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Agenda

Session 1-April 19, 2pm-4:30pm eastern
TITLE: Basics of Conducting Sexual Harassment Investigations

Session 2-April 26, 2:30pm-5pm eastern
TITLE: Basics of Conducting Sexual Violence Investigations

Session 3-May 4, 9am-11:30am eastern
TITLE: Basics of Conducting Intimate Partner Violence Investigations

Session 4-
TITLE: Basics of Conducting Other Protected Class Harassment/Discrimination Investigations (Race, Religion, Ethnicity, etc.)

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Statutes
20 U.S.C.D.
§1681-1688


Regulatory Guidance
34 C.F.R. § 106


Sub-Regulatory Guidance
Dear Colleague Letters
OCR Website


Executive Orders

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**Title IX –
20 U.S.C.
1681-1688**

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- 1681: Sex
 - Prohibitions, exceptions
 - Preferential or disparate treatment not required (but can be evidence)
 - “educational institution” defined
- 1687: Interpretation of “program or activity”

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Federal Statute - Prohibition



20 USCA § 1681 Sex (a) Prohibition against discrimination

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

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**Federal
Statute -
Exceptions**

- Admission policies
- Institutions changing from single-sex status
- Religious institutions
- Military services or merchant marines
- Public traditional single-sex institutions
- Social fraternities or sororities and voluntary youth organizations
- Boys or girl conference
- Father-son/mother-daughter activities
- “Beauty pageants”

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Title IX Overview



Applies to Higher Ed
and K-12



Limited regulations
pre-2020



Covers wide range of
sex discrimination

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2020 Regulations



Preamble



Process For Sexual
Harassment ONLY



Technical Assistance

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§106.3 – Remedial Action



Fix it



No monetary damages

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§106.6 – Effect of Other Requirements and Preservation of Rights



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§106.8(a) Designation of Coordinator



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§106.8(b) Dissemination of Policy



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§106.8(C) Adoption of Grievance Procedure



“grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part and a grievance process that complies with § 106.45 for formal complaints as defined in § 106.30.”

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§106.8(d) Application Outside of the United States



Only applies to US (and US territories)

Use other policy

No Clery conflicts

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§106.8(d) Religious Institution



Submit in writing

Specific tenant

Not required

Raise any time

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§106.30 Definitions – 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.”

§106.30 Definitions – Actual Knowledge



- 
Title IX
Coordinator
- 
Official
with
authority
- 
Different
K-12
standard
- 
Designation
- 
Not same as
CSAs

§106.30 Definitions – Complainant & Respondent

- **Complainant**
“an individual who is alleged to be the victim of conduct that could constitute sexual harassment”
- **Respondent**
“an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment”

§106.30 Definitions – Formal Complaint

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- "... 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."
- "Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party."

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§106.30 Definitions - Sexual Harassment



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

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;
2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity;
3. "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).

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On the Basis of Sex

"Under *Bostock*'s reasoning, laws that prohibit sex discrimination – including Title IX of the Education Amendments of 1972 ... prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary."

Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, January 21, 2021

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PRONG 1: Quid Pro Quo



Must be an employee respondent (not volunteer, visitor, student)

"This for that" harassment

When favorable professional or educational treatment is conditioned on a sexual activity

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PRONG 2: Hostile Environment+ (The *Davis* Standard)



No definition of consent required

Not the same Title VII "hostile environment" or 2001 Guidance

First Amendment protections

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PRONG 3: The VAWA Offenses



Sexual Assault
Rape
Fondling
Incest
Statutory Rape

Intimate Partner Violence
Dating Violence
Domestic Violence

Stalking

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§106.30 Definitions – Supportive Measures



“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.”

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§106.30 Definitions – Supportive Measures



Non-disciplinary, non-punitive

Both parties

Academic, housing, and athletic impact

“Mutual restrictions on contact”

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§106.44 Recipient’s Response



Deliberately Indifferent

Educational Program or Activity

Equitable

Contact Complainant

On-line

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§106.44 (c) Emergency Removal;
(d) Administrative Leave



Emergency removal



Administrative leave

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§106.45 Grievance Process



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

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§106.45 Grievance Process



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§106.45 Grievance Process



Range of sanctions and remedies

Standard of evidence

Appeal

Supportive measures

Respect privilege

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§106.45 Grievance Process



Notice requirements



Additional allegations

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Training §106.44(b)(1)(iii)

- All Title IX Personnel
 - Definition of sexual harassment
 - Scope of the recipient's education program or activity
 - How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable
 - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- Decision-makers
 - Technology to be used at a live hearing
 - Issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant
- Investigators
 - Issues of relevance to create an investigative report that fairly summarizes relevant evidence

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§106.45(b)(3) Dismissal of a Formal Complaint



- Must dismiss:**
- Behavior does not constitute sexual harassment
 - Did not occur in educational program or activity, not in the United States

- May dismiss:**
- Complainant withdraws formal complaint
 - Respondent no longer enrolled/employed
 - Insufficient evidence

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§106.45(b)(4) Consolidation of a Formal Complaint



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§106.45 Grievance Process



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§106.45(b)(6) Hearings



Live hearing



Cross-examination

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§106.45(b)(6) Hearings



Advisor

Relevancy

Participation consequences

“Physically present”

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§106.45(b)(7) Determination Regarding Responsibility



Allegations

Procedural steps

Findings of fact

Conclusion/application

Rationale

Appeal procedures

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Sanctions and Remedies



Sanctions



Remedies

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§106.45(b)(8) Appeals



MUST have

- Procedure
- New evidence
- Conflict or bias that impacted outcome

Additional grounds permitted

Decision-maker can have no other role

Reasonably prompt time frame

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§106.45(b)(8) Appeals



Notification of appeal

Equal opportunity to respond

Written outcome - rationale

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§106.45(b)(9) Informal Resolution



Notice



Voluntary



Not allowed for Employee/student

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§106.45(b)(10) Recordkeeping (seven years)



Case Materials



Training materials

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§106.71 Retaliation Prohibited



Intimidation, threats, coercions, discrimination

May use same grievance procedure

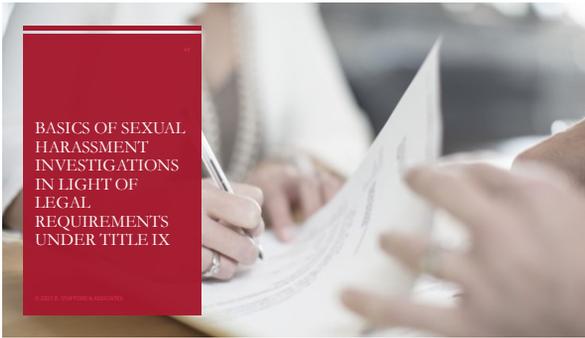
1st Amendment

False reports

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- Must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which the employee must be referred to as the "Title IX Coordinator"
- Name or title, office address, electronic mail address, and telephone number of the Title IX Coordinator to applicants, employees, unions
- Receive reports any time (including non-business hours) of sex discrimination in person, by mail, by telephone, or by electronic mail, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report
- Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures

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Title IX Coordination



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Title IX Determinations



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Actual Knowledge



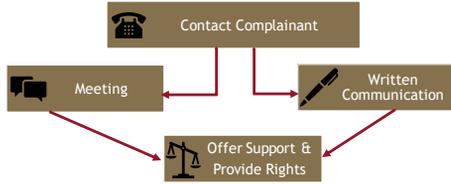
“Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school.”

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Actual Knowledge - Next Steps



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2020 Title IX Regulations - Supportive Measures



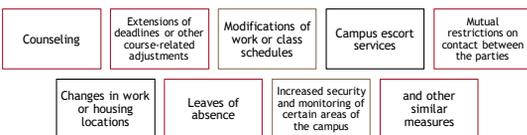
- Non-disciplinary, non-punitive individualized services
- Offered as appropriate, as reasonably available, and without fee or charge
- To the Complainant and/or the Respondent
- Before or after the filing of a formal complaint or where no formal complaint has been filed
- Designed to restore or preserve equal access without unreasonably burdening the other party
- Must maintain as confidential to the extent it would not impair the ability to provide

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2020 Title IX Regulations - Supportive Measures



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Title IX Formal Complaint



Filed/Signed



Alleging sexual harassment



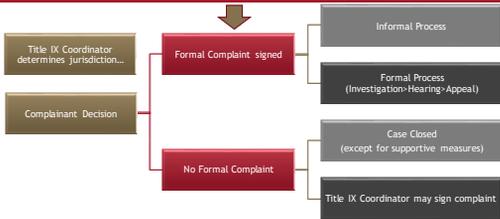
Requesting an investigation (or informal option)

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Title IX Case Flowchart Post Outreach

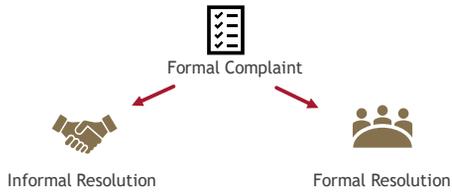


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Resolution Options



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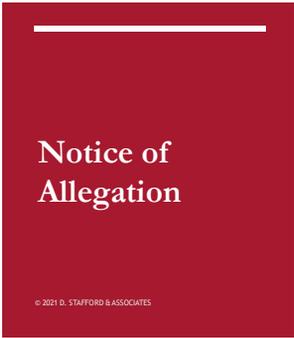
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Formal Process 



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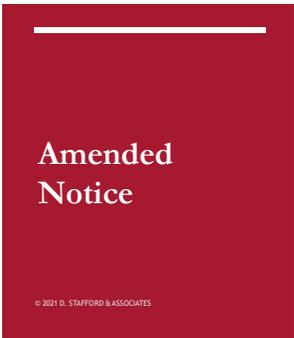
Notice of Allegation

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- Sufficient details known at the time including
 - the identities of the parties involved if known
 - the conduct allegedly constituting sexual harassment
 - the date and location if known
- Statement that the respondent is presumed not responsible
- Determination regarding responsibility is made at the conclusion of the grievance process
- May have an advisor of their choice, who may be, but is not required to be, an attorney
- May inspect and review evidence
- Inform the parties of any provision in code of conduct that prohibits knowingly making false statements or knowingly submitting false information

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Amended Notice

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- (ii) If, in the course of an investigation, the recipient decides to investigate allegations about the complainant or respondent that are not included in the notice ... the recipient must provide notice of the additional allegations to the parties whose identities are known.
- Also amend if...
 - Date wrong
 - Location wrong
 - Additional complainant

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Notice of Investigation/ Interview/ Meetings

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- Date, time, location of meeting
- Participants at the meeting
- Purpose of meetings
- With sufficient time for the party to prepare

Best Practice to also include:

- Name of Investigator(s)
- How to allege bias/conflict of interest

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Basic Investigator Role 

- 1 Interview Parties
- 2 Identify and Interview Witnesses
- 3 Collect Evidence
- 4 Draft Report(s)

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Logistical Decisions

-  WHO SENDS NOTICE?
-  WHO SCHEDULES?
-  HOW ARE STEPS DOCUMENTED?
-  WHO COLLECTS INSTITUTIONAL EVIDENCE?
-  WHO SENDS EVIDENCE/REPORT?
-  WHO DETERMINES DEADLINES?

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Title IX Investigations 

- Burden of proof
- Burden on institution
- Cannot restrict ability of parties to discuss the allegations
- Cannot restrict parties to gather/present relevant evidence

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Investigations in the Regulations



Fact witnesses

Expert witnesses

Inculpatory evidence

Exculpatory evidence

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Inspect and Review Evidence



“Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.”

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Inspect and Review Stage



Send to party and advisor



Provide at least 10 days to review



Allow submission of written response



Investigator must “consider” written response prior to completion of report

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Investigative Report



“Create an investigative report that fairly summarizes relevant evidence”

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Inspect and Review Stage



Send to party and advisor



At least 10 days before hearing



Allow review and written response

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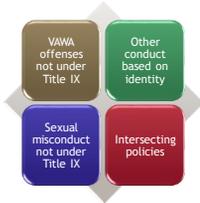


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Other Types of Investigations



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Possible Differences



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Likely Similarities



INTERVIEWS



EVIDENCE COLLECTION



ADVISORS

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