



Unpacking the Final Title IX Regulations: Q&A With An Expert

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Agenda

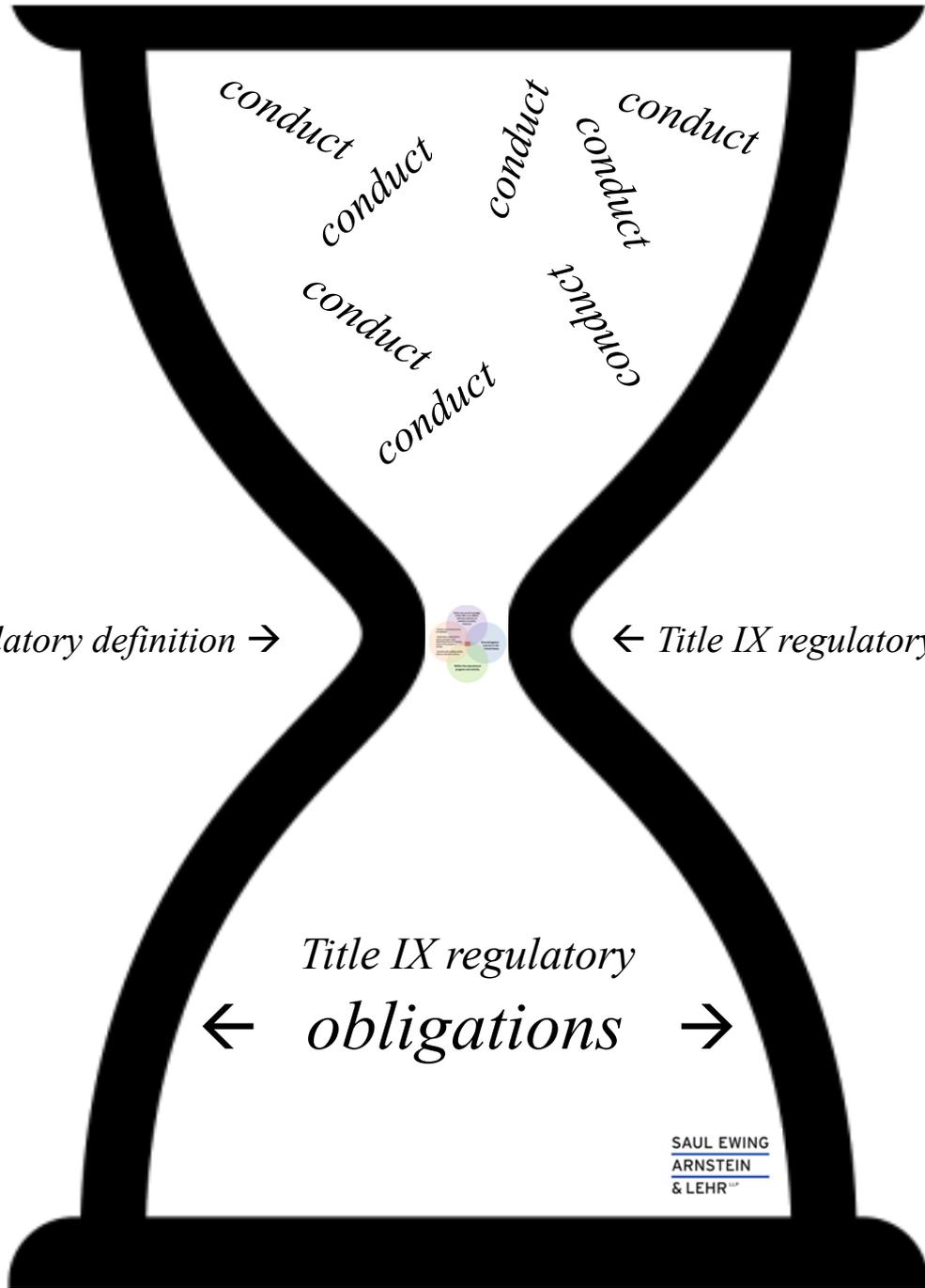
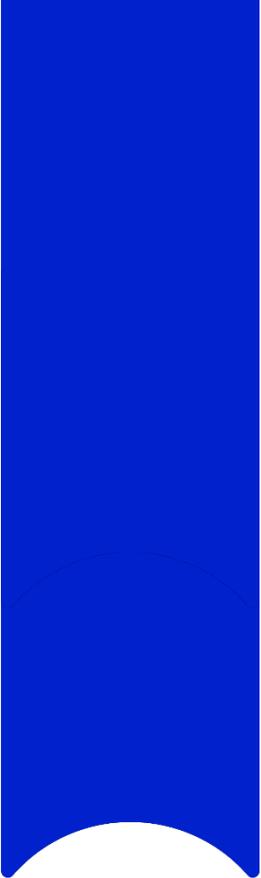
- Status of Final Regulations
- Title IX Jurisdiction
- Response Obligations to Actual Notice
and the Formal Complaint Rule
- Implementing a Compliant Hearing Model
- Alternative Resolution
- Implementation
- Q&A

Status of Final Regulations

Status of Final Regulations

When and How?

- Final rule released by ED informally on its website on May 6, 2020
 - (2000+ double-spaced pages)
- Published in the Federal Register on May 19, 2020 (34 CFR Part 106)
 - (550+ tight single-spaced pages)
- OCR Blog: <https://www2.ed.gov/about/offices/list/ocr/blog/index.html>
- Effective date: August 14, 2020
 - ED has publicly articulated an intent to begin enforcement on that date
 - No “grace period”
- No lawsuit (yet) *seeking to preliminarily enjoin* the regs or their effective date



Title IX regulatory definition →

← Title IX regulatory definition

*Title IX regulatory
← obligations →*

Title IX Jurisdiction

Title IX Jurisdiction

Four Elements → Response Obligations

A recipient with

[1] *actual knowledge* of

[2] *sexual harassment*

[3] in *an education program or activity* of the recipient

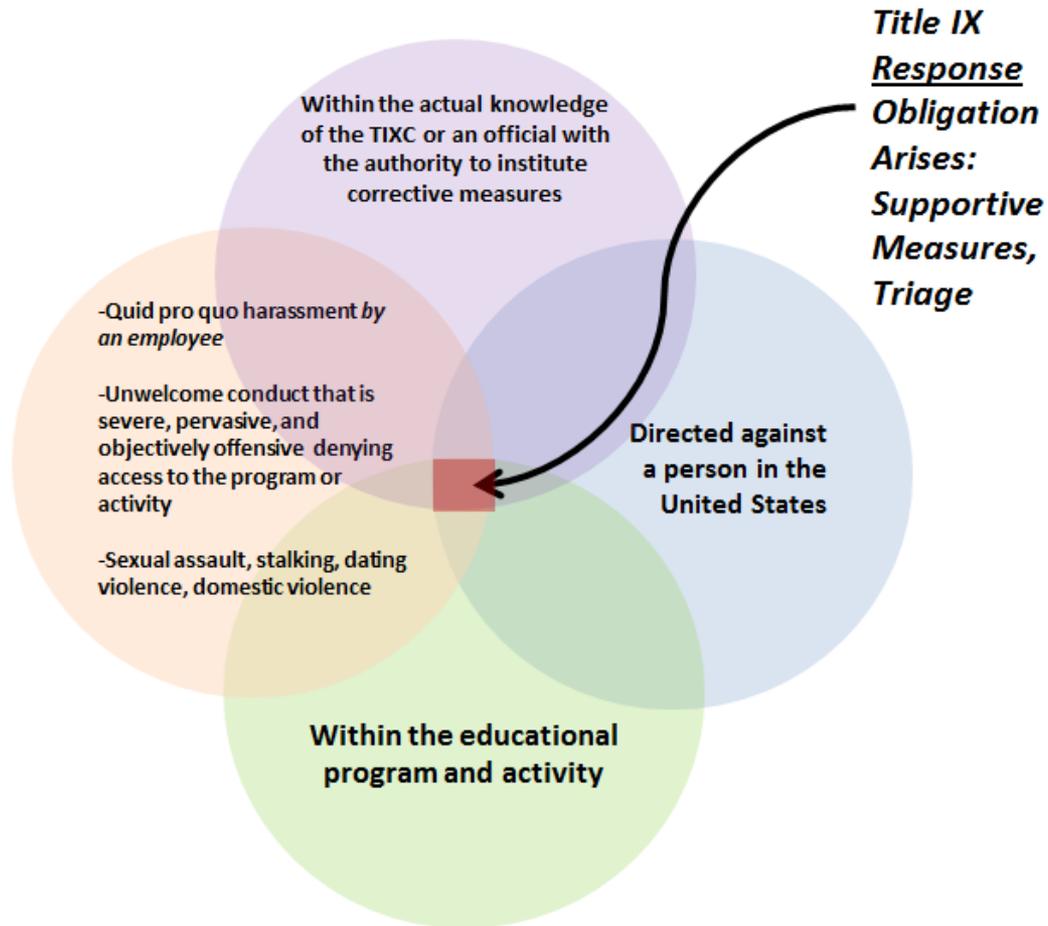
[4] against *a person in the United States*

→ must *respond* in a manner that is

→ not deliberately indifferent.

§ 106.44(a)

Title IX Jurisdiction



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Title IX Jurisdiction

Actual Knowledge and Responsible Employees

“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.” § 106.30

Concept of “responsible employees” is gone. They are permitted, but not required, and serve no purpose re institutional obligations

Title IX Jurisdiction

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

- 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;
- 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
- “sexual assault” as defined 20 U.S.C. 1092(f)(6)(A)(v), “dating violence” as defined in 34 U.S.C. 1229(a)(10), “domestic violence” as defined in 34 U.S.C. 12291(a)(8), or “stalking” as defined in 34 U.S.C. 12291(a)(30)

§ 106.30

Title IX Jurisdiction

“Education program or activity” is:

All operations of the institution, including . . .

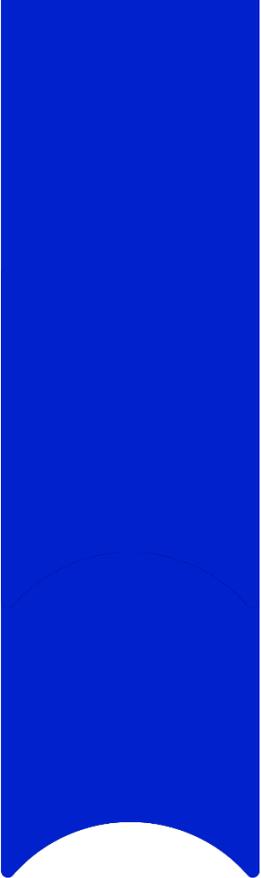
- “[L]ocations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.”
- *Applies to employees, including employee on employee conduct*

§ 106.44(a)

Title IX Jurisdiction

How will we resolve :

- Conduct that is not “severe AND pervasive”?
- Unwelcome conduct on the basis of another protected class (e.g. race, religion)?
- In study abroad?
- In off-campus housing complexes or unrecognized Greeks?
- Is not the subject of a formal complaint?
- And others?

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Response Obligations to Actual Notice and the Formal Complaint Rule

Response Obligations

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 the authority to institute corrective measures on behalf of the recipient...”

§ 106.30

Response Obligations

Actual Knowledge -- What now?

To a report

- *Offer of supportive measures*
- *Explain formal complaint process*

To a formal complainant

- *Investigation followed by*
- *Live hearing/compliant grievance process*

Unless facts require or permits dismissal

Response Obligations

Actual Knowledge -- Supportive Measures

“The Title IX Coordinator must

[1] promptly contact the complainant to discuss the availability of supportive measures. . .

[2] consider the complainant’s wishes with respect to supportive measures,

[3] inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and

[4] explain to the complainant the process for filing a formal complaint.”

§ 106.44(a)

Response Obligations

Actual Knowledge -- Supportive Measures

May include:

- Counseling
- Extension of deadlines or other course-related adjustments
- Modification of work or class schedules
- Campus escort services
- Restrictions on contact between the parties
- Changes in work or housing locations
- Voluntary leaves of absence
- Increased security and monitoring of certain areas of the campus
- Others

Response Obligations

Actual Knowledge -- Emergency Removals

We may remove respondent on an emergency basis only if we:

- Conduct an individualized safety and risk analysis,
- Determine that respondent poses an immediate [imminent] threat to the *physical* health or safety of *anyone* justifying removal,
- The threat arises from the allegations of sexual harassment, and
- Provide opportunity for respondent to challenge removal immediately thereafter.

Response Obligations

Formal Complaints

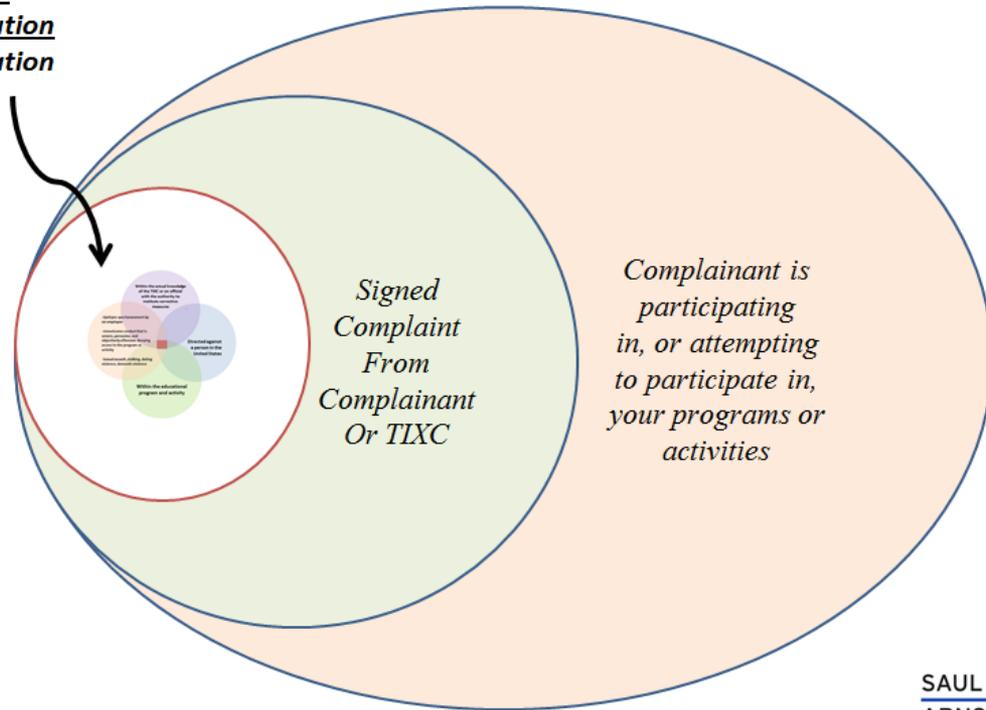
A school must follow procedures prescribed in the final regulations in response to a formal complaint

- Formal Complaint: *a document signed by the complainant or by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed. § 106.30*

Response Obligations

Formal Complaints

*Title IX
Formal
Resolution
Obligation
Arises*



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Response Obligations and Title IX Jurisdiction

If the conduct alleged by the complainant . . .

- would not constitute sexual harassment even if proved,
- did not occur against a person in the United States, or
- did not occur within the recipient's program or activity, or
- the complainant was not participating, or attempting to participate in the P&A *at the time of the complaint*

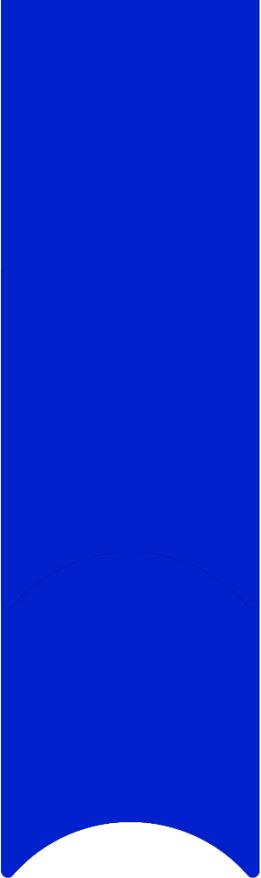
we must terminate the grievance process with regard to that conduct for the purposes of sexual harassment under Title IX.

However, such a dismissal does not preclude action under another provision of the recipient's code of conduct. § 106.45(b)(3)

Response Obligations and Title IX Jurisdiction

We “may dismiss” if:

- Complainant requests to withdraw their complaint
- Respondent is no longer enrolled or employed
- When specific circumstances prevent gathering evidence sufficient to reach a determination

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Implementing a Compliant Hearing Model

Hearings

Live Hearings Required at Post-Secondary Institutions

- For postsecondary institutions, the recipient's grievance process must provide for a live hearing. § 106.45(b)(6)(i)
- *but see* recipients that are not postsecondary institutions may, but need not, provide for a hearing. § 106.45(b)(6)(ii)
 - *With or without a hearing, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.*

Hearings

Live Hearings Required – Evidence

- A recipient “must make all [inculpatory and exculpatory evidence] . . . available at any hearing to give each party equal opportunity to refer to such evidence during the hearing . . .” giving each party at least ten days to submit a written response.
- § 106.45(b)(5)(vi)

Hearings

Live Hearings Required – Advisors (Applies throughout investigation process)

- Parties have 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,
- May not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding;
- We 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.

Hearings

Live Hearings Required – Cross Examination

- At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.
- Cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice.
 - *If a party does not have an advisor present at the live hearing, the recipient must provide an advisor of the recipient's choice to conduct cross-examination on behalf of that party.*

Hearings

Live Hearings Required – Cross Examination – What?

- Where one party appears at the hearing and *the other party does not*, the non-appearing party’s advisor may appear and conduct cross-examination even when the party whom they are advising does not appear.
 - Where one party does not appear and that party’s advisor of choice does not appear, *a recipient-provided advisor must still cross-examine the other, appearing party “on behalf of” the non-appearing party*, resulting in consideration of the appearing party’s statements but not the non-appearing party’s statements (without any inference being drawn based on the non-appearance).

Hearings

Live Hearings Required – Hearsay

- 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.
 - 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

Hearings

Live Hearings Required – Relevance

- 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.
 - Only exceptions to relevance standard:
 - *Rape shield protection;*
 - *Legally-recognized privilege; and*
 - *Hearsay*

Hearings

Live Hearings Required – Virtual and Remote

- 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.
 - Live hearings 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.

Hearings

Hearing Officers

- The decision-maker “cannot be the same person(s) as the Title IX Coordinator or the investigator(s).” §106.45(b)(7)(i)
- Must “not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.” §106.45(b)(1)(iii)

Hearings

Written Determination

Decision-makers must “issue a written determination regarding responsibility” that must include:

- Identification of conduct code sections alleged to have been violated;
- A description of the procedural steps taken from the receipt of the complaint through the determination;
- Findings of fact supporting the determination;
- Conclusions regarding the application of the code of conduct to the facts;
- Statement of rationale for, the result as to each allegation, including any findings of responsibility and sanctions;
- Remedies provided to the complainant; and
- The recipient’s procedures and permissible bases for the parties to appeal.

Hearings

Outcome Notification

“The recipient must keep confidential the identity of...any individual who has been reported to be the perpetrator of sex discrimination, any respondent...except as may be permitted by . . . FERPA . . . or as required by law, or to carry out the purposes of [the Title IX regulations], including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.”

§106.71(a)

Hearings

Records

All records pertaining to our responses to reports, including our responsive supportive measures and resolutions materials, must be retained for seven years.

Process Generally

Training

We are required to train all participants in our processes – Title IX staff, investigators, hearing officers, those who facilitate alternative resolution – *everyone* – on the following topics:

- Definition of sexual harassment in § 106.30,
- 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, and
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

Process Generally

Training

In addition,

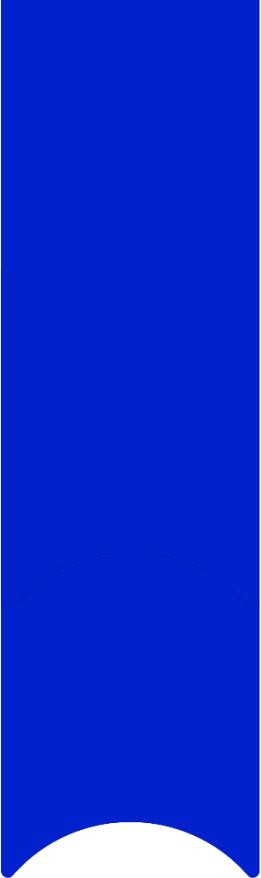
- *Decision-makers* must receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant; and
- *Investigators* must receive training on issues of relevance to create an investigative report.

Process Generally

Training

All materials used to train Title IX personnel must be publicly available on the school's website.

- This may mean that the school has to secure permission from the training's copyright holder to publish the training materials on the school's website.
- If a school is unable to secure permission from a third party to post copyrighted training materials, then the school must create or obtain training materials that can lawfully be posted on the school's website.

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Standards of Evidence and Appeals

Standards of Evidence and Appeals

Burden of Proof

- Permitted to use either clear and convincing evidence standard; or preponderance of the evidence standard
- *But* recipients must 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

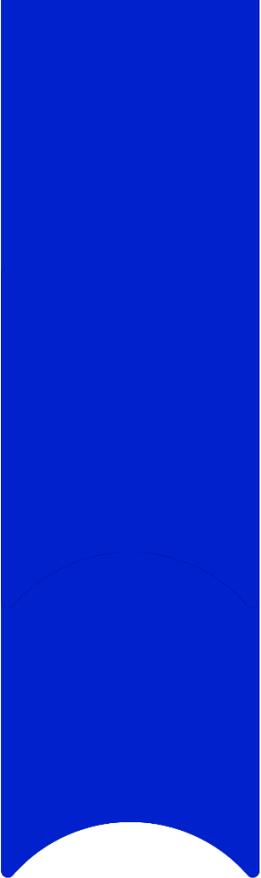
§ 106.45(b)(1)(vii)



Standards of Evidence and Appeals

Appeal Standards

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

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Informal (*Alternative*) Resolution

Alternative Resolution

Alternative Resolutions Available

- At any time prior to reaching a determination regarding responsibility, we may facilitate an informal resolution process that does not involve a full investigation and adjudication
 - May not require the parties to participate in an informal resolution process and
 - *May not offer an informal resolution process unless a formal complaint is filed*

Alternative Resolution

Alternative Resolution Requirements

To facilitate an alternative resolution, we must:

- Obtain the parties' voluntary written consent; and
- Provide written notice to the parties 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,
 - Any consequences resulting from participating in the informal resolution process, including records that will be maintained or could be shared.

Alternative Resolution

Alternative Resolution Requirements

A written consent form to participate in informal resolution might include e.g., agreement that:

- Successful completion of preparatory meetings is a precondition to participation in informal resolution
- The parties are bound by the terms of any final informal resolution agreement, cannot return to formal resolution after an agreement, and consequences for failing to comply with agreement terms
- How and for how long records will be kept

Alternative Resolution

Alternative Resolution Requirements

- Any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint
- *May not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student*

Implementation

Implementation

Recommendation 1

Convene a working group comprised of stakeholders necessary to make changes that are as broad reaching as those required by the regulations.

A start at suggested representation on the working group:

- OGC and/or outside counsel
- TIXC and Office of Institutional Equity staff
- Student affairs, student conduct
- Human resources, labor relations
- Provost's office

If you are on a large campus, consider creating sub-working groups for discrete issues like labor, faculty, etc.

Implementation

Recommendation 2

Gather all materials that may need to be revised or considered:

- CBAs
- Student and faculty handbooks
- State laws that bear on investigations, adjudications, including the standard of evidence and limitations/prescriptions regarding the role of advisors and outcome notification

If you identify conflicts with state law, bring on government relations, and, depending on your state, consider looping in your state AG's office

Implementation

Recommendation 3

Identify community stakeholders that must, or should, weigh in on the new policy prior to implementation, and develop a communications plan with respect to each. *E.g.:*

- Governing board
- Office of the President
- Faculty senate
- Student government/press
- Campus advocacy groups

Implementation

Recommendation 4

As a working group, draft and adopt a timeline:

- To have a final policy on August 14, when must key steps be accomplished to make sure drafting, input, revisions, and a final draft are rolled out?
- Communicate with all of the groups you identified on the prior slide
- Let them know *now* when to expect to be asked for feedback and that you will be on a tight schedule.

Questions & Answers



Stay Connected

