



# Title IX Coordinator Training

## Part 1 of 3

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# Title IX Coordinator Training

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Christine Galdston, J.D., LL.M.

Title IX Consultant

[Christine@T9Now.com](mailto:Christine@T9Now.com)

[www.T9NOW.com](http://www.T9NOW.com)





# Organization & Content

## 01

- History & Context
- Conflicts of Interest, Bias & Impartiality
- Title IX Personnel
- Key Terms
- Record-keeping

## 02

- Sexual Harassment
- Mandatory Response Obligations
- What to do When You Receive a Report/Complaint

## 03

- Investigation
- Hearing
- Dismissals
- Appeals
- Sanctions & Remedies



# Part 1

History & Evolution of Title IX

Underlying Principles

Supreme Court Framework

Overview of Major Provisions & Procedural Protections

Training Requirements

Bias, Conflict of Interest & Impartiality

Title IX Personnel

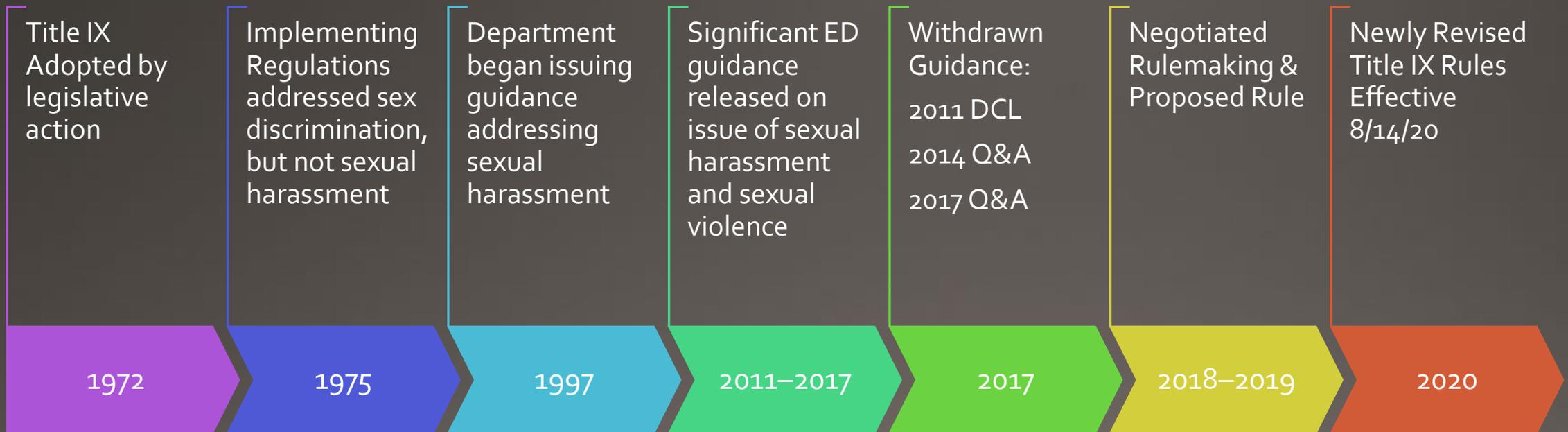
Key Terms & Definitions

Record Keeping

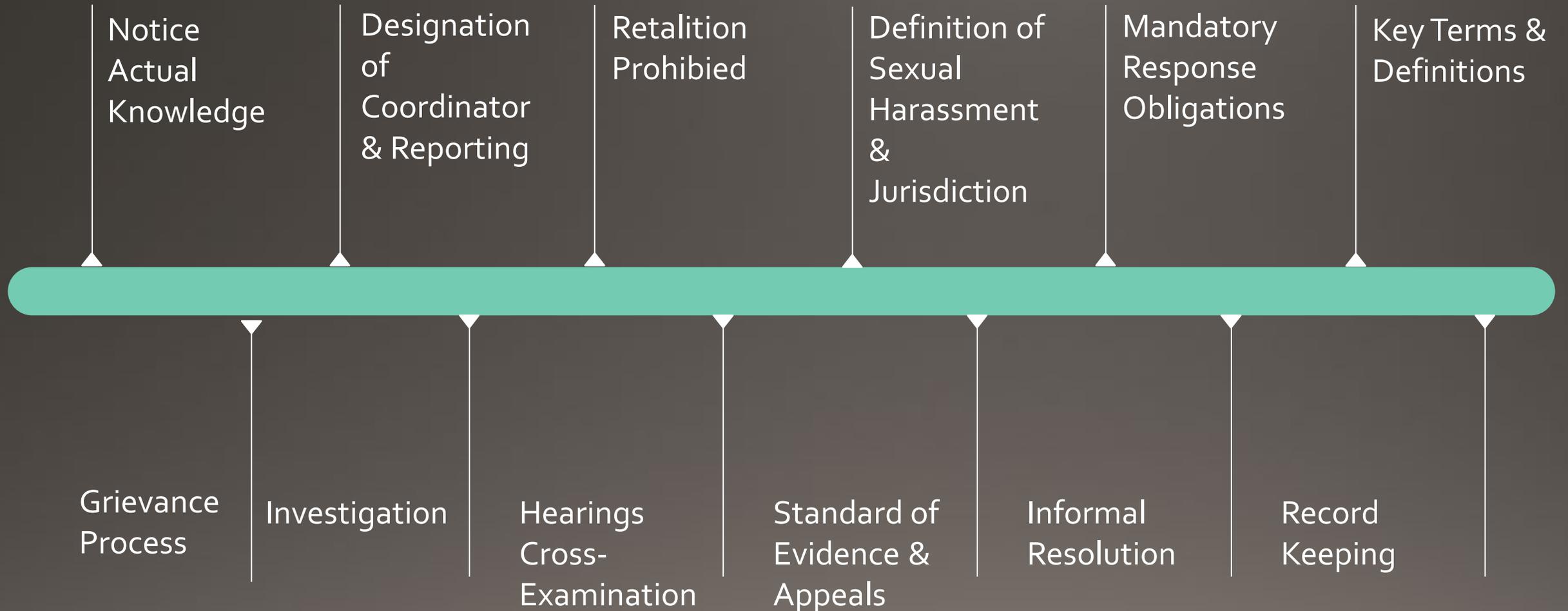




# History & Evolution



# FINAL TITLE IX RULE MAJOR PROVISIONS



# Principles Underlying the New Rules

Protect	Protect Due Process & Fundamental Fairness
Improve	Improve Integrity of the Grievance Process
Effectuate	Effectuate Purpose of the Law in Preventing Sex Discrimination





# Supreme Court Framework

*Gebser v. Lago Vista Independent School District (1998 524 U.S. 274)*

*Davis v. Monroe County Board of Education (1999 526 U.S. 629)*



# Supreme Court Framework

1. Sexual Harassment
2. Actual Knowledge
3. Deliberate Indifference



# Three-Pronged Definition of Sexual Harassment

1. Unwelcome sexual conduct that is so severe and pervasive and objectively offensive it effectively denies a person equal educational access
2. Quid Pro Quo
3. Clery/VAWA Sex Offenses

*\*Quid Pro Quo and Clery prongs do not have to be severe, pervasive and objectively offensive; a single incident falling within the scope of either could constitute prohibited sexual harassment*



# Actual Knowledge

- Notice of sexual harassment or allegations of sexual harassment
- Made to the Title IX Coordinator
- Or to any school official who has the authority to institute corrective measures on behalf of the school



# Deliberate Indifference

- Was the school's response clearly unreasonable in light of the known circumstances?
- Did the school respond meaningfully to every report of alleged sexual harassment whether or not it triggered the formal grievance process?



# Deliberate Indifference

*The school's response:*

- **Must be Prompt**
- **Must Include offering supportive measures to complainant**
- **Ensures the Title IX Coordinator contact each complainant to discuss supportive measures**
- **Considers complainant's wishes regarding supportive measures**
- **Informs the complainant of the availability of supportive measures with or without filing a formal complaint**
- **Explains the process for filing a formal complaint**
- **Treat the parties equitably (*i.e. not identically, but equitably*)**
- **Follows the grievance process before imposing any disciplinary sanctions on respondent**
- **Effectively implements remedies designed to restore or preserve educational access**



# Procedural Protections 106.45

CITATION	SUMMARY
106.45(a)	School's treatment of parties may constitute discrimination
106.45(b)(1)(i)-(x)	Grievance Process Requirements
106.45(b)(2)	Written Notice of Allegations to Both Parties
106.45(b)(3)-(b)(4)	Formal Complaints Must be Investigated, Dismissals, Consolidation
106.45(b)(5)(i)-(vii)	Investigation Requirements
106.45(b)(6)	Cross Examination Conducted by Advisor
106.45(b)(7)	Independent/Neutral Decision-maker, Standard of Evidence Same, Written Determination
106.45(b)(8)	Appeals: Procedural Irregularities, New Evidence, Bias or Conflict of Interest
106.45(b)(9)	Informal Resolution: Voluntary, Written Consent. Not Allowed for Employee Respondent
106.45(b)(10)	Record Keeping, Publication of Training Material



# Mandatory Training Requirements 106.45(b)

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

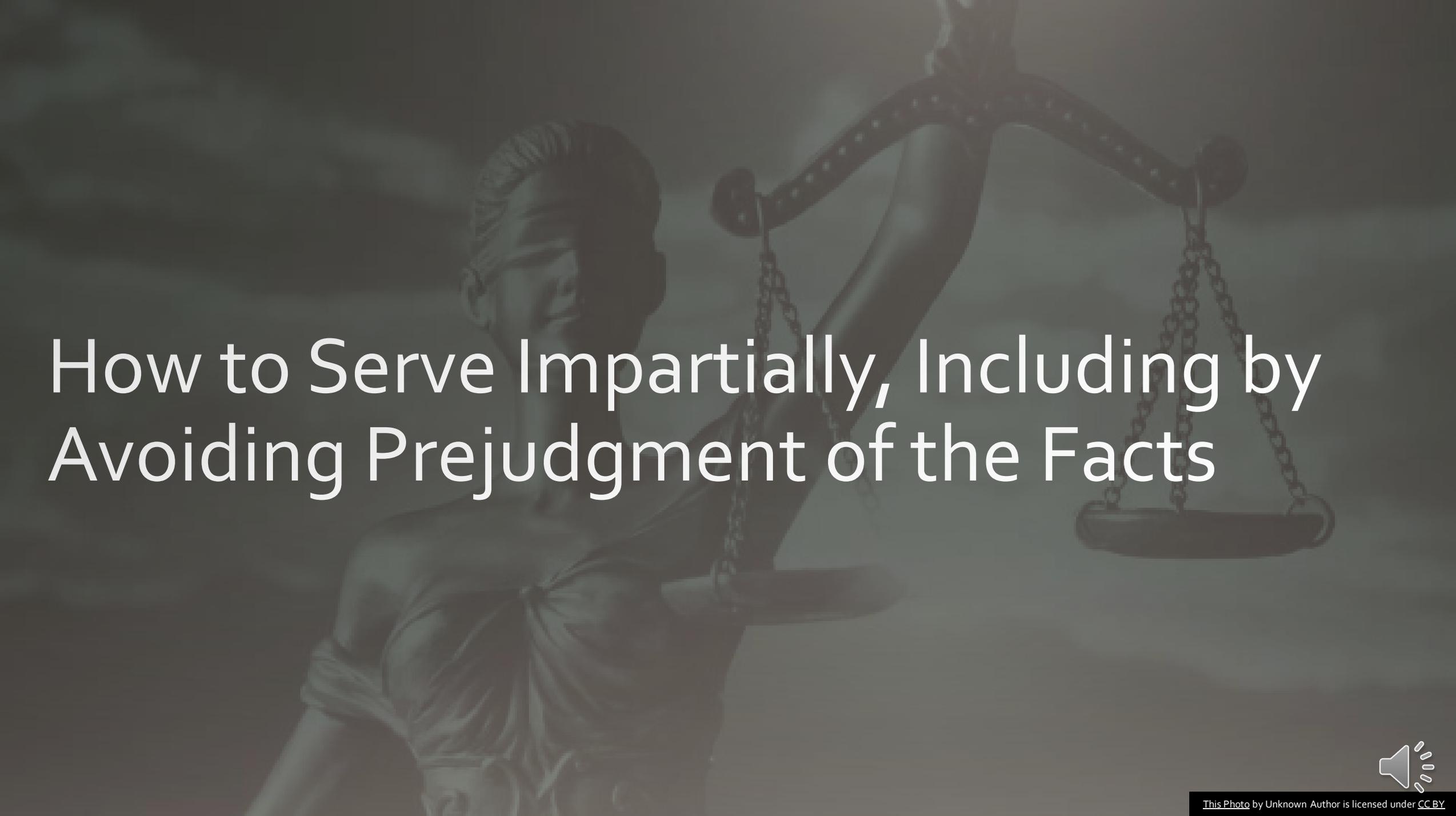


## Mandatory Training Requirements 106.45(b)

*\*ALL training materials must be made publicly available on school's website.*

*\*Training materials must be maintained for seven years.*



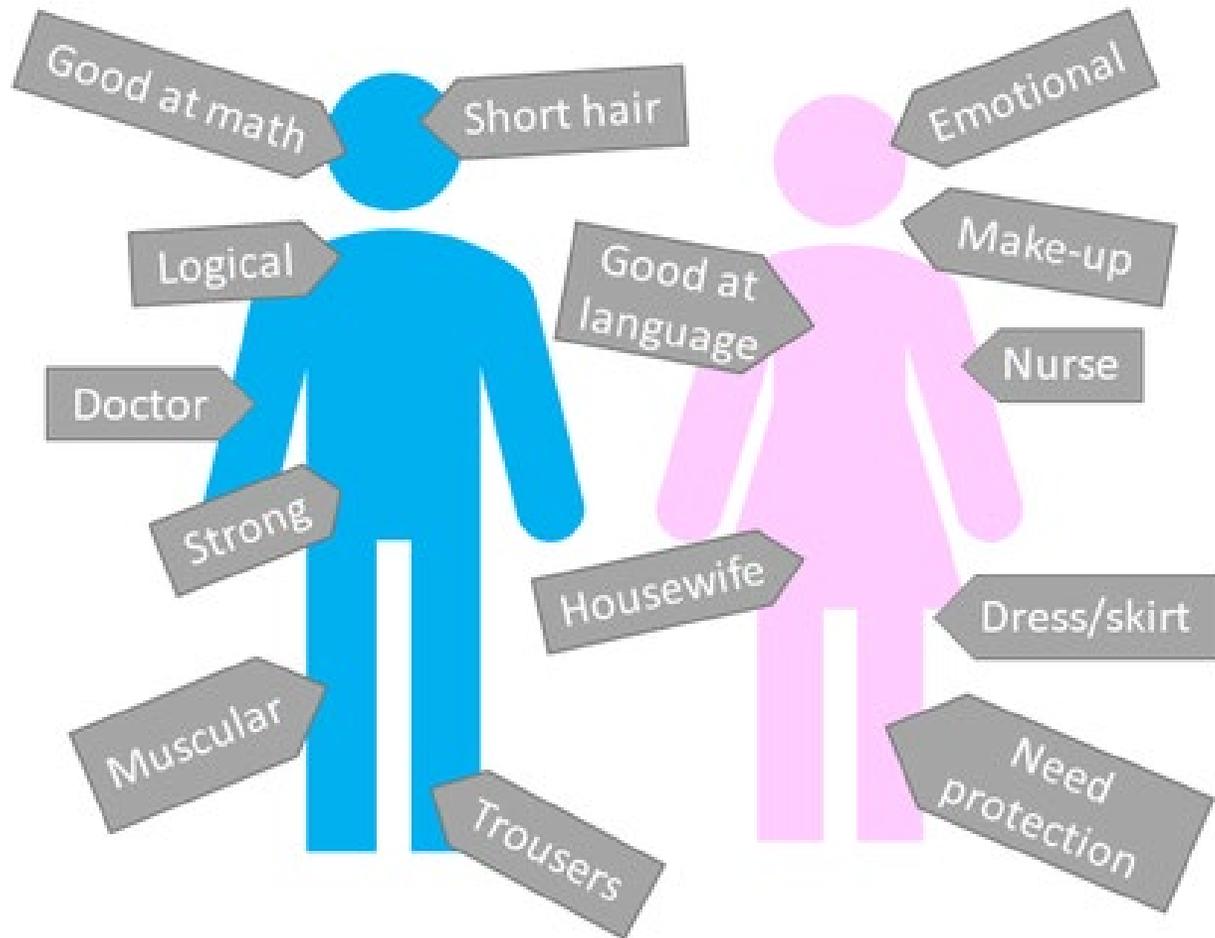


# How to Serve Impartially, Including by Avoiding Prejudgment of the Facts



# How to Avoid Conflicts of Interest and Bias





## *Avoiding Sex Stereotypes*

Any materials used to train must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment



# Title IX Personnel

Title	Responsibilities	Training	Status
Title IX Coordinator (multiple &/or deputies)	Coordinate, Intake Reports & Complaints, T9 analysis, Initiate Formal Complaint, Implement Supportive Measures	Sexual Harassment, Investigation & Grievance Procedure, Hearings, Appeals & Informal Resolution (as applicable); Impartiality, Relevance, Privilege	Must be Employee May Not Serve as Decision-Maker
Investigator	Conduct Fair, Objective and Impartial Investigation, Differentiate b/w Related & Relevant Evidence & Privilege	Sexual Harassment; How to Conduct an Investigation, Impartiality, Relevance, Privilege, Report-Writing	Staff or External May Not Serve as Decision-Maker
Decision Makers	Evaluate Evidence, Make & Write Decision, "Rule" on Relevancy during Cross-Examination	Sexual Harassment, Hearing Process, Technology, Evidence/Relevancy	Staff or External Cannot Serve in Any Other Capacity
Advisor(s)	Question Opposing Party & Witnesses	None required	Party provided Staff or External
Informal Resolution Facilitator	Informal Resolution Processes	Informal Resolution Processes	Staff or External



# Title IX Personnel: Official with Authority(OWA)

- Described in 34 CFR 106.30
- Notice to OWA is Actual Knowledge
- OWA determination is fact specific, depending on circumstances unique to each school
- Training, ability or obligation to report does not equal OWA
- School may designate OWA



School “must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities” under Title IX

Intake reports and complaints

Threat & T9 Applicability Assessments

Offer & coordinate supportive measures

- “The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures”

May investigate if can do so objectively & without bias

- *ED cautions against conflict of interest*

“Responsible for effective implementation of any remedies”

# What Does the Title IX Coordinator Do?



## Title IX Coordinator Role 106.8

- Must be an employee with the specific job title “Title IX Coordinator”
- Must publish and disseminate this employees contact information with your policy
- Must have the requisite authority to fulfill their responsibilities in compliance with the law



# Investigators, Decision-makers & Facilitators

- Rule prohibits “single-investigator model”
- Coordinator *may* serve as investigator as long as can do so conflict and bias-free \* *note the Department cautions on this*
- Schools may structure T9 team as best suits their needs otherwise, as long as they ensure objectivity and impartiality



Complainant  
& Respondent

Formal  
Complaint

Supportive  
Measures

Actual  
Knowledge

Consent

Sexual  
Harassment

# Key Terms & Definitions 34 CFR 106.30



## Complainant & Respondent 106.30

- Parties to the complaint: alleged victim and alleged perpetrator of conduct that could constitute sexual harassment.
- Complainant: participating or attempting to participate in program or activity
- Respondent: enrolled or under recipient's control



## Formal Complaint 106.30

- A document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation.
- May be filed in person, by mail, by electronic mail, or by other methods identified by school.
- “document filed by a complainant” is either a document or electronic submission that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the one filing the formal complaint.



# Supportive Measures

Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or respondent before or after the filing of a formal complaint or where no complaint has been filed.



Designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party.



Obligated to offer (with or without a formal complaint) and to engage in an interactive discussion with complainant regarding their wishes.



Must be kept confidential to the extent possible to allow implementation.



# Supportive Measures 106.30

- Non-disciplinary, non-punitive
- Individualized services that may be offered to the complainant *or respondent* free of charge
- That do not **unreasonably** burden the other party
- May include services to protect the safety of all parties as well as the school's educational environment or to deter sexual harassment
- Must be kept confidential to the extent possible
- Schools must document the facts and circumstances that render the supportive measures they have implemented appropriate *and* must also document rationale if they do not implement supportive measures explaining how this decision was not *deliberately indifferent*



## Supportive Measures 106.30

- Must promptly contact the complainant to discuss the availability of supportive measures
- Must consider complainant's wishes
- Must inform complainant of the availability of supportive measures with or without filing a complaint



## Actual Knowledge 106.30(a)

- “Notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient”
- “Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge”
- “the mere ability or obligation” to report “or having been trained to do so” does not equal actual knowledge



# Consent

- Not Defined in Regulations
- Critical Contested Issue in Many Cases
- Affirmative Consent Required in Some States
- California “Yes Means Yes”
- New York “Enough is Enough”



# Consent

- Must clearly define and consistently apply your definition
- The school carries the burden of collecting sufficient evidence to reach a final determination, not the parties
- Especially when using an affirmative consent standard, be mindful that you do not misuse it by requiring the respondent to prove the existence of consent or likewise shift the burden to a complainant to prove the absence of consent



# Record Keeping



# Recordkeeping 106.45(b)(10)

- Seven Year Retention Period
- Reports & Complaints
- Any Action Taken in Response
- Basis for Conclusions that Response Was Not Deliberately Indifferent
- Supportive Measures
- Rationale If No Supportive Measures
- Other Measures to Restore or Preserve Equal Access
- Dismissal Records
- Investigation Records, Determinations, Recording of Hearing
- Record of Sanctions/Discipline or Remedies
- Appeals & Decision
- Training Material
- Informal Resolution & Outcome



## Record Keeping 106.45(b)(10)(ii)

- Schools need to create a record to demonstrate why and how their response and actions were not deliberately indifferent.
- Documentation of emergency removals and administrative leaves for employee respondents must also be maintained.



## Re-Cap & Key Takeaways

- Definition of sexual harassment and scope of rule is significantly narrowed
- Supportive measures are emphasized and always required
- Due process and fundamental fairness must be preserved
- Record keeping requirements include documentation that school's response was not deliberately indifferent



## Part 2 Preview

- Sexual Harassment Defined
- Mandatory Response Obligations
- What to do When You Receive a Report/Complaint





# Title IX Coordinator Training

## Part 2 of 3

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- Sexual Harassment Definition
- Scope & Jurisdiction
- What to do When You Receive a Report/Complaint
- Dismissals
- Grievance Process Timeframe

## 03

- Investigation
- Hearing
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- Appeals
- Sanctions & Remedies



## Part 2

- Definition of Sexual Harassment
- Reports & Complaints
- Does Title IX Apply? Scope & Jurisdiction
- What to Do When You Receive a Report of Sexual Harassment
- Dismissals
- Reasonably Prompt Timeframe



# Definition of Sexual Harassment 3-Prongs

Quid Pro Quo	<i>Employee</i> Conditions Something of Value for Sexual Favor
<i>Davis</i> Standard	So Severe, Pervasive and Objectively Offensive
VAWA Crimes	Sexual Assault, Stalking, Dating & Domestic Violence



# Sexual harassment 106.30

1. An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
3. "sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30)



# Sexual harassment: Quid Pro Quo

- Applies solely to an employee respondent
- Involves an abuse of authority by an employee
- Doesn't require a showing of severity, pervasiveness or offensiveness
- Need not be explicit, could be implied



## Sexual harassment: Severe, Pervasive, Offensive (*Davis*)

- ***“Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity”***
- ***directed at verbal or expressive conduct***
- ***evaluated under the “reasonable person standard” taking into consideration the characteristics of the alleged victim***



## Sexual harassment: Clery/VAWA Crimes

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



# Sexual Assault

- Sexual assault means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation
- Includes any sexual act directed against another person without their consent, including rape, sodomy, sexual assault with an object, fondling, incest and statutory rape





# Sexual Assault & Consent

- What is key with sexual assault is CONSENT, or the lack thereof
- The new regs DO NOT DEFINE CONSENT; this is left up to institutions
- Some states do have laws that mandate a specific definition of CONSENT
- Must clearly define and consistently apply your definition
- The school carries the burden of collecting sufficient evidence to reach a final determination, not the parties
- Especially when using an affirmative consent standard, be mindful that you do not misuse it by requiring the respondent to prove the existence of consent or likewise shift the burden to a complainant to prove the absence of consent



# Dating Violence

- **(10) DATING VIOLENCE** The term “[dating violence](#)” means violence committed by a person—
- **(A)** who is or has been in a social relationship of a romantic or intimate nature with the victim; and
- **(B)** where the existence of such a relationship shall be determined based on a consideration of the following factors:
  - **(i)** The length of the relationship.
  - **(ii)** The type of relationship.
  - **(iii)** The frequency of interaction between the persons involved in the relationship.



# Domestic Violence

**8) DOMESTIC VIOLENCE** THE term “[domestic violence](#)” includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or [youth](#) victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction.



# Stalking

- **(30)STALKING** THE term “[stalking](#)” means engaging in a course of conduct directed at a specific person that would cause a reasonable person to—  
**(A)**fear for his or her safety or the safety of others; or
- **(B)**suffer substantial emotional distress.



# Retaliation Prohibited 106.71

*“No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege under Title IX, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner.”*



# Jurisdiction & Scope

Who? What? When? Where? Why?



# Jurisdiction & Scope

## Who?

Any person may report; Complainant must be actively attempting to participate in educational program or activity; Respondent must be enrolled or under recipient's control

## What?

Conduct that meets the definition of sexual harassment

## When?

No SOL/time limit as long as other conditions met

## Where?

In the U.S. & within the school's educational program or activity

## Why?

“on the basis of sex”

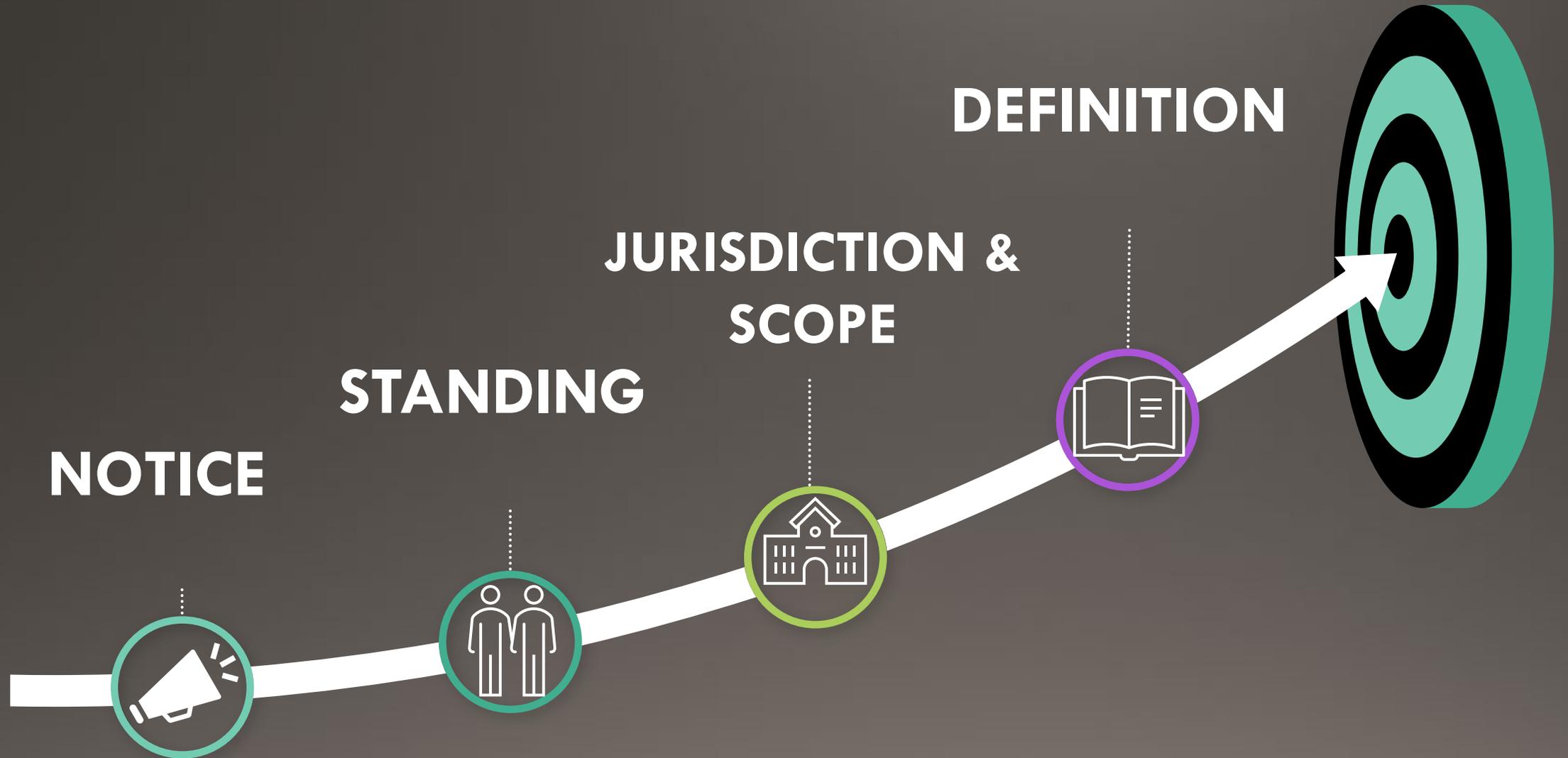


## Educational Program or Activity 106.44

- Locations, events, or circumstances where the school exercises substantial control over both:
  - the Respondent
  - the context in which the alleged sexual harassment or discrimination occurs
    - includes any building owned or controlled by the school or by a student organization that is officially recognized by the school.



# TITLE IX ASSESSMENT



## Formal Complaint 106.30

- A formal complaint is a *“document filed by complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting recipient investigate the allegation of sexual harassment”*
- Schools should not take the requirement of a written formal complaint to create “bureaucratic loopholes” or technicalities to avoid initiating the grievance process



# Filing a Formal Complaint

- goal is to make filing a complaint “as accessible as possible”
- may be filed with the Title IX Coordinator in person, by mail or by electronic mail
- schools may identify “any additional method”
- formal complaint can’t be filed by phone; schools could use an online submission portal
- rules do not restrict the method in which a REPORT may be received
- schools must disclose the contact information for the Title IX Coordinator **PROMINENTLY** on their website and in any catalog or handbook
- Complaints may be consolidated if involve multiple complainants or respondents and allegations arise out of the same set of circumstances



# Formal Complaint Signed by a Title IX Coordinator

- only the Title IX Coordinator may initiate a complaint if the complainant does not want to
- the decision to move forward is made on behalf of the school, not the complainant
- school has an obligation to uphold and comply with Title IX and an obligation not to act with deliberate indifference
- if the allegations would warrant disciplinary action, the school cannot institute punitive or disciplinary action without first going through the grievance process

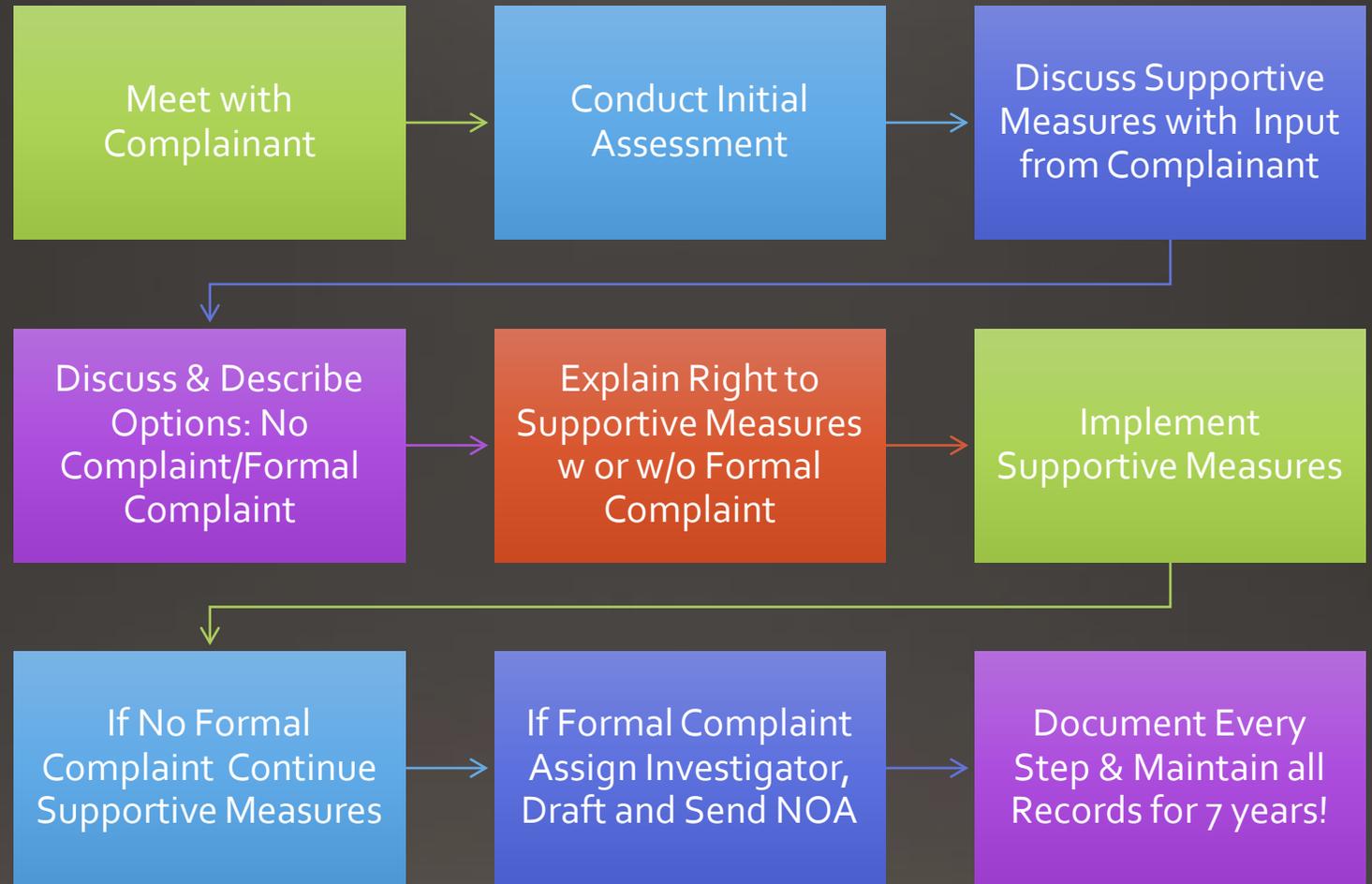


# Anonymous Reports & Complaints

- regulations do not prohibit schools from implementing anonymous reporting
- the school has actual knowledge when such a report goes to the Title IX Coordinator or OWA
- school is under an obligation to respond in a manner that is not deliberately indifferent
- coordinator may initiate a formal complaint even if complainant's identity is unknown



# What to Do When You Receive a Report



# Emergency Removal 106.44(c)

- Emergency: Immediate Threat to Physical Health or Safety
- Arising out of the Allegations of Sexual Harassment
- Based on an Individualized Risk and Safety Assessment
- Must Allow for Immediate Challenge
- 106.44(d) Authorizes Administrative Leave for Employees



# Assessing a Report or Complaint

Actual Knowledge?

- Report to Tg Coordinator?
- Report to Official with Authority?

Jurisdiction  
&  
Scope?

- Over the Parties?
- Education Program or activity?
- In the U.S.?

Sexual Harassment?

- Quid Pro Quo or Clery Crime?
- Severe and Pervasive and Objectively Offensive?



# If Allegation Does Not Trigger Title IX Response

- implement supportive measures
- refer to non-Title IX misconduct process
- adjust code of conduct process for non-T9 sexual misconduct



# Title IX Sexual Harassment or Code of Conduct Violation?



# Supportive Measures

- Referral to counseling, medical/health services
- Referral to employee assistance program
- Mutual no-contact orders
- Student financial aid counseling
- Altering campus housing
- Altering work arrangements
- Safety planning
- Providing campus escorts
- Providing academic accommodations
- Increased campus security
- Timely warnings
- Visa and immigration services
- LOAs/ scheduling modifications



# Dismissals 106.45(b)(3)

Doesn't meet definition or jurisdictional requirements

Complainant wants to withdraw complaint

Respondent is no longer enrolled or employed

Specific circumstances prevent school from gathering evidence sufficient to reach a determination



## Mandatory Dismissals 106.45 (b)(3)(i)

- 1. would not constitute sexual harassment as defined in 106.30, even if proved,*
- 2. did not occur in the recipient's educational program or activity,*
- 3. or against a person in the United States*



## Discretionary Dismissals 106.45 (b)(3)(ii)

1. Complainant notifies the Coordinator in writing that they would like to withdraw the complaint, or any allegation therein
2. The respondent is no longer enrolled or employed by the school
3. Specific circumstances prevent the school from gathering evidence sufficient to reach a determination as to the formal complaint



## Dismissals 106.45 (b)(3)

- apply to individual allegations or to an entire complaint
- the parties must receive written notification and reasons for any dismissal
- mandatory dismissals are appealable



# Informal Resolution 106.45(b)(9)

- Can only be offered after a formal complaint is filed
- Must provide written notice disclosing allegations, details and consequences of the process
- Both parties must voluntarily consent in writing to the informal process
- Cannot be used in cases where respondent is an employee
- Either party may withdraw from the informal process, which would trigger the formal grievance process
- Facilitators must be trained and impartial, free from conflicts & bias
- School may not pressure/condition informal resolution on enrollment or employment



# Reasonably Prompt Timeframes

## 106.45(b)(1)(v)

- School determines timeframe as long as it is reasonably prompt
- Must balance due process and fundamental fairness with prompt resolution
- Includes appeals and informal resolution processes
- Administrative delay is not sufficient “good cause”



# Reasonably Prompt Timeframes

## 106.45(b)(1)(v)

### Delays & Extensions

- Must be Temporary, Limited & for Good Cause
- Must provide written notice to parties



# Reasonably Prompt Timeframes

## 106.45(b)(1)(v)

- Administrative Delay
  - *School's inefficiency not good cause*
- Availability of Parties & Witnesses
- Law Enforcement Activity
- Accommodations for Disabilities
- Language Assistance



# Reasonably Prompt Timeframes

## 106.45(b)(1)(v)

### Concurrent Law Enforcement Activity

- distinct, separate and independent processes
- obligated to respond to T9 allegations irrespective of criminal matter
- law enforcement investigation could justify a delay or extension
- delay cannot be protracted or open-ended

### Availability of Parties & Witnesses

- must try to accommodate individuals' schedules to allow their meaningful participation
- parties may participate remotely
- a party or witness cannot indefinitely delay the grievance process by refusing to cooperate
- the process can proceed even in the absence of a party or witness
- must keep nonparticipating party informed



## Part 2 Re-cap & Key Takeaways

1. *A school must respond if the allegations meet the definition of sexual harassment, the conduct occurred in the scope of the school's educational program or activity, in the US, and both the respondent and complainant are enrolled/engaged or under the school's control*
2. *Once triggered the school must respond with supportive measures that ensure complainant's continued access to the educational program or activity, whether or not, a formal complaint is filed; the Coordinator will conduct an assessment to determine next steps*
3. *If a case doesn't fall within the scope of T9 it must be dismissed and may be handled under the school's other policies*
4. *Informal resolution is an option for schools if the parties agree after a formal complaint is filed and must adhere to the informal resolution requirements*
5. *The entire process must be resolved within reasonably prompt timeframes that allows for reasonable delay or extensions for good cause*



## Part 3 Preview

### *The Grievance Process*

- *Investigation*
- *Hearing & Cross-examination*
- *Appeal*
- *Sanctions & Remedies*





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- Dismissals
- Grievance Process Timeframe

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## Part 2 Review

- Definition of Sexual Harassment
- Reports & Complaints
- Does Title IX Apply? Scope & Jurisdiction
- What to Do When You Receive a Report of Sexual Harassment
- Dismissals
- Reasonably Prompt Timeframe



## Part 3

- Grievance Process
- Due Process & Fundamental Fairness
- Investigation
- Evidentiary Considerations
- Hearing
- Cross-Examination
- Appeals
- Sanctions & Remedies



# Mandatory Training Requirements 106.45(b)

- ✓ *On Title IX's definition of "sexual harassment"*
- ✓ *On the scope of the school's education program or activity*
- ✓ *On how to serve impartially, including by avoiding prejudgment of the facts at issue*
- ✓ *On how to avoid conflicts of interest and bias*
- ✓ *Any materials used to train must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.*
- ✓ ***On how to conduct an investigation and grievance process***
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# Grievance Process: Basic Requirements

- (i) Treat parties equitably
- (ii) Require objective evaluation of all relevant evidence
- (iii) Train Title IX personnel & post all training on web-site
- (iv) Include a presumption that respondent is not responsible
- (v) Include reasonably prompt time frames
- (vi) Describe the range of, or list, possible disciplinary sanctions and remedies
- (vii) State standard of evidence: preponderance or clear and convincing
- (viii) Include process and bases for appeals
- (ix) Exclude privileged evidence



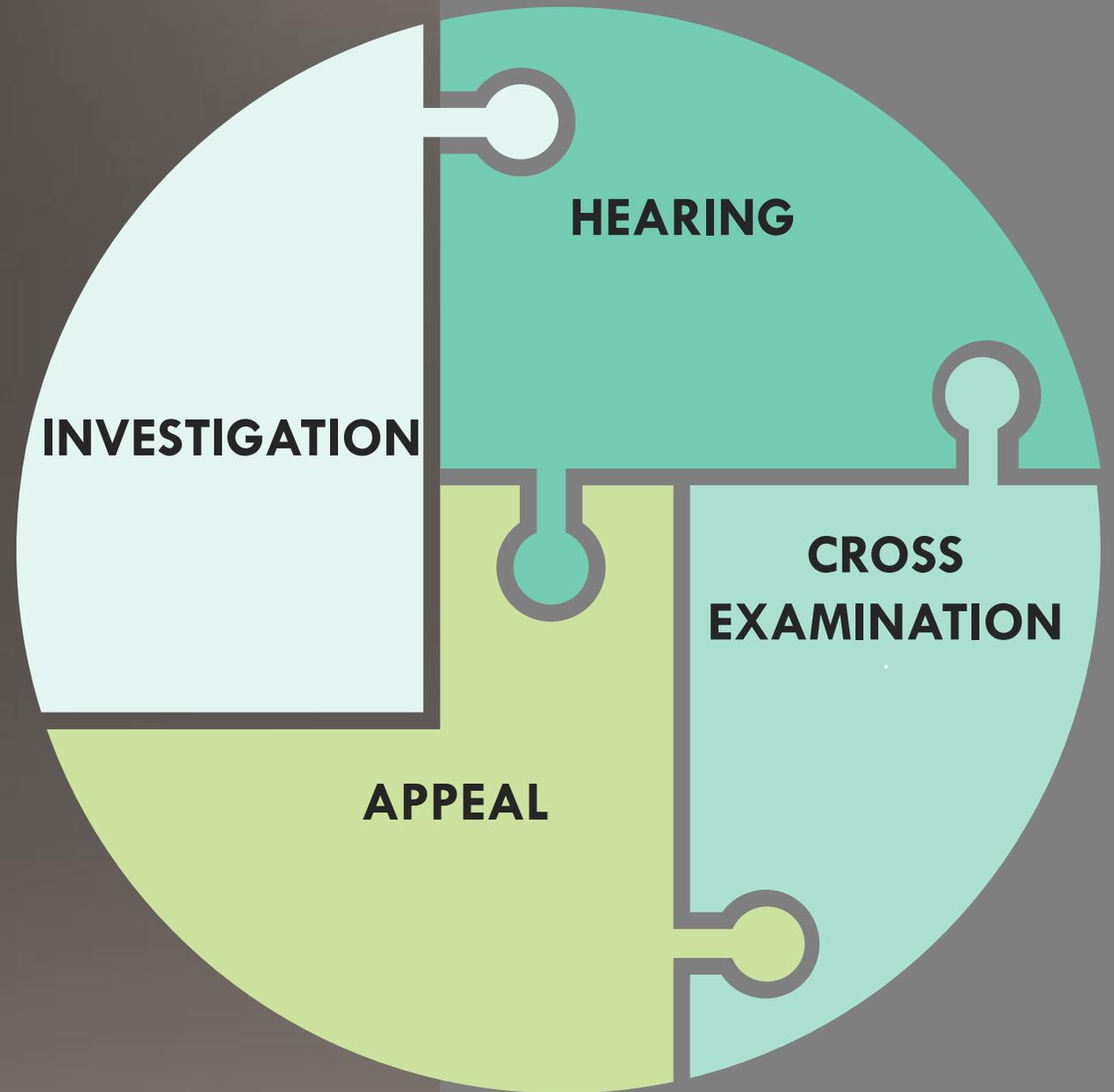
School's treatment of parties may constitute discrimination  
106.45(a)

*(a) A recipient's treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination...*

*(b)...Any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment...apply equally to both parties.*



**FORMAL  
GRIEVANCE  
PROCESS:  
MAJOR  
COMPONENTS**



## Treat parties equitably 106.45(b)(1)(i)

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



Require objective evaluation of all relevant evidence 106.45(b)(1)(ii) Title IX personnel must be conflict & bias free

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

*(iii) Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment in § 106.30, the scope of the recipient’s education program or activity....*



## Presumption of Non-Responsibility 106.45(b)(1)(iv) Reasonably Prompt Timeframes

- Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility at the conclusion of the grievance process.
- Include reasonably prompt timeframes for the conclusion of the grievance process, including appeals and informal resolutions, with allowance for short-terms, good cause delays or extensions of timeframes



## Describe the range of, or list, possible disciplinary sanctions and remedies 106.45(b)(1)(vi)

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

*Title IX Coordinator responsible for effective implementation of remedies: addressed under § 106.45(b)(7)(iii)*

- \*Sanctions/discipline are punitive, the intent is to punish and prevent future recurrence; Focus is on the respondent
- \*Remedies and are provided ensure equal access; Focus is on the victim, or on the campus community at large
- \*Both sanctions and remedies are imposed after a finding of responsibility
- \*Remedies are similar to supportive measures, but they differ in that supportive measures are offered prior to any grievance process (or without a grievance process) and may not be punitive or unreasonably burden the respondent
- \*Remedies, however, are implemented after a finding of responsibility and they may place a burden on respondent and may be punitive
- \*Remedies MUST be implemented upon a finding of responsibility



## State standard of evidence: preponderance or clear and convincing 106.45(b)(1)(vii)

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

- \*Standard must be used consistently across all cases
- \*Same standard must apply to both student and employee cases
- \*Preponderance: 51% or more likely that conduct did or did not occur
- \*Clear and Convincing: higher bar, evidence is more than 51% but less than beyond a reasonable doubt



Include process and bases for appeals 106.45(b)(1)(viii) and Range of Supportive Measures 106.45(b)(1)(ix)

- ✓ Describe the procedures and permissible bases for the complainant and respondent to appeal;
- ✓ Describe the range of supportive measures available to complainants and respondents



## Privileged Evidence Inadmissible 106.45(b)(1)(x)

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

- ✓ medical records
- ✓ psychological records
- ✓ attorney-client communications
- ✓ spousal privilege
- ✓ school remains subject to any other applicable privacy laws



## Notice of Allegations (NOA) 106.45(b)(2)

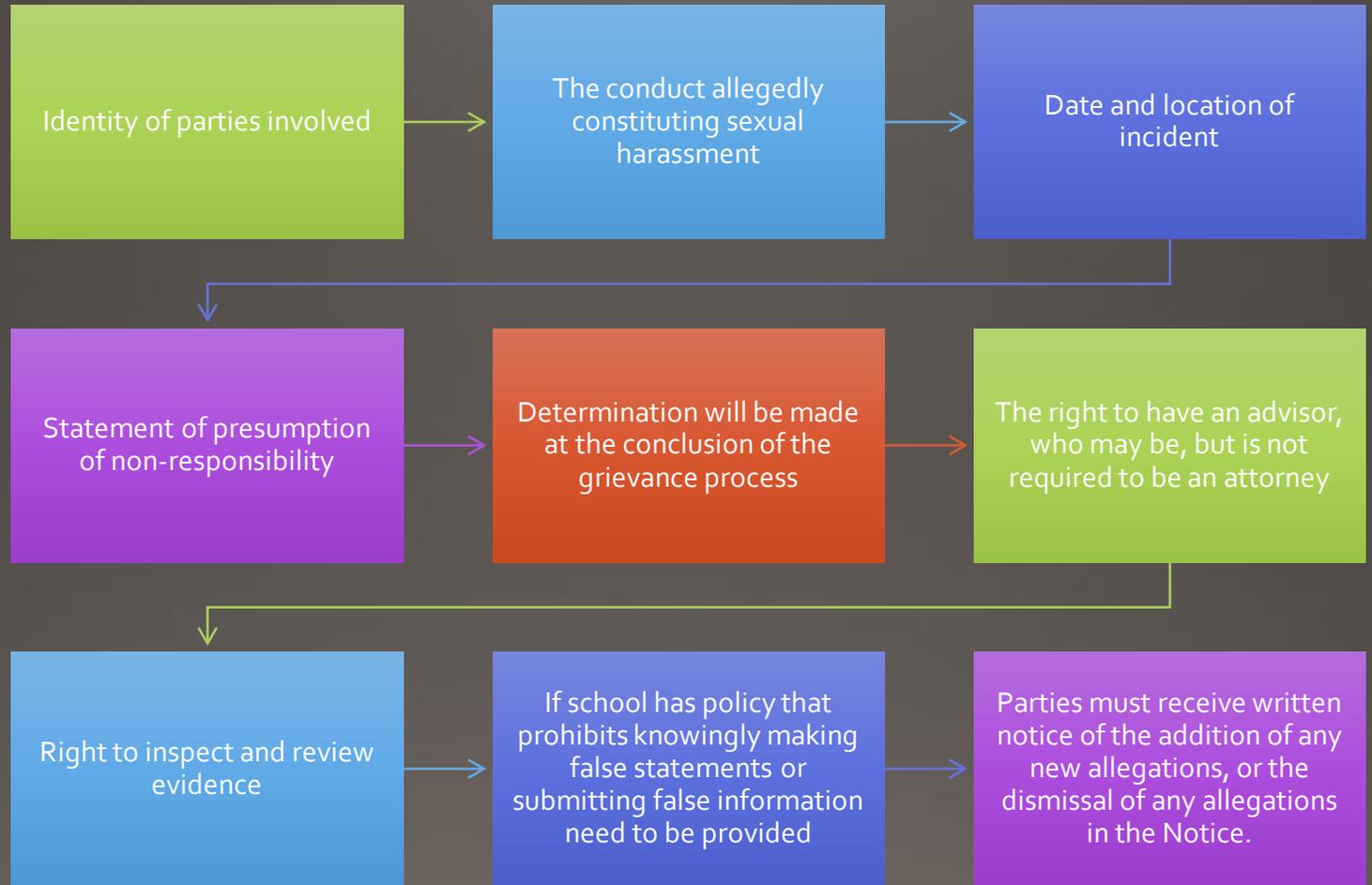
*Notice of allegations—(i) Upon receipt of a formal complaint, a recipient must provide the following written notice to the parties who are known:*

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

*(B) Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in § 106.30, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview.*



# Notice of Allegations



## Sufficient Details of NOA 106.45(b)(2)(B)

- ✓ Identities of the parties involved in the incident, if known,
  - ✓ Conduct allegedly constituting sexual harassment
  - ✓ Date and location of the alleged incident, if known
  - ✓ Statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process
  - ✓ Right to an advisor of their choice, who may be, but is not required to be, an attorney
  - ✓ Right to inspect and review evidence
  - ✓ Include any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process
- \*Protect PII (SS#, homes address, phone numbers, etc) to extent possible*



# Formal Complaints Must be Investigated

## Dismissals & Consolidation 106.45(b)(3)-(5)

### Formal Complaints Must be Investigated

- must undertake an investigation in all cases where a formal complaint is filed
- concurrent law enforcement activity or investigation could justify delay *but* any such delay would only apply *after* the NOA is provided
- investigative techniques used in criminal setting would not necessarily apply; no delay in NOA or investigation; parties must have notice and opportunity to prepare

### Mandatory Dismissal

- if allegations do not meet the definition, scope and jurisdictional requirements of Title IX they must be dismissed

### Consolidation

- may (but are not required to) consolidate complaints





# Investigation: Rights of the Parties



# Investigator

*Preamble: “Final regulations leave recipients..... flexibility to use their own employees, or to outsource Title IX investigation and adjudication functions, and the Department encourages recipients to pursue alternatives to the inherent difficulties that arise when a recipient’s own employees are expected to perform these functions free from conflict of interest and bias”*

- Single investigator model prohibited (Investigator cannot be decision-maker)
- May have more than one investigator on a case
- Title IX Coordinator may serve as Investigator, although this could raise issues in terms of potential conflict of interest or bias
- Conflict & bias of Title IX personnel is a basis for appeal
- Schools must have process to ensure no conflict/bias and *may* provide a process for parties to assert claims of conflict/bias during the investigation



## Burden of Proof 106.45(b)(5)(i)

*\*The burden of gathering evidence and the burden of proof must remain on schools not the parties*

- Both parties have the right to provide evidence and witnesses, but it is not their responsibility
- It is the school's job to conduct the investigation, track down and gather all of the evidence possibly and interview witnesses...
- The school is neutral during this process, they are not focusing on gathering evidence to prove respondent "guilty" or to prove respondent is not responsible; they are not "building a case"
- The goal is a truth-seeking mission; gather everything so that a neutral decision maker can reach an accurate determination based on the facts



## Opportunity to Present Evidence 106.45(b)(5)(ii)

*Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence*

\*note witnesses may be “expert” witnesses although what constitutes an expert witness, and who qualifies as an expert, is not defined

\*same rules/evidentiary considerations would apply, i.e. evidence concerning complainant’s prior sexual behavior is not relevant (with limited exceptions), privileged evidence is inadmissible unless waived, etc.



# Right to Discuss the Allegations & Gather Evidence

## 106.45(b)(5)(iii)

- ✓ Schools must not restrict the ability of the parties to discuss the allegations or gather evidence (no gag orders)
- ✓ Parties have the right to discuss the allegations with anyone they choose with limited exceptions:
  - ✓ no-contact directive
  - ✓ retaliatory manner



## Right to an Advisor 106.45(b)(5)(iv)

*Parties must have the same ability to select an advisor of choice, who may be, but need not be an attorney*

- ✓ Parties can choose anyone to be their advisor
  - ✓ friend, parent, classmate, attorney
- ✓ Role of advisors
  - ✓ provide support, accompany party to meetings/interviews
  - ✓ adversarial with respect to their role in the hearing and in conducting cross examination
- ✓ School may limit to advisor's role with respect to their participation
- ✓ Any rules around the role of advisors must apply equally to both parties
- ✓ If a party does not have an advisor, the school must provide one at no cost to the party for the limited purpose of conducting cross exam during the hearing
- ✓ Advisor does not have to match the qualifications of the other party's, so if the other party has an attorney, the school is not obligated to provide an attorney



## Written Notice 106.45(b)(5)(v)

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

\*School must balance promptness with procedural protections/due process



# Opportunity to Review Evidence & Investigative Report

Prior to completion of investigative report, school must send to parties and their advisors, all evidence gathered that is directly related to the allegations, inculpatory & exculpatory, and provide at least 10 days to review and respond in writing

Final investigation report must fairly summarize relevant evidence and be provided to party and the party's advisor at least 10 days prior to a hearing with an opportunity to review and respond in writing



## Investigation Requirements 106.45(b)(5)(vi) Right to Inspect Evidence

Schools must send the parties *and their advisors*:

- ✓ **ALL** evidence directly related to the allegations
  - \**will include relevant **and irrelevant evidence** including that which would otherwise be excluded under the rape shield protections*
- ✓ includes evidence the school will not use/rely in making a decision
- ✓ includes inculpatory or exculpatory evidence whether obtained from a party or other source
- ✓ electronic format or a hard copy, otherwise, method and format of delivery up to school
- ✓ parties must have *at least 10 days* to submit a written response
  - \*consider when determining reasonable timeframes
- ✓ the investigator will consider parties input prior to completion of the investigative report
- ✓ evidence *must be made available at hearing*



# Investigation Requirements 106.45(b)(5)(vii) Right to the Investigative Report & Evidence

AFTER the initial review period which includes all evidence:

- ✓ the investigator will finalize the investigative report incorporating feedback received from the parties as appropriate.
- ✓ The final report will summarize RELEVANT evidence
  - \* will exclude evidence about complainant's prior sexual history with two limited exceptions
- ✓ The final report must be provided to the parties and their advisors in electronic or hard copy, at least ten (10) days prior to the hearing, with an opportunity to respond in writing.



# Dismissals 106.45(b)(3)

Doesn't meet definition or jurisdictional requirements

Complainant wants to withdraw complaint

Respondent is no longer enrolled or employed

Specific circumstances prevent school from gathering evidence sufficient to reach a determination



## Evidentiary Considerations

Burden of Proof: school carries the burden to collect evidence

Related-to: all evidence that is related to the allegations; includes relevant and irrelevant evidence

Relevant: all evidence directly related to the allegations EXCEPT evidence related to the complainant's prior sexual behavior unless it is offered to provide identity or consent

Privileged: evidence subject to a legally recognized privilege, attorney-client, physician-patient, spousal, clergy, medical/health or psychological records

Statements of non-cooperating party or witness: the statements of a party or witness that does not submit to cross examination may not be considered by the decision-maker in rendering a decision

Appeal: appeal based on procedural irregularity could include appeal of a decision to include or not include evidence based on categorization as relevant or not, or on school's failure to objectively evaluate all relevant evidence



## Independent/Neutral Decision-maker 106.45(b)(7)

- ✓ *Decision-maker must be independent*
- ✓ *Appeal decision-maker must also be independent, they must be different from the hearing decision-maker, so you will need to have two trained decision-makers available for every case in the event a party appeals*
- ✓ *Schools may utilize multiple decision-makers in a case, such as a panel, within their discretion*
- ✓ *Decision-maker makes relevancy determinations during the hearing, after each question, and prior to each answer during cross, will need to provide the rationale for any determination that evidence is not relevant*



# Live Hearing

Cross-examination must be conducted the party's advisor of choice (or school provided if party does not have one):

- ✓ directly
- ✓ orally
- ✓ in real time
- ✓ never by a party personally

\*At the request of either party, the recipient must provide for the entire hearing to occur with the parties located in separate room with technology enabling the parties to see and hear each other

\*Live hearings may be conducted with all the parties physically present in the same location or, at the school's discretion, any or all parties, witnesses or other participants may appear at the live hearing virtually.



# Relevancy & Rape Shield Protections

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



# Non-Cooperating Party or Witness

- If a party or witness does not submit to cross examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility;
- However, the decision-maker cannot draw an inference based solely on that party's or witness's absence or refusal to answer questions
- School has no ability to compel either parties or witnesses to cooperate, appear at the hearing, provide testimony or otherwise participate in the process



# Record of Hearing

Schools must create an audio or audiovisual recording, or transcript of the hearing

- ✓ Must maintain for seven-years
- ✓ Parties have the right to inspect



## Written Determination 106.45(b)(7)

*The written determination must include:*

- Allegations potentially constituting sexual harassment
- Procedural steps taken
- Findings of fact
- Conclusions regarding the application of code of conduct to the facts
- Statement and rationale for each allegation
  - Including determination of responsibility
  - Any disciplinary sanctions & applicable remedies
- Bases & procedure for Appeal



# Appeals

Appeals of final determination or dismissal MUST be offered to both parties on the following bases:

Procedural irregularity that effecting outcome

New evidence, not reasonably available at the time of determination, that could affect the outcome

Title IX Coordinator, Investigator or Decision-maker had a conflict of interest or bias



## Part 3 Re-cap & Key Takeaways

- Formal Grievance Process requires that respondent must be presumed not responsible, and must incorporate the principles of due process & fundamental fairness
- The school carries the burden of proof and must conduct an impartial investigation, allowing the parties to provide evidence and witnesses and an opportunity to inspect and meaningfully respond to ALL evidence prior to completion of a final investigative report
- The school must provide a live hearing with cross examination conducted by advisors; only relevant and non-privileged evidence may be considered
- Both parties have a right to appeal under four different bases
- Sanctions may only be imposed after a finding of responsibility and Remedies must be afforded to complainant after a finding of responsibility



Supplemental Training Materials/Suggestions, and updates to the Rules will be posted at [www.T9Now.com](http://www.T9Now.com) or you may contact me directly at [Christine@T9Now.com](mailto:Christine@T9Now.com) with any questions.

Thank you!



A stack of several books with various colored spines (red, blue, brown) is visible on the right side of the slide. The background is a soft, out-of-focus light blue and white.

# Title IX Coordinator Training

## Part 3 of 3

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# Title IX Investigator Training

## Final Title IX Regulations

34 CFR Part 106

Effective August 14, 2020

# Title IX Investigator Training

July 2020

Christine Galdston, J.D., LL.M.  
Title IX Consultant  
[Christine@T9Now.com](mailto:Christine@T9Now.com)  
[www.T9NOW.com](http://www.T9NOW.com)



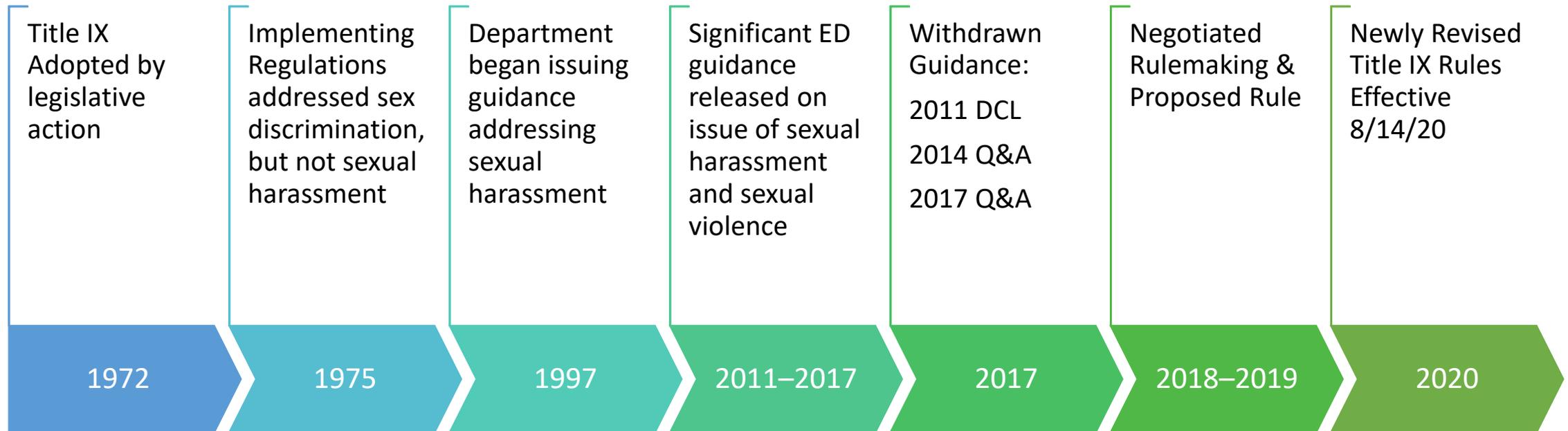
# Title IX Investigator Training

- ✓ *On Title IX's definition of "sexual harassment"*
- ✓ *On the scope of the school's education program or activity*
- ✓ *On how to serve impartially, including by avoiding prejudgment of the facts at issue*
- ✓ *On how to avoid conflicts of interest and bias*
- ✓ *On how to conduct an investigation*
- ✓ *Evidence: Relevancy, Privilege, Exclusions*





# History & Evolution



# Principles Underlying the New Rules

<b>Protect</b>	Protect Due Process & Fundamental Fairness
<b>Improve</b>	Improve Integrity of the Grievance Process
<b>Effectuate</b>	Effectuate Purpose of the Law in Preventing Sex Discrimination



# Procedural Protections 106.45

CITATION	SUMMARY
106.45(a)	School's treatment of parties may constitute discrimination
106.45(b)(1)(i)-(x)	<b>Grievance Process Requirements</b>
106.45(b)(2)	<b>Written Notice of Allegations to Both Parties</b>
106.45(b)(3)-(b)(4)	<b>Formal Complaints Must be Investigated, Dismissals, Consolidation</b>
106.45(b)(5)(i)-(vii)	<b><u>Investigation Requirements</u></b>
106.45(b)(6)	Cross Examination Conducted by Advisor
106.45(b)(7)	Independent/Neutral Decision-maker, Standard of Evidence Same, Written Determination
106.45(b)(8)	Appeals: Procedural Irregularities, New Evidence, Bias or Conflict of Interest
106.45(b)(9)	Informal Resolution: Voluntary, Written Consent. Not Allowed for Employee Respondent
106.45(b)(10)	Record Keeping, Publication of Training Material



# Title IX Personnel

TITLE	RESPONSIBILITIES	TRAINING	STATUS
Title IX Coordinator (multiple &/or deputies)	Coordinate, Intake Reports & Complaints, T9 analysis, Initiate Formal Complaint, Implement Supportive Measures	Sexual Harassment, Investigation & Grievance Procedure, Hearings, Appeals & Informal Resolution (as applicable); Impartiality, Relevance, Privilege	Must be Employee May Not Serve as Decision-Maker
Investigator	Conduct Fair, Objective and Impartial Investigation, Differentiate b/w Related & Relevant Evidence & Privilege	Sexual Harassment; How to Conduct an Investigation, Impartiality, Relevance, Privilege, Report-Writing	Staff or External May Not Serve as Decision-Maker
Decision Makers	Evaluate Evidence, Make & Write Decision, "Rule" on Relevancy during Cross-Examination	Sexual Harassment, Hearing Process, Technology, Evidence/Relevancy	Staff or External Cannot Serve in Any Other Capacity
Advisor(s)	Question Opposing Party & Witnesses	None required	Party provided Staff or External
Informal Resolution Facilitator	Informal Resolution Processes	Informal Resolution Processes	Staff or External



# Definition of Sexual Harassment

**Jurisdiction &  
Scope of Title IX  
Rule**



# Definition of Sexual Harassment 3-Prongs

Quid Pro Quo	<i>Employee</i> Conditions Something of Value for Sexual Favor
<i>Davis</i> Standard	So Severe, Pervasive and Objectively Offensive
VAWA Crimes	Sexual Assault, Stalking, Dating & Domestic Violence



# Definition of Sexual Harassment 3-Prongs

1. An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
3. "sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30)



# Sexual Harassment: Quid Pro Quo

- Applies solely to an employee respondent
- Involves an abuse of authority by an employee
- Doesn't require a showing of severity, pervasiveness or offensiveness
- Need not be explicit, could be implied



# Sexual Harassment: Severe, Pervasive, Offensive (*Davis*)

- “Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity”
- directed at verbal or expressive conduct
- evaluated under the “reasonable person standard” taking into consideration the characteristics of the alleged victim



# Sexual Harassment: Clery/VAWA Crimes

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



# Sexual Assault

- Sexual assault means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation
- Includes any sexual act directed against another person without their consent, including rape, sodomy, sexual assault with an object, fondling, incest and statutory rape



# Dating Violence

- (10) DATING VIOLENCE The term dating violence means violence committed by a person—
- (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and
- (B) where the existence of such a relationship shall be determined based on a consideration of the following factors:
  - (i) The length of the relationship.
  - (ii) The type of relationship.
  - (iii) The frequency of interaction between the persons involved in the relationship.



# Domestic Violence

8) DOMESTIC VIOLENCE THE term domestic violence includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.



# Stalking

- (30)STALKING THE term stalking means engaging in a course of conduct directed at a specific person that would cause a reasonable person to—(A)fear for his or her safety or the safety of others; or
- (B)suffer substantial emotional distress.



## Educational Program or Activity 106.44

- Locations, events, or circumstances where the school exercises substantial control over both:
  - the Respondent
  - the context in which the alleged sexual harassment or discrimination occurs
    - includes any building owned or controlled by the school or by a student organization that is officially recognized by the school



# Dismissals 106.45(b)(3)

Doesn't meet definition or jurisdictional requirements: apply to individual allegations or to an entire complaint  
the parties must receive written notification and reasons for any dismissal; mandatory dismissals are appealable

Complainant wants to withdraw complaint Complainant notifies the Coordinator in writing that they would like to withdraw the complaint, or any allegation therein

Respondent is no longer enrolled or employed

Specific circumstances prevent school from gathering evidence sufficient to reach a determination



# Formal Grievance Process



# Grievance Process Basic Requirements

Treat parties equitably

Require objective evaluation of all relevant evidence

Train Title IX personnel & post all training on web-site

Include a presumption that respondent is not responsible

Include reasonably prompt time frames

Describe the range of, or list, possible disciplinary sanctions and remedies

State standard of evidence: preponderance or clear and convincing

Include process and bases for appeals

Exclude privileged evidence



# Require objective evaluation of all relevant evidence

## 106.45(b)(1)(ii) Title IX personnel must be conflict & bias free

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

*(iii) Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment in § 106.30, the scope of the recipient’s education program or activity....*



# How to Serve Impartially & Objectively

106.45(b)(1)(ii) Require on objective evaluation of all relevant evidence-including both inculpatory and exculpatory evidence-and that provides credibility determinations may not be based on a person's status as a complainant, respondent or witness;



# Investigators Must be Conflict & Bias Free & May Not Serve as Decision-Makers

- Rule prohibits “single-investigator model”
- Coordinator *may* serve as investigator as long as can do so conflict and bias-free \* *note the Department cautions on this*
- May have more than one investigator on a case



# Conflicts of Interest and Bias

- Schools must have process to ensure no conflict/bias
- May provide a process for parties to assert claims of conflict/bias during the investigation
- Consider including a provision in your policy that allows students to raise concerns about an investigator, or any Title IX personnel during the grievance process
- Conflict & bias of Title IX personnel is a basis for appeal



# Presumption of Non-Responsibility

## 106.45(b)(1)(iv)

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



# Reasonably Prompt Timeframes



# Reasonably Prompt Timeframes 106.45(b)(1)(v)

## Concurrent Law Enforcement Activity

- distinct, separate and independent processes
- obligated to respond to T9 allegations irrespective of criminal matter
- law enforcement investigation could justify a delay or extension
- delay cannot be protracted or open-ended

## Availability of Parties & Witnesses

- must try to accommodate individuals' schedules to allow their meaningful participation
- parties may participate remotely
- a party or witness cannot indefinitely delay the grievance process by refusing to cooperate
- the process can proceed even in the absence of a party or witness
- must keep nonparticipating party informed



# The Investigation



# Investigation of a Formal Complaint

- School bears burden of proof and gathering evidence
- School cannot access, disclose, or otherwise use a party's medical records without voluntary, written consent
- Parties have the right to present witnesses and other inculpatory and exculpatory evidence
- Not restrict the ability of either party to discuss the allegations or to gather and present relevant evidence
- Provide the parties the right to an advisor, who may accompany them to any meeting
- Provide written notice of the date, time, location, participants, and purpose of all interviews, or other meetings, with sufficient time for the party to prepare
- Provide both parties and their advisors an equal opportunity to inspect and review any evidence prior to conclusion of the investigation
- Create an investigative report that fairly summarizes relevant evidence and, send to each party and the party's advisor, the investigative report for their review and written response





# Investigation: Rights of the Parties

Opportunity to Present Evidence & Witnesses

Cannot Restrict Parties Right to Discuss Case

Right to an Advisor

Notice & Opportunity to Prepare

Right to Review All Related-to Evidence

Right to Review Investigation Report

Burden on School Not on Parties



# Right to Discuss the Allegations & Gather Evidence

## 106.45(b)(5)(iii)

- ✓ Schools must not restrict the ability of the parties to discuss the allegations or gather evidence (no gag orders)
- ✓ Parties have the right to discuss the allegations with anyone they choose with limited exceptions:
  - ✓ no-contact directive
  - ✓ retaliatory manner



# Right to an Advisor 106.45(b)(5)(iv)

*Parties must have the same ability to select an advisor of choice, who may be, but need not be an attorney*

- ✓ Parties can choose anyone to be their advisor
  - ✓ friend, parent, classmate, attorney
- ✓ Role of advisors
  - ✓ provide support, accompany party to meetings/interviews
  - ✓ adversarial with respect to their role in the hearing and in conducting cross examination
- ✓ School may limit to advisor's role with respect to their participation
- ✓ Any rules around the role of advisors must apply equally to both parties
- ✓ If a party does not have an advisor, the school must provide one at no cost to the party for the limited purpose of conducting cross exam during the hearing
- ✓ Advisor does not have to match the qualifications of the other party's, so if the other party has an attorney, the school is not obligated to provide an attorney



Written Notice  
106.45(b)(5)(v)

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



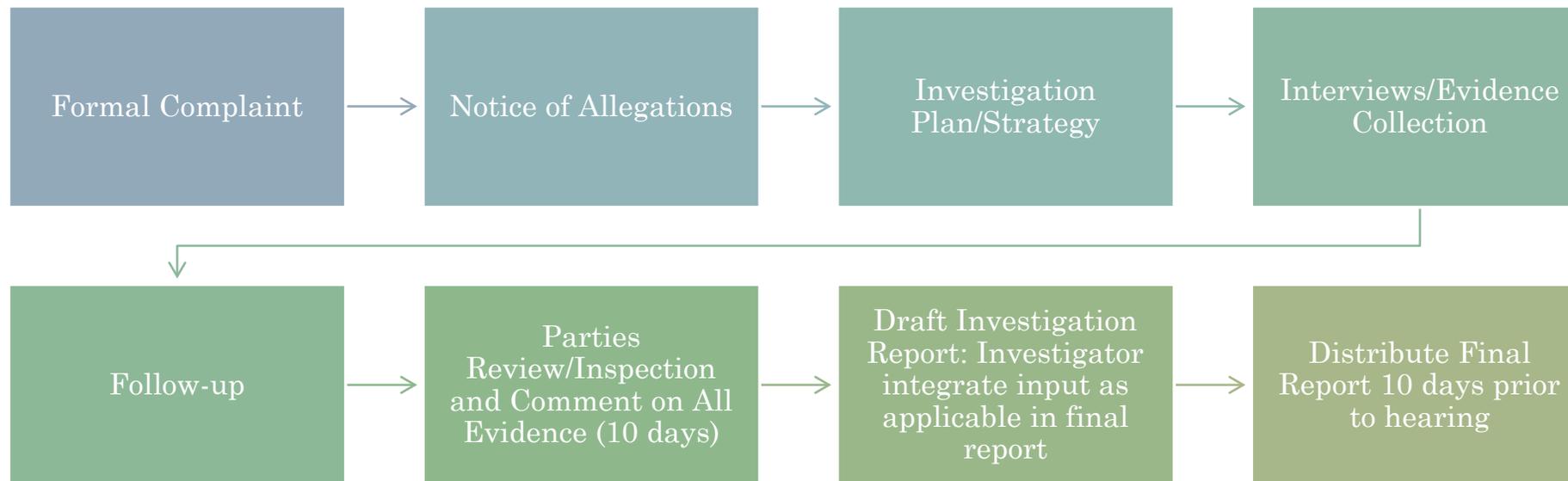
# Burden of Proof 106.45(b)(5)(i)

*\*The burden of gathering evidence and the burden of proof must remain on schools not the parties*

- Both parties have the right to provide evidence and witnesses, but it is not their responsibility
- It is the school's job to conduct the investigation, track down and gather all of the evidence possibly and interview witnesses
- The school is neutral during this process, they are not focusing on gathering evidence to prove respondent "guilty" or to prove respondent is not responsible; they are not "building a case"
- The goal is a truth-seeking mission; gather everything so that a neutral decision maker can reach an accurate determination based on the facts



# Steps in the Investigation Process



Notice of  
Allegations  
(NOA)  
106.45(b)(2)

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

- (A) Notice of the recipient's grievance process that complies with this section, including any informal resolution process.
- (B) Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in § 106.30, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview.



## Sufficient Details of NOA 106.45(b)(2)

1. The identities of the parties involved in the incident, if known.
2. The conduct allegedly constituting sexual harassment under § 106.30.
3. The date and location of the alleged incident, if known.
4. The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.
5. The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney.
6. Right to inspect and review evidence
7. The written notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.



# Investigation

Develop	Develop Investigation Plan
Gather	Gather all Relevant Evidence
Conduct	Conduct Interviews
Provide	Provide Evidence to Parties; Draft Final Investigative Report



## Investigation Plan

- Determine the scope of the investigation
- Establish a preliminary timeline of events Identify important testimony and evidence
- Develop an initial witness list
- Determine order in which to interview the accused and witnesses



# Interviewing Parties & Witnesses



# Interviews

- Interviews should be conducted in a private location with no interruptions; try to make the interviewee feel comfortable
- Provide a brief explanation of the institution's investigatory process
- Advise interviewees of the anticipated time frame for completing the investigation
- Explain what, if any, information might be shared with others
- Explain the institution's prohibition on retaliation



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Don't: Use overly “legalistic” or formal language

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Do: Balance empathy with objectivity; establish rapport while maintaining professionalism



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Don't: Avoid difficult or embarrassing questions because they are uncomfortable

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Do: Use tact and sensitivity, but can't skip important details



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Don't: Ask leading questions based on what you think probably happened

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Do: Allow the details and facts to come out first, then follow-up with additional clarifying questions as you learn more



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Don't: Make promises you can't keep, or set unrealistic expectations

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Do: Be clear about the process including the limits on “confidentiality”



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Don't: Interrupt, ask “blaming” or biased questions, or fill in the gaps with your own assumptions

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Do: Ask open ended questions and Allow Interviewee to provide their story in their own words...allow space to let them speak



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Don't: Treat the interview like an interrogation or inquisition

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Do: Ensure you remain objective and keep your role in context, this is an administrative process, not a law enforcement investigation



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Don't: Allow subconscious or unconscious bias or preconceived beliefs to taint your objectivity

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Do: Take a moment before each interview to consciously affirm that you will keep an open mind throughout the process, gather all of the evidence first, and then analyze it in context



# Evidence



# Evidence

- School Carries the Burden of Evidence
- Only Relevant Evidence May be Considered by Decision-Maker
- Investigator Must Collect All Evidence Related-to Allegations
- Privileged Evidence is Not Admissible Without Consent
- Medical Records, Mental Health Records are Not Admissible Without Consent
- No Other Restrictions on Evidence (legal rules don't apply)
- Parties Have the Right to Inspect the Evidence
- Statements of Party of Witness that Does Not Submit to X-Exam May Not be Relied Upon by Decision-Maker
- Decision-Maker Evaluates Credibility During Hearing
- School May Develop Guidelines re: Evaluating Evidence (weight,etc.), as Long as Don't Contravene Rules



## Relevancy

Relevance: evidence pertinent to proving whether facts material the allegation are more or less likely to be true and that do not relate to complainant's sexual predisposition of prior sexual acts (with two exceptions).



## Related-to vs. Relevant

### Related-to

Investigator must collect all evidence that is related to the allegations whether or not relevant (excluding evidence subject to privilege, medical records)

### Relevant

Relevant evidence is all evidence related to, except that which is protected under the rape shield provisions (and not otherwise privileged, medical records)



# Relevancy, Rape Shield Protections & Exceptions

- Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are NOT RELEVANT, *unless*:
  - offered to prove
    1. "Mistaken Identity"
      - that someone other than the respondent committed the conduct alleged by the complainant, or
    2. Consent
      - concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.



Privileged  
Evidence  
Inadmissible  
106.45(b)(1)(x)

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

- ✓ patient-doctor
- ✓ attorney-client
- ✓ spousal privilege



## Other Inadmissible Evidence

Statements of non-cooperating party or witness: the statements of a party or witness that does not submit to cross examination may not be considered by the decision-maker in rendering a decision



# Evidence

- Investigators and decision-makers must receive training on issues of relevance, procedural rules (both required and any discretionary-i.e. rules of order and decorum for hearing) for conducting investigation and hearing, including evidentiary rule.
- A school MAY train or adopt guidelines, regarding how to evaluate, credit or assign weight to types of relevant, admissible evidence, that must be reflected in published training materials as long as they don't conflict with 106.45 and apply equally to both parties.
- School's may not adopt rules that contravene these requirements, so they can't exclude other evidence on different grounds (such as exclusions that might apply in court-hearsay, lie detector tests, etc).
- An appeal based on procedural irregularity could include appeal of a decision to include or not include evidence based on categorization as relevant or not, or on school's failure to objectively evaluate all relevant evidence.



## Opportunity to Review Evidence & Investigative Report

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Prior to completion of investigative report, school must send to parties and their advisors, all evidence gathered that is directly related to the allegations, inculpatory & exculpatory, and provide at least 10 days to review and respond in writing

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Final investigation report must fairly summarize relevant evidence and be provided to party and the party's advisor at least 10 days prior to a hearing with an opportunity to review and respond in writing



## Right to Inspect Evidence 106.45(b)(5)(vi)

Schools must send the parties *and their advisors*:

✓ **ALL** evidence directly related to the allegations

*\*will include relevant **and irrelevant evidence including that which would otherwise be excluded under the rape shield protections***

✓ includes evidence the school will not use/rely in making a decision

✓ includes inculpatory or exculpatory evidence whether obtained from a party or other source

✓ electronic format or a hard copy, otherwise, method and format of delivery up to school

✓ parties must have *at least 10 days* to submit a written response  
*\*consider when determining reasonable timeframes*

✓ the investigator will consider parties input prior to completion of the investigative report

✓ evidence *must be made available at hearing*

✓ *Note that both evidence and report MUST be sent to advisor, this is the default. If parties wish to opt out, they can, request that the request be provided in writing*



# The Investigative Report



# Investigative Report

## Must fairly summarize the relevant evidence

- Have discretion to determine what format or what other elements to include if any
- Additional information useful from a practical perspective, i.e. providing sufficient background info/context to understand the evidence, to satisfy record-keeping requirements and document process was thorough, fair, etc.



# Investigation Requirements 106.45(b)(5)(vii) Right to the Investigative Report & Evidence

AFTER the initial review period which includes all evidence:

- ✓ the investigator will finalize the investigative report incorporating feedback received from the parties as appropriate.
- ✓ The final report will summarize RELEVANT evidence
  - \* will exclude evidence about complainant's prior sexual history with two limited exceptions
- ✓ The final report must be provided to the parties and their advisors in electronic or hard copy, at least ten (10) days prior to the hearing, with an opportunity to respond in writing.



# Re-Cap & Key Takeaways

1. Definition of sexual harassment and the scope and application of Title IX is significantly narrowed under the revised rules. The formal grievance process, including investigations, is triggered only upon the filing of a formal complaint and only if within the strict definition, scope and jurisdiction of the rule.
2. Investigators must be trained under these rules, free of any conflicts of interest or bias and must conduct a thorough and impartial investigation within the school's designated "reasonably prompt timeframe"; Investigators may not serve as Decision-makers.
3. The school carries the burden of proof and a respondent is presumed not responsible until application of the grievance process and a determination of responsibility after a live hearing by a neutral decision maker.
4. The Investigation includes many procedural protections including right to receive sufficient advance notice with opportunity to prepare, right to provide evidence and witness, and right to inspect all evidence related to the allegations. All rules must apply equally to both parties.



# Title IX Decision-maker Training

## Final Title IX Regulations

34 CFR Part 106

Effective August 14, 2020

# Title IX Decision-maker Training

July 2020

Christine Galdston, J.D., LL.M.  
Title IX Consultant  
[Christine@T9Now.com](mailto:Christine@T9Now.com)  
[www.T9NOW.com](http://www.T9NOW.com)

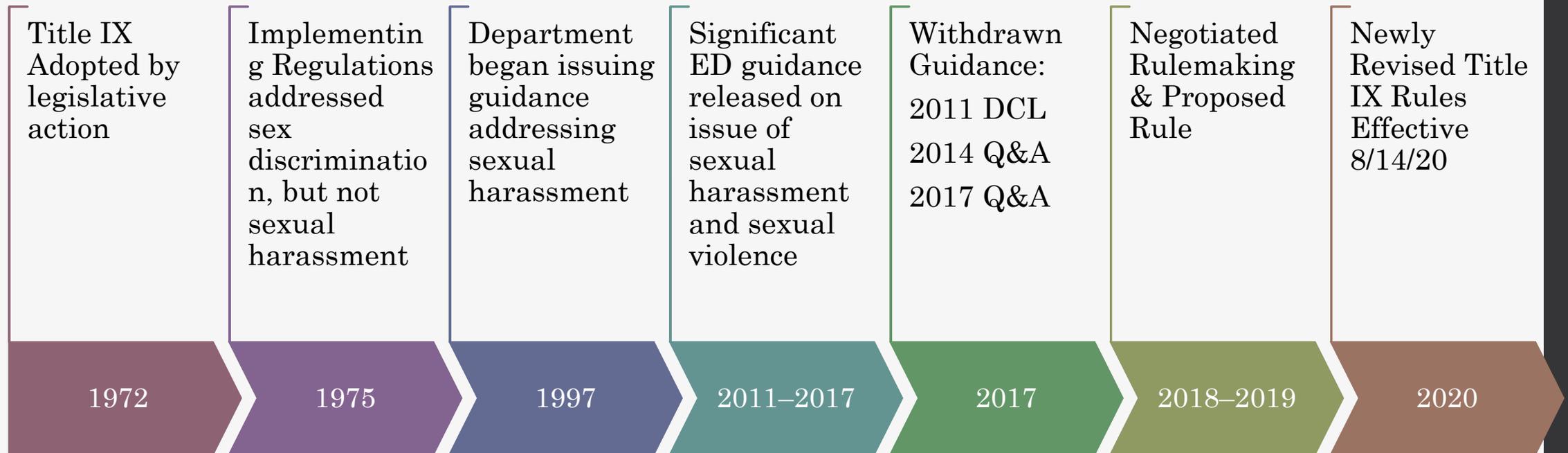


# Title IX Decision-maker Training

- ✓ *Title IX History and Background on Rule Revisions*
- ✓ *On Title IX's definition of "sexual harassment"*
- ✓ *On the scope of the school's education program or activity*
- ✓ *On how to serve impartially, including by avoiding prejudgment of the facts at issue*
- ✓ *On how to avoid conflicts of interest and bias*
- ✓ *On how to conduct an investigation and grievance process, as applicable*
- ✓ *Evidence: Relevancy, Privilege, Exclusions, Rape Shield Protections*
- ✓ *Training on any technology to be used at a live hearing*



# History & Evolution



# Principles Underlying the New Rules

<b>Protect</b>	Protect Due Process & Fundamental Fairness
<b>Improve</b>	Improve Integrity of the Grievance Process
<b>Effectuate</b>	Effectuate Purpose of the Law in Preventing Sex Discrimination



# Procedural Protections 106.45

CITATION	SUMMARY
106.45(a)	School's treatment of parties may constitute discrimination
106.45(b)(1)(i)-(x)	Grievance Process Requirements
106.45(b)(2)	Written Notice of Allegations to Both Parties
106.45(b)(3)-(b)(4)	Formal Complaints Must be Investigated, Dismissals, Consolidation
106.45(b)(5)(i)-(vii)	Investigation Requirements
106.45(b)(6)	Cross Examination Conducted by Advisor
106.45(b)(7)	Independent/Neutral Decision-maker, Standard of Evidence Same, Written Determination
106.45(b)(8)	Appeals: Procedural Irregularities, New Evidence, Bias or Conflict of Interest
106.45(b)(9)	Informal Resolution: Voluntary, Written Consent. Not Allowed for Employee Respondent
106.45(b)(10)	Record Keeping, Publication of Training Material



# Title IX Personnel

Title	Responsibilities	Training	Status
Title IX Coordinator (multiple &/or deputies)	Coordinate, Intake Reports & Complaints, T9 analysis, Initiate Formal Complaint, Implement Supportive Measures	Sexual Harassment, Investigation & Grievance Procedure, Hearings, Appeals & Informal Resolution (as applicable); Impartiality, Relevance, Privilege	Must be Employee May Not Serve as Decision-Maker
Investigator	Conduct Fair, Objective and Impartial Investigation, Differentiate b/w Related & Relevant Evidence & Privilege	Sexual Harassment; How to Conduct an Investigation, Impartiality, Relevance, Privilege, Report-Writing	Staff or External May Not Serve as Decision-Maker
Decision Makers	Evaluate Evidence, Make & Write Decision, “Rule” on Relevancy during Cross-Examination	Sexual Harassment, Hearing Process, Technology, Evidence/Relevancy	Staff or External Cannot Serve in Any Other Capacity
Advisor(s)	Question Opposing Party & Witnesses	None required	Party provided Staff or External
Informal Resolution Facilitator	Informal Resolution Processes	Informal Resolution Processes	Staff or External



# Definition of Sexual Harassment 3-Prongs

Quid Pro Quo	<i>Employee</i> Conditions Something of Value for Sexual Favor
<i>Davis</i> Standard	So Severe, Pervasive and Objectively Offensive
VAWA Crimes	Sexual Assault, Stalking, Dating & Domestic Violence



# Definition of Sexual Harassment 3-Prongs

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1. An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
3. "sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30)



# Sexual Harassment: Quid Pro Quo

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- Applies solely to an employee respondent
- Involves an abuse of authority by an employee
- Doesn't require a showing of severity, pervasiveness or offensiveness
- Need not be explicit, could be implied



# Sexual Harassment: Severe, Pervasive, Offensive (*Davis*)

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- “Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity”
- directed at verbal or expressive conduct
- evaluated under the “reasonable person standard” taking into consideration the characteristics of the alleged victim



# Sexual Harassment: Clery/VAWA Crimes

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



# Sexual Assault

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Sexual assault means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation

Includes any sexual act directed against another person without their consent, including rape, sodomy, sexual assault with an object, fondling, incest and statutory rape



# Dating Violence

(10) **DATING VIOLENCE** The term dating violence means violence committed by a person—

(A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and

(B) where the existence of such a relationship shall be determined based on a consideration of the following factors:

(i) The length of the relationship.

(ii) The type of relationship.

(iii) The frequency of interaction between the persons involved in the relationship.



# Domestic Violence

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8) DOMESTIC VIOLENCE THE term domestic violence includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.



# Stalking

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(30)STALKING THE term stalking means engaging in a course of conduct directed at a specific person that would cause a reasonable person to—(A)fear for his or her safety or the safety of others; or  
(B)suffer substantial emotional distress.



## Educational Program or Activity 106.44

- Locations, events, or circumstances where the school exercises substantial control over both:
  - the Respondent
  - the context in which the alleged sexual harassment or discrimination occurs
  - includes any building owned or controlled by the school or by a student organization that is officially recognized by the school.



# Mandatory & Discretionary Dismissals 106.45(b)(3)

Mandatory: Doesn't meet definition or jurisdictional requirements

Discretionary: Complainant wants to withdraw complaint or any allegation therein

Discretionary: Respondent is no longer enrolled or employed

Discretionary: Specific circumstances prevent school from gathering evidence sufficient to reach a determination



# Formal Grievance Process



# Grievance Process Basic Requirements

Treat parties equitably

Require objective evaluation of all relevant evidence

Train Title IX personnel & post all training on web-site

Include a presumption that respondent is not responsible

Include reasonably prompt time frames

Describe the range of, or list, possible disciplinary sanctions and remedies

State standard of evidence: preponderance or clear and convincing

Include process and bases for appeals

Exclude privileged evidence



# Require objective evaluation of all relevant evidence

## Title IX personnel must be conflict & bias free

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

*(iii) Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment in § 106.30, the scope of the recipient’s education program or activity.*



# How to Serve Impartially & Objectively

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



# Presumption of Non-Responsibility

## 106.45(b)(1)(iv)

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



# Conflicts of Interest and Bias

- Schools must have process to ensure no conflict/bias
- May provide a process for parties to assert claims of conflict/bias during the grievance process
- Conflict & bias of Title IX personnel is a basis for appeal



## Independent/Neutral Decision-maker 106.45(b)(7)

- ✓ *Decision-maker must be independent*
- ✓ *Appeal decision-maker must also be independent, they must be different from the hearing decision-maker, so you will need to have two trained decision-makers available for every case in the event a party appeals*
- ✓ *Schools may utilize multiple decision-makers in a case, such as a panel, within their discretion*
- ✓ *Decision-maker makes relevancy determinations during the hearing, after each question, and prior to each answer during cross, will need to provide the rationale for any determination that evidence is not relevant*



# Hearing



# Live Hearing

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- Postsecondary institutions must conduct a live hearing that must allow for real-time, cross-examination.
- At the request of either party, the recipient must provide for the entire hearing to occur with the parties located in separate room with technology enabling the parties to see and hear each other.
- Live hearings may be conducted with all the parties physically present in the same location or, at the school's discretion, any or all parties, witnesses or other participants may appear at the live hearing virtually.



# Live Hearing & Cross-Examination

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*Cross-examination must be conducted the party's Advisor:*

- ✓ Directly
- ✓ Orally
- ✓ In real time
- ✓ Never by a party personally
- ✓ The advisor may question the other party and any witnesses
- ✓ May ask follow-up questions including those challenging credibility
- ✓ Questions may not be prescreened or submitted in writing
- ✓ Parties have the right to present evidence and witnesses, including expert witnesses
- ✓ School carries the burden of proof



# Technology to be Used at Hearing

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- At the request of either party, the recipient must provide for the entire hearing to occur with the parties located in separate room with technology enabling the parties to see and hear each other.
- Live hearings may be conducted with all the parties physically present in the same location or, at the school's discretion, any or all parties, witnesses or other participants may appear at the live hearing virtually.
- Hearings must be recorded and the recording must be maintained by seven years under the record keeping provision of this rule; additionally, the parties have the right to inspect the recording.



# Rules of Order & Decorum

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- May have a hearing officer or facilitator
- May be more than one decision-maker or panel
- May adopt rules of order and procedure
- May also adopt rules regarding appropriate conduct
- Process is inherently adversarial
- Any rule that the school adopts can't conflict with the regulations
- Any rules must apply equally to both parties



# Confidentiality

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- The regulations require the school to maintain the confidentiality of the parties
- Only participants that need to at hearing should be there



# Relevancy & Cross-examination

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- Only relevant evidence is considered at the hearing
- Decision-maker must make a determination on relevancy after each question is asked, and before the witness/party responds
- Must provide their rationale for excluding question on relevancy basis
- Challenge on relevancy determination could be a basis for a party to appeal



# No ability to compel participation of parties or witnesses

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- The Rule protects every individual's right to choose whether to participate
- A party's absence from the hearing cannot be used against that person
- The decision maker may not make an inference about their exercise of the right not to appear or submit to cross
- If a party does not show up for a hearing, the hearing cannot be dismissed, but a decision would have to be made on available relevant evidence



# Retaliation Prohibited 34 CFR 106.71

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No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege under Title IX, or because the individual has made a report or complaint, testified, assisted, or participated *or refused to participate in any manner.*



# Non-Cooperating Party or Witness

- If a party or witness does not submit to cross examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility;
- However, the decision-maker cannot draw an inference based solely on that party's or witness's absence or refusal to answer questions
- School has no ability to compel either parties or witnesses to cooperate, appear at the hearing, provide testimony or otherwise participate in the process



# Evidence



## Burden of Evidence

Parties have the right present evidence and witnesses, including expert witnesses

*\*School carries the burden of evidence\**



## Relevancy

Evidence pertinent to proving whether facts material the allegation are more or less likely to be true and that do not relate to complainant's sexual predisposition or prior sexual acts (*with two exceptions*).



## Relevancy

Decision-maker “rules” on relevancy of every question asked during cross examination during the hearing.

If they determine a question is not relevant, they must explain why/or provide the rationale for the decision

Schools may adopt rules that the parties may not challenge these findings during the hearing, but exclusions of questions and testimony based on relevance could be appealable as a “procedural irregularity” after the determination has been issued



## Related-to vs. Relevant

### Related-to

Investigator must collect all evidence that is related to the allegations whether or not relevant (excluding evidence subject to privilege, medical records)

### Relevant

Relevant evidence is all evidence related to, except that which is protected under the rape shield provisions (and not otherwise privileged, medical records)



# Relevancy & Rape Shield Protections

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



# Relevancy, Rape Shield Protections & Exceptions

Questions and evidence about the complainant's prior sexual behavior are NOT RELEVANT, *unless* offered to prove

- “Mistaken Identity”: that someone other than the respondent committed the conduct alleged by the complainant, or
- Consent: concern specific incidents of the complainant's *prior* sexual behavior with respect to the respondent and are offered to prove consent.
- Note that questions about a Complainant's predisposition are never allowed, *they are not subject to the exception*



Privileged  
Evidence  
Inadmissible  
106.45(b)(1)(x)

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

- ✓ Patient-doctor
- ✓ Attorney-client
- ✓ Spousal privilege



## Other Inadmissible Evidence

Treatment records from doctor, psychologist, or any other health or mental health provider may not be used without prior written consent of a party.



## Other Evidence Which May Not be Considered

Statements of a party or witness that does not submit to cross examination may not be considered by the decision-maker in rendering a decision



# Assessing Credibility/Weighing Evidence

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- Credibility assessments must be bias free, and cannot be made based on sex stereotypes, or on the basis of a party's status as a complainant or status as a respondent
- Schools are free to provide additional training on these topics, and may adopt specific guidelines for use by decision makers, as long as they do not conflict with the regulations



# Standard of Evidence

Preponderance  
of the  
Evidence

Clear and  
Convincing



# Written Determination Regarding Responsibility 34

## CFR 106.45(b)(7)

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Allegations potentially constituting sexual harassment

A description of the procedural steps taken

Findings of fact supporting the determination

Conclusions regarding the application of code of conduct to the facts

Statement and rationale for each allegation

- Including determination of responsibility
- Any disciplinary sanctions
- Any applicable remedies

Bases & procedure for Appeal

The determination must be provided to the parties in writing simultaneously





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# Appeals

**Procedural irregularity that effecting outcome**

**New evidence, not reasonably available at the time of determination, that could affect the outcome**

**Title IX Coordinator, Investigator or Decision-maker had a conflict of interest or bias**



# Re-Cap & Key Takeaways

1. Definition of sexual harassment and the scope and application of Title IX is significantly narrowed under the revised rules. The formal grievance process is triggered only upon the filing of a formal complaint and only if within the strict definition, scope and jurisdiction of the rule.
2. Decision-makers must be trained under these rules, free of any conflicts of interest or bias and must objectively evaluate the evidence in reaching a determination. Decision-makers may not function in any other Title IX role. And the Decision-maker in any appeal, must be a different individual.
3. The school carries the burden of proof and a respondent is presumed not responsible until application of the grievance process and a determination of responsibility.
4. Live hearings must include cross-examination conducted only by a party's Advisor. Decision-maker "rules" on the relevancy and admissibility of every question asked during cross-examination.
5. The Decision-maker assesses credibility and weighs the evidence, and makes a determination using either the preponderance of the evidence or clear and convincing standard, which is applied consistently across all sexual harassment cases.

