

## NEW FEDERAL TITLE IX REGULATIONS: Changes to the Investigative Process

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## LEARNING OUTCOME

### After participating...

...you will learn how to change your current investigation practices to adhere to the newly proposed Title IX federal regulations.




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# POLL



Describe your current comfort level regarding the proposed regulations.



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## Title IX Proposed Regs: Where are we?

- Rationale by ED for the proposed regs
- Current cases
- NPRM process and the proposed regs
- Today's agenda




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■ Today's Agenda

In 5 Key areas, we will cover these key questions:

- What is the current regulatory language?
- What is the proposed language and what does that mean for campuses?
- How can campuses prepare for these possible changes?

 **ai** ACADEMIC  
IMPRESSIONS 5

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**1. INVESTIGATING FORMAL COMPLAINTS**

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IMPRESSIONS 6

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1. Investigating Formal Complaints

**WHAT IS THE LAW CURRENTLY?**

- a. §106.8 states in part, "Each recipient shall ... coordinate its efforts to comply ... including any investigation of any complaint communicated..."
- b. Current regs lack specificity so institutions created investigative processes they felt were sufficient; many were not
- c. Institutions have since erred on the side of caution and tended to investigate every single complaint (case backlog)
- d. Many institutions also investigate "off campus related activity" (potential effect on an individuals' access to an education); even cases that occur in programs in another country



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1. Investigating Formal Complaints

**WHAT IS THE PROPOSED LANGUAGE?**

- *Proposed §106.45(b)(3) "Investigations of a formal complaint.* The recipient must investigate the allegations in a formal complaint. If the conduct alleged by the complaint would not constitute sexual harassment as defined in section 106.44(e) even if proved or did not occur within the recipient's program or activity, the recipient must dismiss the formal complaint with regard to that conduct..."



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1. Investigating Formal Complaints

**WHAT IS THE PROPOSED LANGUAGE?**

- Requires institutions to “dismiss” formal cases when the behavior is not consistent with the provided definition of sexual harassment OR if the behavior did not occur “within the recipient’s program or activity”
- Distinction between informal and formal complaint
- 8 listed things a recipient must do when engaging in a formal investigation (informational and procedural). *Proposed §106.45(3)(i-ix)*

1. Investigating Formal Complaints

**WHAT IS THE PROPOSED LANGUAGE?**

- Live hearing requirement most problematic; along with the ability to “cross examine” by a party’s advisor of choice and the assignment of an advisor aligned with the party, when one party does not have an advisor. *Proposed §106.45(3)(vii)*
- Specific requirements for “Determination regarding responsibility” *Proposed §106.45(4)*

1. Investigating Formal Complaints

**HOW CAN YOU PREPARE FOR  
THE POSSIBLE CHANGES?**

- ❖ Do not make any sudden moves. These are still only “proposed regs;” there may be some changes ahead.
- ❖ Review your current process. Make a checklist of things you currently do and things you do not do. Are there some “quick fixes” that do not materially alter your processes you could change now?
- ❖ Do you know what the process is and how long it is going to take for you to make changes to your process?
- ❖ Begin campus discussions now.



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**2. PRESERVATION OF RIGHTS**



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2. Preservation of Rights

**WHAT IS THE LAW CURRENTLY?**

- a. Currently, §106.6 specifically mentions the following subsections:
  - 106.6(a) Effect of other Federal provisions
  - 106.6(b) Effect of state or local law or other requirements
  - 106.6(c) Effect of rules or regulations of private organizations
- b. Equal protection clause applies (14th amendment)
- c. No other constitutional based protections or rights are mentioned
- d. Some institutions' processes appeared to have favored victims over respondents (i.e., provided inadequate notifications, predetermined outcomes before considering information provided by the Respondents, failed to consider exculpatory information when found and assigned credibility (or lack thereof) based on the status of the witness)
- e. No mention of FERPA, Due Process, First Amendment

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2. Preservation of Rights

**WHAT IS THE PROPOSED LANGUAGE?**

- *Proposed §106.6(d)* "Constitutional protections. Nothing in this part requires a recipient to:
  - Restrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution;
  - Deprive a person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and the Fourteenth Amendments of the U.S. Constitution; or,
  - Restrict any other rights guaranteed against government action by the U.S. Constitution."

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2. Preservation of Rights

**WHAT IS THE PROPOSED LANGUAGE?**

- GEPA/FERPA provision. *Proposed §106.6(e)*
- Title IV of the Civil Rights Act of 1964 provision. *Proposed §106.6(d)*



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2. Preservation of Rights

**HOW CAN YOU PREPARE FOR THE POSSIBLE CHANGES?**

- ❖ Remember: Constitutional rights apply. Period. Title IX was meant to be a vehicle to ensure recipients address issues when reported; we are neither pro-victim or pro-respondent.
- ❖ Don't ignore basic individual rights throughout your process. Understand when and why information cannot or should not be shared.
- ❖ Review your processes. Does it tend to be more favorable to one particular side? How and why? If so, is there an opportunity/support to make changes favoring "equity" rather than parties?



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### 3. FORMAL GRIEVANCE PROCESSES



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#### 3. Formal Grievance Processes

##### WHAT IS THE LAW CURRENTLY?

- a. Currently, §106. 8(b) **Complaint procedure of recipient** states, “A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.”
- b. No other regulatory language specific to the formal grievance process was provided
- c. Institutions were left basically trying to figure out what the current statutory language meant; some relied heavily on “guidance” and “DCLs”
- d. Some institutions looked to case and state law to help create their grievance procedures.



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3. Formal Grievance Processes

**WHAT IS THE PROPOSED LANGUAGE?**

- *Proposed regs §106.45* Grievance procedures for formal complaints of sexual harassment.
- Treatment of parties (complainant & respondent) may constitute as discrimination for the purposes of Title IX. *Proposed §106.45(a)*
- Specific requirements for "grievance procedures." *Proposed §106.45(b)(1)(i-ix)*

3. Formal Grievance Processes

**WHAT IS THE PROPOSED LANGUAGE?**

- Specific requirements for "Notice of allegations." *Proposed §106.45(b)(2)*
- (As mentioned previously) Specific requirements for "investigations" *Proposed §106.45(b)(3)(i-ix)*
- Specific requirements for "Determination regarding responsibility" *§106.45(b)(4)(i-iii)*

3. Formal Grievance Processes

**WHAT IS THE PROPOSED LANGUAGE?**

- Specific requirements for “Appeals” should you chose to offer one to the parties. §106.45(b)(5)
- Specific requirements regarding “Informal resolution.” §106.45(b)(6)(i-ii)



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3. Formal Grievance Processes

**HOW CAN YOU PREPARE FOR THE POSSIBLE CHANGES?**

- ❖ The proposed regs don't allow much in the way of creativity for institutional grievance processes. Make sure you understand how your current process differs from the proposed reg language.
- ❖ Low hanging fruit? (Things you can change now that doesn't materially alter your current process?)
- ❖ Pay attention to information that must be provided to the parties; those could be easily incorporated into your letter or notification templates.



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**?** QUESTIONS

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4. HEARINGS AND APPEALS

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4. Hearings and Appeals

**WHAT IS THE LAW CURRENTLY?**

- a. Current regs do not mention hearings or appeals.
- b. Institutions use different structures based on a variety of reasons.
- c. Some institutions differentiate between hearing and meeting; some don't.
- d. Some institutions allow for appeals, some don't.

4. Hearings and Appeals

**WHAT IS THE PROPOSED LANGUAGE?**

- *Proposed §106.45(3)(vii)* - requirements specific to higher ed; *§106.453(vi)* - requirements specific to elementary and secondary schools.
- "Must provide a live hearing"
- Cross examinations permitted by "advisors of choice;" If one party has an advisor and the other doesn't, the institution must find an advisor aligned with the party to conduct the cross examination.
- Cross examinations can occur in separate rooms (via technology) if either party requests.

4. Hearings and Appeals

**WHAT IS THE PROPOSED LANGUAGE?**

- Cannot restrict the parties to discuss and gather relevant evidence.
- Expectation of a Decision maker when a question is not allowed to be asked by the parties' advisor during cross examination.
- Ramification of a party or witness not submitting to cross examination.

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4. Hearings and Appeals

**WHAT IS THE PROPOSED LANGUAGE?**

- Appeals aren't required, BUT if you allow one, BOTH parties must be allowed to appeal.
- Decision maker and appellate officer cannot be the same person.

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4. Hearings and Appeals

**HOW CAN YOU PREPARE FOR  
THE POSSIBLE CHANGES?**

- ❖ Is your campus prepared for any “live hearing” requirements? What are some of the barriers to having live hearings on your campus?
- ❖ Is your campus capable of appropriately dealing with an external advisor (or attorney) during a “cross examination?” What are some of the anticipated issues?
- ❖ Does the institution have personnel who can serve as trained advisors? Decision-makers or advisors?
- ❖ Begin campus wide discussion now to gauge the ability of the campus to comply with the new regs should they be adopted as written.



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**5. RECORD KEEPING & DOCUMENTATION**



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5. Record Keeping and Documentation

**WHAT IS THE LAW CURRENTLY?**

- a. Current regs do not mention information regarding recordkeeping or documentation
- b. Institutions use current privacy, confidentiality and FERPA laws as the basis for dealing with records and documentation

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5. Record Keeping and Documentation

**WHAT IS THE PROPOSED LANGUAGE?**

- *Proposed §106.45(b)(7) Recordkeeping*
- Recipients must create, make available to both parties and maintain specific records/documents
- Records/documents include: any sexual harassment investigation, determinations, supportive measures, disciplinary sanctions, remedies designed to preserve or restore educational access to complainant, appeals and outcomes
- Includes materials to train coordinators, investigators and decision makers on sexual harassment issues

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5. Record Keeping and Documentation  
**HOW CAN YOU PREPARE FOR  
THE POSSIBLE CHANGES?**

- ❖ Does your institution take the position that “less documents” are better? You may want to think about what the changes to the regs may mean for you.
- ❖ Does your institution memorialize all information regarding a case, or do you just “summarize” key pieces?
- ❖ Along with materials relating to the training of your relevant Title IX team members, do you also keep information required under other federal regs? (VAWA/Campus SaVE Act, FERPA, Clery, etc.). This may be an opportunity to assemble and store all related campus-wide training and programming information, rather than siloed information.


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## QUESTIONS

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## RESOURCE

1. Current Title IX regs:  
<https://www2.ed.gov/policy/rights/reg/ocr/edlite-34cfr106.html>
2. Actual Proposed Title IX regs (published):  
<https://www.regulations.gov/document?D=ED-2018-OCR-0064-0001>
3. NPR Summary of Proposed Title IX regs:  
<https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-nprm.pdf>
4. DOJ Title IX Legal Manual:  
<https://www.justice.gov/crt/title-ix#Introduction>
5. Link to comments:  
<https://www.regulations.gov/document?D=ED-2018-OCR-0064-0001>
6. Title IX of the Education Amendments of 1972:  
<https://www.govinfo.gov/content/pkg/USCODE-2010-title20/pdf/USCODE-2010-title20-chap38.pdf>
7. EO 11246: <https://obamawhitehouse.archives.gov/the-press-office/2014/07/21/executive-order-further-amendments-executive-order-11478-equal-employmen>
8. FERPA regs:  
<https://www2.ed.gov/policy/gen/guid/fpco/pdf/2012-final-regs.pdf>
9. Clery Act: <https://clerycenter.org/policy-resources/the-clery-act/>

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