

**National Association of College and University Attorneys**  
**Notice of Proposed Rulemaking on Title IX of the Education Amendments of 1972**  
**Published in the Federal Register on November 29, 2018**

<b>Topic</b>	<b>Proposed Regulation</b>	<b>Selected Preamble Excerpts</b> <i>Note: Preamble does not have legal or regulatory force</i>	<b>Regulation Section or Preamble Page No.</b>	<b>Notes</b>
<b>Background</b>				
Purpose, as stated in the preamble		To establish principles including “the right of every survivor to be taken seriously and the right of every person accused to know that guilt is not predetermined.”	p. 61464	
		To establish a policy that “both strongly condemns and punishes sexual misconduct and ensures a fair adjudicatory process.”	p. 61464	
		“[T]o provide the clarity, permanence, and prudence of regulation properly informed by public participation in the full rulemaking process.”	p. 61465	
		To restore “confidence in the reliability of the outcomes of investigations of sexual harassment allegations.”	p. 61465	

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<b>Definitions</b>				
Actual Knowledge	“ <i>Actual Knowledge</i> 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 the authority to institute corrective measures on behalf of the recipient . . . “		§106.30	
Complainant	“ <i>Complainant</i> means an individual who has reported being the victim of conduct that could constitute sexual harassment, or on whose behalf the Title IX Coordinator has filed a formal complaint.”		§106.30	
Formal Complaint	“ <i>Formal Complaint</i> means a document signed by the complainant or by the Title IX Coordinator alleging sexual harassment against a respondent about conduct within its education program or activity and requesting initiation of the recipient’s grievance procedures consistent with section 106.45.”		§106.30	
Respondent	“ <i>Respondent</i> means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.”		§106.30	

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Sexual Harassment	“ <i>Sexual harassment</i> means: (i) 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; (ii) unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity; or (iii) sexual assault as defined in 34 CFR 668.46(a).”		§106.30	
Supportive Measures	“ <i>Supportive Measures</i> 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.”		§106.30	
<b>General Obligations/Department’s Enforcement Posture</b>				
General Obligations and Enforcement Posture	“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 in a manner that is not deliberately indifferent.”		§106.44 (a)	
Actual Knowledge	“ <i>Actual Knowledge</i> 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 the authority to institute corrective measures on behalf of the recipient . . . “		§106.30	

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		This adopts the standard applied to civil Title IX claims by the Supreme Court of the United States (“SCOTUS”).	p. 61467	
	“Imputation of knowledge based solely on respondeat superior or constructive notice is insufficient to constitute actual knowledge.”		§106.30	
	“The mere ability or obligation to report sexual harassment does not qualify an employee, even if that employee is an official, as one who has authority to institute corrective measures on behalf of the recipient.”		§106.30	
		“Determining whether someone is an official with authority to take corrective action is a fact-specific inquiry”	p. 61467	
	“The [actual knowledge] standard is not met when the only official of the recipient with actual knowledge is also the respondent.”		§106.30	
Sexual Harassment	“ <i>Sexual harassment</i> means: (i) 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; (ii) unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity; or (iii) sexual assault as defined in 34 CFR 668.46(a).”		§106.30	

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		<p>“[T]he definition thus seeks to include only sex-based discrimination that is sufficiently serious as to effectively deprive a student of equal access to a funding recipient’s educational program or activity.”</p>	p. 61467	
		<p>“There may be circumstances where the harassment occurs in a recipient’s program or activity, but the recipient’s response obligation is not triggered because the complainant was not participating in, or even attempting to participate in, the education programs or activities provided by that recipient.”</p>	p. 61468	
<p>Program or Activity (and Off-Campus Conduct)</p>		<p>“The Title IX statute defines ‘program or activity’ as ‘all of the operations of’ a recipient. <i>See</i> 20 U.S.C. 1687. An ‘education program or activity’ includes ‘any academic, extracurricular, research, [or] occupational training.’”</p>	p. 61468	

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		<p>“Whether conduct occurs within a recipient’s education program or activity does not necessarily depend on the geographic location of an incident (e.g., on a recipient’s campus versus off of a recipient’s campus).”</p>	P. 61468	
		<p>Factors to consider in determining whether an incident occurred within a recipient’s program or activity: whether the conduct occurred in a location or in a context where the recipient owned the premises; exercised oversight, supervision, or discipline; or funded, sponsored, promoted, or endorsed the event or circumstance</p>	p. 61468	

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		<p>In expounding on the above factors, the preamble discusses fraternities with a string cite: <i>See, e.g., Farmer v. Kansas State Univ.</i>, 2017 WL 980460 (holding that a KSU fraternity is an ‘education program or activity’ for purposes of Title IX because ‘KSU allegedly devotes significant resources to the promotion and oversight of fraternities through its websites, rules, and Office of Greek Affairs. Additionally, although the fraternity is housed off campus, it is considered a ‘Kansas State University Organization,’ is open only to KSU students, and is directed by a KSU instructor. Finally, KSU sanctioned the alleged assailant for his alcohol use, but not for the alleged assault. Presented with these allegations, the Court is convinced that the fraternity is an ‘operation’ of the University, and that KSU has substantial control over student conduct within the fraternity.”)</p>	p. 61468	

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		<p>“Importantly, nothing in the proposed regulations would prevent a recipient from initiating a student conduct proceeding or offering supportive measures to students who report sexual harassment that occurs outside the recipient’s education program or activity (or as to conduct that harms a person located outside the United States, such as a student participating in a study abroad program).”</p>	p. 61468	
Against a Person in the United States	<p>“The requirements that a recipient adopt a policy and grievance procedures as described in this section apply only to exclusion from participation, denial of benefits, or discrimination on the basis of sex occurring against a person in the United States.”</p>		§106.8(d)	
		<p>“The statutory language of Title IX limits its application to protecting ‘person[s] in the United States.’ 20 U.S.C. 1681(a).”</p>	p.61482	

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		<p>“Importantly, nothing in the proposed regulations would prevent a recipient from initiating a student conduct proceeding or offering supportive measures to students who report sexual harassment that occurs outside the recipient’s program or activity (or as to conduct that harms a person located outside the United States, such as a student participating in a study abroad program).”</p>	p. 61468	
Deliberate Indifference	<p>“A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.”</p>		§106.44 (a)	
Available Remedies in Enforcement Actions	<p>“If the Assistant Secretary finds that a recipient has violated this part, such recipient shall take such remedial action as the Assistant Secretary deems necessary to remedy the violation, which shall not include assessment of damages against the recipient. Nothing herein prohibits the Assistant Secretary from deeming necessary equitable relief to remedy a violation of this part.”</p>		§106.3	

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<b>What triggers an institution's obligations?</b>				
Obligation to Initiate a <u>Formal</u> Grievance Proceeding: Formal Complaint	Formal Complaint: "A recipient must follow procedures consistent with section 106.45 in response to a formal complaint."		§106.44 (b)(1)	
Formal Complaint Defined	" <i>Formal Complaint</i> means a document signed by the complainant or by the Title IX Coordinator alleging sexual harassment against a respondent about conduct within its education program or activity and requesting initiation of the recipient's grievance procedures consistent with section 106.45."		§106.30	
Obligation to Initiate <u>Formal</u> Grievance Proceeding: Multiple Reports Against Same Respondent	Multiple Allegations Against Same Respondent: "[W]hen a recipient has actual knowledge of reports by multiple complainants of conduct by the same respondent that could constitute sexual harassment, the Title IX Coordinator must file a formal complaint."		§106.44 (b)(2)	
Obligation to Provide Supportive Measures	"For institutions of higher education, a recipient is not deliberately indifferent when in the absence of a formal complaint the recipient offers and implements supportive measures designed to effectively restore or preserve access to the recipient's education program or activity."		§106.44(b)(3)	

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	“At the time the supportive measures are offered, the recipient must in writing inform the complainant of the right to file a formal complaint at that time or a later date, consistent with other provisions of this part.”		§106.44 (b)(3)	
	Supportive Measures are “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.”		§106.30	
	Supportive measures are “designed to restore or preserve access to the recipient’s education program or activity, without unreasonably burdening the other party; protect the safety of all parties and the recipient’s educational environment; and deter sexual harassment.”		§106.30	
	“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 campus, and other similar measures.”		§106.30	

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Other Obligations	<p>“If paragraphs (b)(1) through (b)(3) of this section are not implicated [no formal complaint, no allegations of multiple complaints against same respondent, and no offer and implementation of supportive measures in absence of formal complaint], 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, consistent with paragraph (a) of this section, respond in a manner that is not deliberately indifferent.”</p>		§106.44 (b)(4)	
Obligation to Terminate Formal Grievance Proceeding	<p>“If the conduct alleged by the complainant would not constitute sexual harassment as defined in §106.30 even if proved or did not occur within the recipient’s program or activity, the recipient must terminate its grievance process with regard to that conduct.”</p>		§106.45(b)(3)	

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		<p>“The Department emphasizes that a recipient remains free to respond to conduct that does not meet the Title IX definition of sexual harassment, or that did not occur within the recipient’s program or activity, including by responding with supportive measures for the affected student or investigating the allegations through the recipient’s student conduct code, but such decisions are left to the recipient’s discretion in situations that do not involve conduct falling under Title IX’s purview.”</p>	p.61475	
		<p>This is “[t]o ensure a recipient’s resources are directed appropriately at handling complaints of sexual harassment . . . [and that] only conduct covered by Title IX is treated as a Title IX issue in a school’s grievance process.”</p>	p. 61475	
<b>Requirements of Formal Grievance Processes</b>				
Equitable Treatment	“Grievance procedures must . . . [t]reat complainants and respondents equitably.”		§106.45 (b)(1)(i)	

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	“An equitable resolution for a complainant must include remedies where a finding of responsibility for sexual harassment has been made against the respondent; such remedies must be designed to restore or preserve access to the recipient’s education program or activity.”		§106.45 (b)(1)(i)	
	“An equitable resolution for a respondent must include due process protections before any disciplinary sanctions are imposed.”		§106.45 (b)(1)(i)	
Objective Evaluation of Relevant Evidence	“Require an objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence—and provide that credibility determinations may not be based on a person’s status as a complainant, respondent, or witness.”		§106.45 (b)(1)(ii)	
Conflicts of Interest	“Grievance procedures must . . . “[r]equire that any individual designated by a recipient as a coordinator, investigator, or decision-maker not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.”		§106.45 (b)(1)(iii)	
Presumption of Not Responsible	“Grievance procedures must . . . [i]nclude a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.”		§106.45 (b)(1)(iv)	

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		<p>“This requirement is added to ensure impartiality by the recipient until a determination is made. The requirement also bolsters other provisions in the proposed regulation that place the burden of proof on the recipient, rather than on the parties; indicate that supportive measures are ‘non-punitive’ (implying that the recipient may not punish an accused person prior to a determination regarding responsibility); and impose due process protections throughout the grievance process.”</p>	p. 61463	
Prompt Timeframe	<p>“Grievance procedures must . . . [i]nclude reasonably prompt timeframes for the conclusion of the grievance process, including reasonably prompt timeframes for filing and resolving appeals if the recipient offers an appeal, and a process that allows for a temporary delay of the grievance process or the limited extension of timeframes for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of the parties or witnesses, concurrent law enforcement activity, or the need for language assistant or accommodations of disabilities.”</p>		§106.45 (b)(1)(v)	

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		“The proposed regulations recognize that the time it takes to complete the grievance process will vary depending on, among other things, the complexity of the investigation. . . . “	p.61473	
		“[I]f a concurrent law enforcement investigation has uncovered evidence that the police plan to release on a specific timeframe and that evidence would likely be material to determining responsibility, a recipient could reasonably extend the timeframe of the grievance process in order to allow that evidence to be included in the final determination of responsibility.”	p.61473	
		“[D]elays caused solely by administrative needs are insufficient to satisfy this standard.”	p.61473	
Describe Range of Sanctions and Remedies	“Grievance procedures must . . . [d]escribe the range of possible sanctions and remedies that the recipient may implement following any determination of responsibility”		§106.45(b)(1) (vi)	
Describe Standard of Evidence	“Grievance procedures must . . . [d]escribe the standard of evidence to be used to determine responsibility.”		§106.45(b)(1) (vii)	

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Describe Appeal Process (if applicable)	“Grievance procedures must . . . [i]nclude the procedures and permissible bases for the complainant and respondent to appeal if the recipient offers an appeal”		§106.45(b)(1) (viii)	
Describe Range of Supportive Measures	“Grievance procedures must . . . [d]escribe the range of supportive measures available to complainants and respondents.”		§106.45(b)(1) (ix)	
		These proposed notice requirements “generally track the language in the Clery Act regulations at 34 CFR 668.46(k)(1) . . . .”	p. 61473	
<b>Pre-Hearing Investigation</b>				
Emergency Removal	“Nothing in this section precludes a recipient from removing a respondent from a recipient’s education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the health or safety of students or employees justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision shall not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or title II of the Americans with Disabilities Act.”		§106.44 (c)	

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		“This language tracks the language in the Clery Act regulations at 34 CFR 668.46(g) . . . .”	p. 61471	
		“Thus, a recipient may remove a student on an emergency basis under § 106.44(c), but only to the extent that such removal conforms with the requirements of the IDEA, Section 504 and Title II of the ADA.”	p. 61471	
Administrative Leave	“Nothing in this section precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of an investigation.”		§106.44 (d)	

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		<p>“Because placing a non-student respondent on administrative leave does not implicate access to the recipient’s education programs and activities in the same way that other respondent-focused measures might, and in light of the potentially negative impact of forcing a recipient to continue an active agency relationship with a respondent while accusations are being investigated, the Department concludes that it is appropriate to allow recipients to temporarily put non-student employees on administrative leave pending an investigation.”</p>	p. 61471	
Notice Requirement	“Upon receipt of a formal complaint, a recipient must provide . . . written notice to the parties who are known”		§106.45(b)(2)	

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Contents of Notice	<p>Written notice must include:</p> <ul style="list-style-type: none"> <li>• “Notice of the recipient’s grievance procedures”</li> <li>• “Notice of the allegations constituting a potential violation of the recipient’s code of conduct, including sufficient details known at the time . . .”</li> <li>• “Sufficient details include the identities of the parties involved in the incident, if known, the specific section of the recipient’s policy allegedly violated, the conduct allegedly constituting sexual harassment under this part and under the recipient’s policy, and the date and location of the alleged incident, if known”</li> <li>• “a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process”</li> <li>• A statement “inform[ing] the parties that they may request to inspect and review evidence [consistent with the regulations]”</li> <li>• A statement “inform[ing] the parties of any provision in the recipient’s code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.”</li> </ul>		§106.45(b)(2)	

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Duty to Supplement Notice	“If in the course of an investigation, the recipient decides to investigate allegations not included in the notice provided pursuant to [this section], the recipient must provide notice of the additional allegations to the parties, if known.”		§106.45(b)(2)(ii)	
Timing of Notice	“Such notice . . . must provide sufficient time to prepare a response before any initial interview.”		§106.45(b)(2)(i)(B)	
Right to an Advisor of Choice during Investigation	“[A] recipient must . . . [p]rovide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice.”		§106.45 (b)(3)(iv)	
	An institution may not “limit the choice of advisor or presence for either the complainant or respondent in any meeting or grievance proceeding.”		§106.45 (b)(3)(iv)	
	An institution “may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.”		§106.45 (b)(3)(iv)	
Right to Inspect and Review	“A recipient must . . . [p]rovide both parties an equal opportunity to inspect and review evidence obtained as part of the investigation that is directly related to the allegations raised in the complaint, including evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility, so that each party can meaningfully respond to evidence prior to the conclusion of the investigation.”		§106.45 (b)(3)(viii)	

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	<p>“Prior to the completion of the investigative report, the recipient must send to each party and the party’s advisor, if any, the evidence subject to inspection and review in an electronic format, such as a file sharing platform, that restricts the parties and advisors from downloading or copying the evidence, and the parties shall have at least ten days to submit written responses, which the investigator will consider prior to the completion of the investigative report.”</p>		§106.45 (b)(3)(viii)	
The Investigative Report	<p>“A recipient must . . . [c]reate an investigative report that fairly summarizes relevant evidence, and, at least 10 days prior to a hearing . . . provide a copy of the report to the parties for their review and written response.”</p>		§106.45 (b)(3)(ix)	
<b>The Hearing</b>				
Live Hearing Required	<p>“For institutions of higher education, the recipient’s grievance procedure must provide for a live hearing.”</p>		§106.45 (b)(3)(vii)	
Notice of Hearing	<p>“The recipient must . . . [p]rovide 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.”</p>		§106.45 (b)(3)(v)	

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Right to Inspect and Review Evidence During Hearing	“The recipient 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, including the evidence upon which the recipient does not intend to rely in reaching a determination of responsibility . . . .The recipient must make all such evidence subject herein to the parties’ inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.”		§106.45 (b)(3)(viii)	
Right to Present Witnesses and Evidence	“[A] recipient must . . . [p]rovide equal opportunity for the parties to present witnesses and other inculpatory and exculpatory evidence.”		§106.45 (b)(3)(ii)	
Right to an Advisor of Choice at Hearing	“[A] recipient must . . . [p]rovide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice.”		§106.45 (b)(3) (iv)	
Live Cross Examination Required (Conducted by Advisors)	“At the hearing, the decision-maker must permit each party to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.”		§106.45 (b)(3)(vii)	

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		<p>“The Department recognizes the high stakes for all parties involved in a sexual harassment investigation, and recognizes that the need for recipients to reach reliable determinations lies at the heart of Title IX’s guarantees for all parties. Indeed, at least one federal circuit court has held that in the Title IX context cross-examination is not just a wise policy, but is a constitutional requirement of Due Process. <i>Doe v. Baum</i>, 903 F.3d 575, 581 (6<sup>th</sup> Cir. 2018)</p>	p. 61476	
	<p>“Such cross examination at a hearing <i>must</i> be conducted by the party’s advisor of choice, notwithstanding the discretion of the recipient under paragraph 106.45(b)(3)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings.”</p>		§106.45 (b)(3)(vii)	
	<p>“If a party does not have an advisor present at the hearing the recipient must provide that party an advisor aligned with that party to conduct cross examination.”</p>		§106.45 (b)(3)(vii)	

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	<p>“All cross-examination must exclude evidence of the complainant’s sexual behavior or predisposition, unless such evidence about the complainant’s sexual behavior is offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the evidence concerns specific incidents of the complainant’s sexual behavior with respect to the respondent and is offered to prove consent.”</p>		<p>§106.45 (b)(3)(vii)</p>	
		<p>“These sections incorporate language from (and are in the spirit of) the rape shield protections found in Federal Rule of Evidence 412.”</p>	<p>p. 61476</p>	
	<p>“The decision-maker must explain to the party’s advisor asking cross- examination questions any decision to exclude questions that are not relevant.”</p>		<p>§106.45 (b)(3)(vii)</p>	
	<p>“At the request of either party, the recipient must provide for cross examination to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party answering questions.”</p>		<p>§106.45 (b)(3)(vii)</p>	
	<p>“If a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility.”</p>		<p>§106.45 (b)(3)(vii)</p>	

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Standard of Evidence	“[T]he recipient must apply either the preponderance of the evidence standard or the clear and convincing evidence standard.”		§106.45(b)(4)(i)	
	“[T]he recipient may employ the preponderance of the evidence standard only if the recipient uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction.”		§106.45 (b)(4)(i)	
	“The recipient must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty.”		§106.45 (b)(4)(i)	
Determinations Regarding Responsibility	The decision-makers “cannot be the same person(s) as the Title IX Coordinator or the investigator(s).”		§106.45 (b)(4)(i)	
		“Requiring the decision-maker to be different from any person who served as the Title IX Coordinator or investigator forecloses a recipient from utilizing a ‘single investigator’ or ‘investigator-only’ model for Title IX grievance processes.”	p.61478	
	Decision-makers must “issue a written determination regarding responsibility.”		§106.45 (b)(4)(i)	

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	<p>Written determinations of responsibility must include: (1) identification of conduct code sections alleged to have been violated, (2) A description of the procedural steps taken from the receipt of the complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather evidence, and hearings held (3) findings of fact supporting the determination (4) conclusions regarding the application of the recipient’s policy to the facts, (5) statement of, rationale for, the result as to each allegation, including a determination regarding responsibility, any sanctions the recipient imposes on the respondent, and any remedies provided to the complainant designed to restore or preserve access to the recipient’s education program or activity; and (6) the recipient’s procedures and permissible bases for the complainant and respondent to appeal.</p>		§106.45 (b)(4)(ii)	
	<p>“The recipient must provide the written determination to the parties simultaneously.”</p>		§106.45 (b)(4)(iii)	
Sanctions and Remedies	<p>An equitable resolution must include remedies for the complainant where a finding against the respondent has been made, with such remedies designed to restore or preserve access to the recipient’s education program or activity, and due process protections for the respondent before any disciplinary sanctions imposed.</p>		§106.45 (b)(1)(i)	

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	“[A] complainant is not entitled to a particular sanction against the respondent.”		§106.45 (b)(5)	
		“Remedies,” which are conceptually distinct from “sanctions” are “designed to restore or preserve the complainant’s education access”	p.61472	
<b>Appeals</b>				
Discretionary	“A recipient may choose to offer an appeal.”		§106.45 (b)(5)	
Equal Rights of Appeal to Both Parties	“If a recipient offers an appeal, it must allow both parties to appeal.”		§106.45 (b)(5)	
Limitations on Grounds for Appeal	“[A]lthough a complainant may appeal on the ground that the remedies are not designed to restore or preserve the complainant’s access to the recipient’s education program or activity, a complainant is not entitled to a particular sanction against the respondent.”		§106.45 (b)(5)	

Topic	Proposed Regulation	Selected Preamble Excerpts	Regulation Section or Preamble Page No.	Notes
Requirements for the Appeals Process	Requirements for Appeals: (i.) notify the other party in writing when an appeals is filed and implement appeal procedures equally for both parties (ii) ensure that the decision-maker is not the same person as any investigator’s or decision-maker(s) that reached the determination regarding responsibility (iii) ensure that the appeal decision-maker complies with the standards set forth in section 106.54(b)(1)(iii), (iv) give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging the outcome; (v) issue a written decision describing the result of the appeal and the rationale for the result and (v) provide the written decision simultaneously to both parties.		§106.45 (b)(5)	
<b>Safe Harbors and Deference</b>				
Safe Harbors	Safe Harbor 1: “If the recipient follows procedures (including implementing any appropriate remedy as required) consistent with section 106.45 in response to a formal complaint, the recipient’s response to the formal complaint is not deliberately indifferent and does not otherwise constitute sex discrimination under Title IX.”		§106.44 (b)(1)	

Topic	Proposed Regulation	Selected Preamble Excerpts	Regulation Section or Preamble Page No.	Notes
	Safe Harbor 2: “When a recipient has actual knowledge of reports by multiple complainants of conduct by the same respondent that could constitute sexual harassment, the Title IX Coordinator must file a formal complaint. If the Title IX Coordinator files a formal complaint in response to such allegations, and the recipient follows procedures (including implementing any appropriate remedy as required) consistent with section 106.45 in response to the formal complaint, the recipient’s response to the reports is not deliberately indifferent.”		§106.44 (b)(2)	
	Safe Harbor 3: “For institutions of higher education, a recipient is not deliberately indifferent when in the absence of a formal complaint the recipient offers and implements supportive measures designed to effectively restore or preserve the complainant’s access to the recipient’s education program or activity.”		§106.44 (b) (3)	
Deference to Institutions	“The Assistant Secretary will not deem a recipient’s determination regarding responsibility to be evidence of deliberate indifference by the recipient merely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence.”		§106.44 (b)(5)	

Topic	Proposed Regulation	Selected Preamble Excerpts	Regulation Section or Preamble Page No.	Notes
		“[U]nless the recipient’s response to sexual harassment is clearly unreasonable in light of the known circumstances, the Department will not second guess such decisions.”	p.61468	
<b>Informal Resolutions</b>				
Informal Resolutions	“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, provided that the recipient . . . provides to the parties a written notice.”		§106.45 (b)(6)	
	Written notice must disclose: (A) the allegations (b) the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations and (c) any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.		§106.45 (b)(6)	
	“The recipient must . . . obtain the parties’ voluntary, written consent to the informal resolution process.”		§106.45 (b)(6)	

Topic	Proposed Regulation	Selected Preamble Excerpts	Regulation Section or Preamble Page No.	Notes
		“[I]n responding to sexual harassment, it is important to take into account the needs of the parties involved in each individual case, some of whom may prefer not to go through a formal complaint process.”	p.61479	
		The recipient and the parties will determine whether the matter is “appropriate” for informal resolution.	p.61479	
Supportive Measures	<i>See supra</i> at pps. 10-11 (discussing institutional obligations to offer and implement supportive measures in the absence of a formal complaint).			
<b>Miscellaneous</b>				
Gag Orders	“[A] recipient must . . . [n]ot restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.”		§106.45(b)(3) (iii)	
Free Speech	“Nothing [in the regulations] requires a recipient to: (1) restrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution . . . “		§106.6(d)(1)	
Retaliation	Notably, no regulations regarding retaliatory conduct appear in the regulations.			
Impact on Other Laws	“Nothing in this part requires a recipient to: (1) Restrict any rights that would otherwise be protected from government action by the		§106.6 (d)	

Topic	Proposed Regulation	Selected Preamble Excerpts	Regulation Section or Preamble Page No.	Notes
	First Amendment of the U.S. Constitution; (2) Deprive a person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution; or (3) Restrict any other rights guaranteed against government action by the U.S. Constitution.”			
	“The obligation to comply with this part is not obviated or alleviated by the FERPA statute or regulations.”		§106.6(e)	
	“Nothing in this part shall be read in derogation of an employee’s rights under title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e <i>et seq.</i> or any regulations promulgated thereunder.”		§106.6(f)	
Designation and Notification Obligations	“Each recipient must designate at least one employee to coordinate its efforts to comply with its responsibilities under this part. The recipient must notify all its students and employees of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated pursuant to this paragraph.”		§106.8 (a)	

Topic	Proposed Regulation	Selected Preamble Excerpts	Regulation Section or Preamble Page No.	Notes
	<p>“Each recipient must notify applicants for admission and employment, students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of sex in the education program or activity that it operates and that it is required by title IX and this part not to discriminate in such a manner.</p> <p>Such notification must state that the requirement not to discriminate in the education program or activity extends to employment and admission (unless Subpart C does not apply to the recipient) and that inquiries about the application of title IX and this part to such recipient may be referred to the employee designated pursuant to section 106.8(a), to the Assistant Secretary, or both.”</p>		§106.8 (b)(1)	
	<p>“(i)Each recipient must prominently display a statement of the policy described in paragraph (b)(1) of this section on its website, if any, and in each handbook or catalog that it makes available to persons entitled to a notification under paragraph (b)(1) of this section. (ii) A recipient must not use or distribute a publication stating that the recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by this part.”</p>		§106.8 (b)(2)	

Topic	Proposed Regulation	Selected Preamble Excerpts	Regulation Section or Preamble Page No.	Notes
	<p>“A recipient must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part and of formal complaints as defined in section 106.44(e)(5). A recipient must provide notice of the recipients grievance procedures, including how to report sex discrimination and how to file or respond to a complaint of sex discrimination, to students and employees.”</p>		§106.8 (c)	
	<p>“The requirements that a recipient adopt a policy and grievance procedures as described in this section apply only to exclusion from participation, denial of benefits, or discrimination on the basis of sex occurring against a person in the United States.”</p>		§106.8 (d)	
Record Keeping	<p>“The recipient must create, make available to the complainant and respondent, and maintain for a period of three years records of—(A) Each sexual harassment investigation, including any determination regarding responsibility, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant; (B) Any appeal and the result therefrom; (C) Informal resolution, if any; and (D) All materials used to train coordinators, investigators, and decisions-makers with regard to sexual harassment.”</p>		§106.45 (b)(7)(i)	

Topic	Proposed Regulation	Selected Preamble Excerpts	Regulation Section or Preamble Page No.	Notes
	<p>“A recipient must create and maintain for a period of three years records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient must document the basis for its conclusion that its response was not clearly unreasonable, and document that it has taken measures designed to restore or preserve access to the recipient’s educational program or activity.”</p>		§106.45 (b)(7)(ii)	
Training	<p>“A recipient must ensure that coordinators, investigators, and decision-makers receive training on both the definition of sexual harassment and how to conduct an investigation and grievance process, including hearings, if applicable, that protect the safety of students, ensure due process protections for all parties, and promote accountability.”</p>		§106.45 (b)(1)(iii)	
	<p>“Any training materials used to train coordinators, investigators, or decision-makers may not rely on sex stereotypes and must promote impartial investigations and adjudications of sexual harassment.”</p>		§106.45 (b)(1)(iii)	
	<p>“The recipient must create, make available to the complainant and respondent, and maintain for a period of three years records of. . . [a]ll materials used to train coordinators, investigators, decisions-makers with regard to sexual harassment.”</p>		§106.45 (b)(7)	

Topic	Proposed Regulation	Selected Preamble Excerpts	Regulation Section or Preamble Page No.	Notes
Religious Exemption	<p>“An institution is not required to seek assurance from the Assistant Secretary in order to assert [a religious] exemption. In the event the Department notifies an institution that it is under investigation for noncompliance with this part and the institution wishes to assert an exemption set forth in paragraph (a) of this section , the institution may at that time raise its exemption by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization, whether or not the institution had previously sought assurance for the exemption from the Assistant Secretary.”</p>		§106.12(b)	

## Directed Questions

*The Department seeks additional comments on the questions below.*

	Question		Page Number	Notes
	<p><b>Applicability of provisions based on type of recipient or age of parties.</b> Some aspects of our proposed regulations . . . differ in applicability between institutions of higher education and elementary and secondary schools. We seek comment on whether our regulations should instead differentiate the applicability of these or other provisions on the basis of whether the complainant and respondent are 18 or over, in recognition of the fact that 18-year-olds are generally considered to be adults for many legal purposes.</p>		p. 61483	
	<p><b>Applicability of Rule to Employees:</b> Like the existing regulations, the proposed regulations would apply to sexual harassment by students, employees, and third parties. The Department seeks the public's perspective on whether there are any parts of the proposed rule that will prove unworkable in the context of sexual harassment by employees, and whether there are any unique circumstances that apply to processes involving employees that the Department should consider.</p>		p. 61483	

	<p><b>Training.</b> The proposed rule would require recipients to ensure that Title IX Coordinators, investigators, and decision-makers receive training on the definition of sexual harassment, and on how to conduct an investigation and grievance process, including hearings, that protect the safety of students, ensures due process for all parties, and promotes accountability. The Department is interested in seeking comments from the public as to whether this requirement is adequate to ensure that recipients will provide necessary training to all appropriate individuals . . . .</p>		p. 61483	
	<p><b>Individuals with Disabilities.</b> The proposed rule addresses the rights of students with disabilities . . . in the context of emergency removals (proposed section 106.44(c)). The Department is interested in comments from the public as to whether the proposed rule adequately takes into account other issues related to the needs of students and employees with disabilities when such individuals are parties in a sex discrimination complaint, or whether the Department should consider including additional language to address the needs of students and employees with disabilities as complainants and respondents. The Department also requests consideration of the different experiences, challenges, and needs of students with disabilities . . . in postsecondary institutions related to sexual harassment.</p>		p. 61483	

	<p><b>Standard of Evidence.</b> In section 106.45(b)(4)(i), we are proposing that the determination regarding responsibility be reached by applying either a preponderance of the evidence standard or the clear and convincing standard, and that the preponderance standard be used only if it is also used for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction. We seek comment on (1) whether it is desirable to require a uniform standard of evidence for all Title IX cases rather than leave the option to schools to choose a standard, and if so then what standard is most appropriate; and (2) if schools retain the option to select the standard they wish to apply, whether it is appropriate to require schools to use the same standard in Title IX cases that they apply to other cases in which a similar disciplinary sanction may be imposed.”</p>		p. 61483	
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	<p><b>Potential Clarification Regarding “Directly Related to the Allegations” language.</b> Proposed section 106.45(b)(3)(viii) requires recipients to provide each party with an equal opportunity to inspect and review any evidence directly related to the allegations obtained as part of the investigation, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility, and provide each party with an equal 86 opportunity to respond to that evidence prior to completion of the investigative report. The “directly related to the allegations” language stems from requirements in FERPA, 20 U.S. Code § 1232g(a)(4)(A)(i). We seek comment on whether or not to regulate further with regard to the phrase, “directly related to the allegations” in this provision.</p>		p. 61483	
	<p><b>Appropriate Time Period for Record Retention.</b> In section 106.45(b)(7), we are proposing that a recipient must create, make available to the complainant and respondent, and maintain records for a period of three years. We seek comments on what the appropriate time period is for this record retention.</p>		p. 61483	

	<p><b>Technology Needed to Grant Requests for Parties to be in Separate Rooms at Live Hearings.</b> In section 106.45(b)(3)(vii) we require institutions of higher education to grant requests from parties to be in separate rooms at live hearings, with technology enabling the decision-maker and parties to see and hear each other simultaneously. We seek comments on the extent to which institutions already have and use technology that would enable the institution to fulfill this requirement without incurring new costs or whether institutions would likely incur new costs associated with this requirement.</p>		p. 61483	
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Prepared by NACUA, December 2018.

The content should not be considered to be or used as legal advice. Legal questions should be directed to institutional legal counsel.