



Navigating and Implementing The New Title IX Rules

*Policies, Trainings, and Campus
Communication Strategies for Colleges*

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Overview of Amendments to Part 106, Title 34 of the Code of Federal Regulations

New Regulatory Provisions:

- 106.30 - Definitions
- 106.44 - Recipient's Response to Sexual Harassment, Generally
- 106.45 - Recipient's Response to Formal Complaints

Amendments to Existing Regulations:

- 106.3(a) Remedial Action
- 106.6(d) Constitutional Protections
- 106(d)(1) First Amendment
- 106.6(d)(2) Due Process
- 106.6(d)(3) Other Constitutional Rights
- 106.6(e) FERPA
- 106.6(f) Title VII and Directed Question 3 (Application to Employees)
- 106.6(g) Exercise of Rights by Parents/Guardians
- 106.6(h) Preemptive Effect
- 106.8(a) Designation of Coordinator
- 106.8(b) Dissemination of Policy
- 106.8(c) Adoption and Publication of Grievance Procedures
- 106.8(d) Application Outside the United States
- 106.9(c) [DELETED]
- 106.71 Retaliation Prohibited



Overview of Amendments (cont.)

- **“Part 106 – Nondiscrimination on the basis of sex in education programs or activities receiving federal financial assistance.”**
 - “The authority ... for part 106 continues to [be] 20 U.S.C. 1681 *et seq.*, unless otherwise noted.”
 - “Subpart B – Coverage is amended by **adding section 106.18.**”
 - “Subpart D – Discrimination on the Basis of Sex in Education Program or Activities Prohibited is amended by **adding sections 106.30, 106.44 106.45, and 106.46.**”
 - “Subpart E – Discrimination on the Basis of Sex in Employment Education Programs or Activities Prohibited is **amended by adding sections 106.62.**”
 - Additional amendments were made to Sections 106.3, 106.6, 106.8, 106.9, 106.12, Subpart F, and Subpart G. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.
- All other aspects of the existing Title IX Regulations remain in effect.



§ 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: *Narrowed Title IX Jurisdiction*

- Alleged Sexual Harassment must involve conduct that occurred “**under an education program or activity** receiving federal funds.” (U.S. Code Title 20 Chap. 38 § 1681).
- Sexual Harassment must have been perpetrated against a person “**in the United States.**”

34 C.F.R. 106.44(a)

§ 106.44(a) – General Response to Sexual Harassment: *Sexual Harassment*

3 categories of misconduct that meet the regulatory definition of “sexual harassment”

- 1) “**An employee** of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in **unwelcome** sexual conduct;” [*quid pro quo*]
- 2) “**Sexual assault**” as defined in 20 U.S.C. § 1092(f)(6)(A)(v), “**dating violence**” as defined in 34 U.S.C. § 12291(a)(10), “**domestic violence**” as defined in 34 U.S.C. § 12291(a)(8), or “**stalking**” as defined in 34 U.S.C. § 12291(a)(30); or
- 3) “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.”

34 C.F.R. 106.30(a).



§ 106.44(a) – General Response to Sexual Harassment: *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”**

- “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 also the respondent.”
- “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.”

34 C.F.R 106.30(a).



§ 106.44(a) – General Response to Sexual Harassment: *Deliberate Indifference*

A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.”

34 C.F.R. 106.44(a).



§ 106.44(a) – General Response to Sexual Harassment: *Supportive Measures*

“A recipient’s response must treat complainants and respondents equitably by offering supportive measures . . . to a complainant. . . .”

“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.”

34 C.F.R. 106.30(a).



§ 106.44(a) – General Response to Sexual Harassment:
Supportive Measures (cont.)

“Complainant means an individual who is alleged to be the victim of conduct that **could** constitute sexual harassment.”

§ 106.44(a) – General Response to Sexual Harassment: *Supportive Measures* (cont.)

“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.”

34 C.F.R. 106.30(a).



§ 106.44(a) – General Response to Sexual Harassment: *Supportive Measures* (cont.)

- Title IX Coordinator must promptly contact complainant to:
 - discuss the availability of supportive measures,
 - consider the complainant’s wishes with respect to 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.



§ 106.44(a) – General Response to Sexual Harassment: *Grievance Process*

“A recipient’s response must treat complainants and respondents equitably . . . by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures . . . against a respondent.”



§ 106.44(a) – General Response to Sexual Harassment: *Grievance Process*

“Respondent means an individual who has been reported to be the perpetrator of conduct that **could** constitute sexual harassment.”



DISCUSSION

- Narrowed jurisdiction
- Student communication strategies
- Supportive measures
- Employee issues, including employee-respondents and new mandatory reporter policies



§ 106.44(a) – General Response to Sexual Harassment: *Constitutional Concerns*

“The Department may not deem a recipient to have satisfied the recipient’s duty to not be deliberately indifferent . . . based on the recipient’s restriction of rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment.”



§ 106.44(b) – Recipient’s Response to Sexual Harassment: *Response to Formal Complaint*

- 1) “In response to a **formal complaint**, a recipient **must** follow a **grievance process that complies with § 106.45**. With or without a formal complaint, a recipient must comply with § 106.44(a).



Formal Complaints

- “Formal complaint means a **document filed by a complainant or signed 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.”
 - “A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under § 106.8(a), and by any additional method designated by the recipient.

34 C.F.R. 106.30(a).

Formal Complaints (cont.)

- “As used in this paragraph, the phrase “document filed by a complainant” means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.”
- Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party under this part or under § 106.45, and must comply with the requirements of this part, including 106.45(b)(1)(iii).



§ 106.44(c) – Recipient’s Response to Sexual Harassment: *Emergency Removal*

- *Emergency removal.* Nothing in this section precludes a recipient from removing a respondent from the recipient’s education program or activity on an emergency basis, provided that the recipient
 - undertakes an **individualized safety and risk analysis**,
 - determines that an **immediate threat to the physical health or safety** of any student or other individual arising from the allegations of sexual harassment justifies removal, and
 - provides the respondent with **notice and an opportunity to challenge** the decision immediately following the removal.



§ 106.44(c) – Recipient’s Response to Sexual Harassment: *Emergency Removal* (cont.)

Emergency removal is subject to the student’s rights under the IDEA, Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act.



§ 106.44(d) – Recipient’s Response to Sexual Harassment: *Administrative Leave*

Recipients may place non-student employee-respondents on administrative leave during the pendency of a formal grievance process subject to the employee’s rights under Section 504 and the ADA.

§ 106.71 – Retaliation

- **Prohibited retaliation:**

- “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 its regulations], 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 its regulations], constitutes retaliation.”

34 C.F.R. 106.71(a).

§ 106.71 – Retaliation (cont.)

- **Exceptions:**

- **First Amendment** – “The exercise of rights protected under the First Amendment does not constitute retaliation....”
- **Materially False Statements** – “Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding . . . does not constitute retaliation . . . , provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.”

34 C.F.R. 106.71(b).



§ 106.45 – Grievance process for formal complaints of sexual harassment

“A recipient’s treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute” sex discrimination under Title IX.

34 C.F.R. 106.45(a).



§ 106.45(b) –Grievance Process

“For the purpose of addressing formal complaints of sexual harassment, a recipient’s grievance process must comply with the requirements of this section.”

“Any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaint of sexual harassment . . . must apply equally to both parties.”



§ 106.45(b) – Grievance Process: *Basic Requirements*

“A recipient’s grievance process must—

“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 . . . against a respondent.”

34 C.F.R. 106.45(b)(1)(i).



§ 106.45(b) – Grievance Process: *Basic Requirements (cont.)*

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

34 C.F.R. 106.45(b)(1)(ii).



§ 106.45(b) – Grievance Process: *Basic Requirements (cont.)*

The Title IX Coordinator, investigator, decision-maker, or any person designated to facilitate informal resolution process may not have a conflict of interest or bias—either for or against complainants, respondents, or individual parties.

34 C.F.R. 106.45(b)(1)(iii).



§ 106.45(b) – Grievance Process: *Basic Requirements (cont.)*

- These individuals must receive training on:
 - The definition of sexual harassment;
 - The scope of the recipient’s education program or activity;
 - The entire formal grievance procedure, from cradle to grave; and
 - Impartiality.
- Decision-makers must receive additional training on:
 - Live hearing technology; and
 - Determining relevance of questions and evidence, including the proper screening of evidence about a complainant’s prior sexual behavior.
- Investigators must receive additional “training on issues of relevance to create an investigative report that fairly summarizes relevant evidence.”

34 C.F.R. 106.45(b)(1)(iii).



§ 106.45(b) – Grievance Process: *Basic Requirements (cont.)*

Training materials must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints.

34 C.F.R. 106.45(b)(1)(iii).



§ 106.45(b) – Grievance Process: *Basic Requirements (cont.)*

The respondent is **presumed not responsible** until a determination regarding responsibility is made at the conclusion of the grievance process.

34 C.F.R. 106.45(b)(1)(iv).



§ 106.45(b) – Grievance Process: *Basic Requirements (cont.)*

- **Reasonably prompt timeframes:**

- Must have reasonably prompt timeframes for conclusion of the entire grievance process, including informal resolution process and appeals.
- Must have process that allows for temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the parties.
- “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.”

34 C.F.R. 106.45(b)(1)(v).



§ 106.45(b) – Grievance Process: *Basic Requirements (cont.)*

Must describe range of potentially available disciplinary sanctions and remedies.

34 C.F.R. 106.45(b)(1)(vi).



§ 106.45(b) – Grievance Process: *Basic Requirements (cont.)*

- **Uniform standard of evidence:**
 - Must choose between 1 of 2 permissible standards of evidence: (1) preponderance of the evidence; and (2) clear and convincing evidence.
 - Must apply that standard to all formal complaints, including against both students and employees.

34 C.F.R. 106.45(b)(1)(vii).



§ 106.45(b) – Grievance Process: *Basic Requirements (cont.)*

Must include procedures and permissible bases for parties to appeal.

34 C.F.R. 106.45(b)(1)(viii).



§ 106.45(b) – Grievance Process: *Basic Requirements (cont.)*

Must describe the **range of supportive measures** available to the parties.

34 C.F.R. 106.45(b)(1)(ix).



§ 106.45(b) – Grievance Process: *Basic Requirements (cont.)*

May not allow any evidence or questions that would invade a **legally recognized privilege**, unless the privilege holder waives it.

34 C.F.R. 106.45(b)(1)(x).



§ 106.45(b) – Grievance Process: *Notice of Allegations*

- Upon receipt of a formal complaint, a recipient must provide known parties with written notice of various matters, including:
 - the formal complaint’s allegations;
 - the formal grievance procedures; and
 - any code-of-conduct provision that prohibits knowingly making false statements or submitting false information during the grievance process.

34 C.F.R. 106.45(b)(2).



§ 106.45(b) – Grievance Process: *Dismissal of a Formal Complaint*

Recipients must investigate the allegations in a formal complaint.

- **Mandatory dismissal** – If the alleged conduct does not meet the basic jurisdictional requirements under Title IX, the recipient must dismiss it for Title IX purposes. The recipient then may address the alleged misconduct under its general disciplinary process.
- **Permissive dismissal** – Recipient may dismiss the formal complaint, or any allegations therein, if at any time during the investigation or hearing:
 - Complainant notifies Title IX Coordinator in writing that he/she would like to withdraw the formal complaint or any allegations therein;
 - The respondent is no longer enrolled in 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 the allegations therein.”
- **Notice of dismissal** – Upon dismissal, the recipient must provide prompt written notice to the parties.

34 C.F.R. 106.45(b)(3).



§ 106.45(b) – Grievance Process: *Investigation of a Formal Complaint*

- **Burden to investigate on recipient** – Must “[e]nsure 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,” with the exception of a party’s medical records.
- **Opportunity to suggest evidence** – Must “[p]rovide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.”
- **No gag order** – May not restrict the parties ability to discuss the case and gather evidence.

34 C.F.R. 106.45(b)(5)(i)-(iii).



§ 106.45(b) – Grievance Process: *Investigation of a Formal Complaint (cont.)*

- **Advisors** – Must “[p]rovide the parties with the same opportunities to have others present during any grievance proceeding,” including an advisor of their choice, who may be an attorney.
 - May not limit choice or presence of an advisor.
 - May establish restrictions on the extent to which advisors may participate, provided the restrictions apply equally to both parties.

34 C.F.R. 106.45(b)(5)(iv).



§ 106.45(b) – Grievance Process: *Investigation of a Formal Complaint (cont.)*

- **Notice of meetings** – Must provide to the 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 a party, with sufficient time for the party to prepare to participate.

34 C.F.R. 106.45(b)(5)(v).



§ 106.45(b) – Grievance Process: *Investigation of a Formal Complaint (cont.)*

- **Opportunity to review pre-report evidence** – Must “[p]rovide 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. . . .”
 - Before completion of investigative report, must send the evidence to the parties and their advisors and give them 10 days to submit a written response.
 - Investigator must consider the written response before completing the final report.



§ 106.45(b) – Grievance Process: *Investigation of a Formal Complaint (cont.)*

- **Investigative report –**
 - Must “[c]reate an investigative report that fairly summarizes relevant evidence. . . .”
 - At least 10 days before hearing, must provide the parties and their advisors with a copy, “for their review and written response.”

34 C.F.R. 106.45(b)(5)(vii).



§ 106.45(b) – Grievance Process: *Hearings*

“For postsecondary institutions, the recipient’s grievance process must provide for a live hearing.”

34 C.F.R. 106.45(b)(6)(i).



§ 106.45(b) – Grievance Process: *Hearings*

- **Hearing panelists:**

- The live hearing may be adjudicated by one or more decision-makers.
- The decision-makers, however, “cannot be the same person(s) as the Title IX Coordinator or the investigator(s). . . .”

34 C.F.R. 106.45(b)(7)(i).

§ 106.45(b) – Grievance Process: *Hearings (cont.)*

- **Cross-examination must be allowed** – Decision-makers “must permit each party’s advisor to ask the other party and any other witnesses all relevant questions and follow-up questions, including those challenging credibility.”
 - **Cross-examination only by the advisor** – “Such cross-examination . . . must be conducted **directly, orally, and in real time** by the party’s advisor of choice and never by a party personally. . . .”
 - **School-appointed advisors** – “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.”

34 C.F.R. 106.45(b)(6)(i).



§ 106.45(b) – Grievance Process: *Hearings (cont.)*

- **Relevance required** – “Only relevant cross-examination and other questions may be asked of a party or witness.”
 - **Decision-makers must screen for relevance in real-time** – “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.”
 - **Rape shield protections** – “Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that **someone other than the respondent committed the conduct** alleged by the complainant, **or** if the questions and evidence concern **specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.**”

34 C.F.R. 106.45(b)(6)(i).



§ 106.45(b) – Grievance Process: *Hearings (cont.)*

No hearsay evidence – “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 a witness’s absence from the live hearing or refusal to answer cross-examination or other questions.”

34 C.F.R. 106.45(b)(6)(i).

§ 106.45(b) – Grievance Process: *Hearings (cont.)*

- **Virtual hearings:**

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

34 C.F.R. 106.45(b)(6)(i).



§ 106.45(b) – Grievance Process: *Hearings (cont.)*

- **Hearing record** – “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.”

34 C.F.R. 106.45(b)(6)(i).



§ 106.45(b) – Grievance Process: *Determination of Responsibility*

- The decision-makers must issue a written determination regarding responsibility, which must include:
 - The allegations constituting sexual harassment;
 - A description of the matter’s procedural history;
 - Findings of fact supporting the determination;
 - Conclusions reached by applying the school’s code of conduct to the facts;
 - An explanation of the rationale for the conclusions, including a determination of responsibility, disciplinary sanctions, and remedies; and
 - The school’s appellate procedures.



§ 106.45(b) – Grievance Process: *Determination of Responsibility* (cont.)

- **Simultaneous publication** – “The recipient must provide the written documentation to the parties simultaneously.”
- **Finality** – “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 not longer be considered timely.”

34 C.F.R. 106.45(b)(7)(iii).



§ 106.45(b) – Grievance Process:
Determination of Responsibility (cont.)

“The Title IX Coordinator is responsible for effective implementation of any remedies.”

34 C.F.R. 106.45(b)(7)(iv).



§ 106.45(b) – Grievance Process: *Appeals*

- Recipient must offer both parties an appeal from:
 - a determination regarding responsibility; and
 - the dismissal of a formal complaint or any allegation therein.

34 C.F.R. 106.45(b)(8).

§ 106.45(b) – Grievance Process: *Appeals (cont.)*

- **Mandatory grounds for appeal:**

- “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.”



§ 106.45(b) – Grievance Process: *Informal Resolution*

A recipient may facilitate an informal resolution process, such as mediation, in lieu of a formal grievance process.

Before doing so, however, the recipient must provide written notice to the parties of their rights, including the right to withdraw from the process at any time, and it must obtain both “parties’ voluntary, written consent” to informal measures.

Informal resolution processes are not allowed for formal complaints involving employee-respondents.

34 C.F.R. 106.45(b)(9).



§ 106.45(b) – Grievance Process: *Record-Keeping*

- For 7 years, the recipient must maintain records of:
 - Each sexual harassment investigation, including determination, sanctions, and remedies resulting therefrom;
 - Any appeals therefrom;
 - Any informal resolutions thereof; and
 - All training materials, which the recipient must also make available for public inspection.

The recipient also must maintain records of any other actions it takes, including supportive measures, in response to reports or formal complaints of sexual harassment.

34 C.F.R. 106.45(b)(10).



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