


An Integrated and Coordinated Approach to Title IX: Understanding the Intersection of Title IX, the Clery Act and VAWA

Presented By:

Devon Riley, Member
Cara Sawyer, Counsel
Jeff Bourgeois, Counsel

The Institutional Response Group | Cozen O'Connor
Gina Maisto Smith, Chair
Leslie M. Gomez, Vice Chair


December 2023



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- These materials are meant to provide a framework for informed discussion, not to provide legal advice regarding specific institutions or contexts.
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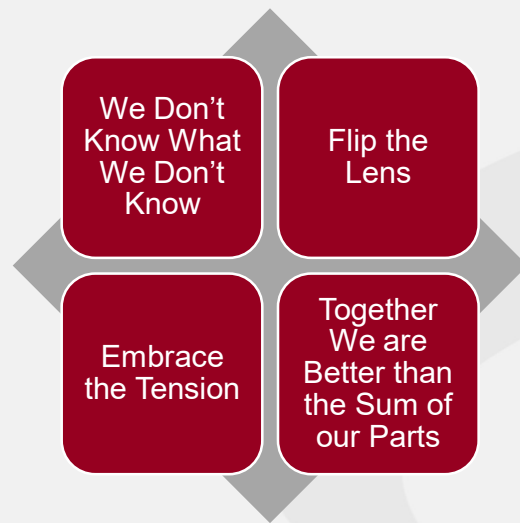
INTRODUCTION



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Framing the Conversation



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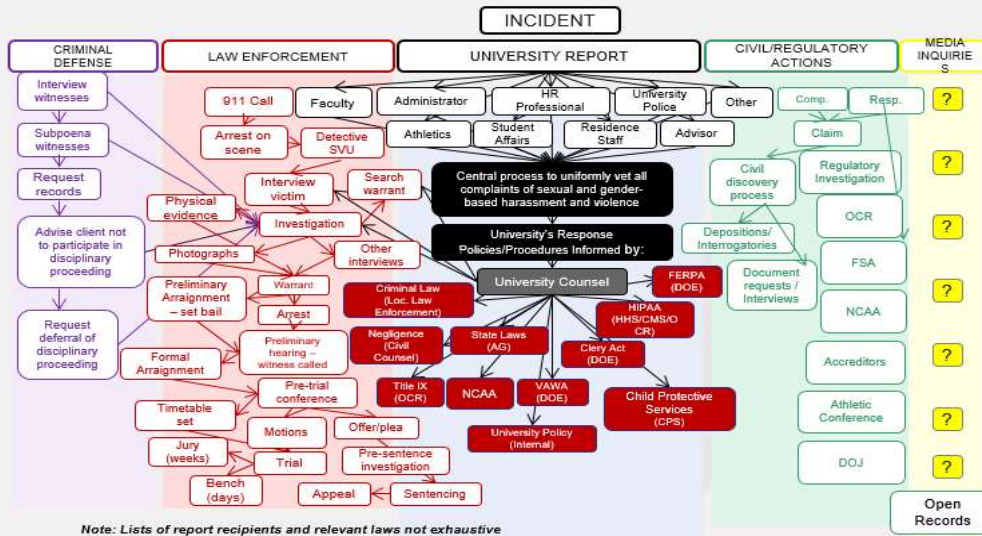
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The Context

- Regulatory Framework
- Dynamics of Trauma & Sexual and Gender-Based Harassment and Violence
- Individual Culture, Climate, History, Resources, Policies, Procedure, and Personnel of the Institution

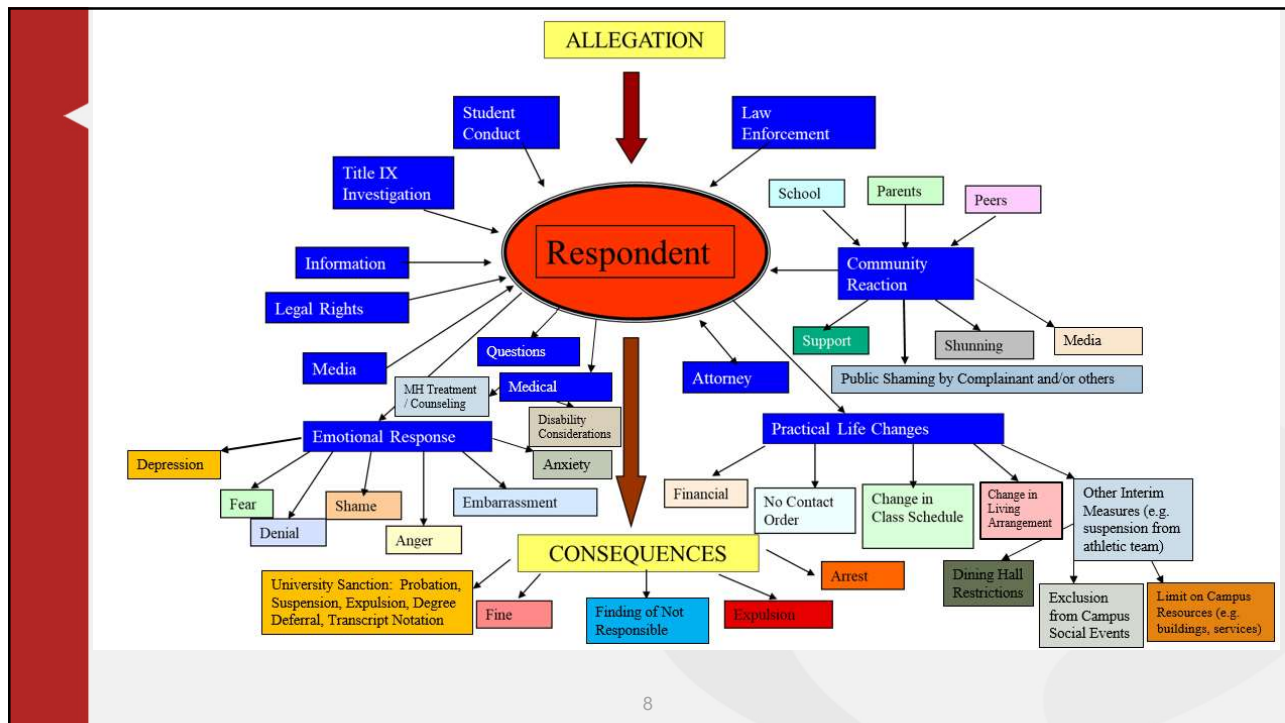


The Challenge of the Context



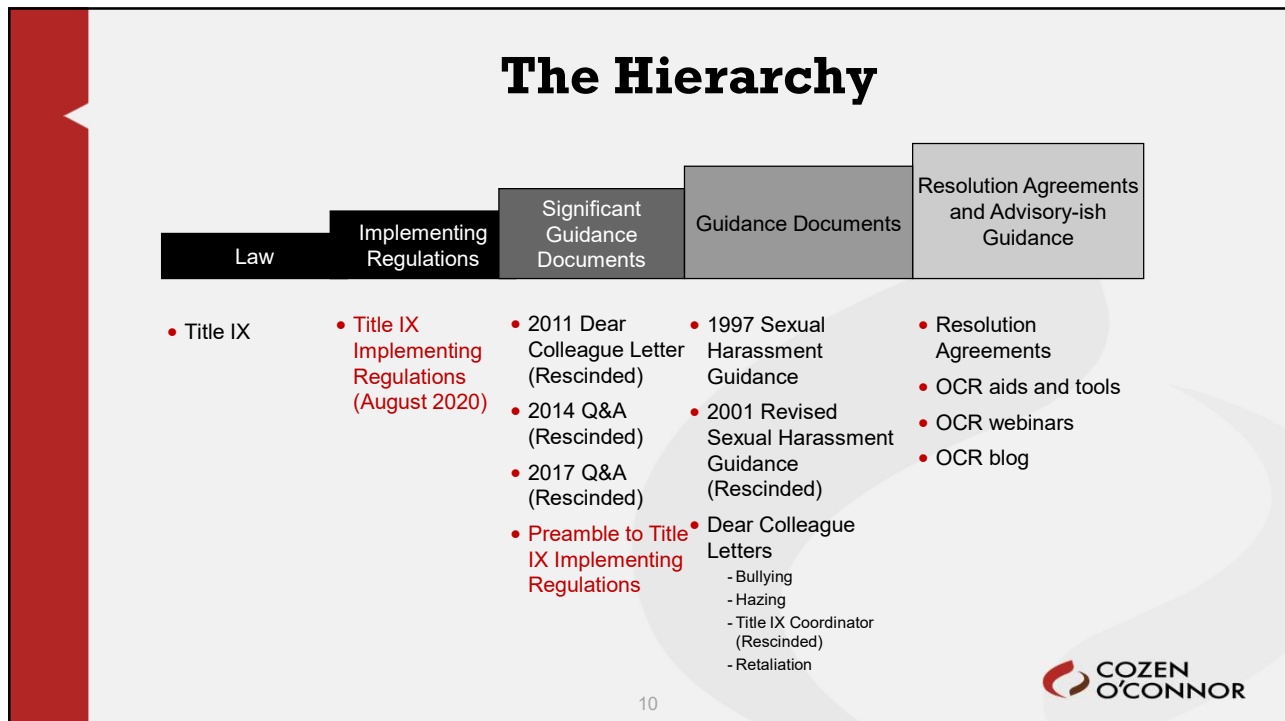


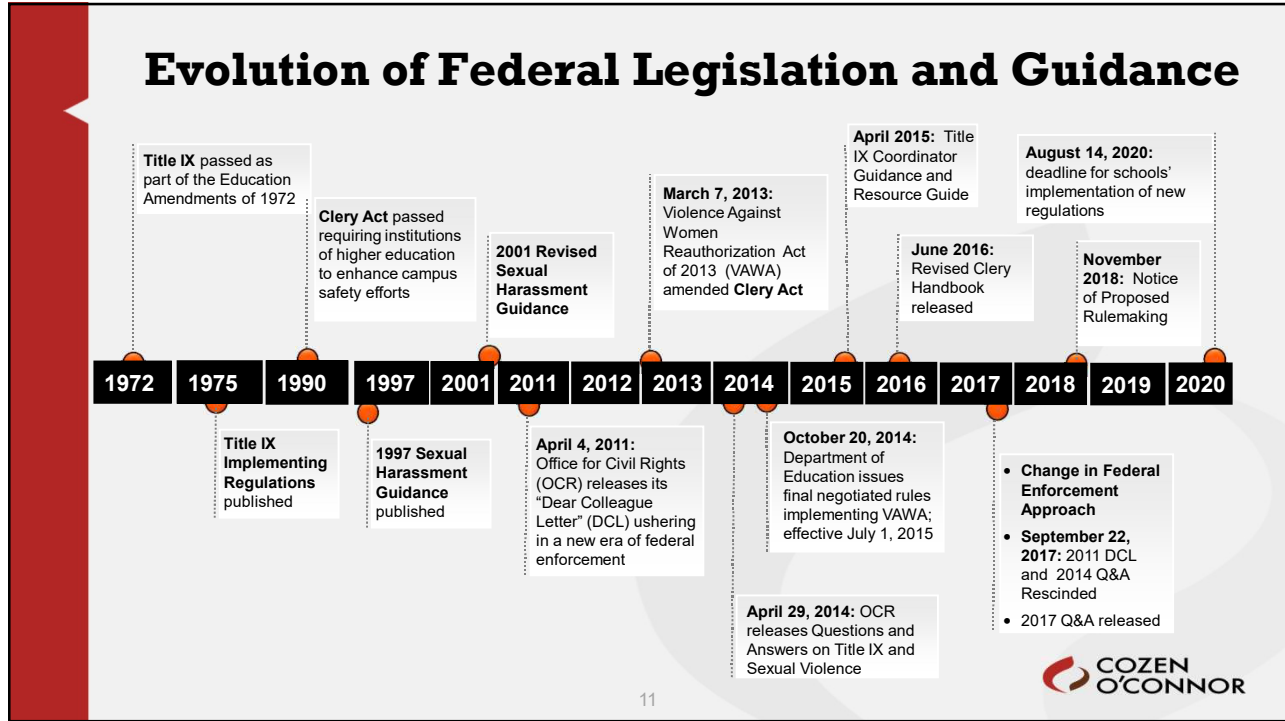
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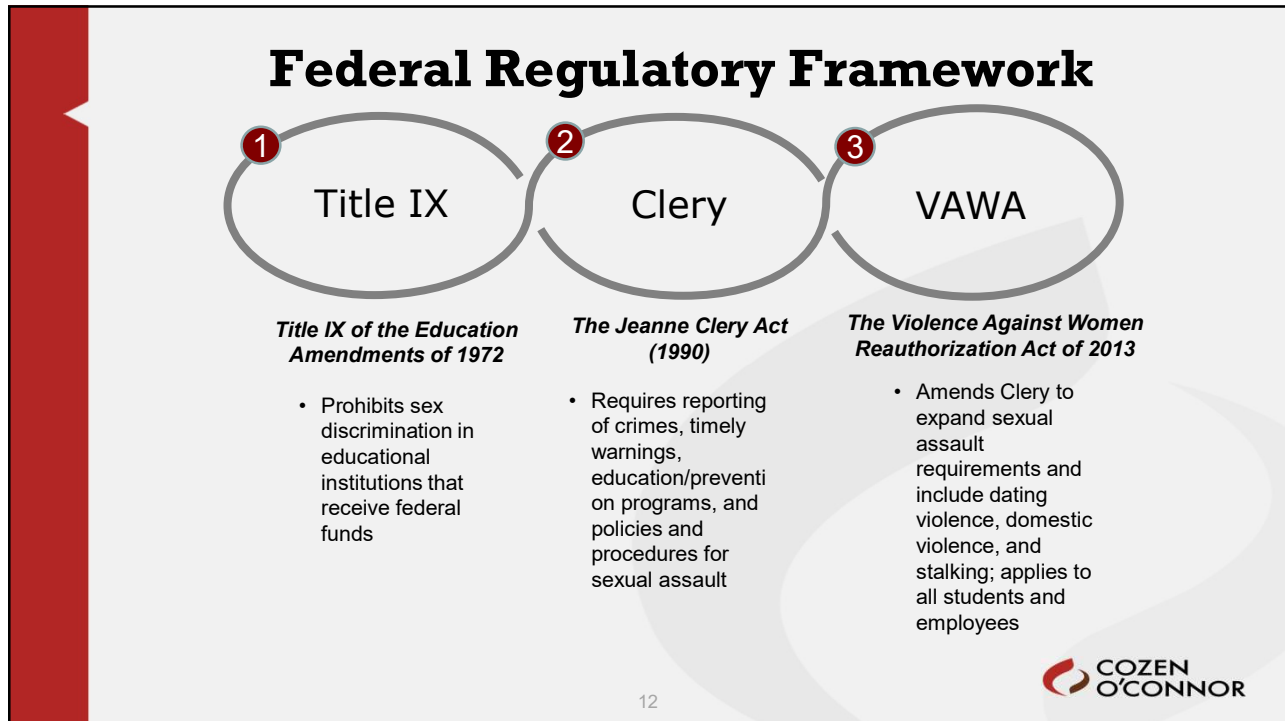
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FEDERAL LEGISLATION AND GUIDANCE





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TITLE IX AND THE CLERY ACT

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The Clery Act (As Amended by VAWA)

Core Tenets:

- Governs a school's response to **sexual assault, dating violence, domestic violence and stalking** (and other crimes)
- Applies to Clery-defined crimes reported to **campus security authorities** that occur **on Clery geography**
- Requires procedural and educational components that do not fully align with Title IX requirements
- Requires reporting of **crime statistics** through
 - Daily crime log
 - Annual security report
- Includes a duty to warn/**timely warnings**

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VAWA: Prompt, Fair, and Impartial Investigation & Resolution

- **Prompt, fair, and impartial process** from the initial investigation to the final result
- Conducted in a manner consistent with the institution's policies and transparent to the accuser and accused
- The accuser and the accused have **equal opportunities** to have others present, including an **advisor of their choice**
- The accuser and accused are given **timely notice of meetings** at which one or the other or both may be present
- The accuser, the accused, and appropriate officials are given **timely and equal access to information** that will be used during informal and formal disciplinary meetings and hearings



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VAWA: Prompt, Fair, and Impartial Investigation & Resolution

- Officials are appropriately **trained** and do not have a **conflict of interest or bias** for or against the accuser or the accused
- The proceeding is completed in a **reasonably prompt timeframe**
- Explicit provision noting that institutions may extend their reasonably prompt deadlines for **good cause** with written notice to the accused and accuser of the delay and the reason for the delay
- The accuser and the accused **receive simultaneous notification**, in writing, of the result of the proceeding, the rationale, sanctions, any available appeal procedures, any change to the results that occurs prior to final resolution and when results become final



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Understanding Title IX

The Law:

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

20 USC § 1681

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Title IX

Core Tenets:

Definition of Sexual Harassment

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

- (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (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).

Title IX Regulations May 19, 2020; § 106.30(a)

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**Core
Tenets:**

Title IX

Response to Sexual Harassment

A recipient with actual knowledge of sexual harassment in an **education program or activity** of the recipient against a person **in the United States**, must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances. ... A recipient's response must treat complainants and respondents equitably by offering **supportive measures** as defined in § 106.30 to a complainant, and by following a **grievance process** that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.

Title IX Regulations May 19, 2020; § 106.44(a)

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**Core
Tenets:**

Title IX

Education Program or Activity

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.

Title IX Regulations May 19, 2020; § 106.44(a)

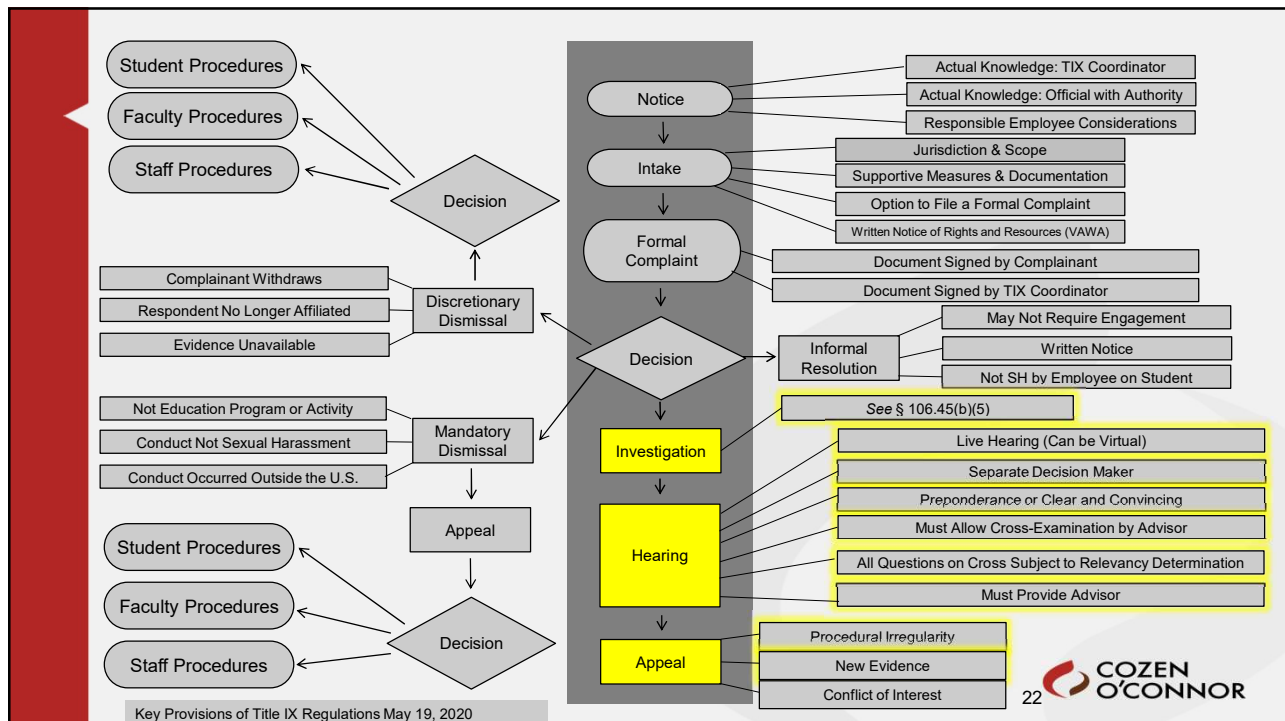
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RESOLUTION PROCESS

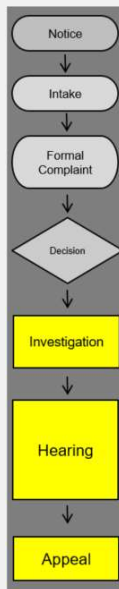
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Basic Requirements



- **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.

Relevant Regulations Sections:

Equitable Treatment: §§ 106.44(a) and 106.45(b)(1)(i)



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Basic Requirements



- Require an objective evaluation of all relevant evidence
 - Including both inculpatory and exculpatory evidence
 - Credibility determinations may not be based on a person's status
- Implementers must be trained and free from conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent

Relevant Regulations Sections:

Equitable Treatment: §§ 106.44(a) and 106.45(b)(1)(i)

Objective evaluation of all relevant evidence: § 106.45(b)(1)(ii)

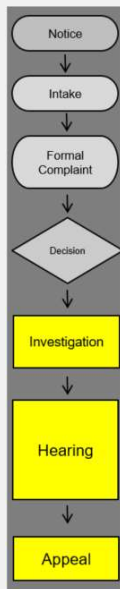
Training and avoidance of conflicts or bias: § 106.45(b)(1)(iii)



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Basic Requirements



- **Presumption that the respondent is not responsible** for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process
- Follow reasonably prompt time frames for conclusion of the grievance process with permissible delay for good cause

Relevant Regulations Sections:

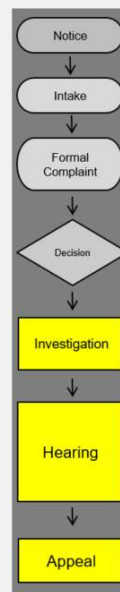
Equitable Treatment: §§ 106.44(a) and 106.45(b)(1)(i)
 Objective evaluation of all relevant evidence: § 106.45(b)(1)(ii)
 Training and avoidance of conflicts or bias: § 106.45(b)(1)(iii)



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Basic Requirements



- Provide a **standard of evidence** to be used to determine responsibility, applying either 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
 - Apply the same standard of evidence to all formal complaints of sexual harassment

Title IX Regulations May 19 2020; §§ 106.45(b)(1)(vii) and 106.45(b)(7)(i), 85 F.R. 30275



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Basic Requirements



- Provide procedures and permissible bases for the complainant and respondent to appeal
- Provide a range of supportive measures available
- 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

Relevant Regulations Sections:

Appeal: §§ 106.45(b)(1)(viii) and 106.45(b)(7)(ii)(F)

Range of Supportive Measures: § 106.45(b)(1)(ix)

Waiver of Privilege: § 106.45(b)(1)(x)



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POST-2020 REGULATION UPDATES: EXECUTIVE ORDERS, CASES AND GUIDANCE

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March 8, 2021: Executive Order

“Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity”

- It is the policy of my Administration that all students should be guaranteed an educational environment free from discrimination on the basis of sex, including discrimination in the form of sexual harassment, which encompasses sexual violence, and including discrimination on the basis of **sexual orientation or gender identity**.
- Secretary of Education to **review all existing regulations**, orders, guidance documents, policies, and any other similar agency actions **within 100 days**.

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March 8, 2021: Executive Order

Context

- The United States Supreme Court decision in *Bostock v. Clayton County* (June 15, 2020) (140 S.Ct. 1731).
 - The Supreme Court held that sex discrimination under Title VII includes **sexual orientation and gender identity**.
 - The Court specifically refused to extend the holding to Title IX’s definition of sex discrimination.

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April 6, 2021: Letter to Students, Educators, and other Stakeholders

- OCR performed a comprehensive review of the Department’s existing regulations, orders, guidance, policies, and any other similar agency actions, including the August 14, 2020 Title IX regulations
- **Timeline**
 - **Public hearings** (held in June 2021)
 - **Q&A** to provide additional clarity about how OCR interprets schools’ existing obligations under the 2020 amendments
 - **New notice of proposed rulemaking announced on June 23, 2022**

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July 20, 2021: Questions and Answers on the Title IX Regulations on Sexual Harassment

- **Questions and answers (37 pages)**
 - Largely repetitive content from regulations and preamble
 - Question 24 addresses the filing a complaint on behalf of a complainant who is unassociated with the institution
- **Sample policy language to provide “clarity” (30 pages)**
 - Not endorsed or preferred
 - Does not have force of law
 - Use of sample policy language does not demonstrate compliance
 - Does not address other applicable laws

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Victim Rights Law Center v. Cardona

(U.S. District Court, D. Massachusetts, July 28, 2021, 2021 WL 3185743)

- Court found the **prohibition on statements not subject to cross-examination to be arbitrary and capricious**
- “Nothing in the administrative record demonstrates that the Department was aware of this result, considered its possibility, or intended this effect. Moreover, the construction of the Final Rule suggests that the Department failed even implicitly to recognize this result.”
- “To so carefully balance and craft the respondent’s safeguards, the definitions, the burdens, and the policies in the run-up to the hearing, just to have the prohibition and definition of absentee statements render the hearing a hollow exercise further demonstrates that the Department failed, even implicitly, to consider the consequences from the prohibition and definition of statements.”



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August 24, 2021: OCR Letter to Students, Educators, and Other Stakeholders

- In light of the court’s ruling in *Victim Rights Law Center v. Cardona*, the Department of Education will “**immediately cease enforcement** of the part of § 106.45(b)(6)(i) regarding the prohibition against statements not subject to cross-examination.”
- “In practical terms, **a decision-maker ... may now consider statements** made by parties or witnesses that are otherwise permitted under the regulations, **even if those parties or witnesses do not participate in cross-examination at the live hearing**, in reaching a determination regarding responsibility in a Title IX grievance process.”



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Doe v. University of the Sciences

961 F.3d 203 (3rd Cir. 2020)

- Court reversed dismissal, finding that Doe articulated a plausible claim for Title IX relief and that USciences breached its contractual obligation of providing fairness to students accused of sexual assault.
- “When Doe’s allegations about selective investigation and enforcement are combined with his allegations related to pressure applied by the 2011 Dear Colleague Letter, we conclude that he states a plausible claim of sex discrimination.”
- “USciences’s contractual promises of “fair” and “equitable” treatment to those accused of sexual misconduct require at least a real, live, and adversarial hearing and the opportunity for the accused student or his or her representative to cross-examine witnesses—including his or her accusers.”
- “Basic fairness in the context of sexual-assault investigations requires that students accused of sexual assault receive these procedural protections.”
- The Court declined to prescribe a method by which an institution must implement these procedural protections.

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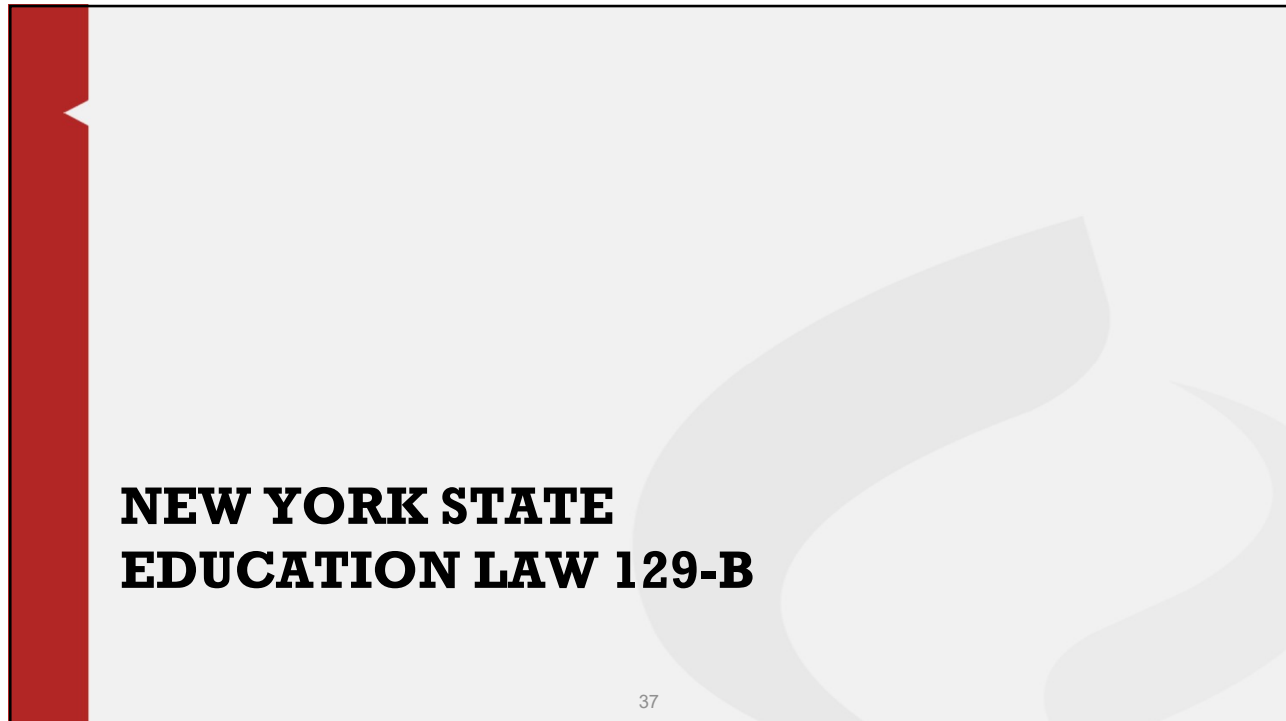
April 6, 2023: U.S. Department of Education NPRM on Student Athletic Eligibility

- Proposed rule would establish that policies violate Title IX when they categorically ban transgender students from participating on sports teams consistent with their gender identity.
- The proposed rule also recognizes that in some instances in competitive high school and collegiate athletics, schools may adopt policies that limit transgender students’ participation.
- The proposed rule would provide schools with a framework for developing eligibility criteria that protects students from being denied equal athletic opportunity, while giving schools the flexibility to develop their own participation policies.

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A presentation slide with a red vertical bar on the left side. The main content area is light gray with a large, faint, stylized number '5' in the background. The title 'NY 129-B – Quick Facts and Resources' is centered at the top in a bold, black, sans-serif font. Below the title is a bulleted list of facts and resources. The Cozen O'Connor logo is in the bottom right corner. The number '38' is located at the bottom center of the slide.

NY 129-B – Quick Facts and Resources

- NY 129-B statute – became law on July 7, 2015
- NY 129-B guidance promulgated by NYSED
 - First guidance document – June 2, 2016
 - Second guidance document – October 14, 2016
- NY 129-B regulations – July 2017
 - 48.1 – Definitions
 - 48.2 – Annual aggregate data reporting

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NY 129-B – Incident Reporting

Per regulations:

- By October 1 each year, institutions shall report to NYSED concerning incidents that were reported during the prior calendar year:
 - a) The number of incidents reported to the Title IX Coordinator (per Complainant):
 1. Number of incident that occurred on campus
 2. Number of incidents that occurred off campus
 3. Total of 1 and 2 above
 - b) Of the total number of incidents:
 1. Number in which Complainant or school sought a school-based process
 2. Number not included in 1 above (includes where school lacked jurisdiction or where process could not go forward for another reason)
 3. Number in which Complainant sought a No Contact Order and total # of NCOs issued

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NY 129-B – Incident Reporting

Per regulations (continued):

- c) Of the incidents in b)1 above, the number that proceeded through the school-based process
- d) Of those in c) above, the number of respondents who were found responsible or who accepted responsibility
- e) Of those in c) above, the number of respondents who were found not responsible
- f) A description of the final sanctions imposed by the school in each incident for which the Respondent was found responsible for sexual assault, dating violence, domestic violence, or stalking, broken down as follows:
 1. Expulsions
 2. Suspensions
 3. Another sanction not expulsion or suspension
 4. Transcript notation indicating found responsible for a violation of the institution's code of conduct
 5. Transcript notation indicating that they withdrew with charges pending

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NY 129-B – Incident Reporting

Per regulations (continued):

- g) Number of cases closed prior to final determination because Respondent withdrew and declined to complete the disciplinary process
- h) Number of cases closed prior to final determination because Complainant withdrew the complaint or an informal resolution was reached
- i) Additional training information. Institutions may report the number of trainings held, the number of staff trained, and the number of students trained during the reporting period.

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NY 129-B – Key Provisions

Affirmative Consent

- Requires adoption of a uniform definition of Affirmative Consent:

Affirmative consent is a knowing, voluntary, and mutual decision among all participants to engage in sexual activity. Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity. Silence or lack of resistance, in and of itself, does not demonstrate consent. The definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity, or gender expression.

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NY 129-B – Key Provisions

Affirmative Consent

- Requires inclusion of other principles in institution's policy:
 - a. Consent to any sexual act or **prior consensual activity** between or with any party does not necessarily constitute consent to any other sexual act.
 - b. Consent is **required regardless** of whether the person initiating the act is under the influence of drugs and/or alcohol.
 - c. Consent may be initially given but **withdrawn** at any time.
 - d. Consent cannot be given by a person who is **incapacitated**, which occurs when an individual lacks the ability to knowingly choose to participate in sexual activity. Incapacitation may be caused by the lack of consciousness or being asleep, being involuntarily restrained, or if an individual cannot otherwise consent. Depending on the degree of intoxication, someone who is under the influence of alcohol, drugs, or other intoxicants may be incapacitated and therefore unable to consent.
 - e. Consent cannot be given when it is the result of any **coercion, intimidation, force, or threat** of harm.
 - f. When consent is **withdrawn or can no longer be given**, sexual activity must stop.

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NY 129-B – Key Provisions

Amnesty for Alcohol and/or Drug Use

- Requires adoption of the following amnesty provision:

*The health and safety of every student at [Institution] is of utmost importance. [Institution] recognizes that students who have been drinking and/or using drugs (whether such use is voluntary or involuntary) at the time that violence, including but not limited to domestic violence, dating violence, stalking, or sexual assault occurs **may be hesitant** to report such incidents due to fear of potential consequences for their own conduct. ...*

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NY 129-B – Key Provisions

Amnesty for Alcohol and/or Drug Use

... [Institution] strongly encourages students to report domestic violence, dating violence, stalking, or sexual assault to institution officials. A **bystander acting in good faith** or a **reporting individual acting in good faith** that discloses any incident of domestic violence, dating violence, stalking, or sexual assault **to [Institution's] officials or law enforcement** will not be subject to [Institution's] code of conduct action for violations of alcohol and/or drug use policies occurring **at or near the time** of the commission of the domestic violence, dating violence, stalking, or sexual assault.

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NY 129-B – Key Provisions

Student Bill of Rights

➤ Requires adoption of the following provision:

All students have the right to:

1. Make a report to local **law enforcement** and/or state police
2. Have disclosures of domestic violence, dating violence, stalking, and sexual assault **treated seriously**
3. Make a decision about whether or not to disclose a crime or violation and participate in the judicial or conduct process and/or criminal justice process **free from pressure by the institution**
4. Participate in a process that is **fair**, impartial, and provides adequate notice and a meaningful opportunity to be heard
5. Be treated with **dignity** and to receive from the institution courteous, fair, and respectful health care and counseling services, where available

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NY 129-B – Key Provisions

Student Bill of Rights

6. Be **free from any suggestion that the reporting individual is at fault** when these crimes and violations are committed, or should have acted in a different manner to avoid such crimes or violations
7. Describe the incident to as **few institution representatives as practicable** and not be required to unnecessarily repeat a description of the incident
8. Be protected from **retaliation** by the institution, any student, the accused and/or the respondent, and /or their friends, family and acquaintances within the jurisdiction of the institution
9. Access to at least one level of **appeal** of a determination
10. Be accompanied by an **advisor** of choice who may assist and advise a reporting individual, accused, or respondent throughout the judicial or conduct process including during all meetings and hearings related to such process
11. Exercise civil rights and practice of religion **without interference** by the investigative, criminal justice, or judicial or conduct process of the institution



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NY 129-B – Key Provisions

Rights of Reporting Parties

- Requires that institutions advise reporting individuals of their right to:
1. Notify university police or campus security, local **law enforcement**, and/or state police
 2. Have **emergency access** to a Title IX Coordinator or other appropriate official trained in interviewing victims of sexual assault
 - Must be available at first disclosure to provide information about reporting options, confidentiality, privacy and, if applicable, preserving evidence, obtaining a sexual assault forensic exam, explaining differences between the campus and law enforcement processes
 - Must state verbatim language at first disclosure
 - Must provide information about resources including counseling and medical services, including if those services are free or fee-based
 - Must provide information about STIs, sexual assault forensic exams, and resources through the NY state office of victim services

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NY 129-B – Key Provisions

Rights of Reporting Parties

3. Disclose **confidentially** the incident to **institution** representatives, who may offer confidentiality pursuant to applicable laws and can assist in obtaining services for reporting individuals
4. Disclose **confidentially** the incident and obtain services from the **state or local government**
 - Regarding 3 and 4 above, 129-B requires a “plain language explanation” of confidentiality for students that contains, at a minimum, the following language: “Even [Institution] offices and employees who cannot guarantee confidentiality will maintain your privacy to the greatest extent possible. The information you provide to a nonconfidential resource will be relayed only as necessary for the Title IX Coordinator to investigate and/or seek a resolution.”
5. Disclose the incident to institution representatives who can offer **privacy or confidentiality**, as appropriate, and can assist in obtaining resources for reporting individuals

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NY 129-B – Key Provisions

Rights of Reporting Parties

6. File a **report** of sexual assault, domestic violence, dating violence, and/or stalking and the right to consult the Title IX Coordinator and other appropriate institution representatives for information and assistance.
 - Reports shall be investigated in accordance with the institution policy and **reporting party's identity shall remain private** at all times if said reporting party wishes to maintain privacy
7. Disclose, if the accused is an employee of the institution, the incident to the institution's **HR authority** or the right to request that a confidential or private employee assist in reporting to HR
8. Receive assistance from appropriate institution representatives in initiating legal proceedings in **family court or civil court**
9. Withdraw a complaint or involvement from the institution process at any time

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NY 129-B – Key Provisions Protections and Accommodations

- Requires that institutions provide the following protections and accommodations:
 1. *If the accused is a student, the issuance of a “**no contact order**” where the burden to avoid contact is on the accused and not the reporting party.*
 - *Either party, the accused or reporting party, may request a prompt review of the need for and terms of the no contact order*
 2. *Assistance by the institution’s police or security forces in obtaining a **protective/restraining order** or in effectuating an arrest if a person violates a protective/restraining order (if arrest powers exist)*
 3. *Information from the institution about the operation of the protective order (for both accused parties and reporting parties) and **consequences** for violating such an order*

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NY 129-B – Key Provisions Protections and Accommodations

4. *If the accused is a student determined to present a continuing threat to the health and safety of the community, subjecting the accused to **interim suspension***
5. *If the accused is a non-student but member of the institution’s community, subjecting the accused to **other interim measures** consistent with other institutional policies*
6. *Other **interim measures** as appropriate, including changes in academic, housing, employment, transportation, or the like in order to help ensure safety, prevent retaliation, and avoid an ongoing hostile environment consistent with the institution’s policies and procedures*



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NY 129-B – Key Provisions

Additional Rights

- Requires that institutions provide the following rights to all students:
1. The right to **request** that student conduct charges be filed against the accused
 2. In all non-consensual sexual activity, domestic violence, dating violence, and stalking cases, the right to a process that includes:
 - A. **Notice** to the accused describing date, time, location, facts alleged, potential policy violation(s), and possible sanctions
 - B. An opportunity to **offer evidence** during an investigation and to present evidence and testimony at a hearing, where appropriate, and to have access to the record for such hearing (maintained for 5 years)
 - Both parties have the right to review the available evidence in the case file consistent with institution policies and procedures
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NY 129-B – Key Provisions

Additional Rights

- C. Access to at least one level of **appeal before a panel**
 - In order to effectuate an appeal, both parties must have simultaneous access to written notice of the findings of fact, the decision and sanction, if any, and the rationale for each.
 - Accused and reporting party must have the same rights
- D. Accompaniment by the party's **advisor of choice**
- E. An impartial, timely, and thorough investigation and adjudication by people who receive annual **training** in
 - Conducting investigations, the effects of trauma, Respondents' rights, the presumption of non-responsibility, and the institution's policies and procedures
- F. **Exclusion** of prior sexual history with persons other than the other party
 - May include prior findings of domestic violence, dating violence, stalking, or sexual assault in sanctioning phase only

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NY 129-B – Key Provisions

Additional Rights

- G. **Exclusion** of mental health diagnoses or histories
- H. **Written notice** of any meeting the party is required to attend
 - I. An opportunity to offer an **impact statement** prior to the issuance of a sanction
- J. A choice about **whether to disclose or discuss** the outcome of a conduct or judicial process
- K. Protection from the public release of information obtained during the investigation (until the appeals panel makes a final determination or unless otherwise required by law)

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NY 129-B – Key Provisions

Transcript Notations

- For **crimes of violence**, including but not limited to sexual violence, institutions shall make a notation on the transcript of students **found responsible** after a conduct process that they were:
 - “Suspended after a finding of responsibility for a code of conduct violation”
 - “Expelled after a finding of responsibility for a code of conduct violation”
- For **crimes of violence**, including but not limited to sexual violence, institutions shall make the following notation on the transcript of students **who withdraw** during a conduct process:
 - “Withdrew with conduct charges pending”
- **Removal** of transcript notations:
 - The institution shall adopt a policy on appeals seeking the removal of a transcript notation for a suspension, provided that such notation shall not be removed prior to **one year** after conclusion of the suspension
 - Notations for expulsion shall not be removed

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NY 129-B – Key Provisions

External Resources

- Institutions that lack appropriate on-campus resources or services shall enter into MOUs, agreements, or partnerships with existing community-based organizations such as rape-crisis centers, domestic violence shelters and assistance organizations to provide services to students
- Institutions shall ensure that students have access to a sexual assault forensic examination by employing the use of a SANE in the campus health center or entering into an MOU with at least one local health care facility to provide such a service



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NY 129-B – Key Provisions

Climate Assessments

- At least every other year, each institution shall conduct a campus climate assessment to “ascertain general awareness and knowledge of the provisions of this article, including student experience with and knowledge of reporting and college adjudicatory processes”
- The climate assessment shall include questions about:
 - The Title IX Coordinator’s role
 - Campus policies and procedures addressing sexual assault
 - How and where to report domestic violence, dating violence, stalking or sexual assault as a victim, survivor, or witness
 - The availability of resources on and off campus, such as counseling, health and academic assistance
 - The prevalence of victimization and perpetration of domestic violence, dating violence, stalking, or sexual assault on and off campus during a set time period
 - Bystander attitudes and behavior
 - Whether reporting individuals disclosed to the institution and/or law enforcement, experiences with reporting and institution processes, and reasons why they did or did not report
 - General awareness of the difference between the institution’s policies and the penal law
 - General awareness of the definition of affirmative consent
- The climate assessment should be anonymous
- Institutions must publish results on their website



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NY 129-B – Key Provisions

Addressing Requests for Confidentiality

- Every institution must ensure that reporting individuals have information about how the institution will weigh a request for confidentiality and respond to such a request.
- In this part of the law, “confidentiality” is used as shorthand for “declining to consent to an investigation.”

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NY 129-B – Key Provisions

Addressing Requests for Confidentiality

- Factors that the Title IX Coordinator should use in evaluating whether to proceed with an investigation despite a reporting party’s request for confidentiality:
 - Whether the accused has a **history of violent behavior** or is a repeat offender
 - Whether the incident represents **escalation** in unlawful conduct on behalf of the accused from previously noted behavior
 - The **increased risk** that the accused will commit additional acts of violence
 - Whether the accused used a **weapon or force**
 - Whether the reporting **individual is a minor**
 - Whether the institution possesses **other means to obtain evidence** such as security footage and
 - Whether available information reveals a **pattern of perpetration** at a given location or by a particular group

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NY 129-B – Key Provisions

Student Onboarding

- Includes and goes beyond the Clery Act requirements for education and training
- Requires new first-year (undergrad, graduate, and professional) and transfer students to receive the following information during their onboarding:
 - The institution **prohibits** sexual and interpersonal violence, provides **resources** to any victims and survivors of such violence, and **addresses** reports of such violence when it has jurisdiction over the accused
 - The institution **defines** sexual assault, domestic violence, dating violence, stalking, confidentiality, privacy, and consent as follows...
 - The institution's policies apply **equally** to all students regardless of sexual orientation, gender identity, or gender expression
 - The **role** of the Title IX Coordinator, university police or campus safety, and other relevant offices
 - Awareness of **violence**, its impact on victims and survivors and their friends and family, and its long-term impact
 - Bystander **intervention** and the importance of taking action to prevent violence when one can safely do so
 - Risk assessment and **risk reduction** including steps that potential victims, perpetrators, and bystanders can take to lower the incidence of violations
- Institutions must use **multiple methods** of education
- Institutions must offer general and specific training in domestic violence, dating violence, stalking, and sexual assault **prevention**
- **Special training requirements** for student leaders, student org officers, and student-athletes
- Institutions must regularly assess programs and policies for effectiveness and relevance



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NY 129-B – Key Provisions

Reporting Aggregate Data to NYSED

- Each year, each institution must report the following aggregate data to the NYSED regarding incidents of domestic violence, dating violence, stalking, and sexual assault:
 - Number of incidents reported to the Title IX Coordinator
 - Number of individuals who sought the institution's judicial or student conduct process
 - Number of cases that proceeded through the judicial or student conduct process
 - Number of Respondents found responsible
 - Number of Respondents found not responsible
 - Description of the final sanctions imposed for each finding of responsibility
 - Number of cases closed prior to a final determination because the Respondent withdrew and declined to participate
 - Number of cases closed prior to a final determination because the Complainant withdrew and declined to participate



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NY State Sexual Harassment Law

- Passed as part of Governor Cuomo’s Fiscal Year 2019 budget
- Updated by Governor Hochul in April 2023 to provide an interactive training video and updated Model Policy and Trainings
- Key resources (<https://www.ny.gov/programs/combating-sexual-harassment-workplace>)
 - FAQ sheet
 - Sexual Harassment Prevention Employer Toolkit
 - Minimum Standards for Sexual Harassment Prevention Policies
 - Minimum Standards for Sexual Harassment Prevention Trainings
 - Model Policy (Updated in 2023)
 - Model Training (Updated in 2023)
 - Slide deck
 - Case studies
 - Prevention Policy Notice Poster
 - Harassment Complaint Form

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NY State Sexual Harassment Law

Key Provisions

- Complainants may report harassment to their employer and/or to the New York State Division of Human Rights
- The Law covers *all* employers, regardless of the number of employees
- The Law protects non-employee contractors, vendors, consultants, etc
- Under certain circumstances, the Law provides for simultaneous obligations to address harassment
 - Example: an employee of a ABC Cleaning Company is assigned to clean the offices of XYZ Architecture Firm. An XYZ employee continually asks the ABC employee out on dates. The ABC employee is entitled to report to **both** ABC and XYZ. The Law requires **both** companies to provide grievance procedures and appropriate remedies.



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NY State Sexual Harassment Law

Key Provisions

- Employers must provide a legally-compliant written policy to all employees in printed or electronic form
 - For third-party vendors or other non-employees, posting the policy in a conspicuous place is sufficient.
 - “Employee” includes all workers, regardless of immigration status. It includes exempt, and non-exempt employees, and those who are part-time, seasonal, or temporary employees.
- Employers must provide a legally-compliant interactive training to all employees annually
 - “Interactive” trainings can be web-based or in-person but must provide an opportunity for trainees to ask questions and receive answers
 - Extra training required for employees in managerial/supervisory roles
 - Employers must take appropriate steps to ensure all employees are trained



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NY State Sexual Harassment Law

Key Provisions

- Employers must provide the policy and training in the language(s) spoken by their employees, as long as those languages are those with state-issued translations
 - If there is not a state-issued translation, the employer may provide the policy and training in English.
- Employers may not mandate arbitration of sexual harassment claims
- Employers may not request or agree to non-disclosure agreements in sexual harassment claims unless requested by the Complainant
 - “Complainant’s request” requires a 21-day waiting and 7-day revocation period



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NY State Sexual Harassment Law

Policy – Minimum Standards

The policy must:

1. Prohibit sexual harassment **consistent with NY State Department of Labor guidance** (enacted in 2015, <https://dhr.ny.gov/anti-discriminationharassment-guidance>)
2. Provide **examples** of conduct that would constitute unlawful sexual harassment
3. Include information about **federal and state statutes** addressing sexual harassment, **remedies** available to victims, and a statement that there **may be applicable local laws**
4. Include a **complaint form**



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NY State Sexual Harassment Law

Policy – Minimum Standards

The policy must (continued):

5. Include a procedure for the **timely and confidential investigation** of complaints that ensures due process for all parties
6. Inform employees of their **rights of redress** and all available forums for adjudicating sexual harassment complaints administratively and judicially
7. Clearly state that sexual harassment is a form of employee **misconduct** and that **sanctions** will be enforced against individuals engaging in such conduct and against supervisors/managers who knowingly allow such behavior to continue
8. Clearly state that **retaliation** against individuals who complain or who testify or assist in any investigation or proceeding is unlawful



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NY State Sexual Harassment Law

Training – Minimum Standards

The training must:

1. Be **interactive**
2. Include an explanation of sexual harassment consistent with NY State Department of Labor guidance (enacted in 2015, <https://dhr.ny.gov/anti-discriminationharassment-guidance>)
3. Include **examples** of conduct that would constitute unlawful sexual harassment
4. Include information about federal and state statutes addressing sexual harassment, and remedies available to victims



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NY State Sexual Harassment Law

Training – Minimum Standards

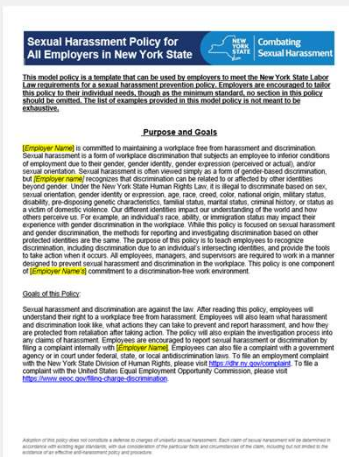
The training must (continued):

- 5. Include information about employees’ rights of redress and all available forums for adjudicating sexual harassment complaints
- 6. Include information addressing **conduct by supervisors** and any additional **responsibilities** for such supervisors



NY State Sexual Harassment Law

Model Policy



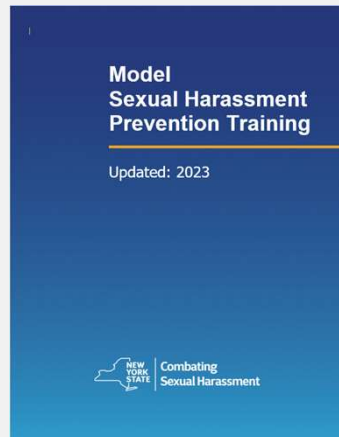
- Eight pages
- “Fill in the blank” format
- Specifically addresses sexual harassment but states that NY State prohibits all forms of discrimination and harassment based on protected status, including:
 - Age
 - Race
 - Color
 - Creed
 - National origin
 - Sexual orientation
 - Military status
 - Sex
 - Disability
 - Marital status
 - Domestic violence victim status
 - Gender identity
 - Criminal history



NY State Sexual Harassment Law *Model Training and Slides*

Model training:

- Eighty pages
- Provides instructions to employers and a checklist of minimum standards
- Includes trainer script, policy walk-through, definitions, procedural overview, and case studies for interactive portion of training



NEW YORK STATE Sexual Harassment Prevention Training

2023 Edition



Slides:

- 2023 updated slide deck for prevention training now combined with eight case studies



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THE STOP SEXUAL HARASSMENT IN NYC ACT

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Stop Sexual Harassment in NYC Act

- Signed into law by Mayor Bill Di Blasio on May 9, 2018
- Codified as Local Law 96 of 2018
- Expands the City Human Rights Law in cases of gender-based harassment to increase the **statute of limitations** from one year to three years and **expand protections to all employees** regardless of the size of their employer



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Stop Sexual Harassment in NYC Act

- Additional obligations for employers include:
 - For employers with 15+ employees, required to conduct annual anti-sexual harassment trainings for all employees
 - Employers must keep records of all trainings, including a signed employee acknowledgement (Note: This was not required by the New York State Sexual Harassment Law)
 - All employers in the city are required to conspicuously display anti-sexual harassment rights and responsibilities notices in English and Spanish and distribute a factsheet to individual employees at the time of hire

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OVERVIEW OF EFFECTIVE PRACTICES

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Key Elements of Effective Practices



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Integration and Coordination

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Key Elements of Effective Practices

- Title IX Coordinator
 - Independent
 - Appropriately resourced
- Coordinated multi-disciplinary response team
 - Coordination of information
 - Coordination of personnel
- Privacy v. confidentiality
 - Distinction between confidential resources and reporting options
 - Informed reporting
- Integration of reporting responsibilities:
 - Responsible Employee
 - Campus Security Authority
 - Mandatory reporter of suspected child abuse

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Key Elements of Effective Practices

- Uniform policy and procedures for resolution:
 - Complainant autonomy/agency
 - Fair and impartial practices
 - Remedies-based options
 - Sanctions-based options
- Centralized reporting and review process
 - Consistent institutional responses
 - Tracking and monitoring of incidents and climate
- Trauma-informed investigations and practices
- Communication
 - Consistency and transparency
 - At the individual and community level
- Education, prevention and training programs

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Separation of Roles

- Separate support and advocacy role from investigation and adjudication
- Conflation of roles can:
 - Impact thorough assessment of the facts
 - Create distrust/confusion by complainant
 - Give appearance of bias/lack of impartiality

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Confidential Resources

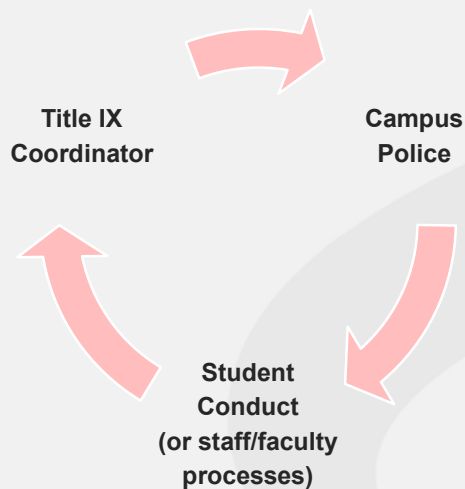
- Students or employees wishing to obtain confidential assistance may do so by speaking with professionals who are obligated by law to maintain confidentiality
- Confidential resources generally include medical providers, mental health providers, clergy, and rape crisis counselors
- Exceptions to confidentiality include:
 - Mandatory child abuse reporting
 - Tarasoff imminent risk of harm to self or others
 - State felony or sexual assault reporting



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Central Review Process/Multi-disciplinary Team



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Centralized Review Process

- Coordination of information and personnel
 - Clearly delineated roles and responsibilities
 - Build in regular and open lines of communication
 - Sequence events in advance
- Separate support and advocacy from investigation and adjudication
- Template communications
- Central tracking for patterns
- Documentation/records
- Ensure consistent implementation:
 - Accommodations
 - Protective measures
 - Investigative practices
 - Sanctions
 - Community remedies
- Transparency in outcomes



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Title IX Assessment → Investigation

- Assess immediate safety and well-being
- Gather basic facts
- Notify of right to contact law enforcement and seek medical treatment
- Notify of importance of preservation of evidence
- Enter into daily crime log
- Assess for timely warning
- Identify resources
- Offer accommodations
- Provide process options
- Assess for pattern
- Ascertain complainant's wishes
- Discuss barriers to proceeding
- Evaluate individual vs. campus safety
- Assign advocate/support person



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Practical Implications: Documenting Key Decisions

- Timely warning
- Supportive measures
 - Emergency removal
- Request for “confidentiality”
- Steps taken to eliminate, prevent & address
- Investigative chronology
- Outcome
- Sanction
- Identify decision-maker(s)
- Outline key factors
- Outline steps taken
- Communicate to parties
- Document in file
 - Capture emails
 - Capture phone calls

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Practical Implications: Evaluation Panel

- Multi-disciplinary team
- Regular communication
- Sharing of information
- Set factors to consider in each report
- Documentation of information sought and received
- Clear decision-making authority

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A Practical Response

- Ensure policies clearly identify reporting options and support resources both on and off campus
- Delineate confidential resources vs. non-confidential reporting options in policy and training
- Ensure all employees are familiar with Title IX reporting expectations
- Offer clear and easy to follow guidance about what happens when a report is received
- Foster a climate that encourages reporting by providing consistency in message, policy, procedure, and outcome



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Tending to the Individual

- Tend to the individual through:
 - Practices informed by an understanding of the impacts of trauma and the dynamics of sexual assault
 - Regular communications
 - Ensuring appropriate support through an advocate, advisor, or support person
 - Adhering to time frames and communicating regarding delays
 - Implementing appropriate interim remedial and protective measures



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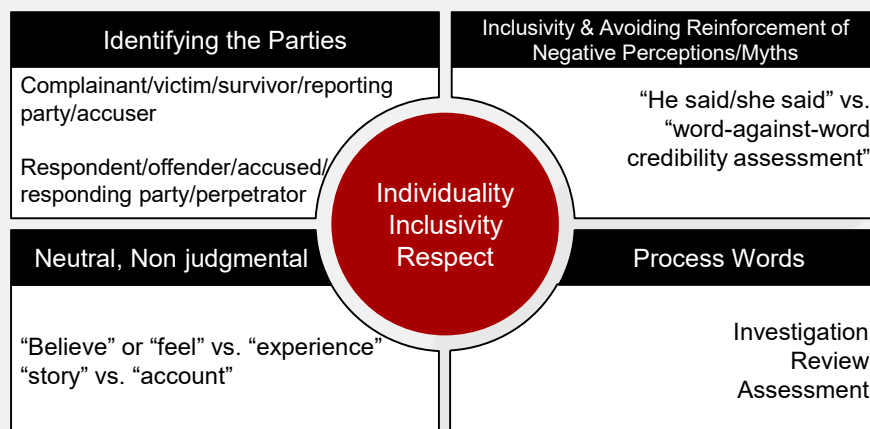
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DYNAMICS OF SEXUAL AND GENDER-BASED HARASSMENT AND INTERPERSONAL VIOLENCE

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Awareness of the Impact of Language



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The Dynamics of Sexual Assault

- Nature of victimization
- Counter-intuitive victim behaviors
- Delay in reporting
- Wavering level of cooperation/recantation
- Role of drugs and alcohol
- Most sexual assaults committed by someone known to the victim
- Most sexual assaults are achieved through threats, intimidation, and exploiting vulnerabilities or incapacitation
- Likelihood of repeat offenders and undetected predators
- Concerns over false reports
- Little to no physical or forensic evidence
- Most common defense is consent
- Decisions based solely on credibility
- Inability to completely eliminate occurrence
- Emotionally charged and incendiary in nature

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Sexual Assault on College Campuses

- Most sexual assaults are committed by someone known to the complainant
- Most sexual assaults result in delayed reporting or no report at all
- Most sexual assaults are achieved through threats, intimidation, and exploiting vulnerabilities or incapacitation due to drugs or alcohol
- Most sexual assaults lack physical evidence
- Most common defense is consent

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Non-Stranger Sexual Assault

- Force is typically not physical
- Does not involve use of weapons
- Force likely to be moral, intellectual, emotional, or psychological
- Often plays upon vulnerability that arises from intoxication of complainant
- Relationship issues greatly affect delay in reporting
- Varying degrees of relationship/trust

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Investigative Considerations

- Questioning of event and actions
 - I should/shouldn't have
 - Why did/didn't I
- Effect of Complainant's own misconceptions
 - I was drinking
 - I consented to some of the acts
 - I put myself in that position
 - Not enough force/no weapon used
 - Not a stranger
 - I have been abused before – it must just be me

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Investigative Considerations

- Effect of power differential
- Preservation of dignity
- Cultural or religious influences
- Processing of incident not linear

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Delay in Reporting

- Delay in reporting
 - Expectation of prompt/fresh complaint
 - Did the victim understand the significance of the act?
- Consider barriers to reporting
 - Ask the why without judgment
 - Help me understand . . .

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The logo for Cozen O'Connor, featuring a stylized red and white graphic to the left of the text "COZEN O'CONNOR".

98

Barriers to Reporting

- Fear of not being believed
- Fear of retaliation
- Fear a loss of privacy
- Fear of being blamed
- Incident may be trivialized
- Incident may be minimized
- Self-doubt:
 - Who to tell?
 - How to report?
 - When to report?
 - Why report?
- Ensure process for reporting that is:
 - Known to victims
 - Convenient
 - Professional
 - Trauma-informed
 - Private

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Disclosure

- A process where an individual reveals abuse or assault
- On-going, not a one time event
- Stages of Disclosure:
 - Denial
 - Tentative
 - Active
 - Recantation
 - Reaffirmation
- Triggers for Disclosure
 - Accidental – victim's secret is found out
 - Purposeful – victim makes decision to tell

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Recantation

- Understand the real life repercussions of disclosing
- How was disclosure received?
- Tremendous actual & emotional costs of disclosure
- Possibility that recantation is real
- Does NOT end the investigation or the process
- Explore direct and indirect causes of recantation

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Direct Causes of Recantation

- Complainant is blamed by family, friends, or respondent
- Direct threats to complainant by respondent/others
- Indirect threats to complainant by community members (shunning)
- Complainant is stigmatized, labeled, or the object of ridicule on campus
- Pressure by any individual to recant
- Emotional blackmail by respondent (I'll be kicked out of school)

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Indirect Causes of Recantation

- Love for the respondent
- Loss of offender in life
- Fragmented peer group/community
- Effect on family members (sadness/depression)
- Lack of family support
- Feeling guilty/responsible
- Fear of testifying
- No desire or emotional fortitude to endure process
- Change in living conditions
- Change in financial status
- Change in school, neighborhood, circle of friends
- Multiple interviews and medical procedures
- Does not want respondent to suffer consequences
- Does not want to relive incident again
- Only wanted abuse to stop
- Just wants life to get back to normal

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Key Takeaways

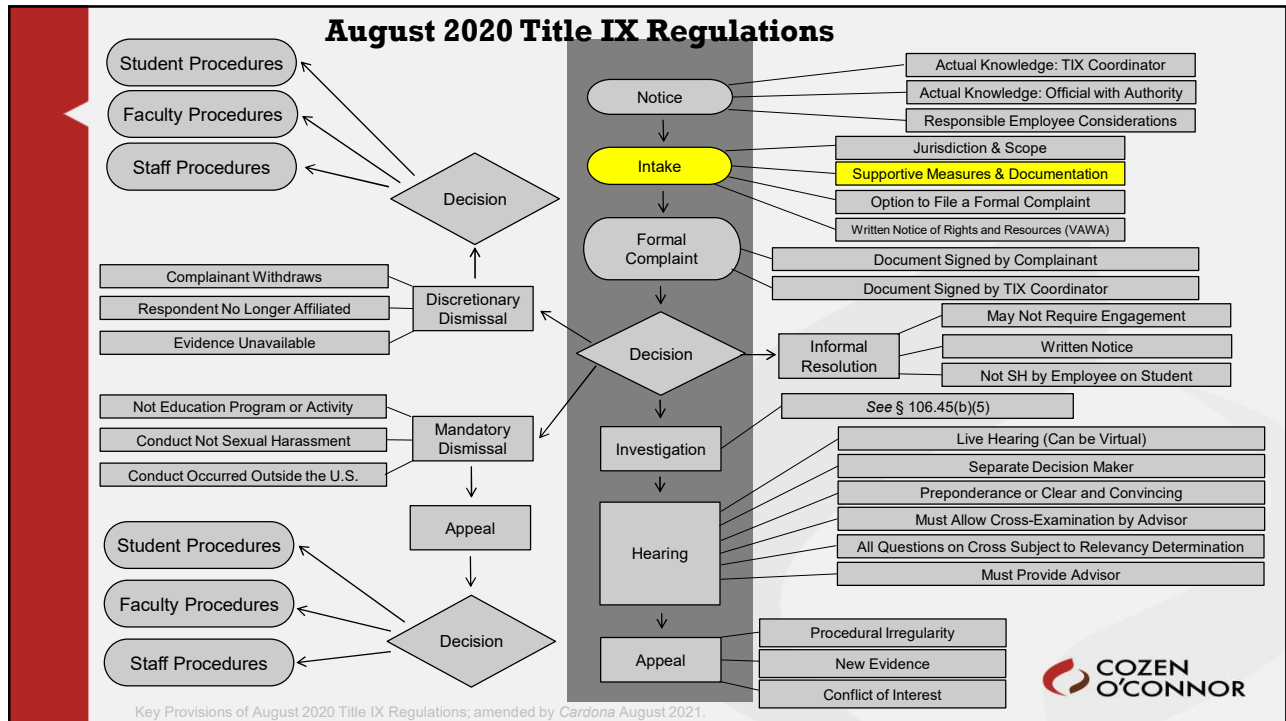
- Individuals respond to trauma differently. Our role is never to conclude that a person has or has not experienced trauma.
- We learn about the potential impacts of trauma so that we avoid improper judgments about a person or the information they share.
- Just as it is improper to cede decision making to statistics, it is improper to base a finding of responsibility on whether the Complainant appears to exhibit effects of trauma.
- While we do not typically think of Respondents experiencing potential neurobiological impacts of trauma, they may experience stressors that impact the way they present themselves and how they share information. We should avoid improper judgments about all people and the information they share.
- **Each individual case must be evaluated on its facts.**

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TITLE IX REGULATIONS: SUPPORTIVE MEASURES



Reports vs. Formal Complaints

- The August 2020 Title IX regulations distinguish and separate a recipient's obligation to **respond to a report** of sexual harassment from a recipient's **obligation to investigate formal complaints** of sexual harassment
 - If students would like supportive measures but do not wish to initiate an investigation...they may make a report of sexual harassment.
 - If students would like supportive measures and also would like the recipient to initiate an investigation...they may file a formal complaint.

August 2020 Title IX Regulations; Preamble, 85 F.R. 30190.



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Offering Supportive Measures



- The Title IX Coordinator must promptly contact the complainant to:
 - Inform of the availability of supportive measures **with or without the filing of a formal complaint**,
 - Consider the **complainant's wishes** with respect to supportive measures
 - Explain the process for filing a formal complaint.
- July 2021 Q & A sample policy:
 - Example Policy 1: The school presumes that reports of prohibited conduct are made in good faith. A finding that the alleged behavior does not constitute a violation of this school's policy or that there is insufficient evidence to establish that the alleged conduct occurred as reported does not mean that the report was made in bad faith.

August 2020 Title IX Regulations; §§106.45(b)(3) and (b)(8), 85 F.R. 30576 and 30577.



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```

graph TD
    A[Notice] --> B[Intake]
    B --> C[Formal Complaint]
    C --> D{Decision}
    D --> E[Investigation]
    E --> F[Hearing]
    F --> G[Appeal]
  
```

Supportive Measures

- Non-disciplinary, non-punitive individualized services
- Offered to both parties without fee or charge
- Designed to restore or preserve equal access to the education program or activity without unreasonably burdening the other party
- May include:
 - counseling,
 - extensions of deadlines or other course-related adjustments,
 - modifications of work or class schedules,
 - campus escort services,
 - mutual restrictions on contact between the parties,
 - changes in work or housing locations,
 - leaves of absence,
 - increased security and monitoring of certain areas of the campus

August 2020 Title IX Regulations; §106.30(a), 85 F.R. 30574.

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graph TD
    A[Notice] --> B[Intake]
    B --> C[Formal Complaint]
    C --> D{Decision}
    D --> E[Investigation]
    E --> F[Hearing]
    F --> G[Appeal]
  
```

Supportive Measures

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

August 2020 Title IX Regulations; §106.30(a), 85 F.R. 30574.

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```

graph TD
    A[Notice] --> B[Intake]
    B --> C[Formal Complaint]
    C --> D{Decision}
    D --> E[Investigation]
    E --> F[Hearing]
    F --> G[Appeal]
  
```

Documentation

- Must maintain records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment
- Must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity
- If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances

August 2020 Title IX Regulations; §§106.45(b)(10)(i) and (ii), 85 F.R. 30578.

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graph TD
    A[Notice] --> B[Intake]
    B --> C[Formal Complaint]
    C --> D{Decision}
    D --> E[Investigation]
    E --> F[Hearing]
    F --> G[Appeal]
  
```

Emergency Removal for Students

- Must undertake an individualized safety and risk analysis and determine that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal
- Must provide the respondent with notice and an opportunity to challenge the decision immediately following the removal

August 2020 Title IX Regulations; §106.44(c), 85 F.R. 30575.

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```

graph TD
    A[Notice] --> B[Intake]
    B --> C[Formal Complaint]
    C --> D{Decision}
    D --> E[Investigation]
    E --> F[Hearing]
    F --> G[Appeal]
  
```

Emergency Removal

- Where a respondent poses an immediate threat to the physical health or safety of the complainant (or anyone else), § 106.44(c) allows emergency removals of respondents prior to the conclusion of a grievance process (or even where no grievance process is pending), thus protecting the safety of a recipient's community where an immediate threat exist.

August 2020 Title IX Regulations; Preamble, 85 F.R. at 30181.

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```

graph TD
    A[Notice] --> B[Intake]
    B --> C[Formal Complaint]
    C --> D{Decision}
    D --> E[Investigation]
    E --> F[Hearing]
    F --> G[Appeal]
  
```

Administrative Leave

- Nothing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45.
- This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.

August 2020 Title IX Regulations; §106.44(d), 85 F.R. 30575.

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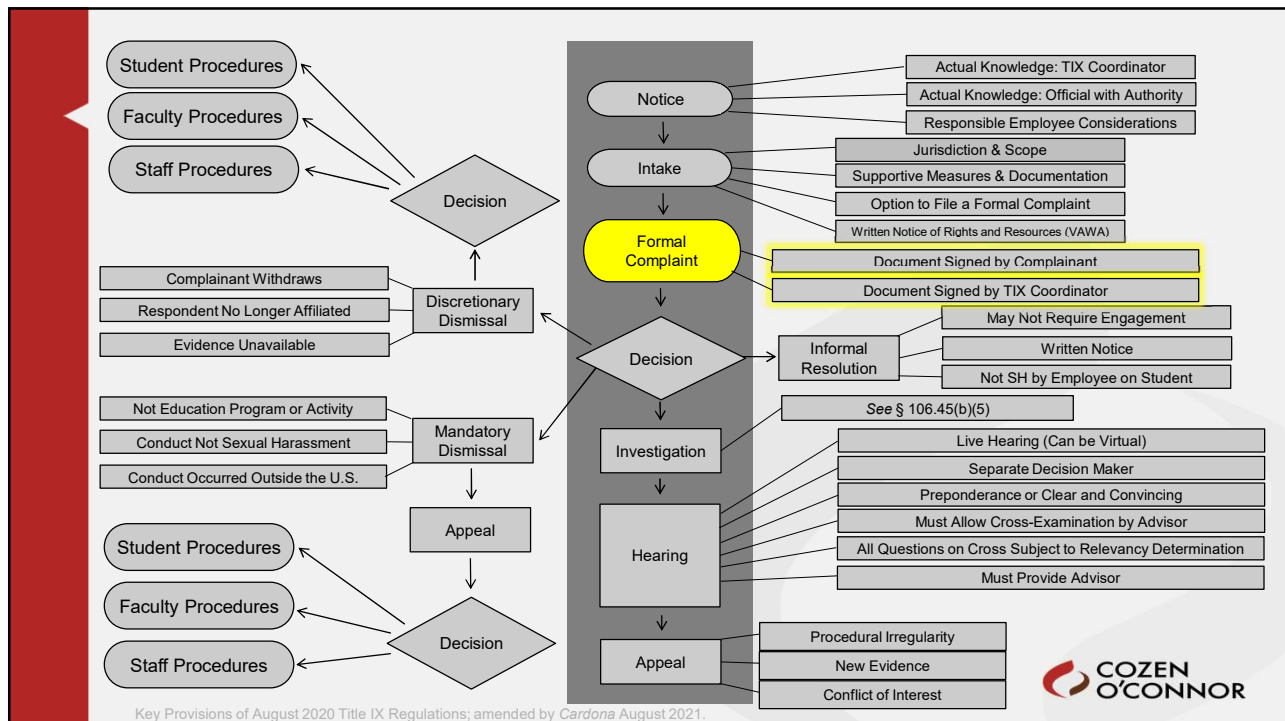
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TITLE IX REGULATIONS: FORMAL COMPLAINTS

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Key Provisions of August 2020 Title IX Regulations; amended by Cardona August 2021.

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graph TD
    A[Notice] --> B[Intake]
    B --> C[Formal Complaint]
    C --> D{Decision}
    D --> E[Investigation]
    E --> F[Hearing]
    F --> G[Appeal]
  
```

Formal Complaint

- Document filed by a complainant or signed by the Title IX Coordinator
- At the time of filing a formal complaint, a complainant **must be participating in or attempting to participate in** the education program or activity of the recipient with which the formal complaint is filed

August 2020 Title IX Regulations; §106.30(a), 85 F.R. 30574.

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```

graph TD
    A[Notice] --> B[Intake]
    B --> C[Formal Complaint]
    C --> D{Decision}
    D --> E[Investigation]
    E --> F[Hearing]
    F --> G[Appeal]
  
```

Formal Complaint: Institutional Response

Upon receipt of a **formal complaint**, the institution:

1. Must complete the actions required upon receiving notice, if not already completed,
2. Must evaluate jurisdiction and required/discretionary dismissal,
3. Should assess appropriate supportive measures for both parties,
4. Should evaluate the need for any other measures, including emergency removal/administrative leave,
5. Must initiate a grievance process that complies with § 106.45


August 2020 Title IX Regulations; §106.30(a), 85 F.R. 30574.

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Formal Complaint: Required Dismissal




```

graph TD
    Notice[Notice] --> Intake[Intake]
    Intake --> FormalComplaint[Formal Complaint]
    FormalComplaint --> Decision{Decision}
    Decision --> Investigation[Investigation]
    Investigation --> Hearing[Hearing]
    Hearing --> Appeal[Appeal]
  
```

- **Must** dismiss if:
 - Conduct would not constitute sexual harassment even if proved,
 - Conduct did not occur in the recipient’s education program or activity, or
 - Conduct did not occur against a person in the United States.
- Such a dismissal does not preclude action under another provision of the recipient’s code of conduct


August 2020 Title IX Regulations; §106.45(b)(3), 85 F.R. 30576.

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Formal Complaint: Discretionary Dismissal




```

graph TD
    Notice[Notice] --> Intake[Intake]
    Intake --> FormalComplaint[Formal Complaint]
    FormalComplaint --> Decision{Decision}
    Decision --> Investigation[Investigation]
    Investigation --> Hearing[Hearing]
    Hearing --> Appeal[Appeal]
  
```

- **May** dismiss the formal complaint or any allegations therein if:
 - A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations,
 - The respondent is no longer enrolled or employed by the recipient, or
 - Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination.

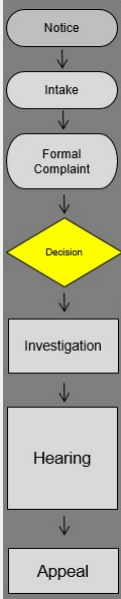
August 2020 Title IX Regulations; §106.45(b)(3), 85 F.R. 30576.

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Dismissal of Formal Complaint




```

graph TD
    A[Notice] --> B[Intake]
    B --> C[Formal Complaint]
    C --> D{Decision}
    D --> E[Investigation]
    E --> F[Hearing]
    F --> G[Appeal]
  
```

- Upon a dismissal required or permitted, the recipient must promptly send **written notice** of the dismissal and reason(s) therefor simultaneously to the parties
- Must offer both parties an **appeal** from a recipient's dismissal of a formal complaint or any allegations therein


August 2020 Title IX Regulations; §§106.45(b)(3) and (b)(8), 85 F.R. 30576 and 30577-78.

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Consolidation of Formal Complaints




```

graph TD
    A[Notice] --> B[Intake]
    B --> C((Formal Complaint))
    C --> D{Decision}
    D --> E[Investigation]
    E --> F[Hearing]
    F --> G[Appeal]
  
```

- A recipient **may** consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, **where the allegations of sexual harassment arise out of the same facts or circumstances.**

August 2020 Title IX Regulations; §106.45(b)(4), 85 F.R. 30576.

122



122



123

A slide with a red vertical bar on the left side. The title "Investigative Principles" is centered at the top in bold, black, uppercase letters. Below the title is a bulleted list of seven principles. The background is light gray with a faint, large, stylized graphic of a person's head and shoulders. The number "124" is in the bottom right corner, and the Cozen O'Connor logo is in the bottom right corner.

Investigative Principles

- Open-ended and thorough inquiry
- Equitable opportunities for the parties to participate
- The conduct of the investigation matters
- Separating intake/support from investigation
- Maintaining and reinforcing impartiality
 - Screening for conflicts of interest or bias
 - Attention to language and communications
- Trained and experienced investigators

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Investigative Goals

- Gather all information that could be directly related
 - Witness interviews
 - Document collection
 - Texts, emails
 - Site visits
 - Surveillance footage
- Evidence review that is transparent
- Draft an investigation report that is:
 - Representative of the investigation
 - Reflects a fair, thorough, complete investigation
 - Anticipates questions/issues from advisors in hearing

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Setting the Stage - Investigations

Institutional Obligations



Parties' Opportunity to Participate



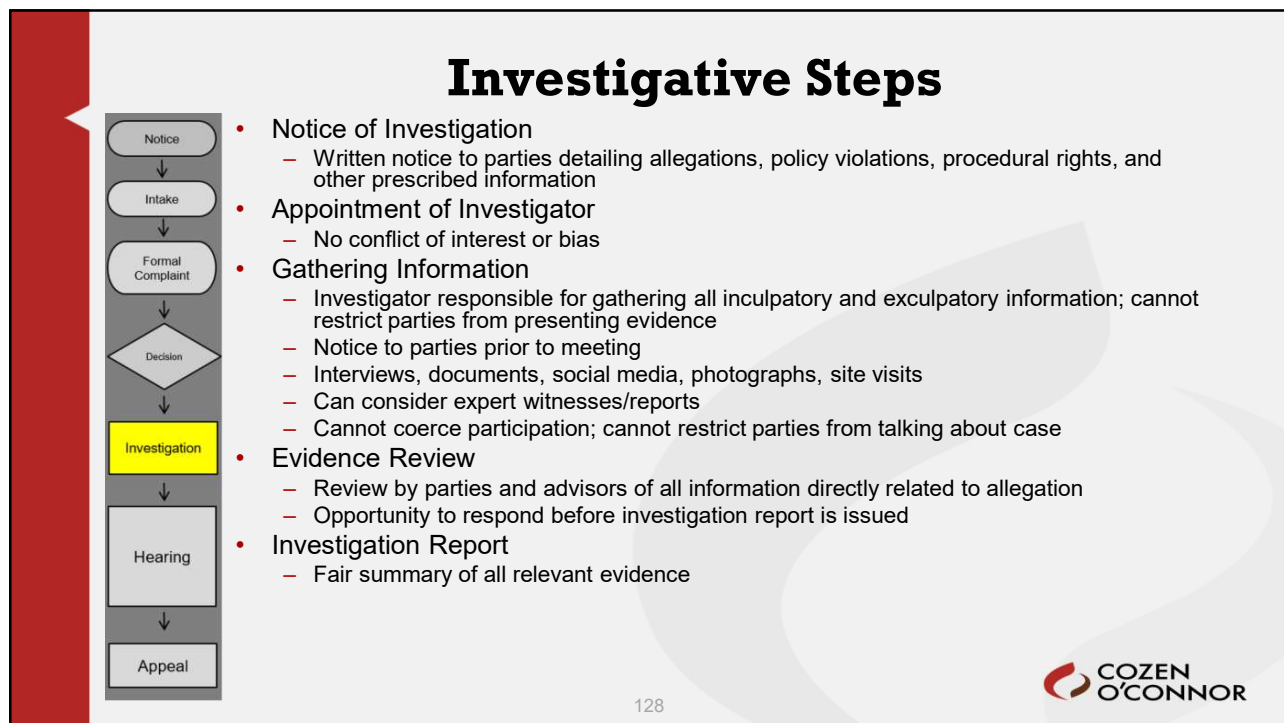
126



126



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Written Notice of all Proceedings



- Written notice of all hearings, investigative interviews or other meetings
- With sufficient time for the party to prepare to participate
- Notice must include:
 - Date, time, location of proceeding
 - Participants invited or expected to attend
 - Purpose of the proceeding

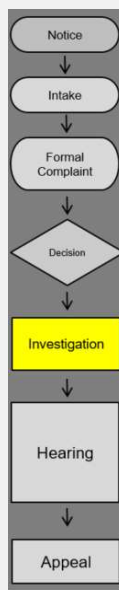
Title IX Regulations §106.45(b)(5)(v); 85 F.R. 30424



129

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Written Notice of Allegations



- Must provide written notice of the allegations.
 - Sufficient time to prepare a response before any initial interview
 - Sufficient details known at the time
 - identities of the parties, if known;
 - the conduct alleged to constitute sexual harassment; and
 - the date and location of the alleged incident, if known.

Title IX Regulations § 106.45(b)(2); 85 F.R. 30576



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Written Notice of the Allegations



– Must state that:

- the respondent is presumed not responsible for the alleged conduct
- a determination regarding responsibility is made at the conclusion of the grievance process

– Must inform the parties:

- they may have an advisor of their choice
- they may inspect and review evidence gathered
- of a prohibition against knowingly making false statements or knowingly submitting false information

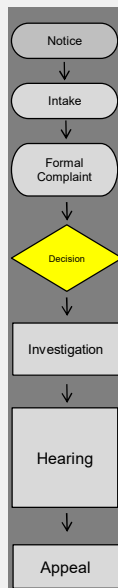
Title IX Regulations § 106.45(b)(2); 85 F.R. 30576



131

131

Written Notice of Allegations



• The notice of the allegations must:

- Be provided with sufficient time for a party to prepare a response before an initial interview

- While the initial notice must be sent “upon receipt” of a formal complaint, with “sufficient time” for a party to prepare for an initial interview, such provisions do not dictate a specific time frame for sending the notice, leaving recipients flexibility to, for instance, inquire of the complainant details about the allegations that should be included in the written notice that may have been omitted in the formal complaint.

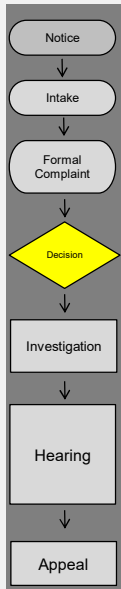
Title IX Regulations §106.45(b)(2); Preamble 85 F.R. 30283



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Supplemental Notice



- If during the investigation, the recipient decides to investigate allegations about the complainant or respondent that are not included in the original notice, the recipient must provide notice of the additional allegations to the parties whose identities are known.
- The Preamble makes it clear that any supplemental notice must be in writing.
 - Although § 106.45(b)(2) requires subsequent written notice to the parties as the recipient discovers additional potential violations...

Title IX Regulations §106.45(b)(2)(ii); Preamble 85 F.R. 30283



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EVIDENCE GATHERING

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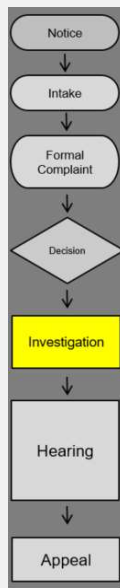
Interview Goals

- Understand the full scope of the information from each witness
- Elements of offense
- Factual gaps/inconsistencies
- Credibility
- Other available evidence
 - Physical, documentary, other witnesses



135

Burden of Gathering Evidence



- Ensure that the burden of proof and the burden of gathering evidence rests on the recipient and not on the parties
 - The recipient's burden is **to gather evidence sufficient to reach a determination** regarding responsibility

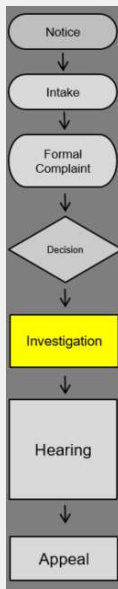
Title IX Regulations §106.45(b)(5)(i); 85 F.R. 30127, FN 562 .



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Burden of Gathering Evidence



- Undertake a **thorough search for relevant facts and evidence** pertaining to a particular case, while operating under the constraints of conducting and concluding the investigation under designated, reasonably prompt time frames and without powers of subpoena.
- Such conditions limit the extensiveness or comprehensiveness of a recipient's efforts to gather evidence while reasonably expecting the recipient to gather evidence that is available.

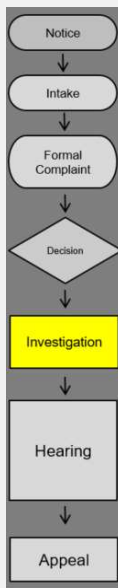
Title IX Regulations; Preamble 85 F.R. 30292



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Burden of Gathering Evidence



- The investigator is obligated to **gather evidence directly related to the allegations** whether or not the recipient intends to rely on such evidence (for instance, where evidence is directly related to the allegations but the recipient's investigator does not believe the evidence to be credible and thus does not intend to rely on it).

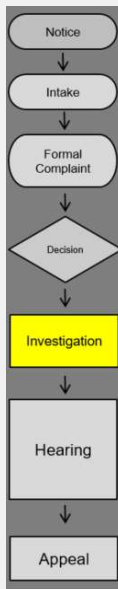
Title IX Regulations; Preamble 85 F.R. 30248-49.



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Opportunity to Participate



- Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.

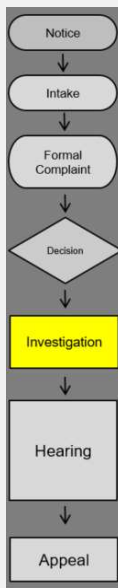
Title IX Regulations §106.45(b)(5)(ii) ; 85 F.R. 30422-23.



139

139

Witnesses & Evidence



- Provide an equal opportunity for the parties to present witnesses and evidence
 - Fact and expert witnesses
 - Inculpatory and exculpatory evidence

Title IX Regulations §106.45(b)(5)(iii); 85 F.R. 30576.



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Evidentiary Considerations

- Relevance
- Privileged Information & Records
- Prior Sexual History
- Prior or Subsequent Misconduct
- Setting Evidentiary Rules

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INVESTIGATING ALCOHOL-INVOLVED CASES

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The Role of Alcohol

- Central nervous system depressant
- Impairs cognition and psychomotor skills
- Progressively impairs all body functions
- Decreases inhibitions
- Impairs perceptions
- May cause blackouts or loss of consciousness
- May cause memory loss
- Effects exacerbated when mixed with other drugs
- Intoxication breeds vulnerability
- A person may be less likely to think someone is trying to sexually assault him/her
- A person intent on harming another may not need to use physical force
- A person may not realize incident has occurred
- A person may delay in reporting for multiple reasons
- No toxicological evidence of BAC/impairment level due to delay in report

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The Role of Alcohol

- 80% to 90% of sexual assaults on campus are acquaintance rapes and involve drugs or alcohol.¹
- “Nearly half of America’s 5.4 million full-time college students abuse drugs or drink alcohol on binges at least once a month.”²
- 90% of campus rapes are alcohol related.³

1. DOJ, National Institute of Justice, 2005.

2. National Center on Addition and Substance Abuse at Columbia University 2007.

3. Bureau of Justice Statistics, 2000, National Commission on Substance Abuse at Colleges and Universities

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144

Alcohol: Investigative Challenges

- Lack of memory
- Inability to give detail
- Person may have been unconscious or in and out of consciousness
- Delay in reporting because:
 - May not know event occurred
 - May not recognize it as lack of consent
 - Feeling of “contributory negligence”
 - Concerns over conduct policy consequences

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Frame Questions Appropriately

- Be aware that questions about drugs and alcohol are often subject to misinterpretation
- Explain amnesty
- Commit to clarity on why you are asking
- Explain the reasons for your questions
 - Assessing for incapacitation
 - Evaluating the “lens” through which the party or witness observed the events (opportunity to see, hear, understand, and remember)
- Explain that you will ask similar questions of all witnesses
- Invite the witness to ask questions before you go further

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Get Detailed Information

- Timeframe of consumption (first drink, last drink, spacing)
- Number of drinks
- For each drink:
 - Type (beer, wine, liquor – with specific brand, if possible)
 - Was it mixed with anything? Who mixed it?
 - How was it served? (Bar or restaurant will lead to more available information)

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Get Detailed Information

- List of others present and when they were there
- Other factors that affect the impact of alcohol:
 - Food consumed before, during, and after and whether food intake was normal or abnormal for the person
 - Height and weight
 - Medications
 - Different sleep patterns
 - Illness
 - Low hydration
 - History of blackouts

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Get Detailed Information

- Complainant's internal experience of their own intoxication (subjective)
 - Loss of consciousness/lack of memory – get the “bookends” of memory
 - Physical impairments – walking, standing, sitting, grasping, keeping head upright, ability to text, ability to remove one's own clothing, incontinence, vomiting
 - Cognitive impairments – dizzy, foggy, sleepy, giggly, hyperactive, sluggish, nonsensical
 - Verbal impairments – slurring, inability to talk, volume regulation
 - Any other effects

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Get Detailed Information

- Others' observations of Complainant (objective)
 - Observations of Complainant's consumption – when, where, what, who else was there?
 - Physical impairments
 - Cognitive impairments
 - Verbal impairments
 - Any other effects

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150

Get Detailed Information

- Other information that can establish timeline, assist in assessing level of impairment, and can provide corroboration of either party's account:
 - History of relationship between the parties
 - Witness's knowledge of Complainant's sober behavior
 - Parties' communications or interactions with each other (compare pre- and post-incident)
 - Parties' descriptions of the incident to others – context, content, demeanor
 - Text/social media messages sent before, during, and after the incident

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Considerations

Consideration	Why?
Avoid asking about intoxication on a scale (e.g. "from 1 to 10")	<ul style="list-style-type: none"> • There is no universal understanding of what the numbers on the scale mean. • Instead, ask about the impacts of drugs or alcohol on a person physically, cognitively, verbally, and otherwise.
Avoid over-reliance on online BAC calculators in determining incapacity	<ul style="list-style-type: none"> • Without a blood or breath test, it is hard to pinpoint a person's BAC, especially after the fact. • BAC is only one data point and does not correlate precisely to a person's subjective experience or objective indicia of intoxication/incapacitation. • Use BAC when it is available; otherwise, rely on subjective and objective indicia of impairment.
Consider the observations of any sober witnesses with experience and/or training	<ul style="list-style-type: none"> • Medics, police, firefighters, and even trained security guards, volunteer EMS, and residence hall staff are generally sober, trained observers paying close attention. • May need to work with local agencies to secure participation and obtain records, if available.
Create and use a universal timeline	<ul style="list-style-type: none"> • Witness statements taken out of context do not help answer the critical question: whether the Respondent knew or should have known that the Complainant was incapacitated. • Create a visual timeline of events and highlight the timeframe the parties were in each other's presence.

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Relevance



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

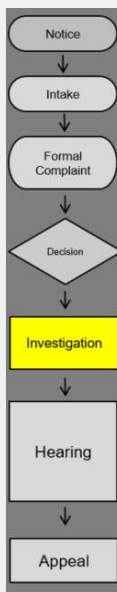
Title IX Regulations May 19, 2020; Preamble at 30247, FN 1018



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Relevance



“While the proposed rules do not speak to

- admissibility of hearsay,
- prior bad acts,
- character evidence,
- polygraph (lie detector) results,
- standards for authentication of evidence,
- or similar issues concerning evidence,

the final regulations require recipients to **gather and evaluate relevant evidence**, with the understanding that . . .

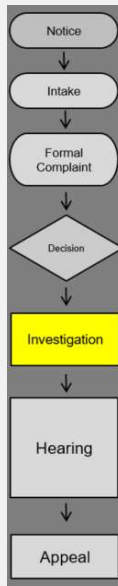
Title IX Regulations May 19, 2020; Preamble at 30247, footnotes omitted



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Relevance



- this includes **both inculpatory and exculpatory evidence**, and
- the final regulations deem questions and evidence about a complainant's prior sexual behavior to be **irrelevant** with two exceptions, and
- preclude use of any information protected by a **legally recognized privilege** (e.g., attorney-client)."

Title IX Regulations May 19, 2020; Preamble at 30247, footnotes omitted



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Limitations on Relevance



- To that end, the Department has determined that recipients **must consider relevant evidence** with the following conditions:
 - a complainant's prior sexual behavior is **irrelevant** (unless questions or evidence about prior sexual behavior meet one of two exceptions, as noted above);
 - information protected by any legally recognized privilege **cannot be used**; no party's treatment records may be used without that party's voluntary, written consent; and
 - The Department notes that where evidence is duplicative of other evidence, a recipient may deem the evidence **not relevant**.

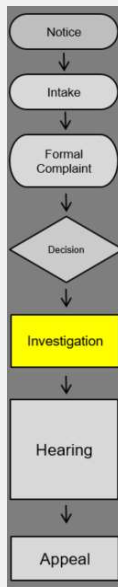
Title IX Regulations, May 19, 2020, Preamble 85 F.R. 30337



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Privileged Information



- 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

Title IX Regulations May 19, 2020; § 106.45(b)(1)(x) 85 F.R.30361



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Privileged Information: Per Se Irrelevant



- In response to commenters' concerns that relevant questions might implicate information protected by attorney-client privilege, the final regulations add § 106.45(b)(1)(x) to bar the grievance process from requiring, allowing, relying on, **or otherwise using questions or evidence** that constitute, or seek disclosure of, information protected under a legally recognized privilege.

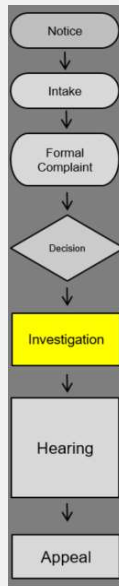
Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30361



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Prior Sexual History



- 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
- To prove consent, if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent.

Title IX Regulations May 19, 2020; §§ 106.45(b)(1)(iii) and 106.45(b)(6) 85 F.R.30461



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Prior Sexual History: Per Se Irrelevant



- The final regulations clarify the rape shield language to state that **questions and evidence subject to the rape shield protections are "not relevant,"** and therefore the rape shield protections apply wherever the issue is whether evidence is relevant or not.
- Footnote 1355: The Department emphasizes that "prior" does not imply admissibility of questions or evidence about a complainant's sexual behavior that occurred after the alleged sexual harassment incident, but rather must mean anything "prior" to conclusion of the grievance process

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30353



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160

Prior Sexual History



- Only applies to complainants in the Regulations
 - The Department reiterates that the rape shield language in this provision does not pertain to the sexual predisposition or sexual behavior of respondents, so **evidence of a pattern of inappropriate behavior by an alleged harasser** must be judged for relevance as any other evidence must be.
 - Note: NY State Law states that Prior Sexual History of both parties may be excluded.

Title IX Regulations May 19, 2020; §§ 106.45(b)(1)(iii) and 106.45(b)(6);
Preamble 85 F.R.30353



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Prior Sexual History: Motive



- The Department disagrees that the rape shield language is too broad. Scenarios described by commenters, where a respondent might wish to prove the complainant had a motive to fabricate or conceal a sexual interaction, do not require admission or consideration of the complainant's sexual behavior.
- Respondents in that scenario could probe a complainant's motive by, for example, inquiring whether a complainant had a dating or romantic relationship with a person other than the respondent, without delving into a complainant's sexual behavior; sexual behavior evidence would remain irrelevant in such circumstances.

Title IX Regulations May 19, 2020; §§ 106.45(b)(1)(iii) and 106.45(b)(6);
Preamble at 30351



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Prior or Subsequent Misconduct



- The regulations do not prohibit the use of prior or subsequent misconduct
 - “Evidence of a pattern of inappropriate behavior by an alleged harasser” permitted if relevant
- Schools will need to determine if such conduct is:
 - Relevant
 - May be used in determining responsibility
 - May be used in sanctioning
- If so, will need to set criteria for consideration

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Relevance of Prior or Subsequent Conduct

- Intent/knowledge/state of mind
- Motive
- Opportunity
- Lack of mistake
- Pattern
- Identity
- Information that is inextricably interwoven with the facts

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Application to Specific Circumstances

- Multiple instances of a respondent engaging in misconduct towards the same complainant
- Multiple allegations by same complainant against same respondent
- Multiple allegations by different complainants against same respondent
- Respondent alleges complainant has engaged in past misconduct involving false reports

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No Comprehensive Evidentiary Rules



- The Department desires to prescribe a grievance process adapted for an educational environment rather than a courtroom, and **declines to impose a comprehensive, detailed set of evidentiary rules** for resolution of contested allegations of sexual harassment under Title IX.
- Rather, the Department has carefully considered the procedures most needed to result in fair, accurate, and legitimate outcomes in Title IX grievance processes.

Title IX Regulations, May 19, 2020, Preamble 85 F.R. 30337

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Simplified Evidentiary Considerations



- Recipients are educational institutions that **should not be converted into *de facto* courtrooms.**
- The final regulations thus prescribe a process that **simplifies evidentiary complexities** while ensuring that determinations regarding responsibility result from **consideration of relevant, reliable evidence.**

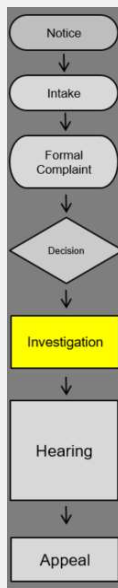
Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30348



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Flexibility to Adopt Rules



- Within these evidentiary parameters **recipients retain the flexibility to adopt rules that govern how the recipient's investigator** and decision-maker evaluate evidence and conduct the grievance process (so long as such rules apply equally to both parties).
- **Relevance is the standard that these final regulations require**, and any evidentiary rules that a recipient chooses must respect this standard of relevance.

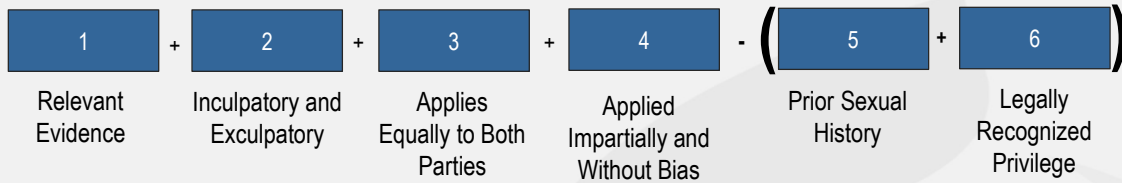
Title IX Regulations May 19, 2020; Preamble at 30248.



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Evidentiary Rules Must Consider



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INVESTIGATIVE PROTOCOLS

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Investigative Protocols

- Developing an investigation plan
- Maintaining a working chronology
- Building a timeline
- Communications
- Documenting interviews
- Gathering physical evidence
- Investigative report
- Privacy and retaliation considerations

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Developing an Investigative Plan

- Develop an investigative plan at the outset
- Make a list of witnesses and order of interviews
- Make a list of other possible sources of evidence
 - How will the evidence be obtained?
- Use checklists to ensure that all possible sources of evidence are considered

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Developing an Investigative Plan

- Explore multiple sources for potential witness interviews
 - Complainant
 - Respondent
 - Any witnesses to the alleged incident
 - Any witnesses to the disclosure(s)
 - First responder personnel
 - Hospital
 - Police
 - Campus
 - Any other alleged victims of the respondent
 - Any witnesses to relevant prior contact between complainant and respondent
 - Other witnesses identified through interviews

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Developing an Investigative Plan

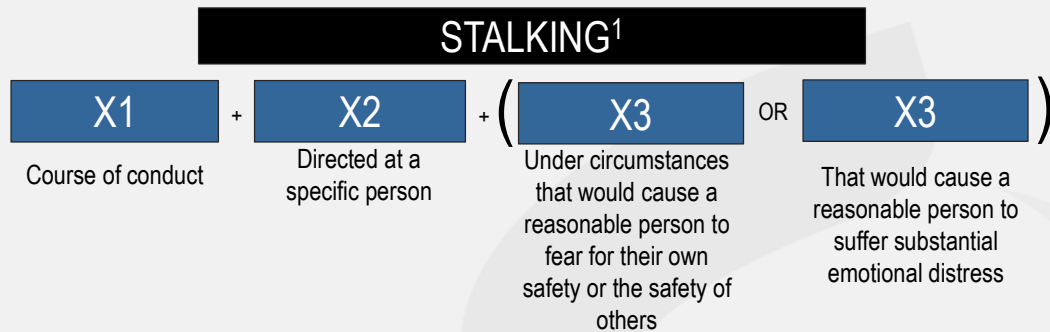
- Maintain flexibility and revise the plan as the investigation reveals other potential sources of evidence
- Look for continually evolving evidence
 - Social media
 - Recent contact between the complainant and the respondent
 - Acts of retaliation

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Map the Elements of the Alleged Conduct



¹ Source: Berkeley College Policy, p. 5 (draft as of 7/25/2023)



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Maintaining a Case Log

- Maintain a chronological log of the investigation including dates/times of interviews, meetings, requests for evidence, receipt of evidence, and all other key events
- Ensure that the investigation is completed within the institution's time frame or that written notice of extensions are given specifying good cause reasons for the delay



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Building a TimeLine

- Create a timeline of events of the incident
 - Remember to include key events other than the alleged sexual assault itself: i.e., relevant prior contact, other complainants, disclosure
- Create a timeline of the relationship between the parties
- Identify witnesses to each event
- Identify any other evidence relevant to each event
- Note where there is agreement/disagreement as to events

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Communications

- Identify contact person for the parties to avoid the need to coordinate with multiple departments
- Ensure regular and timely communications re: next steps, expectations, timing and delays
- Check in!!
- Follow up in person meetings and telephone calls with written memory markers
- Use sensitive and informed tone and content
- Use common and consistent language among team members

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Communications

- Ensure active and regular communication with complainant and respondent regarding procedure and what can be expected.
- Be sensitive, courteous, and professional in all communications. The investigation is stressful on all involved.
- Maintain a working list of contact information for all relevant parties.
- Document all communications.

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Identifying Our Own Biases

- What does rape look like?
- Victim-blaming
 - What was she thinking when...
 - What did he think was going to happen?
- Over-identifying with complainant or respondent
 - I would have...
 - If it was me..
 - That could have been me...
- Culture/diversity/world view

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Diversity and Culture

- Sensitivity to language and bias
 - LGBTQ
 - Cultural differences
 - Race
 - Insular groups
 - 504/disability
- Reporting barriers
- Communication differences/impediments



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FORENSIC INTERVIEWING

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Before You Begin

- Consider timing and location
- Prepare for the interview by reviewing information gathered to date and listing all questions and/or subject matters to be covered
 - But don't forget to listen and follow-up during the interview
- Think about:
 - What information the interviewee is likely to have about the incident
 - The interviewee's relationship to each party
 - Barriers to the interviewee's participation, including:
 - Concerns about retaliation
 - Needing to navigate ongoing relationships
- Permit a support person to be present
- Allow enough time for thorough exploration of the issues

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Before You Begin

- Look beyond the initial set of information
- Ask yourself:
 - What would I want to know?
 - What is missing here?
 - What questions do I still have?
 - What external facts would corroborate or refute the information?
 - Are you able to preliminarily assess the type of case (fabrication, identification, or consent)
- Organization, knowledge, and fluency

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Fabrication, Identification, or Consent

- Fabrication (It didn't happen.)
 - Used when there is no corroborating physical or eyewitness evidence
- Identification (Someone else did it.)
 - Used when there is corroborating physical evidence to establish that act occurred
- Consent
 - Used when there is DNA or other identification evidence
 - Consent is the most common defense in acquaintance rape prosecutions.

Corinne Casarino, *Civil Remedies in Acquaintance Rape Cases*, 6 B.U. Pub. Int. L.J. 185, 189 (1996).



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The Interview Preamble

- Introduce roles:
 - Investigator as fair, impartial, thorough fact-gatherer
 - Advisor as emotional support, silent observer
- Clearly explain that the information you gather will be shared with both parties and with a small circle of administrators involved in resolution
 - If there were to be a criminal or civil case in the future, could be shared pursuant to subpoena or other legal process
- Explain the obligation to provide truthful and complete information
- Reminder not to engage in retaliation or interfere with fact-gathering
- Overview of amnesty policy
- “Do you have any other questions before we begin?”



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Privacy Considerations

- Inform all witnesses that the information:
 - Will be shared with school personnel (need-to-know limited group)
 - May be shared with law enforcement (no requirement to participate)
 - Will not be shared beyond the “need to know” circle
- Request that witnesses:
 - Keep the contents of the interview confidential
 - Avoid discussing the underlying events with other potential witnesses

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Retaliation Considerations

- Discuss importance of non-retaliation with all parties
- Discuss with the respondent that any acts of retaliation could be used as evidence against him/her

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Interview Techniques

- Develop rapport
 - Invest in learning the language of your witness
 - Begin with background/context questions – including the nature of the parties' relationship, if any.
 - Exercise reflective listening in framing next question
 - Maintain attentive posture and good eye contact
 - Allow witness to ask questions

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Interview Techniques

- Allow your witness to give a narrative
 - Refrain from interrupting or from asking clarifying questions
 - Use open-ended free recall questions
 - Focus on sensory details the individual may be able to recall
 - Pay attention to emotional cues and responses and other non-verbal communication
 - Look for any evidence of motive/bias/interest, even where not immediately apparent
 - Listen for “ring of truth” answers

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Interview Techniques

- Go back and ask questions to clarify details
 - Ask memory trigger questions (focused or multiple choice)
 - Explore and allow witness opportunity to reconcile internal inconsistencies
 - Recognize the potential impacts of events on memory and presentation
 - Avoid asking questions that imply a value judgment
 - Frame questions about sensitive areas with an explanation of why you are exploring that area of inquiry
 - Manner of dress
 - Alcohol or other drug consumption
 - Prior sexual history

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Interview Techniques: Corroboration

- Exhaustive search for corroboration
- Identify and explore areas of inquiry that can be corroborated
 - Photos/text messages/social media posts/Uber receipts
- The disclosure of event should be thoroughly explored
 - Circumstances
 - Witnesses (“prompt complaint witnesses”)
- Question opportunity, access, means, and motive
- Test the sensory and emotional details
- Take the claims/defenses to their logical ends and explore logical inconsistencies
- Assess import of lack of corroboration

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Interview Techniques

- Pay attention to your tone of voice and volume level
- In consent cases, identify each parties' perspective on the other's method of communication (verbal and non-verbal) during incident
- Rely upon maps, photos, charts where available
 - Have witness draw a diagram (or mark up a previously obtained floor plan)
- Create running timeline
- Set the stage for a follow-up interview
- Send follow-up email
 - To correct any mistakes/misstatements
 - To provide any additional information recalled after the interview

195



195

The Continuum Approach

- Open-ended
 - Calls for narrative or recall
- Focused
 - Directs the witness to a particular area of focus
- Multiple choice
 - Provides a range of options, "or some other way"
- Yes/No
 - Seeks to clarify a specific point
- Leading
 - Assumes the answer . . .

196



196

Some Useful Phrases

- **Could you/would you be willing to** tell us more about....?
- **How** did you feel about...?
- **What** did you do after...?
- **What happened** then?
- **Can you** explain to me what you meant when you said....?
- **How** did ...?
- **Can you help me** understand ...?

197



197

Informed and Effective Communication

- Using open and conversational communication style
 - Not a “gotcha”
- Listen – don’t assume!
- Embrace the uncomfortable, the pause, and the silence
 - Take a break
 - Offer reassurance
 - Reschedule
- Support the witness by:
 - Demonstrating desire to understand
 - Using reflective listening
 - Avoiding emphasis on “you”
 - Explaining the purpose of the questions
 - Allowing a support person to be present

198



198

Closing the Interview

- After reading the interview statements:
 - What other information will you seek?
 - Who will you seek to interview?
- Is there anything you need to discuss with the interviewee about that information or those witnesses?
 - Contact information
 - Releases for records
 - Caveats
- Set the stage for follow-up
- Reminder about resources and supports
- Reminder about retaliation and non-interference
- Leave the door open

199



199

Documenting Interviews

- Take detailed notes of interviews
 - Details are essential to assessing corroboration
- Determine method of note-taking – handwritten notes, computer, recording
- Preferred method employs two interviewers in which one person focuses on thorough notes
- Use verbatim quotes where possible
 - Assists in evaluating the “ring of truth”
- Document the questions and investigator framing of issues
- Note changes in demeanor, tone or engagement

200



200

Documenting Interviews

- Maintain interview documentation in investigation file
- Remember that students have a right to view their educational record
- Professionalism
- Precision
- Clear and accessible language

201



201

Gathering Physical Evidence

- Determine whether the College has a memorandum of understanding (MOU) with local law enforcement
 - Information-sharing
 - Coordination of interviews
- Consider opportunity to photograph injuries, property damage, or location of incident
- Timeliness is key
 - Physical evidence can be lost, destroyed, or contaminated
 - Injuries heal quickly

202



202

Gathering Physical Evidence

- Physical evidence may include:
 - Injuries, photographs of injuries, medical records
 - Communication records such as telephone, email, voicemail, text, social media
 - Security monitoring video, visitor logs
 - Clothing, bedding, other tangible objects
 - Photographs of scene
 - School records
 - 911 tape, police records
 - Forensic evidence such as DNA

*Note: Forensic evidence must be reviewed by a trained forensic examiner



203

203

Gathering Physical Evidence

- Important to preserve evidence, whether or not law enforcement is involved
- Limited window for evidence collection
 - 72 to 96 hours for a sexual assault nurse examination
 - Physical evidence in clothing or on bedding may last indefinitely
- Ensure the proper medical or forensic personnel handle forensic evidence



204

204

Gathering Physical Evidence

- All physical evidence, whether subject to forensic analysis or not, should be preserved and the chain of custody should be maintained
- Ensure that evidence collection and maintenance is documented including:
 - Date of evidence recovery
 - Location of evidence recovery
 - Person who recovered evidence
 - All persons who handled evidence
 - Location of evidence storage
- Ensure that evidence is stored in a secure location
- Document any time the evidence is removed

205



205

Principles to Remember

- Conduct a follow-up interview for clarification when necessary
- Prepare an amended written notice when necessary
- Document and communicate extensions for good cause
- Document all missing information and attempts to obtain
- Synthesize and assess for gaps before closure

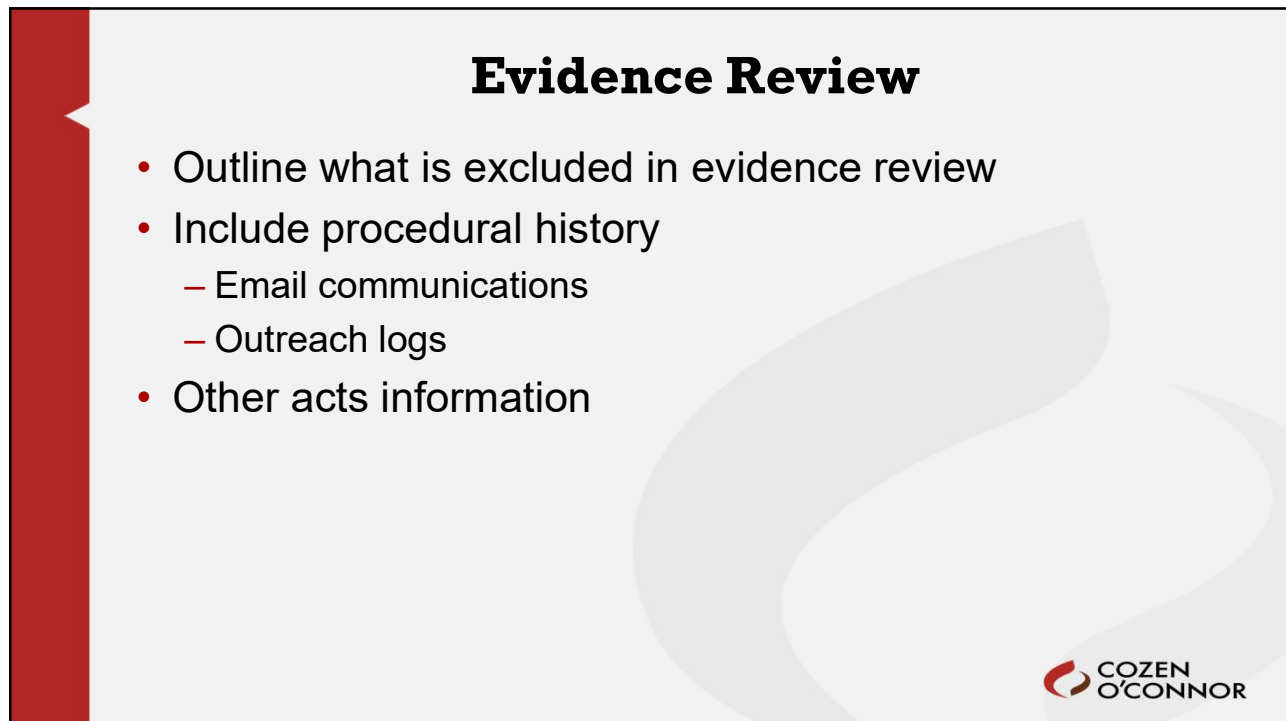
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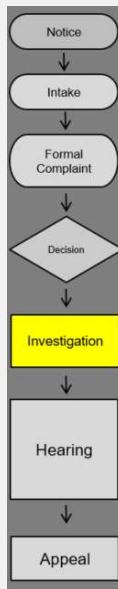


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208

Evidence Review



- “Provide both parties an **equal opportunity to inspect and review any evidence** obtained as part of the investigation that is **directly related to the allegations** raised in a formal complaint so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.”

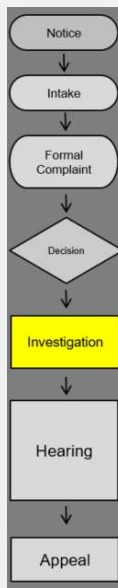
Title IX Regulations §§ 106.45(b)(5)(vi); 85 F.R. 30411



209

209

Evidence Review



- “Recipient must send to each party and the party’s advisor, if any, **the evidence subject to inspection and review** in an electronic format or a hard copy, and the parties must have at least **10 days to submit a written response**, which the investigator will consider prior to completion of the investigative report.”

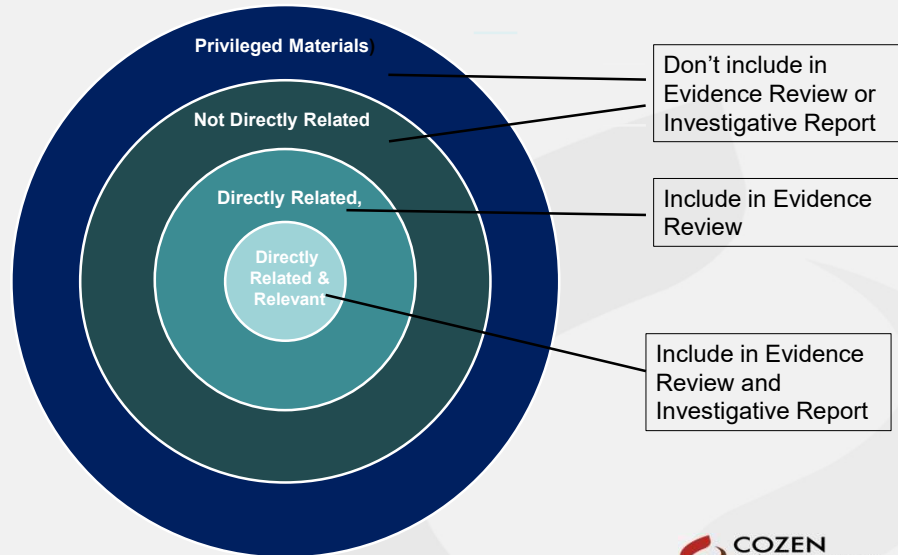
Title IX Regulations §§ 106.45(b)(5)(vi); 85 F.R. 30576



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Evidentiary Levels for Inclusion



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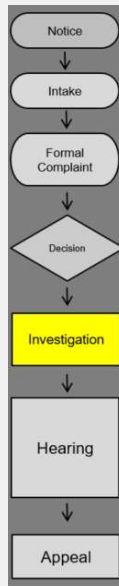
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TITLE IX REGULATIONS: INVESTIGATIVE REPORT

212

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Investigative Report



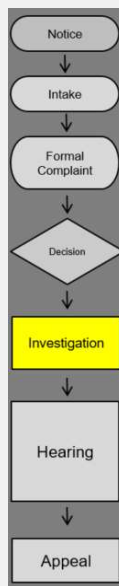
- Create an **investigative report** that fairly summarizes relevant evidence and
- Send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response, **at least 10 days prior** to the determination of responsibility (hearing)
 - This opportunity allows the parties to “effectively provide context to the evidence included in the report” and to “advance their own interests for consideration by the decision-maker.”

August 2020 Title IX Regulations; §106.45(b)(5)(vii), 85 F.R. 30576.
 August 2020 Title IX Regulations; Preamble, 85 F.R.30254, 30307,
 and 30309. 213



213

Revisiting Relevance



- Fairly summarizes the relevant evidence
- Investigator may redact information from the report
 - Recipients may permit or require the investigator to redact from the investigative report information that is not relevant, which is contained in documents or evidence that is relevant.

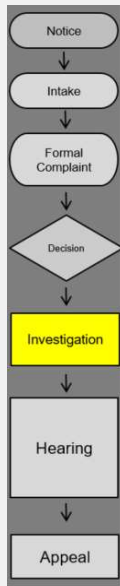
August 2020 Title IX Regulations; Preamble, 85 F.R.30436.

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Investigative Report



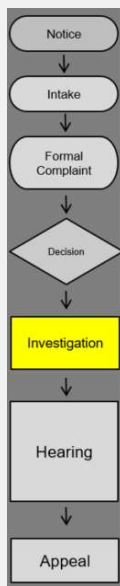
- Allow parties to provide a written response to the investigative report
 - Recipients must also give the parties meaningful opportunity to understand what evidence the recipient collects and believes is relevant, so the parties can advance their own interests for consideration by the decision-maker.
 - The decision-maker is obligated to objectively evaluate all relevant evidence and the parties have the opportunity to argue about what is relevant (and about the persuasiveness of relevant evidence).

August 2020 Title IX Regulations; Preamble, 85 F.R.30309 and 30249.
215



215

Investigative Report



- At least 10 days prior to the determination of responsibility (hearing)
 - Without advance knowledge of the investigative report, the parties will be unable to effectively provide context to the evidence included in the report.
 - A valuable part of this process is giving the parties (and advisors who are providing assistance and advice to the parties) adequate time to review, assess, and respond to the investigative report in order to fairly prepare for the live hearing or submit arguments to a decision-maker where a hearing is not required or otherwise provided.

August 2020 Title IX Regulations; Preamble, 85 F.R.30309.
216



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Investigative Report



- At least 10 days prior to the determination of responsibility (hearing)
 - The parties then have equal opportunity to review the investigative report; if a party disagrees with an investigator's determination about relevance, the party can make that argument in the party's written response to the investigative report and to the decision-maker at any hearing held.

August 2020 Title IX Regulations; Preamble, 85 F.R.30248-49.

217



217

Report Writing Techniques

- Report writing:
 - Professional
 - Balanced and neutral language
 - Content
 - Linguistics
 - Avoid declarative credibility language
 - “Unreliable” vs. insufficient information
 - Recognize perspective of the parties
 - Comment on the evidence, not the parties
 - Avoid the “you”
 - Use of verbatim quotes

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218

Investigative Report

- Use template format with consistent language and content across investigations
- Leave sufficient time for writing, editing, proof reading and review by a fresh set of eyes
- Use of language
 - Non-judgmental
 - Consistent with the policy
- Provides a road map to the reader
- Provides a referendum on fairness, bias, completeness and competence

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Investigative Report

- Begin with introduction of parties, relationship to one another relationship to the institution
- Describe when and how report was received
- Outline basic nature of report as presented by the complainant
- Outline response to the report by the respondent
- Include notice of investigation
- Specify policy violations at issue
- Identify role of the investigator
- Reinforce procedural protections and protocols

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Investigative Report

- Summary of investigation
 - Identify all witnesses interviewed by name and record dates of the interviews
 - Chart may be helpful to identify roles and organize information
 - List any other evidence collected and date of collection
 - Where applicable, explain reasons for inability or decision not to interview witnesses or collect pieces of evidence
 - Reiterate interview protocols

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Investigative Report

- Outline areas of agreement/disagreement (areas where the information is contested/not contested)
- Include timeline for synthesis and analysis of facts
- If making determinations of credibility or findings of fact:
 - Tie discussion and rationale to the elements of the potential policy violations
 - Identify the elements
 - Identify the evidence that supports/rebutts the establishment of the elements
 - Evaluate and analyze credibility factors

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222

Investigative Report

- If making the determination of responsibility
 - Make finding as to sufficiency, by a preponderance, to support finding of responsibility
 - Sufficient or insufficient
 - NOT a finding by a preponderance that event did not occur
 - Must provide rationale
 - Can be concise, but must communicate salient elements of finding
 - Again, comment on evidence, not the people
 - Avoid extraneous and tangential comments
 - Remain closely tied to the facts and reasonable inferences

223



223

Investigative Report – Considerations

- Procedural issues:
 - Notice
 - Have you provided amended notice for any additional potential policy violations
 - Have you shared party and witness names to permit a meaningful evaluation of the sources of information
 - Have you permitted the parties (and their advisors) access to all information that is directly related to the allegations
 - Opportunity to be heard
 - Have you followed up on information offered by the parties, including cross-complaints

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Investigative Report – Considerations

- Factual issues:
 - Detail around sensitive but important issues:
 - Body positions
 - Communications about consent in words/actions
 - Alcohol or other drug use
 - Clothing removal
 - Inclusion of key facts from other sources
 - Disclosure witnesses
 - Parties' communications
 - With one another
 - To others

225



225

Investigative Report

- Include elements that are required as part of the written notice of determination by the decision-maker
 - Identification of the allegations
 - Description of the procedural steps taken from the receipt of the formal complaint through the determination
 - Findings of fact supporting the determination
 - Conclusions regarding the application of the recipient's code of conduct to the facts
 - Rationale
 - Appeal procedures

226



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Investigative Report

- Provide a detailed summary of all relevant information
- Maintain the “source” of the information
 - Interview notes
 - Documentary evidence
 - Other evidence
- Include details of the prohibited conduct that speak to the elements of definitions in policy

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Report-Writing Considerations

- Lay out what each witness saw in chronological form
- Focus on what the Respondent knew or what a reasonable, sober person in Respondent’s position would have known
- Pay close attention to what your reasonable, sober witnesses saw or did not see.
 - First responders: police, medics, student EMTs, public safety, RAs
 - Greek risk management officers “on duty” (but consider relationships/interest)
- Consider whether it is necessary to find that Complainant was or was not incapacitated
 - Where the information supports that Complainant credibly reported their own memory loss, consider the impact of a finding that Complainant “was not incapacitated.”
 - Instead, may choose to write, “the Investigators find that there is insufficient evidence, by a preponderance of the evidence, to find that Respondent knew, or that a reasonable, sober person in Respondent’s position would have known, of Complainant’s potential incapacitation. The Investigators make that finding based on the following information...”

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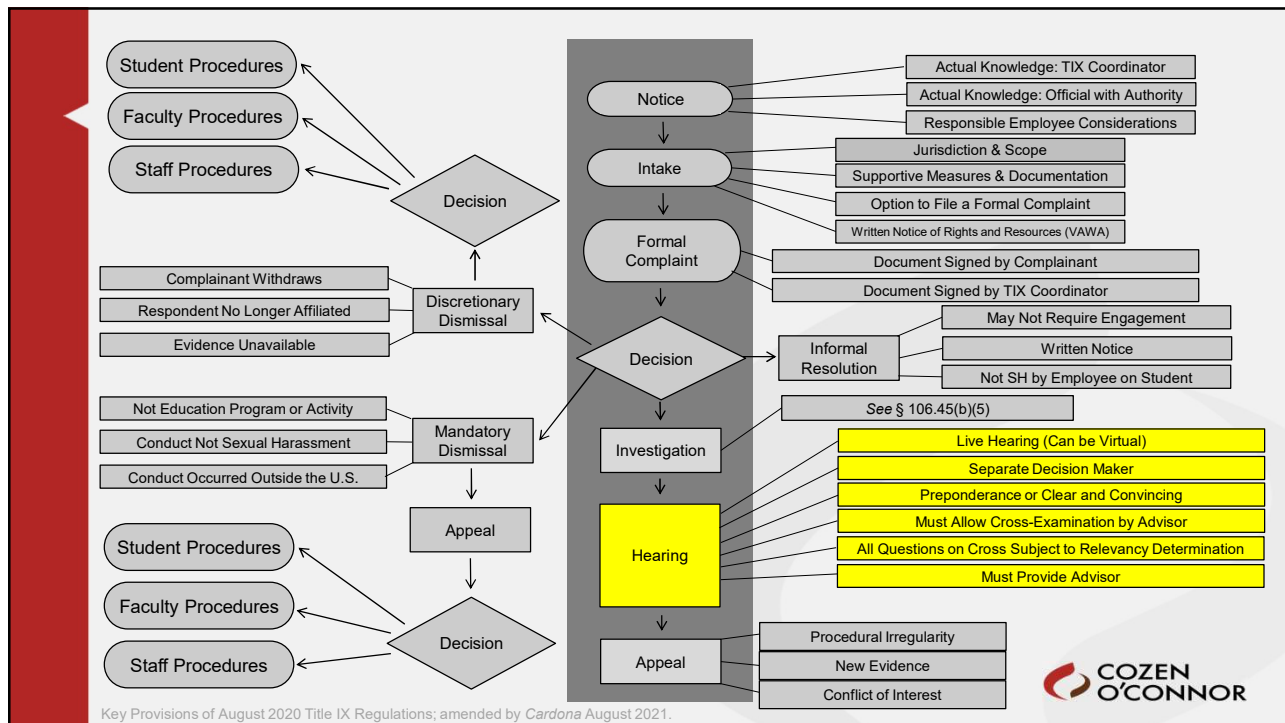


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TITLE IX REGULATIONS: LIVE HEARINGS

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graph TD
    A[Notice] --> B[Intake]
    B --> C[Formal Complaint]
    C --> D{Decision}
    D --> E[Investigation]
    E --> F[Hearing]
    F --> G[Appeal]
  
```

Hearings

- At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions.

August 2020 Title IX Regulations; §106.45(b)(6)(i), 85 F.R. 30577.
231

231

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graph TD
    A[Notice] --> B[Intake]
    B --> C[Formal Complaint]
    C --> D{Decision}
    D --> E[Investigation]
    E --> F[Hearing]
    F --> G[Appeal]
  
```

Hearings

- Only relevant cross-examination and other questions may be asked of a party or witness.
- If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.

August 2020 Title IX Regulations; §106.45(b)(6)(i), 85 F.R. 30577.
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232

Cross-Examination



- At the live hearing, the decision-maker(s) must permit each party's advisor to **ask the other party and any witnesses all relevant questions** and follow-up questions, including those challenging credibility.

August 2020 Title IX Regulations; §106.45(b)(6), 85 F.R. 30577.
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233

Cross-Examination



- Such cross-examination at the live hearing must be conducted **directly, orally, and in real time** by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings.

August 2020 Title IX Regulations; §106.45(b)(6), 85 F.R. 30577.
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234

Cross-Examination



- Only **relevant** cross-examination and other questions may be asked of a party or witness.
- Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must **first determine whether the question is relevant ...**
- The decision-maker(s) must explain to the party proposing the questions **any decision to exclude** a question as not relevant.

August 2002 Title IX Regulations; §106.45(b)(6), 85 F.R. 30577.
235



235

Availability of Evidence at the Hearing



- The recipient must make all such evidence subject to the parties' inspection and review [directly related evidence shared at the evidence review] available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.

August 2020 Title IX Regulations; §106.45(b)(5)(vi), 85 F.R. 30577.
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Protecting the Well-Being of the Parties



➤ July 2021 Q & A:

- A school is permitted to grant breaks to the parties during a live hearing.
- The regulations require a pause in the cross-examination process each time before a party or witness answers a cross-examination question.
 - Allows the decision-maker to determine if the question is relevant.
 - Helps ensure that the pace of the cross-examination does not place undue pressure on a party or a witness to answer immediately.

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237

Hearings

Rules of Decorum

➤ July 2021 Q & A:

- If the manner in which an advisor attempts to ask the question is harassing, intimidating, or abusive (e.g., advisor yells, screams, or comes too close to a witness), the preamble explains that **a school may enforce a rule requiring that relevant questions must be asked in a respectful, non-abusive manner.**

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Hearings

Rules of Decorum

➤ July 2021 Q & A:

- A school also may require a party to use a different advisor if the party's advisor refuses to comply with the school's rules of decorum.
 - For example, the preamble explains that **if a party's advisor of choice yells at others in violation of a school's rules of decorum, the school may remove the advisor and require a replacement.** The school has this authority even when the advisor is asking a question that is relevant to the hearing.

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Hearings

Evaluating Responses

➤ July 2021 Q & A:

- The preamble adds that the 2020 amendments **“protect against a party being unfairly judged due to inability to recount each specific detail of an incident in sequence”** because **“decision-makers must be trained to serve impartially without prejudging the facts.”**

240



240

Personal Preparation: Be Objective

- Identify and set aside personal biases and prejudices
- Be careful to avoid making assumptions as to how a person “should” react
- Avoid putting oneself in the shoes of the complainant or the respondent
- Recognize emotional impact, if any, but do not allow emotion to impact fair and impartial fact-finding

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Personal Preparation: Be Professional

- Maintain an appropriate demeanor at all times
- Be polite and respectful to all parties
- Maintain appropriate sensitivity to presentation of difficult information
- Prepare for the hearing by reading and annotating all materials
 - Outline areas of inquiry
 - Consider wording of questions ahead of time

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242

Responding to Inadmissible Evidence

- Advance determinations of challenged evidence are critical to the proper functioning of the process
 - Use Investigative Report as a guide
- In the event of a deliberate or inadvertent utterance of inadmissible information, how do you unring the bell?
 - Instruction on the record

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Advisors

- Advisors have a speaking role
- Establish rules of decorum and conduct in the hearing via opening instructions
- Establish tone of professionalism and respectful treatment of parties and advisors
- Promptly and firmly redirect advisors who do not abide by the guidelines you set forth

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Participation Techniques

- Be alert to your non-verbal communication
- Pay attention to tone of voice and volume level
- Avoid asking questions that imply a value judgment
- Maintain attentive posture and good eye contact
- Exercise reflective listening in framing next question

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245

What to Ask

- Do I need to know the information?
- When questions arise, it can be helpful to walk yourself through the following set of questions:
 - Will an answer to my question help me decide the appropriate outcome or sanction?
 - Will getting an answer to this question influence my decision?

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The Continuum Approach



247

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Option to Use Technology



- Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient’s direction, any or all parties, witnesses and other participants may appear at the live hearing **virtually, with technology** enabling participants simultaneously to see and hear each other.
- At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with **technology** enabling the decision-maker(s) and parties to **simultaneously see and hear** the party or the witness answering questions.

August 2020 Title IX Regulations; §106.45(b)(6), 85 F.R. 30577.

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Transcript or Recording



- Recipients must create an **audio or audiovisual recording, or transcript**, of any live hearing and make it available to the parties for inspection and review.

August 2020 Title IX Regulations; §106.45(b)(6), 85 F.R. 30577.
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Technology Options

- Zoom
 - Ability to see and hear in real time
 - Breakout rooms
 - Recording

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Deliberation Techniques

- Gather all documents and exhibits in advance
- Use cross-referencing grids/matrices
- Identify specific elements of alleged misconduct from policy definitions
- Begin by identifying areas of agreement as to evidence
- Identify conflicts and prioritize
- Discuss each conflict individually
- Articulate your position and support it from the evidence

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EVALUATING CREDIBILITY

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Evaluating Credibility

- Investigating Credibility in the context of:
 - Sexual Assault
 - Dating violence
 - Domestic violence
 - Stalking
 - Other forms of sexual and gender-based harassment and violence
- Common Challenges
 - Consent
 - Alcohol/incapacitation
 - History of the individual and community relationships

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Evaluating Credibility



254



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Credibility Factors

- Assessing credibility factors:
 - Demeanor
 - Interest
 - Detail
 - Corroboration
 - Common sense
- Testing inherent plausibility in light of the known information, relationships, and circumstances of the disclosure

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255

Demeanor

- Demeanor may be informative, not determinative
- Assessing demeanor requires individual assessment as to how demeanor supports or detracts from overall reliability of information
- Fact-finders should not place undue reliance on demeanor as an indicator of candor or evasion.
- Demeanor is one factor to observe in the context of the totality of the information

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Demeanor

- Claimant/Respondent may be affected by emotional component of sexual assault allegations
- Range of behaviors and emotional reactions vary
- Elicit and consider information from witnesses as to demeanor after the reported incident, during the disclosure, and in response to the report
- Note changes in demeanor and explanations for significant changes
- Consider demeanor during proceedings

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Interest

- If Respondent and Claimant know each other:
 - Understand the context and history of any prior relationships
 - Understand significant events or markers in relationship
- Explore effects of incident:
 - Emotional: fear, intimidation, worry, anxiety
 - Actual: financial, time, participation in the process
- Is there any particular animus/motive/ill will for/or against any party or witness?

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Interest

- How will the party/witness be impacted by their participation in the process?
 - Was information provided “against” interests?
- How will the party/witness be impacted by any particular outcome?
 - Will information shared impact current or future relationships?

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Detail

- Explore all details of event – before, during, and after
- Surrounding details – seemingly insignificant facts that may have greater import
- Sensory details – using the five senses to describe the physical reality of the crime
- Behavioral changes and responses
- Emotional cues and indicators
- Listen for “ring of truth” language on the periphery
- Evaluate panoramic view of events from all parties/witnesses

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Corroboration

- Freeze frame and explore critical junctures
- Cross-reference Complainant and Respondent accounts with all other evidence and witnesses' statements
- Look to attendant details and behavior pre- and post-incident by both parties
- Focus on resolution of conflicts through believable evidence and common sense
- Outline case by issue and cross reference with all available evidence including timelines

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Corroboration

- Verify any statements obtained from witnesses by the first-responding individual (witness, law enforcement)
- Obtain statements from witnesses not interviewed in the preliminary investigation
- Re-photograph any non-genital injuries in order to document changes
- Determine whether a search warrant is needed for any aspect of the investigation
- Identify and contact others who may have been victimized by the respondent

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262

Corroboration

- Consider other attendant details such as:
 - Size, age, power, authority and/or social status differential for Complainant and Respondent
 - Location of incident
 - Isolation of Complainant
 - Potential witnesses or reasons for lack of witnesses
 - Any change in either party's demeanor, personality, or routine after the incident
 - E.g., roommate noticed that Complainant began wearing baggy clothes and stopped attending class regularly
 - E.g., friends noticed Respondent became withdrawn and went home every weekend

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Evaluating Changes in Account

- Explore all circumstances of each account
- Understand the who, what, and where of the interview
- Ask the “why” (without asking why); questions to explore:
 - State of mind
 - Life circumstances at the time
 - Perception of interviewer/process
 - Changes in interest or motivation
- Inquire directly about inconsistencies
- Attempt to reconcile where possible

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Synthesis

- Testing inherent plausibility in light of the known information
- How does it all fit together?
- Does it make sense in the context of:
 - These individuals?
 - The setting?
 - The community?
 - The activity?
 - The relationships?

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Integrated Analysis

Dynamics of Sexual Assault	Informed understanding based on competent experts / debunking the myths.
Demeanor	Did the witness speak in a convincing manner? Was he/she uncertain, confused, self-contradictory or evasive? How did he/she look, act and speak while testifying / reporting?
Interest / Motive / Bias	Did the witness have any interest in the outcome of the case, bias, prejudice, or other motive that might affect his/her testimony?
Detail	Use direct quotes from testimony or statements. How well could the witness remember and describe the things about which he/she testified? Was the ability of the witness to see, hear, know, remember, or describe those things affected by youth or old age or by any physical, mental or intellectual deficiency?
Corroboration	How well did the testimony of the witness square with the other evidence in the case, including the testimony of other witnesses? Was it contradicted or supported by the other testimony and evidence?
Common Sense	Does it all add up? (Gut check) Is there something missing?

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Standard of Evidence



- [T]he recipient must apply the same standard of evidence to student and employee matters, using either the clear and convincing standard or the preponderance of the evidence standard.
- The recipient must apply the same standard of evidence to all formal complaints of sexual harassment.

August 2020 Title IX Regulations; §106.45(b)(6), 85 F.R. 30577.
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Standard of Evidence



- Beyond a Reasonable Doubt
- Clear and Convincing Evidence
- Preponderance of the Evidence
- Some Evidence

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Clear and Convincing*

- The evidence is highly and substantially more likely to be true than untrue
- The fact finder must be convinced that the contention is highly probable
- Proof which requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt
- Clear and convincing proof will be shown where the truth of the facts asserted is highly probable
- Quality of the evidence, not quantity
- NOT beyond a reasonable doubt

* Based on common usage.

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Preponderance of the Evidence*

- More likely to be true than not
- More probable than not
- The greater weight of the evidence
- Tipping the scale ever so slightly
- 51 %
- Based on the more convincing evidence and it's probable truth or accuracy, not on the amount
- Quality of the evidence, not quantity
- NOT beyond a reasonable doubt

* Based on common usage.

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Title IX Sexual Harassment and Sexual Misconduct Policy and Procedures

If you are a victim of a Sexual Assault, Domestic Violence, Dating Violence, or Stalking, your first priority should be to get to a place of safety and/or call 911 for emergency assistance. You should then obtain any necessary medical treatment.

v. 1.5, 07/25/2023

BERKELEY COLLEGE

Title IX (and Non-Title IX) Sexual Harassment and Sexual Misconduct Policy

I. Introduction

Berkeley College (the "College") is committed to providing a safe and equitable environment that promotes the well-being of all students and faculty. The College's policy of discrimination on the basis of sex or gender in any form, including in its admissions, financial aid, and other programs, is prohibited. This policy also prohibits discrimination or harassment based on sex, Sexual and Gender-Based Violence, and Stalking as defined in this Policy.

v. 1.3, 05/06/22

BERKELEY COLLEGE

Title IX Sexual Harassment and Sexual Misconduct Procedures

I. Introduction

Berkeley College (the "College") is committed to providing a prompt and equitable response to reports of Prohibited Conduct under the [Title IX \(and Non-Title IX\) Sexual Harassment and Sexual Misconduct Policy](#) (the "Policy"). These procedures apply to the conduct of students and associates for:

- Reports of Title IX Sexual Harassment, Dating Violence, Domestic Violence, and Stalking, that are reported to have occurred against a person in the United States **and** within the Berkeley College Education Program or Activity; and,
- Reports of Sexual Assault.¹

271

271

Policy Language on Hearings

- Hearings will be conducted either in-person or virtually with technology that enables the Decision Maker and parties to simultaneously see and hear the party and witnesses speaking.
- The College will provide for the live hearing to occur with the parties located in separate rooms with technology enabling the Decision Maker and the parties and their advisors to simultaneously see and hear the party or the witness answering questions.

Berkeley Procedures, May 06, 2022, at 17-18.

272



272

Policy Language on Hearings

- The Decision Maker may be a Berkeley College associate or an external professional, as determined at the sole discretion of the Title IX Coordinator.
- Hearings will generally consist of the following steps, allowing the parties equal opportunities at each stage:
 - a) introductions;
 - b) review of procedural rules;
 - c) presentation of information and witnesses by parties;
 - d) the advisor for each party will ask the other party and any witnesses all relevant questions and follow-up questions, including those assessing credibility; and
 - e) closing remarks.

Berkeley Procedures, May 06, 2022, at 18.
273



273

Policy Language on Hearings

- All parties and witnesses will be invited to speak at the hearing, but no party or witness is required to attend the hearing.
- Provisions impacted by the *Cardona* decision related to consideration of statements not subjected to cross:
 - If a party or witness declines to attend a hearing, or attends but declines to submit to questioning by the other party's advisor, the Decision Maker **may rely on any other** statements of that party or witness in reaching a determination regarding responsibility.
 - The Decision Maker will not draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or declination to answer cross-examination or other questions.

Berkeley Procedures, May 06, 2022, at 18.
274



274

Policy Language on Hearings

- Traditional civil or criminal court rules of evidence do not apply.
- The Decision Maker will determine the relevance of questions asked by the parties, and preclude questions that seek irrelevant information.

Berkeley Procedures, May 06, 2022, at 18.
275



275

Policy Language on Hearings

- However, both parties have the right to exclude their own irrelevant prior sexual history with persons other than the other party in the conduct process or their own mental health diagnosis and/or treatment during the finding of responsibility phase of the hearing.
- As noted above in Section XI.B.1.g. related to Investigations, 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.

Berkeley Procedures, May 06, 2022, at 18.
276



276

Policy Language on Hearings

- At their sole discretion, the Decision Maker may rely upon the investigator's report, the parties' responses to the report, and any supplemental reports, for their understanding of the relevant facts, or they may conduct additional witness interviews and/or gather additional information.
- The Decision Maker may also invite the investigator to participate as a witness at the hearing.

Berkeley Procedures, May 06, 2022, at 18.
277



277

Policy Language on Hearings

- Each party's advisor may 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.
- Only relevant cross-examination and other questions may be asked of a party or witness.

Berkeley Procedures, May 06, 2022, at 18-19.
278



278

Policy Language on Hearings

- Before a Complainant, Respondent, or witness answers a cross-examination or other question, the Decision Maker must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.
- If a party does not have an advisor present at the live hearing, the College will provide without fee or charge to that party, an advisor of the College's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.
- The hearing will be recorded. Recordings will not include deliberations.

Berkeley Procedures, May 06, 2022, at 19.
279



279

Policy Language on Advisors

- Complainants and Respondents are entitled to be accompanied and assisted by an advisor of their choice throughout all phases of the process, including at interviews, other meetings, or hearings.
- There is no requirement that the advisor be an individual from Berkeley College.
- Advisors, including attorneys, may not participate in the process or speak on behalf of the Complainant or Respondent, although advisors are permitted to question the other party and witnesses at a live hearing under the process.

Berkeley Procedures, May 06, 2022, at 10.
280



280

Policy Language on Advisors

- In addition, advisors may ask to suspend any meetings, interviews, or hearings briefly to consult with the party they are advising.
- The College retains the discretion to deny advisors' requests to suspend meetings, interviews, or hearings if such requests are excessive, burdensome, or otherwise unreasonable.

Berkeley Procedures, May 06, 2022, at 10.
281



281

Policy Language on Advisors

- Complainants and Respondents may choose to have an attorney serve as their advisor, but adjustments to the process, including scheduling of interviews or hearings, will not be made for any advisors, including attorneys, if they unduly delay the process.
- If a Complainant or Respondent does not have an advisor present at a live hearing (*see Section XI.B.7 below for more information on live hearings*), the College will provide an advisor free of charge to the party for the sole purpose of facilitating questioning on the party's behalf of other parties and witnesses.

Berkeley Procedures, May 06, 2022, at 10.
282



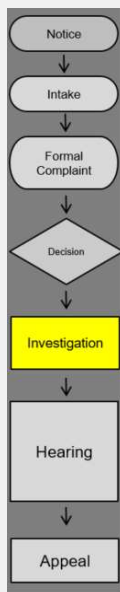
282

TITLE IX REGULATIONS: WRITTEN DETERMINATION

283

283

Content for Written Determination



- Must issue a simultaneous written determination regarding responsibility, including
 - Identification of the allegations
 - Description of the procedural steps taken from the receipt of the formal complaint through the determination
 - Findings of fact supporting the determination
 - Conclusions regarding the application of the recipient's code of conduct to the facts
 - Rationale
 - Appeal procedures

August 2020 Title IX Regulations; §106.45(b)(5)(vii), 85 F.R. 30576-77.

284



284

Notice

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Intake

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Formal Complaint

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Decision

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Investigation

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Hearing

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Appeal

Determination of Responsibility

- Decision-maker(s), cannot be the same person(s) as the Title IX Coordinator or the investigator(s)
- Must issue a simultaneous written determination regarding responsibility, including
 - Identification of the allegations
 - Description of the procedural steps taken from the receipt of the formal complaint through the determination
 - Findings of fact supporting the determination
 - Conclusions regarding the application of the recipient’s code of conduct to the facts
 - Rationale
 - Appeal procedures

August 2020 Title IX Regulations; §106.45(b)(7), 85 F.R. 30577.
285

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Title IX Sexual Harassment and Sexual Misconduct Policy and Procedures

If you are a victim of a Sexual Assault, Domestic Violence, Dating Violence, or Stalking, your first priority should be to get to a place of safety and/or call 911 for emergency assistance. You should then obtain any necessary medical treatment.

v. 1.5, 07/25/2023

BERKELEY COLLEGE

Title IX (and Non-Title IX) Sexual Harassment and Sexual Misconduct Policy

I. Introduction

Berkeley College (the "College") is committed to providing a safe and equitable environment that promotes the well-being of all members of the community. The College does not tolerate discrimination on the basis of sex or gender in any of its programs, activities, or admissions, including in its admissions, recruitment, or enrollment processes. Sexual and Gender-Based Violence, and Stalking are prohibited and are described in this Policy.

v. 1.3, 05/06/22

BERKELEY COLLEGE

Title IX Sexual Harassment and Sexual Misconduct Procedures

I. Introduction

Berkeley College (the "College") is committed to providing a prompt and equitable response to reports of Prohibited Conduct under the [Title IX \(and Non-Title IX\) Sexual Harassment and Sexual Misconduct Policy](#) (the "Policy"). These procedures apply to the conduct of students and associates for:

- Reports of Title IX Sexual Harassment, Dating Violence, Domestic Violence, and Stalking, that are reported to have occurred against a person in the United States and within the Berkeley College Education Program or Activity; and,
- Reports of Sexual Assault.¹

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Policy on Written Decision Letter

- The Title IX Coordinator shall provide the written determination to the parties simultaneously.
- The determination regarding responsibility becomes final either on the date that the College provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.
- The written determination must include:

...

Berkeley Procedures, May 06, 2022, at 19.
287



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Policy on Written Decision Letter

(continued from previous slide)

- Identification of the allegations potentially constituting sexual harassment as defined in this Policy;
- A description of the procedural steps taken from the receipt of the Formal Complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
- Findings of fact supporting the determination;

...

Berkeley Procedures, May 06, 2022, at 19.
288



288

Policy on Written Decision Letter

(continued from previous slide)

- Conclusions regarding the application of the College’s Policy to the facts;
- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the College imposes on the respondent, and whether remedies designed to restore or preserve equal access to the College’s education program or activity will be provided by the College to the complainant; and,
- The College’s appeal procedures and permissible bases for the complainant and respondent to appeal.

Berkeley Procedures, May 06, 2022, at 19.
289



289

TITLE IX REGULATIONS: SANCTIONING

290

290

Sanctioning



- An equitable response for a respondent means a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures, as defined in § 106.30.
- The grievance process must describe the range of possible disciplinary sanctions and remedies.

August 2020 Title IX Regulations; §106.44(a) and §106.45(b)(1)(vii), 85 F.R. 30574 and 30375.

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Discretion in Sanctioning



- The Department does not wish to dictate to recipients the sanctions that should be imposed when a respondent is found responsible for sexual harassment as each formal complaint of sexual harassment presents unique facts and circumstances.
- As previously stated, the Department believes that teachers and local school leaders with unique knowledge of the school climate and student body, are best positioned to make disciplinary decisions.

August 2020 Title IX Regulations; Preamble 85 F.R. 30377 and 30394.

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Educational Purpose



- Because the final regulations do not require particular disciplinary sanctions, the final regulations do not preclude a recipient from imposing student discipline as part of an “educational purpose” that may differ from the purpose for which a recipient imposes employee discipline.

August 2020 Title IX Regulations; Preamble, 85 F.R. 30377 and 30394.
293



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Appeal of Sanction



- The Department notes that under the final regulations, whether the parties can appeal based solely on the severity of sanctions is left to the recipient’s discretion, though if the recipient allows appeals on that basis, both parties must have equal opportunity to appeal on that basis.

August 2020 Title IX Regulations; Preamble, 85 F.R. 30397.
294



294

Discretion in Sanctioning

- Upon reaching a determination that a respondent is responsible for sexual harassment, the final regulations do not restrict a recipient's discretion to impose a disciplinary sanction against the respondent, including suspension, expulsion, or other removal from the recipient's education program or activity.

August 2020 Title IX Regulations; Preamble, 85 F.R. 30224.
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Discretion in Sanctioning

- For reasons described elsewhere in this preamble, the Department does not require any particular disciplinary sanctions against respondents, because these Title IX regulations are focused on requiring remedies for victims, leaving disciplinary decisions to recipients' discretion.

August 2020 Title IX Regulations; Preamble, 85 F.R. 30262.
296



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Discretion in Sanctioning

- The § 106.45 grievance process is designed for implementation by non-lawyer recipient officials, and the final regulations do not intrude on a recipient's discretion to use disciplinary sanctions as educational tools of behavior modification rather than, or in addition to, punitive measures.
- Similarly, these final regulations do not impose a standard of proportionality on disciplinary sanctions.

August 2020 Title IX Regulations; Preamble, 85 F.R. 30266 and 30274.
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297

Discretion in Sanctioning

- The Department has determined that administrative enforcement of Title IX does not require overriding recipients' discretion to make decisions regarding disciplinary sanctions, and thus these final regulations focus on ensuring that respondents are not punished or disciplined unless a fair process has determined responsibility, but respects the discretion of State and local educators to make disciplinary decisions pursuant to a recipient's own code of conduct.

August 2020 Title IX Regulations; Preamble, 85 F.R. 30274.
298



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Title IX Sexual Harassment and Sexual Misconduct Policy and Procedures

If you are a victim of a Sexual Assault, Domestic Violence, Dating Violence, or Stalking, your first priority should be to get to a place of safety and/or call 911 for emergency assistance. You should then obtain any necessary medical treatment.

v. 1.5, 07/25/2023

BERKELEY COLLEGE

Title IX (and Non-Title IX) Sexual Harassment and Sexual Misconduct Policy

I. Introduction

Berkeley College (the "College") is committed to providing a safe and equitable environment that promotes the well-being of all students and faculty. The College does not tolerate discrimination on the basis of sex or gender in any of its programs or activities, including in its admissions, financial aid, or employment processes. This policy addresses sexual harassment, sexual assault, sexual violence, discrimination based on sex, Sexual and Gender-Based Violence, and Stalking as defined in this Policy.

v. 1.3, 05/06/22

BERKELEY COLLEGE

Title IX Sexual Harassment and Sexual Misconduct Procedures

I. Introduction

Berkeley College (the "College") is committed to providing a prompt and equitable response to reports of Prohibited Conduct under the [Title IX \(and Non-Title IX\) Sexual Harassment and Sexual Misconduct Policy](#) (the "Policy"). These procedures apply to the conduct of students and associates for:

- Reports of Title IX Sexual Harassment, Dating Violence, Domestic Violence, and Stalking, that are reported to have occurred against a person in the United States **and** within the Berkeley College Education Program or Activity; and,
- Reports of Sexual Assault.¹

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Policy on Sanctioning

- Sanctions imposed by the institution following a Title IX sexual harassment hearing may include, but are not limited to, oral or written warning/probation, mandatory counseling, education and training requirements, no-contact orders, changes to academic, working or living arrangements (if applicable), revocation of campus privileges, suspension (length of which, and reinstatement conditions, shall depend upon the nature and severity of the offense) and dismissal/termination.

Berkeley Procedures, May 06, 2022, at 19.

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TITLE IX REGULATIONS: APPEALS

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301

Appeals



- A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:
 - Procedural irregularity that affected the outcome of the matter
 - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
 - The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individuals complainant or respondent that affected the outcome of the matter.
- A recipient may offer an appeal equally to both parties on additional bases.

August 2020 Title IX Regulations; §106.45 (b)(8), 85 F.R. 30577.
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Appeals

Notice

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Intake

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Formal Complaint

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Decision

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Investigation

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Hearing

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Appeal

- As to all appeals, the recipient must:
 - Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
 - Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;
 - Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of this section [regarding no conflict of interest or bias, and properly trained];
 - Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging the outcome;
 - Issue a written decision describing the result of the appeal and the rationale for the result; and
 - Provide written decision simultaneously.

August 2020 Title IX Regulations; §106.45(b)(8), 85 F.R. 30577-78.
303

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Title IX Sexual Harassment and Sexual Misconduct Policy and Procedures

If you are a victim of a Sexual Assault, Domestic Violence, Dating Violence, or Stalking, your first priority should be to get to a place of safety and/or call 911 for emergency assistance. You should then obtain any necessary medical treatment.

v. 1.5, 07/25/2023

BERKELEY COLLEGE

Title IX (and Non-Title IX) Sexual Harassment and Sexual Misconduct Policy

I. Introduction

Berkeley College (the "College") is committed to providing a safe and equitable environment that promotes the well-being of all members of the community. The College does not tolerate discrimination on the basis of sex or gender in any of its programs, activities, or services, including in its admissions, financial aid, or employment processes. This Policy describes the procedures for reporting and resolving sexual harassment, sexual assault, sexual violence, discrimination based on sex, Sexual and Gender-Based Violence, and Stalking that are prohibited under Title IX of the Education Amendments of 1972 and are described in this Policy.

v. 1.3, 05/06/22

BERKELEY COLLEGE

Title IX Sexual Harassment and Sexual Misconduct Procedures

I. Introduction

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- Reports of Title IX Sexual Harassment, Dating Violence, Domestic Violence, and Stalking, that are reported to have occurred against a person in the United States and within the Berkeley College Education Program or Activity; and,
- Reports of Sexual Assault.¹

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Policy on Appeals

- Any party may appeal the determination of the Decision Maker, or the dismissal of a Formal Complaint or any allegations therein (as stated in Sections XI.B.8. and VII above), within ten (10) business days of its issuance (the “Appeal Period”).

Berkeley Procedures, May 06, 2022, at 20.
305



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Policy on Appeals

- Parties wishing to appeal may do so only by (1) notifying the Title IX Coordinator in writing of the party's intent to appeal, and (2) submitting a written statement prior to the expiration of the Appeal Period.

Berkeley Procedures, May 06, 2022, at 20.
306



306

Policy on Appeals

- In their sole discretion, the Title IX Coordinator may grant a brief extension of the Appeal Period for good cause shown upon a party's written request, and such extension shall apply to all parties.

Berkeley Procedures, May 06, 2022, at 20.
307



307

Policy on Appeals

- The Title IX Coordinator shall advise all parties of any party's intention to appeal and furnish each party copies of any appeal statements simultaneously. If one party submits a written statement during the Appeal Period, the other party will be given an opportunity to submit a written statement in response, within a designated time period.

Berkeley Procedures, May 06, 2022, at 20.
308



308

Policy on Appeals

- Determinations will only be overturned or modified on appeal on the following bases
 - a procedural irregularity that affected the outcome of the matter;
 - new evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; or
 - The Title IX Coordinator, Title IX Investigator(s), or Decision-Maker had a conflict of interest or bias for or against complainants or respondents generally or the individual Complainant or Respondent that affected the outcome of the matter

Berkeley Procedures, May 06, 2022, at 20₃₀₉



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Policy on Appeals

- In each instance, the College will convene a panel of not less than three (3) appropriately trained members to decide an appeal based upon the appeal statement(s) and the original record; and the decision of the appeal panel by majority vote will be final.
- Whenever practicable, such review will be completed within thirty (30) business days, and both parties will be informed of the result, and the rationale for the result, simultaneously in writing.

Berkeley Procedures, May 06, 2022, at 20₃₁₀



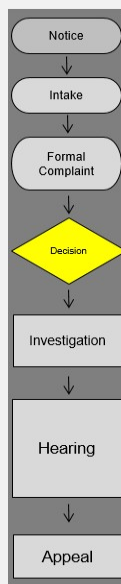
310

TITLE IX REGULATIONS: INFORMAL RESOLUTION

311

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Informal Resolution



- May not require waiver of right to investigation and adjudication of formal complaints
- May not require parties to participate in an informal resolution process
- May not offer an informal resolution process unless a formal complaint is filed
- Must obtain the parties' voluntary, written consent to the informal resolution process
- Cannot offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student

August 2020 Title IX Regulations; §106.45(b)(9), 85 F.R. 30578.

312



312

Informal Resolution

➤ July 2021 Q & A:

- A school is not required to offer an informal resolution process but may facilitate an informal resolution process at any time prior to reaching a determination regarding responsibility, subject to certain conditions.
- The amendments do not require that the parties interact directly with each other as part of an informal resolution process
 - Mediations are often conducted with the parties in separate rooms and the mediator conversing with each party separately.

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Informal Resolution

➤ July 2021 Q & A:

- The parties' participation in mediation or restorative justice, if offered, should remain a decision for each individual party to make in a particular case, and neither party should be pressured to participate in the process.
- A school is not permitted to offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a students.

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PREGNANCY AND PARENTING

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Pregnancy and Parenting

- 34 CFR 106.40(b)
- June 25, 2013 *Dear Colleague Letter & Pamphlet*
(focused on secondary schools but applies to post-secondary schools)
 - “It is illegal under *Title IX* for schools to exclude pregnant students (or students who have been pregnant) from participating in any part of an educational program, including extracurricular activities.”
 - Schools must treat pregnant students in the same way that they treat similarly situated students.

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Pregnancy and Parenting

- **NYS Law: Art. 15, Section 296.1:**
 - It is unlawful (g) For an employer to compel an employee who is pregnant to take a leave of absence, unless the employee is prevented by such pregnancy from performing the activities involved in the job or occupation in a reasonable manner.
 - <https://dhr.ny.gov/system/files/documents/2022/08/nysdhr-guidance-pregnancy-discrimination.pdf>

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Pregnancy and Parenting FAQs

- May an institution require a pregnant student to participate in a separate program for pregnant students?
- Can harassing a student because of pregnancy violate *Title IX*?
- What types of supportive measures must an institution provide to a pregnant student?
- May an institution require a doctor's note before allowing the student to attend class or activities if the institution is concerned about the student's health or safety?

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THE TITLE IX NPRM: WHAT TO EXPECT IN THE NEW REGULATIONS

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The 411 on the NPRM

- Released on June 23, 2022, the 50th anniversary of Title IX
- 50 pages of proposed regulations, coupled with 650 pages of comments and discussion
- 60-day public comment period commences when the NPRM is published in the Federal Register
- OCR has reflected some openness to feedback and comments

“OCR has tentatively determined . . .”



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Shift in Framework (Again)

2020: Deliberate Indifference

- Actual knowledge
- Deliberate indifference
- Narrow definitions and scope
- Formal complaint to trigger action
- Rigid application at every level

2022: Holistic & Aspirational

- “[M]ust take prompt and effective action to end any sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effects”
(NPRM 34 CFR §106.44(a))
- Maintains and expands core requirements re: notice and opportunity to be heard
- Builds in flexibility at many stages of the grievance procedures



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Expansion of Scope and Jurisdiction

- Under §106.10, sex discrimination includes
 - Sex stereotypes
 - Sex characteristics
 - Pregnancy or related conditions
 - Sexual orientation
 - Gender identity
- Current, potential, or past parental, family, or marital status
[§ 106.21, § 106.40, § 106.57]



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Expansion of Scope and Jurisdiction

- Sex-based discrimination means:
 - *Sexual harassment
 - Discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, or gender identity.
 - Other conduct on the basis of sex
 - (1) Quid pro quo harassment
 - (2) Hostile environment harassment
 - (3) Specific offenses
 - Sexual Assault
 - Dating Violence
 - Domestic Violence
 - Stalking



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Expansion of Scope and Jurisdiction

- Shift in hostile environment definition
 - Unwelcome sex-based conduct that is sufficiently severe or pervasive, that based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from the recipient's education program or activity



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Expansion of Scope and Jurisdiction

- Standing – who are the categories of individuals who can trigger a response obligation
 - A student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX
 - A person other than a student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX and who was participating or attempting to participate in the recipient's education program or activity when the alleged sex discrimination occurred.
 - Student includes admitted students



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Expansion of Scope and Jurisdiction

- Education program or activity
 - Conduct that occurs under a recipient's education program or activity includes but is not limited to:
 - Conduct that occurs in a building owned or controlled by a student organization that is officially recognized by a postsecondary institution, and
 - Conduct that is subject to the recipient's disciplinary authority
 - A recipient has an obligation to address a sex-based hostile environment under its education program or activity, even if sex-based harassment contributing to the hostile environment occurred outside the recipient's education program or activity or outside the U.S.



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Intake and Outreach

- Supportive measures
 - Can include involuntary changes in class, work, housing, or extracurricular or any other activity
 - Can include temporary measures that burden a respondent imposed for non-punitive and non-disciplinary reasons and that are designed to protect the safety of the complainant or the recipient's educational environment, or deter the respondent from engaging in sex-based harassment
 - Supportive measures that burden a respondent may be imposed only during the pendency of the grievance procedures and must be terminated at the conclusion of those grievance procedures.
 - Measures must be no more restrictive of the respondent than is necessary to restore or preserve the complainant's access to the recipient's education program or activity
 - No involuntary measures that burden the respondent during informal resolution
 - Right to seek modification or reversal of the supportive measures



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Intake and Outreach

- Emergency removal
 - An immediate and serious threat to the health or safety of students, employees, or other persons arising from the allegations of sex discrimination that justifies removal



328

Intake and Outreach

- Title IX Coordinator required to monitor the recipient's education program or activity for barriers to reporting information about conduct that may constitute sex discrimination under Title IX
- Shift in the "formal complaint" approach
 - Allows for oral and written complaints
 - To the recipient, not to the Title IX Coordinator
 - Title IX Coordinator must determine whether to initiate a complaint of sex discrimination . . . if necessary to address conduct that may constitute sex discrimination



329

Notice and Reporting Responsibilities

- Responsibility to respond arises when recipient is on notice of conduct that MAY be sex discrimination
- Reporting obligations for employees
 - Obligations differ based on whether the conduct involves a student or employee complainant
 - Adds obligations to all employees, including confidential employees, to provide the contact information of the Title IX Coordinator and information about how to report sex discrimination
 - Explicitly incorporates faculty as employees with the responsibility to report sex discrimination



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Notice and Reporting Responsibilities

- Categories of employees
 - Confidential employees
 - Any employee who has authority to institute corrective measures on behalf of the recipient
 - Any employee who has responsibility for administrative leadership, teaching, or advising in the recipient's education program or activity
 - Student complainant: notify the Title IX Coordinator
 - Employee complainant: notify the Title IX Coordinator OR provide the contact information of the Title IX Coordinator and information about how to report sex discrimination
 - All other employees



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Reporting Obligations

Provide Info to Complainant

- Confidential employees
- Any employee who has responsibility for administrative leadership, teaching, or advising in the recipient's education program or activity when the complainant is an employee
- All other employees

Report to Title IX Coordinator

- Any employee who has authority to institute corrective measures on behalf of the recipient
- Any employee who has responsibility for administrative leadership, teaching, or advising in the recipient's education program or activity when the complainant is a student



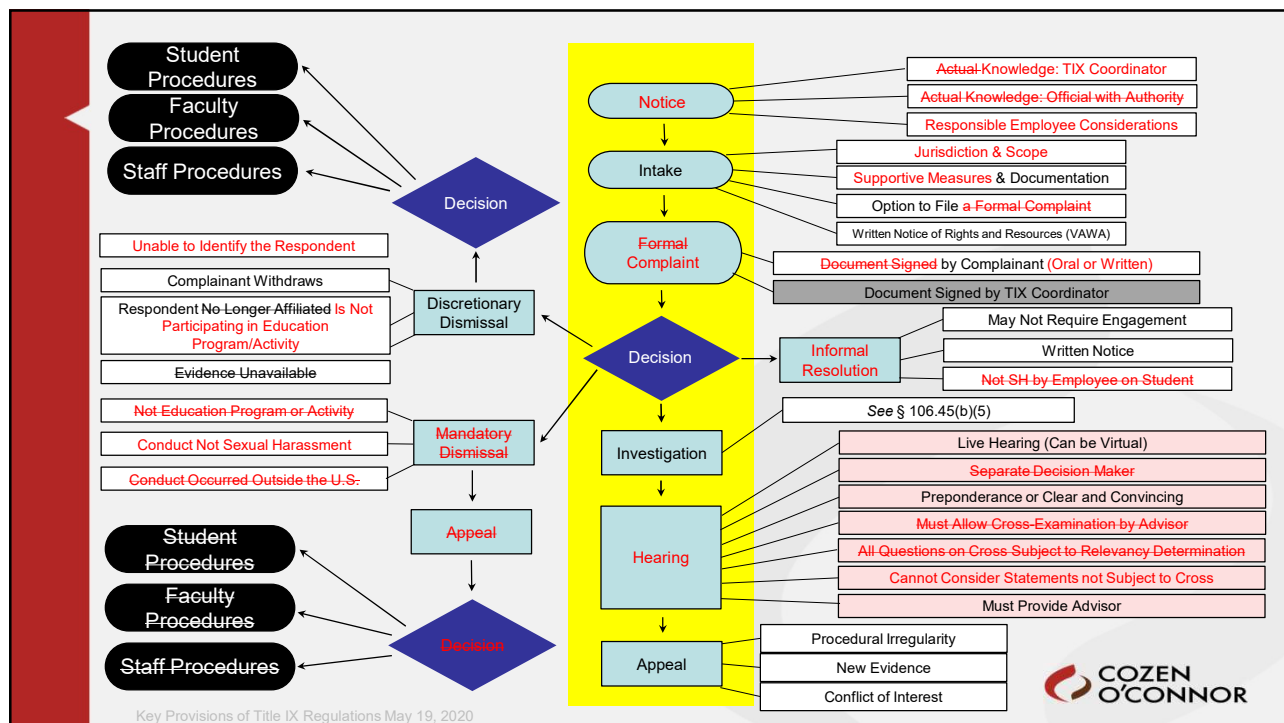
332

Grievance Procedures

- Provides two sets of grievance procedures:
 - § 106.45: prompt and equitable resolution of complaints of sex discrimination
 - § 106.46: resolution of complaints of sex-based harassment involving a student party
- Note:
 - Explicit requirement for written grievance procedures for responding to complaints of sex discrimination related to a person’s actions
 - For complaints alleging that a policy/practice discriminates on the basis of sex, the recipient is not considered a respondent



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§ 106.45 (Prompt and equitable resolution of complaints of sex discrimination)

- Treat complainants and respondents equitably
- No conflict of bias or interest
- Presumption of not responsible
- Reasonably prompt timeframes for the major stages of the grievance process
- Reasonable steps to protect the privacy of the parties and witnesses
- Objective evaluation of all relevant evidence
- Exclude certain classes of evidence
- Notice of allegations
- Adequate, reliable, and impartial investigation
- Burden on recipient to gather evidence
- Provide description of evidence relevant to allegations and reasonable opportunity to respond.
- Notify the parties of the outcome
- Appeal optional
- Complete process before imposing sanctions



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§ 106.46 (Resolution of complaints of sex-based harassment involving a student party)

- Everything under § 106.45 plus
 - Expanded content for written notice of allegations
 - With sufficient time to prepare a response before any initial interview
 - Presumption of non-responsibility
 - Opportunity to present relevant evidence to a trained, impartial decisionmaker
 - Advisor of choice
 - Access to relevant evidence or investigative report that accurately summarizes evidence
 - Potential conduct violation for false statements
 - May delay issuing notice to address safety concerns
 - Expanded requirements re: dismissal
 - Complaint investigation procedures
 - Timely notice of meetings
 - Right to advisor of choice
 - Equal opportunity to have other persons present, if permitted
 - Discretion to allow expert witnesses, if applied for all parties
 - Reasonable extensions of time for good cause
 - Equitable access to relevant evidence



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§ 106.46 (Resolution of complaints of sex-based harassment involving a student party)

- Process for evaluating allegations and assessing credibility
 - Enables decisionmaker to adequately assess the credibility of the parties and witnesses to the extent credibility is in dispute and relevant
 - Allow the decisionmaker to ask the parties and witnesses relevant and not otherwise impermissible questions and follow up questions
 - Individual meetings or live hearings
 - Decisionmaker must determine relevance and permissibility prior to the question being posed and explain any decision to exclude a question
 - Must not permit questions that are unclear or harassing
 - Cannot rely on a party's statements that support that party's position if the party refuses to answer credibility questions



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§ 106.46 (Resolution of complaints of sex-based harassment involving a student party)

Investigator Model

- Equitable access to the relevant evidence or to the same written investigation report
- If report, equitable access to the relevant evidence upon request
- Reasonable opportunity to review and respond prior to determination
- Individual meetings if credibility is an issue and relevant
- Decisionmaker poses questions raised by the parties

Live Hearing

- If live hearing, opportunity to review the evidence and/or investigation report before the live hearing
- Opportunity to respond before or during the hearing
- Physically present in same geographic location or through technology
- Allow each party's advisor to ask questions of any party and any witnesses
- No questioning by the party personally
- Must provide advisor without charge to the party for the purpose of advisor-conducting questioning



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§ 106.46 (Resolution of complaints of sex-based harassment involving a student party)

Outcome and Appeal

- Simultaneous written determination of whether sex-based harassment occurred
- Must offer the parties an appeal

Protections on Privacy

- Must take reasonable steps to prevent and address the parties' and their advisors' unauthorized disclosure of information and evidence obtained solely through the sex-based grievance procedures



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Title IX Coordinator Responsibilities

Title IX Coordinator MUST

- § 106.8 - Retain ultimate oversight over compliance responsibilities
- § 106.8(d) – Be trained
- § 106.8(f) - Maintain records
- § 106.40 – Take specified actions following notice of student's pregnancy or related condition
- § 106.44(b) - Monitor for barriers to reporting AND reasonably address
- § 106.44(f) – Take specified actions after notice of sex discrimination

Title IX Coordinator MAY

- § 106.8(e) - Consult with disability support
- § 106.44(e) - Public awareness events*
- § 106.45(b)(2) - Be the decision maker in grievance process



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Pregnancy or Related Conditions

- § 106.2 - Definition of pregnancy or related conditions:
 - Pregnancy, childbirth, termination of pregnancy, or lactation
 - Medical conditions related to [above]
 - Recovery from [above]
- § 106.40 - Notice requirement re: pregnancy or related conditions - when an employee learns of a student's pregnancy or related condition, the employee must inform them that they may inform the Title IX Coordinator and provide the Title IX Coordinator's contact info

Training!



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RESOURCES

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Creating a Universal Timeline

Using information gathered in the investigation, create a timeline that captures both parties' actions and show the timeframe when they were in the same place (below in blue)*

Complainant	Source(s)		Respondent	Source(s)
Complainant (C) and A "pre-gamed" at B's apartment. C drank three 1.5-ounce shots Jim Beam and ate three slices of pizza. C, A and B walked from B's apartment to second "pre-game" at D's apartment. C drank 2 shots of Ciroc Peach and threw up in D's sink. D and A took photos and posted them on Instagram.	A interview B interview C interview D interview D's and A's photos w/ date/time	8:00 PM	Respondent (R) arrived at party by himself. R filled one 16-ounce cup with beer and drank it quickly.	R interview
		8:30 PM	R saw friends X, Y, Z. Z gave R keys to his Z's room where Z kept hard liquor. R retrieved a 750 ml bottle of Fireball whiskey and drank approximately 1/4 of it himself over the course of about an hour and a half. X and Y each had about 2 shot glasses full. X took a video of R, X and Y drinking Fireball. X sent it in the soccer group chat and R responded to it with a GIF of a flaming meteor.	R interview X interview Y interview Z interview X's video Group chat
		9:00 PM		
C arrived at the soccer party with A, B, and D. D got C a 16-ounce cup of "jungle juice" which C drank slowly over the course of about an hour. (Z on the soccer team provided the jungle juice. Z said it contained 3 parts lemonade, 2 parts Sprite, 1 part gin).	C interview A interview B interview D interview Z interview	9:30 PM		
		10:00 PM		
C went upstairs alone to check out the view from the roof. As C was walking back downstairs, C took the last sip of the "jungle juice" and saw R. C texted C's mom, "happy biray mom I love u so must" (C's mom's birthday was 2 months ago).	C interview C's texts	10:30 PM	R texted Z "thanks for the fireball. Let me know where I can meet you to give you your key back." R saw C coming down the stairs.	R interview R's texts
C reported a complete memory loss from about 10:30 until the next morning.	C interview	11:00 PM	C and R went upstairs into the bathroom. R's friend W walked in as they were kissing and undressing.	R interview W interview
A saw C leaving the bathroom with C's t-shirt on backwards. A escorted C home.	A interview	11:30 PM	Respondent left the bathroom and texted Z "I just got laid!"	R interview Z interview R's texts

*These case facts are fictional and were created for training purposes.

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Incident Response Checklist

- Introduction focusing on safety and wellbeing
- Communication regarding preservation of evidence
- Support with transportation to obtain medical services and/or law enforcement support
- Inform / discharge duties
 - Options
 - Protections
 - Services
 - Clery Act:
 - Importance of prompt complaint
 - Importance of gathering evidence
 - Title IX / DCL:
 - Confidentiality limitations
 - Facilitation of report to police

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Incident Report Form

- Time and date of report
- Time and date of incident
- Location of incident
- Information about the Complainant:
 - Name
 - Sex
 - Affiliation
 - Residence
- Respondent:
 - Name (if known)
 - Relationship to Complainant
 - Sex
 - Number of Respondents
- Information about the alleged conduct:
 - Type of coercion/force
 - Physical injury
 - Penetration
 - Sexual contact without penetration
 - Reported to police

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Investigation Checklist

- Complainant's name or anonymity requested
- Place of occurrence
- Nature of occurrence
- Time of occurrence
- Time of reporting
- Alcohol involved: Drugs involved
- Physical Injury
- Name of accused; known or unknown
- Other crimes evidence/priors
- Complainant's description of event
- Names of witnesses
- Interviews of all parties
- Prior contacts between complainant and accused
- School records
- Intimidation attempts
- Physical evidence:
 - Injury / Medical Evidence - records
 - Security Monitoring Records / Visitor Logs / Audio-Video recordings
 - Telephone records
 - Voicemail
 - Text / E-mail / Social Media
 - Clothing / Tangible Objects
 - Any other physical / forensic evidence
- 911 Tape
- Photographs of the scene
- Photographs of injuries
- Advised re: law enforcement report
- Advised re: preservation and medical treatment
- Advised re: counseling
- Concerns regarding safety of community
- Discharge Title IX responsibilities
- Discharge Clery responsibilities
- Court / Cease & Desist Orders
- Protection Orders

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Investigation Checklist: Complainant

- Reports are consistent over time?
 - Is the complainant's account consistent?
 - Is timeline consistent?
 - Do allegations change? If so, is there a reasonable explanation?
 - Over time?
 - During therapy?
 - With different interviewers?
 - In terms of content?
- Circumstances at time of report?
 - Where?
 - To whom?
 - When?
 - Why?
 - Demeanor?
 - Corroborated by witness?
- Any change in behavior/demeanor/routine after alleged incident?
- Explore past relationship:
 - Whether and how long he or she had known the accused?
 - Circumstances of their meeting
 - Extent of any previous relationship
 - Details of any relevant prior sexual contact with respondent
- Circumstances at time of prior disclosure(s)?
 - Where?
 - To Whom?
 - When?
 - Why?
 - Demeanor?

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Investigation Checklist: Complainant

- Overall credibility?
 - Cognitive impairment?
 - Evidence of psychosis?
 - Evidence of coaching?
 - Current situation impacted by results of conclusions?
 - Demeanor?
 - At time of event?
 - At time of reporting?
 - As reported by other witnesses? If so, identify witnesses.
 - In our interview?
- Secondary gain?
 - Financial?
 - Situational?
 - Occupational?
- Interests or bias?
- Details of description:
 - Central issues?
 - Peripheral issues?
- Corroboration?
- Do facts hang together? Why? Why not?

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Investigation Checklist: Respondent

- Other acts/behaviors relevant to intent?
 - Evidence of substance abuse?
 - If so, is it admitted?
 - Evidence of impulse control issues?
 - If so, is it admitted?
 - Admission of physically inappropriate behavior?
 - Admission of sexually inappropriate behavior?
 - Evidence of fabrication in record (not limited to allegation)?
- Overall Credibility
 - Demeanor?
 - Interest or bias?
 - Corroboration?
 - Do facts hang together? Why or Why no?
- Any witness intimidation?
- Past History
 - Evidence of other misconduct or disciplinary action?
 - Theft/misappropriation?
 - Legal history?
 - Substance abuse?
 - How did the accused respond to prior interventions?
 - Evidence of problematic behavior
 - Troubled relationships?
 - History of previous sanctions?
 - History of treatment/intervention of inappropriate or concerning behaviors?
 - Previous concerns re: protection of others?

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Resources

- As investigator, develop and be prepared to refer to:
 - Incident Response Checklist
 - Incident Report Form
 - Investigation Checklist
 - Investigation Checklist: Complainant
 - Investigation Checklist: Respondent

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Key Resources: Clery

- The Clery Act – Statute and Implementing Regulations
- The Handbook for Campus Safety and Security Reporting (June 2016)
- Westat
 - campussafetyhelp@westat.com
 - 800-435-5985
- Department of Education (ED) Program Review Findings

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