

TITLE IX TRAINING

July 28, 2020

Prepared and Presented By:

Natalie Powell, natalie.powell@coag.gov

Jenna Zerylnick, jenna.zerylnick@coag.gov

Jacob Paul, jacob.paul@coag.gov

Alison Kyles, alison.kyles@coag.gov

Office of the Colorado Attorney General
1300 Broadway, 10th Floor
Denver, Colorado 80203

Table of Contents

1. What's Changed	1
2. Definitions and Key Terms.....	7
3. Education Program or Activity	16
4. Notifications.....	19
5. Intake and IHE Response.....	21
6. Supportive Measures	26
7. Informal Resolutions	31
8. Relevance	33
9. Investigations/Investigative Reports	41
10. Hearings.....	45
11. Technology for Virtual Hearings.....	53
12. Appeals.....	54
13. Sanctions and Remedies.....	57
14. Bias and Conflicts of Interest.....	59
15. Interaction with Other Laws.....	63

** Please note: the page numbers referenced in these materials refer to the page numbers of the preamble and regulations as published in the Federal Register on May 19, 2020, and available at: <https://www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf>.

1. What's Changed

I. Background

- A. Congress enacted Title IX of the education amendments in 1972.
 - 1. “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.
- B. The first full Title IX rulemaking took place in 1975.
- C. In the 1980s, federal courts held that sexual harassment constitutes a form of sex-based discrimination under Title VII of the Civil Rights Act and established liability rules for employers. In the 1990s, courts applied similar rules to schools under Title IX.¹
- D. The Office for Civil Rights (“OCR”) issued a series of policy guidance documents that established foundational requirements for how schools must respond to sexual harassment.
- E. The most recent policy guidance came through a series of Dear Colleague Letters (“DCL”) and Q&A documents.
 - 1. In 2011, the Department of Education (“DOE”) issued a DCL on sexual violence that outlined measures schools must take to “end any harassment, eliminate a hostile environment if it has been created, and prevent harassment from occurring again.”²
 - 2. In 2014, DOE issued more detailed guidance in the form of a Q&A document.³

¹ R. Shep Melnick, *Analyzing the Department of Education’s Final Title IX Rules on Sexual Misconduct*, BROOKINGS, June 11, 2020.

² Dear Colleague Letter, Sexual Violence (April 2011); Melnick, *supra* note 1.

³ Questions and Answers about Title IX and Sexual Violence (April 2014).

3. In 2017, DOE issued a DCL withdrawing the 2011 DCL and 2014 Q&A and issuing a new interim Q&A document.⁴
- F. In 2018, DOE published a notice of proposed rulemaking to address sexual misconduct under Title IX.
1. During the notice-and-comment period, DOE received over 124,000 comments from the public.
 2. The Administrative Procedure Act requires agencies to respond to all significant comments with an explanation.
- G. On May 6, 2020, DOE released the new Title IX regulations.
1. The preamble contains DOE's explanation of the final rule and response to comments. It's more than 2,000 pages long.
 2. There are 26 pages of new regulations. *See* 34 C.F.R. pt. 106.

II. Overview of New Title IX Rules

This section highlights some of the key changes and new requirements.

- A. Substantive Requirements
1. New terms and definitions
 2. Emphasis on serving impartially and prohibition against bias, conflicts of interest, and prejudice
 3. Changes to the scope of actionable misconduct
 - a) narrowed definition of sexual harassment
 - b) parameters on covered activities, individuals, and geography
 - c) mandatory dismissal of complaint from Title IX process if not within ambit of Title IX (but may handle under other school process)

⁴ Dear Colleague Letter, Office for Civil Rights Withdraws Guidance on Sexual Violence and Issues Q&A on Campus Sexual Misconduct (September 2017).

4. IHE response and liability standards
 - a) deliberate indifference response standard
 - b) IHE's treatment of a complainant or a respondent in response to a sexual harassment complaint may constitute discrimination on the basis of sex under Title IX.
5. Confidentiality provisions
 - a) IHE must keep confidential the identity of any individual who makes a report or complaint of sex discrimination, with limited exceptions.
 - b) IHE must keep provision of supportive measures confidential, with limited exception.
 - c) preamble suggests IHEs may prohibit parties and advisors from disseminating evidence, for instance through use of non-disclosure agreements.
6. FERPA
 - a) rules indicate IHEs must comply with information-sharing aspects of Title IX rules as well as FERPA.
 - b) preamble suggests Title IX overrides FERPA in event of conflict.
7. Emphasis on constitutional protections
 - a) First Amendment speech
 - b) Fifth Amendment self-incrimination
 - c) Fourteenth Amendment due process
8. "Rape shield" provisions
 - a) no questions or evidence permitted about: (1) complainant's sexual predisposition; or (2) prior sexual behavior, with limited exceptions.

9. No “gag orders”
 - a) IHEs cannot impose restrictions on ability of either party to discuss allegations under investigation or to gather and present relevant evidence.

B. Procedural Requirements

1. Reporting
 - a) anyone can report sexual discrimination
 - b) contemplates “reports” versus “formal complaints”
 - c) focus on complainant autonomy
2. Notice requirements throughout
3. Supportive measures
4. Informal resolution
5. Prescriptive grievance process
6. Investigation
 - a) no single-investigator models
7. Hearings
 - a) live hearings – in person or virtual
 - b) must be recorded
 - c) cross-examination
 - d) relevancy determinations by decision-maker
 - e) party advisors

8. Appeals
 - a) mandatory equal appeal rights on three specified grounds
 - b) IHEs may allow additional appeal grounds
9. Training
 - a) new requirements for content of training and who must be trained

III. Discretionary Areas

The regulations impose new requirements on IHEs but also allow flexibility to make policy decisions. For example:

- A. IHEs may choose:
 1. Whether to use the preponderance of the evidence standard or clear and convincing evidence standard
 - a) but must use same standard for formal complaints against students as employees
 2. How to handle misconduct that falls outside of Title IX
 3. Which employees to impose mandatory reporting duties upon
 4. How to define certain terms, such as “consent”
 5. The type of supportive measures and remedies/sanctions to make available
 6. Who to designate to conduct individualized safety and risk analysis in relation to emergency removal and how to conduct such an analysis
 7. Reasonable timelines for the grievance process
 8. Whether to hold all hearings virtually
 9. To adopt rules of order or decorum for hearings

10. To adopt procedures, rules, or practices as part of the grievance process in addition to those required by Title IX
 - a) as long as any additional procedures, rules, or practices apply equally to both parties
11. To set parameters on advisor's role
12. To develop template forms for IHE and party use

2. Definitions and Key Terms

I. Section §106.30 Definitions:

- A. **Actual knowledge** means notice of sexual harassment or allegations of sexual harassment to an IHE's Title IX Coordinator or any official of the IHE who has authority to institute corrective measures on behalf of the IHE.... 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 IHE with actual knowledge is 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 IHE. "Notice" as used in this paragraph includes, but is no limited to, a report of sexual harassment to the Title IX Coordinator as described in § 106.8(a).
- B. **Complainant** means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.
- C. **Consent.** The Assistant Secretary will not require IHEs to adopt a particular definition of consent with respect to sexual assault, as referenced in this section.
- Please note:
 1. IHEs cannot shift the burden to a respondent to prove consent, or shift the burden to a complainant to prove absence of consent. (p. 30125).
 2. IHEs must clearly define consent and must apply that definition consistently. (p. 30125).
 3. Title IX Personnel must be trained on how to apply definitions used by the IHE with respect to consent (or the absence of negation of consent) consistently, impartially, and in accordance with the other provisions of § 106.45. (p. 30125).
- D. **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 IHE 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 IHE 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 IHE. 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 IHE) 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).

- Please Note:
 1. Examples of individuals, besides students and employees, who may be “participating in or attempting to participate in the education program or activity”:
 - a) Alumni: A complainant who has graduated may still be “attempting to participate” in the IHE’s education program or activity; for example, where the complainant has graduated from one program but intends to apply to a different program, or where the graduated complainant intends to remain involved with a IHE’s alumni programs and activities. (p. 30318).
 - b) Leave of absence: A complainant who is on a leave of absence may be “participating or attempting to participate” in the IHE’s education program or activity; for example, such a complainant may still be enrolled as a student even while on leave of absence, or may intend to re-apply after a leave of absence and thus is still “attempting to participate” even while on a leave of absence. (p. 30318).
 - c) Desire to re-enroll: A complainant who has left school because of sexual harassment, but expresses a desire to re-enroll if the IHE appropriately responds to the sexual harassment, is “attempting to participate” in the IHE’s education program or activity. (p. 30318).

- d) Admitted students: A complainant who has applied for admission and has been admitted is attempting to participate in the education program or activity of the IHE. (p. 30187).
- e) Applicants: A complainant who has applied for admission may be attempting to participate in the education program or activity. (p.30198, fn. 869).

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

- 1. For an unknown/unidentified respondent: An IHE must investigate a complainant's formal complaint even if the complainant does not know the respondent's identity, because an investigation might reveal the respondent's identity, at which time the IHE would be obligated to send both parties written notice. (p. 30318).

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

- 1. An employee of the IHE conditioning the provision of an aid, benefit, or service of the IHE on an individual's participation in unwelcome sexual conduct;
- 2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the IHE's education program or activity.

- Please Note:

- a) Elements of severity, pervasiveness, and objective offensiveness must be evaluated in light of the known circumstances and depend on the facts of each situation, but must be determined from the perspective of a **reasonable person** standing in the shoes of the complainant. (p. 30156).
- b) The Department believes...that severity and pervasiveness are needed elements to ensure that Title IX's nondiscrimination mandate does not punish verbal conduct in a manner that chills and restricts speech and academic freedom, and that IHEs are not held responsible for

controlling every stray, offensive remark that passes between members of the IHE's community. (p. 30154).

- c) 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 IHE's education program or activity on an equal basis with persons who are not suffering such harassment. (p.30170).
3. "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v):
 - a) 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. The definition of "sexual assault" includes rape, fondling, incest, and statutory rape. *See* <https://www2.ed.gov/admins/lead/safety/handbook.pdf>.
 - Please note:
 - (1) The Federal Bureau of Investigation (FBI) currently has two crime reporting systems: the Summary Reporting System (SRS), and the National Incident Based Reporting System (NIBRS). The current Clery Act regulations, 34 CFR 668.46(a), direct IHEs to look to the SRS for a definition of rape, and to the NIBRS for a definition of fondling, statutory rape, and incest as the offenses falling under "sexual assault." (p. 30176, fn. 791).
 - a. SRS: <https://www.fbi.gov/file-repository/ucr/ucr-srs-user-manual-v1.pdf/view>
 - b. NIBRS: <https://ucr.fbi.gov/nibrs/2011/resources/nibrs-offense-definitions>
 - (2) The FBI has announced it will be retiring the SRS on January 1, 2021, and moving entirely to the NIBRS. (p. 30174).
4. "Dating violence" as defined in 34 U.S.C. 12291(a)(10):
 - a) The term "dating violence" means violence committed by a person—

- (1) who is or has been in a social relationship of a romantic or intimate nature with the victim; and
- (2) where the existence of such a relationship shall be determined based on a consideration of the following factors:
 - a. The length of the relationship.
 - b. The type of relationship.
 - c. The frequency of interaction between the persons involved in the relationship.

5. “Domestic violence” as defined in 34 U.S.C. 12291(a)(8):

- a) 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.

6. “Stalking” as defined in 34 U.S.C. 12291(a)(30):

- a) The term “stalking” means engaging in a course of conduct directed at a specific person that would cause a reasonable person to—
 - (1) fear for his or her safety or the safety of others; or
 - (2) suffer substantial emotional distress.

G. **Supportive measures** means nondisciplinary, 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 IHE’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the IHE’s educational environment, or deter sexual harassment. 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. The IHE 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 IHE to provide the supportive measures. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures. *Please also see* Section 6 on Supportive Measures.

- H. **Elementary and secondary school**, as used in §§ 106.44 and 106.45, means a local educational agency (LEA), as defined in the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act, a preschool, or a private elementary or secondary school.
- I. **Postsecondary institution** means an institution of graduate higher education as defined in § 106.2(l), an institution of undergraduate higher education as defined in § 106.2(m), an institution of professional education as defined in § 106.2(n), or an institution of vocational education as defined in § 106.2(o).

II. Other Key Terms:

- A. **Advisor:** Parties must be afforded 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. §106.45(b)(3)(iv). Only an advisor may conduct cross-examination on behalf of the party at a hearing. §106.45(b)(6)(i). If a party does not have an advisor present at the live hearing, the IHE must provide without fee or charge to that party, an advisor of the IHE's choice, who may be, but is not required to be, an attorney, to conduct cross examination on behalf of that party. *Id.*
- B. **Confidential:** The IHE 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. §106.71(a).

- C. **Clear and Convincing:** standard of evidence that is not formally defined in the regulations. The preamble refers to: “having confidence that a conclusion is based on facts that are highly probable to be true.” (p. 30386).
- D. **Deliberate Indifference:** An IHE will be considered deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances. §106.44.
- E. **Directly Related:** “directly related to the allegations” may encompass a broader universe of evidence than evidence that is “relevant.” (p. 30310).
- F. **Education program or activity** includes locations, events, or circumstances over which the IHE 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. § 106.44(a). *Please also see* Section 3 on Education Program or Activity.
- G. **Informal resolution:** may encompass a broad range of conflict resolution strategies, including, but not limited to, arbitration, mediation, or restorative justice. (p. 30401). *Please also see* Section 7 on Informal Resolution.
- H. **Preponderance of the Evidence:** standard of evidence that is not formally defined in the regulations. The preamble refers to: “concluding that a fact is more likely than not to be true.” (p. 30373).
- I. **Prompt Timeframe:** IHEs must include reasonably prompt time frames for the conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the IHE offers informal resolution processes. § 106.45(b)(1)(v).
 - 1. **Good cause for delay:** The process must allow 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)(v).

2. **Colorado State Law:** §23-5-146(3)(d)(I) states an IHE must make a good faith effort to complete an investigation or adjudicative process, excluding any appeals, within an average of sixty to ninety days, without jeopardizing the rights of a complainant or responding party. The procedure may include a process that allows for an extension of these time frames for good cause with prior written notice of the delay and the reason for the delay to the complainant and the responding party.

J. **Recipient** means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives such assistance, including any subunit, successor, assignee, or transferee thereof. (34 CFR 106.2(i); p. 30117, fn. 521).

- Please note that these training materials refer to Institution of Higher Education, or "IHE," instead of the term "recipient."

K. **Relevance:** Not formally defined in the regulations. *Please also see* Section 8 on Relevance.

L. **Sex (On the Basis of Sex):** Not formally defined in the regulations. The preamble states that anyone may experience sexual harassment, irrespective of gender identity or sexual orientation. (p. 30178).

M. **Title IX Coordinator:** the individual(s) an IHE designates and authorizes to coordinate its efforts to comply with its responsibilities. § 106.8(a).

N. **Title IX Personnel:** Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions. (p.30527).

O. **Retaliation:** means intimidation, threats, coercion, or discrimination against any individual for the purpose of interfering with any right or privilege secured by Title IX or the 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. § 106.71(a).

3. Education Program or Activity

I. Education program or activity: Includes locations, events, or circumstances over which the IHE 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. § 106.44(a).

A. “Education program or activity” includes all incidents of sexual harassment occurring on an IHE’s campus. (p. 30196).

1. For example: an IHE must respond to alleged sexual harassment between two students in one student’s dormitory room provided by the IHE. (p. 30093).

B. But there is no bright-line geographic test. (p. 30204-205). “Education program or activity” also includes incidents of sexual harassment off campus if **any** of the three conditions are met:

1. If the off-campus incident occurs as part of the IHE’s “operations” pursuant to 20 U.S.C. 1687 and 34 CFR 106.2(h);

a) For example, “[p]rogram or activity” encompasses “all of the operations of” IHEs, 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 IHE.** (p. 30202).

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

a) Factors such as whether the IHE funded, promoted, or sponsored the event or circumstance where the alleged harassment occurred . . . may be helpful or useful for IHEs to consider . . . to determine the scope of an IHE’s program or activity, [but] no single factor is determinative. (p. 30197).

b) For example, a teacher’s sexual harassment of a student is likely to constitute sexual harassment “in the program” of

the school even if the harassment occurs off campus. (p. 30198).

- c) As another example, a student using a personal device to perpetrate online sexual harassment during class time may constitute a circumstance over which the IHE exercises substantial control. (p.30202).
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). (p. 30196).
- a) Please note re: officially recognized student organizations:
 - (i) 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 IHE's Title IX obligations will depend on whether the IHE 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 IHE. (p 30197).
 - (ii) 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 IHE'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. (p. 30197).

II. Considerations when the alleged sexual harassment occurs both in and outside of the education program or activity:

- A. In situations involving some allegations of conduct that occurred in an education program or activity, and some allegations of conduct that did not, the IHE must investigate the allegations of conduct that occurred in the IHE's education program or activity. (p. 30198).

- B. Section 106.45(b)(3)(i) provides that a mandatory dismissal of allegations in a formal complaint about conduct not occurring in the IHE's education program or activity is "for purposes of title IX or [34 CFR part 106]; such dismissal does not preclude action under another provision of the IHE's code of conduct." (p. 30201).
- C. For example, if a student is sexually assaulted outside of an education program or activity, but subsequently suffers Title IX sexual harassment in an education program or activity, then these final regulations apply to the latter act of sexual harassment, and the IHE may choose to address the prior assault through its own code of conduct. Nothing in the final regulations prohibits an IHE from resolving allegations of conduct outside the IHE's education program or activity by applying the same grievance process required under § 106.45 for formal complaints of Title IX sexual harassment, even though such a process would not be required under Title IX or these final regulations. Thus, an IHE is not required by these final regulations to inefficiently extricate conduct occurring outside an education program or activity from conduct occurring in an education program or activity arising from the same facts or circumstances in order to meet the recipient's obligations with respect to the latter. (p. 30198).

4. Notifications

I. Designation of Title IX Coordinator

- A. Each IHE must designate and authorize at least one employee to coordinate its efforts to comply with Title IX responsibilities, which employee must be referred to as the Title IX Coordinator. § 106.8(a).
- B. IHE must notify applicants for admission and employment, students and all unions or professional organizations holding collective bargaining professional agreements with the IHE, of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator. § 106.8(a).
- C. IHE must prominently display contact information for the Title IX Coordinator on its website, if any, and in each handbook or catalog that it makes available to persons entitled to notification per the regulations. § 106.8(b)(2)(i).

II. Dissemination of Policy

- A. IHE must notify persons entitled to notification under these rules that the IHE does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by Title IX not to discriminate in such a manner. § 106.8(b)(1).
- B. Such notification must state that the requirement not to discriminate in the education program or activity extends to admission and employment, and that inquiries about Title IX's application may be referred to the IHE's Title IX Coordinator, the Assistant Secretary of Education, or both. § 106.8(b)(1).
- C. Colorado law also has notice and posting requirements for IHE's Title IX policies. *See generally* § 23-5-146, C.R.S.

III. Grievance Procedures

- A. IHE must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by Title IX and a grievance process that complies with Title IX's requirements for formal complaints as defined in the regulations. § 106.8(c)

1. Grievance process must provide notice of specific items, including:
 - a) a description of the range of possible disciplinary sanctions and remedies or a list of possible disciplinary sanctions and remedies that the IHE may implement following any determination of responsibility;
 - b) a statement of 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
 - c) the procedures and permissible bases for the complainant and respondent to appeal; and
 - d) a description of the range of supportive measures available to complainants and respondents.

§ 106.45(b)(1)(vi) – (ix).

- B. IHE must provide notice of its grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond. § 106.8(c).

IV. Training Materials

- A. IHE must make its Title IX training materials publicly available on its website, or if the IHE does not maintain a website, it must make the materials available upon request for inspection by members of the public. § 106.45(b)(10).

V. Publications

- A. IHE must not use or distribute a publication stating that the IHE treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by Title IX. § 106.8(b)(2)(ii).

5. Intake and IHE Response

I. Reporting

- A. Anyone can report sex discrimination, including sexual harassment (whether or not the reporting person is the alleged victim). § 106.8(a)
- B. Both formal complaints and reports that don't qualify as "formal complaints" require IHE action.

II. Actual Knowledge and Duty to Act

- A. IHEs with actual knowledge of sexual harassment in an education program or activity of the IHE against a person in the United States must respond promptly in a manner that is not deliberately indifferent, meaning not clearly unreasonably in light of the known circumstances. § 106.44(a).

III. Which employees count as having "actual knowledge"?

- A. For postsecondary institutions, the regulations limit actual knowledge to only when a Title IX Coordinator or an official with authority to take corrective measures has notice. § 106.30(a).
- B. This standard is not met when the only official of the IHE with actual knowledge is the respondent. § 106.30(a).
- C. 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 IHE. §106.30(a).
- D. Determining whether an employee is an official with authority to institute corrective measures depends on the IHE's operational structure and the employee's roles and duties. (p. 30039).

IV. General Obligations

- A. IHE response must treat complainants and respondents equitably. § 106.44(a).
- B. Burden of proof and burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the IHE, not the parties. § 106.45(b)(5)(i).

- C. IHE must follow Title IX grievance process before imposing disciplinary sanctions or other actions that are not supportive measures against a respondent. § 106.44(a).
- D. Regulations require “reasonably prompt time frames.” § 106.45(b)(1)(v)
 - 1. Colorado statute requires good faith effort to complete the adjudication process, exclusive of appeals, within an average of sixty to ninety days. § 23-5-146(3)(d)(I), C.R.S.
- E. IHE may need to undertake some degree of investigation or inquiry at outset to determine whether allegations fall under scope of Title IX.

V. Initial Response to Report of Sexual Harassment

- A. Upon receipt of a report of sexual harassment falling within the scope of Title IX from anyone, Title IX Coordinator must:
 - 1. Contact complainant to discuss availability of supportive measures, with or without a formal complaint;
 - 2. Consider complainant’s wishes with respect to supportive measures; and
 - 3. Explain to complainant the process for filing a formal complaint.

§ 106.44(a).

VI. Formal Complaints

Formal complaint triggers IHE’s obligation to initiate formal grievance process. § 106.44(b)(1). To be a formal complaint, a report must:

- A. Allege sexual harassment;
- B. Be made by a person (or the parent of a person) who: (1) allegedly experienced the conduct complained of, and (2) is participating or attempting to participate in a program or activity;
- C. Be a document filed by a complainant or signed by a Title IX Coordinator;
- D. Be made “against a respondent”; and

- E. Request an investigation.

VII. Reports covered by Title IX but without a formal complaint

When a complainant has not made a formal complaint, yet the alleged conduct falls under Title IX, the Title IX Coordinator must either:

- A. Close the report – if, for example the complainant does not want an investigation; or
- B. Sign a formal complaint and initiate the Title IX grievance process.
 - 1. Some circumstances may require the Title IX Coordinator to initiate an investigation and adjudication of allegations in order to protect the IHE’s educational community or otherwise avoid being deliberately indifferent to known sexual harassment. (p. 30132).

VIII. Notifications required after a formal complaint made

- A. Notice of the IHE’s grievance process that complies with this section, including any informal resolution process.
- 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:
 - 1. the identities of the parties involved in the incident, if known,
 - 2. the conduct allegedly constituting sexual harassment under § 106.30,
 - 3. and the date and location of the alleged incident, if known.
- C. The written notice must also:
 - 1. 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.
 - 2. 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.

3. inform the parties of any provision in the IHE's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

- D. If, in the course of an investigation, the IHE decides to investigate allegations about the complainant or respondent that fall within the scope of Title IX and 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)(2)(i)(A), (B), and (ii).

IX. Mandatory Dismissal

Must dismiss a complaint from Title IX process if the alleged conduct:

- A. would not constitute sexual harassment as defined in the regulations;
- B. did not occur in the IHE's education program or activity; OR
- C. did not occur against a person in the United States.

§ 106.45(b)(3)(i).

X. Discretionary Dismissal

May dismiss a complaint from the Title IX process, at any time, if:

- A. complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein;
- B. the respondent is no longer enrolled or employed by the IHE; or
- C. specific circumstances prevent the IHE from gathering evidence sufficient to reach a determination.

§ 106.45(b)(3)(ii).

XI. Dismissal Requirements

Upon dismissal from Title IX process, IHE must:

- A. promptly send written notice of dismissal and the reason to both parties, and
- B. offer an appeal based on procedural irregularity, new evidence, or conflict of interest/bias.

§ 106.45(b)(3)(iii).

XII. Discretion to Address non-Title IX Misconduct Pursuant to IHE's Community Standards

Dismissal from Title IX proceeding does not preclude action under another provision of the IHE's code of conduct. § 106.45(b)(3)(i).

6. Supportive Measures

I. Definition of Supportive Measures:

- A. §106.30(a) defines “supportive measures” as: nondisciplinary, 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.
- B. Designed to restore or preserve equal access to the IHE’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the IHE’s educational environment, or deter sexual harassment.
- C. Supportive measures may include:
 - 1. counseling,
 - 2. extensions of deadlines or other course-related adjustments,
 - 3. modifications of work or class schedules,
 - 4. campus escort services,
 - 5. mutual restrictions on contact between the parties,
 - 6. changes in work or housing locations,
 - 7. leaves of absence,
 - 8. increased security and monitoring of certain areas of the campus, and
 - 9. other similar measures.

II. Responsibility for offering/coordinating supportive measures.

- A. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures. (p. 30310).

III. Disclosure of available supportive measures.

- A. The IHE's grievance process must describe the range of supportive measures available to complainants and respondents. §106.45(b)(1)(ix).

IV. When supportive measures must be offered.

- A. Supportive measures must be offered with **or** without a formal complaint. No written document is required to put a school on notice (i.e., convey actual knowledge) of sexual harassment triggering the IHE's response obligations under § 106.44(a). (p. 30267). The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, 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).

- B. Process is intended to be interactive: The process for offering supportive measures after considering the complainant's wishes is an interactive process that is not unlike the interactive process that the ADA (Americans with Disabilities Act) requires. (p. 30494).

V. Supportive measures must be offered to complainants and may be offered to respondents:

- A. The final regulations require IHEs to offer supportive measures to complainants and permit IHEs to offer supportive measures to respondents. (p. 30230).

VI. Regulations do not require disclosure of available off-campus supportive resources:

- A. The Department declines to require IHEs to list off-campus supportive resources for complainants, respondents, or both, though the final regulations do not prohibit an IHE from choosing to do this. (p. 30245).

VII. Considerations when offering supportive measures:

- A. The Title IX Coordinator must consider the complainant's wishes. § 106.44(a).

- B. Supportive measures do not have to be “proportional to the harm alleged” or constitute the “least burdensome measures” possible. (p. 30183).
- C. However, supportive measures cannot impose an **unreasonable** burden on the other party. (p. 30181). Considerations when examining the burdens on parties:
1. **Unreasonable burden applies to access to all educational opportunities and benefits:** Whether a supportive measure meets the § 106.30 definition also includes analyzing whether a respondent’s access to the array of educational opportunities and benefits offered by the IHE is unreasonably burdened. Changing a class schedule, for example, may more often be deemed an acceptable, reasonable burden than restricting a respondent from participating on a sports team, holding a student government position, participating in an extracurricular activity, and so forth. (p. 30182).
 2. **Supportive measures should not amount to sanctions:** If an IHE has listed ineligibility to play on a sports team or hold a student government position, for example, as a possible disciplinary sanction that may be imposed following a determination of responsibility, then the IHE may not take that action against a respondent without first following the § 106.45 grievance process. (p. 30182).
 3. **Give consideration to the scope of supportive measures:** For instance, where both parties are athletes and sometimes practice on the same field, consideration must be given to the scope of a no-contact order that deters sexual harassment, without unreasonably burdening the other party, with the goal of restricting contact between the parties without requiring either party to forgo educational activities. It may be unreasonably burdensome to prevent respondents from attending extra-curricular activities that a IHE offers as a result of a one-way no contact order prior to being determined responsible; similarly, it may be unreasonably burdensome to restrict a complainant from accessing campus locations in order to prevent contact with the respondent. (p.30184).
 4. **One-way no contact order may be appropriate in limited circumstances:** §106.30 does not mean that one-way no-contact

orders are never appropriate. A fact-specific inquiry is required into whether a carefully crafted no-contact order restricting the actions of only one party would meet the § 106.30 definition of supportive measures. For example, if an IHE issues a one-way no-contact order to help enforce a restraining order, preliminary injunction, or other order of protection issued by a court, or if a one-way no-contact order does not unreasonably burden the other party, then a one-way no contact order may be appropriate. . . . (p. 30184).

VIII. Documentation required for supportive measures:

- A. **IHE must document supportive measures provided:** For each response required under § 106.44, an IHE 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. § 106.45(b)(10)(i).
- B. **IHE must document when no supportive measures provided:** If an IHE does not provide a complainant with supportive measures, then the IHE must document the reasons why such a response was not clearly unreasonable in light of the known circumstances under §106.45(b)(10)(ii). (p. 30189).

IX. Supportive measures must be kept confidential:

- A. The IHE 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 IHE to provide the supportive measures. § 106.30.

X. Length of supportive measures:

- A. IHEs retain discretion as to whether to continue supportive measures even after a determination of non-responsibility. (p. 30183).

XI. Supportive measures when an IHE has no jurisdiction:

- A. Nothing in the final regulations prevents IHEs from initiating a student conduct proceeding or offering supportive measures to address sexual harassment against a person outside the United States. (p. 30206).

XII. Although not included in the regulations as supportive measures, the regulations allow emergency removal and administrative leave as potential actions an IHE may take in response to a formal complaint:

A. Emergency removal: Nothing precludes an IHE from removing a respondent from the IHE's education program or activity on an emergency basis, provided that the IHE 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).

- Please note:

- a) This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.

B. Administrative leave: These regulations do not preclude IHEs from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with these regulations.

- Please note:

- a) This provision shall not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 (Section 504) or the Americans with Disabilities Act (ADA). Thus, administrative leave may occur, but only to the extent that it conforms with the requirements of Section 504 and the ADA. See §106.44(d).

- b) Administrative leave for non-student employees during the pendency of an investigation under § 106.45 could be with pay (or benefits) or without pay (or benefits). (p. 30326).

- c) Administrative leave for student-employees is not necessarily prohibited if the leave does not violate other regulatory provisions. Administrative leave may jeopardize a student-employee's access to educational benefits and opportunities in a way that a non-student employee's access to education is not jeopardized. Accordingly, administrative leave is not always appropriate for student-employees. (p. 30237).

7. Informal Resolutions

I. When can an IHE use an informal resolution process to resolve Title IX complaints?

- A. An IHE can use informal resolution when **all of the following** are true
 - 1. A formal complaint has already been filed. § 106.45(b)(9).
 - 2. The complaint **does not** allege that an employee sexually harassed a student. *Id.* (§ 106.45(b)(9)(iii)).
 - 3. Both parties provide voluntary, written consent to an informal resolution. *Id.* (§ 106.45(b)(9)(ii)).
 - 4. The IHE gives the parties a written notice disclosing the allegations and the requirements of the informal process. *Id.* (§ 106.45(b)(9)(i)).

II. What does an informal resolution process entail?

- A. Informal resolutions can include mediation, arbitration, restorative justice, or other strategies. (p. 30401). The regulations intentionally do not define “informal resolution” in order to provide IHEs with flexibility. *See id.* Informal resolutions do not require live hearings or cross-examinations, which may make them desirable when there are no factual disputes between the parties about the underlying incident(s). (p. 30329).
- B. Advisor participation: The regulations do not require IHEs to allow the parties to confer with an advisor before entering an informal resolution process, or require IHEs to provide the parties with advisors before entering an informal resolution process. (p. 30402).

III. What other restrictions are there on informal resolution?

- A. An IHE may **not** condition enrollment, employment, or any other right of students or employees on agreeing to an informal process. *Id.* (§ 106.45(b)(9)). At any time prior to agreeing to a resolution, either party has the right to withdraw from the informal process and resume the formal grievance process with no consequences. (p. 30575; §106.45(b)(9)(i)).

IV. Who can facilitate an informal process?

- A. The regulations do not require IHEs to have more than one person facilitating an informal process. *Id.* at 30372. These facilitators can be third party providers, and do not have to sign MOUs with the IHE. *Id.* at 30405. All facilitators are subject to the same training and impartiality requirements as are an IHE's Title IX Coordinators, investigators, and other decision-makers. (p. 30575; §106.45(b)(1)(iii)).

V. What sanctions can an IHE impose after an informal process?

- A. An IHE can impose any disciplinary consequence after an informal process that they could also impose in a formal process, including expulsion. *See id.* at 30405. However, the respondent may withdraw from the informal process at any point, and can thus choose to begin or resume a formal process instead of agreeing to a particular sanction. (p. 30407).

VI. Can facilitators of informal processes serve as witnesses in subsequent formal grievance processes?

- A. Yes, as long as this possibility is disclosed to the parties in the written notice prior to the informal process beginning. (p. 30401).
- B. However, IHEs may also want to consider Colorado state law concerning the confidentiality of mediation communications. § 13–22–307, C.R.S. protects certain mediation communications as confidential, unless specific exceptions are met. One exception is when all parties and the mediator consent in writing to a subsequent disclosure. *Id.*

8. Relevance

The new regulations contain requirements about relevant evidence. But they do not explicitly define the term relevance. Generally, the regulations require that investigators and decision-makers objectively evaluate all relevant evidence, inculpatory and exculpatory, whether obtained by the IHE from a party or another source. (p. 30105).

A policy statement from DOE explains:

“The § 106.45 grievance process is designed to bring all relevant evidence concerning sexual harassment allegations to the decision-maker’s attention so that a determination regarding responsibility is reached fairly and reliably.” (p. 30226).

I. What do the words “inculpatory” and “exculpatory” mean?

- A. Title IX does not define these words.
- B. Black’s Law Dictionary definitions:
 - 1. inculpatory evidence: evidence showing or tending to show one’s involvement in a crime or wrong.
 - 2. exculpatory evidence: evidence tending to establish a criminal defendant’s innocence.

II. What does “relevance” mean?

- A. Merriam Webster Definition
 - 1. affording evidence tending to prove or disprove the matter at issue or under discussion.
- B. Legal Definition in Federal Rules of Evidence
 - 1. “Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Federal Rule of Evidence Rule 401.
- C. Relevance under Title IX
 - 1. Title IX regulations do not define relevance. But the preamble explains relevant evidence as “evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true.” (p. 30294).

2. The following guidance on relevance also appears in the preamble:
 - a) Different Evidence for Different Circumstances: Type and extent of evidence available will differ based on the facts of each incident. (p. 30247).
 - b) The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied. (p. 30247, fn. 1018).
 - c) A layperson's determination that a question is not relevant is made by applying logic and common sense, but not against a backdrop of legal expertise. (p. 30343).
 - d) Objective or corroborating evidence is not required. Some situations have no eyewitnesses and completing plausible narratives. Such situations still must be evaluated through objective evaluation of relevant evidence regardless of whether the available relevant evidence consists of the parties' own statements, statements of witnesses, or other evidence. (p. 30247).

III. Title IX excludes certain types of evidence and questions as *not relevant*:

A. Rape Shield Provisions

1. All questions and evidence of a complainant's sexual predisposition are irrelevant, with no exceptions;
2. Questions and evidence about a complainant's prior sexual behavior are irrelevant, unless:
 - a) The questions and evidence are offered to prove that someone other than the respondent committed the conduct alleged; or
 - b) 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.

§ 106.45(b)(6)(i).

IV. What do the terms sexual predisposition and prior sexual behavior mean?

A. The regulations do not define these terms. But the preamble explains that Title IX’s rape shield provisions are patterned after Federal Rule of Evidence 412. And the preamble references Rule 412’s Advisory Committee Notes to explain the scope of the rape shield provisions:

1. Sexual behavior connotes all activities that involve actual physical conduct, i.e., sexual intercourse and sexual contact, or that imply sexual intercourse and sexual contact, including the victim’s use of contraceptives, evidence of the birth of a child, and sexually transmitted diseases. Sexual behavior also includes “the behavior of the mind.”
 - a. Behavior of the mind includes “fantasies or dreams.” Federal Rule of Evidence 412; *Herchenroeder v. Johns Hopkins Univ. Applied Physics Lab.*, 171 F.R.D. 179, 181 (D. Md. 1997).
2. Sexual predisposition includes the victim’s “mode of dress, speech, or lifestyle.”

(p. 30350, fn. 1343 *citing* Advisory Committee Notes, Federal Rule of Evidence 412).

V. Bar Against Other Types of Evidence

A. Title IX bars the following types of evidence as irrelevant or otherwise excluded from consideration in a grievance process:

1. information protected by a legally recognized privilege, unless waived, § 106.45(b)(1)(x);
2. any party’s medical, psychological, and similar records unless the party has given voluntary, written consent, § 106.45(b)(5)(i); and
3. statements of a party or witness who has not been subjected to cross-examination at a live hearing. § 106.45(b)(6)(i).

(p. 30293, fn. 1147).

VI. Major Areas with Relevance Considerations

- A. Grievance process generally
- B. Investigation

- C. Hearing/cross-examination
- D. Appeal
- E. Training
- F. Effect of IHE violation of relevance rules

VII. Excerpts from New Title IX Rules

A. Grievance Process Generally

- 1. The grievance process must 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. § 106.45(b)(1)(ii).

B. Investigation

- 1. Parties must have 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: (1) the evidence upon which the IHE does not intend to rely in reaching a determination regarding responsibility and (2) inculpatory or exculpatory evidence whether obtained from a party or other source. § 106.45(b)(3)(vi). [emphasis added]

- a) “Directly Related” does not mean the same thing as “Relevant”: “Directly Related” may encompass a broader universe of evidence than evidence that is “relevant.” (p. 30304).
- b) “Directly Related” Definition: The Department declines to define certain terms in this provision such as . . . “evidence directly related to the allegations,” as these terms should be interpreted using their plain and ordinary meaning.” (p. 30304).
- c) Investigator’s production of evidence: investigator must provide all evidence that relates¹ to the allegations and

¹ The regulations say “directly relates” but the preamble omits the word “directly” in this comment.

should not screen out related evidence that the investigator does not believe is relevant. (p. 30304).

- (i) But, an IHE has some discretion to determine what evidence is directly related to the allegations in a formal complaint. (p. 30428).
 - d) Redaction: Investigator may redact information that is not directly related to the allegations or that is otherwise barred from use under § 106.45. (p. 30304).
2. Investigator must create an investigative report that fairly summarizes relevant evidence and send the report to each party and advisor at least 10 days prior to hearing. § 106.45(b)(3)(vii).
- a) Relevant Evidence Only: All evidence summarized in the investigative report must be relevant. (p. 30304).
 - b) Redaction: May permit or require investigator to redact from the investigative report information that is not relevant. (p. 30304).
 - c) Corrections: If a party disagrees with an investigator's relevance determination, the party can make that argument in the written response to the investigative report and to the decision-maker at hearing. The decision-maker is obligated to objectively evaluate all relevant evidence and the parties have the opportunity to argue about what is relevant. (p. 30249).
3. No "Gag Orders": IHE may not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence. § 106.45(b)(5)(iii).

C. Hearing and Cross-Examination

1. At hearing, the decision-maker 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. § 106.45(b)(6)(i).

2. Only relevant cross-examination and other questions may be asked of a party or witness. § 106.45(b)(6)(i).
3. Before a party or witness answers a cross-examination or other question, the decision-maker must first determine whether the question is relevant and explain any decision to exclude a question as not relevant. § 106.45(b)(6)(i).
 - a) A decision-maker need not give a lengthy or complicated explanation of a relevancy determination; it is sufficient, for example, for a decision-maker to explain that a question is irrelevant because the question calls for prior sexual behavior information without meeting one of the exceptions in rule, or because the question asks about a detail that is not probative of any material fact concerning the allegations. (p. 30343).
4. Decision-maker is under an obligation to objectively evaluate all relevant evidence, both inculpatory and exculpatory, and must therefore independently reach a determination regarding responsibility without giving deference to the investigative report. (p. 30308).
5. Rules of Procedure and Decorum:
 - a) IHE may adopt rules that specify a process for making objections to the relevance of questions and evidence, place reasonable time limitations on a hearing, and so forth. (p. 30361).
 - (i) Or IHE may adopt a rule preventing parties and advisors from challenging relevancy determinations (after receiving the decision-maker's explanation) during the hearing. (p. 30343).
 - b) IHE may adopt and apply codes of conduct and rules of decorum to ensure that parties and advisors conduct cross-examination in a respectful and non-abusive manner, and the decision-maker remains obligated to ensure that only relevant questions are posed during cross-examination. (p. 30340).

- (i) IHE may also educate its community about what cross-examination during a Title IX grievance process will look like. (p. 30316).
 - c) IHE may adopt rules of order or decorum to forbid badgering a witness and may fairly deem repetition of the same question to be irrelevant. (p. 30248).
- 6. Rules of Evidence:
 - a) IHE may not adopt evidentiary rules of admissibility that contravene those evidentiary requirements prescribed under § 106.45. For example, an IHE may not adopt a rule excluding relevant evidence because it may be unduly prejudicial, concern prior bad acts, or concern character evidence. (p. 30248).
 - (i) Where evidence is relevant but concerns a party's character or prior bad acts, the decision-maker may objectively evaluate that evidence by analyzing whether it warrants a high or low level of weight or credibility. (p. 30337).
 - b) IHE may not adopt rules barring certain types of relevant evidence, e.g. lie detector test results or rape kits. (p. 30294).
 - c) Where evidence is duplicative of other evidence, a recipient may deem the evidence not relevant. (p. 30361).

D. Appeal

- 1. Grounds for appeal may involve relevance.
 - a) Parties may appeal erroneous relevance determinations, if they affected the outcome. (p. 30343).
 - b) Procedural irregularity, as grounds for appeal, could include an IHE's failure to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence. (p. 30249).

E. Training

1. IHE must ensure that decision-makers receive training 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. § 106.45(b)(1)(iii).
2. IHE must ensure that investigators receive training on issues of relevance to create investigative report that fairly summarizes relevant evidence. § 106.45(b)(1)(iii).

F. Effect of IHE violation of relevance rules

1. Upon review, OCR may independently determine that evidence deemed relevant by the decision-maker was in fact irrelevant and should not have been relied upon. Such a violation may result in an IHE's determination regarding responsibility being set aside by OCR. (p. 30221).

9. INVESTIGATIONS/INVESTIGATIVE REPORTS

I. Standard of review and the importance of investigations in decisions

- A. Burden of proof to collect information is on the IHE.
- B. Inspect and review any evidence directly related to allegations.

II. Relevance Considerations

- A. Directly Related vs. Relevant. *See also* Section 8 on Relevance.

III. Possible uses of investigative reports

- A. The decision-maker may use them in reaching their conclusion.
 - But please note, the decision-maker must make a determination regarding responsibility without giving deference to the investigative report. (p. 30314).
- B. IHE, Complainants, or Respondents may use them in a grievance hearing.
- C. Complainants or Respondents may use them as exhibits if they file an appeal, lawsuits for discrimination, federal civil rights claim, or other litigation.
- C. The IHE may use them as exhibits in its defense of those lawsuits.
- E. If Respondent is an employee, could be used in a personnel action.

IV. Who should do the investigation?

- A. The investigator should be:
 - 1. Objective and impartial. If there is a relationship or bad blood between the chosen investigator and any party or witness, assign it to another investigator. This is also true if there is a supervisory or evaluative relationship between a party and the investigator.
 - 2. Familiar with the Title IX regulations and the IHE's rules, policies, and procedures.

3. Trained in conducting the type of investigation required by the Title IX grievance process.
4. Able to maintain confidentiality, as appropriate.
5. Detailed and organized. Able to accurately report the parties' and witnesses' statements.

V. Planning the investigation

- A. Must provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and any other inculpatory and exculpatory evidence. § 106.45(b)(5)(ii).
- B. Find out whether the investigation should follow up on additional allegations or complaints that are discovered in the course of the investigation, or whether the investigation should be confined only to the original issue.
 1. If, in the course of an investigation, the IHE decides to investigate allegations about the complainant or respondent that fall within the scope of the sexual harassment policy and are not included in the notice provided pursuant to §106.45(b)(2)(i)(B), the IHE must provide notice of the additional allegations to the parties whose identities are known. §106.45(b)(2)(B)(ii).
 2. IHE does have the ability to 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. §106.45(b)(4).
- C. Collect the available background information (formal complaint, emails, other documents; applicable IHE policies and procedures; reports of prior complaints or investigations involving the same individuals or similar claims, etc.) and review before beginning to interview witnesses.
- D. Remember that certain information cannot be accessed without consent: An IHE 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 IHE obtains that party's voluntary, written consent. § 106.45(b)(5)(i).

VI. Conducting the investigation

- A. Deciding whom to interview.
- B. Providing notice to parties of interviews: IHE must provide parties with written notice of investigative interviews with sufficient time for the party to prepare and participate. §106.45(b)(5)(v).
- C. Conducting the interviews.
 - 1. Types of questions to ask
 - 2. Demeanor toward interviewees
 - 3. Alternatives for preserving a record of the interview
 - 4. Cautions about promising confidentiality
 - 5. Cautions about promising certain results
 - 6. Avoiding assumptions
 - 7. Presuming a conclusion
 - 8. Failing to show your work
 - 9. Avoiding personal bias
- D. Representation at the interviews. Parties have the right to be accompanied by an advisor of their choice, but the IHE can place restrictions on the extent to which the advisor can participate, so long as the restrictions apply equally to both parties § 106.45(b)(3)(iv).
- E. Remember that an IHE cannot restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence. § 106.45(b)(3)(iii).

- F. IHE must provide directly related evidence to the parties prior to completion of investigative report:
1. Must 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 IHE 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 the conclusion of the investigation. § 106.45(b)(5)(vi).
 2. Prior to completion of the investigative report, the IHE 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. *Id.*
 3. The IHE 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. *Id.*

VII. Writing the report

- A. What to put in/leave out of the report: report must fairly summarize the relevant evidence. §106.45(b)(5)(vii).
- B. Cautions about including recommendations or conclusions in the report.
- C. Regulations require: At least 10 days prior to a hearing...the IHE must 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(b)(5)(vii).

10. Hearings

I. Live Hearing

- A. IHEs must provide for a live hearing. § 106.45(b)(6)(i). The requirement for a live hearing cannot be waived by the IHE or by one or both parties. (p. 30360).
- B. Live hearings may be conducted with all parties physically present in the same geographic location or, at the IHE's discretion or the request of either party, 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. *Id.*
- C. The live hearing must be recorded or transcribed: IHEs must create an audio or audio visual recording, or transcript, of any live hearing and make it available to the parties for inspection and review. *Id.*

II. Written notice of the hearing

- A. IHE must provide written notice of the date, time, location, participants, and purpose of all hearings. § 106.45(b)(5)(v).

III. No rights to subpoenas or pre-hearing depositions

- A. No subpoenas or pre-hearing depositions allowed: [P]arties are not granted the right to depose parties or witnesses, nor to invoke a court system's subpoena powers to compel parties or witnesses to appear at hearings, which are common features of procedural rules governing litigation and criminal proceedings. (p. 30306).

IV. Advisors

- A. Parties have the right to an advisor of their choice, who may be, but does not have to be, an attorney. § 106.45(b)(3)(iv).
- B. An advisor must be provided to conduct cross examination if a party does not have an advisor to attend the hearing: If a party does not have an advisor present at the live hearing, the IHE must provide without fee or charge to that party, an advisor of the IHE's choice, who may be, but is not required to be, an attorney, to conduct cross examination on behalf of that party. (p. 30342).

- C. Only an advisor can conduct cross examination: At the live hearing, each party's advisor must be permitted to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. § 106.45(b)(6)(i).
- D. Role of advisor: Other than allowing the advisor to conduct cross examination, an IHE 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)(5)(iv).
- E. Advisors may conduct direct examination: For example, whether advisors also may conduct direct examination is left to an IHE's discretion. (p.30342).
- F. An attorney advisor is not required: An IHE may fulfill its obligation to provide an advisor for a party to conduct cross examination at a hearing without hiring an attorney to be that party's advisor, and that remains true regardless of whether the other party has hired a lawyer as an advisor of choice. (p. 30341).

V. Decision-Makers

- A. The decision-maker(s) . . . cannot be the same person(s) as the Title IX Coordinator or the investigator(s). § 106.45(b)(7).
- B. Right and responsibility to ask questions: The decision-maker has the right and responsibility to ask questions and elicit information from parties and witnesses on their own initiative to aid the decision-maker in obtaining relevant evidence both inculpatory and exculpatory, and the parties also have equal rights to present evidence in front of the decision-maker so the decision-maker has the benefit of perceiving each party's unique perspectives about the evidence. (p. 30331).
- C. Must determine relevancy of each question asked: 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. §106.45(b)(6)(i).
- D. Must objectively evaluate relevant evidence: The decision-maker is under an obligation to objectively evaluate all relevant evidence both inculpatory and exculpatory, and must therefore independently reach a

determination regarding responsibility without giving deference to the investigative report. (p. 30314).

- E. Hearing Officer vs. Decision Maker: IHEs have discretion to decide whether to have a hearing officer (presumably to oversee or conduct a hearing) separate and apart from a decision-maker, and the final regulations do not prevent the same individual serving in both roles. (p. 30372).

VI. Support Persons

- A. Because of the confidentiality requirements under §106.71(a), unless required by law, a party **cannot** have a person other than their advisor attend the hearing. (p. 30499).
- B. But, who may be “required by law” to attend with a party? If a party has a disability, IHEs must comply with disability laws that may require accommodations. Thus, a person assisting a party with a disability, or a language interpreter, may accompany a party to the hearing without violating § 106.71(a) because such a person’s presence at the hearing is required by law and/or necessary to conduct the hearing. (p. 30339).

VII. Rules of Decorum

- A. IHEs may adopt and apply codes of conduct and rules of decorum to ensure that parties and advisors, including assigned advisors, conduct cross-examination questioning in a respectful and non-abusive manner. The decision-maker remains obligated to ensure that only relevant questions are posed during cross-examination. (p. 30340).
- B. If a party’s provided advisor, or advisor of choice, refuses to comply with an IHE’s rules of decorum (for example, by insisting on yelling at the other party), the IHE may provide that party with a different advisor to conduct cross-examination on behalf of that party. (p. 30342).

VIII. Standards of Evidence

- A. Under §106.45(b)(1)(vii), an IHE may use either:

1. Clear and Convincing: Not formally defined. Preamble refers to: having confidence that a conclusion is based on facts that are highly probable to be true. (p. 30386).

or

2. Preponderance of the Evidence: Not formally defined. Preamble refers to: concluding that a fact is more likely than not to be true. (p. 30373).

B. Although IHE can use either standard, the IHE must use same standard of evidence for all formal complaints of sexual harassment, and must use the same standard of evidence for formal complaints against both students and employees. § 106.45(b)(1)(vii).

- ***Please note:*** IHEs may want to consider Colorado state law, which provides that IHEs must use a preponderance of the evidence standard when the student is a respondent. *See* § 23-5-146(3)(d)(II), C.R.S.

C. Corroborating evidence is not required: Neither the preponderance of the evidence standard, nor the clear and convincing evidence standard, requires corroborating evidence. (p. 30381, fn. 1441).

IX. Equal Opportunity to Present Evidence, Including Expert Testimony

A. IHE must provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, (which may include investigators), and other inculpatory and exculpatory evidence as part of the investigation, even if the IHE believes that refusing to do so was not clearly unreasonable. (p. 30213).

X. IHE can also present evidence

A. Although IHE is not a party to the proceeding, this does not prevent the IHE from presenting evidence to the decision-maker, who must then objectively evaluate relevant evidence (both inculpatory and exculpatory) and reach a determination regarding responsibility (p. 30291). ** Please note that the IHE, not the complainant or respondent, has to meet the standard of evidence.

XI. Cross-Examination

- A. 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. § 106.45(b)(6)(i).
- B. Cross-examination **cannot** be done through written questions: the final regulations clarify that submission of written questions, even during a live hearing, is not compliant with § 106.45(b)(6)(i). (p. 30335).

XII. Failure to Submit to Cross-examination

- A. 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)(6)(i).
 - 1. Includes prior statements in emails, text chains, police reports, SANE reports, medical records, etc. (p. 30349).
 - 2. Applies even in the case of death or disability. (p. 30348).
- B. Exceptions: Some exceptions to general rule regarding failure to submit to cross examination:
 - 1. Video evidence: Where a complainant refuses to answer cross-examination questions, but video evidence exists showing the underlying incident, a decision-maker may still consider the available evidence and make a determination. (p. 30328). This exception does not apply to statements made within the video. *Id.*
 - 2. Statements themselves = sexual harassment: A respondent's alleged verbal conduct, that itself constitutes the sexual harassment at issue, is not the respondent's "statement" as that word is used in § 106.45(b)(6)(i), because the verbal conduct does not constitute the making of a factual assertion to prove or

disprove the allegations of sexual harassment; instead, the verbal conduct constitutes part or all of the underlying allegation of sexual harassment itself. For example, where a complainant alleges that the respondent said to the complainant: “If you go on a date with me, I’ll give you a higher grade in my class,” and at the postsecondary institution’s live hearing, the respondent does not submit to cross-examination, then § 106.45(b)(6)(i) does not preclude the decision-maker from relying on the complainant’s testimony that the respondent said those words to the complainant. *See* OCR Blog 20200522, available at <https://www2.ed.gov/about/offices/list/ocr/blog/index.html>.

XIII. Relevancy Determinations

- A. *Please see* Section 8 on Relevance.

XIV. Other Evidentiary Issues

- A. The regulations do not speak to admissibility of hearsay, prior bad acts, character evidence, polygraph (lie detector) results, standards for authentication of evidence, or similar issues concerning evidence, but the final regulations require IHEs to gather and evaluate relevant evidence. (p. 30247).
- B. Relevance is the standard that the final regulations require, and any evidentiary rules that an IHE chooses must respect this standard of relevance. **For example, an IHE may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence.** (p. 30248).
- C. IHE cannot 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)(1)(x).

XV. Credibility Determinations

- A. Admissible, relevant evidence must be evaluated for weight or credibility by an IHE’s decisionmaker. (p. 30294).

- B. The degree to which any inaccuracy, inconsistency, or implausibility in a narrative provided by a party or witness should affect a determination regarding responsibility is a matter to be decided by the decision-maker, after having the opportunity to ask questions of parties and witnesses, and to observe how parties and witnesses answer the questions posed by the other party. (p. 30313).
- C. A party's answers to cross-examination questions can and should be evaluated by a decision-maker in context, including taking into account that a party may experience stress while trying to answer questions. Because decision-makers must be trained to serve impartially without prejudging the facts at issue, the final regulations protect against a party being unfairly judged due to inability to recount each specific detail of an incident in sequence, whether such inability is due to trauma, the effects of drugs or alcohol, or simple fallibility of human memory. (p. 30323).

XVI. Determination of Responsibility

- A. A decision-maker must issue written determination regarding responsibility. § 106.45(b)(7)(i).
- B. Under §106.45(b)(7)(ii), the written determination must include:
 - 1. Identification of the allegations potentially constituting sexual harassment as defined in § 106.30.
 - 2. 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.
 - 3. Findings of fact supporting the determination;
 - 4. Conclusions regarding the application of the IHE's code of conduct to the facts;
 - 5. A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility,

any disciplinary sanctions the IHE imposes on the respondent, and whether remedies designed to restore or preserve equal access to the IHE's education program or activity will be provided by the IHE to the complainant; and

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

C. The written determination does **not** need to include: an evaluation of contradictory facts, exculpatory evidence, "all evidence" presented at a hearing, or how credibility assessments were reached. (p. 30389).

11. Technology for Virtual Hearings

I. Practice Tips for Virtual Hearings

- A. Know how to share content/screen to show exhibits.
- B. Know how to control the mute settings.
- C. Know how to record the hearing if necessary, as the regulations require the hearing to be recorded or transcribed.
- D. If platform allows, know how to put participants in a lobby or waiting area, as needed.
- E. Consider having an advance test of the technology with participants.
- F. Consider having parties submit and/or exchange potential exhibits in advance of the hearing.
- G. Encourage participants to participate in a location that has strong internet connection, is private and quiet, and has adequate lighting.
- H. Encourage participants to silence computer and telephone notifications during the hearing.

II. User Guides/Tutorials:

- A. Many digital platforms have online guides/tutorials, but also consider partnering with the IHE's IT department for specific questions and follow-up. See for example:
 - Cisco Webex: https://www.cisco.com/c/en/us/td/docs/collaboration/CWMS/4_0/User_Guide/cwms_b_user-guide-cwms-4-0.pdf
 - Zoom: <https://support.zoom.us/hc/en-us>.
 - Microsoft Teams: <https://support.microsoft.com/en-us/office/microsoft-teams-video-training-4f108e54-240b-4351-8084-b1089f0d21d7>.
 - Google Hangouts: <https://support.google.com/hangouts/?hl=en#topic=6386417>.

12. Appeals

I. Mandatory Opportunity for Appeals

- A. IHEs must allow both parties to appeal:
 - 1. a determination regarding responsibility
 - 2. a dismissal of a formal complaint

§ 106.45(b)(8).

- B. The regulations suggest that informal resolution agreements should be treated as binding contracts and are not appealable. (§ 106.45(b)(9), p. 30405).

II. Grounds for Appeal

- A. Either party can appeal a determination or dismissal on the following grounds:
 - 1. procedural irregularity that affected the outcome of the matter;
 - a. Procedural irregularity could include an IHE's failure to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence. (p. 30249).
 - b. Parties may appeal erroneous relevance determinations, if they affected the outcome, under the right to appeal on grounds of procedural irregularity. (p. 30343).
 - c. For example, if an IHE dismisses a formal complaint because the IHE concludes that the misconduct alleged does not meet the definition of sexual harassment, a party might appeal the mandatory dismissal by asserting procedural irregularity on the basis that the alleged conduct in fact does meet the definition of sexual harassment, and thus mandatory dismissal was inappropriate. (p. 30294).
 - 2. new evidence that was not reasonably available at the time the determination was made that could affect the outcome of the matter; or

3. Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias for or against one of the parties that affected the outcome of the matter.

§ 106.45(b)(8).

- B. Schools may also offer opportunity for appeal equally to both parties on additional bases. § 106.45(b)(8).

III. Grievance Process Requirements

- A. An IHE's grievance process must:
 1. include a description of the procedures and permissible bases for both parties to appeal. § 106.45(b)(1)(viii).
 2. include a reasonably prompt timeframe for filing and resolving appeals. § 106.45(b)(1)(v).
 - a) Colorado statute requiring good faith effort to complete adjudication process within average of 60 to 90 days is exclusive of appeals. § 23-5-146(3)(d)(I), C.R.S.

IV. Procedural Requirements

- A. For all appeals, an IHE must:
 1. notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
 2. ensure that the decision-maker for the appeal is not the same person as the decision-maker that reached the determination regarding responsibility or dismissal, the investigator, or the Title IX Coordinator;
 3. ensure that the decision-maker for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of section 106.45, i.e., the training requirements and prohibitions against conflicts of interest and bias;
 4. give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
 5. issue a written decision describing the result of the appeal and the rationale for the result; and

6. provide the written decision simultaneously to both parties.

§ 106.45(b)(8).

V. Additional Considerations for Appeals.

- A. The rules leave to an IHE's discretion whether the severity or proportionality of sanctions is an appropriate basis for appeal, but any such appeal offered by an IHE must be offered equally to both parties. (p. 30396).
- B. A written determination becomes "final" only after the time period to file an appeal has expired, or if a party does file an appeal, after the appeal decision has been sent to the parties. (p. 30393).
- C. Supportive measures to maintain the status quo may need to continue during pendency of appeal. (p. 30393).
- D. IHE must maintain any records of an appeal and its result for 7 years. § 106.45(b)(10).
- E. IHE must ensure that decision-makers for appeals receive training. § 106.45(b)(1)(iii).

13. Sanctions and Remedies

I. Sanctions Upon Respondent

- A. A respondent must be sanctioned only after a fair process has determined that the respondent has perpetrated sexual harassment. (p. 30242).
- B. IHEs are not required to implement certain sanctions: The regulations do not mandate suspension or expulsion as the only appropriate sanction following a determination of responsibility against a respondent; IHEs deserve flexibility to design sanctions that best reflect the needs and values of the IHE's educational mission and community. (p. 30407).
- C. Sanctions do not have to be proportional to conduct: The regulations do not impose a standard of proportionality on disciplinary sanctions. (p. 30274).
- D. In considering sanctions, an IHE can consider mitigating circumstances: Although no type of sexual harassment, with the exception of fondling (fn. 631), depends on the intent or purpose of the respondent, the respondent's lack of comprehension that the conduct constituting sexual harassment violates the bodily or emotional autonomy and dignity of a complainant may (in an IHE's discretion) factor into the sanction decision. (p. 30144).
- E. Zero Tolerance Policies or Restorative Justice: The regulations do not preclude an IHE from adopting a zero tolerance policy, or using a restorative justice model after a determination of responsibility finds a respondent responsible. (pp. 30383, 30406).
- F. Sanctions cannot be effective until after appeal, if an appeal is made by either party: The Department believes that in order for an appeal, by either party, to be fully effective, the IHE must wait to act on the determination regarding responsibility while maintaining the status quo between the parties through supportive measures designed to ensure equal access to education. (p. 30393).

II. Remedies to Complainant

- A. IHE must provide remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent. § 106.45(b)(1)(i).
- B. Remedies must be designed to restore or preserve equal access to the IHE'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. *See* §106.45(b)(1)(i).
- C. Remedies may overlap with sanctions: For instance, the IHE may impose a unilateral no-contact order on the respondent as part of a sanction that also may constitute a remedy. (p. 30425).
- D. Remedies are not required for respondents: The Department declines to require remedies for respondents in situations where a complainant is found to have brought a false allegation. (p. 30246).
- E. Title IX Coordinator implements remedies: [W]here the final determination has indicated that remedies will be provided, the complainant can then communicate separately with the Title IX Coordinator to discuss what remedies are appropriately designed to preserve or restore the complainant's equal access to education. (p. 30520).
- F. IHEs are prohibited from disclosing remedies to respondents: Remedies (which do not directly affect the respondent) must not be disclosed to the respondent. (p. 30425). Thus, written determinations should preserve confidentiality concerning remedies as much as possible. **For instance, if an IHE wishes to change the housing arrangement of the complainant as part of a remedy, the written determination should simply state that remedies will be provided to the complainant; the complainant would then communicate separately with the Title IX Coordinator to discuss remedies.** (p. 30425).

14. Bias and Conflicts of Interest

I. Regulations require no bias or conflicts of interest:

- A. § 106.45(a) provides: An IHE's treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX.
- B. § 106.45(b)(1)(iii) provides: any individual designated by an IHE as a Title IX Coordinator, investigator, decisionmaker, or any person designated by an IHE to facilitate an informal resolution process, cannot have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.
- C. §106.45(b)(1)(iii) further provides: that all Title IX Coordinators investigators, decision-makers, and any person who facilitates an informal resolution process, must receive training on how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. In conducting Title IX proceedings, all such persons must not rely on sex stereotypes—typical notions of what men or women do or do not do—and must promote impartial investigations and adjudications of formal complaints of sexual harassment.

II. Definitions. Regulations do not define conflicts of interest or bias. Definitions from Merriam Webster include:

- A. Conflict of Interest
 - 1. a conflict between the private interests and the official or professional responsibilities of a person in a position of trust

or

 - 2. a conflict between competing duties. See <https://www.merriam-webster.com/dictionary/conflict%20of%20interest>.
- B. Bias
 - 1. an inclination of temperament or outlook; especially, a personal and sometimes unreasoned judgment. See <https://www.merriam-webster.com/dictionary/bias>.

C. Partial

1. inclined to favor one party more than the other. See <https://www.merriam-webster.com/dictionary/partial>.

III. Presence of bias is fact determinative, and should not necessarily be based on stereotypes, prior affiliations, or outcomes:

- A. Based on a reasonable person standard: Whether bias exists requires examination of the particular facts of a situation and the Department encourages IHEs to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased, exercising caution not to apply generalizations that might unreasonably conclude that bias exists. (p. 30252).
- B. Cautions against using sex-stereotypes as evidence bias: The Department cautions against applying sex-stereotypes that might unreasonably conclude that bias exists, for example assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that a male is always the perpetrator, or a woman is always the victim. (p. 30252).
- C. Cautions against using prior affiliations as evidence of bias: IHEs should also guard against disqualifications based solely on prior professional affiliations, such as a belief that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents. The training required by § 106.45(b)(1)(iii) is intended to provide Title IX personnel with the tools needed to serve impartially and without bias such that the prior professional experience of a person whom an IHE would like to have in a Title IX role need not disqualify the person from obtaining the requisite training to serve impartially in a Title IX role. (p. 30252).
- D. Cautions against evaluating bias based on outcomes: The Department cautions parties and IHEs from concluding bias, or possible bias, based solely on the outcomes of grievance processes decided under the final regulations; for example, the mere fact that a certain number of outcomes result in determinations of responsibility, or non-

responsibility, does not necessarily indicate or imply bias on the part of Title IX personnel. (p. 30252).

IV. To avoid implications of bias and conflicts of interest:

- A. Treat complainants and respondents equitably under the regulations. The regulations require IHEs to offer complainants supportive measures with or without a formal complaint. (p. 30218-9). The regulations also require IHEs to provide a presumption of non-responsibility to a respondent until a decision is rendered in the grievance process. §106.45(b)(1)(iv).
- B. Avoid sex stereotypes in an IHE's training materials, as well as its Title IX policies and procedures. (p. 30254).
- C. Treat each person as individual, not as a member of a class. The obligation under Title IX is to treat each person as an individual, not as a member of a class subject to prejudgment and prejudice on the basis of sex. Prohibited bias may also be based on race, color, or national origin.
- D. Objectively examine relevant evidence before reaching determination: Title IX personnel should objectively examine relevant evidence, and avoid prejudgment of facts, before reaching a determination on responsibility. (pp. 30214, 30252).
- E. Give both parties equal opportunity to present witnesses and evidence. (p. 30222).
- F. Continue to evaluate issues of bias and conflicts of interest throughout the grievance process: For instance, if an individual's involvement with the emergency removal process results in bias or conflict of interest for or against the complainant or respondent, § 106.45(b)(1)(iii), such bias would preclude such personnel from serving in a role during a grievance process. (p. 30235).
- G. Example of potential conduct exhibiting bias: If a Title IX Coordinator restricts a party from providing evidence, then the Title IX Coordinator would be violating these final regulations and may even have a conflict of interest or bias, as described in § 106.45(b)(1)(iii). (p. 30432).

V. What has been alleged, not necessarily proven, in past cases nationwide as evidence of bias or a conflict of interest:

- A. IHE's training materials were one-sided;
- B. IHE failed to conduct an adequate investigation and objectively pursue the evidence;
- C. IHE failed to reveal information learned during the investigation to both parties;
- D. IHE investigator advocated for certain discipline;
- E. IHE personnel made statements demonstrating favor towards complainants or respondents;
- E. IHE failed to follow its own policies;
- F. IHE failed to follow established procedures for Title IX investigations and hearings;
- G. Decision-maker was influenced by other school officials in reaching a decision;
- H. Decision-maker had professional connections with one of the party's parents.

15. Interactions with Other Laws

I. Clery Act

- A. The Clery Act, as amended by the Violence Against Women Act, requires institutions of higher education that receive federal student financial aid to disclose crime statistics and security information about sexual assault, domestic violence, dating violence, and stalking, that occur in their “Clery geography.” *See* 85 Fed. Reg. 30511 (May 19, 2020).
- B. Examples of overlaps:
1. Definitions of sexual harassment under Title IX regulations include certain Clery Act offenses. (p. 30513).
 2. The same disciplinary procedures can satisfy the Clery Act and these regulations. (p. 30523).
 3. “Campus security authorities” who have crime-reporting obligations under the Clery Act can be the same people who have obligations to initiate grievance procedures under these regulations, but need not be. *Id.*
 4. The Clery Act requires that IHEs provide lists of potential sanctions for dating violence, domestic violence, sexual assault, or stalking. *Id.* at 30512. Such lists also satisfy the requirement in these regulations to describe the range of sanctions that an IHE may impose on a party found responsible. §106.45(b)(1)(vi)).
- C. Examples of differences:
1. The Department of Education recommends having a Title IX Coordinator separate from a Clery Coordinator. (p. 30525).
 2. These regulations require information to be included in an IHE’s written determination regarding responsibility above what the Clery Act requires. (p. 30520).
 3. Clery geography may differ from the locations that are part of an “education program or activity” under these regulations. (p. 30516).

4. Emergency removal of a student under Title IX does not necessarily require an emergency notification under the Clery Act. (p. 30517).
5. Clery regulations require written explanation of rights and options to a student or employee victim of dating violence, domestic violence, sexual assault, or stalking, regardless of where the alleged offense occurred or whether it occurred in the IHE's education program or activity. 34 C.F.R. § 668.46(b)(11)(vii).

II. Family Educational Rights and Privacy Act (FERPA)

- A. FERPA gives students the right to see their educational records, prevents IHEs from otherwise disclosing those records, and applies to all IHEs that receive federal funding. FAMILY POLICY COMPLIANCE OFFICE, U.S. DEPARTMENT OF EDUCATION, FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA), go.usa.gov/xf2F6.
- B. The Department of Education believes these regulations to be consistent with FERPA, but when a true conflict exists, these regulations take precedence. (p. 30424).
- C. These regulations adopt the same standard for disclosure as FERPA.
 1. FERPA requires IHEs to disclose records "directly related to" a student, and these regulations require IHEs to disclose to the parties evidence "directly related to" allegations in a formal complaint. (p. 30423).
 2. This standard does not apply to health records, unless a party has submitted health records as evidence in an investigation, in which case the IHE can redact the records to disclose only what is "directly related to" the complaint. (p. 30427; 30576 §106.45(b)(5)(i)).
- D. IHEs may disclose that a student was found responsible in a Title IX proceeding without the student's consent under the FERPA exceptions for personally identifiable information, for example, to another IHE in relation to enrollment or transfer. (pp. 30429-30).

III. Criminal Laws

- A. While Title IX violations can overlap with criminal sexual assault laws, an IHE cannot discharge its legal obligations by referring sexual harassment allegations to law enforcement, or requiring or advising complainants to do so. (p. 30099).
- B. An IHE may delay a grievance process due to concurrent law enforcement activity in some circumstances. (p. 30099, fn.466; p. 30575; § 106.45(b)(1)(v)).
- C. An IHE's decision-maker cannot draw any inference about the responsibility of the respondent based solely on a party's choice not to appear or answer questions, including their choice to avoid self-incrimination that could be used against the respondent in a criminal proceeding. (p. 30099, fn.466; p. 30577; § 106.45(b)(6)(i)).
- D. IHEs may use evidence obtained from law enforcement in a grievance process. (p. 30099, fn.466; p. 30576; § 106.45(b)(5)(vi)).

IV. Other Laws

- A. The regulations make clear that nothing in them should be read to deprive a party of their **free speech, due process, or other constitutional rights**, including the right to remain silent (the right against self-incrimination). (p. 30573, § 106.6(d); pp. 30287-88).
- B. **Title VII** is not limited to employees and may apply to individuals other than employees. (p. 30439). And **Title IX** provides the same benefits and due process protections to employees as it does to students. (p. 30439).
- C. In grievance proceedings, IHEs must satisfy their obligations to provide auxiliary aids and services, and reasonable accommodations, under the **ADA, Section 504, and Title VI**. (pp. 30271-72).
- D. These regulations may interact with HIPAA (p. 30443), state sunshine laws (p. 30427), and state laws governing medical and counseling records. (p. 30435).