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Title IX Compliance Training

Summer 2020

A Brief History of Title IX of the Education Amendments Act of 1972

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TITLE IX STATUTE

“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 U.S.C. 1681

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A Brief History of Title IX

1972

Title IX of the Education Amendments Act of 1972 is Enacted

Title IX federal statute prohibits discrimination on the basis of sex in education programs and activities that receive federal financial assistance.

1975

Title IX Regulations are Published

The U.S. Department of Health, Education, and Welfare was the federal agency that first promulgated regulations under Title IX.

1997

The DOE Issues the First Title IX Guidance

This is the first of multiple guidance documents that addressed the regulations but were not technically legally binding.

2001

The DOE Issues the 2001 Title IX Guidance Document

This 2001 guidance document revised the 1997 guidance document.

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A Brief History of Title IX

2011

The DOE Issues the Dear Colleague Letter

This 2011 guidance document was withdrawn by the DOE in 2017 and is no longer in effect.

2014

The DOE Issues the 2014 Q&A

This 2014 guidance document was withdrawn by the DOE in 2017 and is no longer in effect.

2017

The DOE Issues the 2017 Q&A

The DOE began to engage in a formal federal rulemaking process to make the 2020 regulatory amendments to the 1975 regulations legally binding.

2020

The DOE Publishes the New Title IX Regulations

On May 6th, 2020, the DOE published the new Title IX regulations, 34 C.F.R. 106, to be effective on August 14th, 2020.

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Overview of Training Program

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Overview of Training Program

§ 106.45(B)(1)(III) REQUIRES ALL TITLE IX PERSONNEL TO BE TRAINED ON THE NEW TITLE IX REGULATIONS

This training program will provide Title IX Coordinators, Investigators, Decision-Makers, and Facilitators of Informal Resolution Processes with training on all required topics mandated by the new Title IX regulations.

§ 106.45(B)(10)(I) REQUIRES ALL TRAINING MATERIALS TO BE MADE PUBLICLY AVAILABLE ON RECIPIENTS' WEBSITES

Schools that purchase this training program through UECAT are granted permission to make all of the training materials publicly available on their institution's website.

Overview of Training Program

§ 106.45(B)(1)(III) REQUIRES TITLE IX PERSONNEL TO BE TRAINED ON THE FOLLOWING TOPICS

- the definition of sexual harassment;
- the scope of the recipient's education program or activity;
- how to conduct an investigation and grievance process, including hearings, appeals and informal resolution processes, as applicable;
- how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias;
- technology to be used at a live hearing;
- issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant; and
- issues of relevance to create an investigative report that fairly summarizes relevant evidence.

Sources Referenced

- The focus of this training is to engage in regulatory interpretation to help Title IX Personnel understand their obligations under the new Title IX regulations.

- The majority of information and language presented throughout this training comes directly from the:
  - New Title IX regulations [34 C.F.R. 106];
  - Preamble in the published Title IX regulatory document [found in the Federal Register - Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance]; or
  - Department of Education Blogs [found on the Department's website]

- If information presented is not sourced directly from the regulations, then it is because the regulations and/or preamble do not fully address/define the topic or term being discussed or the information is being used to supplement regulatory interpretation.
  - In the case that information on a slide is not taken from the official Department sources, it will be indicated with a footnote "[FN #]," and a citation to the alternative source can be found at the bottom of the slide.

- As required by § 106.45(b)(1)(iii), sources referenced in this training have been carefully selected so as to not rely on sex stereotypes and to promote impartial investigations and adjudications of formal complaints of sexual harassment.

Terminology

- **Complainant:**
  - an individual who is alleged to be the victim of conduct that could constitute sexual harassment

- **Recipient:**
  - recipients of Federal financial assistance covered by Title IX, including elementary and secondary schools as well as postsecondary institutions

- **Respondent:**
  - an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment

- **Title IX Personnel:**
  - includes Title IX Coordinators, Investigators, Decision-Makers, and Facilitators of Informal Resolution Processes

Terminology

- **United States Department of Education:**
  - to be referenced as the "Department" throughout the training

- **Office for Civil Rights**
  - to be referenced as "OCR" throughout the training

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When is a Recipient Required to Respond Under Title IX?

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§ 106.44 Recipient's Response to Sexual Harassment

§ 106.44(a) General 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.

§ 106.44
Recipient's Response to Sexual Harassment

Actual Knowledge

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§ 106.44 Recipient's Response to Sexual Harassment

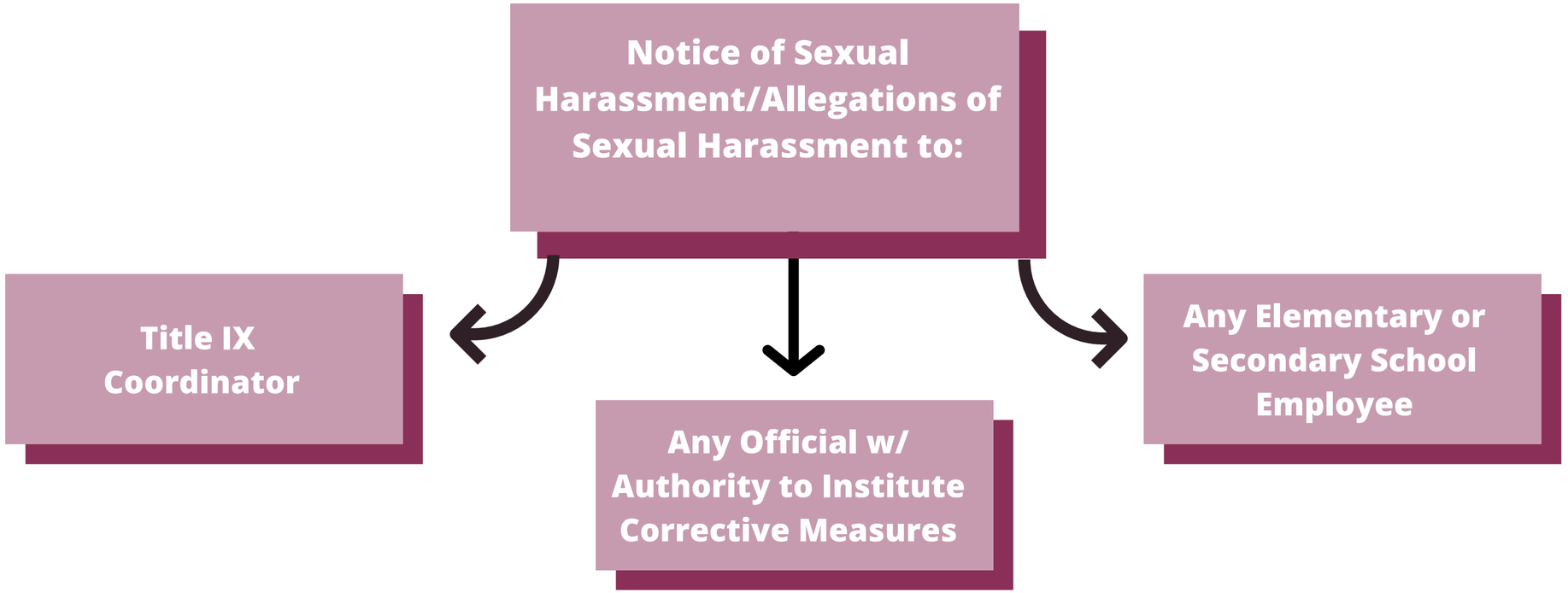
§ 106.30(a) Definitions - Actual Knowledge

- Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school.
  - The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient.
- Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge.
- This standard is not met when the only official of the recipient with actual knowledge is the respondent.

§ 106.44(a) Recipient's Response to Sexual Harassment:

Actual Knowledge

§ 106.30 - Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school. . .



§ 106.30 Definition of Actual Knowledge

Notice

- §106.30(a): “Notice” as used in this paragraph includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator as described in § 106.8(a).

- §106.8(a):
    - Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person’s verbal or written report.
    - Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator.

§ 106.30 Definition of Actual Knowledge

Notice

- A Title IX Coordinator, an official with authority to institute corrective measures on behalf of the recipient, and any employee of an elementary and secondary school may receive notice through:
  - An oral report of sexual harassment by a complainant or anyone else;
  - A written report;
  - Personal observation;
  - A newspaper article;
  - An anonymous report; or
  - Various other means.

§ 106.30 Definition of Actual Knowledge

Title IX Coordinator

- § 106.8 Designation of coordinator, dissemination of policy, and adoption of grievance procedures.
  - (a) Designation of coordinator. Each recipient must designate and authorize at least one employee . . . as the "Title IX Coordinator." The recipient must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator pursuant to this paragraph.
  - (b) Dissemination of Policy . . . Each recipient must prominently display the contact information required to be listed for the Title IX Coordinator under paragraph (a) of this section and the policy described in paragraph (b)(1) of this section on its website, if any, and in each handbook or catalog that it makes available to persons entitled to a notification under paragraph (a) of this section.

§ 106.30 Definition of Actual Knowledge

Officials With Authority to Institute Corrective Measures

- Officials With Authority to Institute Corrective Measures will hereinafter be referred to as "officials with authority."

- Determining whether an individual is an “official with authority” is a legal determination that depends on the specific facts relating to a recipient’s administrative structure and the roles and duties held by officials in the recipient’s own operations.
  - “Overall, this category is rather narrow and the identity of the relevant employees rests on an institution’s own policies regarding who has the authority to take action to redress sexual violence.” [1]

- Postsecondary institutions have discretion to determine which employees, other than the Title IX Coordinator, have authority to institute corrective measures on behalf of the recipient.

§ 106.30 Definition of Actual Knowledge

Distinction Between Officials w/ Authority and Employees Who Have a Duty to Report

"Responsible" Employees

- An employee who is designated by the postsecondary institution as a mandatory reporter and is expected to report incidents of sexual harassment to "appropriate school officials"
- NOT REQUIRED

Campus Security Authorities

- A "CSA" is an employee at the institution who has crime reporting obligations under the Clery Act.

Officials w/ Authority

- An employee who is given authority by the postsecondary institution to institute corrective measures on behalf of the recipient with respect to sexual harassment or allegations of sexual harassment

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§ 106.30 Definition of Actual Knowledge

Distinction Between Officials w/ Authority and Employees Who Have a Duty to Report

Officials with Authority to Institute Corrective Measures

- The final regulations give postsecondary institutions discretion to decide to authorize certain employees in a manner that makes those employees "officials with authority" as described in § 106.30, and to decide that other employees should remain confidential resources to whom a student at a postsecondary institution might disclose sexual harassment without automatically triggering a report by the employee to the Title IX Coordinator.

- Even if the institution designates certain CSAs as confidential resources for Title IX purposes [and not as officials with authority] CSAs may still be required to report sexual harassment (when the conduct also consists of a Clery crime) for Clery Act purposes

§ 106.30 Definition of Actual Knowledge

Distinction Between Officials W/ Authority and Employees Who Have a Duty to Report

Officials With Authority vs. Campus Security Authorities

- The Department does not assume that all campus security authorities have the authority to institute corrective measures on behalf of a recipient with respect to sexual harassment or allegations of sexual harassment.
  - Institutions may determine that all of their CSAs are officials who have the authority to institute corrective measures on behalf of the recipient with respect to sexual harassment or allegations of sexual harassment;
    - If a CSA is also an official with authority to institute corrective measures as to sexual harassment, then under these final regulations, notice of sexual harassment to that CSA requires the institution's prompt response, whether or not the sexual harassment disclosed to that CSA constitutes a Clery Act crime that must be reported for Clery Act purposes.
  - It is very likely that at least some of an institution's CSAs have authority to institute corrective measures on behalf of the recipient for purposes of the conduct defined as "sexual harassment" under § 106.30.

§ 106.30 Definition of Actual Knowledge

Distinction Between Officials w/ Authority and Employees Who Have a Duty to Report

Any Elementary or Secondary School Employee

- In the elementary and secondary school setting where school administrators, teachers, and other employees exercise a considerable degree of control and supervision over their students, the Department believes that requiring a school district to respond when its employees know of sexual harassment (including reports or allegations of sexual harassment) furthers Title IX's nondiscrimination mandate in a manner that best serves the needs and expectations of students.

§ 106.30 Definition of Actual Knowledge

Distinction Between Officials w/ Authority and Employees Who Have a Duty to Report

Any Elementary or Secondary School Employee

- Employees at elementary and secondary schools stand in a unique position with respect to students and that a school district should be held accountable for responding to sexual harassment under Title IX when the school district's employees have notice of sexual harassment or sexual harassment allegations.
  - It is unreasonable to expect young students to differentiate among employees for the purpose of which employees' knowledge triggers the school's response obligations and which do not.
  - Elementary and secondary schools generally operate under the doctrine of in loco parentis, under which the school stands "in the place of" a parent with respect to certain authority over, and responsibility for, its students.
  - Employees at elementary and secondary schools typically are mandatory reporters of child abuse under State laws for purposes of child protective services.

§ 106.44(a) Recipient's Response to Sexual Harassment

Actual Knowledge

§ 106.30(a): . . . Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge.

→ Vicarious Liability

- "Vicarious liability" is a legal term that conveys the concept of being liable for the actions or omissions of another.

→ Constructive Notice

- The 1997 Guidance recommended that schools take action on the basis of constructive notice rather than actual knowledge, stating that: [A] school will be liable under Title IX if its students sexually harass other students if . . . the school knows or should have known of the harassment.

§ 106.44
Recipient's Response to Sexual Harassment

Deliberate Indifference

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§ 106.44 Recipient's Response to Sexual Harassment

§ 106.44(a) General 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.

§ 106.44(a) Recipient's Response to Sexual Harassment

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.

Deliberately Indifferent

- A recipient acts with deliberate indifference only when it responds to sexual harassment in a manner that is "clearly unreasonable in light of the known circumstances."

- If a recipient with actual knowledge responds in a clearly unreasonable manner, this constitutes the recipient committing intentional discrimination under Title IX.

§ 106.44(a) Recipient's Response to Sexual Harassment

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.

Deliberately Indifferent

- In order to not be deliberately indifferent, § 106.44(a) requires that a recipient's response:
  - must be prompt;
  - must consist of offering supportive measures to a complainant;
  - must ensure that the Title IX Coordinator contacts each complainant (i.e., person who is alleged to be the victim of sexual harassment) to discuss supportive measures, consider the complainant's wishes regarding supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.
- This mandatory, proactive, and interactive process helps ensure that complainants receive the response that will most effectively address the complainant's needs in each circumstance.

§ 106.44 Recipient's Response to Sexual Harassment

Responding Promptly

- Unlike previous Department guidance, the new regulations allow schools more flexibility and discretion in determining what a prompt response is:
  - Neither the 1997 Guidance nor the 2001 Guidance defined "prompt" resolution of complaints;
  - The withdrawn 2011 Dear Colleague Letter recommended a time frame of 60 calendar days;
  - The 2017 Q&A did not recommend a particular time frame for "prompt" resolution but rather referenced the approach outlined in the 2001 Guidance.

§ 106.44 Recipient's Response to Sexual Harassment

Responding Promptly

- In response to comments, the Department also revised § 106.44(a) to clarify that a recipient must respond promptly in a manner that is not deliberately indifferent:
  - This clarifies that whether or not a formal complaint triggers a grievance process, the recipient must promptly offer supportive measures to the complainant.
  - Where a formal complaint does trigger a grievance process, § 106.45(b)(1)(v) requires recipients to have a reasonably prompt time frame for the conclusion of the grievance process, including any appeals or informal resolution process.

§ 106.44(a) Recipient's Response to Sexual Harassment

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.

Deliberately Indifferent

- In order to not be deliberately indifferent, § 106.44(a) requires that a recipient's response:
  - must be prompt;
  - must consist of offering supportive measures to a complainant;
  - must ensure that the Title IX Coordinator contacts each complainant (i.e., person who is alleged to be the victim of sexual harassment) to discuss supportive measures, consider the complainant's wishes regarding supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.
- This mandatory, proactive, and interactive process helps ensure that complainants receive the response that will most effectively address the complainant's needs in each circumstance

§ 106.44 Recipient's Response to Sexual Harassment

§106.30(a) Definition of Supportive Measures

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

- Supportive measures means 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 where no formal complaint has been filed.

§ 106.44 Recipient's Response to Sexual Harassment

§106.30(a) Definition of Supportive Measures

- Such measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.

- The recipient 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.

§ 106.44 Recipient's Response to Sexual Harassment

§106.30(a) Definition of Supportive Measures

- Supportive measures 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; and
  - Other similar measures.

§ 106.44 Recipient's Response to Sexual Harassment

Supportive Measures

- While the Department recognizes that the range of supportive measures (defined in § 106.30 as individualized services, reasonably available, without fee or charge to the party) will vary among recipients, the Department believes that every recipient has the ability to consider, offer, and provide some kind of individualized services reasonably available, designed to meet the needs of a particular complainant to help the complainant stay in school and on track academically and with respect to the complainant's educational benefits and opportunities, and to protect parties' safety or deter sexual harassment.
    - These final regulations impose on recipients a legal obligation to do what recipient educational institutions have the ability and responsibility to do to respond promptly and supportively to help complainants, while treating respondents fairly.

§ 106.44(a) Recipient's Response to Sexual Harassment

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.

Deliberately Indifferent

- In order to not be deliberately indifferent, § 106.44(a) requires that a recipient's response:
  - must be prompt;
  - must consist of offering supportive measures to a complainant;
  - must ensure that the Title IX Coordinator contacts each complainant (i.e., person who is alleged to be the victim of sexual harassment) to discuss supportive measures, consider the complainant's wishes regarding supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.
- This mandatory, proactive, and interactive process helps ensure that complainants receive the response that will most effectively address the complainant's needs in each circumstance

§ 106.44(a) Recipient's Response to Sexual Harassment

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.

→ Deliberately Indifferent

- Additionally, in order to not be deliberately indifferent, § 106.44(a) requires a recipient's response:
  - Must treat complainants and respondents equitably, meaning that:
    - for a complainant, the recipient must offer supportive measures; and
    - for a respondent, the recipient must follow a grievance process that complies with §106.45 before imposing disciplinary sanctions.
  - If a respondent is found to be responsible for sexual harassment, the recipient must effectively implement remedies for the complainant, designed to restore or preserve the complainant's equal educational access, and may impose disciplinary sanctions on the respondent.

Scope of a Recipient's Education Program or Activity

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§ 106.44 Recipient's Response to Sexual Harassment

§ 106.44(a) General 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.

Language Already Covered:

- ✔ Actual Knowledge
- ✔ Deliberate Indifference

Language to be Covered:

- → Sexual Harassment
- → Education Program or Activity
- → Against a Person in the United States

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§ 106.44
Recipient's Response to Sexual Harassment

Education Program or Activity

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Scope of a Recipient's Education Program or Activity

§ 106.44(a) General 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.

§ 106.44(a) General Response to Sexual Harassment

- . . . 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.

TAKE NOTE!

Understanding the scope of a recipient's education program or activity is important not only to inform your school's response obligations to sexual harassment but also to inform other required Title IX policies and practices.

For example, § 106.45(b)(3) requires that:

- The recipient must investigate the allegations in a formal complaint, but if the conduct alleged in the formal complaint …
  - Would not constitute sexual harassment as defined in § 106.30 even if proved;
  - Did not occur in the recipient's education program or activity; or
  - Did not occur against a person in the United States,

  … then the recipient MUST DISMISS THAT COMPLAINT with regard to that conduct for the purposes of sexual harassment under Title IX or this part.

- Such a dismissal does not preclude action under another provision of the recipient's code of conduct.

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Scope of a Recipient's Education Program or Activity

Program or Activity Explained

- Whether conduct occurs in a recipient's education program or activity does not necessarily depend on the geographic location of the incident.

- Instead, "education program or activity" relies on:
  - (1) Statutory and regulatory definitions of "program or activity,"; and
    - Statutory Definition: 20 U.S.C. 1687
    - Regulatory Definition: 34 CFR 106.2(h)
  - (2) The statement adapted from the Supreme Court's language in Davis Next Friend LaShonda D. v. Monroe County Board of Education, 526 U.S. 629 (1999) (hereinafter referred to as "Davis") added to § 106.44(a).

Scope of a Recipient's Education Program or Activity

Program or Activity Explained

- Title IX obligations extend to sexual harassment incidents that occur off campus if any of three conditions are met:
  - (1) If the off-campus incident occurs as part of the recipient's "operations" pursuant to 20 U.S.C. 1687 and 34 CFR 106.2(h);
  - (2) If the recipient exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus pursuant to § 106.44(a); or
  - (3) If a sexual harassment incident occurs at an off-campus building owned or controlled by a student organization officially recognized by a postsecondary institution pursuant to §106.44(a).

Scope of a Recipient's Education Program or Activity

(1) Program or Activity Defined by Congress

- The Department notes that “program or activity” has been defined in detail by Congress and is reflected in existing Department regulations.

- The Department will interpret a recipient’s education “program or activity” in accordance with the Title IX statute and its implementing regulations.

- Note, the regulatory language [34 CFR 106.2(h)] is the same as the statutory language [20 U.S.C. 1687].

Scope of Recipient's Education Program or Activity

20 U.S.C. 1687

"Program or activity" and "program" mean all of the operations of-
(2)(A) A college, university, or other postsecondary institution, or a public system of higher education; or
(B) A local educational agency (as defined in 20 U.S.C. 7801), system of vocational education, or other school system.

All of the Operations Of . . .

- The Title IX statute and existing regulations broadly define a recipient's "program or activity" to include (as to schools) "all of the operations" of the school, such that situations that arise on campus are already part of a school's education program or activity.
  - For instance, incidents that occur in housing that is part of a recipient's operations such as dormitories that a recipient provides for students or employees whether on or off campus are part of the recipient's education program or activity. For example, a recipient must respond to an alleged [incident] of sexual harassment between two students in one student's dormitory room provided by the recipient.

- "All of the operations" of a school clearly includes all incidents of sexual harassment occurring on a recipient's campus.

Scope of Recipient's Education Program or Activity

20 U.S.C. 1687

"Program or activity" and "program" means all of the operations of-
(2)(A) A college, university, or other postsecondary institution, or a public system of higher education; or
(B) A local educational agency (as defined in 20 U.S.C. 7801), system of vocational education, or other school system.

All of the Operations Of . . .

- This can also include incidents of sexual harassment that occur electronically or online.

- The Department emphasizes that the education "program or activity" jurisdictional condition is a fact-specific inquiry applying existing statutory and regulatory definitions of “program or activity” to the situation;
  - However, for recipients who are postsecondary institutions or elementary and secondary schools as those terms are used in the final regulations, the statutory and regulatory definitions of “program or activity” encompass “all of the operations of” such recipients, and such “operations” may certainly include computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of, the recipient.

Scope of a Recipient's Education Program or Activity

(2) Davis Language Found in § 106.44(a)

- The Supreme Court in Davis states:
  - "Moreover, because the harassment must occur 'under' 'the operations of' a recipient, 20 U.S.C. §§ 1681(a), 1687, the harassment must take place in a context subject to the school district's control. These factors combine to limit a recipient's damages liability to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs."

Scope of a Recipient's Education Program or Activity

(2) Davis Language Found in § 106.44(a)

- § 106.44(a): . . . 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.

- This regulatory language aligns with the Supreme Court decision Davis and clarifies when sporting activities, after school programs, or field trips constitute part of the recipient's education program or activity

Scope of Recipient's Education Program or Activity

Locations, Events, or Circumstances Over Which the Recipient Exercised. . .

Substantial Control Over Both:

1. Respondent; and

2. Context in which Sexual Harassment Occured

Scope of a Recipient's Education Program or Activity

Substantial Control

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.

→ Substantial Control Over the Respondent

- § 106.30: Respondent means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

Scope of a Recipient's Education Program or Activity

Substantial Control

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.

Substantial Control Over the Respondent

- The Supreme Court in Davis states:
  - "[A recipient] exercises significant control over the harasser, for it has disciplinary authority over its students." [1]

- Thus, if the respondent is a student of the school, then it can be assumed that the school has "substantial control" over the respondent because it has disciplinary authority over its students.

[1] Davis v. Monroe Cty, Bd. of Ed., 526 U.S. 629, 630 (1999).

Scope of a Recipient's Education Program or Activity

Substantial Control

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.

Substantial Control Over the Respondent

- The final regulations provide in § 106.45(b)(3)(ii) that a recipient may in its discretion dismiss a formal complaint if the respondent is no longer enrolled or employed by the recipient, recognizing that a recipient's general obligation to provide a complainant with a prompt, non-deliberately indifferent response might not include completing a grievance process in a situation where the recipient lacks any disciplinary authority over the respondent.
  - § 106.45(b)(3)(ii): The recipient may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: . . . the respondent is no longer enrolled or employed by the recipient.

Scope of a Recipient's Education Program or Activity

Substantial Control

§ 106.44: 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.

→ Substantial Control Over the Context in Which the Sexual Harassment Occurs

- The Supreme Court in Davis held:
  - "Where, as here, the misconduct occurs during school hours on school grounds, misconduct is taking place 'under' an 'operation' of the recipient. In these circumstances, the recipient retains substantial control over the context in which the harassment occurs." [1]

[1] Davis v. Monroe Cty, Bd. of Ed., 526 U.S. 629, 630 (1999).

Scope of a Recipient's Education Program or Activity

Substantial Control

§ 106.44: 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.

→ Substantial Control Over the Context in Which the Sexual Harassment Occurs

- The NPRM cited to Federal court opinions that have considered whether sexual harassment occurred in a recipient's education program or activity by examining factors such as whether the recipient funded, promoted, or sponsored the event or circumstance where the alleged harassment occurred.

- While it may be helpful or useful for recipients to consider factors applied by Federal courts to determine the scope of a recipient's program or activity, no single factor is determinative to conclude whether a recipient exercised substantial control over the respondent and the context in which the harassment occurred.

Scope of a Recipient's Education Program or Activity

Locations

- All incidents that occur on campus;
- Incidents that occur in housing that is part of a recipient's operations such as:
  - Dormitories that a recipient provides for students or employees that are on campus or off campus.
- Incidents that occur electronically or online.

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Scope of a Recipient's Education Program or Activity

Events

- Ask: Did the school fund, promote, or sponsor the event where the alleged harassment occurred?

- For example:
  - Sporting events;
  - Academic events;
  - Student organization events;
  - Etc.

Scope of a Recipient's Education Program or Activity

Circumstances

- Ask: Did the school fund, promote, or sponsor the circumstance where the alleged harassment occurred?

- For example:
  - Field Trips;
  - After school programs;
  - Volunteer programs;
  - Sporting activities;
  - Etc.

Scope of a Recipient's Education Program or Activity

(3) Buildings Owned or Controlled by Officially Recognized Student Organizations

- . . . For the purposes of this section, §§ 106.30 [sexual harassment definition], and 106.45 [grievance process], "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.

Scope of a Recipient's Education Program or Activity

Officially Recognized Student Orgs

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.

→ Any Building Owned or Controlled by a Student Organization

- Official recognition of a student organization, alone, does not conclusively determine whether all the events and actions of the students in the organization become a part of a recipient's education program or activity;
  - However, the Department believes that a reasonable, bright line rule is that official recognition of a student organization brings buildings owned or controlled by the organization under the auspices of the postsecondary institution recipient and thus within the scope of the recipient's Title IX obligations.

Scope of a Recipient's Education Program or Activity

Officially Recognized Student Orgs

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.

Any Building Owned or Controlled by a Student Organization

- Where a postsecondary institution has officially recognized a student organization, the recipient's Title IX obligations apply to sexual harassment that occurs in buildings owned or controlled by such a student organization:
  - Irrespective of whether the building is on campus or off campus, and
  - Irrespective of whether the recipient exercised substantial control over the respondent and the context of the harassment outside the fact of officially recognizing the fraternity or sorority that owns or controls the building.

Scope of a Recipient's Education Program or Activity

Officially Recognized Student Orgs

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.

→ Student Organization That is Officially Recognized by a Postsecondary Institution

- As part of the process for official recognition, a postsecondary institution may require a student organization that owns or controls a building to agree to abide by the recipient's Title IX policy and procedures under these final regulations, including as to any misconduct that occurs in the building owned or controlled by a student organization.

Scope of a Recipient's Education Program or Activity

Officially Recognized Student Orgs

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.

→ Student Organization That is Officially Recognized by a Postsecondary Institution

- Where a postsecondary institution has officially recognized a student organization, and sexual harassment occurs in an off campus location not owned or controlled by the student organization yet involving members of the officially recognized student organization, the recipient's Title IX obligations will depend on whether the recipient exercised substantial control over the respondent and the context of the harassment, or whether the circumstances may otherwise be determined to have been part of the "operations of" the recipient.

Scope of a Recipient's Education Program or Activity

Example of Building Owned or Controlled by an Official Student Organization

- Under the final regulations (e.g., § 106.44(b)(1)) a postsecondary institution must investigate formal complaints alleging sexual harassment that occurred in a fraternity or sorority building (located on campus, or off campus) owned by the fraternity or sorority, if the postsecondary institution has officially recognized that Greek life organization.

Scope of Recipient's Education Program or Activity

Title IX obligations extend to sexual harassment incidents that occur off campus if any one of the three following conditions are met:

Condition One

If the off-campus incident occurs as part of the recipient's "operations" pursuant to 20 U.S.C. 1687 and 34 CFR 106.2(h);

Condition Two

If the recipient exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus pursuant to § 106.44(a); or

Condition Three

If a sexual harassment incident occurs at an off-campus building owned or controlled by a student organization officially recognized by a postsecondary institution pursuant to §106.44(a).

§ 106.44 Recipient's Response to Sexual Harassment

§ 106.44(a) General 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.

Language Already Covered:

- ✔ Actual Knowledge
- ✔ Deliberate Indifference
- ✔ Education Program or Activity

Language to be Covered:

- → Sexual Harassment
- → Against a Person in the United States

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§ 106.44
Recipient's Response to Sexual Harassment
Against a Person in the United States

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§ 106.44 Recipient's Response to Sexual Harassment

Against a Person in the United States

- The final regulations do not extend Title IX protections to incidents of sexual misconduct occurring against persons outside the United States, including incidents that may occur against students in international study abroad programs.

§ 106.44 Recipient's Response to Sexual Harassment

Against a Person in the United States

- The Department believes a plain meaning interpretation of a statute is most consistent with fundamental rule of law principles, ensures predictability, and gives effect to the intent of Congress.

- By its plain text, the Title IX statute does not have extraterritorial application:
  - Title IX states that "[n]o 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[.]"

§ 106.44 Recipient's Response to Sexual Harassment

Against a Person in the United States

- Courts have recognized a canon of statutory construction that "Congress ordinarily intends its statutes to have domestic, not extraterritorial, application."

- If Congress intended Title IX to have extraterritorial application, then it could have made that intention explicit in the text when it was passed in 1972, and Congress could amend Title IX to apply to a recipient's education programs or activities located outside the United States if Congress so chooses.

§ 106.44 Recipient's Response to Sexual Harassment

Against a Person in the United States

- Based on the presumption against extraterritoriality reinforced by Supreme Court decisions and the plain language in the Title IX statute limiting protections to persons "in the United States," the Department believes that the Department does not have authority to declare that the presumption against extraterritoriality has been overcome, absent further congressional or Supreme Court direction on this issue.

§ 106.44 Recipient's Response to Sexual Harassment

Against a Person in the United States

- The Department emphasizes that nothing in these final regulations prevents recipients from initiating a student conduct proceeding or offering supportive measures to address sexual misconduct against a person outside the United States.

- The Department revised § 106.45(b)(3) to explicitly state that even if a recipient must dismiss a formal complaint for Title IX purposes because the alleged sexual harassment did not occur against a person in the U.S., such a dismissal is only for purposes of Title IX, and nothing precludes the recipient from addressing the alleged misconduct through the recipient's own code of conduct.

§ 106.44 Recipient's Response to Sexual Harassment

Against a Person in the United States

- Title IX protects every individual in the U.S. against discrimination on the basis of sex in education programs or activities receiving Federal financial assistance, regardless of citizenship or legal residency.

- The jurisdictional limitation that sexual harassment occurred against "a person in the United States" is not a limitation that protects only U.S. citizens;
    - International students or foreign students studying in the United States are entitled to the same protections under Title IX as any other individuals.

§ 106.44 Recipient's Response to Sexual Harassment

Against a Person in the United States

- Title IX states that "[n]o person in the United States" shall be subject to discrimination based on sex.

- It is well-settled that the word "person" in this context includes citizens and non-citizens alike.

Definition of Sexual Harassment

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§ 106.44 Recipient's Response to Sexual Harassment

§ 106.44(a) General 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.

Language Already Covered:

- ✔ Actual Knowledge
- ✔ Deliberate Indifference
- ✔ Education Program or Activity
- ✔ Against a Person in the United States

Language to be Covered:

- → Sexual Harassment

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§ 106.30(a) Definition of Sexual Harassment

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

Prong One

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;

Prong Two

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

Prong Three

"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)(1), "domestic violence" as defined in 32 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

§ 106.30(a) Definition of Sexual Harassment

Prong One: "Quid Pro Quo"

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§ 106.30(a) Definition of Sexual Harassment

PRONG ONE: "QUID PRO QUO"

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.

→ Employee

- The Quid Pro Quo harassment prong applies to all of a recipient's employees, so that it includes situations where, for instance, a teacher, faculty member, or coach holds authority and control over a student's success or failure in a class or extracurricular activity.

- The Department declines to expand the description to include non-employee students, volunteers, or others not deemed to be a recipient's employee.

§ 106.30(a) Definition of Sexual Harassment

PRONG ONE: "QUID PRO QUO"

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.

→ Individual's Participation in Unwelcome Sexual Conduct

- The Department interprets the term "unwelcome" as used in the first and second prongs of the § 106.30 definition of sexual harassment as a subjective element (i.e., whether the complainant viewed the conduct as unwelcome).

§ 106.30(a) Definition of Sexual Harassment

PRONG ONE: "QUID PRO QUO"

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.

→ Individual's Participation in Unwelcome Sexual Conduct

- When a complainant acquiesces to unwelcome conduct in a quid pro quo context to avoid potential negative consequences, such "consent" does not necessarily mean that the sexual conduct was not "unwelcome" or that prohibited quid pro quo harassment did not occur.

- Even if a complainant in a quid pro quo situation pretended to welcome the conduct (for instance, due to fear of negative consequences for objecting to the employee's suggestions or advances in the moment), the complainant's subjective statement that the complainant found the conduct to be unwelcome suffices to meet the "unwelcome" element.

§ 106.30(a) Definition of Sexual Harassment

PRONG ONE: "QUID PRO QUO"

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.

→ Individual's Participation in Unwelcome Sexual Conduct

- Determining whether unwelcome sexual conduct is proposed, suggested, or directed at a complainant . . . does not require the employee to expressly tell the complainant that such a bargain is being proposed.

- Quid pro quo harassment applies whether the "bargain" proposed by the recipient's employee is communicated expressly or impliedly.

§ 106.30(a) Definition of Sexual Harassment

PRONG ONE: "QUID PRO QUO"

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.

→ Individual's Participation in Unwelcome Sexual Conduct

- Quid pro quo harassment constitutes sexual harassment under § 106.30, without being evaluated for severity, pervasiveness, and objective offensiveness.

- The Department declines to require that quid pro quo harassment be severe and pervasive;
  - Abuse of authority in the form of even a single instance of quid pro quo harassment (where the conduct is not "pervasive") is inherently offensive and serious enough to jeopardize equal educational access.

§ 106.30(a) Definition of Sexual Harassment

Prong Two: "SPOODE"

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§ 106.30(a) Definition of Sexual Harassment

PRONG TWO: "SPOODE"

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.

→ Two Standards to be Applied When Evaluating Prong Two Conduct

- The element of unwelcome conduct should be determined under a subjective standard.
  - i.e., whether the complainant viewed the conduct as unwelcome.

- The elements of severe, pervasive, objective offensiveness, and denial of equal access should be determined under a reasonable person in the shoes of the complainant standard.
  - Severe, Pervasive, Objectively Offensive, and Denial of Equal access ("SPOODE").

§ 106.30(a) Definition of Sexual Harassment

PRONG TWO: "SPOODE"

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.

Unwelcome Conduct

- "Unwelcome" Defined:
  - The Department interprets "unwelcome" as a subjective element;
  - The complainant's subjective statement that the complainant found the conduct to be unwelcome suffices to meet the "unwelcome" element.

- Unwelcome conduct encompasses both unwelcome conduct of a "sexual nature" and other forms of unwelcome conduct "on the basis of sex."

§ 106.30(a) Definition of Sexual Harassment

PRONG TWO: "SPOODE"

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.

→ Unwelcome Conduct

- Unwelcome Conduct of a Sexual Nature:
  - can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature, by an employee, student, or third party.

- Unwelcome Conduct on the Basis of Sex:
  - can include verbal and nonverbal behaviors, devoid of sexual content, that convey insulting, hostile, degrading attitudes about a particular sex; and
  - may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping.

§ 106.30(a) Definition of Sexual Harassment

PRONG TWO: "SPOODE"

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.

Examples of Unwelcome Conduct

1. Female graduate students' laboratory experiments are repeatedly sabotaged by male students in the class.

2. Students in the school cafeteria heckle another student with comments based on the student's sexual orientation (e.g. "gay students are not welcome at this table in the cafeteria").

3. A male student or a group of male students targets a gay student for physical sexual advances, serious enough to deny or limit the victim's ability to participate in or benefit from the school's program.

§ 106.30(a) Definition of Sexual Harassment

PRONG TWO: "SPOODE"

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.

→ Examples of Unwelcome Conduct Explained

- ***Unwelcome Conduct on the Basis of Sex***

  1. Female graduate students' laboratory experiments are repeatedly sabotaged by male students in the class.

- ***Not Sexual Harassment Under Title IX***

  2. Students in the school cafeteria heckle another student with comments based on the student's sexual orientation (e.g. "gay students are not welcome at this table in the cafeteria").

- ***Unwelcome Conduct of a Sexual Nature***

  3. A male student or a group of male students targets a gay student for physical sexual advances, serious enough to deny or limit the victim's ability to participate in or benefit from the school's program.

§ 106.30(a) Definition of Sexual Harassment

PRONG TWO: "SPOODE"

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.

→ Reasonable Person

- The SPOODE elements are to be determined under a "reasonable person in the shoes of the complainant" standard:
  - (1) severe;
  - (2) pervasive;
  - (3) objectively offensive; and
  - (4) denial of equal access.
- The SPOODE elements are are evaluated from the perspective of a "reasonable person," so that the complainant's individualized reaction to sexual harassment is not the focus when a recipient is identifying and responding to Title IX sexual harassment incidents or allegations.

§ 106.30(a) Definition of Sexual Harassment

PRONG TWO: "SPOODE"

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.

§ 106.30(a) Definition of Sexual Harassment

PRONG TWO: "SPOODE"

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.

→ Reasonable Person

- Prong two does not require an "intent" element; unwelcome conduct that meets the SPOODE elements is actionable sexual harassment regardless of the respondent's intent to cause harm.

- The following factors should also be taken into account when evaluating the SPOODE elements:
  - Ages
  - Abilities
  - Relative positions of authority of the individuals involved in the incident

§ 106.30(a) Definition of Sexual Harassment

PRONG TWO: "SPOODE"

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.

→ Severe, Pervasive, and Objectively Offensive

- Recipients' desire to provide students with a safe, nondiscriminatory learning environment will lead recipients to evaluate sexual harassment incidents using common sense and taking circumstances into consideration, including the ages, disability status, positions of authority of involved parties, and other factors.

- Nothing in the final regulations disallows or disapproves of that common sense approach to determinations of severity, pervasiveness, and objective offensiveness.

§ 106.30(a) Definition of Sexual Harassment

PRONG TWO: "SPOODE"

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.

→ Severe

- A complainant does not have to "prove severity"; a complainant need only describe what occurred and the recipient must then consider whether the described occurrence was severe from the perspective of a reasonable person in the complainant's position.

§ 106.30(a) Definition of Sexual Harassment

PRONG TWO: "SPOODE"

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.

→ Pervasive

- Disseminating "revenge porn," or conspiring to sexually harass people (such as fraternity members telling new pledges to "score"), or other unwelcome conduct that harms and humiliates a person on the basis of sex may meet the SPOODE elements, including pervasiveness, particularly where the unwelcome sex-based conduct involves widespread dissemination of offensive material or multiple people agreeing to potentially victimize others and taking steps in furtherance of the agreement.

§ 106.30(a) Definition of Sexual Harassment

PRONG TWO: "SPOODE"

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.

→ Objectively Offensive

- Ask whether a reasonable person, in the position of the particular complainant, would find the conduct offensive.

- The objective nature of the inquiry simply means that evaluation is made by a reasonable person considering whether, standing in the shoes of the complainant, the conduct would be offensive.

§ 106.30(a) Definition of Sexual Harassment

PRONG TWO: "SPOODE"

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.

→ Effectively Denies Equal Access

- This element identifies severe, pervasive, objectively offensive unwelcome conduct that deprives the complainant of equal access, measured against the access of a person who has not been subjected to the sexual harassment.

- A complainant is effectively denied equal access when:
  - a complainant has been entirely, physically excluded from educational opportunities; OR
  - a complainant is in any situation where the sexual harassment "so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."

§ 106.30(a) Definition of Sexual Harassment

PRONG TWO: "SPOODE"

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.

→ Effectively Denies Equal Access

- Examples of effective denial of equal access include, but are not limited to, the following:
  - Skipping class to avoid a harasser
  - A decline in a student's grade point average
  - Having difficulty concentrating in class
  - Quitting extracurricular activities

§ 106.30(a) Definition of Sexual Harassment

PRONG TWO: "SPOODE"

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.

→ Effectively Denies Equal Access

- No concrete injury is required to conclude that serious harassment would deprive a reasonable person in the complainant's position of the ability to access the recipient's education program or activity on an equal basis with persons who are not suffering such harassment.
- This element does not require that:
  - a complainant has already suffered loss of education before being able to report sexual harassment;
  - a complainant's total or entire educational access has been denied; OR
  - a complainant dropped out of school, failed a class, had a panic attack, or otherwise reached a "breaking point" in order to report and receive a recipient's supportive response to sexual harassment.

§ 106.30(a) Definition of Sexual Harassment

PRONG TWO: "SPOODE"

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.

→ Education Program or Activity

- A recipient's "education program or activity" is defined by § 106.44(a):
  - 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.

§ 106.30(a) Definition of Sexual Harassment

PRONG TWO: "SPOODE"

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.

→ Supreme Court Interpretation

- The SPOODE elements come from the Supreme Court case, Davis Next Friend LaShonda D. v. Monroe County Board of Education, 526 U.S. 629 (1999) (hereinafter referred to as "Davis").

- Throughout Davis, the Supreme Court discussed types of conduct that does and does not meet the SPOODE elements.

§ 106.30(a) Definition of Sexual Harassment

PRONG TWO: "SPOODE" (Supreme Court Case- Davis)

Facts of the Case

- The Supreme Court found a 5th grader's allegations that she was repeatedly harassed by a classmate over a 5-month period supported the conclusion that the SPOODE elements were met. [1]

- The 5th grader alleged that her classmate engaged in the following conduct:
  - attempted to touch her breasts and genital area and said, "I want to get in bed with you," and, "I want to feel your boobs" [2];
  - repeated the conduct described above in subsequent weeks [3];
  - placed a door stop in his pants and proceeded to act in a sexually suggestive manner during physical education class [4];
  - rubbed his body up against hers in the school hallway in a sexually suggestive manner. [5]

[1] Davis v. Monroe Cty, Bd. of Ed., 526 U.S. 629, 631 (1999).
[2] Id. at 633.
[3] Id.
[4] Id. at 634.
[5] Id.

§ 106.30(a) Definition of Sexual Harassment

PRONG TWO: "SPOODE" (Supreme Court Case- Davis)

Supreme Court Considerations of SPOODE Conduct

- "The most obvious example of student-on-student sexual harassment" that would meet the SPOODE elements would "involve the overt, physical deprivation of access to school resources." [1]
  - "Consider, for example, a case in which male students physically threaten their female peers every day, successfully preventing the female students from using a particular school resource—an athletic field or a computer lab." [2]

- "It is not necessary, however, to show physical exclusion to demonstrate that students have been deprived by the actions of another student or students of an educational opportunity on the basis of sex." [3]

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[1] Davis v. Monroe Cty, Bd. of Ed., 526 U.S. 629, 651 (1999).
[2] Id.
[3] Id.

§ 106.30(a) Definition of Sexual Harassment

PRONG TWO: "SPOODE" (Supreme Court Case- Davis)

Supreme Court Considerations of SPOODE Conduct

- "It is not enough to show that a student has been teased or called offensive names, even if these comments target differences in gender." [1]

- The behavior must be "so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect." [2]

- The Department echoes the Davis holding and states:
  - Title IX does not stand as a zero-tolerance ban on all sexual harassment.
  - Title IX does not stand as a Federal civil rights law to prevent all conduct that “makes me feel uncomfortable.”

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[1] Davis v. Monroe Cty, Bd. of Ed., 526 U.S. 629, 651-52 (1999).
[2] Id.

§ 106.30(A) DEFINITION OF SEXUAL HARASSMENT

PRONG TWO: SPOODE

BASED ON THE REASONABLE PERSON STANDARD:	S SEVERE	P PERVASIVE	O O OBJECTIVELY OFFENSIVE	DE DENIED EQUAL ACCESS
Yes?	✓	✓	✓	✓
No?				
Need more information?				

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§ 106.30(a) Definition of Sexual Harassment

Prong Three: "Sex-Based Crimes"

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§ 106.30(a) Definition of Sexual Harassment

PRONG THREE: "SEX-BASED CRIMES"

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

- ✔ Prong One: "Quid Pro Quo"
- ✔ Prong Two: "SPOODE"
- → Prong Three: "Sex-Based Crimes"
  - "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v);
  - "Dating violence" as defined in 34 U.S.C. 12291(a)(1);
  - "Domestic violence" as defined in 32 U.S.C. 12291(a)(8); or
  - "Stalking" as defined in 34 U.S.C. 12291(a)(30).

§ 106.30(a) Definition of Sexual Harassment

PRONG THREE: "SEX BASED CRIMES" (Sexual Assault)

Sexual Assault- 20 U.S.C. 1092(f)(6)(A)(v)

The term “sexual assault” means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation. [1]

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[1] 20 U.S.C. 1092(f)(6)(A)(v)

§ 106.30(a) Definition of Sexual Harassment

PRONG THREE: "SEX BASED CRIMES" (Sexual Assault)

The FBI has Two Uniform Crime Reporting ("UCR") Systems, with Two Definitions of Rape

UCR's Summary Reporting System (SRS)

- Rape: Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim. [1]

UCR's National Incident-Based Reporting System (NIBRS)

- Rape: The carnal knowledge of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity. [2]

[1]U.S. Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division Uniform Crime Reporting Program, Summary Reporting System User Manual, page 174 (June 20, 2013).
[2] U.S. Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, Uniform Crime Reporting Program 2019.2 National Incident-Based Reporting System User Manual, page 39 (May 07, 2020).

§ 106.30(a) Definition of Sexual Harassment

PRONG THREE: "SEX BASED CRIMES" (Sexual Assault)

UCR's Summary Reporting System (SRS)

- The 2016 Clery Handbook and the Clery Regulations rely on this definition. [1]

UCR's National Incident-Based Reporting System (NIBRS)

- The FBI has announced it will retire the SRS and transition to using only the NIBRS in January 2021 [2];
  - As a result, this training will focus on the NIBRS definitions of sex offenses, so Title IX Personnel do not have to be retrained or reevaluate how to define rape under Title IX.

[1] 20 U.S.C. 1092(f)(6)(A)(v); see also U.S. Department of Education Office of Postsecondary Education, The Handbook for Campus Safety and Security Reporting, page 3-6 (2016 ed.).
[2] Press Release, SRS to NIBRS: The Path to Better UCR Data, U.S. Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, (May 28, 2017), https://www.fbi.gov/services/cjis/cjis-link/srs-to-nibrs-the-path-to-better-ucr-data.

§ 106.30(a) Definition of Sexual Harassment

PRONG THREE: "SEX-BASED CRIMES" (Sexual Assault - NIBRS Forcible Offenses)

Rape (Except Statutory Rape)

The carnal knowledge of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity. [1]

Sodomy

Oral or anal sexual intercourse with another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity. [2]

Sexual Assault With an Object

To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity. [3]

Fondling

The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity. [4]

[1] U.S. Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, Uniform Crime Reporting Program 2019.2 National Incident-Based Reporting System User Manual, page 39 (May 07, 2020).
[2] Id.
[3] Id.
[4] Id.

§ 106.30(a) Definition of Sexual Harassment

PRONG THREE: "SEX-BASED CRIMES" (Sexual Assault - NIBRS Forcible Offenses)

Without the Consent of the Victim

- The Department will not require recipients to adopt a particular definition of consent with respect to sexual assault.
- The Department believes that the definition of what constitutes consent for purposes of sexual assault within a recipient's educational community is a matter best left to the discretion of recipients.
- Recipients may consider relevant State laws in adopting a definition of consent.

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§ 106.30(a) Definition of Sexual Harassment

PRONG THREE: "SEX-BASED CRIMES" (Sexual Assault - NIBRS Forcible Offenses)

Without the Consent of the Victim

- While the Department declines to impose a definition of consent on recipients, a recipient selecting its own definition of consent must apply such definition consistently both in terms of not varying a definition from one grievance process to the next and as between a complainant and respondent in the same grievance process.

- Regardless of how a recipient's policy defines consent for sexual assault purposes, the burden of proof and the burden of collecting evidence sufficient to reach a determination regarding responsibility, rest on the recipient under § 106.45(b)(5)(i).
  - The final regulations do not permit the recipient to shift that burden to a respondent to prove consent, and do not permit the recipient to shift that burden to a complainant to prove absence of consent.

§ 106.30(a) Definition of Sexual Harassment

PRONG THREE: "SEX-BASED CRIMES" (Sexual Assault - NIBRS Forcible Offenses)

Incapable of Giving Consent Because of Age

- The Department will defer to State law regarding the age when a person has the ability to consent.

Incapable of Giving Consent Because of Temporary or Permanent Mental or Physical Incapacity

- The Department leaves flexibility to recipients to define consent as well as terms commonly used to describe the absence or negation of consent (e.g., incapacity, coercion, threat of force), in recognition that many recipients are under State laws requiring particular definitions of consent, and that other recipients desire flexibility to use definitions of consent and related terms that reflect the unique values of a recipient's educational community.

§ 106.30(a) Definition of Sexual Harassment

PRONG THREE: Sexual Assault

Rape: The carnal knowledge of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity. [1]

→ Carnal Knowledge of a Person

- Black's Law Dictionary, 6th ed., defines carnal knowledge as "the act of a man having sexual bodily connections with a woman; sexual intercourse." [2]

- There is carnal knowledge if there is the slightest penetration of the sexual organ of the female (vagina) by the sexual organ of the male (penis). [3]
    - However, for UCR purposes, this offense includes the rape of both males and females as long as at least one of the offenders is the opposite sex of the victim. [4]

[1] U.S. Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, Uniform Crime Reporting Program 2019.2 National Incident-Based Reporting System User Manual, page 39 (May 07, 2020).
[2] Id.
[3] Id.
[4] Id.

§ 106.30(A) DEFINITION OF SEXUAL HARASSMENT

PRONG THREE: "SEX-BASED CRIMES" (Sexual Assault - Rape)

RAPE:	CARNAL KNOWLEDGE	WITHOUT CONSENT; OR	INCAPABLE OF GIVING CONSENT B/C OF AGE; OR	INCAPABLE OF GIVING CONSENT B/C OF INCAPACITY
Yes?	✔	✔	✔	✔
No?				
Need more information?				

§ 106.30(a) Definition of Sexual Harassment

PRONG THREE: Sexual Assault

Sodomy: Oral or anal sexual intercourse with another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity. [1]

→ Oral Sexual Intercourse

- Note, the Department and FBI do not define the phrase "sexual intercourse."
  - Schools may wish to consider defining this term in their codes of conduct.

→ Anal Sexual Intercourse

- Note, the Department and FBI do not define the phrase "sexual intercourse."
  - Schools may wish to consider defining this term in their codes of conduct.

[1] U.S. Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, Uniform Crime Reporting Program 2019.2 National Incident-Based Reporting System User Manual, page 39 (May 07, 2020).

§ 106.30(A) DEFINITION OF SEXUAL HARASSMENT

PRONG THREE: "SEX-BASED CRIMES" (Sexual Assault W/ An Object)

SODOMY:	ORAL OR ANAL SEXUAL INTERCOURSE	WITH ANOTHER PERSON	WITHOUT CONSENT; OR	INCAPABLE OF GIVING CONSENT B/C OF AGE; OR	INCAPABLE OF GIVING CONSENT B/C OF INCAPACITY
Yes?	✔	✔	✔	✔	✔
No?					
Need more information?					

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§ 106.30(a) Definition of Sexual Harassment

PRONG THREE: Sexual Assault

Sexual Assault With An Object: To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity. [1]

Object or Instrument

- "An "object" or "instrument" is anything used by the offender other than the offender's genitalia. [2]

- For example:
  - Finger
  - Bottle
  - Handgun
  - Stick [3]

[1] U.S. Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, Uniform Crime Reporting Program 2019.2 National Incident-Based Reporting System User Manual, page 39 (May 07, 2020).
[2] Id.
[3] Id.

§ 106.30(a) Definition of Sexual Harassment

PRONG THREE: Sexual Assault

Sexual Assault With An Object: To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

Unlawfully Penetrate

- Note, the Department and the FBI do not define the phrase "unlawfully penetrate."
  - Schools may wish to consider defining this term in their codes of conduct.

§ 106.30(a) Definition of Sexual Harassment

PRONG THREE: Sexual Assault

Sexual Assault With An Object: To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

→ Genital or Anal Opening

- Note, the FBI definition does not list "oral opening" in the definition of Sexual Assault With An Object.

→ Of the Body of Another Person

- Note, in the case that someone forces another individual to unlawfully penetrate themselves with an object, it may not constitute Sexual Assault with an Object under this definition.
  - Thus, that type of misconduct would likely not fall under Title IX and a school may adjudicate a complaint of this nature under its alternative grievance process.

§ 106.30(A) DEFINITION OF SEXUAL HARASSMENT

PRONG THREE: "SEX-BASED CRIMES" (Sexual Assault W/ An Object)

SEXUAL ASSAULT W/ AN OBJECT:	OBJECT OR INSTRUMENT USED TO UNLAWFULLY PENETRATE	GENITAL OR ANAL OPENING	OF ANOTHER PERSON	WITHOUT CONSENT; OR	INCAPABLE OF GIVING CONSENT B/C OF AGE; OR	INCAPABLE OF GIVING CONSENT B/C OF INCAPACITY
Yes?	✔	✔	✔	✔	✔	✔
No?						
Need more information?						

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UNIVERSAL EDUCATION COMPLIANCE & TRAINING

§ 106.30(a) Definition of Sexual Harassment

PRONG THREE: Sexual Assault

Fondling: The touching of the private body parts of another person for the purpose of sexual gratification without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity. [1]

→ Touching of Private Body Parts

- Note, the Department and FBI do not define the phrase "Private Body Parts."
  - Schools may wish to consider defining this term in their codes of conduct.

[1] U.S. Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, Uniform Crime Reporting Program 2019.2 National Incident-Based Reporting System User Manual, page 39 (May 07, 2020).

§ 106.30(a) Definition of Sexual Harassment

PRONG THREE: Sexual Assault

Fondling: The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

For the Purpose of Sexual Gratification

- Section 106.30 defining "sexual harassment" does not impose an independent intent or mens rea requirement on conduct that constitutes sexual harassment; however, the Department notes that the sexual offense of "fondling" includes as an element of fondling touching "for the purpose of sexual gratification."
  - Courts have interpreted similar "purpose of" elements in sex offense legislation as an intent requirement, and recipients should take care to apply that intent requirement to incidents of alleged fondling so that, for example, unwanted touching committed by young children – with no sexualized intent or purpose – is distinguished from Title IX sexual harassment and can be addressed by a recipient outside these final regulations.

§ 106.30(a) Definition of Sexual Harassment

PRONG THREE: Sexual Assault

Fondling: The touching of the private body parts of another person for the purpose of sexual gratification without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

→ For the Purpose of Sexual Gratification

- The Department notes that recipients may find useful guidance in State law criminal court decisions that often recognize the principle that, with respect to juveniles, a sexualized purpose should not be ascribed to a respondent without examining the circumstances of the incident (such as the age and maturity of the parties).
  - "The element of purpose may not be inferred solely from the act itself. . . . Rather, factors like age disparity, control by the juvenile, the location and secretive nature of the juvenile's actions, and the attitude of the juvenile should be taken into account. . . . The mere act of touching is not enough to show purpose." [1]

[1] In re K.C., 226 N.C. App. 452, 457 (N.C. App. 2013).

§ 106.30(a) Definition of Sexual Harassment

PRONG THREE: Sexual Assault

Fondling: The touching of the private body parts of another person for the purpose of sexual gratification without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

→ For the Purpose of Sexual Gratification

- This "purpose" requirement separates the sex offense of fondling from the touching described by commenters as "children playing doctor" or inadvertent contact with a person's buttocks due to jostling in a crowded elevator, and so forth.

- Touching that does not involve the requisite "purpose of sexual gratification" element still may be addressed by a recipient outside a Title IX process.

§ 106.30(A) DEFINITION OF SEXUAL HARASSMENT

PRONG THREE: "SEX-BASED CRIMES" (Sexual Assault - Fondling)

FONDLING:	TOUCHING OF PRIVATE BODY PARTS	FOR THE PURPOSE OF SEXUAL GRATIFICATION	WITHOUT CONSENT; OR	INCAPABLE OF GIVING CONSENT B/C OF AGE; OR	INCAPABLE OF GIVING CONSENT B/C OF INCAPACITY
Yes?	✔	✔	✔	✔	✔
No?					
Need more information?					

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§ 106.30(a) Definition of Sexual Harassment

PRONG THREE: "SEX-BASED CRIMES" (Sexual Assault - Nonforcible Offenses)

Incest

- Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law. [1]

Statutory Rape

- Nonforcible sexual intercourse with a person who is under the statutory age of consent. [2]

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[1] U.S. Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, Uniform Crime Reporting Program 2019.2 National Incident-Based Reporting System User Manual, page 40 (May 07, 2020).
[2] Id.

§ 106.30(a) Definition of Sexual Harassment

PRONG THREE: "SEX-BASED CRIMES" (VAWA Offenses)

Dating Violence

34 U.S.C. 12291(a)(1)

The term “dating violence” means violence committed by a person—(A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (B) where the existence of such a relationship shall be determined based on a consideration of the following factors:

(i) The length of the relationship.
(ii) The type of relationship.
(iii) The frequency of interaction between the persons involved in the relationship.

Domestic Violence

34 U.S.C. 12291(a)(8)

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

Stalking

34 U.S.C. 12291(a)(30)

The term “stalking” means engaging in a course of conduct directed at a specific person that would cause a reasonable person to—

(A) fear for his or her safety or the safety of others; or
(B) suffer substantial emotional distress.

§ 106.30(a) Definition of Sexual Harassment

PRONG THREE: "SEX-BASED CRIMES" (VAWA Offenses - Dating Violence)

Dating Violence - 34 U.S.C. 12291(a)(10)

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

§ 106.30(a) Definition of Sexual Harassment

PRONG THREE: Dating Violence

The term “dating violence” means violence committed by a person—(A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (B) where the existence of such a relationship shall be determined based on a consideration of the following factors: (i) The length of the relationship. (ii) The type of relationship. (iii) The frequency of interaction between the persons involved in the relationship. [1]

→ Social Relationship of a Romantic or Intimate Nature

- "Institutions are responsible for determining whether or not an incident meets the definition of dating violence, and they must consider the [complainant's] characterization of the relationship when making that determination." [2]

- "We stress that generational or other differences in terminology and culture may mean that a [complainant] may describe a dating relationship using different terms from how an institutional official might describe 'dating.'” [3]
  - "The [complainant's] use of terms such as ‘‘hanging out’’ or ‘‘hooking up’’ rather than ‘‘dating,’’ or whether or not the relationship was ‘‘monogamous’’ or ‘‘serious’’ should not be determinative." [4]

[1] 34 U.S.C. 12291(a)(10)
[2] Office of Postsecondary Education, Department of Education, Federal Register, 34 CFR Part 668 Violence Against Women Act; Final Rule, page 62757 (October 20, 2014), https://www.govinfo.gov/content/pkg/FR-2014-10-20/pdf/2014-24284.pdf.
[3] Id.
[4] Id.

§ 106.30(a) Definition of Sexual Harassment

PRONG THREE: Dating Violence

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

→ Social Relationship of a Romantic or Intimate Nature

- When the [complainant] asserts that there was a dating relationship, institutions should err on the side of assuming that the victim and the perpetrator were in a dating relationship. [1]

- The determination of whether or not the [complainant] and the [respondent] were in a social relationship of a romantic or intimate nature would be made based on the [complainant's] statement and taking into consideration the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. [2]

[1] Office of Postsecondary Education, Department of Education, Federal Register, 34 CFR Part 668 Violence Against Women Act; Final Rule, page 62757 (October 20, 2014), https://www.govinfo.gov/content/pkg/FR-2014-10-20/pdf/2014-24284.pdf.
[2] Id.

§ 106.30(a) Definition of Sexual Harassment

PRONG THREE: Dating Violence

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

→ **Length of Relationship**

→ **Type of Relationship**

→ **Frequency of Interaction Between the Persons Involved in the Relationship**

§ 106.30(a) Definition of Sexual Harassment

PRONG THREE: "SEX-BASED CRIMES" (VAWA Offenses - Domestic Violence)

Domestic Violence - 34 U.S.C. 12291(a)(8)

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

§ 106.30(a) Definition of Sexual Harassment

PRONG THREE: Domestic Violence

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

- **Current or Former Spouse or Intimate Partner of the Victim;**
- **Person with Whom the Victim Shares a Child in Common;**
- **Person Who is Cohabitating with or Has Cohabitated with the Victim as a Spouse or Intimate Partner;**
- **Person Similarly Situated to a Spouse of the Victim Under Domestic or Family Violence Laws of the Jurisdiction Receiving Grant Monies; OR**
- **Any Other Person Against an Adult or Youth Victim Who is Protected from that Person's Acts Under the Domestic or Family Violence Laws of the Jurisdiction**

[1] 34 U.S.C. 12291(a)(8)

§ 106.30(a) Definition of Sexual Harassment

PRONG THREE: "SEX-BASED CRIMES" (VAWA Offenses - Stalking)

Stalking - 34 U.S.C. 12291(a)(30)

The term “stalking” means engaging in a course of conduct directed at a specific person that would cause a reasonable person to—

(A) fear for his or her safety or the safety of others; or

(B) suffer substantial emotional distress.

§ 106.30(a) Definition of Sexual Harassment

PRONG THREE: Stalking

The term “stalking” means engaging in a course of conduct directed at a specific person that would cause a reasonable person to—

(A) fear for his or her safety or the safety of others; or

(B) suffer substantial emotional distress. [1]

→ Course of Conduct

- Two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person’s property. [2]

→ Reasonable Person

- A reasonable person under similar circumstances and with similar identities to the victim. [3]

[1] 334 U.S.C. 12291(a)(30)
[2] Office of Postsecondary Education, Department of Education, Federal Register, 34 CFR Part 668 Violence Against Women Act; Final Rule, page 62784 (October 20, 2014), https://www.govinfo.gov/content/pkg/FR-2014-10-20/pdf/2014-24284.pdf.
[3] Id.

§ 106.30(a) Definition of Sexual Harassment

PRONG THREE: Stalking

The term "stalking" means engaging in a course of conduct directed at a specific person that would cause a reasonable person to—

(A) fear for his or her safety or the safety of others; or

(B) suffer substantial emotional distress.

→ Fear for His/Her Safety or the Safety of Others

- Ask: Would the course of conduct cause a reasonable person under similar circumstances and with similar identity to the victim fear for their safety or the safety of others? [1]

→ Suffer Substantial Emotional Distress

- Significant mental suffering or anguish that may, but does not necessarily require medical or other professional treatment or counseling. [2]

[1] Office of Postsecondary Education, Department of Education, Federal Register, 34 CFR Part 668 Violence Against Women Act; Final Rule, page 62784 (October 20, 2014), https://www.govinfo.gov/content/pkg/FR-2014-10-20/pdf/2014-24284.pdf.
[2] Id. at 62884-85.

REMEMBER!

§ 106.30(a) defines sexual harassment as conduct

ON THE BASIS OF SEX that satisfies one or more of the following:

Prong One

"Quid Pro Quo"

Prong Two

"SPOODE"

Prong Three

"Sex-Based Crimes "

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Grievance Process for Formal Complaints of Sexual Harassment

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§ 106.45 Grievance Process for Formal Complaints of Sexual Harassment

§ 106.45(b)(1)

§ 106.45(b)(1) Basic Requirements for Grievance Process

Equitable Treatment of Parties

§ 106.45(b)(1)(i)

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

- Remedies must be designed to restore or preserve equal access to the recipient's education program or activity.

- Such remedies may include the same individualized services described in § 106.30 as "supportive measures"; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent.

§ 106.45(b)(1) Basic Requirements for Grievance Process

§ 106.45(b)(1)(i)

Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. Remedies must be designed to restore or preserve equal access to the recipient's education program or activity . . .

Treat Complainants and Respondents Equitably

- The § 106.45 grievance process generally treats both parties equally, but § 106.45(b)(1)(i) is an exception, wherein equitable treatment of the parties requires recognizing that a complainant's interests differ from those of a respondent with respect to the purpose of the grievance process.

- This is intended to provide both parties with a fair, truth-seeking process that reasonably takes into account differences between a party's status as a complainant versus as a respondent.

§ 106.45(b)(1) Basic Requirements for Grievance Process

§ 106.45(b)(1)(i)

Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. Remedies must be designed to restore or preserve equal access to the recipient's education program or activity. . .

Treat Complainants and Respondents Equitably

- The equitable distinction in § 106.45(b)(1)(i) recognizes the significance of remedies for complainants and disciplinary sanctions for respondents, but does not alter the benefit of the § 106.45 grievance process providing procedural rights and protections for both parties.
  - Equitable treatment of a complainant means providing remedies, and
  - Equitable treatment of a respondent means imposing disciplinary sanctions only after following a fair grievance process.

§ 106.45(b)(1) Basic Requirements for Grievance Process

§ 106.45(b)(1)(i)

Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. Remedies must be designed to restore or preserve equal access to the recipient's education program or activity. . .

→ Provide Remedies to a Complainant Where a Determination for Sexual Harassment Has Been Made Against the Respondent

- The Department believes that § 106.45(b)(1)(i) provides a strong, clear requirement for the benefit of victims of sexual harassment:
  - Where a § 106.45 grievance process results in a determination that the respondent in fact committed sexual harassment against the complainant, the complainant must be given remedies.

§ 106.45(b)(1) Basic Requirements for Grievance Process

§ 106.45(b)(1)(i)

Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. Remedies must be designed to restore or preserve equal access to the recipient's education program or activity. . .

→ Provide Remedies to a Complainant Where a Determination for Sexual Harassment Has Been Made Against the Respondent

- § 106.45(b)(1)(i):
  - Such remedies may include the same individualized services described in § 106.30 as "supportive measures";

- § 106.30:
  - . . . Supportive measures 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, and other similar measures.

§ 106.45(b)(1) Basic Requirements for Grievance Process

§ 106.45(b)(1)(i)

Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. Remedies must be designed to restore or preserve equal access to the recipient's education program or activity.

→ Provide Remedies to a Complainant Where a Determination for Sexual Harassment Has Been Made Against the Respondent

- § 106.45(b)(1)(i):
  - However, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent;

- The final regulations revise § 106.45(b)(1)(i) to state that remedies may consist of the same individualized services listed illustratively in § 106.30 as "supportive measures" but remedies need not meet the limitations of supportive measures (i.e., unlike supportive measures, remedies may in fact burden the respondent, or be punitive or disciplinary in nature).

§ 106.45(b)(1) Basic Requirements for Grievance Process

§ 106.45(b)(1)(i)

Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. Remedies must be designed to restore or preserve equal access to the recipient's education program or activity.

Following § 106.45 Grievance Process Before Imposing Any Disciplinary Sanctions or Other Actions That Are Non-Supportive Measures Against a Respondent

- The Department has revised § 106.45(b)(1)(i) to include the phrase "or other actions that are not supportive measures as defined in § 106.30" in addition to disciplinary sanctions, to describe equitable treatment of a respondent during a grievance process.

§ 106.45(b)(1) Basic Requirements for Grievance Process

§ 106.45(b)(1)(i)

Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. Remedies must be designed to restore or preserve equal access to the recipient's education program or activity.

→ Following § 106.45 Grievance Process Before Imposing Any Disciplinary Sanctions or Other Actions That Are Non-Supportive Measures Against a Respondent

- § 106.30:
  - "Supportive measures" means 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 where no formal complaint has been filed.
  - Such measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.

§ 106.45(b)(1) Basic Requirements for Grievance Process

§ 106.45(b)(1)(i)

Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. Remedies must be designed to restore or preserve equal access to the recipient's education program or activity.

→ Remedies Must Be Designed to Restore or Preserve Equal Access to the Recipient's Education Program or Activity

- The Department believes that remedies designed to restore and preserve equal access to the recipient's education programs or activities is the appropriate focus of these final regulations, and a recipient's selection and implementation of remedies will be evaluated by what is not clearly unreasonable in light of the known circumstances.
  - ***Refer to previous training section on deliberate indifference that addresses what is "clearly unreasonable."

§ 106.45(b)(1) Basic Requirements for Grievance Process

§ 106.45(b)(1)(i)

Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. Remedies must be designed to restore or preserve equal access to the recipient's education program or activity.

→ Remedies Must Be Designed to Restore or Preserve Equal Access to the Recipient's Education Program or Activity

- The Department is persuaded by the Supreme Court's rationale in Davis that courts (and administrative agencies) should not second guess a school's disciplinary decisions, and the Department desires to avoid creating regulatory rules that effectively dictate particular disciplinary sanctions that obligate recipients to attempt to guarantee that sexual harassment does not recur, instead focusing on whether a recipient is effectively implementing remedies to complainants where respondents are found responsible for sexual harassment.

§ 106.45(b)(1) Basic Requirements for Grievance Process

§ 106.45(b)(1)(i)

Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. Remedies must be designed to restore or preserve equal access to the recipient's education program or activity.

→ Remedies Must Be Designed to Restore or Preserve Equal Access to the Recipient's Education Program or Activity

- The Department declined to remove "designed to" from this provision.
  - Sexual harassment can cause severe trauma to victims, and while Title IX obligates a recipient to respond appropriately when students or employees are victimized with measures aimed at ensuring a victim's equal access, the Department does not believe it is reasonable to hold recipients accountable for situations where despite a recipient's reasonably designed and implemented remedies, a victim still suffers loss of access (for example, by dropping out) due to the underlying trauma.

§ 106.45(b)(1) Basic Requirements for Grievance Process

Objective Evaluation of All Relevant Evidence

§ 106.45(b)(1)(ii)

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

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§ 106.45(b)(1) Basic Requirements for Grievance Process

§ 106.45(b)(1)(ii)

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

Objective Evaluation of All Relevant Evidence

- This provision does not require "objective" evidence (as in, corroborating evidence); this provision requires that the recipient objectively evaluate the relevant evidence that is available in a particular case.

§ 106.45(b)(1) Basic Requirements for Grievance Process

§ 106.45(b)(1)(ii)

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

→ Objective Evaluation of All Relevant Evidence

- The recipient's investigation and adjudication of the allegations must be based on an objective evaluation of the evidence available in a particular case; the type and extent of evidence available will differ based on the facts of each incident.
  - The Department understands that in some situations, there may be little or no evidence other than the statements of the parties themselves, and this provision applies to those situations.
  - Title IX campus proceedings often involve allegations with competing plausible narratives and no eyewitnesses, and such situations still must be evaluated by objectively evaluating the relevant evidence, regardless of whether that available, relevant evidence consists of the parties' own statements, statements of witnesses, or other evidence.

§ 106.45(b)(1) Basic Requirements for Grievance Process

§ 106.45(b)(1)(ii)

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

→ Objective Evaluation of All Relevant Evidence

- The Department disagrees that this provision could permit endlessly delayed proceedings while parties or the recipient search for "all" relevant evidence; § 106.45(b)(1)(v) requires recipients to conclude the grievance process within designated reasonable time frames and thus "all" the evidence is tempered by what a thorough investigation effort can gather within a reasonably prompt time frame.

§ 106.45(b)(1) Basic Requirements for Grievance Process

§ 106.45(b)(1)(ii)

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

→ Inculpatory Evidence

- "Inculpatory Evidence is defined as evidence showing or tending to show one's involvement in a crime or wrong." [1]

→ Exculpatory Evidence

- "Exculpatory evidence is defined as evidence tending to establish a criminal defendant's [or, in the case of Title IX, a respondent's] innocence." [2]

[1] Inculpatory Evidence, Black's Law Dictionary (11th ed. 2019).
[2] Exculpatory Evidence, Black's Law Dictionary (11th ed. 2019).

§ 106.45(b)(1) Basic Requirements for Grievance Process

§ 106.45(b)(1)(ii)

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

→ Credibility Determinations May Not Be Based on a Person's Status as a Complainant, Respondent, or Witness

- Every determination regarding responsibility must be based on objective evaluation of relevant evidence, not assumptions or inferences based on party status (i.e., status as a complainant, respondent, or witness).

- The Department disagrees [with Commenters] that disregarding party status poses problems for investigators or adjudicators or directs them to ignore central factors in reaching credibility determinations.
  - Title IX personnel are not prevented from understanding and taking into account each party's interests and the "stakes" at issue for each party, yet what is at stake does not, by itself, reflect on the party's truthfulness.

§ 106.45(b)(1) Basic Requirements for Grievance Process

§ 106.45(b)(1)(ii)

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

→ Credibility Determinations May Not Be Based on a Person's Status as a Complainant, Respondent, or Witness

- The Department believes that allowing for a process that permits credibility inferences or conclusions to be based on party status would:
  - Invite bias and partiality;
  - Inevitably prejudge the facts at issue rather than determine facts based on the objective evaluation of evidence; and
  - Decrease the likelihood that the outcome reached would be accurate.

§ 106.45(b)(1) Basic Requirements for Grievance Process

§ 106.45(b)(1)(ii)

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

→ Credibility Determinations May Not Be Based on a Person's Status as a Complainant, Respondent, or Witness

- Section 106.45(b)(1)(ii) applies throughout the grievance process, including with respect to application of § 106.45(b)(1)(iv), to ensure that the presumption of [a respondent's] non-responsibility is not interpreted to mean that a respondent is considered truthful, or that the respondent's statements are credible or not credible, based on the respondent's status as a respondent.
    - Treating the respondent as not responsible until the conclusion of the grievance process does not mean considering the respondent truthful or credible.

§ 106.45(b)(1) Basic Requirements for Grievance Process

Conflict of Interest, Bias, and Training Requirements

§ 106.45(b)(1)(iii)

- Require that any individual designated by a recipient as [Title IX Personnel] not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

- A recipient must ensure that [Title IX Personnel] receive training on [mandated training topics included throughout this presentation].

- Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment . . .

§ 106.45(b)(1) Basic Requirements for Grievance Process

§ 106.45(b)(1)(iii)

Require that any individual designated by a recipient as [Title IX Personnel] not have a conflict of interest or bias for or against:

(A) complainants or respondents generally; or

(B) an individual complainant or respondent.

→ **Conflict of Interest or Bias**

→ **For or Against Complainants or Respondents Generally**

→ **For or Against an Individual Complainant or Respondent**

§ 106.45(b)(1) Basic Requirements for Grievance Process

§ 106.45(b)(1)(iii)

Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment . . .

→ **Must Not Rely on Sex Stereotypes**

→ **Must Promote Impartial Investigations**

IMPORTANT!

§ 106.45(b)(1)(iii) requires Title IX Personnel be trained on how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

How to Serve Impartially

"Impartial: Not favoring one side more than another; unbiased and disinterested; unswayed by personal interest." [1]

Avoiding Prejudgment of the Facts at Issue

Avoiding Conflicts of Interest and Bias

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[1] Impartial, Black's Law Dictionary (11th ed. 2019).

§ 106.45(b)(1) Basic Requirements for Grievance Process

Presumption of Non-Responsibility

§ 106.45(b)(1)(iv)

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

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§ 106.45(b)(1) Basic Requirements for Grievance Process

§ 106.45(b)(1)(iv)

Include a 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 . . .

→ Presumption that the Respondent is Not Responsible

- Section 106.45(b)(1)(ii) applies throughout the grievance process, including with respect to application of the presumption, to ensure that the presumption of non-responsibility is not interpreted to mean that a respondent is considered truthful, or that the respondent's statements are credible or not credible, based on the respondent's status as a respondent.

- Treating the respondent as not responsible until the conclusion of the grievance process does not mean considering the respondent truthful or credible; rather, that presumption buttresses the requirement that investigators and decision-makers serve impartially without prejudging the facts at issue.

§ 106.45(b)(1) Basic Requirements for Grievance Process

§ 106.45(b)(1)(iv)

Include a 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 . . .

→ **Determination Regarding Responsibility is Made**

→ **Conclusion of the Grievance Process**

§ 106.45(b)(1) Basic Requirements for Grievance Process

Time Frames

§ 106.45(b)(1)(v)

- Include reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes, and a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities . . .

§ 106.45(b)(1) Basic Requirements for Grievance Process

§ 106.45(b)(1)(v)

Include reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes, and a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action.

→ **Reasonably Prompt Time Frames**

→ **Process for Temporary Delay or Limited Extension of Time Frames**

§ 106.45(b)(1) Basic Requirements for Grievance Process

§ 106.45(b)(1)(v)

Include reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes, and a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action.

→ Good Cause

- Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities

→ Written Notice

§ 106.45(b)(1) Basic Requirements for Grievance Process

Disciplinary Sanctions and Remedies

§ 106.45(b)(1)(vi)

- Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility . . .

§ 106.45(b)(1) Basic Requirements for Grievance Process

Standard of Evidence for Determining Responsibility

§ 106.45(b)(1)(vii)

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

§ 106.45(b)(1) Basic Requirements for Grievance Process

§ 106.45(b)(1)(vii)

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

→ **Preponderance of the Evidence Standard**

→ **Clear and Convincing Evidence Standard**

§ 106.45(b)(1) Basic Requirements for Grievance Process

§ 106.45(b)(1)(vii)

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

→ **Apply the Same Standard of Evidence to All Formal Complaints of Sexual Harassment**

§ 106.45(b)(1) Basic Requirements for Grievance Process

Appeals, Supportive Measures, Legally Recognized Privileges

§ 106.45(b)(1)(viii)

- Include the procedures and permissible bases for the complainant and respondent to appeal;

§ 106.45(b)(1)(ix)

- Describe the range of supportive measures available to complainants and respondents; and

§ 106.45(b)(1)(x)

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

§ 106.45 Grievance Process for Formal Complaints of Sexual Harassment

§§ 106.45(b)(2)-(9)

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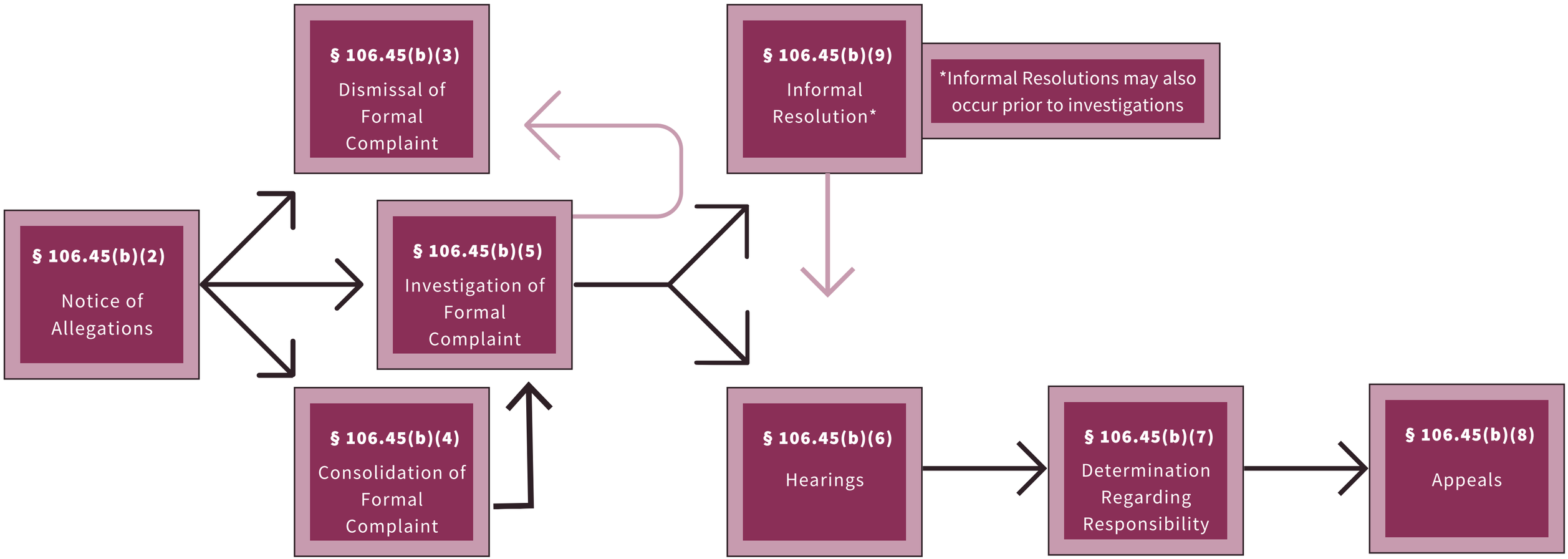
§ 106.45 Grievance Process for Formal Complaints of Sexual Harassment



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§ 106.45 Grievance Process for Formal Complaints of Sexual Harassment

§ 106.45(b)(2)-
Notice of Allegations

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§ 106.45(b) Grievance Process

Notice of Allegations

§ 106.45(b)(2)(i)

- (i) Upon receipt of a formal complaint, a recipient must provide the following written notice to the parties who are known:
  - (A) Notice of the recipient's grievance process that complies with this section, including any informal resolution process . . .

§ 106.45(b) Grievance Process

Notice of Allegations

§ 106.45(b)(2)(i)

- (i) Upon receipt of a formal complaint, a recipient must provide the following written notice to the parties who are known:
  - . . . (B) Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in § 106.30, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview.
    - Sufficient details include the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment under § 106.30, and the date and location of the alleged incident, if known.
    - The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.
    - The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section.
    - The written notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

§ 106.45(b) Grievance Process

Notice of Allegations

§ 106.45(b)(2)(ii)

- (ii) If, in the course of an investigation, the recipient decides to investigate allegations about the complainant or respondent that are not included in the notice provided pursuant to paragraph (b)(2)(i)(B) of this section, the recipient must provide notice of the additional allegations to the parties whose identities are known.

§ 106.45(b) Grievance Process

Written Notice of Allegations Checklist

Written Notice of the Recipient's Grievance Process

Include any informal resolution process.

Notice of Allegations with Sufficient Details Known at the Time

Sufficient details include:

- the identities of the parties involved in the incident
- the conduct allegedly constituting sexual harassment under § 106.30, and
- the date and location of the alleged incident.

Presumption of Non-Responsibility

A statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.

Choice of Advisor

The parties may have an advisor of their choice, who may be, but is not required to be, an attorney, who may:

- accompany the party to the investigative meetings/ interviews; and
- inspect and review investigative evidence.

Prohibition of Knowingly Making a False Statement or Submitting False Information

The written notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

Any Additional Allegations About the Complainant or Respondent

If, in the course of an investigation, the recipient decides to investigate allegations about the Complainant or Respondent that are not included in the original notice of allegations, the recipient must provide notice of the additional allegations to the parties whose identities are known.

§ 106.45 Grievance Process for Formal Complaints of Sexual Harassment

§ 106.45(b)(3)-
Dismissal of Formal Complaint

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§ 106.45(b) Grievance Process

Dismissal of a Formal Complaint

§ 106.45(b)(3)(i)

- i) The recipient must investigate the allegations in a formal complaint. If the conduct alleged in the formal complaint
  - Would not constitute sexual harassment as defined in § 106.30 even if proved;
  - Did not occur in the recipient's education program or activity; or
  - Did not occur against a person in the United States,

  Then the recipient MUST dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under Title IX or this part;

- Such a dismissal does not preclude action under another provision of the recipient's code of conduct.

§ 106.45(b) Grievance Process

Dismissal of a Formal Complaint

§ 106.45(b)(3)(ii)

- (ii) The recipient MAY dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing:
  - A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein;
  - 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 as to the formal complaint or allegations therein.

§ 106.45(b) Grievance Process

Dismissal of a Formal Complaint

§ 106.45(b)(3)(iii)

- (iii) Upon a dismissal required or permitted pursuant to paragraph (b)(3)(i) or (b)(3)(ii) of this section, the recipient MUST promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties.

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§ 106.45 Grievance Process for Formal Complaints of Sexual Harassment

§ 106.45(b)(4)- Consolidation of Formal Complaints

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§ 106.45(b) Grievance Process

Consolidation of Formal Complaints

§ 106.45(b)(4)

- 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.

- Where a grievance process involves more than one complainant or more than one respondent, references in this section to the singular "party," "complainant," or "respondent" include the plural, as applicable.

§ 106.45 Grievance Process for Formal Complaints of Sexual Harassment

§ 106.45(b)(5)- Investigation of a Formal Complaint

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§ 106.45(b) Grievance Process

Investigation of a Formal Complaint

§ 106.45(b)(5) When investigating a formal complaint and throughout the grievance process, a recipient must—

- (i) Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties provided that the recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for a grievance process under this section (if a party is not an "eligible student," as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a "parent," as defined in 34 CFR 99.3) . . .

§ 106.45(b) Grievance Process

Investigation of a Formal Complaint

§ 106.45(b)(5) When investigating a formal complaint and throughout the grievance process, a recipient must—

- (ii) Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence . . .

§ 106.45(b) Grievance Process

Investigation of a Formal Complaint

§ 106.45(b)(5) When investigating a formal complaint and throughout the grievance process, a recipient must—

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

§ 106.45(b)(1) Basic Requirements for Grievance Process

§ 106.45(b)(5)(iii)

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

Purpose of This Provision

- The purpose of this provision is to ensure that parties have equal opportunity to participate in serving their own respective interests in affecting the outcome of the case.

- This provision helps ensure that other procedural rights under § 106.45 are meaningful to the parties; for example, while the parties have equal opportunity to inspect and review evidence gathered by the recipient under § 106.45(b)(5)(vi), this provision helps make that right meaningful by ensuring that no party's ability to gather evidence (e.g., by contacting a potential witness, or taking photographs of the location where the incident occurred) is hampered by the recipient. . . .

§ 106.45(b)(1) Basic Requirements for Grievance Process

§ 106.45(b)(5)(iii)

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

Purpose of This Provision

- The two requirements of this provision sometimes overlap, such as where a party's ability to "discuss the allegations under investigation" is necessary precisely so that the party can "gather and present evidence," for example to seek advice from an advocacy organization or explain to campus security the need to access a building to inspect the location of an alleged incident.

- This provision in no way immunizes a party from abusing the right to "discuss the allegations under investigation" by, for example, discussing those allegations in a manner that exposes the party to liability for defamation or related privacy torts, or in a manner that constitutes unlawful retaliation.

IMPORTANT!

§ 106.71 prohibits retaliation.

§ 106.71(a) Retaliation Prohibited

- No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part. Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX or this part, constitutes retaliation.

IMPORTANT!

§ 106.71 prohibits retaliation.

§ 106.71(a) Retaliation Prohibited

- The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

- Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).

IMPORTANT!

§ 106.71 prohibits retaliation.

§ 106.71(b) Specific Circumstances

- (1) The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under paragraph (a) of this section.

- (2) Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

§ 106.45(b) Grievance Process

Investigation of a Formal Complaint

§ 106.45(b)(5) When investigating a formal complaint and throughout the grievance process, a recipient must—

- (iv) Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and

- Not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding;

- However, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.

§ 106.45(b) Grievance Process

Investigation of a Formal Complaint

§ 106.45(b)(5) When investigating a formal complaint and throughout the grievance process, a recipient must—

- (v) Provide, to a party whose participation is invited or expected, written notice of:
  - The date;
  - Time;
  - Location;
  - Participants; and
  - Purpose

  Of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate.

§ 106.45(b) Grievance Process

Investigation of a Formal Complaint

§ 106.45(b)(5) When investigating a formal complaint and throughout the grievance process, a recipient must—

- (vi) 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, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.
- Prior to completion of the investigative report, the 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.
- The recipient must make all such evidence subject to the parties' inspection and 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.

§ 106.45(b)(1) Basic Requirements for Grievance Process

§ 106.45(b)(5)(vi)

(vi) 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, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation . . .

→ Any Evidence Directly Related to the Allegations

- The Department declines to define . . . "evidence directly related to the allegations," as this term should be interpreted using its plain and ordinary meaning.

- 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).

§ 106.45(b) Grievance Process

Investigation of a Formal Complaint

Importance of § 106.45(b)(5)(vi)

- It is important that at the phase of the investigation where the parties have the opportunity to review and respond to evidence, the universe of that exchanged evidence should include all evidence (inculpatory and exculpatory) that relates to the allegations under investigation, without the investigator having screened out evidence related to the allegations that the investigator does not believe is relevant.

- The parties should have the opportunity to argue that evidence directly related to the allegations is in fact relevant (and not otherwise barred from use under § 106.45), and parties will not have a robust opportunity to do this if evidence related to the allegations is withheld from the parties by the investigator.

- The following slide demonstrates why it is important for the investigator to include ANY evidence directly related to the allegations raised in the formal complaint for the purposes of the parties' review and written response.

§ 106.45(b) Grievance Process

Investigation of a Formal Complaint

Importance of § 106.45(b)(5)(vi)

- An investigator may discover during the investigation that evidence exists in the form of communications between a party and a third party (such as the party's friend or roommate) wherein the party characterizes the incident under investigation. If the investigator decides that such evidence is irrelevant (perhaps from a belief that communications before or after an incident do not make the facts of the incident itself more or less likely to be true), the other party should be entitled to know of the existence of that evidence so as to argue about whether it is relevant.
- The investigator would then consider the parties' viewpoints about whether such evidence (directly related to the allegations) is also relevant, and on that basis decide whether to summarize that evidence in the investigative report.
- A party who believes the investigator reached the wrong conclusion about the relevance of the evidence may argue again to the decision-maker (i.e., as part of the party's response to the investigative report, and/or at a live hearing) about whether the evidence is actually relevant, but the parties would not have that opportunity if the evidence had been screened out by the investigator (that is, deemed irrelevant) without the parties having inspected and reviewed it as part of the exchange of evidence under § 106.45(b)(5)(vi).

§ 106.45(b) Grievance Process

Investigation of a Formal Complaint

§ 106.45(b)(5) When investigating a formal complaint and throughout the grievance process, a recipient must—

- (vii) Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, 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.

§ 106.45 Grievance Process for Formal Complaints of Sexual Harassment

§ 106.45(b)(6)- Hearings & Relevancy Determinations

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§ 106.45(b) Grievance Process

Hearings

§ 106.45(b)(6)(i)

- (i) For postsecondary institutions, the recipient's grievance process must provide for a live hearing. . . 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.

- Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient's discretion, 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.

- 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.

IMPORTANT!

§ 106.45(b)(1)(iii) requires that decision-makers receive training on any technology to be used at a live hearing.

Technology Requirements

- If any or all parties are attending the live hearing virtually, the technology must enable all participants to simultaneously see and hear each other;
- If parties are located in separate rooms, the technology must enable the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions.
- Recipients are required to create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.
- NOTE: Recipients must ensure that their decision-maker(s) receive training on their institution's specific technology to be used during live hearings.

§ 106.45(b) Grievance Process

Hearings

§ 106.45(b)(6)(i)

- 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.

- 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.
  - § 106.45(b)(5)(iv): . . . the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.

- 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.

§ 106.45(b) Grievance Process

Hearings

§ 106.45(b)(6)(i)

- If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility;

- Provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.

§ 106.45(b) Grievance Process

Hearings & Relevancy

§ 106.45(b)(6)(i)

- 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 and explain any decision to exclude a question as not relevant.

Relevant Cross-Examination and Other Questions

- The Department declines to define "relevant" and states that this term should be interpreted using its plain and ordinary meaning.
- The next slides provide some helpful information/guidelines for making relevancy determinations.

Relevancy Determinations

Complainant's Sexual Predisposition and Sexual History

A Complainant's sexual predisposition is NEVER relevant

A Complainant's sexual history is ONLY relevant if questions/evidence about sexual history are offered to prove:

(1) that someone other than the respondent committed the conduct alleged by the complainant; OR

(2) 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.

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Relevancy Determinations

Respondent's Sexual Predisposition and Sexual History

- The Department declines to extend the rape shield language to respondents. The Department does not wish to impose more restrictions on relevance than necessary to further the goals of a Title IX sexual harassment adjudication, and does not believe that a respondent's sexual behavior requires a special provision to adequately protect respondents from questions or evidence that are irrelevant.

- By contrast, in order to counteract historical, societal misperceptions that a complainant's sexual history is somehow always relevant to sexual assault allegations, the Department follows the rationale of the Advisory Committee's Note to Fed. R. Evid. 412, and the Supreme Court's observation in Michigan v. Lucas, [1] that rape shield protections are intended to protect complainants from harassing, irrelevant questions at trial.

- The Department cautions recipients that some situations will involve counter-claims made between two parties, such that a respondent is also a complainant, and in such situations the recipient must take care to apply the rape shield protections to any party where the party is designated as a "complainant" even if the same party is also a "respondent" in a consolidated grievance process.

[1] Michigan v. Lucas, 500 U.S. 145, 146 (1991).

Relevancy Determinations

Legally Recognized Privilege(s) and Treatment Records

§ 106.45(b)(1)(x)

- A recipient's grievance process may 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.

§ 106.45(b)(5)(i)

- The recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, UNLESS the recipient obtains that party's voluntary, written consent to do so for a grievance process under this section.
- A recipient cannot use treatment records, "regardless of whether the recipient already has possession of such treatment records," even if the records are relevant.

Relevancy Determinations

Repetitive Questioning or Badgering

- A recipient may adopt rules of order or decorum to forbid badgering a witness, and may fairly deem repetition of the same question to be irrelevant.

- A recipient is permitted to develop institutional rules and practices to oversee cross-examination to ensure that questioning is relevant, respectful, and non-abusive, so long as those rules and practices apply equally to both parties.

§ 106.45 Grievance Process for Formal Complaints of Sexual Harassment

§ 106.45(b)(7)- Determination Regarding Responsibility

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§ 106.45(b) Grievance Process

Determination Regarding Responsibility

§ 106.45(b)(7)(i)

- (i) The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the recipient must apply the standard of evidence [chosen by the recipient].
    - Either the preponderance of the evidence standard or clear and convincing evidence standard.

§ 106.45(b) Grievance Process

Determination Regarding Responsibility

§ 106.45(b)(7)(ii)

- (ii) The written determination must include—
  - (A) Identification of the allegations potentially constituting sexual harassment as defined in § 106.30;
  - (B) 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;
  - (C) Findings of fact supporting the determination;
- [See next slide for additional requirements.]

§ 106.45(b) Grievance Process

Determination Regarding Responsibility

§ 106.45(b)(7)(ii)

- (ii) The written determination must include—
  - (D) Conclusions regarding the application of the recipient's code of conduct to the facts;
  - (E) A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and
  - (F) The recipient's procedures and permissible bases for the complainant and respondent to appeal.

§ 106.45(b) Grievance Process

Notice of Determination Regarding Responsibility Checklist

Allegations That Constitute the § 106.30 Definition of Sexual Harassment

Identification of the allegations potentially constituting sexual harassment as defined in § 106.30.

A Description of All Procedural Steps Taken from the Inception of the Formal Complaint

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 that Support the Determination of Responsibility

Findings of fact supporting the determination.

Application of the Recipient's Code of Conduct to the Facts of the Case

Conclusions regarding the application of the recipient's code of conduct to the facts.

Reasons for Determinations of Responsibility, Disciplinary Sanctions, and/or Remedies Imposed

A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant.

Potential Availability of Appeal Procedures

The recipient's procedures and permissible bases for the complainant and respondent to appeal.

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§ 106.45(b) Grievance Process

Determination Regarding Responsibility

§ 106.45(b)(7)(iii)

- (iii) The recipient must provide the written determination to the parties simultaneously.

- The determination regarding responsibility becomes final either on the date that the recipient 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.

§ 106.45 Grievance Process for Formal Complaints of Sexual Harassment

§ 106.45(b)(8)- Appeals

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§ 106.45(b) Grievance Process

Appeals

§ 106.45(b)(8)(i)

- (i) 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:
  - (A) Procedural irregularity that affected the outcome of the matter;
  - (B) 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
  - (C) 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 individual complainant or respondent that affected the outcome of the matter.

§ 106.45(b)(8)(ii)

- (ii) A recipient may offer an appeal equally to both parties on additional bases.

§ 106.45(b) Grievance Process

Appeals

§ 106.45(b)(8)(iii)

- (iii) As to all appeals, the recipient must:
  - (A) Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
  - (B) 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;
  - (C) Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of this section;
- [See next slide for additional requirements.]

§ 106.45(b) Grievance Process

Appeals

§ 106.45(b)(8)(iii)

- (iii) As to all appeals, the recipient must:
  - (D) Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
  - (E) Issue a written decision describing the result of the appeal and the rationale for the result; and
  - (F) Provide the written decision simultaneously to both parties.

§ 106.45 Grievance Process for Formal Complaints of Sexual Harassment

§ 106.45(b)(9)- Informal Resolution

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§ 106.45(b) Grievance Process

Informal Resolution

§ 106.45(b)(9) Informal Resolution

- A recipient may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section.

- Similarly, a recipient may not require the parties to participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed.

- However, at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient –

[Continued on next slide.]

IMPORTANT!

§ 106.45(b)(9) requires that the complainant file a formal complaint prior to the initiation of an informal resolution process.

Formal Complaint Required for Informal Resolution

- (9) Informal resolution. A recipient may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section. Similarly, a recipient may not require the parties to participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed. However, at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient . . .

§ 106.45(b) Grievance Process

Informal Resolution

§ 106.45(b)(9)(i)

- (i) Provides to the parties a written notice disclosing: the allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations,
  - Provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and
  - Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;

[Continued on next slide.]

§ 106.45(b) Grievance Process

Informal Resolution

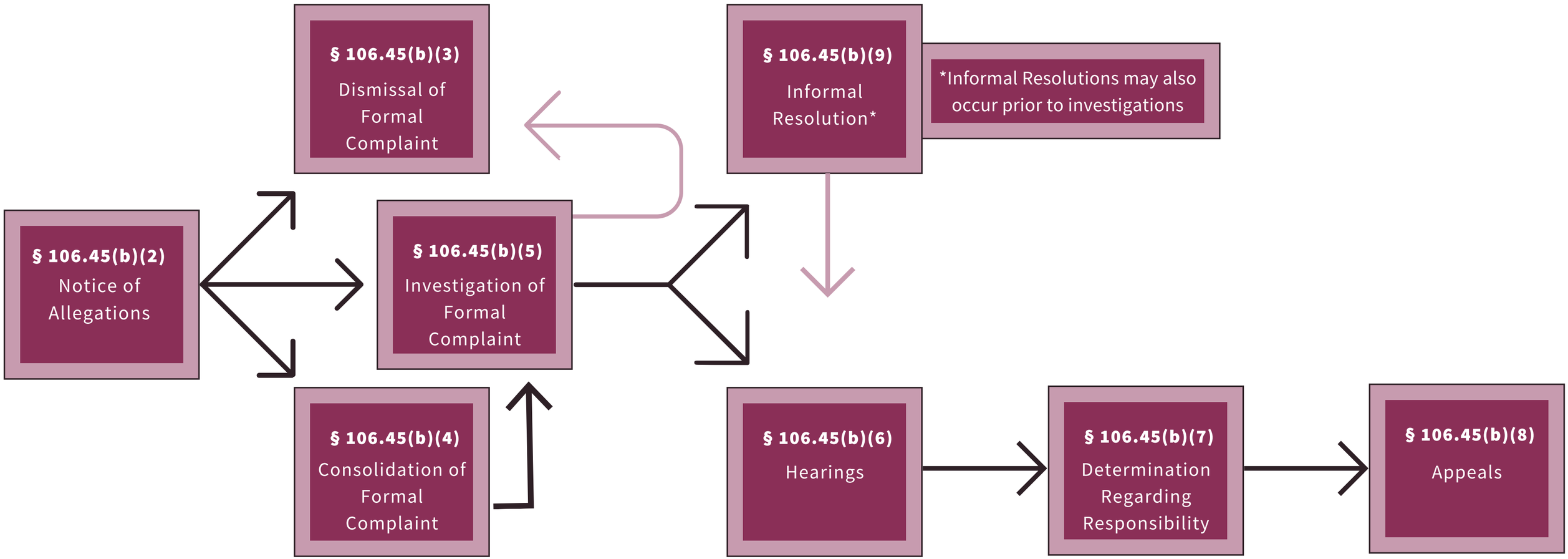
§ 106.45(b)(9)(ii)

- (ii) [The recipient must] Obtain the parties' voluntary, written consent to the informal resolution process; and

§ 106.45(b)(9)(iii)

- (iii) [The recipient may not] offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

§ 106.45 Grievance Process for Formal Complaints of Sexual Harassment - Questions?



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§ 106.45 Grievance Process for Formal Complaints of Sexual Harassment

§ 106.45(b)(10)- Recordkeeping

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§ 106.45(b) Grievance Process

Recordkeeping

§ 106.45(b)(10)(i)

- (i) A recipient must maintain for a period of seven years records of –
  - (A) Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required under paragraph (b)(6)(i) of this section, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity;
  - (B) Any appeal and the result therefrom;
  - (C) Any informal resolution and the result therefrom; and
  - (D) All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.

§ 106.45(b) Grievance Process

Recordkeeping

§ 106.45(b)(10)(ii)

- (ii) For each response required under § 106.44, a recipient must create, and maintain for a period of seven years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient 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. The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.