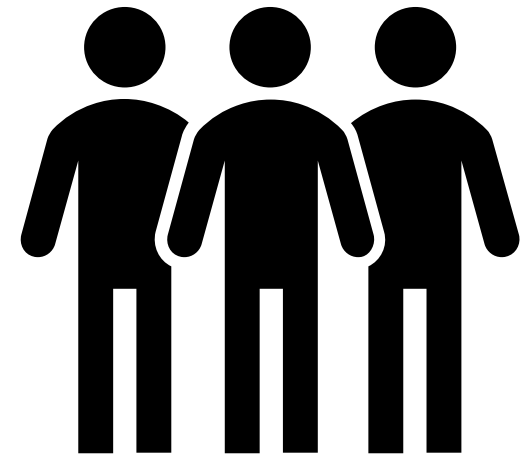
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- Must adopt, publish, and implement grievance procedures consistent with 106.45 and 106.46 (discussed later)
- Grievance procedures must "provide for the prompt and equitable resolution of complaints"

## Notice of Nondiscrimination 106.8(c)

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- Must provide a notice of nondiscrimination to the following:
  - Students
  - Parents, guardians, or other authorized legal representatives of elementary school and secondary school students
  - Employees
  - Applicants for admission and employment
  - All unions and professional organizations holding collective bargaining or professional agreements with the recipient



# Required Elements of the Notice of Nondiscrimination – 106.8(c)(1)

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- (A) A statement that the recipient does not discriminate on the basis of sex and prohibits sex discrimination in any education program or activity that it operates, as required by Title IX and this part, including in admission
- (B) A statement that inquiries about the application of Title IX and this part to the recipient may be referred to the recipient's Title IX Coordinator, OCR, or both
- (C ) The name or title, office address, email address, and telephone number of the recipient's Title IX Coordinator;
- (D) How to locate the recipient's nondiscrimination policy and grievance procedures
- (E) How to report information about conduct that may constitute sex discrimination under Title IX; and how to make a complaint of sex discrimination

## Sample Notice of Nondiscrimination (1 of 3)

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The following sample nondiscrimination policy meets the minimum requirements of the 2024 amendments:

- [ABC School] does not discriminate on the basis of sex and prohibits sex discrimination in any education program or activity that it operates, as required by Title IX and its regulations, including in admission and employment.
- Inquiries about Title IX may be referred to [ABC School's] Title IX Coordinator, the U.S. Department of Education's Office for Civil Rights, or both.

(Continued on next slide)

## Sample Notice of Nondiscrimination (2 of 3)

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- [ABC School's] Title IX Coordinator is [name or title, office address, email address, and telephone number]. [ABC School's] nondiscrimination policy and grievance procedures can be located at [include link to location(s) on website or otherwise describe location(s)].
- To report information about conduct that may constitute sex discrimination or make a complaint of sex discrimination under Title IX, please refer to [include link to location(s) on website or otherwise describe location(s)].



# Sample Notice of Nondiscrimination (3 of 3)

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The 2024 amendments require each recipient to prominently include all elements of its notice of nondiscrimination on its website and in each handbook, catalog, announcement, bulletin, and application form that it makes available to people entitled to notice, or which are otherwise used in connection with the recruitment of students or employees.

If necessary, due to the format or size of any publication, the 2024 amendments provide that a recipient may instead include in those publications the information covered in the following statement:

**[ABC School] prohibits sex discrimination in any education program or activity that it operates. Individuals may report concerns or questions to the Title IX Coordinator. The notice of nondiscrimination is located at [insert website address].**

# Necessary Policy Components

## Standard of Evidence – 106.45(h)(1)

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- Regulations require using the "preponderance of the evidence" standard unless your institution uses "clear and convincing" as the standard in **all other comparable proceedings** (including in relation to other discrimination complaints), in which case you may **elect** to use "clear and convincing"
- "All other comparable proceedings" is not otherwise defined.
- Tip: If you want to use "clear and convincing," start scouring your policies to make sure you can argue that it is the standard in **all** other comparable proceedings.

# Jurisdiction

## Key Action Items: Jurisdiction

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- Revise your Jurisdiction/Scope sections of your policy.
- Update your definitions section to reflect 106.2.
- Revise dismissal provisions.

## Language in 2020 Title IX Regulations

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- Under 2020 Title IX Regulations, we knew Title IX extended to a recipient's education programs or activities, against a person in the United States.
- We also knew that a recipient's education programs and activities could extend to some off-campus locations where the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurred, and any building owned or controlled by a student organization that is officially recognized by a post-secondary institution. (2020 Title IX Regulations 106.30(a) - the 2024 Title IX Regulations remove 106.30(a).)

# Clarification of extra-jurisdictional conduct

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- Section 106.11 Application contemplates when conduct outside of the United States fall under Title IX.
- The Regulations apply "to every recipient and to all sex discrimination occurring under a recipient's **education program or activity in the United States**" (as in the 2020 Regulations)....

## AND

- "A recipient **has an obligation to address a sex-based hostile environment** under its education program or activity, **even when some conduct alleged to be contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States.**"

## Why it matters in sex-based hostile environments

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- Extra-jurisdictional conduct can impact the elements in sex-based harassment (106.2 definition, addressed above):
  1. The **degree** to which the **conduct affected the complaint's ability to access** the recipient's education program or activity;
  2. The type, **frequency**, and **duration** of the conduct;
  3. 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 conduct;
  4. The location of the conduct and the **context** in which the conduct occurred; and
  5. Other sex-based harassment in the recipient's education program or activity.



# On/Off Campus?

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- Section 106.11:

"For purposes of this section, conduct that occurs under a recipient's education program or activity includes but is not limited to conduct that occurs in a building owned or controlled by a student organization that is officially recognized by a postsecondary institution, **and conduct that is subject to the recipient's disciplinary authority.**"

# What is the Reach of Your Policies?

- Student Conduct
- Employees
- Faculty



Page 33529:

- Recipients **are not responsible** for actions of the parties over which it lacks significant control
- Recipients **are responsible** for conduct over which it exercises disciplinary authority or otherwise has substantial control

"The Department therefore reiterates that a recipient should not focus its analysis on whether alleged conduct happened 'on' or 'off' campus but rather on **whether the recipient has disciplinary authority over the respondent's conduct in the context in which it occurred.**"

# Outside the US - Preamble Example (1 of 2)

Page 33529:

- Student A reports:
  - Student was sexually assaulted by Student B while studying abroad
  - After returning to campus, Student B has been taunting Student A with sexually suggestive comments
  - Student A cannot concentrate or participate fully in her classes and activities



## Outside the US - Preamble Example (2 of 2)

Page 33530:

- Must address the allegation of a hostile environment created by Student B's taunting
  - Requires a fact-specific inquiry into whether the encounters with Student B outside the U.S. gave rise to a hostile environment
- "The recipient would not, however, have a standalone **obligation** to address the underlying alleged sexual assault of Student A that allegedly occurred while Student A and Student B were abroad because Title IX's protections do not apply extraterritorially."
- So, no obligation... but *can* it be addressed? (see next slide)

# Application of Other Policies to conduct outside the U.S.

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Page 33532:

- No extraterritorial application
  - "No person in the United States shall..."
- However – conduct may be addressed under other codes of conduct or policies pertaining to study abroad programs



# Conduct Under a Recipient's Disciplinary Authority

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Page 33532:

- "How a recipient determines whether conduct would be subject to its disciplinary authority and what constitutes a 'similar context' is a fact-specific analysis unique to each recipient;
- However, the Department reiterates that to the extent a recipient addresses other student misconduct or other interactions between students that occur off campus, a recipient **may not disclaim responsibility for sex discrimination that occurs in a similar context.**
  - **Ex:** one student steals from another at an off-campus location
  - **Ex:** nonsexual assault of a student at an off-campus location
  - What about employees?

## Definition of "Complainant" - 106.2, p. 33882

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- Student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX
- A person other than a student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX and who was participating or attempting to participate in the recipient's education program or activity at the time of the alleged sex discrimination



## Definition of "Student" - 106.2, p. 33884

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- Student is "a person who has gained admission."
- Admission is defined to include "selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient." (p. 208)

## Definition of "Respondent" - 106.2, p. 33884

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- A person who is alleged to have violated the recipient's prohibition on sex discrimination

# Definition of "Complaint" - 106.2, p. 33882

- An oral or written request to the recipient that objectively can be understood as a request for the recipient to investigate and make a determination about alleged discrimination under Title IX



# Sample Language Regarding Complaints (1 of 2)

The following people have a right to make a complaint of sex discrimination, including complaints of sex-based harassment, requesting that [ABC School] investigate and make a determination about alleged discrimination under Title IX:

- A “complainant,” which includes:
  - a student or employee of [ABC School] who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX; or
  - a person other than a student or employee of [ABC School] who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX at a time when that individual was participating or attempting to participate in [ABC School’s] education program or activity;
  - A parent, guardian, or other authorized legal representative with the legal right to act on behalf of a complainant; or
  - [ABC School’s] Title IX Coordinator\*

## Sample Language Regarding Complaints (2 of 2)

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With respect to complaints of sex discrimination other than sex-based harassment, in addition to the people listed above, the following persons have a right to make a complaint:

- Any student or employee [of ABC School]; or
- Any person other than a student or employee who was participating or attempting to participate in [ABC School's] education program or activity at the time of the alleged sex discrimination.

# Sample Language Regarding Consolidation of Complaints

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[ABC School] may consolidate complaints of sex discrimination against more than one respondent, or by more than one complainant against one or more respondents, or by one party against another party, when the allegations of sex discrimination arise out of the same facts or circumstances. When more than one complainant or more than one respondent is involved, references below to a party, complainant, or respondent include the plural, as applicable.

# Duties of a Title IX Coordinator

*See pages 33474-33896*

# Key Takeaways this Section: Duties of a Title IX Coordinator

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- Identify the areas of your policy that need to be amended.
- Consider expanding Title IX team members – remember to train if new duties are assumed.
- Review the 8 considerations for engaging Title IX process and test these considerations on common scenarios on campus.
- Review the responsibilities of Title IX Coordinator (or designees) with respect to pregnancy and parenting.
- Update training materials to reflect changes in definitions.



# Initiation of Complaint by TIXC

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- 8 Considerations for initiation by TIXC (§ 106.44(f)(1)(v) – (vi))
  - (1) Complainant's request not to proceed
  - (2) Complainant's reasonable safety concerns re: initiation
  - (3) Risk that additional acts of sex discrimination might occur w/out a complaint
  - (4) Severity of the alleged sex discrimination
    - Would a finding of responsibility result in removal/imposition of another sanction?)
  - (5) Age and Relationship of the parties
    - Was Respondent an employee of the recipient?
  - (6) Scope of the alleged sex discrimination
    - Information suggesting a pattern? Ongoing sex discrimination? Impacting multiple individuals?
  - (7) Availability of evidence to assist a decisionmaker in determining whether sex discrimination occurred
  - (8) Whether the recipient could end the alleged sex discrimination and prevent its recurrence without initiating its grievance procedures

# Initiation of Complaint by TIXC – Tell Complainant

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- If initiating, notify Complainant and address reasonable concerns
- Regardless of initiating:
  - Take other appropriate prompt and effective steps to ensure sex discrimination does not continue
- NOTE: TIXCs are not required to analyze the 8 considerations if the conduct, as alleged, could not constitute sex discrimination

# Duties of a Title IX Coordinator - Pregnancy

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- 34 C.F.R. 106.40(b)(2)
  - When a student/person with legal right to act on behalf of the student informs "ANY EMPLOYEE" of pregnancy or related condition, the employee MUST provide the student with the Title IX Coordinator's information and informs the student that the Title IX Coordinator can coordinate measures to preserve equal access to the education program or activity.
  - Exception: if the employee reasonably believes that the Title IX Coordinator has already been notified.
- 34 C.F.R. 106.40(b)(3)(I)
  - Recipients have a responsibility to provide information regarding the institution's obligations to ensure equal access and prevent discrimination.

# Sex Discrimination

Definition: 106.10, p. 33886

## Prohibition – 106.31

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- Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any **academic, extracurricular, research, occupational training, or other education program or activity** operated by a recipient that receives Federal financial assistance.

## Key Action Items: Sex Discrimination (1 of 2)

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- Talk to your legal counsel about this definition
  - Remember the lawsuits that have been filed
- Identify sections of your current policy that will need to be updated to reflect the new definitions and scope;
- Educate your core group as to the changes in the prohibition, scope, and application and brainstorm ways in which this would impact operations on campus (e.g., updating reporting requirements, updating training materials related to employee reporting requirements, etc.).

## Key Action Items: Sex Discrimination (2 of 2)

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- Do you have off-campus programs? Do your affiliation agreements include a reporting requirement for those entities?
- Do your other employment and conduct processes allow for considering off campus behavior or behavior that occurs outside the United States? We want to resolve conflicts that exist in other policies.

## Scope – 106.10

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- Discrimination on the basis of sex includes discrimination on the basis of:
  - Sex stereotypes
  - Sex characteristics
  - Pregnancy or related conditions
  - Sexual orientation
  - Gender identity
- Sex-Based Harassment is a form of Sex Discrimination (106.2)



## Sex Discrimination

Discrimination on  
the basis of sex  
characteristics

Discrimination on  
the basis of sexual  
orientation

Discrimination on the  
basis of sex stereotypes

Discrimination on  
the basis of gender  
identity

Discrimination on the basis  
of Pregnancy or Related  
Conditions

### Sex-Based Harassment

- *Quid pro quo*
- Hostile environment
- Sexual assault
- Domestic violence
- Dating violence
- Stalking

# Key Takeaways from this Section: Sex Discrimination

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- Note the following changes:
  - The definition of what is prohibited (§ 106.31),
  - The change in the definition of "on the basis of sex" (§ 106.10),
  - The concept of "de minimis harm" (§ 106.31), and
  - The change regarding activity that occurs outside of your educational program or activity and outside of the United States, but creates a hostile environment on your campus (§ 106.11).

## Prohibition – 106.31

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- Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any **academic, extracurricular, research, occupational training, or other education program or activity** operated by a recipient that receives Federal financial assistance.

## Where an Exception Applies... 106.31

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- A recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to **more than *de minimis* harm**, except as permitted by:
  - The exceptions laid out in 20 USC 1681(a)(1) through (9) and 106.12 through 106.15
  - The exceptions in 20 USC 1686 and corresponding regulations 106.32(b)(1)  
[Housing]
  - 106.41(b) [Athletics]
- Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to **more than *de minimis* harm** on the basis of sex.

## Application – 106.11

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- Applies to all sex discrimination occurring under a recipient's education program or activity in the United States
- Includes:
  - Conduct occurring in a building owned/controlled by recognized student organization; and
  - Conduct that is subject to the recipient's disciplinary authority
- Recipient has an obligation to address a sex-based hostile environment under its education program or activity, even when some conduct alleged to be contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States.

# Sample Language – Adoption of Grievance Procedures

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The following statement published in a recipient's grievance procedures would accurately summarize this general requirement:

[ABC School] has adopted grievance procedures that provide for the prompt and equitable resolution of complaints made by students, employees, or other individuals who are participating or attempting to participate in its education program or activity, or by the Title IX Coordinator, alleging any action that would be prohibited by Title IX or the Title IX regulations.

# Sex-Based Harassment

**Definition: 106.2, pp. 33884**

## Key Takeaways: Sex-Based Harassment

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- The new regulations change the definition of sex-based harassment (keep in mind the changes to the definition "on the basis of sex").
- *Quid pro quo* harassment now includes employees, agents, and "other persons authorized by the college or university to provide aid, benefit or service." This means that contractors will be subject to the regulations and could create liability for the institution.
- The definition of hostile environment is no longer severe, pervasive and objectively offensive, it is now based on a definition more common to hostile environment under Title VII (but notice the difference between the Title VII standard and this one). Note the variation in the definition of domestic violence.

*"Unwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive..."*



## Key Action Items: Sex-Based Harassment

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- Identify the areas of your policy that need to be amended.
- Identify and update all contracts of third-party vendors that provide educational programs and services.
- Do your vendor contracts expressly reference obligations for reporting any sort of incident involving sexual harassment?
- Update training materials to reflect changes in definitions.

# Definition of Sex-Based Harassment – 106.2, p. 33884

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

- *Quid pro quo* harassment
- Hostile environment harassment
- Specific offenses
  - Sexual assault
  - Dating violence
  - Domestic violence
  - Stalking

## Definition of *Quid Pro Quo* – 106.2, p. 33884

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- 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

## Definition of Hostile Environment – 106.2, p. 33884 (1 of 2)

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- Unwelcome sex-based conduct that, based on the totality of the circumstances, is **subjectively and objectively offensive** and is **so severe or pervasive** that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity (i.e., creates a hostile environment).
- Title VII standard, for reference: "must be so severe or pervasive" with reasonable-person standard for charging party

# Definition of Hostile Environment – 106.2, p. 33884 (2 of 2)

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- Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following:
  - The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;
  - The type, frequency, and duration of the conduct;
  - 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 conduct;
  - The location of the conduct and the context in which the conduct occurred; and
  - Other sex-based harassment in the recipient's education' program or activity

## Specific Offenses – On the basis of Sex

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- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking

Note: The domestic violence definition aligns with but does not adopt the full VAWA definition that applies to victim services (e.g. verbal, psychological, economic, or technological abuse).

Also note: these definitions did not change from the 2022 Title IX Regulations. We'll talk later about what that means – if anything – for your policy.

# "Actual Knowledge" and Reporting Requirements

# Key Action Items: "Actual Knowledge" and Reporting Requirements

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- Identify which employees fall into which categories.
- Revise policy to match updated reporting requirements.
- Train employees on their reporting obligations.
- Will you give an info sheet to employees if you allow them to share Title IX contact information instead of making a report?
- How will your employees document that they have met their requirements by sharing contact information?



## Language in 2020 Title IX Regulations

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- Under 2020 Title IX Regulations, notice to trigger "actual knowledge" for purposes of liability was limited to:
  - For K-12: any employee, except those deemed confidential (prior to the 2020 Title IX Regulations, "actual knowledge" had been limited to designated school employees).
  - For post-secondary institutions: the Title IX Coordinator or any official who has the authority to institute corrective measures on behalf of a recipient (prior to the 2020 Title IX Regulations, "actual knowledge" extended to any employee)

# Section 106.44's Notice Requirements – Elementary or Secondary School Recipients

- Must require all of its employees who are not confidential employees to notify the Title IX Coordinator when employee has information about conduct that reasonably may constitute sex discrimination under Title IX

(106.44(c)(1))



# Reporting in Non-K12 Settings

Duties	Must Report to TIXC	Either report to TIXC or Provide contact info
Authority to institute corrective measures	X	
Administrators	X	
Faculty	X	
Advisors	X	
Non-confidential other employees		X
Confidential employees		X (with required explanations)
Student employees	Institution makes reasonable determination as to what applies	

# Section 106.44's Notice Requirements – Post-secondary recipients (and the rest)

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## Required to report to TIXC:

Any employee who is not a confidential employee **and** who either

- Has authority to institute corrective measures on behalf of the recipient **or**
- Has responsibility for administrative leadership, teaching, or advising in the recipient's education program or activity

## Report what?

- Required to notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination under Title IX;

# Section 106.44's Notice Requirements – Post-secondary recipients (and the rest)

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## Required to report to TIXC OR Provide TIC

All other employees not covered on the last slide, to:

- Notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination under Title IX; or
  - Provide the contact information of the Title IX Coordinator and information about how to make a complaint of sex discrimination to any person who provides the employee with information about conduct that reasonably may constitute sex discrimination under Title IX
- 
- Acknowledgement that post-secondary institutions have student-employees, and will have to make an individualize determination for any overlap in responsibilities above for student or employee role
  - Acknowledgement that the requirements above in (i) and (ii) do not apply where the employee is the subject of sex discrimination at issue

(106.44(C)(2)-(4))

## Definition of "Confidential Employees"

- Confidential/privileged under state law – only applies to information received while functioning in that confidential/privileged role
- Confidential/privileged as designated by policy
- Researchers who are conducting IRB-approved human research – only applies to information received while conducting the research

(Confidential employees can report to TIXC with consent; otherwise, they're providing contact information to the person.)



## Confidential employee requirements

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- A recipient must notify all participants in the recipient's education program or activity how to contact its confidential employees (exclusion of post-secondary IRB research)
- A recipient must require confidential employee to explain to any person who informs them of conduct that reasonably may constitute sex discrimination under Title IX:
  - Employee is a confidential employee and not required to notify Title IX Coordinator about conduct that reasonably may constitute sex discrimination
  - How to contact Title IX Coordinator and make a complaint
  - That the Title IX Coordinator may be able to offer and coordinate supportive measures, as well as initiate informal resolution or formal grievance process

## "Take Back the Night" Exception

- If you learn of sex-based discrimination through a public educational event, you don't have to act in response, but you do have to use it to inform your preventive efforts. See 106.44(e)





# Supportive Measures and Emergency Removal

**Definition: 106.2, p. 33885**

***See also 106.44(h) and (i)***

# Key Action Items: Supportive Measures and Emergency Removal

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- Note the changes to the definition of Supportive Measures: Identify the areas of your policy that need to be amended.
- Identify those who will review appeals of Supportive Measures
- Map out your process for Emergency Removal based on requirements: **imminent and serious threat** to the health or safety
- Remember to consider access issues when providing or implementing Supportive Measures – ADA/504 considerations.
- Update training materials to reflect changes in definitions.

# Definition of Supportive Measures – 106.2, p. 33885

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Individualized measures offered as appropriate, as reasonably available, without unreasonably burdening a complainant or respondent, not for punitive or disciplinary reasons, and without fee or charge to the complainant or respondent to:

- Restore or preserve that party's access to the recipient's education program or activity, including measures that are designed to protect the safety of the parties or the recipient's educational environment; or
- Provide support during the recipient's grievance procedures or during the informal resolution process. [NOTE: specific discussion of Supportive Measures in 106.44 and 106.45]

## List of Example Supportive Measures – 106.44(g)

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- Counseling
- Extensions of deadlines and other course-related adjustments
- Campus escort services
- Increased security and monitoring of certain areas of the campus
- Restrictions on contact **applied to one or more parties**
- Leaves of absence
- Changes in class, work, housing, or extracurricular or any other activity, **regardless of whether there is or is not a comparable alternative**
- **Training and education programs** related to sex-based harassment

# Consult with Disability Services re Supportive Measures

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- If a student is a student with a disability under Section 504, the Title IX Coordinator may consult with your office of disability services in determining appropriate supportive measures. See 106.44(g)(6)(ii)

## Appeals re: Supportive Measures

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- Must have the ability to seek modification or reversal from an appropriate and impartial employee

## Sample Language – Supportive Measures

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[ABC School] will offer and coordinate supportive measures as appropriate for the complainant and/or respondent to restore or preserve that person's access to [ABC School's] education program or activity or provide support during [ABC School's] Title IX grievance procedures or during the informal resolution process.<sup>16</sup> For complaints of sex-based harassment, these supportive measures may include [DESCRIBE RANGE that complies with §106.44(g)].

# Emergency Removal from educational program or activity

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- Must undertake an individualized safety and risk analysis
- Must determine that an "**imminent and serious threat** to the health or safety of **a complainant or any students, employees, or other persons** arising from the allegations of sex discrimination justifies removal"
- Must provide respondent with notice and an opportunity to challenge

Note: Institutions still have the right to put employee respondents on administrative leave. See 106.44(I).

Note: Reference to interaction with ADA/504



# Student with a Disability

**Definition: 106.2, p. 33884**

***See also* 106.8(e), p. 33886**

## Key Action Items: Students with a Disability

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- Identify the areas of your policy that need to be amended.
- Work with ADA/504 Coordinator on information sharing provisions re FERPA
- Consider events in your process where ADA/504 issues are common (e.g. Grievance process, intake, etc.)
- Update training materials to reflect changes in definitions.

## Definition of Student with a Disability – 106.2, p. 33884

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- A student who is an individual with a disability under Section 504, or a child with a disability as defined by the IDEA.
- TIXC "may consult, as appropriate" with disability support services to help comply with Section 504. Such consultation = "legitimate educational interest."
- Recipients must establish criteria in its annual notification of FERPA rights to permit its Title IX Coordinator to constitute a school official with legitimate educational interests when performing functions to carry out §106.8(e)

# Students with Disabilities

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"The rights of students with disabilities warrant the attention and concern demonstrated by the obligations set forth in § 106.8(e), and the inclusion of this provision in the final regulations will provide clarity for students with disabilities about what to expect from their educational institutions when they are involved in Title IX grievance procedures as complainants or respondents." (p. 33552)

# Informal Resolution

*See* 106.44(k), p. 33890

## Key Action Items: Informal Resolution

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- Identify the areas of your policy that need to be amended.
- Note expansion to higher education employment matters
- Also note application to K-12 environments (does your institution have a school on campus?)
- Increase number of IR facilitators on campus – consider reaching out to your other institutional colleagues to develop common services.

# Informal Resolution (IR) 106.44(k) - Expanded

Formal complaint no longer required. IR is permitted when a recipient

- Receives a complaint of sex discrimination, or
- Receives information about conduct that reasonably may constitute sex discrimination.

Expanded to higher ed student/employee claims. IR is not permitted

- For complaints that include allegations that an employee engaged in sex-based harassment of an elementary or secondary school student, or
- When such a process would conflict with federal, state or local law.

## Sample Language – Informal Resolution

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In lieu of resolving a complaint through [ABC School]’s Title IX grievance procedures, the parties may instead elect to participate in an informal resolution process. [ABC School] does not offer informal resolution to resolve a complaint that includes allegations that an employee engaged in sex-based harassment of an elementary school or secondary school student, or when such a process would conflict with Federal, State, or local law.



## Sample Language – Informal Resolution

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[ABC College] **will** inform the parties in writing of any informal resolution process it offers and determines is appropriate, if any. Before the initiation of an informal resolution process, [ABC College] will explain in writing to the parties:

- The allegations;
- The requirements of the informal resolution process;
- That any party has the right to withdraw from the informal resolution process and initiate or resume grievance procedures at any time before agreeing to a resolution;
- That if the parties agree to a resolution at the end of the informal resolution process, they cannot initiate or resume grievance procedures arising from the same allegations;
- The potential terms that may be requested or offered in an informal resolution agreement, including notice that an informal resolution agreement is binding only on the parties; and
- What information [ABC College] will maintain and whether and how [ABC College] could disclose such information for use in Title IX grievance procedures if such procedures are initiated or resumed.

# Grievance Process

*See* 106.44, 106.45, and 106.46

## Key Action Items: Grievance Process

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- Confer with stakeholders to balance all competing interests in what a good grievance process looks like, consistent with your institutional ethic of care.
- Figure out your 106.45 procedures.
- Figure out your 106.46 procedures.
- Make sure you comply with Clery requirements when they apply.
- Have a beautiful flowchart ready to assist your explanations.

# Public Institutions in the 6th Circuit

- *Doe v. Baum* still applies, which means...
  - Still need to provide for live cross-examination when
    - Credibility is in dispute
    - Credibility is material to the outcome
    - The potential sanction is as serious as expulsion or suspension
  - Remember:
    - Only applies to matters involving student respondents
    - The parties will need advisors—the regs prohibit parties from cross-examining each other
    - Cross must, at a minimum, allow (1) the respondent to probe witness credibility and (2) the factfinder to observe the witness's demeanor under questioning
      - Cross examination does not require witnesses to answer every single question and courts recognize a school's interests in protecting victims of alleged sexual assault
    - Respondents can waive their right to cross-examination



## Remember your Clery obligations (1 of 3)

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- VAWA Prevention Programming - Must have prevention and awareness programming for all incoming students and new employees which includes:
  - Definitions of VAWA crimes
  - Consent
  - A description of bystander intervention and information on risk reduction
  - A description of ongoing prevention and awareness campaigns
- Procedures for discipline re VAWA Crimes – Must include:
  - Steps, anticipated timelines, and decision-making process
  - Standard of evidence
  - Possible sanctions
  - Protective measures

## Remember your Clery obligations (2 of 3)

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- Proceedings for VAWA Crimes:
  - *General* - Must be prompt, fair, and impartial
  - *Training of officials* - Must "[b]e conducted by officials who, at a minimum, receive annual training on the issues related to dating violence, domestic violence, sexual assault, and stalking and on how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability."
  - *Equal presence of others* - Must "[p]rovide the accuser and the accused with the same opportunities to have others present during any institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice"
  - *Limitations on advisor participation* - Must "[n]ot limit the choice of advisor or presence for either the accuser or the accused in any meeting or institutional disciplinary proceeding; however, the institution 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."
  - *Simultaneous notification* - Must require simultaneous notification in writing to both the accuser and the accused of result of disciplinary proceeding, procedures for appeal, change to results, and when results become final

## Remember your Clery obligations (3 of 3)

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- Notice to "victims" of procedures to follow for VAWA crimes:
  - Importance of preserving evidence
  - "Options about the involvement of law enforcement and campus authorities, including notification of the victim's option to—
    - Notify proper law enforcement authorities, including on-campus and local police;
    - Be assisted by campus authorities in notifying law enforcement authorities if the victim so chooses; and
    - Decline to notify such authorities"
  - "Where applicable, the rights of victims and the institution's responsibilities for orders of protection, "no-contact" orders, restraining orders, or similar lawful orders issued by a criminal, civil, or tribal court or by the institution"

## Definition of Relevant – 106.2, p. 33884

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- Related to the allegations of sex discrimination under investigation as part of the grievance procedures under 106.45, and if applicable 106.46.
- Questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred, and evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred.



# Sample Language Regarding Relevant Evidence (1 of 2)

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- [ABC School] **will** objectively evaluate all evidence that is relevant and not otherwise impermissible—including both inculpatory and exculpatory evidence. Credibility determinations will not be based on a person’s status as a complainant, respondent, or witness.
- The following types of evidence, and questions seeking that evidence, are impermissible (i.e., will not be accessed or considered, except by [ABC School] to determine whether one of the exceptions listed below applies; will not be disclosed; and will not otherwise be used), regardless of whether they are relevant:
  - Evidence that is protected under a privilege recognized by Federal or State law or evidence provided to a confidential employee, unless the person to whom the privilege or confidentiality is owed has voluntarily waived the privilege or confidentiality;

# Sample Language Regarding Relevant Evidence (2 of 2)

## (continued)

- A party's or witness's records that are made or maintained by a physician, psychologist, or other recognized professional or paraprofessional in connection with the provision of treatment to the party or witness, unless [ABC School] obtains that party's or witness's voluntary, written consent for use in its grievance procedures; and
- Evidence that relates to the complainant's sexual interests or prior sexual conduct, unless evidence about the complainant's prior sexual conduct is offered to prove that someone other than the respondent committed the alleged conduct or is evidence about specific incidents of the complainant's prior sexual conduct with the respondent that is offered to prove consent to the alleged sex-based harassment. The fact of prior consensual sexual conduct between the complainant and respondent does not by itself demonstrate or imply the complainant's consent to the alleged sex-based harassment or preclude determination that sex-based harassment occurred.

## Definition of Remedies – 106.2, p. 33884

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- Measures provided, as appropriate, to a complainant or any other person the recipient identifies as having had their equal access to the recipient's education program or activity limited or denied by sex discrimination.
- These measures are provided to restore or preserve that person's access to the recipient's education program or activity after a recipient determines that sex discrimination occurred.

## Sample Language – Discipline & Remedies

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Following a determination that sex-based harassment occurred, [ABC School] may impose disciplinary sanctions, which may include [LIST OR DESCRIBE RANGE]. [ABC School] may also provide remedies, which may include [LIST OR DESCRIBE RANGE].

# Recipient's Response to Sex Discrimination – 106.44, p. 33888

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- Recipient with knowledge of conduct that reasonably may constitute sex discrimination in its education program or activity must respond promptly and effectively
- Who has a responsibility to notify the Title IX Coordinator when they have "information about conduct that reasonably may constitute sex discrimination?"
  - Non-confidential employees who have authority to institute corrective measures on behalf of the recipient
  - Non-confidential employees who have responsibility for administrative leadership, teaching, or advising in the recipient's education program or activity
  - \*\*For all other non-confidential employees – must either 1) notify the Title IX Coordinator or Provide the contact information of the Title IX Coordinator and provide information about how to make a complaint of sex discrimination

# Regular Process versus Heightened Procedures (106.45 versus 106.46)

- You'll hear us refer to these numbers a lot in the next section and future trainings - two separate sections within the regulations
- Preamble, p. 33633: "Section 106.45 of these final regulations specifies grievance procedures for the prompt and equitable resolution of complaints of sex discrimination generally, while [section] 106.46 specifies further grievance procedures for the prompt and equitable resolution of complaints of sex-based harassment involving a student party in a postsecondary institution."
- 106.45: The decisionmaker **may** be the same person as the Title IX Coordinator or investigator.
- 106.46 - Can you have the same person? SHOULD you have the same person?
  - Talk to legal counsel about interpretation

# Grievance Procedures – Big Picture

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For **PRIVATE** institutions within the 6th Circuit:

- Single investigator model can be used for:
  - **All cases involving sex discrimination, regardless of party status (106.45)**
    - Remember – the decisionmaker must have the opportunity to question parties and witnesses to adequately assess credibility to the extent credibility is both in dispute and relevant
    - Cannot have a separate decisionmaker that reviews the investigation report and issues a decision.
    - If you have a separate decisionmaker, there must be an opportunity to question in order to assess credibility
  - **All cases involving sex-based harassment if the parties are NOT students (106.46(a))**

# Which Grievance Process Applies? (Assuming Jurisdiction)

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- Are you a postsecondary institution?
  - If yes: Go to next question.
  - If no: Regular (106.45) applies.
- Is one of the parties a student?
  - If yes: Go to next question.
  - If no: Regular (106.45) applies.
- Do the allegations include sex-based harassment?
  - If yes: Regular (106.45) + (Heightened) 106.46 apply.
  - If no: Regular (106.45) applies.



## Who can file a complaint? 106.45(a)(2)

---

- Applies only to respondent individuals (not respondent institution)
- Sex-Based Harassment complaints can be filed by:
  - Complainant,
  - Parent/guardian or other authorized legal representative with the legal right to act on behalf of a complainant
  - Title IX Coordinator
- Sex Discrimination (non SBH) complaints can be filed by:
  - All of the above, plus any student or employee
  - Any other person who was participating or attempting to participate in the institution's education program or activity at the time of the alleged sex discrimination

# Other Notable Features of the Regular (106.45) Process

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- Must provide notice to parties if deadlines are delayed for various stages of the process
- If you have different procedures for different situations, you must explain this
- Must provide notice of allegations to the parties - but this notice includes less information than 2020 regulations require (see sample language in Resource Guide)
- All dismissal is discretionary - and you must offer an appeal process (see sample language in Resource Guide)
- Must provide evidence or description of evidence (but they can still see evidence upon request) for party's response ("reasonable opportunity")
- Prevent unauthorized disclosure of evidence

# Investigator as Decision-Maker in Regular Process (106.45)

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- Decision-maker must question parties and witnesses to assess credibility to the extent credibility is in dispute and relevant
- Simplified requirements for written determination
- Appeals must be comparable to other procedures
- Your policy must describe sanctions and supportive measures

# No Advisors Required Under Regular Process (106.45)

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- 106.45 does not require nor prohibit advisors
- Clery Act still requires advisor of choice in situations involving sexual assault, dating violence, domestic violence, and stalking
  - Ex: allegation of stalking between employees

# Considerations for Regular Process (106.45)

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- Think about your current procedures handling discrimination cases
- Do you want to carve out sex discrimination under Title IX or update a separate policy to include the requirements of the 2024 Title IX regulations?
- Does it make sense to have one process for 106.45 and 106.46 cases?
  - Might simplify things to have one process
  - Employees and students would be subjected to the same process, but
  - It will need to comply with greater procedural requirements of 106.46
  - Will need to comply with CBA, employee policies, faculty policies
  - Consider resources if you use a live hearing to resolve complaints of sex-based harassment – can you do the same for all sex discrimination complaints?

# Sample Language for 106.45 Grievance Procedures - Introduction

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[ABC School] has adopted grievance procedures that provide for the prompt and equitable resolution of complaints made by students, employees, or other individuals who are participating or attempting to participate in its education program or activity, or by the Title IX Coordinator, alleging any action that would be prohibited by Title IX or the Title IX regulations.

# Sample Language for 106.45 Grievance Procedures – Basics (1 of 3)

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- [ABC School] will treat complainants and respondents equitably
- [ABC School] requires that any Title IX Coordinator, investigator, or decisionmaker not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. A decisionmaker may be the same person as the Title IX Coordinator or investigator.
- [ABC School] presumes that the respondent is not responsible for the alleged sex discrimination until a determination is made at the conclusion of its grievance procedures

# Sample Language for 106.45 Grievance Procedures – Basics (2 of 3)

- [ABC School] has established the following timeframes for the major stages of the grievance procedures: [DESCRIBE REASONABLY PROMPT TIMEFRAMES, for major stages, including for example, evaluation (i.e., the decision whether to dismiss or investigate a complaint); investigation; determination; and appeal, if any].
- [ABC School] has also established the following process that allows for the reasonable extension of timeframes on a case-by-case basis for good cause with notice to the parties that includes the reason for the delay: [DESCRIBE PROCESS].



# Sample Language for 106.45 Grievance Procedures – Basics (3 of 3)

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- [ABC School] **will** take reasonable steps to protect the privacy of the parties and witnesses during its grievance procedures. These steps will not restrict the ability of the parties to obtain and present evidence, including by speaking to witnesses; consult with their family members, confidential resources, or advisors; or otherwise prepare for or participate in the grievance procedures. The parties cannot engage in retaliation, including against witnesses.

# Sample Language - Notice of Allegations (1 of 2)

Upon initiation of [ABC School]’s Title IX grievance procedures, [ABC School] will notify the parties of the following:

- [ABC School’s] Title IX grievance procedures and any informal resolution process;
- Sufficient information available at the time to allow the parties to respond to the allegations, including the identities of the parties involved in the incident(s), the conduct alleged to constitute sex discrimination, and the date(s) and location(s) of the alleged incident(s);
- Retaliation is prohibited; and (continued on next slide)

## Sample Language - Notice of Allegations (2 of 2)

- The parties are entitled to an equal opportunity to access the relevant and not otherwise impermissible evidence or an accurate description of this evidence. [If [ABC School] provides a description of the evidence: The parties are entitled to an equal opportunity to access the relevant and not otherwise impermissible evidence upon the request of any party.]

If, in the course of an investigation, [ABC School] decides to investigate additional allegations of sex discrimination by the respondent toward the complainant that are not included in the notice provided or that are included in a complaint that is consolidated, [ABC School] will notify the parties of the additional allegations.

## Sample Language - Dismissal (1 of 2)

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[ABC School] may dismiss a complaint of sex discrimination if:

- [ABC School] is unable to identify the respondent after taking reasonable steps to do so;
- The respondent is not participating in [ABC School's] education program or activity and is not employed by [ABC School];
- The complainant voluntarily withdraws any or all of the allegations in the complaint, the Title IX Coordinator declines to initiate a complaint, and [ABC School] determines that, without the complainant's withdrawn allegations, the conduct that remains alleged in the complaint, if any, would not constitute sex discrimination under Title IX even if proven; or
- [ABC School] determines the conduct alleged in the complaint, even if proven, would not constitute sex discrimination under Title IX. Before dismissing the complaint, [ABC School] will make reasonable efforts to clarify the allegations with the complainant.

## Sample Language - Dismissal (2 of 2)

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Upon dismissal, [ABC School] **will** promptly notify the complainant of the basis for the dismissal. If the dismissal occurs after the respondent has been notified of the allegations, then [ABC School] will also notify the respondent of the dismissal and the basis for the dismissal promptly following notification to the complainant, or simultaneously if notification is in writing.

# Sample Language - Appeal of Dismissal (1 of 2)

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[ABC School] **will** notify the complainant that a dismissal may be appealed and will provide the complainant with an opportunity to appeal the dismissal of a complaint. If the dismissal occurs after the respondent has been notified of the allegations, then [ABC School] will also notify the respondent that the dismissal may be appealed. Dismissals may be appealed on the following bases:

- Procedural irregularity that would change the outcome;
- New evidence that would change the outcome and that was not reasonably available when the dismissal was made; and
- The Title IX Coordinator, investigator, or decisionmaker had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that would change the outcome.

# Sample Language - Appeal of Dismissal (2 of 2)

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If the dismissal is appealed, [ABC School] will:

- Notify the parties of any appeal, including notice of the allegations, if notice was not previously provided to the respondent;
- Implement appeal procedures equally for the parties;
- Ensure that the decisionmaker for the appeal did not take part in an investigation of the allegations or dismissal of the complaint;
- Ensure that the decisionmaker for the appeal has been trained consistent with the Title IX regulations;
- Provide the parties a reasonable and equal opportunity to make a statement in support of, or challenging, the outcome; and
- Notify the parties of the result of the appeal and the rationale for the result.

## Sample Language - Next Steps after Dismissal

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When a complaint is dismissed, [ABC School] will, at a minimum:

- Offer supportive measures to the complainant as appropriate;
- If the respondent has been notified of the allegations, offer supportive measures to the respondent as appropriate; and
- Take other prompt and effective steps, as appropriate, through the Title IX Coordinator to ensure that sex discrimination does not continue or recur within [ABC School's] education program or activity.



## Sample Language – Investigation (1 of 5)

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[ABC College] will provide for adequate, reliable, and impartial investigation of complaints.

The burden is on [ABC College]—not on the parties—to conduct an investigation that gathers sufficient evidence to determine whether sex discrimination occurred.

[ABC College] will provide to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all meetings or proceedings with sufficient time for the party to prepare to participate.

## Sample Language – Investigation (2 of 5)

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[ABC College] **will** provide the parties with the same opportunities to be accompanied to any meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney.

- [ABC College] **will not** limit the choice or presence of the advisor for the complainant or respondent in any meeting or proceeding.
- [ABC College] may establish restrictions regarding the extent to which the advisor may participate in these grievance procedures, as long as the restrictions apply equally to the parties.

## Sample Language – Investigation (3 of 5)

---

[ABC College] **will** provide the parties with the same opportunities, if any, to have people other than the advisor of the parties' choice present during any meeting or proceeding.

[ABC College] **will** provide an equal opportunity for the parties to present fact witnesses and other inculpatory and exculpatory evidence that are relevant and not otherwise impermissible.

[ABC College] **will** review all evidence gathered through the investigation and determine what evidence is relevant and what evidence is impermissible regardless of relevance.

## Sample Language – Investigation (4 of 5)

---

[ABC College] **will** provide each party and the party’s advisor, if any, with an equal opportunity to access the evidence that is relevant to the allegations of sex-based harassment and not otherwise impermissible, in the following manner:

- [ABC College] **will** provide an equal opportunity to access either the relevant and not otherwise impermissible evidence, or the same written investigative report that accurately summarizes this evidence. [If [ABC College] provides access to an investigative report: [ABC College] will further provide the parties with an equal opportunity to access the relevant and not otherwise impermissible evidence upon the request of any party.];

## Sample Language – Investigation (5 of 5)

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### (Continued)

- [ABC College] **will** provide a reasonable opportunity to review and respond to the evidence or the investigative report. If [ABC College] conducts a live hearing as part of its grievance procedures, it will provide this opportunity to review the evidence in advance of the live hearing. [[ABC College] may decide whether to provide this opportunity to respond prior to the live hearing, during the live hearing, or both prior to and during the live hearing.]; and
- [ABC College] **will** take reasonable steps to prevent and address the parties' and their advisors' unauthorized disclosure of information and evidence obtained solely through the sex-based harassment grievance procedures.

## Features of Heightened Process (106.46)

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- Notice of allegations is more robust; may delay provision of notice due to safety concerns
- Parties are entitled to advisor of choice
- Parties get notice/appeal for discretionary dismissal
- Discretion to determine whether parties may present expert witnesses - must apply equally to both parties
- Evidence or summary plus access to evidence

# Heightened Process Credibility Procedures (106.46(f))

---

- **Asynchronous process** – Parties submit questions, decision-maker asks questions and provides recording/transcript, parties submit follow-up questions, repeat
  - Investigator is permitted to conduct this process
- **Live Hearing** -
  - **Hearing Officer Led Process** – Decision-maker asks relevant, permissible questions submitted by parties
  - **Cross-Examination Process** (current procedures) – Advisors and decision-maker ask questions

## **Non-Participation - 106.46(f)(4)**

---

- A decisionmaker may choose to place less or no weight upon statements by a party or witness who refuses to respond to questions deemed relevant and not impermissible.
- The decisionmaker must not draw an inference about whether sex-based harassment occurred based solely on a party's or witness's refusal to respond to such questions.



# Sample of Sex-Based Harassment Grievance Procedure Involving Student Complainants or Student Respondents at Postsecondary Institutions (§ 106.46)

---



[ABC College] has adopted Title IX grievance procedures that provide for the prompt and equitable resolution of complaints made by students, employees, or other individuals who are participating or attempting to participate in its education program or activity, or by the Title IX Coordinator. These grievance procedures address complaints of sex-based harassment that involve a student party.

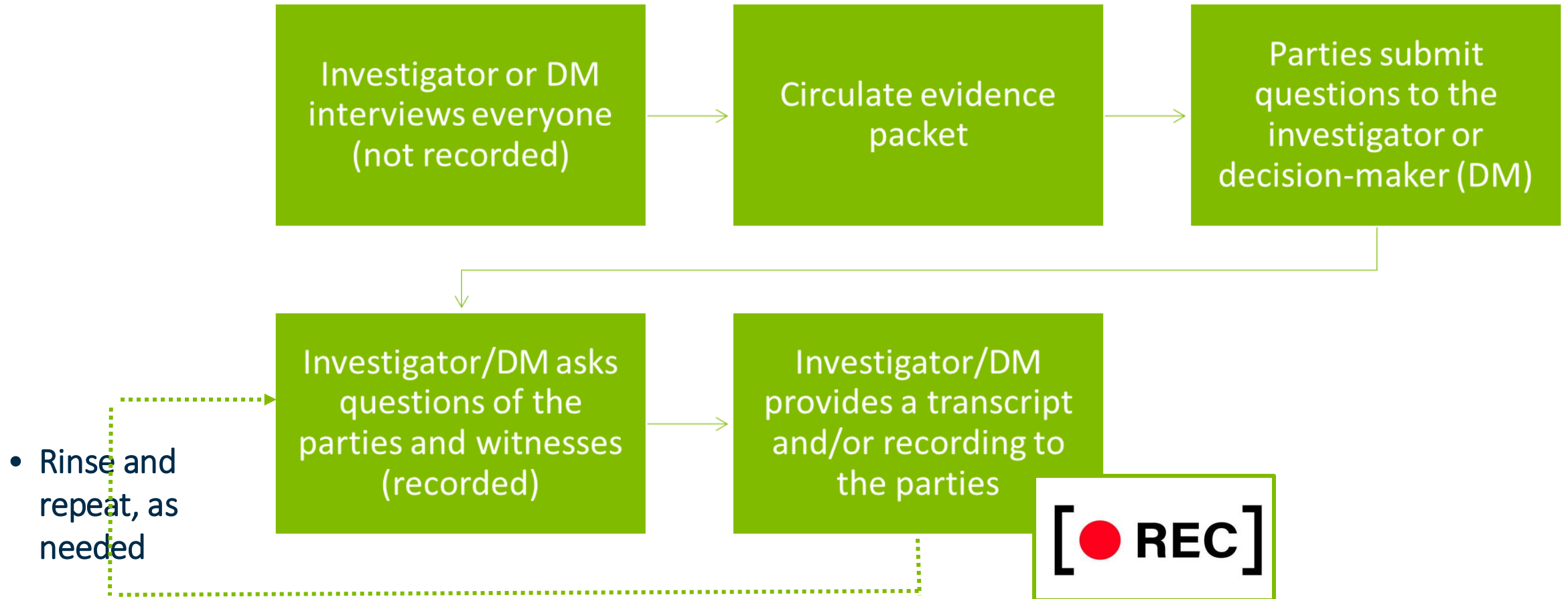
## Asynchronous Process 106.46(f)(1)(i)

---

- Must allow the investigator or decisionmaker to ask questions during individual meetings
- Must allow parties to propose questions to be asked during the individual meetings
- Must provide an audio/audio visual recording to each party – then allow a reasonable opportunity for follow-up questions
  - Possible to do the first "individual meeting" during the investigation and follow-up meetings after the evidence is shared
  - Should this happen AFTER the evidence/summary of evidence has been shared?



# Consider this sequence - Asynchronous



# Considerations for 106.46 - Asynchronous (1 of 2)

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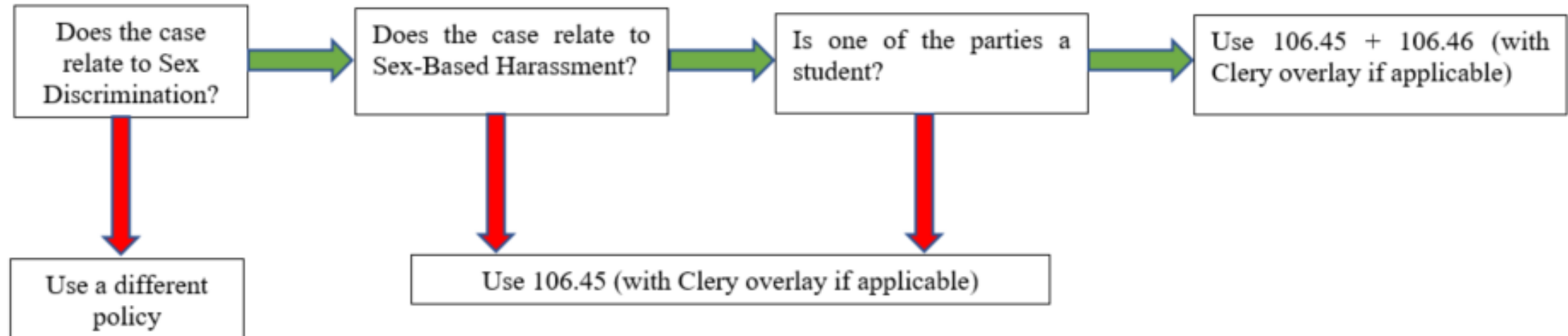
- Remember the questioning must be recorded and shared – are your investigators/decisionmakers prepared?
- Contemplates a back-and-forth process with parties preparing questions and follow-up questions – how many "back-and-forths" do you need?
- Going back and forth – at what point does this process stop being trauma-informed?

# Considerations for 106.46 - Asynchronous (2 of 2)

- What parameters do you want, if any, on the following:
  - Time for parties to submit questions (think: non-responsive parties)
  - Time for parties and witnesses to be interviewed (think: ghosting)
  - Process should continue until the parties have had an opportunity ask all appropriate and relevant questions and follow-up questions (p. 33739)
    - Appropriate number of meetings will depend on facts and circumstances of a given
    - If they become duplicative or harassing, may decline to ask additional questions



# Which Procedures Apply?



# Sample Language for 106.46 - Asynchronous

[ABC College] **will** provide a process that enables the decisionmaker to question parties and witnesses to adequately assess a party's or witness's credibility to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex-based harassment.

[When [ABC College] chooses not to conduct a live hearing: [ABC College's] process for proposing and asking relevant and not otherwise impermissible questions and follow-up questions of parties and witnesses, including questions challenging credibility, will:

- Allow the investigator or decisionmaker to ask such questions during individual meetings with a party or witness;
- Allow each party to propose such questions that the party wants asked of any party or witness and have those questions asked by the investigator or decisionmaker during one or more individual meetings, including follow-up meetings, with a party or witness, subject to the procedures for evaluating and limiting questions discussed below; and
- Provide each party with an audio or audiovisual recording or transcript with enough time for the party to have a reasonable opportunity to propose follow-up questions.]

## Hearing Officer Led Process 106.46(f)(1)(ii)(A)

---

- The decisionmaker asks all the questions
  - The decisionmaker can be the investigator?
- Allows each party to propose questions to be asked of other parties and witnesses
  - "Pass the list of questions-type hearing"
- Questions must be relevant and not otherwise impermissible
- Questions cannot be unclear or harassing
  - DM must give parties an opportunity to revise such questions
- Follow-up questions permitted



# Consider this sequence – Hearing Officer Led Process

Prior to the hearing, the parties submit questions to the decision-maker (DM)

At the hearing, the DM asks relevant, permissible questions

Parties/witnesses answer questions

Parties submit follow-up questions for DM to ask if relevant and permissible

# Considerations for Hearing Officer Led Process 106.46

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- Public v. Private?
  - This option is not compliant with *Baum*
- Will the parties feel heard without advisor questions?
- Necessary to train decisionmakers to make a record of their decisions re: questions
  - What is the process for acknowledging questions proposed by a party that will not be asked?
  - How will decisionmakers explain their thought process when re-phrasing a question

# Sample Language for 106.46 - Live Hearing Option #1

---

## (Decisionmaker asks questions prepared by the parties)

[ABC College's] process for proposing and asking relevant and not otherwise impermissible questions and follow-up questions of parties and witnesses, including questions challenging credibility, will allow the decisionmaker to ask such questions, and...

- Allow each party to propose such questions that the party wants asked of any party or witness and have those questions asked by the decisionmaker, subject to the procedures for evaluating and limiting questions discussed below

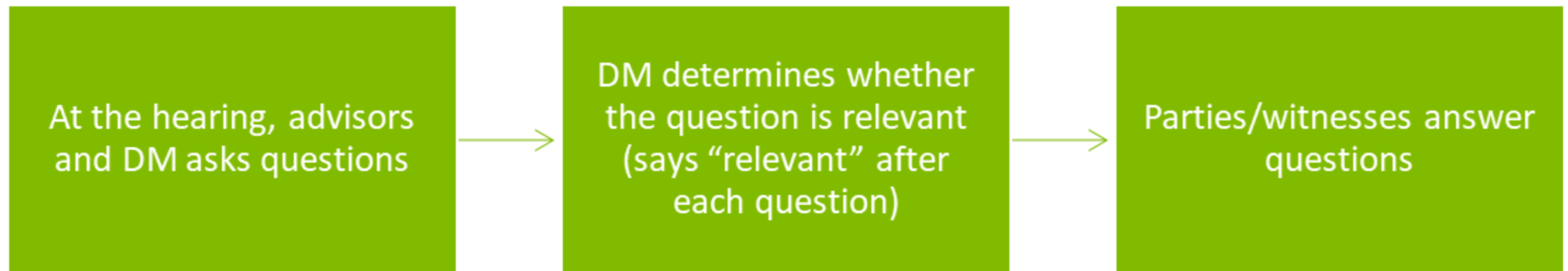
## Cross-Examination Process 106.46(f)(1)(ii)(B)

---

- Think of your current hearing process under the 2020 regs
- Questions asked by a decisionmaker and advisors
  - Must appoint advisor if party does not have one
- Questions must be relevant and not otherwise impermissible
- Questions cannot be unclear or harassing
  - DM must give parties an opportunity to revise such questions
- Must determine relevance "prior to the question being posed"

# Consider this sequence – Cross-Examination Process

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# Considerations for Cross-Examination Hearing (106.46)

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- Only option for public institutions in the 6th Circuit (*Baum*)
- Risk of re-traumatizing parties?
  - Consider the experience of your Title IX office since August 14, 2020
- Consider the resources available to you
- Necessary to train decisionmakers to make real-time relevance determinations

## Initial Thoughts

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- Court decisions may "guide" whether you choose Asynchronous Hearings, Hearing Officer Led Hearings, or Cross-Examination Hearings
- There are logistical issues with all hearing options. Asynchronous could be integrated into the investigator model if there is good planning.
- Consider which option is appropriate where:
  - A party refuses to participate in the process
  - All relevant conduct is documented in objective evidence (texts, videos)
  - There are no disputed facts based on the evidence collected

# Sample Language for 106.46 - Live Hearing Option #2

## (Permits Advisors to Question Parties and Witnesses)

[ABC College's] process for proposing and asking relevant and not otherwise impermissible questions and follow-up questions of parties and witnesses, including questions challenging credibility, will allow the decisionmaker to ask such questions

- Allow each party's advisor to ask any party or witness such questions, subject to the procedures for evaluating and limiting questions discussed below. Such questioning will never be conducted by a party personally. [If [ABC College] permits advisor-conducted questioning and a party does not have an advisor to ask questions on their behalf, [ABC College] will provide the party with an advisor of [ABC College's] choice, without charge to the party, for the purpose of advisor-conducted questioning. In those instances, [ABC College] will not appoint a confidential employee and may appoint, but is not required to appoint, an attorney to serve as an advisor.]



# Sample Language for 106.46 - Evaluating Questioning at the Hearing

*Procedures for the decisionmaker to evaluate the questions and limitations on questions:* The decisionmaker will determine whether a proposed question is relevant and not otherwise impermissible before the question is posed and will explain any decision to exclude a question as not relevant or otherwise impermissible. Questions that are unclear or harassing of the party or witness being questioned will not be permitted. The decisionmaker will give a party an opportunity to clarify or revise a question that the decisionmaker determines is unclear or harassing. If the party sufficiently clarifies or revises the question, the question will be asked.

*Refusal to respond to questions and inferences based on refusal to respond to questions:* The decisionmaker may choose to place less or no weight upon statements by a party or witness who refuses to respond to questions deemed relevant and not impermissible. The decisionmaker will not draw an inference about whether sex-based harassment occurred based solely on a party's or witness's refusal to respond to such questions.

# Sample Language for 106.46 - Determination Whether Sex-Based Harassment Occurred (1 of 4)

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Following an investigation and evaluation of all relevant and not otherwise impermissible evidence, [ABC College] **will:**

Use the [preponderance of the evidence or, if applicable, clear and convincing] standard of proof to determine whether sex discrimination occurred. The standard of proof requires the decisionmaker to evaluate relevant and not otherwise impermissible evidence for its persuasiveness. If the decisionmaker is not persuaded under the applicable standard by the evidence that sex discrimination occurred, whatever the quantity of the evidence is, the decisionmaker will not determine that sex discrimination occurred.

# Sample Language for 106.46 - Determination Whether Sex-Based Harassment Occurred (2 of 4)

Notify the parties simultaneously in writing of the determination whether sex-based harassment occurred under Title IX including:

- A description of the alleged sex-based harassment;
- Information about the policies and procedures that [ABC College] used to evaluate the allegations;
- The decisionmaker's evaluation of the relevant and not otherwise impermissible evidence and determination whether sex-based harassment occurred;
- When the decisionmaker finds that sex-based harassment occurred, any disciplinary sanctions [ABC College] will impose on the respondent, whether remedies other than the imposition of disciplinary sanctions will be provided by [ABC College] to the complainant, and, to the extent appropriate, other students identified by [ABC College] to be experiencing the effects of the sex-based harassment; and
- [ABC College's] procedures and permissible bases for the complainant and respondent to appeal.

# Sample Language for 106.46 - Determination Whether Sex-Based Harassment Occurred (3 of 4)



[ABC College] **will not** impose discipline on a respondent for sex discrimination prohibited by Title IX unless there is a determination at the conclusion of the Title IX grievance procedures that the respondent engaged in prohibited sex discrimination.

If there is a determination that sex discrimination occurred, as appropriate, the Title IX Coordinator **will**:

- Coordinate the provision and implementation of remedies to a complainant and other people [ABC College] identifies as having had equal access to [ABC College's] education program or activity limited or denied by sex discrimination;
- Coordinate the imposition of any disciplinary sanctions on a respondent, including notification to the complainant of any such disciplinary sanctions; and
- Take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within [ABC College's] education program or activity.

# Sample Language for 106.46 - Determination Whether Sex-Based Harassment Occurred (4 of 4)

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- Comply with the Title IX grievance procedures before the imposition of any disciplinary sanctions against a respondent; and
- Not discipline a party, witness, or others participating in the Title IX grievance procedures for making a false statement or for engaging in consensual sexual conduct based solely on the determination whether sex discrimination occurred.

The determination regarding responsibility becomes final either on the date that [ABC College] provides the parties with the written determination of the result of any appeal, or, if no party appeals, the date on which an appeal would no longer be considered timely.

# Sample Language - Procedures for a Live Hearing

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- [ABC College] **will** conduct the live hearing with the parties physically present in the same geographic location or, at [ABC College's] discretion or upon the request of either party, will conduct the live hearing with the parties physically present in separate locations with technology enabling the decisionmaker and parties to simultaneously see and hear the party or witness while that person is speaking.
- [ABC College] **will** create an audio or audiovisual recording or transcript of any live hearing and make it available to the parties for inspection and review.

# New Training Requirements

**106.8(d), pp. 33885-33886**

## Key Takeaways This Section: New Training Requirements (Slide 1 of 2)

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- ❑ The new regulations require training for all employees and your Title IX team including the Title IX Coordinators or designees – identify orientation periods where training can happen with new employees.
- ❑ Any employee whose job responsibilities are contemplated as a Title IX responsibility under the new regulations must be trained when their job responsibilities shift not just when they are newly hired – identify mechanisms to have human resources or academic affairs alert the Title IX Coordinator when an individual has changed job responsibilities to make sure that they can be trained promptly.
- ❑ Identify those members of your Title IX team who will need to be trained on your policy and by the August 1 deadline.



## Key Takeaways this Section: New Training Requirements (Slide 2 of 2)

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- Identify training schedules and on-line training platforms
- Update training materials to reflect changes in definitions.

# The Who and the When of Training Requirements 106.8(d)

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## Who?

1. "All employees"
2. Investigators, decisionmakers, and "other persons who are responsible for implementing the recipient's grievance procedures or have authority to modify or termination supportive measures."
3. "Facilitators of informal resolution process"
4. Title IX Coordinators or Designees.

## When? Two periods of time:

1. "promptly upon hiring" or "change in position that alters duties under Title IX;  
and
2. "Annually thereafter"

## "All Employees"

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- Recipient's obligation to address sex discrimination in its education program or activity
- The scope of conduct that constitutes sex discrimination, including definition of sex-based harassment
- All applicable notification requirements regarding student pregnancy (106.40(b)(2) - providing TIXC contact information and information about actions to ensure equal access and avoid discr.)
- All applicable notification requirements regarding response to sex discrimination (106.44(c) - NOTE: reporting requirements will be different depending on employee roles and status as student-employee)

# Title IX Team

## Training Requirement Summary



	All Employee Topics	Recipient's Response to Sex Disc. (106.44)	Recipients Grievance Procedures (106.45; poss. 106.46)	What is Relevant? What is Impermissible Evidence?	Serve impartially; Without Conflict of Interest and Bias.	Avoiding Prejudgment of Facts	Rules and Practices re: Informal Resolution (106.44(k))
Investigators	X	X	X	X	X	X	
Decisionmakers	X	X	X	X	X	X	
Resp. For Grievance Proc./Mod. Sup. Measures	X	X	X	X	X	X	
Informal Res.	X				X		X
Title IX Cord.*	X	X	X	X	X	X	X

- Title IX Coordinators and Designees have even more training requirements (106.8(d)(4))

# Title IX Coordinator/Designees

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Title IX Coordinators and Designees have more training requirements:

- Responsibilities to pregnant students
- Responsibilities under the grievance process, including with regard to supportive measures
- Recipient's recordkeeping system and Title IX recordkeeping requirements
- "Any other training necessary to coordinate the recipient's compliance with Title IX"

# Retaliation

**Definition: 106.2, p. 33884**

***See also* 106.71**

## Key Takeaways this Section: Retaliation

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- Identify policies, including Title IX Policy, that reference or use the old definition under 106.71.
- Update training materials to reflect changes in definitions.
- Note the reference to employees acting on behalf of a participant as being protected.

# Definition of Retaliation, 106.2, p. 33884 (1 of 2)

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- Intimidation, threats, coercion, or discrimination against any person by the recipient, a student, or an employee or other person authorized by the recipient to provide aid, benefit, or service under the recipient's education program or activity,
  - For the purpose of interfering with any right or privilege secured by Title IX or this part, or
  - Because the person has reported information, made a complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part, including an information resolution process, in grievance procedures, and in any other actions taken by a recipient [to eliminate the discrimination, prevent its recurrence, and remedy its effects]



## Definition of Retaliation, 106.2, p. 33884 (2 of 2)

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- Nothing in this definition or this part precludes a recipient from **requiring an employee** or other person authorized by a recipient to provide aid, benefit, or service under the recipient's education program or activity **to participate** as a witness in, or otherwise assist with, an investigation, proceeding, or hearing under this part.

# Athletics

# Athletics

- Establishing separate athletic teams under § 106.41(b) = not de minimis harm.
- Preventing someone from participating in school including in sex-separate activities (athletics) consistent with their gender identity = de minimis harm?

**The Athletics NPRM (*Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male or Female Athletic Teams*) was NOT a part of this rule.**



# Pregnancy and Parenting

**Definitions: 106.2, p. 3383-3384**

# Key Takeaways this Section: Pregnancy and Parenting

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- Note definitions of parenting status and pregnancy – scope is broad
- Socialize this notice and reporting requirements with HR and Academic Affairs
- Determine existing reporting pathways and enhance the ability for employees to access resources to provide to pregnant persons.
- Update training materials to reflect changes in definitions.

## Key Regulations

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- Admissions – 106.21(c)
- Non-discrimination, notice, and **reasonable modifications** – 106.40
- Voluntary leaves of absence – 106.40(b)(3)(iv)
- **Lactation space** - 106.40(b)(3)(v)
- **Limitations on supporting documentation** – 106.40(b)(3)(vi)
- Comparable treatment to other temporary medical conditions – 106.40(b)(4)
- Certification to participate – 106.40(b)(5)

# Pregnancy Discrimination and Title IX - Scope

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- Scope of sex discrimination now includes discrimination based on sex stereotypes, sex characteristics, **pregnancy or related conditions**, sexual orientation, and gender identity. (§ 106.10).

## Definition of Parental Status – 106.2, p. 3383

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- The status of a person who, with respect to another person who is under the age of 18 or who is 18 or older but is incapable of self-care because of a physical or mental disability, is:
  - A biological parent;
  - An adoptive parent;
  - A foster parent;
  - A stepparent;
  - A legal custodian or guardian;
  - In loco parentis with respect to such a person; or
  - Actively seeking legal custody, guardianship, visitation, or adoption of such a person.



# Definition of Pregnancy or Related Conditions – 106.2, p. 33883-33884

- Pregnancy, childbirth, termination of pregnancy, or lactation;
- Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation; or
- Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions.



# Provide Reasonable Modifications

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- 34 C.F.R. 106.40(b)(3)(ii)(B)
  - "The recipient must make **reasonable modifications** to the recipient's policies, practices, or procedures as necessary to prevent sex discrimination and ensure equal access to the recipient's education program or activity. Each reasonable modification must be **based on the student's individualized needs**. In determining what modifications are required under this paragraph, **the recipient must consult with the student.**"
- 34 C.F.R. 106.40(b)(3)(ii)(B)
  - "A modification that a recipient can demonstrate would **fundamentally alter** the nature of its education program or activity **is not a reasonable modification.**"

## Limitations on Supporting Documentation

---

- 34 C.F.R. 106.40(b)(3)(vi)
- A recipient must not require supporting documentation under paragraphs (b)(3)(ii) through (v) unless the documentation is necessary and reasonable for the recipient to determine the reasonable modifications to make or whether to take additional specific actions under paragraphs (b)(3)(ii) through (v).

# Availability of Lactation Spaces

---

- 34 C.F.R. 106.40(b)(3)(v)
  - The recipient must ensure that the student can access a lactation space, which must be a space other than a bathroom, that is clean, shielded from view, free from intrusion from others, and may be used by a student for expressing breast milk or breastfeeding as needed.

# Optional Policy Components

## Examples of Prohibited Conduct

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- Do you have examples in your current policy? Your pre-2020 regulations policy?
- Examples from the Preamble
- Examples from EEOC's "Enforcement Guidance on Harassment in the Workplace" (April 29, 2024)
  - Recognize that workplace examples may not always work for student-to-student interactions

## Definition of "Discrimination"

---

- Look to your current civil rights policy
- Will typically include the following components:
  - Treating someone differently in a negative way ("adverse action" or "adverse impact")
  - Because of
  - A protected status – in this case, sex

## Guidance regarding "Discrimination"

---

- Consider providing guidance on how a determination will be reached
  - Example:

In determining whether discrimination occurred, [the Office] will consider the following:

- Whether there was an adverse action taken against the complainant,
- Whether individuals outside of the protected class received more favorable treatment.

If these two conditions are met, [the Office] will consider whether there is a legitimate, non-discriminatory reason for the action.



## "One stray remark"

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- Preamble, p. 33508:

"In addition, and as indicated elsewhere in this preamble, **one stray remark does not satisfy the level of pervasiveness to which the regulations refer.** The Department reaffirms the statement in the July 2022 NPRM that the **offensiveness of a particular expression as perceived by some persons, standing alone, would not be a legally sufficient basis to establish a hostile environment under Title IX.** (citation omitted) Further, a statement of one's point of view on an issue of debate and with which another person disagrees, event strongly so, is not the kind or degree of conduct that implicates the regulations."

## Written Notice under 106.45

---

- 106.45(c) requires that parties receive *Notice of the Allegations* upon initiation of 106.45 grievance procedures
- This notice doesn't have to be in writing
  - "... the Department leaves it to recipients' discretion to determine whether to provide written notice of allegations outside the context of complaints of sex-based harassment involving a postsecondary student." Preamble, 33638
  - In other words – written notice is required for 106.46, but not 106.45
- But... "a recipient may choose to reduce notices to writing..." 33681
- Consider your institutional ethic of care
- Discuss due process/state law concerns with your legal counsel

# Prohibition on Considering Prior Statements Not Tested by Cross-Examination in Live Hearings (1 of 2)

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- Consider *VRLC*, 2022 guidance from ED, and the fact that no such prohibition exists in the 2024 regulations
- Public institutions: must consider *Baum*
- Consider sample language on next slide

# Sample Language – Refusal to Respond to Questions

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*Refusal to respond to questions and inferences based on refusal to respond to questions:* The decisionmaker may choose to place less or no weight upon statements by a party or witness who refuses to respond to questions deemed relevant and not impermissible. The decisionmaker will not draw an inference about whether sex-based harassment occurred based solely on a party's or witness's refusal to respond to such questions.

# Incapacitation Definition

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- How is your definition working for you?
- Should incorporate an objective standard for whether Respondent knew or should have known
- Can be helpful to consider examples of what incapacitation might look like to a Respondent



# Character Evidence

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- What does your policy say now?
- See 33524
  - ED declined commenter's suggestion to state that evidence that aides in credibility determination is relevant
  - Sometimes evidence that goes to credibility will be relevant, but
  - "... there may be evidence that arguably pertains to credibility but is irrelevant to the allegations of sex discrimination."
  - When credibility is (1) in dispute and (2) is relevant, decisionmakers may question parties and witnesses to assess credibility
- Your policy language regarding character evidence should consider relevance to the issue of credibility and the allegations
  - Blanket prohibitions may preclude relevant evidence

## Pattern Evidence

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- What does your policy say now?
- 33514:

"The Department agrees that other sex-based harassment may prompt a Title IX Coordinator to address broader concerns. The Department also clarifies that a respondent's past sex-based harassment of people other than the complainant **would not be part of the analysis of whether current sex-based harassment by the respondent created a hostile environment for the complainant.** However, as explained in the discussion of § 106.45(b)(7)(iii), such pattern evidence may be permissible for use in Title IX grievance procedures, as the recipient must objectively evaluate pattern evidence to the extent it is relevant, i.e., whether it is related to the allegations of sex-based harassment under investigation and may aid a decisionmaker in determining whether the alleged sex-based harassment occurred."

# Structural Considerations



# Where do I start?

---

- Start with your current policy
  - Does its structure make sense?
  - Can you amend what you have?
- Think about the steps of the process
  - Start with general information about prevention and training
  - Move through the process of a case
  - Definitions, Intake, Supportive Measures, Process for individual cases
- Separate process from policy?
  - May be helpful if you have different processes that apply to different groups (students, employees)
  - Consider necessary approval processes – same for policies and procedures?
  - If not – separate procedure documents may provide for greater flexibility

# Language Considerations

## Be Mindful of Policy Language

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- Avoid charged words like victim, survivor, and perpetrator
  - Recognizing we still have the NIBRS definitions from 2020
- Generally safe to stick with the language of the regulations...
  - Informal Resolution
  - Supportive Measures (NOT "accommodations")
- BUT – be careful with "cross-examination"
  - Doesn't appear in the current regs, but required by *Baum*

## Be Consistent

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- If you refer to a particular resource on one page – refer to that resource by the same name throughout the policy
- If your policy addresses more than one resolution process, consider giving them Titles that can be used to identify them in trainings, communications to parties, scripts, etc.
  - "Investigator Resolution Process"
  - "Asynchronous Process"

# Your Next Moves

## Next Steps

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- Determine the process necessary to approve the policy by the deadline.
  - Does your Board need to approve? If so, can they schedule a meeting over the summer?
  - Does any other group on campus need to approve (e.g. Faculty Senate) based on your policy approval requirements? If so, what is the timeline?
- Gather your stakeholders – Board members, faculty, staff, students, community members?
- Get feedback on what choices might fit your community best
- Make decisions about the options you will exercise in your policy.
- Work with counsel to integrate your choices—and your ethic of care—into the policy.

## Our Next Moves

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If you want to join our newsletter to make sure you don't miss out on future trainings, go to [www.brickergraydon.com/subscribe](http://www.brickergraydon.com/subscribe)

**Thank You**

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