



# **Title IX Certification (Higher Education) for Investigators and Decisionmakers**

**Session 2: Developing Policies and Conducting Investigations**

**Presented by: Richard F. Verstegen**

# Overview

I

## Policies and Procedures

- Nondiscrimination Policy
- Nondiscrimination Notice
- Grievance Procedure

II

## Addressing Conduct

- Information on Conduct
- Complaints
- Grievance Procedure
- Informal Resolution
- Determination
- Appeal

III

## Conclusion

**POLICIES**

**PROCEDURES**

# Policies and Procedures

# Policies and Procedures

- Policies need to consider
  - Interaction when claims also involve other protected classes (race, disability, etc.)
  - Interaction with other state laws
  - Interaction with overlapping federal laws (Title VII)
  - Interaction with student code of conduct





# Policies and Procedures

- **Nondiscrimination Policy**
- **Notice of Nondiscrimination**
- **Grievance Procedure**
  - Complaint
  - Dismissal
  - Informal resolution
  - Grievance Procedure
  - Investigation
  - Determination
  - Appeal



# Addressing Conduct on Sex Discrimination



## Poll Question

How many sexual harassment cases do you address each year?

- Around 0 to 5
- Around 6 to 10
- Around 11-20
- More than 20



# Title IX Coordinator

- **Title IX Coordinator Requirements**
  - A Title IX Coordinator, **when notified** of conduct that reasonably may constitute sex discrimination under Title IX or this part, is required to take certain actions to promptly and effectively **end** any sex discrimination in its education program or activity, **prevent** its recurrence, and **remedy** its effects.
  - However, a Title IX Coordinator is not required to comply with this section upon being notified of conduct that may constitute sex discrimination if the Title IX Coordinator reasonably determines that the conduct as alleged **could not constitute sex discrimination** under Title IX or this part.

# Title IX Coordinator

- Title IX Coordinator Requirements

- A recipient must require its Title IX Coordinator, **when notified** of conduct that reasonably may constitute sex discrimination under Title IX or this part, **to take the following actions** to promptly and effectively **end** any sex discrimination in its education program or activity, **prevent** its recurrence, and **remedy** its effects:
  1. Treat the complainant and respondent equitably;
  2. Offer and coordinate **supportive measures**, as appropriate, for the **complainant**;
  3. **Notify the complainant**, or if the complainant is unknown, the individual who reported the conduct, **of the grievance procedures** under § 106.45, and if applicable § 106.46, and the **informal resolution process**, if available and appropriate;
  4. Regardless of whether a complaint is initiated, **take other appropriate prompt and effective steps**, in addition to steps necessary to effectuate the remedies provided to an individual complainant, if any, to ensure that sex discrimination does not continue or recur within the recipient's education program or activity.

# Definitions– Parties

- **Complainant**
  - A **student or employee** who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX or this part; **or**
  - A **person** other than a student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX or this part and who was participating or attempting to participate in the recipient's education program or activity at the time of the alleged sex discrimination. 34 C.F.R. § 106.2

# Definitions– Parties

## Respondent

- A person who is alleged to have violated the recipient's prohibition on sex discrimination. 34 C.F.R. § 106.2.
- The requirements in the grievance procedures related to a respondent apply only to sex discrimination complaints alleging that **a person** violated the recipient's prohibition on sex discrimination.
- When a sex discrimination complaint alleges that a recipient's policy or practice discriminates on the basis of sex, the **recipient** is not considered a respondent. 34 C.F.R. § 106.45(a)(1)

# Definition – Supportive Measures

- **Supportive measures**
  - Individualized measures offered as appropriate, as reasonably available, without unreasonably burdening a complainant or respondent, not for punitive or disciplinary reasons, and without fee or charge to the complainant or respondent to:
    - (1) Restore or preserve that party's access to the recipient's education program or activity, including measures that are designed to protect the safety of the parties or the recipient's educational environment; or
    - (2) Provide support during the recipient's grievance procedures under § 106.45, and if applicable § 106.46, or during the informal resolution process under § 106.44(k).

# Definition – Supportive Measures

- **Supportive measures**
  - For allegations of sex discrimination other than sex-based harassment or retaliation, a recipient's provision of supportive measures does not require the recipient, its employee, or any other person authorized to provide aid, benefit, or service on the recipient's behalf **to alter the alleged discriminatory conduct** for the purpose of providing a supportive measure.

# Definition – Supportive Measures

- **Supportive measures**
  - Supportive measures may vary depending on what the recipient deems to be reasonably available. These measures may include but are not limited to counseling; extensions of deadlines and other course-related adjustments; campus escort services; increased security and monitoring of certain areas of the campus; **restrictions on contact applied to one or more parties**; leaves of absence; **changes in class, work, housing, or extracurricular or any other activity, regardless of whether there is or is not a comparable alternative**; and training and education programs related to sex-based harassment.

# Definition – Supportive Measures

- **Supportive measures**
  - Supportive measures must not unreasonably burden either party and must be designed to protect the safety of the parties or the recipient's educational environment or to provide support during the recipient's grievance procedures under § 106.45, and if applicable § 106.46, or during the informal resolution process under § 106.44(k).
  - A recipient must not impose such measures for punitive or disciplinary reasons.

# Definition – Supportive Measures

- **Supportive measures**
  - A recipient may, as appropriate, modify or terminate supportive measures at the conclusion of the grievance procedures under § 106.45, and if applicable § 106.46, or at the conclusion of the informal resolution process under paragraph (k) of this section, or the recipient may continue them beyond that point.

# Definition – Supportive Measures

- **Supportive measures**
  - A recipient must provide a complainant or respondent with a timely opportunity to seek, from an appropriate and **impartial employee**, modification or reversal of the recipient's decision to provide, deny, modify, or terminate supportive measures applicable to them.
  - The **impartial employee** must be someone other than the employee who made the challenged decision and must have the authority to modify or reverse the decision if the impartial employee determines that the decision to provide, deny, modify, or terminate the supportive measure was inconsistent with the definition of supportive measures in § 106.2. A recipient must also provide a party with the opportunity to seek additional modification or termination of a supportive measure applicable to them if circumstances change materially.

# Definition – Supportive Measures

- **Supportive measures**
  - A recipient must not disclose information about any supportive measures to persons other than the person to whom they apply, including informing one party of supportive measures provided to another party, **unless necessary to provide the supportive measure** or restore or preserve a party's access to the education program or activity, or when an exception in § 106.44(j)(1) through (5) applies.

# Response to Sexual Harassment Allegations— Emergency Removal

- Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an imminent and serious threat to the health or safety of a complainant or any students, employees, or other persons arising from the allegations of sex discrimination justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision must not be construed to modify any rights under the Individuals with Disabilities Education Act, 20 U.S.C. 1400 et seq., § 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, or the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 et seq.

# Response to Sexual Harassment Allegations— Administrative Leave

Nothing in this part precludes a recipient from placing an employee respondent on administrative leave from employment responsibilities during the pendency of the recipient's grievance procedures. This provision must not be construed to modify any rights under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, or the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 et seq.

# Title IX Coordinator

- **Title IX Coordinator Requirements**

- If a complaint is made, **notify** the respondent of the grievance procedures under § 106.45, and if applicable § 106.46, and the informal resolution process, if available and appropriate;
- In response to a complaint, **initiate** the grievance procedures under § 106.45, and if applicable § 106.46, or the informal resolution process, if available and appropriate and requested by all parties.
- If the recipient has initiated grievance procedures under § 106.45, and if applicable §, 106.46, or offered an informal resolution process under paragraph (k) of this section to the respondent, offer and coordinate supportive measures under paragraph (g) of this section, as appropriate, for the respondent;

# Grievance Procedure - Complaint

- Complaint
- Complaint means an oral or written request to the recipient that objectively can be understood as a request for the recipient to investigate and make a determination about alleged discrimination under Title IX or this part.

# Grievance Procedure - Complaint

- Complaint
- The following persons have a right to make a complaint **of sex discrimination, including complaints of sex-based harassment**, requesting that the recipient investigate and make a determination about alleged discrimination under Title IX or this part:
  - (i) A complainant;
  - (ii) A parent, guardian, or other authorized legal representative with the legal right to act on behalf of a complainant;
  - (iii) The Title IX Coordinator, after making the determination specified in § 106.44(f)(1)(v);

# Grievance Procedure - Complaint

- Complaint
  - (iv) With respect to complaints of sex discrimination other than sex-based harassment, in addition to the persons listed in paragraphs (a)(2)(i) through (iii) of this section,
    - (A) Any student or employee; or
    - (B) Any person other than a student or employee who was participating or attempting to participate in the recipient's education program or activity at the time of the alleged sex discrimination.

# Title IX Coordinator

- **Title IX Coordinator Requirements**

- In the absence of a complaint or the withdrawal of any or all of the allegations in a complaint, and in the absence or termination of an informal resolution process, **determine whether to initiate a complaint** of sex discrimination that complies with the grievance procedures under § 106.45 and if applicable, § 106.46.
  - To make this fact-specific determination, the Title IX Coordinator must consider, at a minimum, the following factors:
    - (1) the complainant's request not to proceed with initiation of a complaint;
    - (2) the complainant's reasonable safety concerns regarding the initiation of a complaint;
    - (3) the risk that additional acts of sex discrimination would occur if a complaint is not initiated;
    - (4) the severity of the alleged sex discrimination, including whether the discrimination, if established, would require the removal of a respondent from campus or imposition of another disciplinary sanction to end the discrimination and prevent its recurrence;

# Title IX Coordinator

- **Title IX Coordinator Requirements**

- To make this fact-specific determination, the Title IX Coordinator must consider, at a minimum, the following factors:
  - (5) the age and relationship of the parties, including whether the respondent is an employee of the recipient;
  - (6) the scope of the alleged sex discrimination, including information suggesting a pattern, ongoing sex discrimination, or sex discrimination alleged to have impacted multiple individuals;
  - (7) the availability of evidence to assist a decisionmaker in determining whether sex discrimination occurred; and
  - (8) whether the recipient could end the alleged sex discrimination and prevent its recurrence without initiating its grievance procedures under § 106.45, and if applicable § 106.46.
- If initiating a complaint pursuant to the above factors, the Title IX Coordinator must notify the complainant prior to doing so and appropriately address reasonable concerns about the complainant's safety or the safety of others, including by providing supportive measures consistent with paragraph (g) of this section.

# Informal Resolution

- At any time prior to determining whether sex discrimination occurred under § 106.45, and if applicable § 106.46, a recipient may offer to a complainant and respondent an informal resolution process, unless the complaint includes allegations that an employee engaged in sex-based harassment of an elementary school or secondary school student, or such a process would conflict with Federal, State or local law. A recipient that provides the parties an informal resolution process must, to the extent necessary, also require its Title IX Coordinator to take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity.

# Informal Resolution

- Subject to the limitations in paragraph (k)(1) of this section, a recipient has discretion to determine whether it is appropriate to offer an informal resolution process when it receives information about conduct that reasonably may constitute sex discrimination under Title IX or this part or when a complaint of sex discrimination is made and may decline to offer informal resolution despite one or more of the parties' wishes.
- In addition to the limitations in paragraph (k)(1) of this section, circumstances when a recipient may decline to allow informal resolution include but are not limited to when the recipient determines that the alleged conduct would present a future risk of harm to others.

# Informal Resolution

- In lieu of resolving a complaint through the recipient's grievance procedures, the parties may instead elect to participate in an informal resolution process under § 106.44(k) if provided by the recipient consistent with that paragraph.
- A recipient must not require or pressure the parties to participate in an informal resolution process.
- The recipient must obtain the parties' voluntary consent to the informal resolution process and must not require a waiver of the right to an investigation and determination of a complaint as a condition of enrollment or continuing enrollment, or employment or continuing employment, or exercise of any other right.

# Informal Resolution

- The facilitator for the informal resolution process must not be the same person as the investigator or the decisionmaker in the recipient's grievance procedures.
- Any person designated by a recipient to facilitate an informal resolution process must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.
- Any person facilitating informal resolution must receive training under § 106.8(d)(3).

# Informal Resolution

- Before initiation of an informal resolution process, the recipient must provide to the parties notice that explains:
  - (i) The allegations;
  - (ii) The requirements of the informal resolution process;
  - (iii) That, prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and to initiate or resume the recipient's grievance procedures;

# Informal Resolution

- Before initiation of an informal resolution process, the recipient must provide to the parties notice that explains:
  - (iv) That the parties' agreement to a resolution at the conclusion of the informal resolution process would preclude the parties from initiating or resuming grievance procedures arising from the same allegations;
  - (v) The potential terms that may be requested or offered in an informal resolution agreement, including notice that an informal resolution agreement is binding only on the parties; and
  - (vi) What information the recipient will maintain and whether and how the recipient could disclose such information for use in grievance procedures under § 106.45, and if applicable, § 106.46, if grievance procedures are initiated or resumed.

# Informal Resolution

- Potential terms that may be included in an informal resolution agreement include but are not limited to:
  - (i) Restrictions on contact; and
  - (ii) Restrictions on the respondent's participation in one or more of the recipient's programs or activities or attendance at specific events, including restrictions the recipient could have imposed as remedies or disciplinary sanctions had the recipient determined at the conclusion of the recipient's grievance procedures that sex discrimination occurred.



# Investigation

# Grievance Procedure – Notice of Allegations

- Upon initiation of the recipient's grievance procedures, a recipient must provide notice of the allegations to the parties whose identities are known.
- (1) The notice must include:
  - (i) The recipient's grievance procedures under this section, and if applicable § 106.46, and any informal resolution process under § 106.44(k);
  - (ii) Sufficient information available at the time to allow the parties to respond to the allegations. Sufficient information includes the identities of the parties involved in the incident(s), the conduct alleged to constitute sex discrimination under Title IX or this part, and the date(s) and location(s) of the alleged incident(s), to the extent that information is available to the recipient;

# Grievance Procedure – Notice of Allegations

- (1) The notice must include:
  - (iii) A statement that retaliation is prohibited; and
  - (iv) A statement that the parties are entitled to an equal opportunity to access the relevant and not otherwise impermissible evidence, or an accurate description of this evidence as set out in paragraph (f)(4) of this section; and if the recipient provides a description of the evidence, the parties are entitled to an equal opportunity to access to the relevant and not otherwise impermissible evidence upon the request of any party.

# Grievance Procedure – Notice of Allegations

- (2) If, in the course of an investigation, the recipient decides to investigate additional allegations of sex discrimination by the respondent toward the complainant that are not included in the notice provided under paragraph (c) of this section or that are included in a complaint that is consolidated under paragraph (e) of this section, the recipient must provide notice of the additional allegations to the parties whose identities are known.

# Grievance Procedure - Dismissal

- A recipient may dismiss a complaint of sex discrimination made through its grievance procedures under this section, and if applicable § 106.46, for any of the following reasons:
  - (i) The recipient is unable to identify the respondent after taking reasonable steps to do so;
  - (ii) The respondent is not participating in the recipient's education program or activity and is not employed by the recipient;

# Grievance Procedure - Dismissal

- A recipient may dismiss a complaint of sex discrimination made through its grievance procedures under this section, and if applicable § 106.46, for any of the following reasons:
  - (iii) The complainant voluntarily withdraws any or all of the allegations in the complaint, the Title IX Coordinator declines to initiate a complaint under § 106.44(f)(1)(v), and the recipient determines that, without the complainant's withdrawn allegations, the conduct that remains alleged in the complaint, if any, would not constitute sex discrimination under Title IX or this part even if proven; or
  - (iv) The recipient determines the conduct alleged in the complaint, even if proven, would not constitute sex discrimination under Title IX or this part. Prior to dismissing the complaint under this paragraph, the recipient must make reasonable efforts to clarify the allegations with the complainant.

# Grievance Procedure - Dismissal

- (2) Upon dismissal, a recipient must promptly notify the complainant of the basis for the dismissal. If the dismissal occurs after the respondent has been notified of the allegations, then the recipient must also notify the respondent of the dismissal and the basis for the dismissal promptly following notification to the complainant, or simultaneously if notification is in writing.
- (3) A recipient must notify the complainant that a dismissal may be appealed and provide the complainant with an opportunity to appeal the dismissal of a complaint on the basis set out in § 106.46(i)(1). If the dismissal occurs after the respondent has been notified of the allegations, then the recipient must also notify the respondent that the dismissal may be appealed on the basis set out in § 106.46(i)(1).

# Grievance Procedure - Dismissal

## Grievance Procedure – Dismissal and Appeal

The dismissal may be appealed on the following bases:

- **Procedural irregularity** that would change the outcome;
- **New evidence** that would change the outcome and that was not reasonably available when the determination on dismissal was made; and
- The Title IX Coordinator, investigator, or decisionmaker had **a conflict of interest or bias** for or against complainants or respondents generally or the individual complainant or respondent that would change the outcome.

34 C.F.R. § 106.46(i)(1)(i)-(iii).

# Grievance Procedure - Dismissal

- If the dismissal is appealed, the recipient must:
  - (i) Notify the parties of any appeal, including notice of the allegations consistent with paragraph (c) of this section if notice was not previously provided to the respondent;
  - (ii) Implement appeal procedures equally for the parties;
  - (iii) Ensure that the decisionmaker for the appeal did not take part in an investigation of the allegations or dismissal of the complaint;
  - (iv) Ensure that the decisionmaker for the appeal has been trained as set out in § 106.8(d)(2);
  - (v) Provide the parties a reasonable and equal opportunity to make a statement in support of, or challenging, the outcome; and
  - (vi) Notify the parties of the result of the appeal and the rationale for the result

# Grievance Procedure - Dismissal

- (4) A recipient that dismisses a complaint must, at a minimum:
  - (i) Offer supportive measures to the complainant as appropriate under § 106.44(g);
  - (ii) For dismissals under paragraph (d)(1)(iii) or (iv) of this section in which the respondent has been notified of the allegations, offer supportive measures to the respondent as appropriate under § 106.44(g); and
  - (iii) Require its Title IX Coordinator to take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity under § 106.44(f)(1)(vii).

# Grievance Procedure - Consolidation

- A recipient may consolidate complaints of sex discrimination against more than one respondent, or by more than one complainant against one or more respondents, or by one party against another party when the allegations of sex discrimination arise out of the same facts or circumstances.
- If one of the complaints to be consolidated is a complaint of sex-based harassment involving a student complainant or student respondent at a postsecondary institution, the grievance procedures for investigating and resolving the consolidated complaint must comply with the requirements of § 106.46 in addition to the requirements of this section. When more than one complainant or more than one respondent is involved, references in this section and in § 106.46 to a party, complainant, or respondent include the plural, as applicable.

# Poll Question

Have you used any informal resolution process in your sexual harassment cases?

- Yes, for both students and employees
- Yes, for students only
- Yes, for employees only
- No



# Grievance Procedure - Investigation

- A recipient must provide for adequate, reliable, and impartial investigation of complaints. To do so, the recipient must:
  - (1) Ensure that the burden is on the recipient—not on the parties—to conduct an investigation that gathers sufficient evidence to determine whether sex discrimination occurred;
  - (2) Provide an equal opportunity for the parties to present fact witnesses and other inculpatory and exculpatory evidence that are relevant and not otherwise impermissible;
  - (3) Review all evidence gathered through the investigation and determine what evidence is relevant and what evidence is impermissible regardless of relevance, consistent with § 106.2 and with paragraph (b)(7) of this section; and

# Grievance Procedure - Investigation

- A recipient must provide for adequate, reliable, and impartial investigation of complaints. To do so, the recipient must:
  - (4) Provide each party with an equal opportunity to access the evidence that is relevant to the allegations of sex discrimination and not otherwise impermissible, consistent with § 106.2 and with paragraph (b)(7) of this section, in the following manner:
    - (i) A recipient must provide an equal opportunity to access either the relevant and not otherwise impermissible evidence, or an accurate description of this evidence. If the recipient provides a description of the evidence, it must further provide the parties with an equal opportunity to access the relevant and not otherwise impermissible evidence upon the request of any party;
    - (ii) A recipient must provide a reasonable opportunity to respond to the evidence or to the accurate description of the evidence described in paragraph (f)(4)(i) of this section; and
    - (iii) A recipient must take reasonable steps to prevent and address the parties' unauthorized disclosure of information and evidence obtained solely through the grievance procedures. For purposes of this paragraph, disclosures of such information and evidence for purposes of administrative proceedings or litigation related to the complaint of sex discrimination are authorized.

# Grievance Procedure – Relevant Evidence

- Relevant means related to the allegations of sex discrimination under investigation as part of the grievance procedures under § 106.45, and if applicable § 106.46. Questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred, and evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred.

# Grievance Procedure - Determination

- A recipient must provide a process that enables the decisionmaker to question parties and witnesses to adequately assess a party's or witness's credibility to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination.

## Poll Question

Who do you use as decision-makers?

- School employees
- Outside legal counsel
- Outside administrators



# Grievance Procedure - Determination

- Following an investigation and evaluation of all relevant and not otherwise impermissible evidence under paragraphs (f) and (g) of this section, the recipient must:
  - (1) Use the preponderance of the evidence standard of proof to determine whether sex discrimination occurred, unless the recipient uses the clear and convincing evidence standard of proof in all other comparable proceedings, including proceedings relating to other discrimination complaints, in which case the recipient may elect to use that standard of proof in determining whether sex discrimination occurred. Both standards of proof require the decisionmaker to evaluate relevant and not otherwise impermissible evidence for its persuasiveness; if the decisionmaker is not persuaded under the applicable standard by the evidence that sex discrimination occurred, whatever the quantity of the evidence is, the decisionmaker must not determine that sex discrimination occurred.

# Grievance Procedure - Determination

- Following an investigation and evaluation of all relevant and not otherwise impermissible evidence under paragraphs (f) and (g) of this section, the recipient must:
  - (2) Notify the parties in writing of the determination whether sex discrimination occurred under Title IX or this part including the rationale for such determination, and the procedures and permissible bases for the complainant and respondent to appeal, if applicable;

# Grievance Procedure - Determination

- Following an investigation and evaluation of all relevant and not otherwise impermissible evidence under paragraphs (f) and (g) of this section, the recipient must:
- ((3) If there is a determination that sex discrimination occurred, as appropriate, require the Title IX Coordinator to coordinate the provision and implementation of remedies to a complainant and other persons the recipient identifies as having had equal access to the recipient's education program or activity limited or denied by sex discrimination, coordinate the imposition of any disciplinary sanctions on a respondent, including notification to the complainant of any such disciplinary sanctions, and require the Title IX Coordinator to take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity under § 106.44(f)(1)(vii). A recipient may not impose discipline on a respondent for sex discrimination prohibited by Title IX unless there is a determination at the conclusion of the recipient's grievance procedures that the respondent engaged in prohibited sex discrimination;

# Grievance Procedure - Determination

- Following an investigation and evaluation of all relevant and not otherwise impermissible evidence under paragraphs (f) and (g) of this section, the recipient must:
  - (4) Comply with § 106.45, and if applicable § 106.46, before the imposition of any disciplinary sanctions against a respondent; and
  - (5) Not discipline a party, witness, or others participating in a recipient's grievance procedures for making a false statement or for engaging in consensual sexual conduct based solely on the recipient's determination whether sex discrimination occurred.

# Grievance Procedure - Appeals

- In addition to an appeal of a dismissal consistent with paragraph (d)(3) of this section, a recipient must offer the parties an appeal process that, at a minimum, is the same as it offers in all other comparable proceedings, if any, including proceedings relating to other discrimination complaints.
- For a complaint of sex-based harassment involving a student complainant or student respondent, a postsecondary institution must also offer an appeal on the bases set out in § 106.46(i)(1).

# Title IX Regulations

## Title IX Regulations: Sex-Based Harassment / Postsecondary Notice of Allegations

- Upon the **initiation** of the postsecondary institution's sex-based harassment **grievance procedures** under this section, a postsecondary institution must provide **written notice** to the parties whose identities are known **with sufficient time** for the parties to prepare a response before any initial interview.

34 C.F.R. § 106.46(c).

# Title IX Regulations

## Title IX Regulations: Sex-Based Harassment / Postsecondary

### Content of Notice of Allegations

- The written notice must include **all information** required under § 106.45(c)(1)(i) through (iii) **and also inform the parties that:**
  - The respondent is **presumed not responsible** for the alleged sex-based harassment until a determination is made at the conclusion of the grievance procedures under this section **and** that prior to the determination, the parties will have an **opportunity to present** relevant and not otherwise impermissible evidence to a trained, impartial decisionmaker;
  - They may have an **advisor of their choice** to serve in the role set out in paragraph (e)(2) of this section, and that the advisor may be, but is not required to be, an attorney;

34 C.F.R. § 106.46(c)(1).

# Title IX Regulations

## Title IX Regulations: Sex-Based Harassment / Postsecondary Content of Notice of Allegations

- They are entitled to an **equal opportunity to access the relevant** and not otherwise impermissible evidence or an investigative report that accurately summarizes this evidence as set out in paragraph (e)(6) of this section; and if the postsecondary institution provides access to an investigative report, the parties are entitled to an equal opportunity to access to the relevant and not otherwise impermissible evidence upon the request of any party; and
- If applicable, the postsecondary institution's code of conduct prohibits knowingly making false statements or knowingly submitting false information during the grievance procedure

34 C.F.R. § 106.46(c)(1).

# Title IX Regulations

## Title IX Regulations: Sex-Based Harassment / Postsecondary Complaint Investigation

- When investigating a complaint alleging sex-based harassment and throughout the postsecondary institution's grievance procedures for complaints of sex-based harassment involving a student complainant or a student respondent, a postsecondary institution:
  - Must provide, to a party whose participation is invited or expected, **written notice** of the date, time, location, participants, and purpose of all meetings or proceedings with sufficient time for the party to prepare to participate;
  - Must provide the parties with the **same opportunities to be accompanied to any meeting or proceeding by the advisor of their choice**, who may be, but is not required to be, an attorney, and not limit the choice or presence of the advisor for the complainant or respondent in any meeting or proceeding; however, the postsecondary institution may establish restrictions regarding the extent to which the advisor may participate in the grievance procedures, as long as the restrictions apply equally to the parties;

34 C.F.R. § 106.46(e)

# Title IX Regulations

## Title IX Regulations: Sex-Based Harassment / Postsecondary Complaint Investigation

- Must provide the parties with the same opportunities, if any, to have persons **other than the advisor of the parties' choice** present during any meeting or proceeding;
- Has discretion to determine whether the parties may present **expert witnesses** as long as the determination applies equally to the parties;
- Must allow for the reasonable extension of timeframes on a case-by-case basis for good cause with written notice to the parties that includes the reason for the delay; and

34 C.F.R. § 106.46(e)

# Title IX Regulations

## Title IX Regulations: Sex-Based Harassment / Postsecondary Complaint Investigation

- Must provide each party and the party's advisor, if any, **with an equal opportunity to access the evidence** that is relevant to the allegations of sex-based harassment and not otherwise impermissible, consistent with §§ 106.2 and 106.45(b)(7), in the following manner:
  - A postsecondary institution must provide an equal opportunity to access either the relevant and not otherwise impermissible evidence, **or** the same written investigative report that accurately summarizes this evidence. If the postsecondary institution provides access to an investigative report, it must further provide the parties with an equal opportunity to access the relevant and not otherwise impermissible evidence upon the request of any party;

34 C.F.R. § 106.46(e)

# Title IX Regulations

## Title IX Regulations: Sex-Based Harassment / Postsecondary Complaint Investigation – Decision-making Process

- A postsecondary institution must provide a process as specified in this subpart that enables the decisionmaker to question parties and witnesses to adequately assess a party's or witness's credibility to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex-based harassment.

34 C.F.R. § 106.46(f)

# Title IX Regulations

## Title IX Regulations: Sex-Based Harassment / Postsecondary Complaint Investigation – Decision-making Process (No Live Hearing)

- When a postsecondary institution chooses **not** to conduct a live hearing under paragraph (g) of this section, the process for proposing and asking relevant and not otherwise impermissible questions and follow-up questions of parties and witnesses under §§ 106.2 and 106.45(b)(7), including questions challenging credibility, must:
  - Allow the **investigator or decisionmaker** to ask such questions during individual meetings with a party or witness;
  - Allow each party to propose such questions that the party wants asked of any party or witness and have those questions asked by the **investigator or decisionmaker** during one or more individual meetings, including follow-up meetings, with a party or witness, subject to the requirements in paragraph (f)(3) of this section; and
  - Provide each party with an audio or audiovisual recording or transcript with enough time for the party to have a reasonable opportunity to propose follow-up questions.

34 C.F.R. § 106.46(f)

# Title IX Regulations

## Title IX Regulations: Sex-Based Harassment / Postsecondary Complaint Investigation – Decision-making Process (Live Hearing)

- When a postsecondary institution chooses to conduct a live hearing under paragraph (g) of this section, the process for proposing and asking relevant and not otherwise impermissible questions and follow-up questions of parties and witnesses under §§ 106.2 and 106.45(b)(7), including questions challenging credibility, must allow the decisionmaker to ask such questions, and either:
  - Allow each party to propose such questions that the party wants asked of any party or witness and have those questions asked by the decisionmaker, subject to the requirements under paragraph (f)(3) of this section; or
  - Allow each party's advisor to ask any party or witness such questions, subject to the requirements under paragraph (f)(3) of this section. Such questioning must never be conducted by a party personally. If a postsecondary institution permits advisor-conducted questioning and a party does not have an advisor to ask questions on their behalf, the postsecondary institution must provide the party with an advisor of the postsecondary institution's choice, without charge to the party, for the purpose of advisor-conducted questioning. In those instances, the postsecondary institution must not appoint a confidential employee and may appoint, but is not required to appoint, an attorney to serve as an advisor.

34 C.F.R. § 106.46(f)

# Title IX Regulations

## Title IX Regulations: Sex-Based Harassment / Postsecondary Complaint Investigation – Decision-making Process (Written Determination)

The written determination must include:

- A description of the alleged sex-based harassment;
- Information about the policies and procedures that the postsecondary institution used to evaluate the allegations;
- The decisionmaker's evaluation of the relevant and not otherwise impermissible evidence and determination of whether sex-based harassment occurred;
- When the decisionmaker finds that sex-based harassment occurred, any disciplinary sanctions the postsecondary institution will impose on the respondent, whether remedies other than the imposition of disciplinary sanctions will be provided by the postsecondary institution to the complainant, and, to the extent appropriate, other students identified by the postsecondary institution to be experiencing the effects of the sex-based harassment; and
- The postsecondary institution's procedures for the complainant and respondent to appeal.

34 C.F.R. § 106.46(h).

# Title IX Regulations

## Title IX Regulations: Sex-Based Harassment / Postsecondary Appeals

- A postsecondary institution must offer the parties an appeal from a determination of whether sex-based harassment occurred, and from a postsecondary institution's dismissal of a complaint or any allegations therein, on the following bases:
  - Procedural irregularity that would change the outcome;
  - New evidence that would change the outcome and that was not reasonably available when the determination of whether sex-based harassment occurred, or dismissal was made; and
  - The Title IX Coordinator, investigator, or decisionmaker had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that would change the outcome.
- A postsecondary institution may offer an appeal to the parties on additional bases, so long as the procedures and additional bases for appeal are equally available to all parties.
- As to all appeals, the postsecondary institution must comply with the requirements in § 106.45(d)(3)(i), (v), and (vi) in writing.  
34 C.F.R. § 106.46(i).

# Title IX Regulations

## Title IX Regulations: Sex-Based Harassment / Postsecondary

- A postsecondary institution's written grievance procedures for prompt and equitable resolution of **complaints of sex-based harassment involving a student complainant or student respondent** must include provisions that incorporate the requirements of § 106.45 and this section.

34 C.F.R. § 106.46(a).



# Conclusion





## Conclusion

- Need to review policies
- Need to decide on certain elements in your grievance procedure
- Need to identify different individuals to serve in different roles

# What was your key takeaway?

Please let us know in the Q&A.

We will use your response with your first name and last initial on our website so others can benefit!





**Richard Verstegen**  
**Attorney**

# Questions?



**Boardman & Clark, LLP**



<https://www.boardmanclark.com>



**(608) 286-7233**



[rverstegen@boardmanclark.com](mailto:rverstegen@boardmanclark.com)

# Disclaimer of Warranties

While our certification and webinar programs are designed to provide participants with the skills and knowledge necessary to improve employability and career performance, ultimately the success of a certification or webinar program comes down to the background, practical experience, ability and (especially) commitment of each participant. Because these qualities vary, we are unable to provide universal warranties, representations or guarantees (collectively “Warranties”) that a particular certification or certification program or webinar will result in required legal or regulatory compliance, job placement advantages, career opportunities, or overall attainment of career goals. And while our Programs (as defined below) are designed, written and presented to be as accurate and authoritative as possible, we do not provide medical, legal, accounting or other professional services or advice, and our Programs may not be relied upon as such. The participant (“you”) remains solely responsible for compliance with all applicable laws, regulations, accounting standards, and official health guidelines.

Therefore, you agree that you purchase, participate in, use, and rely on (“your Use”) our certifications, certification programs, webinars, presentations, commentaries, products, services, and materials (collectively, our “Programs”) at your own risk. Our Programs are provided “as is” without any express or implied Warranties of any kind, including any Warranties of merchantability, fitness for a particular purpose, or non-infringement. We provide no Warranties, and you agree by your Use not to rely on any Warranties, that our Programs are free of errors or omissions. As part of the consideration given in connection with being allowed to participate in our Programs, and by your Use of our Programs, you (a) release us from all claims for damages arising or alleged to have arisen from your Use of our Programs, (b) agree that in no event will we be liable for any direct, indirect, special, or consequential damages arising or alleged to have arisen out of your Use of our Programs, and (c) you further agree that any damages you may be awarded against us notwithstanding the foregoing limitations of liability will be limited to the amount, if any, you paid for the Program resulting in or alleged to have resulted in your damages.