

Title IX Training – Overview of 2024 Regulations, Presented by Clark Hill

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Definitions have Changed

§ 106.2

- “**Complaint**” – an **oral** or written request to Recipient that objectively can be understood to investigate and make a determination
 - Need not use any “magic words” or refer to Title IX, grievance process, to trigger obligation to investigate and initiate the grievance process
 - Objective standard – reasonably be understood as a request to investigate and make a determination
 - Doesn't require Complainant's actual or digital signature
 - Doesn't require Complainant to be the person initiating the process
 - Recordkeeping – left up to the Recipient how to keep records on oral reports that are subject to recordkeeping
- **Current regs.** refer to a “formal complaint” and only as to sex harassment
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- **§106.2**
 - “**Complainant**” – anyone who is alleged to have been subjected to conduct that constitutes sex discrimination
 - Removes “victim”
 - Need not be current student or employee if person was participating or attempting to participate in educational program/activity at the time of the incident
 - **Current regulations** reference the time of filing complaint
 - Refers to persons who have been subject to “sex discrimination” vs. sex harassment
 - Applies to third-parties who are participating in the educational program or activity – e.g. visiting student athlete
- **§106.2**
 - “**Respondent**” – an individual who is alleged to have violated the recipient's prohibition on sex discrimination
 - Expands coverage to complaints of any form of sex discrimination, not just harassment, which was the prior definition
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- Party
 - Refers only to a Complainant or Respondent
 - Parties refers to both Complainant and Respondent
 - Does not include Title IX Coordinator, witnesses, adjudicators

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§106.2 and Requirements under §106.40

Confidential Employee

- Not required to report to Title IX Coordinator
- Notify persons how to contact confidential employees
- Confidential employees inform persons to explain their role and that they do not report
- Provide the person with contact information for Title IX Coordinator and how to make a complaint
- Advise Title IX coordinator may be able to provide supportive services

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- Communications with an employee who is required to maintain the information as confidential or privileged
 - The employee's confidential status, for purposes of this part, is only with respect to information received while the employee is functioning within the scope of their duties to which privilege or confidentiality applies
- Employee who has been designated as a confidential resource to provide services relating to sex discrimination
 - Examples: guidance counselors, organizational ombuds, staff with an on-campus sex assault program
- Employees conducting review board approved research study (researchers)

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§106.2

- Pregnancy and Related Conditions
- Includes
 - Pregnancy
 - Childbirth
 - Termination of pregnancy
 - Lactation
 - Related medical conditions and recovery
- Condition does not need to meet the ADA definition of disability
- Covers "perceived" pregnancy or related conditions
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- "Supportive Measures" – same definition retained:
 - non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or when no formal complaint has been filed.
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- "Disciplinary Sanctions" - consequences imposed on a respondent following a determination that the respondent violated the recipient's prohibition on sex discrimination under Title IX.
- Process for imposing disciplinary sanctions set forth in § 106.45
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- "Remedies" - measures provided, as appropriate, to a complainant or any other person the Recipient identifies as having had equal access to the recipient's education program or activity limited or denied by sex discrimination.
 - Remedies are designed to restore or preserve access to the recipient's education program or activity after a recipient determines that sex discrimination occurred.
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- Dept. has long-recognized Title IX prohibits sex discrimination on basis of stereotypes
 - “non-conformity with stereotypical notions of how boys or girls are expected to act”
 - Restricts students from participating
- Acts of verbal, nonverbal or physical aggression, intimidation or hostility based on nonconformity with stereotypical notices of masculinity, femininity, or gender identify

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Proposed § 106.2 and § 106.10

Sex Based harassment is a form of sex discrimination

Prohibits all forms of **Sex Discrimination** and expands “on the basis of sex” to:

- sex stereotypes
- sex characteristics
- pregnancy or related conditions
- Sexual orientation
- Gender identity
- Prohibits discrimination on the basis of pregnancy or related conditions or parental status

Hostile Environment Harassment - Changed to Sex Based Harassment

- Projection of a 10% increase in addressing complaints under Title IX grievance process
- Increased costs justified by “ensuring effective implementation of obligation to ensure education is free from sex discrimination
- Other changes, such as single-investigator model and optional live hearings will offset costs

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Hostile Environment Harassment - Changed to Sex Based Harassment Cont'd

- 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 an educational program or activity
- Also Includes:
 - sexual assault
 - dating violence,
 - domestic violence,
 - stalking
- Definitions from the Clery Act and VAWA.

Clery Act and VAWA Definitions Align

- Sexual assault - "an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting [UCR] system of the Federal Bureau of Investigation [FBI]."
- Dating violence - violence committed by a person (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (B) where the existence of such a relationship shall be determined based on a consideration of the following factors: (i) The length of the relationship; (ii) The type of relationship; and (iii) The frequency of interaction between the persons involved in the relationship. 3
- Stalking - a course of conduct directed at a specific person that would cause a reasonable person to either fear for their safety or the safety of others or suffer substantial emotional distress
- Domestic Violence – Mirrors VAWA 2022 but removed the words "of violence" that were modifying "felony and misdemeanor crimes" in the definition of domestic violence.

Differences between Current Reg and New Reg

Sex Harassment – Hostile Environment

- *Differences:*
- *Current regulation “so severe, pervasive, and objectively offensive ...”*
- *Current regulation covers sexual harassment, but not other forms of sex-based harassment*

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

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Factors that may be considered

§ 106.2

- Department noted that the factors were similar to those used in evaluating hostile environment under Title VII (29 CFR 1604.11)
 - Totality of the circumstances
 - Nature
 - Frequency
 - Context of conduct

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Factors Explained

§ 106.2

- Degree of impact (on complainant, community, multiple individuals)
- Frequency and duration
- Ages, roles, previous interactions, other factors
 - Relative power dynamics (esp. with student and employee)
- Location and context
 - Provides info on unwelcomeness, subjective or objective offensiveness, severity or pervasiveness and effect on complainant's ability to access or benefit from program or activity
- Other sex-based harassment

Quid Pro Quo Sex-based Harassment – No Change

§ 106.2

- Any employee, agent, or other person authorized by Recipient to provide
 - Aid
 - Benefit
 - Service
- Under the Recipient's educational program/activity
- Conditions receipt of the benefit on a person's participation in unwelcome sexual conduct

More definition changes:

§ 106.2

- Relevant – not currently defined in the Regs.
- New regulations mentions relevance several times:
 - Need to train investigators on relevance (§ 106.45(b)(1)(iii))
 - Investigation Report must summarize relevant evidence (§ 106.45(b)(5)(vii))
 - Recipients cannot restrict the ability of either party to gather and present relevant evidence (§ 106.45(b)(5)(iii))
 - Party's advisor has the ability to ask the other party and any witnesses all relevant questions and follow-up questions, and that only relevant cross-examination and other questions may be asked of a party or witness (§ 106.45(b)(6)(i))

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Relevancy

Definitions Continued:

- New Regs. clarify that questions are relevant
 - "when they seek evidence that may aid in showing whether the alleged sex discrimination occurred," and
 - "when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred."
 - Does not adopt a specific set of evidence
- **Prohibitions:** (i) Complainant's sexual interests, (ii) complainant's sexual conduct; (iii) private health info; and (iv) privileged by law

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More Definitions

§ 106.2

- “Retaliation
- Peer Retaliation

§ 106.71 –

- Clarifies that a recipient must prohibit retaliation, including peer retaliation
- Must respond to conduct that “reasonably might constitute retaliation”
- Use same procedures for other forms of sex discrimination

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More Definitions

§ 106.30 (A)

- “Consent” – removed the definition for sexual assault
- Best left to discretion of Recipients to define for their own institutions
- State law may be consulted and included in the definition

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When Recipient “has knowledge” of Conduct that “may reasonably” constitute sex discrimination

§ 106.44

- Offering and coordinating supportive measures
- Discussion regarding initiating complaint
- Taking prompt and effective action to end sex discrimination and prevent recurrence
- Permits offering informal resolution EXCEPT in K-12 schools involving employee/student if it conflicts with federal, state or local law
- Prohibits disclosure of personally identifiable information

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Mandatory Reporting In Postsecondary Institutions

Distinguish between two categories of employees who are not confidential employees:

Category 1:

Those who either have authority to institute corrective measures on behalf of the recipient or responsibility for administrative leadership, teaching, or advising in the recipient's education program or activity.

Category 2:

All other employees who are not confidential employees and not covered under Category 1.

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Who Must Report?

Category 1:

Employees must notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination under Title IX or the regulations.

Category 2:

Employees must either notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination under Title IX or the regulations, or provide the contact information of the Title IX Coordinator and information about how to make a complaint of sex discrimination to any person who provides the employee with information about conduct that reasonably may constitute sex discrimination under Title IX or the regulations.

The institution has discretion to determine which of these two actions Category 2 employees must take or whether to leave the discretion to those employees.

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Confidential Employee In Postsecondary Institutions

Section 106.44(d) makes clear that a confidential employee is not required to notify the Title IX Coordinator when a person informs them of conduct that reasonably may constitute sex discrimination under Title IX or this part.

Section 106.44(d) requires a recipient to notify all participants in the recipient's education program or activity of how to contact its confidential employees, if any, subject to a limited exclusion discussed below.

Confidential employee must explain the employee's status as confidential person for purposes of Title IX and the Title IX regulations, including the circumstances in which the employee is not required to notify the Title IX Coordinator about conduct that reasonably may constitute sex discrimination.

Confidential employees remain subject to § 106.40(b)(2)'s requirement to provide information to a student, or a person who has a legal right to act on behalf of the student, when the student or person with a legal right informs the employee of the student's pregnancy or related conditions. This obligation does not apply when the confidential employee—as with other employees—reasonably believes the Title IX Coordinator has already been notified.

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- Informal Resolution Process

When is it appropriate?

With the exception of when there is an allegation that an employee engaged in sex-based harassment of an elementary school or secondary school student or when an informal resolution process would conflict with applicable Federal, State, or local law, a recipient has discretion to determine when informal resolution is not appropriate, notwithstanding the parties' consent.

In making this determination, a recipient may consider the 8 factors a Title IX Coordinator must consider when determining whether to initiate a complaint of sex discrimination.

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Current Regs: Permit informal resolution only if a complaint has been filed

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Scope of Title IX – Under New Regulations

- On Campus Conduct
- Conduct whose effects have an impact on campus (Title IX covers all aspects of the recipient's education program or activity, including extracurricular activities)
- ***Current regulations do not require recipient to address activity outside of the U.S. or happened outside of the recipient's educational program or activity – 2024 Regulations Expand to Outside of the United States (think: Overseas study program or mission trips)***

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Off-Campus Conduct that Creates or Contributes to a Hostile Environment in a Recipient's Education Program or Activity

Proposed § 106.11

- Expands coverage to a Recipient's education program or activity where:
 - Conduct occurs in any building owned or controlled by a student organization that is officially recognized by post-secondary institution
 - Conduct that occurs off-campus when the Respondent is a representative or otherwise engaged in conduct under the Recipient's disciplinary authority
 - Covers sex-based harassment contributing to hostile environment outside of the recipient's education program or activity or outside the United States

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What's Different in the new Regs on the Grievance Process?

Current regs include specific requirements for grievance procedures for complaints of sex harassment that apply to all recipients

- Current Regulation: hearings and cross-exam are required at post-secondary institutions

New regulations provide more flexibility for single decision-maker

- Title IX Coordinator
- Investigator
- Or you can hold hearings with separate decision maker

Single Investigator Model

- Section 106.45(b)(2) prohibits any person from serving as a Title IX Coordinator, investigator, or decisionmaker if they have a conflict of interest or bias, either for or against complainants or respondents generally or an individual complainant or respondent.
- The person who facilitates informal resolution cannot be the same person as the investigator or decisionmaker in order to allow the parties to participate fully and candidly in the informal resolution process.
- The Title IX Coordinator may serve as an investigator or decisionmaker because an evaluation of all relevant and not otherwise impermissible evidence is also not inherently inconsistent with the Title IX Coordinator's responsibility to coordinate the recipient's compliance with its obligations under Title IX and the final regulations. See § 106.44(f).
- The DOL Determined This Model Meets Due Process Requirements
- Relieves Administrative Burden

Different Process for The Various Types of Complaints

- A recipient may adopt different processes for different complaints (ie Title VII and Title IX)
- A recipient must articulate consistent principles for how it will determine whether certain grievance procedures apply to some, but not all, complaints, if a recipient adopts grievance procedures that apply to the resolution of some, but not all, complaints.

Respecting Complainant Autonomy

Require recipients to provide clear info and training on:

- When employees must notify Title IX Coordinator about sex discrimination
- How students can report sex discrimination for the purpose of seeking confi assistance only or for the purpose of asking the recipient to initiate grievance procedures

Complainant has the right to file a complaint even if they leave the educational program or activity because of the discrimination or personal reasons (**this is new**)

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Title IX Coordinator Response to Sex Discrimination

§ 106.44 (f) – (g)

- Title IX Coordinator must take following steps after being notified of sex discrimination:
 - Treat complainant and respondent equitably at every stage of recipient's response
 - Notify Parties of grievance procedures and if complaint is made
 - Notify the parties about information resolution process
 - Offer and coordinate supportive measures to both complainant and respondent
- Supportive measures should be provided even if a formal complaint isn't filed

Title IX Coordinator Response if no Complaint made:

- In absence of complaint/informal resolution process, determine whether to initiate a complaint to address sex discrimination
 - Under 2020 Regulations, when a Title IX Coordinator determined that a nondeliberately indifferent response to alleged sex discrimination required an investigation, the Title IX Coordinator had the discretion to initiate a recipient's grievance process. 85 FR 30131.
- Take other prompt and effective steps to ensure sex discrimination does not continue or recur in addition to providing remedies to the individual complainant
- Provide supportive measures to both complainant and respondent

When Can A Title IX Coordinator Initiate a Complaint?

New 8 Factor Consideration

- (1) The complainant's request not to proceed with initiation of a complaint.
- (2) The complainant's reasonable safety concerns regarding initiation of a complaint.
- (3) The risk that additional acts of sex discrimination would occur if a complaint is not initiated.
- (4) The severity of the alleged sex discrimination, including whether the discrimination, if established, would require the removal of a respondent from campus or imposition of another disciplinary sanction to end the discrimination and prevent its recurrence.
- (5) The age and relationship of the parties, including whether the respondent is an employee of the recipient.
- (6) The scope of the alleged sex discrimination, including information suggesting a pattern, ongoing sex discrimination, or sex discrimination alleged to have impacted multiple 441 individuals.

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8 Factor Considerations Misc.

- (7) The availability of evidence to assist a decisionmaker in determining whether sex discrimination occurred.
- (8) Whether the recipient could end the alleged sex discrimination and prevent its recurrence without initiating its grievance procedures under § 106.45, and if applicable § 106.46.

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- Find out why complainant doesn't want to pursue – see if we can convince complaint to go forward

Title IX Coordinator Response

How is this different from current Regs?

- Under Current Regs:
 - only require treat complainant and respondent equitably
 - by providing remedies if it is determined that sex harassment has occurred following grievance process and
 - do not permit an offer of informal resolution unless formal complaint has been filed

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Grievance Procedures for all Sex Discrimination Complaints

§ 106.45

- General requirements:
 - Grievance processes in writing
 - Equitable treatment for complainants and respondents
 - Title IX Coordinator, Investigators, Decisionmakers must be free of conflicts or bias
 - Decisionmaker can be the Title IX Coordinator or the Investigator (**Different**)
 - Presumption Respondent is NOT RESPONSIBLE until end of grievance process
- - Give the parties the opportunity to express if coordinator or investigator should not participate

Grievance Procedures for all Sex Discrimination Complaints

§ 106.45

- New Regulation includes detailed requirements for all complaints of sex discrimination with specific changes for age, maturity, level of independence of students in various educational settings
- Grievance process must include basic and essential requirements for fairness and reliability for all parties

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Proposed Regs: Grievance Process Cont'd

§ 106.45

- Reasonably prompt timeframes for all major stages
- Reasonable steps to protect privacy of parties and witnesses
- Objective evaluation of relevant and not otherwise impermissible evidence
- Notice of allegations to parties
- Dismissals permitted under certain circumstances, but not required

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Grievance – Appeal Proc

- Provide opportunity for appeal based on:
 - Procedural irregularity
 - New evidence
 - Conflict of interest or bias
 - Other bases offered equally to

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Best Practices Recommendation

For Investigators and Title IX Coordinators who will serve as Decision-makers

- Provide enhanced training on new requirements for informing parties during the investigation
- Soliciting questions
- Credibility determination
- Relevance Training

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Investigations

- Investigation Requirements:
 - Burden on recipient to gather evidence – shifts from the parties
 - Equal opportunity to present relevant fact witnesses and evidence
 - Determination by decisionmaker on relevant and impermissible evidence

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Additional Requirements for Grievance Procedures at Post-secondary Institutions

§ 106.46

- Prompt notice of allegations, dismissals, delays, meetings, interviews, and hearings
- Advisor can be present at meetings or proceedings
- Equitable access to relevant and not impermissible evidence or to written report summarizing
- Decisionmaker has a process to assess credibility in meetings or hearing

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- Advisors can be present outside of the hearing process

Additional Requirements Continued

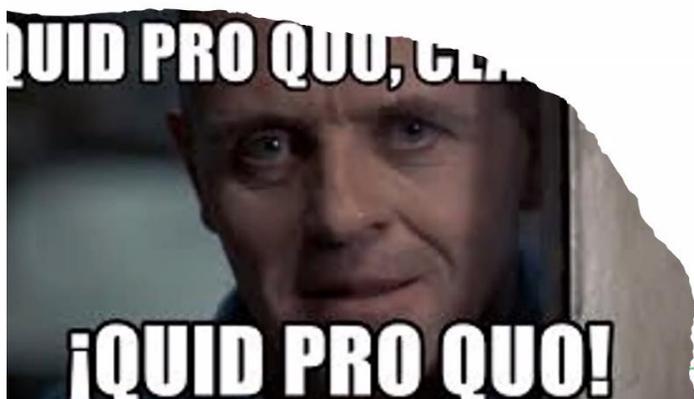
- Parties can propose relevant questions to ask during a meeting or live hearing
- Allowing advisor to ask relevant questions during live hearing
- Live hearings permitted, but not required – except as required under State Law
- If live, must permit parties to attend in separate locations by using technology
- No unclear or harassing questions
- No reliance on statement of a party if the party does not respond to credibility questions BUT cannot draw adverse inference based on refusal to answer questions

Guidance on Factors to Consider for Sex-Based Harassment – Non-exhaustive:

- the degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;
- the type, frequency, and duration of the conduct;
- the parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the alleged unwelcome conduct;
- the location of the conduct, the context in which the conduct occurred, and the control the recipient has over the respondent; and
- other sex-based harassment in the recipient's education program or activity.
- ** A recipient would not be prohibited from considering additional relevant factors to determine whether a hostile environment has been created.*



2024 Proposed Sex-Based Harassment, § 106.2 NO CHANGE



- "**Quid Pro Quo**" harassment by a school employee or other person authorized by a Recipient to provide an aid, benefit, or service, who conditions that aid, benefit or service on participation in unwelcome sexual conduct

- Includes incidents of sexual assault, dating violence, domestic violence and stalking

- No substantial changes to this portion

Response to Sex Discrimination/Harassment

- Current Regulations: only require a response to possible sex harassment when recipient has "actual knowledge" of the harassment.
 - Only employees with authority to institute corrective measures can have actual knowledge
 - In elementary schools and secondary schools, the actual knowledge requirement applies to all employees
 - Response standard: NOT deliberately indifferent.

Responding to Sex Discrimination

Section 106.44

- New regulations require prompt and effective action to end any prohibited sex discrimination that occurred in its education program
- Take action to prevent its recurrence and remedy its effects.

Ensuring Recipients learn of possible sex discrimination

Proposed Section 106.44 (c)

- Mandatory reporters must report to Title IX Coordinator
 - Any employee of **elementary or secondary school** that is not a confidential employee is required to notify
 - Any employee at **post-secondary institution** who has authority to take corrective action, has responsibility for administrative leadership, teaching, or advising in an education program or activity
 - All other employees are obligated to notify Title IX Coordinator or provide the individual with the Title IX Coordinator's contact info and details about reporting
 - Confidential employees do not need to report but only to provide individual with the Title IX Coordinator contact info and details about reporting

Monitoring



§ 106.44 (B)

- Recipient must monitor barriers in the educational program or activity about conduct that might constitute sex discrimination
- Must take action to remove any barriers identified
- Requirements:
 - Employees and students must have info about the identity and role of confidential employees
 - Students know how to make a complaint and seek supportive measures
 - Recipients know to honor a complainant's request not to proceed

Retaliation

§§ 106.2, 106.71

- Retaliation includes peer retaliation – student against student
- Defined: intimidation, threats, coercion, or discrimination
- Cannot take action against student/employee under code of conduct for the purpose of intimidating, threatening, coercing, or discriminating

Current Regs: Prohibit retaliation but do not include definitions or include peer retaliation

Discrimination Based on Pregnancy or Related Conditions

§§ 106.2, 106.21 (c), 106.40, 106.57

- Must protect students and employees from discrimination based on pregnancy or related conditions
 - Must provide reasonable modifications
 - Option of an individualized, reasonable modifications
 - Allow voluntary leave of absence for medical reasons and reinstatement upon return
 - Reasonable break times for lactation
 - Provide lactation space for students and employees
- Modernize and clarify Title IX prohibition against treating parents differently based on sex, including defining parental status, includes guardians, adoption or stepparents

Current Regs: prohibit discrimination against students, employees, applicants based on pregnancy, childbirth and recovery and from adopting rules that treat parents differently based on sex

Discrimination on basis of Sex Orientation, Gender Identity, Sex Characteristics

Proposed Sections 106.10, 106.31 (a) (2), 106.41 (b)(2)

- Prohibits recipients from separating or treating any person differently based on sex that subjects a person to more than minimal harm
 - Includes policies and practices that prevent students from participating in education program or activity consistent with their gender identity
 - Title IX trumps state law
- **Department will engage in separate rulemaking on Title IX's application to athletics and permitted criteria for eligibility to participate in male or female athletic teams**

Enhanced Training for [Investigators and Decision-makers](#) and for those handling [informal resolution](#)

[Enhanced training for those](#) responsible for implementing grievance procedures or authority to modify/terminate supportive measures:

[Topics in § 106.8 \(d\) \(1\)](#)

Obligations under § 106.46

How to serve impartially – avoid pre-judgment, bias, conflicts

Meaning and application of relevance

Training

All Employees

- Scope of training to include all employees of Recipient:
- Obligation to address sex discrimination
- Definition of sex-based harassment
- Notification and information requirements under
- § 106.40 (b)(2) and 106.44

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Training for Informal Resolution Facilitators

- Topics in § 106.8 (d) (3)
- Rules and practices associated with the informal resolution process
- How to serve impartially
- Avoid conflicts and bias

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Training for Coordinators and Designees

- All topics listed in § 106.8 (d) (1) through (3)
(includes the all-employee training, investigators and decision-makers, and informal resolution facilitators)
- Specific responsibilities under § § 106.8 (a), 106.40 (b)(3) and 106.44 (f) and 106.44 (g)
- Recordkeeping requirements and systems for same
- Any other training required to coordinate recipient's compliance with Title IX

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Some Administrative Guidance

§ 106.6 and § 106.8

Must comply with Title IX even if a conflict between Title IX and state law or FERPA

Title IX does not override legal right of parent, guardian or other authorized legal representative to act on behalf of complainant, respondent or other person

Must designate a Title IX Coordinator

Must adopt and publish non-discrimination and grievance processes

Differentiated mandatory training based on role

Protection for disabled students

Recordkeeping requirement – 7 years

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Policies Must Have:

- Clear processes for determination of whether sex discrimination occurred
 - Standard of proof (preponderance or clear and convincing)
 - Notify parties of outcome and opportunity to appeal (still required)
 - If determination of violation, appropriate remedies, prompt and effective steps to ensure discrimination does not continue or recur
 - Before any sanctions, grievance processes are completed
 - Prohibited from disciplining a party, witness, or other participant from making false statement or for engaging in consensual sexual conduct
 - Parties can choose an informal resolution process
 - Grievance procedures must describe range of possible supportive measures and list of sanctions and remedies



Post-Secondary Grievance

Proposed Section 106.46

- Provide written notice of determination
 - Description of allegations
 - Info on policies and procedures
 - Decisionmaker's evaluation of relevant evidence and determination, disciplinary sanctions and remedies, appeal procedures
 - The decisionmaker must explain any decision to exclude questions that are impermissible in addition to those that are excluded for relevance.

Grievance – Appeal Process

- Provide opportunity for appeal based on:
 - Procedural irregularity
 - New evidence
 - Conflict of interest or bias
 - Other bases offered equally to parties

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