



# Title IX and Sexual Harassment: Federal Regulations and the Louisiana Template

*Policy, Training, and Campus  
Communication Strategies*

Presented by

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# Overview of Title IX: Title IX of the Education Amendments of 1972

**“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any educational program or activity receiving Federal financial assistance.”**

**20 U.S.C. § 1681 et seq.**

-Title IX of the Education Amendments of 1972 to the Civil Rights Act of 1964



# Overview of Title IX: Who does it protect?

**Any person** in the United States participating in and/or reaping benefits provided under any educational program or activity receiving Federal financial assistance.

20 U.S.C. § 1681 et seq.

## Examples:

- Persons with or without disabilities.
- Persons from the U.S. and from other countries (documented or undocumented).
- Straight, gay, lesbian, bisexual and transgender individuals.
- Part-time and full-time students and employees.



# Overview of Title IX: Why and how does it affect the LA BOR and its member Institutions?

- Title IX applies to all “recipients” of Federal funds.
- LA BOR Institutions receives millions of dollars each year from the federal government, directly and indirectly, including through receipt of student federal financial assistance.
- Therefore, each Member Institution is required to comply with Title IX.



# Overview of Title IX: Consequences for Noncompliance

- ▶ Loss of federal funding.
- ▶ Lengthy state and/or federal investigations.
- ▶ Loss of due process for the accused.
- ▶ Unsafe education environment for the alleged victim.
- ▶ Risks to the campus community.
- ▶ Negative media exposure.
- ▶ Penalties for violations.
- ▶ Private lawsuits against individuals and/or the institution that may result in substantial damages and attorney's fees.



# Title IX Regulations, BOR Uniform Policy, and Best Practices



# Foundational Elements

- Due Process
- Fundamental Fairness
- Truth-Seeking
- Supportive Measures
  - Complainant
  - Respondent
  - Third Parties
- Life Span
  - Report → Complaint → Investigation → Adjudication → Appeal
  - Informal Resolution



# Power-Based Violence

- **Power-based Violence**: Any form of interpersonal violence intended to control or intimidate another person through the assertion of power over the person, to include the following:
  - Dating violence;
  - Domestic abuse and family violence;
  - Nonconsensual observation of another person's sexuality without the other person's consent;
  - Sexual assault;
  - Sexual exploitation;
  - Sexual harassment (differentiated from 106.30 sexual harassment);
  - Stalking and cyberstalking;
  - Unlawful communications; or
  - Unwelcome sexual or sex- or gender-based conduct that is objectively offensive and has a discriminatory intent.
- Power-based violence that is not covered by the Title IX Grievance Procedure, such as off-campus power-based violence alleged to have an on-campus effect or occurring during a study-abroad program, may be addressed under the broader BOR Uniform Policy.



# Consent

- **Consent:** Consent to engage in sexual activity must exist from beginning to end of each instance of sexual activity.
  - Consent is demonstrated through **mutually understandable words and/or actions** that clearly indicate a willingness to engage in a specific sexual activity.
  - **Silence alone, without actions evidencing permission, does not demonstrate Consent.** Consent must be **knowing and voluntary**.
  - To give Consent, a person must be of legal age.
  - Assent does not constitute Consent if obtained through coercion or from an individual whom the Alleged Offender knows or reasonably should know is **Incapacitated**.
  - The responsibility of obtaining Consent rests with the person initiating sexual activity.
  - Use of alcohol or drugs does not diminish one's responsibility to obtain Consent.
  - **Consent to engage in sexual activity may be withdrawn by any person at any time.**
  - Once withdrawal of Consent has been expressed, the sexual activity must cease.
  - Consent is automatically withdrawn by a person who is no longer capable of giving Consent.
  - A current or previous consensual dating or sexual relationship between the parties does not itself imply Consent or preclude a finding of responsibility.

# Incapacitation

- ▶ **Incapacitation:** An individual is considered to be incapacitated if, by reason of mental or physical condition, the individual is manifestly unable to make a knowing and deliberate choice to engage in sexual activity. Individuals who are asleep, unresponsive, or unconscious are incapacitated.
  - ▶ Other indicators that an individual may be incapacitated include, but are not limited to, inability to communicate coherently, inability to dress/undress without assistance, inability to walk without assistance, slurred speech, loss of coordination, vomiting, or inability to perform other physical or cognitive tasks without assistance.

BOR Uniform Policy XVI(A)



# Retaliation

- Retaliation is expressly prohibited under the BOR Uniform Policy. Retaliation includes, but is not limited to, intimidation, harassment, threats, or other adverse action or speech against the person who reported the misconduct, the parties, and their witnesses.
- The BOR, system management boards, and Louisiana's postsecondary Institutions expressly prohibit retaliation against anyone who:
  - In good faith reports what they believe is power-based violence,
  - Cooperates with an investigation or proceeding under this Policy, or
  - Opposes conduct that they believe to violate this Policy.
- Anyone who knowingly makes a false accusation of unlawful discrimination, harassment, or retaliation of any form will be subject to an investigation for a potential violation of this Policy and may be subject to disciplinary action, up to and potentially including termination for employees and expulsion for students.



# Title IX: Who is Involved

- Complainant
- Respondent
  
- Title IX Coordinator
- Investigator
- Decision-Maker
- Advisors/Confidential Advisors
- Responsible Employees/Mandated Reporters





# Policy Scope

- The comprehensive scope of the Uniform Policy on Power-Based Violence/Sexual Misconduct includes procedures to address both power-based violence (which includes sexual misconduct) and Title IX conduct (governed by the Title IX Formal Grievance Procedures).
- Power-based violence, addressed in the BOR Uniform Policy, is a broader term that covers gender/sex-based misconduct beyond the Title IX Regulations' "sexual harassment" definition. Power-based violence prohibited by this Policy includes conduct defined in Act 472.
- **When power-based violence meets the criteria specified in the Title IX Regulations, it must be addressed under the Title IX Formal Grievance Procedure**, and not this overarching Power-Based Violence Policy, to the extent the processes differ between the two policies.
- Combined, BOR's and Louisiana's public postsecondary education systems and their Institutions' policies and procedures are intended to ensure that all students impacted by an incident or Formal Complaint of power-based violence receive appropriate support and fair treatment, and that allegations of power-based violence are handled in a prompt, thorough, and equitable manner.

# BOR Uniform Policy & Title IX Regulations

- The **BOR Uniform Policy on Power-Based Violence/Sexual Misconduct** can be thought of as an “umbrella” policy governing larger categories of conduct than the accompanying **Title IX Grievance Procedure**.
- Most cases will be investigated and adjudicated according to the BOR Uniform Policy.





# USDOE's 2020 Title IX Regulations



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

## New Regulatory Provisions:

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

## Amendments to Existing Regulations:

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





## § 106.44(a) – General Response to Sexual Harassment

A recipient with **actual knowledge of sexual harassment** in an education program or activity of the recipient against a person in the United States must respond **promptly** in a manner that is **not deliberately indifferent**.



# § 106.44(a) – General Response to Sexual Harassment: *Narrowed Title IX Jurisdiction*

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

34 C.F.R. 106.44(a); See BOR Title IX Grievance Procedure II

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

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

- 1) “**An employee** of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in **unwelcome** sexual conduct;” [*quid pro quo*]
- 2) “**Sexual assault**” as defined in 20 U.S.C. § 1092(f)(6)(A)(v), “**dating violence**” as defined in 34 U.S.C. § 12291(a)(10), “**domestic violence**” as defined in 34 U.S.C. § 12291(a)(8), or “**stalking**” as defined in 34 U.S.C. § 12291(a)(30); or
- 3) “Unwelcome conduct determined by a reasonable person to be so **severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the recipient’s education program or activity.”

34 C.F.R. 106.30(a); See BOR Title IX Grievance Procedure II(A)

## § 106.30 – Definitions

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

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



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

“Actual knowledge” means notice of sexual harassment or allegations of sexual harassment to a recipient’s **Title IX Coordinator** or **any official of the recipient who has authority to institute corrective measures on behalf of the recipient . . . .”**

- “Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge.”
- “This standard is not met when the only official of the recipient with actual knowledge is also the respondent.”
- “The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient.”

34 C.F.R 106.30(a).



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

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

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



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

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

34 C.F.R. 106.45(b)(1)(iii); See BOR Title IX Grievance Procedure III



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

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

“Supportive measures means **non-disciplinary, non-punitive individualized services** offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.”

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

34 C.F.R. 106.30(a); See BOR Title IX Grievance Process IV



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

“Supportive measures may include:”

- “counseling,
- extensions of deadlines or other course-related adjustments,
- modifications of work or class schedules,
- campus escort services,
- mutual restrictions on contact between the parties,
- changes in work or housing locations,
- leaves of absence,
- increased security and monitoring of certain areas of the campus; and
- other similar measures.”



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

- Title IX Coordinator must promptly contact complainant to:
  - discuss the availability of supportive measures,
  - consider the complainant's wishes with respect to supportive measures,
  - inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and
  - explain to the complainant the process for filing a formal complaint.



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

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



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

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



# Formal Complaints

- “Formal complaint means a **document filed by a complainant or signed by the Title IX Coordinator** alleging **sexual harassment** against a respondent and requesting that the recipient investigate the allegation of sexual harassment.”
  - “At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.”\*
  - “A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under § 106.8(a), and by any additional method designated by the recipient.”

34 C.F.R. 106.30(a); BOR Title IX Grievance Procedure VI(A)



# Filing a Formal Complaint—Title IX Coordinator

- A Title IX Coordinator may sign a Formal Complaint to initiate or continue the Title IX Formal Grievance Procedure, if necessary, to fulfill an institution's duty under Title IX to not be deliberately indifferent to actual knowledge of sexual misconduct.
- Signing a Formal Complaint does not make a Title IX Coordinator a Complainant or otherwise a party.

BOR Title IX Grievance Procedure VI (B)

# Withdrawal/Dismissal

- **Withdrawal**

- After filing a Formal Complaint, a Complainant may withdraw their Formal Complaint at any time by providing written notice to the Title IX Coordinator. That withdrawal concludes the Title IX Formal Grievance Procedure process unless the Title IX Coordinator takes action [and signs the Formal Complaint].

- **Mandatory Dismissal**

- If the conduct alleged in the Formal Complaint does not satisfy the requirements of sexual harassment as defined by §106.30, an institution must dismiss the Formal Complaint under this grievance process. However, the Title IX Coordinator will transfer the Complaint to BOR's Policy addressing power-based violence for review and possible investigation and resolution.

- **Permissive Dismissal**

- An institution may dismiss a Formal Complaint...if at any time during the investigation or hearing:
  - A Complainant notifies the Title IX Coordinator in writing that the Complainant would like to withdraw the Formal Complaint or any allegations therein;
  - The Respondent is no longer enrolled in or employed by the institution; or
  - Specific circumstances prevent the institution from gathering evidence sufficient to reach a determination as to the Formal Complaint or allegations therein.

- Notice must be given to the parties simultaneously upon dismissal.

BOR Title IX Grievance Procedure VI(C-F)

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

- *Emergency removal.* Nothing in this section precludes a member Institution from removing a respondent from the Institution’s education program or activity on an emergency basis, provided that the Institution:
  - 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-d) – Recipient’s Response to Sexual Harassment: *Emergency Removal, Administrative Leave (cont.)*

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

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

## § 106.71 – Retaliation

- **Prohibited retaliation:**

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

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

## § 106.71 – Retaliation (cont.)

- **Exceptions:**

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

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



## § 106.45 – Grievance process for formal complaints of sexual harassment

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

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

## § 106.45(b) –Grievance Process

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

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



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

“A recipient’s grievance process must—

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

34 C.F.R. 106.45(b)(1)(i); BOR Title IX Grievance Procedure III



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

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

34 C.F.R. 106.45(b)(1)(ii); BOR Title IX Grievance Procedure III



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

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

34 C.F.R. 106.45(b)(1)(iv); BOR Title IX Grievance Procedure III





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

- **Reasonably prompt timeframes:**
  - Must have reasonably prompt timeframes for conclusion of the entire grievance process, including informal resolution process and appeals.
  - Must have process that allows for temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the parties.
  - “Good cause may include considerations such as the absence of a party, a party’s advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities.”



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

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

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



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

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

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

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

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



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

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

34 C.F.R. 106.45(b)(2); BOR Title IX Grievance Procedure VIII(A)



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

Must describe range of potentially available disciplinary sanctions and remedies.

34 C.F.R. 106.45(b)(1)(vi); BOR Title IX Grievance Procedure E



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

Must include procedures and permissible bases for  
parties to appeal.

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



# Investigations



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

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

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





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

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

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



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

- **Notice of meetings** – Must provide to the party whose participation is invited or expected written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings with a party, with sufficient time for the party to prepare to participate.

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



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

- **Opportunity to review pre-report evidence** – Must “[p]rovide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint. . . .”
  - Before completion of investigative report, must send the evidence to the parties and their advisors and give them 10 days to submit a written response.
  - Investigator must consider the written response before completing the final report.



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

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

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



# Hearings



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

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

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



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

- **Hearing panelists:**

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

34 C.F.R. 106.45(b)(7)(i); See BOR Title IX Grievance Procedure VIII(C)

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

- **Cross-examination must be allowed** – Decision-makers “must permit each party’s advisor to ask the other party and any other witnesses all relevant questions and follow-up questions, including those challenging credibility.”
  - **Cross-examination only by the advisor** – “Such cross-examination . . . must be conducted **directly, orally, and in real time** by the party’s advisor of choice and never by a party personally. . . .”
  - **School-appointed advisors** – “If a party does not have an advisor present at the live hearing, the recipient ***must*** provide **without fee or charge to that party**, an advisor **of the *recipient’s* choice**, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.”

34 C.F.R. 106.45(b)(6)(i); BOR Title IX Grievance Procedure VIII(C)



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

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

34 C.F.R. 106.45(b)(6)(i); BOR Title IX Grievance Procedure VIII(C)



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

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

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

34 C.F.R. 106.45(b)(6)(i); BOR Title IX Grievance Procedure VIII(C)

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

- **Virtual hearings:**

- “At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions.”
- “Live hearings . . . may be conducted with all parties physically present in the same geographic location or, at the recipient’s discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other.”

34 C.F.R. 106.45(b)(6)(i); BOR Title IX Grievance Procedure VIII(C)



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

**Hearing record** – “Recipients must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.”

34 C.F.R. 106.45(b)(6)(i); BOR Title IX Grievance Procedure VIII(C)



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

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



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

- **Simultaneous publication** – “The recipient must provide the written documentation to the parties simultaneously.”
- **Finality** – “The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would not longer be considered timely.”

34 C.F.R. 106.45(b)(7)(iii); BOR Title IX Grievance Procedure VIII(D)



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

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

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



# Appeals





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

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

34 C.F.R. 106.45(b)(8); BOR Title IX Grievance Procedure IX

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

- **Mandatory grounds for appeal:**

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

34 C.F.R. 106.45(b)(8)(i)-(ii).



# Informal Resolution



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

“At any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication...”

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

Informal resolution processes are not allowed to resolve allegations that an employee sexually harassed a student.

34 C.F.R. 106.45(b)(9); Title IX Grievance Procedure X



# Record-Keeping



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

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

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

34 C.F.R. 106.45(b)(10).; BOR Title IX Grievance Procedure XI



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