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## Highlights of the New Title IX Regulations.

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# Overview – Balancing of Interests

- New regulations are an attempt at ensuring a fair process for both complainants and accused students and have struck a balance along these lines:
  - Complainants are assured every report of sexual misconduct will be taken seriously, that they will have agency re choice of formal process (or not), and they will have prompt access to supportive measures regardless of whether they pursue a formal process and with no showing of proof of their allegations.
  - If complainant pursues a formal grievance process, both parties are assured of specified procedural protections designed to ensure due process/fundamental fairness for both.
  - Respondents are assured that they will not be subjected to discipline unless they are found responsible after a fair process, including notice, an opportunity to respond, and impartial decisionmakers.
  - The parties may agree to informal resolution options.

# Gatekeeping: Definition of Sexual Harassment and Jurisdiction

## ***Definition of Sexual Harassment for Title IX Purposes - § 106.30 (Definitions) (p. 2014)***

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

- (i) A school employee conditioning education benefits on participation in unwelcome sexual conduct (i.e., *quid pro quo*); or
- (ii) Unwelcome conduct **that a reasonable person would determine** is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school's education program or activity; or
- (iii) Sexual assault (as defined in the Clery Act), **dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA).**

# Jurisdiction: Sexual Harassment Occurring in a School's "Education Program or Activity" and "in the United States" § 106.44(a) (p. 2016)

- Schools must respond when sexual harassment occurs in the school's education program or activity, against a person in the United States.
- For the purposes of this section, §§ 106.30, and 106.45, "education program or activity" includes:
  - locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and
  - also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

# School's Mandatory Response Obligations: Recipient's response to sexual harassment § 106.44 (pp. 2016-18) – Not to be Deliberately Indifferent -

- A school must respond **promptly** to Title IX sexual harassment in a manner that is not deliberately indifferent, which means in a way that is not clearly unreasonable in light of the known circumstances.
  - **Offering supportive measures to the complainant.**
  - **Promptly contacting the complainant to discuss the availability of wishes for supportive measures, and explaining to the complainant the process for filing a formal complaint.**
  - **Following a grievance process that complies with the Final Rule before the imposition of any disciplinary sanctions or other actions that are not supportive measures, against a respondent.**

**(§ 106.44(a) (pp. 2016-17))**

# School's Mandatory Response Obligations: Two Key Terms § 106.30 (a) (pp. 2013-15)

- “Actual Knowledge” means notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient.
- “Formal Complaint” is a document **filed** by a complainant or **signed** by the Title IX Coordinator alleging sexual harassment against a respondent **and requesting that the school investigate the allegation of sexual harassment.**
  - **At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the school with which the formal complaint is filed.**
  - **Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party during a grievance process, and must comply with requirements for all Title IX personnel to be free from conflicts and bias.**

# “Supportive Measures” § 106.30 (a) (p. 2015)

- “Non-disciplinary, non-punitive individualized services offered” “to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.”
- “[D]esigned to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party.”
- The Final Rule retains the NPRM’s definition of “supportive measures” but clarifies that the purpose of supportive measures is **equal access** to education.

# Emergency Removal §106.44(c) (p. 2017)

School is not prevented from removing a respondent on an emergency basis, as long as school conducts individualized safety/risk assessment; determine there is an “immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment”; and provides respondent with notice and an immediate opportunity to challenge the removal



# Key Guiding Framework for grievance process for formal complaints of sexual harassment §106.45 (pp. 2018-2030)

“Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.” *§106.45(b)(1) (p. 2018)*

# Major Components of Grievance Process

- Notice *§106.45(b)(2)(i)–(ii) (pp. 2020-2021)*
- Investigation *§106.45(b)(5)(i)–(vii) (pp. 2022-2024)*
- Hearing and Determination *§106.45(b)(6)(i)- (ii) p(p. 2024-2026); § 106.45(b)(7)(i)- (iv) p(p. 2026-2027);*
- Appeal *§106.45(b)(8)(i)-iii (pp. 2027-2028)*
- Informal Resolution *§106.45(b)(9) (pp. 2028-2029)*

# Notice of allegations §106.45(b)(1)(i)–(ii) (pp. 2020-2021)

- With a formal complaint, school must provide written notice to the parties regarding grievance process and notice of the allegations including “including sufficient details known at the time and with sufficient time to prepare a response before any initial interview.”
- “Sufficient details include the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment . . . and the date and location of the alleged incident, if known.”
- Must supplement notice if additional allegations come to light.

# Basic requirements for grievance process §106.45(b)(2)(i)–(x) p(p. 2018-2020) [Not an exhaustive list, but highlights]

- Objective evaluation of “all relevant evidence – including both inculpatory and exculpatory” §106.45(b)(1)(ii) (p. 2018).
- Training §106.45(b)(1)(iii) (p. 2019).
- Presumption of not responsible §106.45(b)(1)(iv) (p. 2019).
- “Reasonably prompt time frame”; limited extensions for “good cause.” §106.45(b)(1)(v) (pp. 2019-20).
- Same standard of evidence for students and faculty (preponderance or clear and convincing) §106.45(b)(1)(vii) (p. 2019).

# Grievance Process: Training § 106.45 (b)(iii) (p. 2019)

- Requires that Coordinator, investigator, decision-maker, or any person designated to facilitate an informal resolution process be free from conflict of interest or bias.
- Mandates training on:
  - Definition of sexual harassment
    - Scope of education program/activity
    - How to conduct an investigation and grievance process
    - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.
  - Requires training of decision-makers for hearings on issues of relevance of questions and evidence
  - Requires training of investigators on issues of relevance to create an investigative report “that fairly summarizes relevant evidence.”

# Investigations - §106.45 (b)(5) (pp. 2022-2024)

- Burden of both proof and making the record is on the school *§106.45 (b)(5)(i) p(p. 2022-23)*.
- Ensure parties have equal opportunity to present evidence/witnesses, including experts *§106.45 (b)(5)(ii) (p. 2023)*.
- No gag rules *§106.45 (b)(5)(iii) (p. 2023)*:
  - Right to accompaniment by advisor of choice *§106.45 (b)(5)(iv) (p. 2023)*
- Equal access to **any** evidence gathered as part of investigation “that is directly related to the allegations...including the evidence upon which the recipient does not intend to rely.” *§106.45 (b)(5)(vi) (p. 2023-24)*.
- Prior to finalizing report **must send** to party **and** advisor the evidence with a 10-day response period *§106.45 (b)(5)(vi) (p. 2024)*; final report at least 10 days prior to hearing. *§106.45 (b)(5)(vii) (p. 2024)*.

# Live Hearings & Cross-Examination (for Postsecondary recipients; K-12 can be on written questions) §106.45 (b)(6)(i) (pp. 2024-2026)

- “[E]ach party’s advisor” is permitted “to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party’s advisor of choice and never by a party personally....”
- “Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.”
- If a party does not have an advisor for a live hearing, one must be provided, at no charge, by the school.
- Audio or audiovisual recording or transcript must be made AND be made available to the parties for inspection and review.

# Rape Shield Protections for Complainants and Availability of Adverse Inferences §106.45 (b)(6)(i) (p. 2025)

- Sexual history of complainants is off limits unless used to prove that someone other than respondent engaged in the alleged conduct, or to prove consent between parties with a shared sexual history.
- “If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility **based solely** on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions.”



# Determination regarding Responsibility §106.45 (7) (i)-(iv)(pp. 2026-27)

- Must be in writing and contain:
  - Standard of proof used,
  - Identification of allegations,
  - Procedural history (including methods used to gather evidence),
  - Findings of fact,
  - Application of Code to facts,
  - Statement of, and rationale for, the result as to each allegation.
- Finding is final only after written determination on appeal, or if no appeal filed, on the date on which appeal would no longer be considered timely.

# Appeals §106.45 (8) (i)-(iii)(pp. 2027-28)

- Must be provided to both parties and also in connection with dismissal of a formal complaint or any allegations therein.
- Bases:
  - New evidence,
  - Procedural irregularity,
  - Bias or conflict of interest by Coordinator, investigator (s) or decision-maker(s),
  - Additional bases as determined by school.
- Notice to party of the other party's appeal.
- Written decision on appeal with rationale.

# Informal Resolution §106.45(9)(pp. 2028-29)

- Cannot require parties to engage in informal resolution and cannot condition enrollment or employment or any other right on waiver of a right to an investigation or adjudication of a formal complaint.
- Informal process may only be offered if a formal complaint is filed and informal process may be used at any time prior to a determination of responsibility.
- School may facilitate informal resolution such as mediation that does not involve full investigation/adjudication if parties fully informed in writing of allegations, how the informal process works, are notified of the circumstances under which the process precludes resumption of formal complaint related to the same allegations, when formal process would be foreclosed and that either party may withdraw prior to reaching a resolution including when it might preclude a party from resuming the grievance process for a formal complaint.

# Dismissal §106.45 (3)(i-iii)(pp. 2021-22)

- Must dismiss if alleged conduct would not constitute sexual harassment or did not occur in the recipient's education program or activity, or did not occur within the United States.
- May dismiss formal complaint (or allegations therein) if:
  - Complainant provides written notice of wish to withdraw, or
  - Respondent no longer enrolled or employed, or
  - Specific circumstances prevent school from gathering evidence sufficient to make a determination.

# Retaliation §106.71(pp. 2031-32)

- Exercise of First Amendment rights does not constitute retaliation.
- Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding does not constitute retaliation.

# Relevant Links

## **Preamble and Final Regulations (Regulations appear at pp. 2008-2033):**

<https://www2.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf>

## **Summary of Major Provisions:**

<https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf>

## **Comparison of Final Rule with NPRM:**

<https://www2.ed.gov/about/offices/list/ocr/docs/titleix-comparison.pdf>

## **DOE Title IX Final Overview Document – Guiding Principles:**

<https://www2.ed.gov/about/offices/list/ocr/docs/titleix-overview.pdf>

# Relevant Links Continued

## **Press Release re New Regulations:**

<https://www.ed.gov/news/press-releases/secretary-devos-takes-historic-action-strengthen-title-ix-protections-all-students>

## **SAVE Regulatory Crosswalk:**

<http://www.saveservices.org/wp-content/uploads/Regulatory-Crosswalk-5.11.2020.xlsx>