**OPEN Center Technical Assistance Questions and Responses by Category**
Through 12/31/2020

## Advisors

**Question:** If the respondent does not find a suitable advisor and only wants to be represented by an attorney, does the institution have to pay for the party's attorney?

**Answer:** No, the institution is not required to pay for the party's attorney. The Rule states that "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." § 106.45(b)(6)(i) (emphasis added).

In the Rule at p. 1147 the Department explains:

> This directive addresses many of the commenters' concerns about providing an advisor. By explicitly acknowledging that advisors provided by a recipient may be – but need not be – attorneys, expressly stating that the provided advisor is "of the recipient's choice," and limiting the role of provided advisors to conducting cross-examination on behalf of a party, the final regulations convey the Department's intent that a recipient enjoys wide latitude to fulfill this requirement. Claims by a party, for instance, that a recipient failed to provide "effective assistance of counsel" would not be entertained by the Department because this provision does not require that advisors be lawyers providing legal counsel nor does this provision impose an expectation of skill, qualifications, or competence. An advisor's cross-examination "on behalf of that party" is satisfied where the advisor poses questions on a party's behalf, which means that an assigned advisor could relay a party's own questions to the other party or witness, and no particular skill or qualification is needed to perform that role.

**Question:** Advisors, regardless if they are attorneys or not, cannot use legal rules of evidence nor can they use rules of civil procedure. Can the Title IX Coordinator indicate to the advisors their limitations during cross-examination?

**Answer:** It is overly broad to suggest that advisors can never "use" legal rules of evidence or rules of civil procedure. For instance, in some cases, an advisor may wish to refer to a rule of evidence in order to establish a legally-recognized privilege on behalf of a party.

However, nothing in the Rule prohibits the recipient from informing advisors of choice—(or advisors provided to a party under 106.45(b)(6)(i))—of the evidentiary rules imposed by the Title IX Rule. Similarly, the Rule does not preclude the recipient from explaining to party advisors that the Title IX Rule does not incorporate, or allow the recipient to incorporate, additional evidentiary rules that would exclude relevant evidence.

**Question:** Are advisors of choice expected to cross-examine witnesses?

**Answer:** The new Title IX Rule, § 106.45(b)(6)(i), states that a postsecondary institution must hold a live hearing. That provision further states: "At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally." (emphasis added). Thus, each party's advisor of choice must be "permitted" to cross-examine witnesses.

**Question:** Does it run afoul of the Title IX regulation's obligations for recipients to provide an internal advisor for purposes of cross examination (as opposed to hiring a person external to the institution). I read the regulation as permitting internal advisors to serve, but have come concern about this language, and other language like it, that requires recipients to be neutral: Whether a party's cross-examination is conducted by a party's advisor of choice or by the advisor provided to that party by the recipient, the recipient itself remains neutral, including the decision-maker's obligation to serve impartially and objectively evaluate relevant evidence. Does an institutional employee advocating on behalf of a party conflict with the recipient's obligation to be "neutral" writ large?

**Answer:** Thank you for your question regarding OCR's new Title IX Regulations. All references and citations are to the official version of the Regulation published in the Federal Register available is here. A link to the unofficial version of the final Regulations is available here.

All Title IX personnel (i.e., Title IX Coordinators, investigators, decision-makers, persons who facilitate informal resolution processes) must serve free from bias and conflicts of interest. See 34 C.F.R. § 106.45(b)(1)(iii). The § 106.45(b)(1)(iii) prohibition of Title IX personnel having conflicts of interest or bias does *not*, however, apply to party advisors, including advisors provided to a party by a postsecondary institution as required under § 106.45(b)(6)(i).

As the Department noted at page 30323 of the Preamble to the Final Regulations: "Because these final regulations require each party's advisor, and not the recipient (as the investigator, decision-maker, or other recipient official), to conduct cross- examination, the recipient remains impartial and neutral toward both parties throughout the entirety of the grievance process. By contrast, the parties (through their advisors) are not impartial, are not neutral, and are not objective… Cross-examination is conducted by the parties' advisors, who have no obligation to be neutral, while the recipient remains impartial and neutral with respect to both parties by observing the parties' respective advocacy of their own perspectives and interests and reaching a determination regarding responsibility based on objective evaluation of the evidence. Thus, the grievance process remains impartial, even though the parties and their advisors are, by definition, not impartial."

## Appeals

**Question:** Would a recipient comply with the new regulations regarding the bases for appeal if the recipient's policy allows for appeals only where (1) procedural irregularly "materially affected" the outcome; (2) new evidence that was not reasonably available could "materially affect" the outcome; or (3) the Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias that "materially affected" the outcome? In other words, is it correct to interpret the regulation as only requiring the provision of appeals where the basis for appeal did or could have "materially affected" the outcome?

**Answer:** Thank you for your question regarding OCR's new Title IX regulations. OCR's OPEN Center is pleased to respond. All references and citations are to the unofficial version of the final regulations, which are available here. A link to the official version of the Rule published in the Federal Register is here.

The Title IX Rule does not use the modifier "materially" in the provisions relating to the mandatory grounds for appeals that schools must offer. To be clear, the new Title IX Rule, at § 106.45(b)(8)(i), states:

> A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:
>
> (A) Procedural irregularity *that affected the outcome* of the matter;
>
> (B) 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
>
> (C) 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.

(emphasis added).

**Question:** In the "Appellate Processes" section, it states that "the person who decides the appeal cannot be the same person who reached the determination regarding responsibility..." **Question:** Is "the person who reached the determination regarding responsibility" mentioned above can be understood as "decision-makers"? If not, how are they different from each other?

**Answer:** The Title IX Rule, § 106.45(b)(8)(iii)(B) states that as to appeals, the recipient must: "Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator[.]" Thus, the Rule refers to the person who reaches a determination regarding responsibility, and to a

person who decides an appeal, as "decision-makers" and states that an appeal decision-maker cannot be the same person as the decision-maker who reached the determination regarding responsibility that is being appealed.

## Applicability of Title IX

**Question:** This may be a dumb question; do institutions without athletic programs fall under the Title IX regulations?

**Answer:** Thank you for your question regarding OCR's new Title IX regulations. OCR's OPEN Center is pleased to respond. The unofficial version of the final Title IX regulations is available here. A link to the official version of the Rule published in the Federal Register is here.

Yes, institutions which are recipients of Federal funding from the U.S. Department of Education are required to comply with Title IX and recipients are required to comply with the new Title IX regulations irrespective of whether they have athletic programs. Title IX prohibits discrimination on the basis of sex in all "education programs and activities" that receive Federal financial assistance from the Department. 20 U.S.C. § 1681. As such, while a recipient's athletic programs would generally be included under "education programs and activities" for purposes of sexual harassment, Title IX applies to all of a recipient's educational programs and activities. In addition, for the purposes of Title IX's coverage of sexual harassment, the term "education program or activity" includes "locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution."

**Question:** Where a Formal Complaint alleges conduct that constitutes Sexual Harassment, but also involves allegations of non-Title IX sexual misconduct and/or other code of conduct violations, is it permissible to consolidate all of the potential violations and adjudicate them in one grievance proceeding under a Title IX policy? If not, what would be a permissible way to handle such an inevitable scenario?

**Answer:** Thank you for your question regarding OCR's new Title IX Regulations. All references and citations are to the official version of the Regulation published in the Federal Register available is here. A link to the unofficial version of the final Regulations is available here.

The Title IX Regulations do not preclude a recipient from using the same Title IX personnel—whether that be employees of the recipient or the employees of a third-party, such as a consortium of schools—to investigate allegations of misconduct that fall outside the scope of Title IX. Similarly, the Regulations do not preclude a recipient from using a grievance process that complies with 34 C.F.R. § 106.45 with

respect to allegations that fall outside the scope of Title IX. In the Preamble of the Rule at p. 30157, for example, the Department notes:

In response to commenters' concerns, the final regulations revise § 106.45(b)(3)(i) to clearly state that dismissal for Title IX purposes does not preclude action under another provision of the recipient's code of conduct. Thus, if a recipient is required under State law or the recipient's own policies to investigate sexual or other misconduct that does not meet the § 106.30 definition, the final regulations clarify that a recipient may do so. Similarly, if a recipient wishes to use a grievance process that complies with § 106.45 to resolve allegations of misconduct that do not constitute sexual harassment under § 106.30, nothing in the final regulations precludes a recipient from doing so. Alternatively, a recipient may respond to non-Title IX misconduct under disciplinary procedures that do not comply with § 106.45. The final regulations leave recipients flexibility in this regard, and prescribe a particular grievance process only where allegations concern sexual harassment covered by Title IX.

**Question:** There are many schools, e.g., XXX, XXX, and XXX Universities, that have set up auxiliary proceedings and procedures for allegations of sexual misconduct that don't rise to the level of sexual harassment as defined by the new rule or that occur in off-campus locations not subjected to Title IX jurisdiction. Are these ancillary sexual misconduct panels going to be subjected to the same Title IX protections as those for mediating Title IX disputes? As a former Title IX respondent in which there was no due process, I have very little confidence in Title IX coordinators or Title IX investigators and do not want to enable colleges and universities to resort to the same sort of bad behavior that they did under Obama-era guidance. I have two additional questions germane to this point. 1) Would the punishments be less severe for violations of secondary, e.g., Code of Conduct or sexual misconduct, policies than for those of Title IX-governed proceedings, or is this entirely up to the institution? 2) Can a respondent, facing a single allegation, be found not responsible for having engaged in sexual harassment in a Title IX proceeding and then found responsible for sexual misconduct in a separate proceeding, which is basically double jeopardy?

**Answer:** Thank you for your question regarding OCR's new Title IX Regulations. All references and citations are to the official version of the Regulation published in the Federal Register available is here. A link to the unofficial version of the final Regulations is available here.

The § 106.45 grievance process applies only to formal complaints alleging sexual harassment as defined in § 106.30, that occurred in the recipient's education program or activity against a person in the United States. These final regulations do not establish what kind of process a recipient should or must use to resolve allegations of other types of misconduct.

If a recipient is required under State law or the recipient's own policies to investigate sexual or other misconduct that does not meet the § 106.30 definition, the final regulations clarify that a recipient may do so. Similarly, if a recipient wishes to use a grievance process that mirrors § 106.45 to resolve allegations of misconduct that do not constitute sexual harassment under § 106.30, nothing in the final regulations precludes a recipient from doing so. The sanctions the recipient imposes under the Title IX

grievance process and under its own code of conduct are generally left to the recipient's discretion, and the Department will not second-guess those sanctions.

A recipient may respond to non-Title IX misconduct under disciplinary procedures that do not comply with § 106.45. The final regulations leave recipients flexibility in this regard and prescribe a particular grievance process only where allegations concern sexual harassment covered by Title IX (Preamble at 30157). Dismissal for Title IX purposes does not preclude action under another provision of the recipient's code of conduct. § 106.45(b)(3)(i).

**Question:** I have a debate going and would like to know for my own sanity in the workplace. Is it required that you tell the person offending you that their behavior is offensive? This gives them a chance to not do it again. Others have said that action can be taken without the person not knowing they offended you.

**Answer:** Thank you for your question regarding OCR's new Title IX Regulations. All references and citations are to the official version of the Regulation published in the Federal Register available is here. A link to the unofficial version of the final Regulations is available here.

The U.S. Equal Employment Opportunity Commission (EEOC) is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy, transgender status, and sexual orientation), national origin, age (40 or older), disability or genetic information. It appears from your question that you are asking about sexual harassment in the workplace. If that is the case, the following EEOC fact sheet may be helpful: https://www.eeoc.gov/laws/guidance/fact-sheet-sexual-harassment-discrimination.

## Compliance

**Question:** Hello. My name is XXX, a specialist with the Office of Equity and Inclusion, Professional Standards in XXX County Public Schools, XXXX. I have a quick question - What, if any, are the penalties for school districts not being able to comply to all the mandated information regarding Title IX by August 14?

**Answer:** Thank you for your question regarding OCR's new Title IX Regulations. All references and citations are to the official version of the Regulation published in the Federal Register available is here. A link to the unofficial version of the final Regulations is available here.

OCR is responsible for enforcing Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681 et seq., and its implementing regulation, 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex by recipients of Federal financial assistance from the Department.

The Department may require a recipient to take remedial action for discriminating in violation of Title IX or for violating Title IX's implementing regulations. If OCR must initiate enforcement measures against a recipient for a violation of Title IX, such enforcement measures could result in a range of outcomes, from securing voluntary resolution agreements to comply with the regulations within a specified time frame, to referral to the Department of Justice for judicial proceedings, for potential loss of Federal financial assistance from the Department, as defined above. Any remedial action must be consistent with the Title IX statute at 20 U.S.C. 1682.

## Concurrent Law Enforcement Investigations

**Question:** Could you clarify how clear and apparent violations within some communities will be address by the OCR? Who enforces consequences to those who have chosen to disregard sexual assaults and identify them as unfounded within 20 minutes? How and who enforce consequences to serious criminal violations of the civil rights laws related? How will the US DOE address law enforcement who state directly that ONLY they call Child Protective Services AFTER they determine legitimacy and credibility on abuse and/or a sex crime? How will the OCR address direct retaliation which may be considered serious criminal civil rights violations by the DOJ OCR or does the DOE forward them to the DOJ under these circumstances?

**Answer:** Thank you for your questions regarding OCR's new Title IX regulations. OCR's OPEN Center is pleased to respond. All references and citations are to the unofficial version of the final regulations, which are available here. A link to the official version of the Rule published in the Federal Register is here.

The new Title IX Rule does not alter a school's obligations under State or other laws such as the New Jersey law you cite regarding use of Child Advocacy Centers. Under the Rule, a school must promptly respond to a sexual harassment incident occurring in the school's education program or activity, against a person in the United States, whenever any K-12 school employee has notice of sexual harassment or allegations of sexual harassment. See § 106.30 (defining "actual knowledge"); § 106.44(a). The Rule defines "sexual harassment" to include any instance of quid pro quo harassment by a school employee; any single instance of sexual assault, dating violence, domestic violence, or stalking; or any unwelcome conduct on the basis of sex that a reasonable person would determine to be so severe, pervasive, and objectively offensive that it effectively denies a person equal educational access. See § 106.30 (defining "sexual harassment"). The Rule gives "any person" the right to report sexual harassment to the Title IX Coordinator, verbally or in writing, including by phone or email. See § 106.8(a). School personnel who report sexual harassment are protected from retaliation under the Rule. See § 106.71. The new Title IX Rule contains express prohibitions against any Title IX personnel of a school having bias or conflicts of interest, as well as training requirements for all Title IX personnel. See § 106.45(b)(1)(iii).

The Rule acknowledges that a school's response to a sexual harassment incident may intersect with or occur concurrently with law enforcement investigation into the same misconduct, although a school's obligation to respond to sexual harassment under Title IX is independent from whether law

enforcement is also investigating the same incident. See § 106.45(b)(1)(v). See also the Rule at page 20, where the Department explains: "Alleged victims of sexual harassment often have options to pursue legal action through civil litigation or by pressing criminal charges. Title IX does not replace civil or criminal justice systems. However, the way in which a school, college, or university responds to allegations of sexual harassment in an education program or activity has serious consequences for the equal educational access of complainants and respondents. These final regulations require recipients to offer supportive measures to every complainant, irrespective of whether the complainant files a formal complaint. Recipients may not treat a respondent as responsible for sexual harassment without providing due process protections. When a recipient determines a respondent to be responsible for sexual harassment after following a fair grievance process that gives clear procedural rights to both parties, the recipient must provide remedies to the complainant."

## Clery Act

**Question:** When a complainant decided to dismiss a complaint – to my understanding of the Clery Act – that does not dismiss the institution's responsibility to claim the crime in its daily crime log or its statistical reporting. Is that a correct?

**Answer:** Thank you for your question regarding OCR's new Title IX regulations. OCR's OPEN Center is pleased to respond. All references and citations are to the unofficial version of the final regulations, which are available here. A link to the official version of the Rule published in the Federal Register is here.

At page 1784 of the Rule, the Department states:

"The Department promulgates these final regulations under Title IX and not under the Clery Act. These final regulations apply to all recipients of Federal financial assistance, and these recipients include many parties that are not institutions of higher education, receiving Federal student financial aid under Title IV of the HEA. For example, these final regulations apply to elementary and secondary schools, which are not subject to the Clery Act. *These final regulations do not change, affect, or alter any rights, obligations, or responsibilities under the Clery Act*."

For a discussion of the intersection between the Title IX Rule and the Clery Act, see pages 1782-1845 of the preamble to the Rule.

**Question:** Does the final notice intent to mirror Clery Act Geography in all off-campus descriptions?

**Answer:** Thank you for your questions regarding OCR's new Title IX regulations. OCR's OPEN Center is pleased to respond. All references and citations are to the unofficial version of the final regulations,

which are available here. A link to the official version of the Rule published in the Federal Register is here.

The Title IX Rule, at § 106.44(a), states that a recipient's "education program or activity" includes "any building owned or controlled by a student organization that is officially recognized by a postsecondary institution." At pages 627-28 of the preamble to the Rule, the Department explains:

We note that the revision in § 106.44(a) referencing a "building owned or controlled by a student organization that is officially recognized by a postsecondary institution" is not the same as, and should not be confused with, the Clery Act's use of the term "noncampus building or property," even though that phrase is defined under the Clery Act in part by reference to student organizations officially recognized by an institution. For example, "education program or activity" in these final regulations includes buildings within the confines of the campus on land owned by the institution that the institution may rent to a recognized student organization. As discussed in the "Clery Act" subsection of the "Miscellaneous" section of this preamble, the Clery Act and Title IX serve distinct purposes, and Clery Act geography is not co-extensive with the scope of a recipient's education program or activity under Title IX.

(internal footnotes omitted).

## Cross-Examination

**Question:** If a party refuses to participate in cross-examination, will that be held against them?

**Answer:** The Rule states "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 witness's absence from the live hearing or refusal to answer cross-examination or other questions." § 106.45(b)(6)(i) (emphasis added)

**Question:** How many questions shall be asked during cross-examination at a live hearing?

**Answer:** The Rule does not impose a limit on the number of relevant questions that may be asked during cross-examination.[1]

[1] Original answer included: "For further information, see the response to your Question 1 [asking about limit to number of questions], above."

**Question:** May the questions be sent beforehand so the parties may prepare?

**Answer:** The Rule requires cross-examination by the parties' advisors to occur "directly, orally, and in real time" during a live hearing. § 106.45(b)(6)(i). Thus, the recipient cannot require parties or party advisors to submit cross-examination questions beforehand.

**Question:** May the parties answer cross-examination questions in writing?

**Answer:** The Rule does not permit parties (or witnesses) to answer cross-examination questions in writing. Cross-examination by party advisors must occur "directly, orally, and in real time" during the live hearing. § 106.45(b)(6)(i) (emphasis added). The Rule states "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." § 106.45(b)(6)(i).

It is important to note that the Rule does not excuse a recipient from compliance with applicable disability laws. For example, if a party with a disability requires assistive technology in order to answer cross-examination questions "directly, orally, and in real time," the recipient must make any necessary accommodation under applicable disability laws.

**Question:** In the new Title IX rules, it states that if a party does not appear at a live hearing (if one is held), or chooses to not answer cross examination questions, that party's statement must be excluded. If that happens, how does that impact that party's statement in the investigative report? Does it mean all statements provided by that party before the hearing (including statements made to an investigator and summarized in the investigation report) are excluded?

**Answer:** The new Title IX Rule, in§ 106.45(b)(6)(i), requires postsecondary institutions to hold a live hearing with opportunity for each party (through party advisors) to conduct cross-examination. That provision also states: "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 witness's absence from the live hearing or refusal to answer cross-examination or other questions."

At page 1179 of the preamble to the Rule, the Department explains (emphasis added):

Because party and witness statements so often raise credibility questions in the context of sexual harassment allegations, *the decision-maker must consider only those statements that have benefited from the truth-seeking function of cross-examination*. The recipient, and the parties, have equal opportunity (and, for the recipient, the obligation) to gather and present relevant evidence including

fact and expert witnesses, and face the same limitations inherent in a lack of subpoena power to compel witness testimony. The Department believes that the final regulations, including § 106.45(b)(6)(i), strike the appropriate balance for a postsecondary institution context between ensuring that only relevant and reliable evidence is considered while not over-legalizing the grievance process.

At page 1181 of the preamble to the Rule, the Department states:

> The prohibition on reliance on "statements" applies not only to statements made during the hearing, but also to any statement of the party or witness who does not submit to cross-examination. *"Statements" has its ordinary meaning, but would not include evidence (such as videos) that do not constitute a person's intent to make factual assertions*, or to the extent that such evidence does not contain a person's statements. Thus, police reports, SANE reports, medical reports, and other documents and records may not be relied on to the extent that they contain the statements of a party or witness who has not submitted to cross-examination. While documentary evidence such as police reports or hospital records may have been gathered during investigation and, if directly related to the allegations inspected and reviewed by the parties, and to the extent they are relevant, summarized in the investigative report, the hearing is the parties' first opportunity to argue to the decision-maker about the credibility and implications of such evidence. Probing the credibility and reliability of *statements* asserted by witnesses contained in such evidence requires the parties to have the opportunity to cross-examine the witnesses making the statements.

(emphasis added); (footnotes omitted). For a further discussion of this topic and how it relates to unprotected speech that itself constitutes sexual harassment under the Title IX Rule, see this blog post.

At page 1175 of the preamble to the Rule, the Department notes: "In cases where a complainant files a formal complaint, and then does not appear or refuses to be cross-examined at the hearing, this provision [§ 106.45(b)(6)(i)] excludes the complainant's statements, including allegations in a formal complaint."

**Question:** I understand that the regs say that the decision-maker shall not rely on statements from a party or witness who does not participate in the hearing. Does this refer to the original source of the statement or evidence, or the source at the hearing?

**Answer:** The new Title IX Rule, at § 106.45(b)(6)(i), requires postsecondary institutions to hold a live hearing with opportunity for each party (through party advisors) to conduct cross-examination. That provision also states: "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 witness's absence from the live hearing or refusal to answer cross-examination or other questions."

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(emphasis added); (internal footnotes omitted).

At page 1168 of the Rule, the Department notes that it is declining to embrace certain exceptions to evidentiary rules commonly found in the rules of evidence that apply in criminal or civil courts of law, such as "statements against self-interest": "The Department declines to add exceptions to this provision, such as permitting reliance on statements against a party's interest. Determining whether a statement is against a party's interest, and applying the conditions and exceptions that apply in evidentiary codes that utilize such a rule, would risk complicating a fact-finding process so that a non-attorney decision-maker – even when given training in how to impartially conduct a grievance process – may not be equipped to conduct the adjudication."

**Question:** If the investigator does not testify as a witness, would there be portions of the investigation report that could be disregarded because the investigator was not subject to cross-examination?

**Answer:** As to postsecondary institutions, which must hold a live hearing with opportunity for cross-examination pursuant to § 106.45(b)(6)(i), that provision also precludes the decision-maker from relying on the statements of any party or witness who does not "submit to cross-examination at the live hearing." The new Title IX Rule does not make an exception for the recipient's investigator; thus, if the investigator does not submit to cross-examination at the live hearing, statements of the investigator cannot be relied on by the decision-maker. However, the Rule does not require the investigative report to contain "statements" or for the investigator to offer their own statements, as defined in the Rule (that is, a person's intent to make factual assertions; see Preamble at p. 1181). See also Preamble at p. 1031 ("The Department does not wish to prohibit the investigator from including recommended findings or conclusions in the investigative report. However, the decision-maker is under an independent obligation to objectively evaluate relevant evidence, and thus cannot simply defer to recommendations made by the investigator in the investigative report.").

**Question:** Respondent tells her best friend XXX that she really did sexually assault the complainant, XXX. At the hearing, the decision-maker asks XXX about this. XXX confirms it. The decision-maker asks respondent about it, and respondent refuses to answer. The respondent then refuses to be subject to cross-examination, at all. Do we read page 1182 of the preamble (5/6/20 version, p. 1214 of the 5/19/20) to mean that because the respondent refused to answer the question of the decision-maker, the decision-maker is able to rely on the "confession" to the extent it is relevant, and the decision-maker finds XXX credible? The provision directing the decision-maker not to rely on the confession and not draw an inference solely from Respondent's silence are no longer applicable, because the decision-maker posed the question?

**Answer:** Thank you for your questions regarding OCR's new Title IX regulations. OCR's OPEN Center is pleased to respond. All references and citations are to the unofficial version of the final regulations, which are available here. A link to the official version of the Rule published in the Federal Register is here.

The new Title IX Rule specifies that the prohibition against relying on a party's statements applies in the context of a live hearing in the post-secondary context if the party "does not submit to cross-examination," § 106.45(b)(6)(i), and the same provision describes "cross-examination" as being conducted by a party's advisor (i.e., not by the decision-maker). Thus, a party's failure or refusal to answer a question posed by the decision-maker is not covered by the provision prohibiting the decision-maker from relying on the party's statements. See also Preamble at p. 1182 ("This provision requires a party or witness to 'submit to cross-examination' to avoid exclusion of their statements; the same exclusion of statements does not apply to a party or witness's refusal to answer questions posed by the decision-maker. If a party or witness refuses to respond to a decision-maker's questions, the decision-maker is not precluded from relying on that party or witness's statements."). However if a party's advisor of choice asks a relevant question of another party or a witness, and that party or witness declines to respond to the question, then the decision-maker is precluded from relying on any statement made by that party or witness.

**Question:** Suppose the respondent's advisor isn't well-prepared and forgets to cross-examine the complainant during the hearing on a key statement related to credibility. What is the effect of this on the statement made by the complainant – may or may not the decision-maker consider it, and please explain why or why not?

**Answer:** Thank you for your questions regarding OCR's new Title IX regulations. OCR's OPEN Center is pleased to respond. All references and citations are to the unofficial version of the final regulations, which are available here. A link to the official version of the Rule published in the Federal Register is here.

The new Title IX Rule requires that postsecondary institutions hold a live hearing at which each party has the opportunity to cross-examine other parties and witnesses, where such cross-examination is conducted by a party's advisor and never by a party personally. § 106.45(b)(6)(i). If a party does not pose a cross-examination question to the other party, then the answering party cannot be said to have "not submitted" to cross-examination, and the provision of § 106.45(b)(6)(i) prohibiting the decision-maker from relying on the statements of a party who has not submitted to cross-examination would not apply.

**Question:** If a party truly has no questions to ask via their advisor in cross-examination, can they ask something to the effect of "Is everything in your statement in the report accurate?" If the answer is yes, is the statement then able to be considered? If no, then follow-up questions can be asked. Or do they still need to ask questions based on key facts to allow credibility to be fully assessed about each individual statement?

**Answer:** Thank you for your questions regarding OCR's new Title IX regulations. OCR's OPEN Center is pleased to respond. All references and citations are to the unofficial version of the final regulations, which are available here. A link to the official version of the Rule published in the Federal Register is here.

The new Title IX Rule requires, for a postsecondary institution, that "At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility." This contradicts the assumption in your question – that a witness "must be questioned thoroughly." Under the Rule, each party's advisor must be permitted to conduct cross-examination. Thus, the Rule permits a party's advisor (but never a party personally) to ask the question you pose in your hypothetical, and if that is the only relevant cross-examination question posed by the party's advisor to the witness then there would be no basis for the decision-maker not to rely on the witness's statements because the witness has "submitted" to cross-examination. See also Preamble to the Rule at p. 1181 ("to 'submit to cross-examination' means answering those cross-examination questions that are relevant").

**Question:** The regs are unclear on how much cross-examination is needed. If an advisor asks a party one question only about their statements, are all statements now admissible, or must the advisor question about each statement for that statement to be admitted?

**Answer:** Thank you for your questions regarding OCR's new Title IX regulations. OCR's OPEN Center is pleased to respond. All references and citations are to the unofficial version of the final regulations, which are available here. A link to the official version of the Rule published in the Federal Register is here.

The new Title IX Rule requires postsecondary institutions to hold a live hearing and at the live hearing the decision-maker must "permit" each party's advisor to conduct cross-examination. Thus, the Rule does not require a party's advisor to ask cross-examination questions, but rather each party's advisor must be permitted to ask all relevant cross-examination questions including follow-up questions.

**Question:** Let's suppose a Complainant hires me as an expert witness. I give a statement as a witness during the investigation. I am called as a witness at the hearing. I testify, and then am questioned by the Complainant. The Respondent's advisor strategically refuses to cross-examine me, and the decision-maker has no questions for me. Assuming my testimony is relevant, is my statement admissible even though I was not cross-examined, because I was willing to submit to it?

**Answer:** Thank you for your questions regarding OCR's new Title IX regulations. OCR's OPEN Center is pleased to respond. All references and citations are to the unofficial version of the final regulations, which are available here. A link to the official version of the Rule published in the Federal Register is here.

The new Title IX Rule requires postsecondary institutions to hold a live hearing and at the live hearing the decision-maker must "permit" each party's advisor to conduct cross-examination. Thus, the Rule does not require a party's advisor to ask cross-examination questions, but rather each party's advisor must be permitted to ask all relevant cross-examination questions including follow-up questions. A witness has "submitted to cross-examination" by answering all relevant cross-examination questions posed to the witness by a party's advisor.

**Question:** We had a student reach out to our office asking whether a "Final Rule" assertion that was shared on twitter is correct. The tweet (screenshot attached) reads: "In 19 days schools will be forced to ignore statement evidence if the person refuses cross-ex. Meaning, if your rapists texts you "sorry I raped you" your school can't consider the text if they refuse to be cross-examined." Our understanding is that the Department of Education has not spoken as to the exact scenario that is referenced in the

tweet. In order to provide our student with the most accurate information, we were hoping you could clarify this for us.

**Answer:** Thank you for your question regarding OCR's new Title IX Regulations. All references and citations are to the unofficial version of the final Regulations available here. A link to the official version of the Regulations published in the Federal Register is available is here.

The new Title IX Regulations, at 34 C.F.R. § 106.45(b)(6)(i), require postsecondary Institutions to hold a live hearing with opportunity for each party (through party advisors) to conduct cross-examination. That provision also states: "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 witness's absence from the live hearing or refusal to answer cross-examination or other questions."

At page 1179 of the preamble to the Regulations, the Department explains:

> Because party and witness statements so often raise credibility questions in the context of sexual harassment allegations*, the decision-maker must consider only those statements that have benefited from the truth-seeking function of cross-examination*. The recipient, and the parties, have equal opportunity (and, for the recipient, the obligation) to gather and present relevant evidence including fact and expert witnesses, and face the same limitations inherent in a lack of subpoena power to compel witness testimony. The Department believes that the final regulations, including § 106.45(b)(6)(i), strike the appropriate balance for a postsecondary institution context between ensuring that only relevant and reliable evidence is considered while not over-legalizing the grievance process.

(emphasis added).

At page 1181 of the preamble to the Regulations, the Department states:

The prohibition on reliance on "statements" applies not only to statements made during the hearing, but also to any statement of the party or witness who does not submit to cross-examination. *"Statements" has its ordinary meaning, but would not include evidence (such as videos) that do not constitute a person's intent to make factual assertions*, or to the extent that such evidence does not contain a person's statements. Thus, police reports, SANE reports, medical reports, and other documents and records may not be relied on to the extent that they contain the statements of a party or witness who has not submitted to cross-examination. While documentary evidence such as police reports or hospital records may have been gathered during investigation and, if directly related to the allegations inspected and reviewed by the parties, and to the extent they are relevant, summarized in the investigative report, the hearing is the parties' first opportunity to argue to the decision-maker about the credibility and implications of such evidence. Probing the credibility and reliability of *statements* asserted by witnesses contained in such evidence requires the parties to have the opportunity to cross-examine the witnesses making the statements.

(emphasis added); (internal footnotes omitted).

At page 1168 of the Regulations, the Department notes that it is declining to embrace certain exceptions to evidentiary rules commonly found in the rules of evidence that apply in criminal or civil courts of law, such as "statements against self-interest":

> The Department declines to add exceptions to this provision, such as permitting reliance on statements against a party's interest. Determining whether a statement is against a party's interest, and applying the conditions and exceptions that apply in evidentiary codes that utilize such a rule, would risk complicating a fact-finding process so that a non-attorney decision-maker – even when given training in how to impartially conduct a grievance process – may not be equipped to conduct the adjudication.

**Question:** I have several questions while watching the video on "Conducting and Adjudicating Title IX Hearings: An OCR Training Webinar." I am trying to create a training handbook on this process, but because I am not a lawyer I am having difficulty understanding certain segments of the video:

- 10 minutes 15 seconds: Is the requirement for written questions and answers prior to the live hearing just at the elementary or HS level, or is it required or recommended at the post-secondary level too?
- 10 minutes 45 seconds: Again, the two narrow exceptions regarding prior sexual consent, are they at the elementary or HS level, or is it required or recommended at the post-secondary level too?
- 11 minutes 15 seconds: It sounds like everything before this point was directed at the elementary or HS level. Does that mean at this point all questions, answers in cross-examinations in the live hearing are allowed in real time without any prior submission to the decision-maker, and only an advisor of the complainant or respondent can do cross-examinations? Is that correct?

**Answer:** Thank you for your questions regarding Title IX. All references and citations are to the unofficial version of the final Regulations, which are available here. A link to the official version of the Regulations published in the Federal Register is here.

34 C.F.R. § 106.45(b)(6) requires a live hearing with cross-examination conducted by the parties' advisors at postsecondary institutions, while making hearings optional for elementary and secondary schools (and other recipients that are not postsecondary institutions), so long as the parties have equal opportunity to submit written questions for the other parties and witnesses to answer before a determination regarding responsibility is reached. In response to your first question, the provision regarding a requirement to submit written questions does not apply at the postsecondary level.

Addressing your second question, the final regulations state that with or without a hearing, 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(6)(ii).

As to your final question, at the postsecondary level, 34 C.F.R. § 106.45(b)(6)(i), states: "At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally." (emphasis added). Although the decision-maker(s) could ask clarifying questions of the parties or witnesses, the final regulations grant cross-examination authority to only one other group: the parties' advisors.

**Question:** The Department has made clear that it does not "wish to prohibit [ ] investigator[s] from including recommended findings or conclusions in the investigative report" (Fed. Reg. Vol 85, No. 97 at 30308) and that investigators may appear and testify at a hearing about their findings and conclusions. See id. at 303014 (stating a witness could be an investigator). The Department has also made it clear that the decision maker cannot rely on any statements of other parties/witnesses contained the investigator's report or testimony if the party/witness does not submit to cross-examination. 9/4/20 Q&A at 7-8, Answer 9. However, can the decision maker rely on the recommended findings/conclusions of an investigator if those findings/conclusions rely on, but do not contain, statements made by parties/witnesses who do not submit to cross-examination?

**Answer:** Thank you for your question regarding Title IX. The unofficial version of the final Title IX regulations is available here. A link to the official version of the Rule published in the Federal Register is here.

The Title IX Rule obligates the decision-maker (who must be a different person from the investigator) to reach the determination regarding responsibility, and the decision-maker has an independent obligation to objectively evaluate all relevant evidence. See § 106.45(b)(7), § 106.45(b)(1)(ii).

After a postsecondary institution conducts its hearing, the Rule states that if a party or witness refuses to submit to cross-examination, the decision-maker must not rely on any statements of that party or witness in reaching a determination regarding responsibility. See § 106.45(b)(6)(i). The prohibition on reliance on "statements" applies not only to statements made during the hearing, but also to any statement of the party or witness who does not submit to cross-examination.

Nothing about the Rule prevents a Title IX Coordinator or investigator from making recommendations regarding facts at issue in the context of a formal complaint, the question of responsibility, or the appropriateness of remedies or disciplinary sanctions. However, a decision-maker—whether an employee of the recipient or an employee of a third party, such as a consortium of schools—is precluded from deferring to these findings or recommendations, and must make their own independent evaluation of the evidence.

**Question:** Is the questioning at a live hearing unlimited?

**Answer:** The Rule requires that schools provide the opportunity for cross-examination and that party advisors must be allowed to ask all relevant questions (including follow-up questions) and only relevant questions. In the preamble to the Rule at page 1227, the Department notes "Additionally, questions that are duplicative or repetitive may fairly be deemed not relevant and thus excluded." Section 106.45(b)(6)(i) states: "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."

**Question:** Who will field the pertinence of the questions at a live hearing?

**Answer:** The Rule states "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." § 106.45(b)(6)(i) (emphasis added).

**Question:** What happens if a party has an emotional or medical crisis during questioning at a live hearing?

**Answer:** In the preamble to the Rule at pages 1088-89, the Department states: "With respect to cross-examination, the Department notes that the final regulations do not prevent a recipient from granting breaks during a live hearing to permit a party to recover from a panic attack or flashback, nor do the final regulations require answers to cross-examinations to be in linear or sequential formats. The final regulations do not require that any party, including a complainant, must recall details with certain levels of specificity; rather, a party's answers to cross-examination questions can and should be evaluated by a decision-maker in context, including taking into account that a party may experience stress while trying to answer questions. Because decision-makers must be trained to serve impartially without prejudging the facts at issue, the final regulations protect against a party being unfairly judged due to inability to recount each specific detail of an incident in sequence, whether such inability is due to trauma, the effects of drugs or alcohol, or simple fallibility of human memory. We have also revised § 106.45(b)(6)(i) in a manner that builds in a 'pause' to the cross-examination process; before a party or witness answers a cross-examination question, the decision-maker must determine if the question is relevant. This helps ensure that content of cross-examination remains focused only on relevant questions and that the pace of cross-examination does not place undue pressure on a party or witness to answer immediately."

At page 1145, the Department notes that under the Rule "a recipient has discretion to adopt rules governing the conduct of hearings that could, for example, include rules about the timing and length of breaks requested by parties or advisors." Note that any such rule adopted by a recipient must apply equally to both parties, pursuant to § 106.45(b).

At page 1062, the Department states: "The Department also notes that recipients must comply with obligations under applicable disability laws, and that the final regulations contemplate that disability accommodations (e.g., a short-term postponement of a hearing date due to a party's need to seek medical treatment for anxiety or depression) may be good cause for a limited extension of the recipient's designated, reasonably prompt time frame for the grievance process."

**Question:** I know that the regulations state that any party or witness that refuses cross-examination cannot have their testimony/statements considered by the decision-maker. However, is this also the case if a party/witness refuses to answer, for example, only one question in cross-examination, but willingly answers others? Can a party/witness refuse to answer a question, but answer others, without having all of their statements and testimony thrown it? It seems the regulations only address the issue of a party/witness refusing to submit to cross-examination altogether.

**Answer:** Thank you for your question regarding OCR's new Title IX Regulations. All references and citations are to the official version of the Regulation published in the Federal Register available is here. A link to the unofficial version of the final Regulations is available here.

A witness or party has "submitted to cross-examination" by answering *all relevant cross-examination questions* posed to the witness or party by a party's advisor. If a witness or party refuses to answer a relevant question posed by a party advisor at the live hearing, that witness or party has not submitted to cross-examination under the Final Regulations, and 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 that party's or witness's refusal to answer cross- examination or other questions.

**Question:** 1. Can there be more than one decision maker per case and present at a live hearing? 2. Does the decision maker decide all sanctions resulting from the hearing that the Title IX Coordinator enforces? 3. If a party or witness chooses not to participate in the cross examination, can statements made direction (directly?) to the investigator still be used as evidence in the hearing?

**Answer:** Thank you for your question regarding OCR's new Title IX Regulations. All references and citations are to the official version of the Regulations published in the Federal Register available is here. A link to the unofficial version of the final Regulations is available here.

At page 30371 of the preamble to the Regulations, the Department states: "The Department notes that the final regulations leave significant flexibility to recipients, including whether the Title IX Coordinator

can also serve as the investigator, whether to use a panel of decision-makers or a single decision-maker, and whether to use the recipient's own employees or outsource investigative and adjudicative functions to professionals outside the recipient's employ." Thus, a decision-maker may be the recipient's employee or, at the recipient's discretion, may be a non-employee such as a consultant or contractor. The decision-maker, however, "cannot be the same person(s) as the Title IX Coordinator or the investigator(s)." 34 C.F.R. §106.45(b)(7).

The Regulations do not preclude a recipient from using one decision-maker to reach the determination regarding responsibility, and having another decision-maker, who may be an employee or administrator of the recipient (e.g., a tenure committee) determine appropriate disciplinary sanctions (including making such a decision at a separate hearing), so long as the end result is that the decision-maker who reached the determination regarding responsibility includes the disciplinary sanctions imposed by the recipient against the respondent in the written determination issued under 34 C.F.R. § 106.45(b)(7). The issuance of a written determination cannot be a piecemeal process that is broken down into chronologically occurring sub-parts. In other words, when a recipient uses a separate decision-maker to make disciplinary sanction decisions, the recipient must issue a single written determination containing all of the information required under 34 C.F.R. § 106.45(b)(7).

In the postsecondary context, only statements that have been tested for credibility will be considered by the decision-maker in reaching a determination regarding responsibility. Section 106.45(b)(6)(i) clarifies that although a decision-maker cannot rely on the statement of a party or witness who does not submit to cross-examination, the decision-maker cannot draw any inference about the determination regarding responsibility based solely on a party's or witness's absence from the hearing or refusal to answer cross-examination or other questions. The prohibition on reliance on ''statements'' applies not only to statements made during the hearing, but also to any statement of the party or witness who does not submit to cross-examination. ''Statements'' has its ordinary meaning but would not include evidence (such as videos) that do not constitute a person's intent to make factual assertions, or to the extent that such evidence does not contain a person's statements. (Preamble at 30349).

**Question:** Under the Title IX regulations published on May 19, 2020, a party or witnesses' statements are only admissible when they have been subjected to cross examination at a live hearing. Being subjected to cross examination means answering all relevant questions posed by a parties' advisor. My question is if both parties indicate in advance of the hearing that they don't have any questions for a witness, does that witness still have to appear in order to have been considered subjected to cross examination, and thus have their statements available to be considered by the decision maker?

**Answer:** Thank you for your question regarding OCR's new Title IX Regulations. All references and citations are to the official version of the Regulation published in the Federal Register available is here. A link to the unofficial version of the final Regulations is available here.

In the postsecondary context, only statements that have been tested for credibility will be considered by the decision-maker in reaching a determination regarding responsibility. Thus, if a party or witness who

made a "statement" during the investigation submits to cross-examination at a live hearing (whether in-person or virtually), the party's or witness's statement is deemed relevant and can be considered by the decision-maker when determining responsibility.

## Decision-Makers

**Question:** 4) must the decision-maker be independent of the institution - ie - can the decision-maker be an employee of the institution? How about the person(s) reviewing any appeal? How about the person appointed by the institution to act as advisor?

**Answer:** The Rule allows a recipient the discretion to use the recipient's own employees, or to hire outside professionals, to perform the roles of Title IX investigator, decision-maker (including any decision-maker for the appeal), or facilitator of an informal resolution. In the preamble to the Rule at page 1259, the Department states "The Department notes that the final regulations leave significant flexibility to recipients, including whether the Title IX Coordinator can also serve as the investigator, whether to use a panel of decision-makers or a single decision-maker, and *whether to use the recipient's own employees or outsource investigative and adjudicative functions to professionals outside the recipient's employ.*" Emphasis added.

The Rule does not preclude a postsecondary institution from appointing an employee of the institution to serve as a party's advisor for purposes of cross-examination, if the party does not have an advisor.

Note that the recipient's Title IX Coordinator must be the recipient's employee. See § 106.8(a).

**Question:** Section 106.45(b)(7) "requires a decision-maker who is not the same person as the Title IX Coordinator or the investigator to reach a determination regarding responsibility by applying the standard of evidence the recipient has designated…" Does this mean that neither the Title IX Coordinator nor the investigator can be the decision-maker, or are Title IX Coordinator and investigator being used interchangeably? If the Title IX Coordinator did not conduct the investigation, could that person be the decision-maker?

**Answer:** The Title IX Rule states in § 106.45(b)(7)(i) that the decision-maker "cannot be the same person(s) as the Title IX Coordinator or the investigator(s)" and § 106.45(b)(8)(iii)(B) states that that the recipient must ensure that a decision-maker for an appeal is "not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator." At page 1259 of the preamble to the Rule, the Department states:

> "The Department notes that the final regulations leave significant flexibility to recipients, including whether the Title IX Coordinator can also serve as the investigator, whether to use a

> panel of decision-makers or a single decision-maker, and whether to use the recipient's own employees or outsource investigative and adjudicative functions to professionals outside the recipient's employ."

(emphasis added).

**Question:** Could you provide some clarity regarding whether the "decision-maker" has to be the same person/panel who decides sanctioning? Can the "decision-maker" determine responsibility with another step in the process (impact/mitigation meetings with a different administrator) to determine sanctions? Can the "decision-maker" determine responsibility and make sanction recommendations to another person/body?

**Answer:** Thank you for your questions regarding OCR's new Title IX regulations. OCR's OPEN Center is pleased to respond. All references and citations are to the unofficial version of the final regulations, which are available here. A link to the official version of the Rule published in the Federal Register is here.

The Title IX Rule, at § 106.45(b)(7), requires a recipient's decision-maker(s) to issue a written determination that must include, among other items, the result as to each allegation and rationale for the result, any disciplinary sanctions imposed by the recipient against the respondent, and whether remedies will be provided by the recipient to the complainant. The Rule does not preclude a recipient from using one decision-maker to reach the determination regarding responsibility, and having another decision-maker (e.g., a panel of administrators) determine appropriate disciplinary sanctions (including making such a decision at a separate meeting), so long as the end result is that the decision-maker who reached the determination regarding responsibility includes the disciplinary sanctions imposed by the recipient against the respondent in the written determination issued under § 106.45(b)(7). In other words, whether a recipient holds a separate administrative meeting, or uses a separate decision-maker, to make disciplinary sanction decisions, the recipient must issue a single written determination containing all of the information required under § 106.45(b)(7). Recipients should also remain aware of their obligation to conclude the grievance process within the reasonably prompt time frames designated in the recipient's grievance process, under § 106.45(b)(1)(v). Additionally, each decision-maker—whether an employee of the recipient or an employee of a third party such as a consortium of schools—owes an individual and ongoing duty not have a conflict of interest or bias for or against complainants or respondents generally, or with respect to an individual complainant or respondent, pursuant to § 106.45(b)(1)(iii).

**Question:** If the decision-maker makes a finding, can another person or panel make sanctioning decisions, if the sanction will depend in any way on the decision-maker's assessment of credibility, but the sanctioner was not present at the hearing?

**Answer:** Thank you for your questions regarding OCR's new Title IX regulations. OCR's OPEN Center is pleased to respond. All references and citations are to the unofficial version of the final regulations, which are available here. A link to the official version of the Rule published in the Federal Register is here.

The new Title IX Rule requires a decision-maker to prepare a written determination regarding responsibility that contains, among other items, any disciplinary sanctions imposed on the respondent. § 106.45(b)(7). The Rule does not preclude a recipient from having multiple decision-makers in the context of any given formal complaint, some of whom decide the question of responsibility, and some of whom reach a decision as to appropriate disciplinary sanctions. However, the written determination issued by the decision-maker(s) must comply with § 106.45(b)(7), by including any disciplinary sanctions imposed on the respondent.

**Question**: Can you tell me, under the new Title IX regulations is it acceptable to have two or more decision makers collaborate and be involved in a hearing? You can assume they are all trained and have no conflicts of interest.

**Answer**: Thank you for your question regarding OCR's new Title IX Regulations. All references and citations are to the official version of the Regulation published in the Federal Register available is here. A link to the unofficial version of the final Regulations is available here.

At page 30371 of the preamble to the Regulations, the Department states: "The Department notes that the final regulations leave significant flexibility to recipients, including whether the Title IX Coordinator can also serve as the investigator, *whether to use a panel of decision-makers or a single decision-maker*, and whether to use the recipient's own employees or outsource investigative and adjudicative functions to professionals outside the recipient's employ." (emphasis added). Thus, a decision-maker may be the recipient's employee or, at the recipient's discretion, may be a non-employee such as a consultant or contractor. The decision-maker, however, "cannot be the same person(s) as the Title IX Coordinator or the investigator(s)." 34 C.F.R. §106.45(b)(7).

Recipients can also share responsibility with other entities during the adjudication process. For instance, a decision-maker retained by a regional center could make a finding on the issue of responsibility, while leaving to the recipient the ultimate decision on the appropriate specific discipline for a student who is found responsible. In this way, the Title IX regulations provide flexibility to use multiple decision-makers in any sexual harassment grievance process, so long as the written determination at the end of the process is provided to the parties in a manner consistent with the new regulations.

**Question:** 1. Can there be more than one decision maker per case and present at a live hearing? 2. Does the decision maker decide all sanctions resulting from the hearing that the Title IX Coordinator

enforces? 3. If a party or witness chooses not to participate in the cross examination, can statements made direction (directly?) to the investigator still be used as evidence in the hearing?

**Answer:** Thank you for your question regarding OCR's new Title IX Regulations. All references and citations are to the official version of the Regulations published in the Federal Register available is here. A link to the unofficial version of the final Regulations is available here.

At page 30371 of the preamble to the Regulations, the Department states: "The Department notes that the final regulations leave significant flexibility to recipients, including whether the Title IX Coordinator can also serve as the investigator, whether to use a panel of decision-makers or a single decision-maker, and whether to use the recipient's own employees or outsource investigative and adjudicative functions to professionals outside the recipient's employ." Thus, a decision-maker may be the recipient's employee or, at the recipient's discretion, may be a non-employee such as a consultant or contractor. The decision-maker, however, "cannot be the same person(s) as the Title IX Coordinator or the investigator(s)." 34 C.F.R. §106.45(b)(7).

The Regulations do not preclude a recipient from using one decision-maker to reach the determination regarding responsibility, and having another decision-maker, who may be an employee or administrator of the recipient (e.g., a tenure committee) determine appropriate disciplinary sanctions (including making such a decision at a separate hearing), so long as the end result is that the decision-maker who reached the determination regarding responsibility includes the disciplinary sanctions imposed by the recipient against the respondent in the written determination issued under 34 C.F.R. § 106.45(b)(7). The issuance of a written determination cannot be a piecemeal process that is broken down into chronologically occurring sub-parts. In other words, when a recipient uses a separate decision-maker to make disciplinary sanction decisions, the recipient must issue a single written determination containing all of the information required under 34 C.F.R. § 106.45(b)(7).

In the postsecondary context, only statements that have been tested for credibility will be considered by the decision-maker in reaching a determination regarding responsibility. Section 106.45(b)(6)(i) clarifies that although a decision-maker cannot rely on the statement of a party or witness who does not submit to cross-examination, the decision-maker cannot draw any inference about the determination regarding responsibility based solely on a party's or witness's absence from the hearing or refusal to answer cross-examination or other questions. The prohibition on reliance on ''statements'' applies not only to statements made during the hearing, but also to any statement of the party or witness who does not submit to cross-examination. ''Statements'' has its ordinary meaning but would not include evidence (such as videos) that do not constitute a person's intent to make factual assertions, or to the extent that such evidence does not contain a person's statements. (Preamble at 30349).

**Question:** May a recipient divide its grievance process into two phases, in which one decision maker administers a hearing and makes a determination with respect to responsibility for Sexual Harassment, then, based on that finding and as applicable, a separate decision maker decide what remedies and sanctions may be appropriate. I ask because many recipients may use outside hearing officers, who are well situated and changed to serve a hearing officer but may be less well situated to make determinations about recipient-appropriate remedies and sanctions.

**Answer:** Thank you for your question regarding OCR's new Title IX Regulations. All references and citations are to the official version of the Regulations published in the Federal Register available is here. A link to the unofficial version of the final Regulations is available here.

The Regulations do not preclude a recipient from using one decision-maker to reach the determination regarding responsibility, and having another decision-maker, who may be an employee or administrator of the recipient (e.g., a tenure committee) determine appropriate disciplinary sanctions (including making such a decision at a separate hearing), so long as the end result is that the decision-maker who reached the determination regarding responsibility includes the disciplinary sanctions imposed by the recipient against the respondent in the written determination issued under 34 C.F.R. § 106.45(b)(7). The issuance of a written determination cannot be a piecemeal process that is broken down into chronologically occurring sub-parts. In other words, when a recipient uses a separate decision-maker to make disciplinary sanction decisions, the recipient must issue a single written determination containing all of the information required under § 106.45(b)(7).

**Question:** The first question is regarding dual enrollment in both a K-12 program and college program. Should a sexual harassment allegation arise, would those students need to go through the university's formal Title IX process (with a live hearing) or the K-12's process that may not have the live hearing component.

The second question is regarding decision makers and remedy determinations. The regulations are clear that the decision maker must articulate the basis for any remedies in their determinations. I read this to mean that the decision maker must also issue any remedies/sanctions but wanted clarification from OCR. Currently many institutions have a bifurcated process where a responsibility determination is first made and then a different group of folks or one individual makes a sanctioning determination. My read is that this will not be allowed under this new process. Can you clarify?

**Answer:** Thank you for your question regarding OCR's new Title IX Regulations. All references and citations are to the official version of the Regulations published in the Federal Register available is here. A link to the unofficial version of the final Regulations is available here.

The Final Regulations direct recipients of Federal financial assistance to respond promptly to each instance of notice of sexual harassment (or allegations of sexual harassment) in the school's education program or activity, against a person in the United States, by taking specific, required actions such as offering supportive measures to the complainant.

Thus, the answer to your first question depends, in part, on whether the dual enrollment program constituted a part of the recipient's education program activity, and if so, which recipient was in fact responding to an allegation of sexual harassment in its education program or activity is an elementary or secondary school, or a post-secondary school. In the Preamble to the regulations, the Department noted that:

These final regulations require a recipient to respond to sexual harassment whenever the recipient has notice of sexual harassment that occurred in the recipient's own education program or activity, regardless of whether the complainant or respondent is an enrolled student or an employee of the recipient. The manner in which a recipient must, or may, respond to the sexual harassment incident may differ based on whether the complainant or respondent are students, or employees, of the recipient.

Preamble at 30488 (footnote omitted). The Regulations do not preclude a recipient from using one decision-maker to reach the determination regarding responsibility, and having another decision-maker, who may be an employee or administrator of the recipient (e.g., a tenure committee) determine appropriate disciplinary sanctions (including making such a decision at a separate hearing), so long as the end result is that the decision-maker who reached the determination regarding responsibility includes the disciplinary sanctions imposed by the recipient against the respondent in the written determination issued under 34 C.F.R. § 106.45(b)(7). The issuance of a written determination cannot be a piecemeal process that is broken down into chronologically occurring sub-parts. In other words, when a recipient uses a separate decision-maker to make disciplinary sanction decisions, the recipient must issue a single written determination containing all of the information required under § 106.45(b)(7).

## Definitions

**Question:** In the OCR webinar issued today, the presenters referenced that the rules refer to "complainant and respondent." Are recipients expected to use these terms going forward?

**Answer:** Thank you for your question regarding OCR's new Title IX regulations. OCR's OPEN Center is pleased to respond. All references and citations are to the unofficial version of the final regulations, which are available here. A link to the official version of the Rule published in the Federal Register is here.

The Title IX Rule and the Department do not impose a specific obligation on a recipient to utilize the terminology of the Rule in the recipient's Title IX policies and procedures. However, failure to use the Rule's terminology may result in the recipient's educational community (and OCR) lacking clarity as to whether the recipient's policies and procedures in fact comply with the Rule. For example, if a recipient's policy refers to a "reporting party" but does not use "complainant" as that term is defined in § 106.30, the recipient and its educational community may not have clarity as to whether the recipient's prompt response is directed to "the complainant" (i.e., the alleged victim) as the Rule requires (see § 106.44(a)) or to a third party who has reported that someone other than the person who made the report has been victimized by sexual harassment.

**Question:** How should recipients define sexual assault?

**Answer:** As you note, the new Title IX Rule defines sexual harassment to include "sexual assault" as defined in the Clery Act, 20 U.S.C. § 1092(f)(6)(A)(v). As you also note, that statutory provision states: "The term 'sexual assault' means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation."

In the preamble to the Rule discussing the definition of "sexual assault" (e.g., pp. 541, 547), the Department does not cite to the Clery Act Handbook. Instead, the Department will rely on "an offense classified as a forcible or nonforcible sex offense" under the FBI's uniform crime reporting system (UCR), as referenced in the Clery Act statute.

**Question:** How closely should a recipient's policies track with the terminology provided by OCR in the 2020 regs?

**Answer:** The Title IX Rule and the Department do not impose a specific obligation on a recipient to utilize the terminology of the Rule in the recipient's Title IX policies and procedures. However, failure to use the Rule's terminology may result in the recipient's educational community (and OCR) lacking clarity as to whether or not the recipient's policies and procedures in fact comply with the Rule. For example, if a recipient's policy refers to a "reporting party" but does not use "complainant" as that term is defined in § 106.30, the recipient and its educational community may not have clarity as to whether the recipient's prompt response is directed to "the complainant" (i.e., the alleged victim) as the Rule requires (see § 106.44(a)) or to a third party who has reported that someone other than the person who made the report has been victimized by sexual harassment.

**Question:** How should recipients define sexual assault?

**Answer:** The new Title IX Rule defines "sexual assault" by reference to 20 U.S.C. 1092(f)(6)(A)(v). That statute, in turn, defines "sexual assault" as "an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation." As you note, the FBI UCR currently uses two crime reporting programs, the SRS and the NIBRS. As noted in the Preamble to the new Rule at page 547, fn. 741, the FBI has announced intent to retire the SRS in January 2021, and thereafter to only use the NIBRS. The new Title IX Rule does not require a recipient to select one or the other (SRS or NIBRS) to define "sexual assault," nor does the Rule prohibit a recipient from using definitions from either or both the SRS and NIBRS (for example, as you propose, defining "rape" under the SRS and other sex offenses per the NIBRS definitions), so long as all forcible and non-forcible sex offenses described by the FBI UCR are utilized as the recipient's definition of "sexual assault" for Title IX purposes. Whether or not the label "forcible or non-forcible" is used within the SRS or NIBRS, the sex offenses described under each of those FBI UCR programs are "sexual assault" for Title IX purposes, by virtue of § 106.30(a) (defining "sexual harassment"), regardless of whether the sex offense requires "force" as an element.

**Question:** In this sentence, does "reasonable person" modify only severe, pervasive, and objectively offensive only, or the effective denial clause as well? To clarify, can an effective denial be something a reasonable person would experience, even if there is not evidence to show that the Complainant was effectively denied?

**Answer:** The "reasonable person" standard applies to all the elements of the second prong of the § 106.30(a) definition of "sexual harassment" including the effective denial element. See Preamble to the Rule at p. 525 ("Evaluating whether a reasonable person in the complainant's position would deem the alleged harassment to deny a person 'equal access' to education protects complainants against school officials inappropriately judging how a complainant has reacted to the sexual harassment."); pp. 525-26 ("… this provision assumes the negative educational impact of quid pro quo harassment and Clery Act/VAWA offenses included in § 106.30 and evaluates other sexual harassment based on whether a reasonable person in the complainant's position would be effectively denied equal access to education compared to a similarly situated person who is not suffering the alleged sexual harassment.)

**Question:** If a formal complaint alleges attempted sexual assault, would that be covered under 106.30, or would a recipient need to dismiss that complaint? Thank you.

**Answer:** The new Title IX Rule, in the Preamble at p. 541 and fn. 777-779 (footnotes excluded here), addresses attempted sexual assault (such as rape): "With respect to an attempted rape, we define 'sexual assault' in § 106.30 by reference to the Clery Act, which in turn defines sexual assault by reference to the FBI UCR, and the FBI has stated that the offense of rape includes attempts to commit rape."

**Question:** I am seeking clarification regarding the correct definitions of sexual assault, dating violence, domestic violence, and stalking that universities should use in their policies, given that the regulations reference other sources. There has been much discussion and confusion in the higher education community regarding these definitions. Specifically, the confusion regarding the definition of sexual assault has been compounded by the fact that the FBI definitions changed after the statutory reference included in the Title IX regulations. "Sexual assault" is defined in 20 U.S.C. 1092(f)(6)(A)(v) as "an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation." However, the FBI no longer classifies sexual assault as "forcible or nonforcible" sex offenses. See: https://www.fbi.gov/file-repository/ucr/ucr-srs-user-manual-v1.pdf/view and https://www.fbi.gov/services/cjis/cjis-link/ucr-program-changes-definition-of-rape. The Clery Act regulations and Appendix A have clear definitions that appear to be the same ones that the Department intended to use for Title IX purposes. Would you be able to confirm that these are the correct definitions?

**Answer:** Thank you for your question regarding OCR's new Title IX Regulations. All references and citations are to the official version of the Regulations published in the Federal Register available is here. A link to the unofficial version of the final Regulations is available here.

*Sexual harassment* under 34 C.F.R. § 106.30 of the Title IX regulations means conduct on the basis of sex in an education setting that satisfies one or more of the following:

> 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*" harassment);
>
> 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; or
>
> Sexual assault, dating violence, domestic violence, or stalking.

The final Title IX Regulations define these offenses by referencing their definitions under other federal laws, as follows:

Under the new Regulations, ''sexual assault'' is defined using the definition found in the Clery Act, 20 U.S.C. 1092(f)(6)(A)(v) (as amended by the VAWA), which in turn, refers to the FBI's Uniform Crime Reporting Program (UCR).

The FBI UCR consists of two crime reporting systems: The Summary Reporting System (SRS) and the National Incident-Based Reporting System (NIBRS). The current Clery Act regulations, 34 C.F.R. § 668.46(a), direct recipients to look to the SRS for a definition of rape and to NIBRS for a definition of fondling, statutory rape, and incest as the offenses falling under ''sexual assault.'' The FBI will transition to using only the NIBRS in January 2021.

The new Title IX Regulations do not require a recipient to select one or the other (SRS or NIBRS) to define "sexual assault," nor do the Regulations prohibit a recipient from using definitions from either or both the SRS and NIBRS (for example, defining "rape" under the SRS and other sex offenses per the NIBRS definitions), so long as all forcible and non-forcible sex offenses described by the FBI UCR are utilized as the recipient's definition of "sexual assault" for Title IX purposes. Whether or not the label "forcible or non-forcible" is used within the SRS or NIBRS, the sex offenses described under each of those FBI UCR programs are "sexual assault" for Title IX purposes, by virtue of 34 C.F.R. § 106.30(a) (defining "sexual harassment"), regardless of whether the sex offense requires "force" as an element.

The NIBRS provides more specific definitions for several offenses, as follows:

**Sex Offenses**—Any sexual act or attempted sexual act directed against a complainant, without the consent of the complainant including instances where the complainant is incapable of giving consent.

**Rape**—Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of complainant, without the consent of the complainant.

**Sodomy**—Oral or anal sexual intercourse with another person, forcibly and/or against that person's will (non-consensually) or not forcibly or against the person's will in instances where the complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

**Sexual Assault With An Object**—To use an object or instrument to penetrate, however slightly, the genital or anal opening of the body of another person, forcibly and/or against that person's will (non-consensually) or not forcibly or against the person's will in instances where the complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

**Fondling**—The touching of the private body parts of another person (buttocks, groin, breasts) for the purpose of sexual gratification, forcibly and/or against that person's will (non-consensually) or not forcibly or against the person's will in instances where the complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

**Sex Offenses, Nonforcible:**

> **Incest**—Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by Illinois law.
>
> **Statutory Rape**—Nonforcible sexual intercourse with a person who is under the statutory age of consent of 17 years old (or 18 years old when the perpetrator is in a position of trust or authority, such as a teacher or coach).

Under the new Title IX Regulations, "dating violence'' is defined using the definition in the Violence Against Women Act (VAWA), 34 U.S.C. § 12291(a)(10), which means violence committed by a person—

- who is or has been in a social relationship of a romantic or intimate nature with the victim; and
- where the existence of such a relationship shall be determined based on a consideration of the following factors:
    - The length of the relationship
    - The type of relationship
    - The frequency of interaction between the persons involved in the relationship

Similarly, the new regulations define "domestic violence'' by referencing its definition in VAWA, at 34 U.S.C. § 12291(a)(8). "Domestic violence" is defined as including felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.

The new regulations also define "stalking'' by referencing its definition in VAWA, at 34 U.S.C. § 12291(a)(30). Stalking means engaging in a course of conduct directed at a specific person that would cause a reasonable person to—

- fear for his or her safety or the safety of others; or
- suffer substantial emotional distress.

For more information, please see the Department's October 7, 2020 blog post.

**Question:** I have a question about the new Title IX Regulations. Here is the definition of Sexual Harassment in 106.30. I am trying to find the definition of sexual assault. When I go to the highlighted statute it tell me sexual assault is as defined in the FBI UCR. However, the UCR does not have crimes separated by "forcible or nonforcible sex offenses." What crimes are included in the definition of sexual assault? And where can I find those? Here are the definitions from the new Title IX regulations. 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; or (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). If you look up 20 USC 1092(f)(6)(A)(V), it says that sexual assault "means an offense classified as a forcible or nonforcible sex offense under as defined in the uniform crime reporting system of the Federal Bureau of Investigation."

**Answer:** Thank you for your question regarding OCR's new Title IX Regulations. All references and citations are to the official version of the Regulations published in the Federal Register available is here. A link to the unofficial version of the final Regulations is available here.

*Sexual harassment* under 34 C.F.R. § 106.30 of the Title IX regulations means conduct on the basis of sex in an education setting that satisfies one or more of the following:

> 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*" harassment);
>
> 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; or
>
> Sexual assault, dating violence, domestic violence, or stalking.

The final Title IX Regulations define these offenses by referencing their definitions under other federal laws, as follows:

Under the new Regulations, ''sexual assault'' is defined using the definition found in the Clery Act, 20 U.S.C. 1092(f)(6)(A)(v) (as amended by the VAWA), which in turn, refers to the FBI's Uniform Crime Reporting Program (UCR).

The FBI UCR consists of two crime reporting systems: The Summary Reporting System (SRS) and the National Incident-Based Reporting System (NIBRS). The current Clery Act regulations, 34 C.F.R. § 668.46(a), direct recipients to look to the SRS for a definition of rape and to NIBRS for a definition of fondling, statutory rape, and incest as the offenses falling under ''sexual assault.'' The FBI will transition to using only the NIBRS in January 2021.

The new Title IX Regulations do not require a recipient to select one or the other (SRS or NIBRS) to define "sexual assault," nor do the Regulations prohibit a recipient from using definitions from either or both the SRS and NIBRS (for example, defining "rape" under the SRS and other sex offenses per the NIBRS definitions), so long as all forcible and non-forcible sex offenses described by the FBI UCR are utilized as the recipient's definition of "sexual assault" for Title IX purposes. Whether or not the label "forcible or non-forcible" is used within the SRS or NIBRS, the sex offenses described under each of those FBI UCR programs are "sexual assault" for Title IX purposes, by virtue of 34 C.F.R. § 106.30(a) (defining "sexual harassment"), regardless of whether the sex offense requires "force" as an element.

The NIBRS provides more specific definitions for several offenses, as follows:

**Sex Offenses**—Any sexual act or attempted sexual act directed against a complainant, without the consent of the complainant including instances where the complainant is incapable of giving consent.

**Rape**—Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of complainant, without the consent of the complainant.

**Sodomy**—Oral or anal sexual intercourse with another person, forcibly and/or against that person's will (non-consensually) or not forcibly or against the person's will in instances where the complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

**Sexual Assault With An Object**—To use an object or instrument to penetrate, however slightly, the genital or anal opening of the body of another person, forcibly and/or against that person's will (non-consensually) or not forcibly or against the person's will in instances where the complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

**Fondling**—The touching of the private body parts of another person (buttocks, groin, breasts) for the purpose of sexual gratification, forcibly and/or against that person's will (non-consensually) or not forcibly or against the person's will in instances where the complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

**Sex Offenses, Nonforcible:**

> **Incest**—Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by Illinois law.
>
> **Statutory Rape**—Nonforcible sexual intercourse with a person who is under the statutory age of consent of 17 years old (or 18 years old when the perpetrator is in a position of trust or authority, such as a teacher or coach).

Under the new Title IX Regulations, "dating violence'' is defined using the definition in the Violence Against Women Act (VAWA), 34 U.S.C. § 12291(a)(10), which means violence committed by a person—

- who is or has been in a social relationship of a romantic or intimate nature with the victim; and
- where the existence of such a relationship shall be determined based on a consideration of the following factors:
    - The length of the relationship
    - The type of relationship
    - The frequency of interaction between the persons involved in the relationship

Similarly, the new regulations define "domestic violence'' by referencing its definition in VAWA, at 34 U.S.C. § 12291(a)(8). "Domestic violence" is defined as including felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.

The new regulations also define "stalking'' by referencing its definition in VAWA, at 34 U.S.C. § 12291(a)(30). Stalking means engaging in a course of conduct directed at a specific person that would cause a reasonable person to—

- fear for his or her safety or the safety of others; or
- suffer substantial emotional distress.

For more information, please see the Department's October 7, 2020 blog post.

## Deliberate Indifference Standard

**Question:** It is clear that the Department will apply a deliberate indifference standard to the recipient's response to sexual harassment. Does this also apply where the respondent pursues a complaint about the school's response to sexual harassment? That is, will a deliberate indifference standard be applied in situations, for instance, where the respondent alleges that the process was inequitable or supportive measures were unreasonably burdensome?

**Answer:** The Rule requires a recipient to promptly respond to actual knowledge of sexual harassment in the recipient's education program or activity against a person in the United States in a manner that is not deliberately indifferent. See § 106.44(a). The Rule further requires, as part of the recipient's response, that the recipient treat the parties equitably, which for a respondent means refraining from imposing disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30 against a respondent, without following the § 106.45 grievance process. See § 106.44(a), § 106.45(b)(1)(i).

If a recipient took an action that is unreasonably burdensome, then that action would not constitute a supportive measure as defined in § 106.30; the recipient must follow the grievance process in § 106.45 before taking an action that is not a supportive measure, unless the emergency removal or administrative leave provisions apply. See § 106.44(c), § 106.44(d). The Rule also requires a recipient's response to include offering supportive measures to a complainant as defined in § 106.30(a). See § 106.44(a). The Rule further requires a recipient to comply with all provisions in § 106.45 in response to a formal complaint of sexual harassment. See § 106.44(b)(1). A recipient's failure to comply with any of the Rule's requirements is a violation of Title IX's implementing regulations, regardless of whether the regulatory violation also constitutes sex discrimination under Title IX or constitutes deliberate indifference under § 106.44(a), and regardless of whether the recipient's violation disfavors a complainant or a respondent.

## Employees

**Question:** Do these requirements apply to allegations between employees in a university setting as well?

**Answer:** The new Title IX Rule in § 106.30(a) defines "complainant" and "respondent" respectively as "an individual who is alleged to be the victim" and "an individual who has been reported to be the perpetrator." (emphasis added). So any person may be a complainant or respondent, regardless of whether the person is a student, employee, or otherwise affiliated with the university. Similarly, the Rule requires a university to respond promptly when the university has actual knowledge of sexual harassment in the university's education program or activity against a person in the United States, and that response must treat the complainant and respondent equitably by offering supportive measures to the complainant and refraining from imposing disciplinary sanctions on the respondent without following a grievance process that complies with § 106.45. See § 106.44(a). Thus, the Rule does not exclude sexual harassment allegations where the complainant and respondent are both employees.

At pages 1510-11 of the preamble to the Rule, the Department explains:

> The Department appreciates support for its final regulations, which apply to employees. Congress did not limit the application of Title IX to students. Title IX, 20 U.S.C. 1681, expressly states: "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 . . . ." Title IX, thus, applies to any person in the United States who experiences discrimination on the basis of sex in any education program or activity receiving Federal financial assistance. Similarly, these final regulations, which address sexual harassment, apply to any person, including employees, in an education program or activity receiving Federal financial assistance.

The Department also notes that Title VII is not limited to employees and may apply to individuals other than employees. Title VII prohibits "unlawful employment practices" against "an individual" by employers, labor unions, employment agencies, joint-labor management committees, apprenticeship

programs and, thus, protects individuals other than employees such as job and apprenticeship applicants. As Title VII protects more than just employee's rights, the Department revises § 106.6(f) to state that nothing in Part 106 of Title 34 of the Code of Federal Regulations may be read in derogation of any individual's rights rather than just any employee's rights under Title VII. The Department recognizes that employers must fulfill their obligations under Title VII and also under Title IX. There is no inherent conflict between Title VII and Title IX, and the Department will construe Title IX and its implementing regulations in a manner to avoid an actual conflict between an employer's obligations under Title VII and Title IX.

(footnotes omitted).

**Question:** What is a guidance of Office of Civil Rights to colleges regarding the situation when colleges require professors accused of gender-based harassment to participate in related Title IX investigation over summer period when faculty members are not paid and do not have to report for duty?

**Answer:** The obligation of a college to respond to actual knowledge of sexual harassment in the college's education program or activity against a person in the United States (i.e., the conditions in § 106.44(a) that trigger the college's prompt response) does not depend on whether the incident occurred during a period when faculty members are paid or reporting for duty. Nor does the obligation depend on whether the investigation is conducted during a period when faculty members are paid or reporting for duty.

If the incident is under investigation by the college (because a formal complaint was filed; see § 106.30 defining "formal complaint" and § 106.44(b)(1)), the college must investigate and adjudicate the allegations in the formal complaint under the college's designated, reasonably prompt time frames. See § 106.45(b)(1)(v). The absence of a party or witness may constitute "good cause" for the college to extend its time frame on a short-term basis. See § 106.45(b)(1)(v). The Rule does not preclude a recipient from conducting investigatory interviews, or live hearings, virtually and remotely, and this flexibility should be taken into account in determining whether or not the "absence" of a party or witness constitutes good cause to temporarily delay the proceedings.

Note that under the Rule, a college is not permitted to "require" any person to participate in a grievance process; any person has the right to choose to participate, or choose not to participate, in a Title IX grievance process, free from retaliation. See § 106.71(a).

**Question:** Do the new Title IX regulations apply to employees in the 7th Circuit, with the Circuit having ruled that an employee's Title IX claim is preempted by Title VII?

**Answer:** The new Title IX Rule applies to all recipients of Federal financial assistance operating education programs or activities, including to recipients located in the jurisdiction of the Seventh Circuit Court of Appeals. At page 1512 of the Preamble of the Rule, the Department notes:

The split among Federal courts relates to whether an implied private right of action exists for damages under Title IX for redressing employment discrimination by employers. These Federal cases focus on whether Congress intended for Title VII to provide the exclusive judicial remedy for claims of employment discrimination. Courts have not precluded the Department from administratively enforcing Title IX with respect to employees.

**Question:** Recipients are wondering if faculty discipline processes, in which sanctions are reviewed by many layers of committees, and which can lead to tenure revocation proceedings, all still allowed to be separate and outside of 106.45, or whether recipients somehow need to be figuring out how to combine findings and sanctions into one hearing process under 106.45.

**Answer:** The Title IX Rule, at § 106.45(b)(7), requires a recipient's decision-maker(s) to issue a written determination that must include, among other items, the result as to each allegation and rationale for the result, any disciplinary sanctions imposed by the recipient against the respondent, and whether remedies will be provided by the recipient to the complainant.

The Rule does not preclude a recipient from using one decision-maker to reach the determination regarding responsibility, and having another decision-maker, who may be an employee or administrator of the recipient (e.g., a tenure committee) determine appropriate disciplinary sanctions (including making such a decision at a separate hearing), so long as the end result is that the decision-maker who reached the determination regarding responsibility includes the disciplinary sanctions imposed by the recipient against the respondent in the written determination issued under § 106.45(b)(7). The issuance of a written determination, cannot be a piecemeal process that is broken down into chronologically occurring sub-parts.

In other words, when a recipient uses a separate decision-maker to make disciplinary sanction decisions, the recipient must issue a single written determination containing all of the information required under § 106.45(b)(7). Recipients should also remain aware of their obligation to conclude the grievance process within the reasonably prompt time frames designated in the recipient's grievance process, under § 106.45(b)(1)(v). Additionally, each decision-maker—whether an employee of the recipient or an employee of a third party such as a consortium of schools—owes an individual and ongoing duty not have a conflict of interest or bias for or against complainants or respondents generally, or with respect to an individual complainant or respondent, pursuant to § 106.45(b)(1)(iii).

**Question:** Should our institution distinguish workplace sexual harassment (Title VII) from Title IX since the definitions are different? Prior to the final rule, our definition of sexual harassment was consistent

for faculty/staff and for students. Thus, in an employee-on-employee case, we relied on the EEOC's guidance under Title VII. May we continue to do so under the Final Rule? Finally, what is the recommended definition to apply in faculty-on-student matters or student-on-faculty matters? It is clear from the Rule that quid-pro-quo scenarios would be covered, but if the case does not meet that definition?

**Answer:** Please note that the definition of sexual harassment under the Title IX Rule is found in § 106.30, and is a regulatory definition rather than a "recommended" definition, or a definition that merely has the status of non-binding agency guidance.

Recipients who are subject to both Title VII and Title IX must comply with both. The Title IX Rule, at § 106.6(f), provides that nothing about the Title IX regulations lessens an individual's rights under Title VII. In the Preamble to the Rule, at pages 1508-63, the Department discusses at length the intersection between Title VII and the Title IX regulations, and the application of the Title IX regulations to employees. Where misconduct meets the definition of "sexual harassment" under § 106.30, a recipient must follow the Title IX Rule with respect to responding to that misconduct, irrespective of whether the complainant (i.e., the alleged victim) and/or the respondent (i.e., the alleged perpetrator) are employees of the recipient or not.

**Question:** I have a question about the Emergency Removal provision, § 106.44(c), in the new regulations. Does this provision only apply to student respondents? Or does a recipient also need utilize the Emergency Removal process when placing a non-student employee on Administrative Leave during the grievance process?

**Answer:** Thank you for your question regarding OCR's new Title IX Regulations. All references and citations are to the official version of the Regulation published in the Federal Register available is here. A link to the unofficial version of the final Regulations is available here.

Section 106.44(c) of the Final Title IX Regulations applies to an emergency removal of *any* respondent. Any respondent (whether an employee, a student, or other person) who poses an immediate threat to the health or safety of any student or other individual may be removed from the recipient's education program or activity on an emergency basis, where an individualized safety and risk analysis justifies the removal. Thus, respondents who are employees receive the same due process protections with respect to emergency removals (*i.e.,* post-removal notice and opportunity to challenge the removal) as respondents who are students.

In addition, pursuant to 34 C.F.R. § 106.44(d), a recipient may place a non-student employee respondent on administrative leave, even if the emergency removal provision in 34 C.F.R. § 106.44(c) does not apply.

## Evidence

**Question:** What are the rules of evidence at a hearing - are the usual court room rules to apply at the hearings - or something less?

**Answer:** The Rule uses "relevance" as the sole admissibility criterion for what evidence is admissible. See § 106.45(b)(1)(ii) (the recipient's grievance process must provide for objective evaluation of all relevant evidence, including evidence that is inculpatory and exculpatory). The Rule also deems certain evidence and information to be not relevant or otherwise precludes the recipient from using it: (i) a party's treatment records, without the party's prior written consent [§ 106.45(b)(5)(i)]; (ii) information protected by a legally recognized privilege [§ 106.45(b)(1)(x)]; (iii) questions or evidence about a complainant's sexual predisposition, and questions or evidence about a complainant's prior sexual behavior unless it meets one of two limited exceptions [§ 106.45(b)(6)(i)-(ii)]; and, for postsecondary institutions, the decision-maker cannot rely on the statements of a party or witness who does not submit to cross-examination [§ 106.45(b)(6)(i)].

In the preamble to the Rule, at pages 980-82, the Department explains:

> These final regulations require objective evaluation of relevant evidence, and contain several provisions specifying types of evidence deemed irrelevant or excluded from consideration in a grievance process; a recipient may not adopt evidentiary rules of admissibility that contravene those evidentiary requirements prescribed under § 106.45. For example, a recipient may not adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice; although such a rule is part of the Federal Rules of Evidence, the Federal Rules of Evidence constitute a complex, comprehensive set of evidentiary rules and exceptions designed to be applied by judges and lawyers, while Title IX grievance processes are not court trials and are expected to be overseen by layperson officials of a school, college, or university rather than by a judge or lawyer. Similarly, a recipient may not adopt rules excluding certain types of relevant evidence (e.g., lie detector test results, or rape kits) where the type of evidence is not either deemed "not relevant" (as is, for instance, evidence concerning a complainant's prior sexual history ) or otherwise barred from use under § 106.45 (as is, for instance, information protected by a legally recognized privilege). However, the § 106.45 grievance process does not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by a recipient's decision-maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with § 106.45 and apply equally to both parties. In response to commenters' concerns that the final regulations do not specify rules about evaluation of evidence, and recognizing that recipients therefore have discretion to adopt rules not otherwise prohibited under § 106.45, the final regulations acknowledge this reality by adding language to the introductory sentence of § 106.45(b): "Any provisions, rules, or practices other than those required by § 106.45 that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment, as defined in § 106.30, must apply equally to both parties."

**Question:** After the final report is issued and the parties have been given the opportunity to respond - is the final report admitted at the hearing as "evidence"? If the report is submitted and received as evidence - are the written comments of the parties also admitted as evidence?

**Answer:** The Rule does not explicitly designate the investigate report required to be prepared under § 106.45(b)(5)(vii) as "evidence." Similarly, the Rule does not deem the parties' response to the investigative report to be "evidence."

**Question:** If the investigative report and/or the comments thereto are admitted into evidence, should the report be redacted by the "decision-maker" to exclude any information in the report gathered from witnesses who refuse to participate in the hearing?

**Answer:** After a postsecondary institution conducts its hearing, the Rule states that if a party or witness refuses to submit to cross-examination, the decision-maker must not rely on any statements of that party or witness in reaching a determination regarding responsibility. See § 106.45(b)(6)(i). The Rule does not require the decision-maker to redact the investigative report.

**Question:** Do recipients have latitude to define relevance on their own?

**Answer:** At page 811, footnote 1018 of the Preamble of the Rule, the Department states: "The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied." At page 812 of the Preamble the Department states:

Relevance is the standard that these final regulations require, and any evidentiary rules that a recipient chooses must respect this standard of relevance. For example, a recipient may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence. A recipient may adopt rules of order or decorum to forbid badgering a witness, and may fairly deem repetition of the same question to be irrelevant.

**Question:** Does an advisor or party have an opportunity to provide input about how evidence should be weighted by the decision-maker?

**Answer:** Yes. The parties' equal opportunity to inspect, review, and respond to evidence directly related to the allegations (see § 106.45(b)(5)(vi)) and equal opportunity to review and respond to the recipient's investigative report (see § 106.45(b)(5)(vii)) allow each party the opportunity to provide input and make arguments about the relevance of evidence and how a decision-maker should weigh the evidence. In the Preamble to the Rule at p. 1015, the Department states that the Rule:

> . . . balances the recipient's obligation to impartially gather and objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence, with the parties' equal right to participate in furthering each party's own interests by identifying evidence overlooked by the investigator and evidence the investigator erroneously deemed relevant or irrelevant and making arguments to the decision-maker regarding the relevance of evidence and the weight or credibility of relevant evidence.

Note that §§ 106.45(b)(5)(vi)-(vii) require the recipient to "send to each party *and the party's advisor, if any*" the evidence and the investigative report, so that a party's advisor can advise the party in exercising the party's right to review and respond to the evidence and to the investigative report. (emphasis added).

**Question:** The provision on prior sexual history and predisposition seems to apply to the hearing; should it also be applied by investigators to the report, or is that implied by the provision that requires the report to contain only relevant information?

**Answer:** The new Title IX Rule, at § 106.45(b)(6)(i)-(ii), states that a complainant's sexual predisposition is "not relevant," and that a complainant's prior sexual behavior is "not relevant" unless the questions or evidence meet one of two limited exceptions. The investigative report required under § 106.45(b)(5)(vii) requires a summary of "relevant" evidence, and therefore evidence of a complainant's sexual predisposition or prior sexual behavior is not included in the investigative report if such evidence is "not relevant" as provided under § 106.45(b)(6). See Preamble at p. 1017: ". . . all evidence summarized in the investigative report under § 106.45(b)(5)(vii) must be 'relevant' such that evidence about a complainant's sexual predisposition would never be included in the investigative report and evidence about a complainant's prior sexual behavior would only be included if it meets one of the two narrow exceptions stated in § 106.45(b)(6)(i)-(ii) (deeming all questions and evidence about a complainant's sexual predisposition 'not relevant,' and all questions and evidence about a complainant's prior sexual behavior 'not relevant' with two limited exceptions)."

**Question:** It is unclear what kind of evidence OCR might believe was directly related to a complaint, but not relevant to the investigators, such that it would not be relied upon (but separately provided to the parties)(why would a recipient not rely on directly related evidence?). If we understand correctly, the parties would be able to make the case at the hearing that this information be considered by the decision-maker, though it was not included in the investigation report. Is that correct, and if so, what if the parties want to make the case that there is evidence not included in the investigation report or the "does not intend to rely on" pile that should be considered by the decision-maker (thus it was determined to be not relevant and/or directly related by investigators). May a party make that case, and if so, how would they know about the evidence to argue for its inclusion if they were not the source of it?

**Answer:** At pages 814-15 of the Preamble to the Rule (footnotes omitted here), the Department addresses this issue:

The Department disagrees that an investigator should not get to decide what is relevant, and the final regulations give the parties ample opportunity to challenge relevancy determinations. The investigator is obligated to gather evidence directly related to the allegations whether or not the recipient intends to rely on such evidence (for instance, where evidence is directly related to the allegations but the recipient's investigator does not believe the evidence to be credible and thus does not intend to rely on it). The parties may then inspect and review the evidence directly related to the allegations. The investigator must take into consideration the parties' responses and then determine what evidence is relevant and summarize the relevant evidence in the investigative report. The parties then have equal opportunity to review the investigative report; if a party disagrees with an investigator's determination about relevance, the party can make that argument in the party's written response to the investigative report under § 106.45(b)(5)(vii) and to the decision-maker at any hearing held; either way the decision-maker is obligated to objectively evaluate all relevant evidence and the parties have the opportunity to argue about what is relevant (and about the persuasiveness of relevant evidence). The final regulations also provide the parties equal appeal rights including on the ground of procedural irregularity, which could include a recipient's failure to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence. Furthermore, § 106.45(b)(1)(iii) requires the recipient's investigator and decision-maker to be well-trained to conduct a grievance process compliant with § 106.45 including determining "relevance" within the parameters of the final regulations.

See also Preamble to the Rule at pp. 1018-19 (describing the importance of the parties having access to evidence directly related to the allegations, without that evidence being "screened out" by the investigator as irrelevant, so the parties know of the existence of such evidence and can argue about its relevance in response to the evidence review, and again to the decision-maker).

**Question:** How does OCR define "directly related" evidence within the regulations?

**Answer:** The new Title IX Rule does not contain a definition of "directly related to the allegations" so the phrase must be given its ordinary meaning. Note that this phrase was selected for the Rule in part because the "directly related" language aligns with FERPA. The Preamble to the Rule discusses this at, for example, pages 1451-53.

**Question:** I have several questions while watching the video on "Conducting and Adjudicating Title IX Hearings: An OCR Training Webinar." I am trying to create a training handbook on this process, but because I am not a lawyer I am having difficulty understanding certain segments of the video:

• 10 minutes 15 seconds: Is the requirement for written questions and answers prior to the live hearing just at the elementary or HS level, or is it required or recommended at the post-secondary level too?

• 10 minutes 45 seconds: Again, the two narrow exceptions regarding prior sexual consent, are they at the elementary or HS level, or is it required or recommended at the post-secondary level too?

• 11 minutes 15 seconds: It sounds like everything before this point was directed at the elementary or HS level. Does that mean at this point all questions, answers in cross-examinations in the live hearing are allowed in real time without any prior submission to the decision-maker, and only an advisor of the complainant or respondent can do cross-examinations? Is that correct?

**Answer:** Thank you for your questions regarding Title IX. All references and citations are to the unofficial version of the final Regulations, which are available here. A link to the official version of the Regulations published in the Federal Register is here.

34 C.F.R. § 106.45(b)(6) requires a live hearing with cross-examination conducted by the parties' advisors at postsecondary institutions, while making hearings optional for elementary and secondary schools (and other recipients that are not postsecondary institutions), so long as the parties have equal opportunity to submit written questions for the other parties and witnesses to answer before a determination regarding responsibility is reached. In response to your first question, the provision regarding a requirement to submit written questions does not apply at the postsecondary level.

Addressing your second question, the final regulations state that with or without a hearing, 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(6)(ii).

As to your final question, at the postsecondary level, 34 C.F.R. § 106.45(b)(6)(i), states: "At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally." (emphasis added). Although the decision-maker(s) could ask clarifying questions of the parties or witnesses, the final regulations grant cross-examination authority to only one other group: the parties' advisors.

**Question:** Do the regulations prohibit the decision-maker from relying on relevant statements of a party in making the findings of fact supporting its determination regarding sexual harassment if that party refuses to answer written, relevant questions?

**Answer:** Outside the context of a postsecondary institution, the new Title IX Rule contains no express prohibition on a decision-maker relying on a party's or witness's statements when the party or witness refuses to answer the written, relevant questions provided for under § 106.45(b)(6)(ii).

**Question:** Do the regulations permit a school district to adopt a policy prohibiting the decision-maker from relying on relevant statements of a party in making the findings of fact supporting its determination regarding sexual harassment if that party refuses to answer written, relevant questions?[2]

**Answer:** Even outside the postsecondary institution context, decision-makers must still be cognizant of the requirements in § 106.45 that apply to all recipients, including that recipients "[p]rovide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence." 106.45(b)(5)(ii). Similarly, recipients owe a duty to maintain grievance procedures that "[r]equire 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." See § 106.45(b)(1)(ii).

**Question:** Inquiry regarding confidentiality of supportive measures and due process:

**Answer:** Section 106.30 (defining "supportive measures") states (emphasis added): "The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures." The Rule does not permit a recipient to breach this duty of confidentiality for a reason other than when keeping the supportive measure confidential would "impair the ability" of the recipient "to provide the supportive measure." In the preamble to the Rule at pages 392-93, for instance, the Department explains:

> A recipient's ability to offer supportive measures to a complainant, or to consider whether to initiate a grievance process against a respondent, will be affected by whether the report disclosed the identity of the complainant or respondent. In order for a recipient to provide supportive measures to a complainant, it is not possible for the complainant to remain anonymous because at least one school official (e.g., the Title IX Coordinator) will need to know the complainant's identity in order to offer and implement any supportive measures. Section 106.30 defining "supportive measures" directs the recipient to maintain as confidential any supportive measures provided to either a complainant or a respondent, to the extent that maintaining confidentiality does not impair the recipient's ability to provide the supportive measures. A complainant (or third party) who desires to report sexual harassment without disclosing the complainant's identity to anyone may do so, but the recipient will be unable to

[2] Original question included: "Even if the answer to Question 1 is no," at the beginning of the question.

> provide supportive measures in response to that report without knowing the complainant's identity. If a complainant desires supportive measures, the recipient can, and should, keep the complainant's identity confidential (including from the respondent), unless disclosing the complainant's identity is necessary to provide supportive measures for the complainant (e.g., where a no-contact order is appropriate and the respondent would need to know the identity of the complainant in order to comply with the no-contact order, or campus security is informed about the no-contact order in order to help enforce its terms).

(emphasis added).

If the school conducts a grievance process in response to a formal complaint, § 106.45 does not exempt the recipient from its obligation to keep supportive measures confidential. That expectation is buttressed by the Department's discussion of revision to the recordkeeping provision, § 106.45(b)(10), at page 1406 of the preamble to the Rule:

> In response to commenters' concerns that this provision giving the parties access to records might contradict the requirement to keep supportive measures confidential, the Department has revised § 106.45(b)(10)(i) to remove the language making records available to parties. Because the parties to a formal complaint receive written notice of the allegations, the evidence directly related to the allegations, the investigative report, and the written determination (as well as having the right to inspect and review the recording or transcript of a live hearing), the Department is persuaded that the parties' ability to access records relevant to their own case is sufficiently ensured without the risk that making records available to parties under proposed § 106.45(b)(10) would have resulted in disclosure to one party of the supportive measures (or remedies) provided to the other party.
>
> While § 106.45 directs the recipient to objectively evaluate "all relevant evidence – including both inculpatory and exculpatory evidence" (§ 106.45(b)(1)(ii)) and to provide the parties a copy of the "evidence" that is "directly related to the allegations raised in a formal complaint" for review and response (§ 106.45(b)(5)(vi)), any supportive measures provided to the complainant are not "evidence" that is "directly related to the allegations" and the duty to keep supportive measures confidential applies throughout the grievance process.

In your example, the "timeline" that a respondent might wish to establish may consist of establishing when the school received notice of the alleged sexual harassment (e.g., when the incident was reported), combined with the fact that the Rule requires schools "promptly" to offer all complainants supportive measures which, under the Rule, may include academic coursework adjustments, without piercing the confidentiality of supportive measures by disclosing the recipient's records regarding supportive measures requested by or provided to this complainant.

See also the "Section 106.6(e) FERPA" subsection of the "Clarifying Amendments to Existing Regulations" section of the preamble to the Rule (pages 1442-1508) for discussion of FERPA and the Rule's requirement to disclose evidence "directly related to the allegations" to both parties during a grievance process.

As an additional note, the Rule does not grant respondents a general "right to due process," but does give complainants and respondents the specific procedural rights enumerated throughout § 106.45, which rights are rooted in concepts of due process and fundamental fairness for the benefit of complainants, respondents, witnesses, and recipients. See, e.g., Rule at pp. 82-83, FN 203:

> E.g., Association of Title IX Administrators (ATIXA), ATIXA Position Statement: Why Colleges Are in the Business of Addressing Sexual Violence 3-4 (Feb. 17, 2017) (acknowledging that due process has been denied in some recipients' Title IX proceedings but insisting that "Title IX isn't the reason why due process is being compromised. . . . Due process is at risk because of the small pockets of administrative corruption . . . and because of the inadequate level of training currently afforded to administrators. College administrators need to know more about sufficient due process protections and how to provide these protections in practice.") (emphasis added). The Department agrees that recipients need to know more about sufficient due process protections and what such protections need to look like in practice, and this belief underlies the Department's approach to the § 106.45 grievance process which prescribes specific procedural features instead of simply directing recipients to provide due process protections, or be fair, for complainants and respondents. Edward N. Stoner II & John Wesley Lowery, Navigating Past the "Spirit Of Insubordination": A Twenty-First Century Model Student Conduct Code With a Model Hearing Script, 31 Journal of Coll. & Univ. L. 1, 10-11 (2004) (noting that the trend among colleges and universities has been to put into place written student disciplinary codes but, whether an institution is public or private, a "better practice" is to describe in the written disciplinary code exactly what process will be followed rather than making broad statements about "due process" or "fundamental fairness"). The Department agrees that it is more instructive and effective for the Department to describe what procedures a process must follow, rather than leaving recipients to translate broad concepts like "due process" and "fundamental fairness" into Title IX sexual harassment grievance processes, and unlike the NPRM the final regulations do not reference "due process" but rather prescribe specific procedural features that a grievance process must contain and apply.

**Question:** 1. Can there be more than one decision maker per case and present at a live hearing? 2. Does the decision maker decide all sanctions resulting from the hearing that the Title IX Coordinator enforces? 3. If a party or witness chooses not to participate in the cross examination, can statements made direction (directly?) to the investigator still be used as evidence in the hearing?

**Answer:** Thank you for your question regarding OCR's new Title IX Regulations. All references and citations are to the official version of the Regulations published in the Federal Register available is here. A link to the unofficial version of the final Regulations is available here.

At page 30371 of the preamble to the Regulations, the Department states: "The Department notes that the final regulations leave significant flexibility to recipients, including whether the Title IX Coordinator can also serve as the investigator, whether to use a panel of decision-makers or a single decision-maker, and whether to use the recipient's own employees or outsource investigative and adjudicative functions

to professionals outside the recipient's employ." Thus, a decision-maker may be the recipient's employee or, at the recipient's discretion, may be a non-employee such as a consultant or contractor. The decision-maker, however, "cannot be the same person(s) as the Title IX Coordinator or the investigator(s)." 34 C.F.R. §106.45(b)(7).

The Regulations do not preclude a recipient from using one decision-maker to reach the determination regarding responsibility, and having another decision-maker, who may be an employee or administrator of the recipient (e.g., a tenure committee) determine appropriate disciplinary sanctions (including making such a decision at a separate hearing), so long as the end result is that the decision-maker who reached the determination regarding responsibility includes the disciplinary sanctions imposed by the recipient against the respondent in the written determination issued under 34 C.F.R. § 106.45(b)(7). The issuance of a written determination cannot be a piecemeal process that is broken down into chronologically occurring sub-parts. In other words, when a recipient uses a separate decision-maker to make disciplinary sanction decisions, the recipient must issue a single written determination containing all of the information required under 34 C.F.R. § 106.45(b)(7).

In the postsecondary context, only statements that have been tested for credibility will be considered by the decision-maker in reaching a determination regarding responsibility. Section 106.45(b)(6)(i) clarifies that although a decision-maker cannot rely on the statement of a party or witness who does not submit to cross-examination, the decision-maker cannot draw any inference about the determination regarding responsibility based solely on a party's or witness's absence from the hearing or refusal to answer cross-examination or other questions. The prohibition on reliance on ''statements'' applies not only to statements made during the hearing, but also to any statement of the party or witness who does not submit to cross-examination. ''Statements'' has its ordinary meaning but would not include evidence (such as videos) that do not constitute a person's intent to make factual assertions, or to the extent that such evidence does not contain a person's statements. (Preamble at 30349).

## FERPA & Confidentiality

**Question:** How is FERPA to be applied where the Regulations direct that the parties be given all the particulars and evidence related to the investigation including information about the outcome which may include disciplinary action taken against the respondent. Minimally, the required disclosures involve providing the names of other student witnesses in addition to the names as the complainant and respondent and student statements collected. Typically, information considered to be a student record of one student is not permissibly shared (absent consent) with another student. An exception might be disclosure to a complainant of information necessary to carry out a remedy (i.e. advising complainant of a no contact order in place prohibiting responding from contacting the complainant, information regarding change in the respondent's schedule or bus). While the Regulations strive for transparency in this process, it unclear how to balance the competing interests of maintaining requested confidentiality and compliance with FERPA and providing equal rights to the respondent and compliance with directives for full disclosure related to investigations and the related reports/decisions .

**Answer:** In the Rule, the Department discusses at length the intersection between this Title IX Rule and FERPA. The Rule is interpreted to be consistent with FERPA, and both Title IX and FERPA are interpreted to be consistent with constitutional due process. The Department states on page 1443 that the "Department is precluded from administering, enforcing, and interpreting statutes, including Title IX and FERPA, in a manner that would require a recipient to deny the parties, including employee-respondents, their constitutional right to due process because the Department, as an agency of the Federal government, is subject to the U.S. Constitution. The Department's position is consistent with the principle articulated in the Department's 2001 Guidance that the 'rights established under Title IX must be interpreted consistent with any federally guaranteed due process rights involved in a complaint proceeding.'" Please see the "Section 106.6(e) FERPA" subsection of the "Clarifying Amendments to Existing Regulations" section of the Rule, at pp. 1442-1508.

**Question:** The regulations make the release of a perpetrator's identity confidential unless FERPA exceptions apply. Based on the crimes of violence exception, that means that sexual assault, domestic violence, dating violence and stalking outcomes can be released if there is a finding of violation, but there is no exception for sexual harassment. Does that mean that recipients cannot release a finding of sexual harassment through a reference check, because it would be retaliatory to release this confidential information? Assume no state law requires such release.

**Answer:** The Title IX Rule, § 106.71(a), states that a recipient must keep confidential the identity of any person who has reported sexual harassment, or who has been reported to be a perpetrator of sexual harassment. The purpose of this provision is to prevent the school from retaliating against anyone. This duty of confidentiality has three exceptions in § 106.71(a): if disclosure is permitted under FERPA, if disclosure is required by law, or if disclosure is necessary to carry out the purposes of Title IX and its regulations, including to conduct a grievance process.

A recipient's disclosure of the identity of a respondent cannot be made with a retaliatory purpose without violating § 106.71. If the disclosure is made by a recipient without falling into one of the three exceptions listed in § 106.71, OCR would view the disclosure as potentially retaliatory and examine the facts and circumstances to determine whether the disclosure either (i) satisfied one of the three exceptions (for example, the disclosure was necessary to carry out the purposes of Title IX), or (ii) was made for a non-retaliatory purpose.

**Question:** In the "Supportive measures" section, it is said that "Keep supportive measures confidential to the extent that confidentiality does not impair schools' ability to provide supportive measures"
**Question:** I found this item quite confusing and hope if there is any example to help clarify its meaning.

**Answer:** In the Preamble to the Rule page 393 the Department explains:

> If a complainant desires supportive measures, the recipient can, and should, keep the complainant's identity confidential (including from the respondent), unless disclosing the complainant's identity is necessary to provide supportive measures for the complainant (e.g., where a no-contact order is appropriate and the respondent would need to know the identity of the complainant in order to comply with the no-contact order, or campus security is informed about the no-contact order in order to help enforce its terms).

**Question:** Inquiry regarding confidentiality of supportive measures and due process:

**Answer:** Section 106.30 (defining "supportive measures") states (emphasis added): "The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures." The Rule does not permit a recipient to breach this duty of confidentiality for a reason other than when keeping the supportive measure confidential would "impair the ability" of the recipient "to provide the supportive measure." In the preamble to the Rule at pages 392-93, for instance, the Department explains:

> A recipient's ability to offer supportive measures to a complainant, or to consider whether to initiate a grievance process against a respondent, will be affected by whether the report disclosed the identity of the complainant or respondent. In order for a recipient to provide supportive measures to a complainant, it is not possible for the complainant to remain anonymous because at least one school official (e.g., the Title IX Coordinator) will need to know the complainant's identity in order to offer and implement any supportive measures. Section 106.30 defining "supportive measures" directs the recipient to maintain as confidential any supportive measures provided to either a complainant or a respondent, to the extent that maintaining confidentiality does not impair the recipient's ability to provide the supportive measures. A complainant (or third party) who desires to report sexual harassment without disclosing the complainant's identity to anyone may do so, but the recipient will be unable to provide supportive measures in response to that report without knowing the complainant's identity. If a complainant desires supportive measures, the recipient can, and should, keep the complainant's identity confidential (including from the respondent), unless disclosing the complainant's identity is necessary to provide supportive measures for the complainant (e.g., where a no-contact order is appropriate and the respondent would need to know the identity of the complainant in order to comply with the no-contact order, or campus security is informed about the no-contact order in order to help enforce its terms).

(emphasis added).

If the school conducts a grievance process in response to a formal complaint, § 106.45 does not exempt the recipient from its obligation to keep supportive measures confidential. That expectation is buttressed by the Department's discussion of revision to the recordkeeping provision, § 106.45(b)(10), at page 1406 of the preamble to the Rule:

In response to commenters' concerns that this provision giving the parties access to records might contradict the requirement to keep supportive measures confidential, the Department has revised § 106.45(b)(10)(i) to remove the language making records available to parties. Because the parties to a formal complaint receive written notice of the allegations, the evidence directly related to the allegations, the investigative report, and the written determination (as well as having the right to inspect and review the recording or transcript of a live hearing), the Department is persuaded that the parties' ability to access records relevant to their own case is sufficiently ensured without the risk that making records available to parties under proposed § 106.45(b)(10) would have resulted in disclosure to one party of the supportive measures (or remedies) provided to the other party.

While § 106.45 directs the recipient to objectively evaluate "all relevant evidence – including both inculpatory and exculpatory evidence" (§ 106.45(b)(1)(ii)) and to provide the parties a copy of the "evidence" that is "directly related to the allegations raised in a formal complaint" for review and response (§ 106.45(b)(5)(vi)), any supportive measures provided to the complainant are not "evidence" that is "directly related to the allegations" and the duty to keep supportive measures confidential applies throughout the grievance process.

In your example, the "timeline" that a respondent might wish to establish may consist of establishing when the school received notice of the alleged sexual harassment (e.g., when the incident was reported), combined with the fact that the Rule requires schools "promptly" to offer all complainants supportive measures which, under the Rule, may include academic coursework adjustments, without piercing the confidentiality of supportive measures by disclosing the recipient's records regarding supportive measures requested by or provided to this complainant.

See also the "Section 106.6(e) FERPA" subsection of the "Clarifying Amendments to Existing Regulations" section of the preamble to the Rule (pages 1442-1508) for discussion of FERPA and the Rule's requirement to disclose evidence "directly related to the allegations" to both parties during a grievance process.

As an additional note, the Rule does not grant respondents a general "right to due process," but does give complainants and respondents the specific procedural rights enumerated throughout § 106.45, which rights are rooted in concepts of due process and fundamental fairness for the benefit of complainants, respondents, witnesses, and recipients. See, e.g., Rule at pp. 82-83, FN 203:

> E.g., Association of Title IX Administrators (ATIXA), ATIXA Position Statement: Why Colleges Are in the Business of Addressing Sexual Violence 3-4 (Feb. 17, 2017) (acknowledging that due process has been denied in some recipients' Title IX proceedings but insisting that "Title IX isn't the reason why due process is being compromised. . . . Due process is at risk because of the small pockets of administrative corruption . . . and because of the inadequate level of training currently afforded to administrators. College administrators need to know more about sufficient due process protections and how to provide these protections in practice.") (emphasis added). The Department agrees that recipients need to know more about sufficient due process protections and what such protections need to look like in practice, and this belief underlies the Department's approach to the § 106.45 grievance process which prescribes specific procedural features instead of simply directing recipients to provide due process protections, or be fair, for

complainants and respondents. Edward N. Stoner II & John Wesley Lowery, Navigating Past the "Spirit Of Insubordination": A Twenty-First Century Model Student Conduct Code With a Model Hearing Script, 31 Journal of Coll. & Univ. L. 1, 10-11 (2004) (noting that the trend among colleges and universities has been to put into place written student disciplinary codes but, whether an institution is public or private, a "better practice" is to describe in the written disciplinary code exactly what process will be followed rather than making broad statements about "due process" or "fundamental fairness"). The Department agrees that it is more instructive and effective for the Department to describe what procedures a process must follow, rather than leaving recipients to translate broad concepts like "due process" and "fundamental fairness" into Title IX sexual harassment grievance processes, and unlike the NPRM the final regulations do not reference "due process" but rather prescribe specific procedural features that a grievance process must contain and apply.

**Question:** I have a question regarding when the Title IX Coordinator signs the Formal Complaint: For example, assume the Title IX Coordinator signs the Formal Complaint to begin the grievance process because there are 2 (or 3) complaints of alleged sexual harassment, and the perpetrator is the same individual in all of 3 of these complaints. Assume that none of these three complainants wishes to take advantage of the Informal Resolution Process or file a Formal Complaint and go through the grievance process. When the Title IX Coordinator signs the Formal Complaint to begin the process, is the Title IX Coordinator allowed to share the names of the three Complainants with the Respondent? Or, do we have to get permission from the three Complainants? What is the proper procedure in this matter?

**Answer:** Thank you for your question regarding OCR's new Title IX Regulations. All references and citations are to the official version of the Regulations published in the Federal Register available is here. A link to the unofficial version of the final Regulations is available here.

When a formal complaint is signed by a Title IX Coordinator rather than filed by a complainant, the written notice of allegations in 34 C.F.R. § 106.45(b)(2) requires the recipient to send both parties details about the allegations, including the identity of the parties if known, and thus, if the complainant's identity is known it must be disclosed in the written notice of allegations. However, if the complainant's identity is unknown (for example, where a third party has reported that a complainant was victimized by sexual harassment but does not reveal the complainant's identity, or a complainant has reported anonymously), then the grievance process may proceed if the Title IX Coordinator determines it is necessary to sign a formal complaint, even though the written notice of allegations does not include the complainant's identity.

## Hearing Procedures

**Question:** If there is a safety concern is it appropriate to have Security involved at a live hearing?

**Answer:** The Rule acknowledges the need for schools to provide for the safety of parties (and witnesses) as a paramount concern. For instance, at page 1172, the Department states: "If the respondent 'wrongfully procures' a complainant's absence, for example, through intimidation or threats of violence, and the recipient has notice of that misconduct by the respondent (which likely constitutes prohibited retaliation), the recipient must remedy the retaliation, perhaps by rescheduling the hearing to occur at a later time when the complainant may appear with safety measures in place."

Note also that the definition of "supportive measures" and non-exhaustive, illustrative list of supportive measures, in § 106.30, expressly acknowledge that the purpose of such measures may include "measures designed to protect the safety of all parties or the recipient's educational environment" and give as examples "campus escort services, mutual restrictions on contact between the parties, . . . increased security and monitoring of certain areas of the campus."

Further, although § 106.71(a) obligates the recipient to keep confidential the identities of the parties and witnesses involved in a Title IX grievance process, one of the exceptions to that confidentiality duty is when disclosure is "to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder" and this exception could permit, for instance, the recipient to arrange for the presence of a campus security officer in the hearing room with the complainant, if the recipient determines that such a security measure is needed to carry out the purpose of the hearing, or if a security escort has already been provided to the complainant as a supportive measure and is necessary to carry out the purpose of the hearing.

**Question:** Shall we hire a court reporter? Do we have to buy cameras?

**Answer:** The Rule neither requires nor forbids recipients from hiring court reporters.

The Rule requires postsecondary institutions to hold live hearings, and to grant the request of any party for the live hearing to be held 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." § 106.45(b)(6)(i). The Rule does not prescribe acquisition of particular hardware or software that may be needed for the recipient to comply with this requirement.

**Question:** Do we have to build a safe space for the party to go to if the party wants to answer but not be in the same room as the other party?

**Answer:** In the preamble to the Rule, at pages 1208-09, the Department states:

> The Department appreciates commenters' assertions that some recipients already effectively use technology to enable virtual hearings, and other commenters' concerns that acquiring technology may cause a recipient to incur costs. The Department agrees with some commenters

> who asserted that even where this provision requires a monetary investment in technology, low-cost technology is available and the importance of this shielding provision outweighs the burden of setting up the requisite technology. Although this shielding provision requires that a Title IX live hearing would be held in two "separate rooms" the Department is not persuaded that such a requirement necessitates any recipient's capital investment in renovations or acquiring new real property, because the Department is unaware of a recipient whose existing facilities consist of a single room. These final regulations do not address the eligibility or purpose of grant funding for recipients, and the Department thus declines to provide technology grants via these regulations.

At pages 1967-69, the Department further states:

> We understand that very few recipients, as part of their regular operations, maintain separate hearing rooms equipped with closed-circuit cameras or other live audio and visual conferencing technology. However, the final regulations do not require recipients to construct such spaces or equip them with expensive technology. **The final regulations create no requirements on the space in which the hearing is held and, therefore, we believe most recipients will be able to identify a suitable space within their existing facilities such as an office, classroom, or conference room.** … Section 106.45(b)(6)(i) of these final regulations requires recipients, at the request of either party, to allow for the live hearing, including cross-examination, to occur with the parties in separate rooms and with technology allowing the decision-maker and parties to simultaneously see and hear the party or the witness answering questions. We note that this could be accomplished with an expensive closed-circuit television or video-conferencing system and, to the extent that recipients already possess such technologies, they could use them to meet the requirements of this part. We also recognize that a large number of recipients do not have such technology or equipment readily available to them. In such instances, recipients would be faced with either purchasing such equipment or using existing equipment paired with various software solutions. We believe that very few recipients are likely to, as a result of the final regulations, invest in costly new equipment for a relatively infrequent occurrence – that is, a recipient is unlikely to spend several thousand dollars on equipment and software it only intends to use one to three times per year. We believe it is much more likely that recipients will opt to use existing equipment, such as webcams, laptops, or cell phones, paired with free or relatively inexpensive software solutions. We note that there are more than a dozen free video web conferencing platforms that recipients could use to ensure that decision-makers and parties could simultaneously see and hear the party or witness who is answering questions. Further, the requirements for creating audio or audiovisual recordings or a transcript of hearings can be met at very low or no cost using commonly available voice memo apps or software or tape recorders. However, to ensure that we account for these costs where they may occur, we have revised our assumptions to include a cost for the various technology requirements associated with the final regulations. As discussed above, we believe that recipients are unlikely to incur these costs and, as such, this approach represents an overestimate of likely costs incurred by recipients to comply with this requirement.

(emphasis added).[3]

**Question:** Are all witnesses expected to appear at a hearing, or do decision-makers have the flexibility to request witnesses as they deem necessary?

**Answer:** The Rule does not require that all witnesses appear at a hearing, although it does provide the parties an equal right to present witnesses. The Rule further requires the recipient to objectively evaluate all "relevant evidence." See § 106.45(b)(1)(ii). For recipients holding a live hearing pursuant to § 106.45(b)(6)(i), that provision of the Rule states:

> 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 witness's* absence from the live hearing or refusal to answer cross-examination or other questions.

(emphasis added.) The Rule also requires all recipients to give the parties "equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence[.]" See § 106.45(b)(5)(ii).

At page 1176 of the Preamble of the Rule, the Department acknowledges that recipients do not have subpoena powers to compel attendance of parties or witnesses at a hearing:

> The Department understands that complainants (and respondents) often will not have control over whether witnesses appear and are cross-examined, because neither the recipient nor the parties have subpoena power to compel appearance of witnesses. Some absences of witnesses can be avoided by a recipient thoughtfully working with witnesses regarding scheduling of a hearing, and taking advantage of the discretion to permit witnesses to testify remotely.

Furthermore, § 106.71(a) protects parties and witnesses against retaliation for deciding to participate or *not to participate* in a Title IX grievance process. Thus, a witness cannot be compelled to appear at a hearing, and cannot be intimidated, threatened, coerced, or discriminated against if the witness chooses not to appear. However, the parties must have an equal opportunity to "present" witnesses, so the decision-maker cannot request the presence only of witnesses the decision-maker has deemed necessary. The decision-maker has discretion to permit witnesses to testify at the hearing remotely, using technology. See § 106.45(b)(6)(i).

[3] Original question included: "See the response to your Question 14 [relating to whether recipient had to hire court reporter or buy new cameras], above."

**Question:** In XXX state, student conduct hearings are subject to the state's APA. For cases that could involve suspension (as many Title IX sexual harassment cases might), this requires the University to conduct adjudicative proceedings, which are adversarial in nature and provide substantial procedural rights. See RCW 34.05.410-476. As part of this adversarial process, do the new Title IX regulations permit the University to advocate for a certain outcome at the hearing in line with its investigator's recommended findings and conclusions? For example, if the investigation recommends a respondent be found responsible, is the University permitted at the hearing to present a case (through the investigator, counsel, or some other representative) and argue to the decision maker that the respondent should be found responsible (and vice versa, if the investigation recommends the respondent be found not responsible)?

**Answer:** Allegations of sexual harassment often present an inherently adversarial situation, where parties have different recollections and perspectives about the incident at issue. The final regulations do not increase the adversarial nature of such a situation, and in fact require recipients to act impartially with respect to complainants and respondents. For example, the § 106.45 grievance process helps ensure that the adversarial nature of sexual harassment allegations are investigated and adjudicated impartially by the recipient with meaningful participation by the parties whose interests are adverse to each other (FR 30301).

Section 106.45(b)(6)(i) respects and reinforces the impartiality of the recipient by requiring adversarial questioning to be conducted by party advisors (who by definition need not be impartial because their role is to assist one party and not the other). Precisely because the recipient must provide a neutral, impartial decision-maker, the function of adversarial questioning must be undertaken by persons who owe no duty of impartiality to the parties. Rather, the impartial decision-maker benefits from observing the questions and answers of each party and witness posed by a party's advisor advocating for that party's particular interests in the case.

In the Preamble to the Final Title IX Rule, the Department noted that it "does not wish to prohibit the investigator from including recommended findings or conclusions in the investigative report. However, the decision-maker is under an independent obligation to objectively evaluate relevant evidence, and thus cannot simply defer to recommendations made by the investigator in the investigative report."

**Question:** Inquiry regarding confidentiality of supportive measures and due process:

**Answer:** Section 106.30 (defining "supportive measures") states (emphasis added): "The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures." The Rule does not permit a recipient to breach this duty of confidentiality for a reason other than when keeping the supportive measure confidential would "impair the ability" of the recipient "to provide the supportive measure." In the preamble to the Rule at pages 392-93, for instance, the Department explains:

> A recipient's ability to offer supportive measures to a complainant, or to consider whether to initiate a grievance process against a respondent, will be affected by whether the report disclosed the identity of the complainant or respondent. In order for a recipient to provide supportive measures to a complainant, it is not possible for the complainant to remain anonymous because at least one school official (e.g., the Title IX Coordinator) will need to know the complainant's identity in order to offer and implement any supportive measures. Section 106.30 defining "supportive measures" directs the recipient to maintain as confidential any supportive measures provided to either a complainant or a respondent, to the extent that maintaining confidentiality does not impair the recipient's ability to provide the supportive measures. A complainant (or third party) who desires to report sexual harassment without disclosing the complainant's identity to anyone may do so, but the recipient will be unable to provide supportive measures in response to that report without knowing the complainant's identity. If a complainant desires supportive measures, the recipient can, and should, keep the complainant's identity confidential (including from the respondent), unless disclosing the complainant's identity is necessary to provide supportive measures for the complainant (e.g., where a no-contact order is appropriate and the respondent would need to know the identity of the complainant in order to comply with the no-contact order, or campus security is informed about the no-contact order in order to help enforce its terms).

(emphasis added).

If the school conducts a grievance process in response to a formal complaint, § 106.45 does not exempt the recipient from its obligation to keep supportive measures confidential. That expectation is buttressed by the Department's discussion of revision to the recordkeeping provision, § 106.45(b)(10), at page 1406 of the preamble to the Rule:

> In response to commenters' concerns that this provision giving the parties access to records might contradict the requirement to keep supportive measures confidential, the Department has revised § 106.45(b)(10)(i) to remove the language making records available to parties. Because the parties to a formal complaint receive written notice of the allegations, the evidence directly related to the allegations, the investigative report, and the written determination (as well as having the right to inspect and review the recording or transcript of a live hearing), the Department is persuaded that the parties' ability to access records relevant to their own case is sufficiently ensured without the risk that making records available to parties under proposed § 106.45(b)(10) would have resulted in disclosure to one party of the supportive measures (or remedies) provided to the other party.

While § 106.45 directs the recipient to objectively evaluate "all relevant evidence – including both inculpatory and exculpatory evidence" (§ 106.45(b)(1)(ii)) and to provide the parties a copy of the "evidence" that is "directly related to the allegations raised in a formal complaint" for review and response (§ 106.45(b)(5)(vi)), any supportive measures provided to the complainant are not "evidence" that is "directly related to the allegations" and the duty to keep supportive measures confidential applies throughout the grievance process.

In your example, the "timeline" that a respondent might wish to establish may consist of establishing when the school received notice of the alleged sexual harassment (e.g., when the incident was reported), combined with the fact that the Rule requires schools "promptly" to offer all complainants supportive measures which, under the Rule, may include academic coursework adjustments, without piercing the confidentiality of supportive measures by disclosing the recipient's records regarding supportive measures requested by or provided to this complainant.

See also the "Section 106.6(e) FERPA" subsection of the "Clarifying Amendments to Existing Regulations" section of the preamble to the Rule (pages 1442-1508) for discussion of FERPA and the Rule's requirement to disclose evidence "directly related to the allegations" to both parties during a grievance process.

As an additional note, the Rule does not grant respondents a general "right to due process," but does give complainants and respondents the specific procedural rights enumerated throughout § 106.45, which rights are rooted in concepts of due process and fundamental fairness for the benefit of complainants, respondents, witnesses, and recipients. See, e.g., Rule at pp. 82-83, FN 203:

> E.g., Association of Title IX Administrators (ATIXA), ATIXA Position Statement: Why Colleges Are in the Business of Addressing Sexual Violence 3-4 (Feb. 17, 2017) (acknowledging that due process has been denied in some recipients' Title IX proceedings but insisting that "Title IX isn't the reason why due process is being compromised. . . . Due process is at risk because of the small pockets of administrative corruption . . . and because of the inadequate level of training currently afforded to administrators. College administrators need to know more about sufficient due process protections and how to provide these protections in practice.") (emphasis added). The Department agrees that recipients need to know more about sufficient due process protections and what such protections need to look like in practice, and this belief underlies the Department's approach to the § 106.45 grievance process which prescribes specific procedural features instead of simply directing recipients to provide due process protections, or be fair, for complainants and respondents. Edward N. Stoner II & John Wesley Lowery, Navigating Past the "Spirit Of Insubordination": A Twenty-First Century Model Student Conduct Code With a Model Hearing Script, 31 Journal of Coll. & Univ. L. 1, 10-11 (2004) (noting that the trend among colleges and universities has been to put into place written student disciplinary codes but, whether an institution is public or private, a "better practice" is to describe in the written disciplinary code exactly what process will be followed rather than making broad statements about "due process" or "fundamental fairness"). The Department agrees that it is more instructive and effective for the Department to describe what procedures a process must follow, rather than leaving recipients to translate broad concepts like "due process" and "fundamental fairness" into Title IX sexual harassment grievance processes, and unlike the NPRM the final regulations do not reference "due process" but rather prescribe specific procedural features that a grievance process must contain and apply.

## Inferences

**Question:** The regs are clear that no inferences are to be drawn solely from non-participation of a witness or party, but the regulations also say OCR will not will not second-guess the recipient's determination regarding responsibility, which may rely on an improperly drawn inference. How does OCR reconcile these seemly oppositional provisions?

**Answer:** These provisions are fully consistent with one another. The new Title IX Rule explains at length the purpose and impact of § 106.44(b)(2), under which "The Assistant Secretary will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient, or otherwise evidence of discrimination under title IX by the recipient, solely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence." In the Preamble to the Rule at pages 710-20, the Department explains that § 106.44(b)(2) in no way precludes the Department from enforcing all provisions of § 106.45. In your example, if the recipient draws an impermissible inference based on a party's absence from the live hearing, the Department may find the recipient in violation of § 106.45, including potentially setting aside the recipient's determination regarding responsibility. See, e.g., Preamble to the Rule at p. 713 ("Refraining from second guessing the determination reached by a recipient's decision-maker solely because the evidence could have been weighed differently does not prevent OCR from identifying and correcting any violations the recipient may have committed during the Title IX grievance process.") (emphasis added).

**Question:** May a decision-maker draw an inference about the determination regarding a party's responsibility based on a party's refusal to answer written, relevant questions?

**Answer:** The new Title IX Rule does not require parties to answer the written, relevant questions provided for in § 106.45(b)(6)(ii), and the Rule prohibits a recipient from threatening, coercing, intimidating, or discriminating against a party for exercising rights under Title IX, including a choice not to participate in a grievance process. § 106.71(a). Thus, a recipient's policy that purports to "require" parties to answer the written questions posed under § 106.45(b)(6)(ii) risks a determination that such a policy constitutes unlawful retaliation.

**Question:** May a decision-maker draw an inference about the determination regarding a party's responsibility based solely on a party's refusal to answer written, relevant questions?

**Answer:** The new Title IX Rule does not expressly direct a decision-maker to refrain from drawing inferences about the determination regarding responsibility based on a party's or witness's refusal to answer the written, relevant questions provided for under § 106.45(b)(6)(ii).

Even outside the postsecondary institution context, decision-makers must still be cognizant of the requirements of § 106.45 that apply to all recipients, including that recipients "[p]rovide an equal

opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence." 106.45(b)(5)(ii). Similarly, recipients owe a duty to maintain grievance procedures that "[r]equire 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." See § 106.45(b)(1)(ii).

The new Title IX Rule does not expressly direct a decision-maker to refrain from drawing inferences about the determination regarding responsibility based on a party's or witness's refusal to answer the written, relevant questions provided for under § 106.45(b)(6)(ii).

Even outside the postsecondary institution context, decision-makers must still be cognizant of the requirements of § 106.45 that apply to all recipients, including that recipients "[p]rovide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence." 106.45(b)(5)(ii). Similarly, recipients owe a duty to maintain grievance procedures that "[r]equire 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." See § 106.45(b)(1)(ii).

## Informal Resolution

**Question:** Can a university decide not to go forward with a sexual misconduct formal hearing and make a decision on the investigation record if the complainant and respondent both knowingly and voluntarily waive the right to a formal hearing?

**Answer:** The new Title IX Rule provides that under certain conditions, a school can facilitate, and the parties may engage in, informal resolution of the formal complaint of sexual harassment. When the school and the parties opt to resolve a formal complaint through informal resolution, there need not be a hearing. Of course, as you reference, this process must be agreed upon voluntarily.

The Title IX Rule, at § 106.45(b)(9), states:

> A recipient may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section. Similarly, a recipient may not require the parties to participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed. However, 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 complies with § 106.45(b)(9)(i)-(iii)].

A recipient, however, cannot "offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student." § 106.45(b)(9)(iii).

Subject to all of the provisions of § 106.45(b)(9), the Rule does not preclude a recipient from reaching a resolution of the allegations in a formal complaint of sexual harassment through an informal resolution process that does not involve a hearing. Note that § 106.45(b)(9)(i) includes this requirement: ". . . at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint[.]"

## Investigative Reports

**Question:** Can the investigation report make findings that an incident occurred as described by the complainant, as long as the decision-maker is free to come to their own conclusion on that based on the hearing? Can the investigation report make a determination that an incident occurred as described by the complainant and that it violates policy, as long as the decision-maker is free to come to their own conclusion on that based on the hearing? (If not) Can the investigation report make non-binding recommendations about the finding and/or determination, as defined above?

**Answer:** The Title IX Rule obligates the decision-maker (who must be a different person from the investigator) to reach the determination regarding responsibility, and the decision-maker has an independent obligation to objectively evaluate all relevant evidence. *See* § 106.45(b)(7), § 106.45(b)(1)(ii). In the Preamble to the Rule at pages 1031-32 the Department states:

> The Department does not wish to prohibit the investigator from including recommended findings or conclusions in the investigative report. However, the decision-maker is under an independent obligation to objectively evaluate relevant evidence, and thus cannot simply defer to recommendations made by the investigator in the investigative report. As explained in the "Section 106.45(b)(7)(i) Single Investigator Model Prohibited" subsection of the "Determinations Regarding Responsibility" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble, the decision-maker cannot be the same person as the Title IX Coordinator or the investigator and must issue a written determination regarding responsibility, and one of the purposes of that requirement is to ensure that *independent* evaluation of the evidence gathered is made prior to reaching the determination regarding responsibility.

(emphasis added). Nothing about the Rule prevents a Title IX Coordinator or investigator from making recommendations regarding facts at issue in the context of a formal complaint, the question of responsibility, or the appropriateness of remedies or disciplinary sanctions. However, a decision-maker—whether an employee of the recipient or an employee of a third party, such as a consortium of schools—is precluded from deferring to these findings or recommendations, and must make their own independent evaluation of the evidence.

**Question:** Is it OCR's expectation that a recipient will cause an investigation report to be transmitted to the decision-maker, and if so, at what point in the process?

**Answer:** The new Title IX Rule requires the recipient to send a copy of the investigative report to the parties and their advisors (if any) at least ten days prior to the date of a hearing (if a hearing is required or otherwise provided) or other time of determination regarding responsibility, but does not prescribe how or when the investigative report should be given to the decision-maker. Because the purpose of this requirement, found at § 106.45(b)(5)(vii), is to ensure that the parties are prepared for a hearing or, if no hearing is required or otherwise provided, that the parties have the opportunity to have their views of the evidence considered by the decision-maker, the decision-maker will need to have the investigative report and the parties' responses to same, prior to reaching a determination regarding responsibility. See Rule at p. 1036.

## K-12 Proceedings

**Question:** I am not clear as to whether K-12 schools have to have multiple separate individuals fill the positions for Coordinator, Investigator, and Decision-maker. The webinar seemed to say that it is required in K-12 schools. However, the early portions of the Regs document (first 50 or so pages) gave me the impression that this is only required in the collegiate environment.

**Answer:** The new Title IX Rule states, in § 106.45(b)(7)(i), that the decision-maker "cannot be the same person(s) as the Title IX Coordinator or the investigator(s)" and § 106.45(b)(8)(iii)(B) states that that the recipient must ensure that an appellate decision-maker is "not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator." At page 1259 of the preamble to the Rule, the Department states: "*The Department notes that the final regulations leave significant flexibility to recipients, including whether the Title IX Coordinator can also serve as the investigator*, whether to use a panel of decision-makers or a single decision-maker, and whether to use the recipient's own employees or outsource investigative and adjudicative functions to professionals outside the recipient's employ." (emphasis added). These provisions all apply equally to all recipients of Federal financial assistance, including elementary and secondary schools.

**Question:** "The decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions." This appears in a section related to IHEs. Should K12s follow a similar approach with respect to a student who refuses to pose or answer questions (assume no live hearing)?

**Answer:** The provisions of § 106.45(b)(6)(i) apply only to recipients that are postsecondary institutions. Decision-makers at the elementary and secondary level are not bound by the hearing requirements set

forth for postsecondary institutions, and therefore have additional flexibility when adjudicating formal complaints of sexual harassment.

At pages 1240-41 of the preamble to the Rule, the Department states:

> If an elementary and secondary school recipient chooses to hold a hearing (live or otherwise), this provision [§ 106.45(b)(6)(ii)] leaves the recipient significant discretion as to how to conduct such a hearing, because § 106.45(b)(6)(i) applies only to postsecondary institutions. The Department desires to leave elementary and secondary schools as much flexibility as possible to apply procedures that fit the needs of the recipient's educational environment. The Department notes that § 106.45(b) requires any rules adopted by a recipient for use in a Title IX grievance process, other than those required under § 106.45, must apply equally to both parties. Within that restriction, elementary and secondary school recipients retain discretion to decide how to conduct hearings if a recipient selects that option.

**Question:** Are all of these written notifications and opportunities to provide feedback required at the K-12 level? If not, what is specifically required at the K-12 level in terms of written notifications and opportunities to provide feedback during the formal investigation process?

**Answer:** all of the provisions in § 106.45 apply equally to all recipients, except § 106.45(b)(6) (regarding hearings). Thus, the provisions to which you refer do apply to elementary and secondary schools; for example, §§ 106.45(b)(2) (regarding written notice of allegations); 106.45(b)(3) (regarding written notice of dismissals); 106.45(b)(5)(v) (regarding written notice of investigatory interviews and meetings); 106.45(b)(5)(vi) (parties' inspection and review of evidence); 106.45(b)(5)(vii) (parties' review of the investigative report); 106.45(b)(7) (written determination regarding responsibility).

**Question:** If a K12 recipient is required by existing law or policy to provide a hearing, do OCR's rules in 106.45 around cross-examination and consideration of evidence apply to that hearing?

**Answer:** The new Title IX Rule does not require a recipient that is not a postsecondary institution to hold a hearing (live or otherwise). § 106.45(b)(6)(ii). If a non-postsecondary institution recipient, such as a K-12 school, chooses to hold a hearing, the provisions of the Rule that apply solely to postsecondary institutions do not apply to such a hearing. The Department addressed this issue in the Preamble at page 1240-41 of the Preamble:

If an elementary and secondary school recipient chooses to hold a hearing (live or otherwise), this provision leaves the recipient significant discretion as to how to conduct such a hearing, because § 106.45(b)(6)(i) applies only to postsecondary institutions. The Department desires to leave elementary and secondary schools as much flexibility as possible to apply procedures that fit the needs of the recipient's educational environment. The Department notes that § 106.45(b) requires any rules adopted by a recipient for use in a Title IX grievance process, other than those required under § 106.45, must

apply equally to both parties. Within that restriction, elementary and secondary school recipients retain discretion to decide how to conduct hearings if a recipient selects that option.

Note also that recipients must conduct their investigations and any hearings (required or otherwise provided) in a manner consistent with other provisions of 106.45. That includes, for instance, the requirement that recipients "[p]rovide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence." 106.45(b)(5)(ii). Similarly, recipients owe a duty to maintain grievance procedures that "[r]equire 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." See § 106.45(b)(1)(ii). And a recipient cannot retaliate against a party or witness who exercises or declines to exercise their option to participate in a Title IX grievance process. See § 106.71.

**Question:** Do the regulations permit a school district to adopt a code of conduct requiring students to answer written, relevant questions of a party to the process of making the findings of fact supporting a decision-maker's determination regarding responsibility for sexual harassment? If so, do the regulations permit a school district to discipline a student for violating such a code of conduct without engaging in the processes prescribed by 106.45?

**Answer:** The new Title IX Rule requires decision-makers to objectively evaluate all relevant evidence. § 106.45(b)(1)(ii). Thus, a decision-maker must consider all relevant evidence (inculpatory and exculpatory), unless the Rule prohibits consideration of such evidence (for example, the Rule prohibits use or consideration of a party's treatment records without the party's prior written consent, regardless of whether the records constitute or contain relevant evidence). See § 106.45(b)(5)(i).

**Question:** The complainant and her family decide they don't want to file a formal complaint (too complex and lengthy). The K-12 school offers supportive measures and asks the school to resolve the allegations under its code of conduct instead. The school agrees and resolves outside of 106.45 using its conduct process. Is this permissible? Further, the complainant changes her mind as the conduct investigation unfolds, and decides to file a formal Title IX complaint. Now, does the K-12 have to stop its conduct process and redo its entire investigation in a way that complies with the regulations?

**Answer:** The new Title IX Rule requires a recipient to refrain from imposing disciplinary sanctions on a respondent (that is, an individual who is reported to be the perpetrator of conduct that could constitute sexual harassment, where "sexual harassment" is defined by the Rule) without first following a grievance process that complies with § 106.45. §§ 106.44(a) (equitable treatment of complainants and respondents), 106.30(a) (defining "respondent"). Thus, an elementary or secondary school would be in violation of the Rule if it imposed disciplinary sanctions on a respondent without first following the § 106.45 grievance process. Note that § 106.45(b)(9) allows a recipient to facilitate an informal resolution of sexual harassment allegations (except as to allegations that an employee sexually harassed a student) subject to the requirements of that provision, including inter alia that a formal complaint is first filed,

and that each party voluntarily agrees to the informal resolution process after receiving prescribed written notice.

If a complainant initially does not wish to file a formal complaint (and the Title IX Coordinator does not sign a formal complaint because signing one is not required in order for the recipient's response to not be deliberately indifferent), and the complainant later changes his or her mind and does file a formal complaint, then the school must investigate that formal complaint in accordance with § 106.45. § 106.44(a) (supportive measures are available with or without a formal complaint); § 106.30(a) (defining "formal complaint"); § 106.44(b)(1) ("In response to a formal complaint, a recipient must follow a grievance process that complies with § 106.45.").

## Mandatory Reporters

**Question:** My name is XXXX, I am currently assigned as the crimes against persons detective for the XXX University Police Department. We have meet as a collective group on our campus in regard to the new Title IX regulations or Final Rule. We have had discussions of empowering the survivor and creating a true trauma informed survivor centered approach to sexual violence on our campus. I was asked to follow up on the following questions for clarification.

At our University we are working with our Office of Equity on the new Title IX regulations. We were asked to look into the option of law enforcement falling into the category of the "must only with a student's consent" report sexual harassment to the recipient's Title IX Coordinator. (as found on page 30040 of the final rule Federal Register Vol. 85 No. 97). We are working on a more trauma informed survivor centered approach to sexual violence on our campus. In doing so we have formed a partnership with our campus SAAVI office to put the survivor in touch with a victim advocate at the start of a reported incident. During this process, the victim advocate goes over all campus and community based resources, as well as the law enforcement option with the survivor. We have found that this empowers the survivor to make the best educated decision for themselves and their incident and how they would like to proceed at the time. In reading the final rule I found where it is stated "students may benefit from having options to disclose sexual harassment to college and university employees who may keep the disclosure confidential" goes onto state "the Department believes that students at postsecondary institutions benefit from retaining control over whether, and when, the complainant wants the recipient to respond to the sexual harassment that the complainant experienced"(as found on page 30040 of the final rule Federal Register Vol. 85 No. 97).

With that being stated we at XXX University Police Department along with our XXX Office of Equity and General Council are trying to see if there is any violation of the Final Rule that prohibits the campus police department from being put in the reporting lane of mandatory reporting "only with a student's consent". Our group has not been able to see where that would be a violation and I was asked to reach out to see if we could get some clarification to ensure that would be a valid policy to implement. I'm hoping that this is the best avenue to proceed with this question. If not, I would appreciate some guidance on where to submit my request for assistance.

**Answer:** Thank you for your question regarding OCR's new Title IX regulations. All references and citations are to the official version of the Rule published in the Federal Register which is available is here. A link to the unofficial version of the final regulations is available here.

Please note that the response provided to you by OCR is not legal advice and does not constitute an OCR determination regarding the compliance or non-compliance with respect to the new Rule. OCR does not provide advisory opinions, and determinations about a recipient's (school's) compliance with civil rights laws like Title IX are made only after OCR has investigated a complaint filed with OCR, in accordance with OCR's Case Processing Manual.

As an initial matter, it is important to note that the Rule is clear that 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," and that none of the individuals who serve as the "Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process," may "have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent." 34 C.F.R. 106.45(a), (b)((1)(iii). Any general approach employed by a recipient, including a "trauma informed approach" or an approach that "empowers the survivor" must meet this requirement.

With respect to the way in which an institution's mandatory reporting policy empowers survivors to retain as much control as possible over the circumstances of their report of sexual harassment, as noted in the Preamble to the final regulations, the Department intends to leave postsecondary institutions wide discretion to craft and implement the recipient's own employee reporting policy to decide (as to employees who are not the Title IX Coordinator and not officials with authority to implement corrective measures on the recipient's behalf) which employees are mandatory reporters (i.e., employees who must report sexual harassment to the Title IX Coordinator), which employees may listen to a student's or employee's disclosure of sexual harassment without being required to report it to the Title IX Coordinator, and/or which employees must report sexual harassment to the Title IX Coordinator but only with the complainant's consent. (85 FR 30,041-43).

No matter how a college or university designates its employees with respect to mandatory reporting to the Title IX Coordinator, the final regulations ensure that students at postsecondary institutions, as well as employees, are notified of the Title IX Coordinator's contact information and have clear reporting channels, including options accessible even during non-business hours, for reporting sexual harassment in order to trigger the postsecondary institution's response obligations. (85 FR 30,043).

As to your question regarding the reporting obligations of campus police employees, so long as such employees are not "officials with authority" as described in 34 C.F.R. § 106.30 (defining "actual knowledge"), then a recipient has discretion to designate such employees as employees to whom a report or disclosure of sexual harassment will be reported to the recipient's Title IX Coordinator only with the complainant's consent.

**Question:** I am unclear about the new policy change on "mandatory reporters." I've read that coaches and athletic trainers are no longer required to report instances of misconduct and discrimination. Are there any materials available for guidance on this matter?

**Answer:** Thank you for your question regarding OCR's new Title IX Regulations. All references and citations are to the official version of the Regulations published in the Federal Register available is here. A link to the unofficial version of the final Regulations is available here.

As noted in the Preamble to the final regulations, the Department intends to leave postsecondary institutions wide discretion to craft and implement the recipient's own employee reporting policy to decide (as to employees who are not the Title IX Coordinator and not officials with authority) which employees are mandatory reporters (*i.e.,* employees who must report sexual harassment to the Title IX Coordinator), which employees may listen to a student's or employee's disclosure of sexual harassment without being required to report it to the Title IX Coordinator, and/or which employees must report sexual harassment to the Title IX Coordinator but only with the complainant's consent. No matter how a college or university designates its employees with respect to mandatory reporting to the Title IX Coordinator, the final regulations ensure that students at postsecondary institutions, as well as employees, are notified of the Title IX Coordinator's contact information and have clear reporting channels, including options accessible even during non-business hours, for reporting sexual harassment in order to trigger the postsecondary institution's response obligations.

Employees at elementary and secondary schools typically are mandatory reporters of child abuse under State laws for purposes of child protective services.

**Question:** Can an institution designate an individual who would typically be an official with authority (such as a Dean or Chief Executive Director) as a discretionary reporter, who only reports to the Title IX Coordinator with consent from the Complainant? This would be so that these individuals would be available to students as needed to discuss issues without reporting to the Title IX Coordinator.

**Answer:** Thank you for your question regarding OCR's new Title IX Regulations. All references and citations are to the official version of the Regulations published in the Federal Register available is here. A link to the unofficial version of the final Regulations is available here.

As noted in the Preamble to the final regulations, the Department

> intends to leave postsecondary institutions wide discretion to craft and implement the recipient's own employee reporting policy to decide (as to employees who are not the Title IX Coordinator and not officials with authority) which employees are mandatory reporters (*i.e.,* employees who must report sexual harassment to the Title IX Coordinator), which employees may listen to a student's or employee's disclosure of sexual harassment without being required to report it to the Title IX Coordinator, and/or which employees must report sexual harassment to the Title IX Coordinator but only with the complainant's consent.

Preamble at 30043; emphasis added. However, in your hypothetical, you reference the "Dean or Chief Executive Director" of a school, who will generally have authority to take corrective measures in

response to an allegation of sexual harassment. As such, that official would give the recipient on actual notice of sexual harassment. The recipient could designate another individual as a discretionary reporter, provided that individual is neither the Title IX Coordinator, nor an official with authority to institute corrective measures under the regulations.

## Minors in College Programs (Camps, etc.)

**Question:** If a 4th grader is enrolled in a college-sponsored summer camp, and is sexually harassed and complains in the college process, does the college apply live hearing and cross-examination, or use the K-12 procedures for written exchange of questions and answers?

**Answer:** This hypothetical lacks sufficient information to reach a definitive answer. The new Title IX Rule requires live hearings with cross-examination only for recipients that are postsecondary institutions. § 106.45(b)(6)(i). For all recipients that are not postsecondary institutions, hearings are allowed, but never required. § 106.45(b)(6)(ii). The term "postsecondary institution" is a defined term under § 106.30(a).

The Preamble to the Final Rule contemplates that some education programs or activities that are affiliated with postsecondary institutions, but do not themselves constitute a "postsecondary institution," will not be subject to § 106.45(b)(6)(i), but would instead be subject to § 106.45(b)(6)(ii). For instance, the Preamble to the Rule states at page 1538: "Academic medical centers are not postsecondary institutions, although an academic medical center may be affiliated with a postsecondary institution or even considered part of the same entity as the postsecondary institution. Through this revision the Department is giving entities like academic medical centers greater flexibility in determining the appropriate process for a formal complaint."

**Question:** The first question is regarding dual enrollment in both a K-12 program and college program. Should a sexual harassment allegation arise, would those students need to go through the university's formal Title IX process (with a live hearing) or the K-12's process that may not have the live hearing component.

The second question is regarding decision makers and remedy determinations. The regulations are clear that the decision maker must articulate the basis for any remedies in their determinations. I read this to mean that the decision maker must also issue any remedies/sanctions but wanted clarification from OCR. Currently many institutions have a bifurcated process where a responsibility determination is first made and then a different group of folks or one individual makes a sanctioning determination. My read is that this will not be allowed under this new process. Can you clarify?

**Answer:** Thank you for your question regarding OCR's new Title IX Regulations. All references and citations are to the official version of the Regulations published in the Federal Register available is here. A link to the unofficial version of the final Regulations is available here.

The Final Regulations direct recipients of Federal financial assistance to respond promptly to each instance of notice of sexual harassment (or allegations of sexual harassment) in the school's education program or activity, against a person in the United States, by taking specific, required actions such as offering supportive measures to the complainant.

Thus, the answer to your first question depends, in part, on whether the dual enrollment program constituted a part of the recipient's education program activity, and if so, which recipient was in fact responding to an allegation of sexual harassment in its education program or activity is an elementary or secondary school, or a post-secondary school. In the Preamble to the regulations, the Department noted that:

These final regulations require a recipient to respond to sexual harassment whenever the recipient has notice of sexual harassment that occurred in the recipient's own education program or activity, regardless of whether the complainant or respondent is an enrolled student or an employee of the recipient. The manner in which a recipient must, or may, respond to the sexual harassment incident may differ based on whether the complainant or respondent are students, or employees, of the recipient.

Preamble at 30488 (footnote omitted). The Regulations do not preclude a recipient from using one decision-maker to reach the determination regarding responsibility, and having another decision-maker, who may be an employee or administrator of the recipient (e.g., a tenure committee) determine appropriate disciplinary sanctions (including making such a decision at a separate hearing), so long as the end result is that the decision-maker who reached the determination regarding responsibility includes the disciplinary sanctions imposed by the recipient against the respondent in the written determination issued under 34 C.F.R. § 106.45(b)(7). The issuance of a written determination cannot be a piecemeal process that is broken down into chronologically occurring sub-parts. In other words, when a recipient uses a separate decision-maker to make disciplinary sanction decisions, the recipient must issue a single written determination containing all of the information required under § 106.45(b)(7).

## Notices of Nondiscrimination

**Question:** The regs state: "The recipient must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator pursuant to this paragraph." This is confusingly written about notice to parents or legal guardians of elementary and secondary school students…is that limited to K-12 programs, or is this a requirement for IHEs as well? The way it's written could mean that a university is supposed to let every parent/legal guardian in the state know who the TIXC is. Does it apply only to K-12? Is it supposed to mean an IHE only has to notify K-12 parents/legal guardians for things like summer camps or dual credit courses the IHE offers to elementary and secondary students?

**Answer:** Section 106.8(a) states "The recipient must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient" of the contact information for the Title IX Coordinator. Note that the same list of individuals and groups must receive notification of the school's non-discrimination policy (see 106.8(b)), and the same list of individuals and groups must also receive "notice of the recipient's grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond" under 106.8(c).

Section 106.8(a) lists "parents or legal guardians of elementary and secondary school students" as a distinct class of persons who must be notified. The Rule uses a specific definition of "elementary and secondary schools" (see § 106.30(b)). All recipients must send the required notifications to the parents and legal guardians of students of any "elementary and secondary schools" as that term is defined under the Rule. If a postsecondary institution (or any other entity) is operating an "elementary and secondary school" as that term is defined in § 106.30(b), then parents or legal guardians of the students of the "elementary and secondary school" would need to receive the required notifications under § 106.8.

## Notifications

**Question:** In the recently released Title IX regulations, there is a statement that outcome letters should be delivered simultaneously to the Complainant and Respondent. While it seems reasonable that simultaneous would mean seconds or moments apart, I am seeking clarification and definition from the Department.

**Answer:** The new Title IX Rule, § 106.45(b)(7)(iii), states: "The recipient must provide the written determination to the parties simultaneously." The Rule does not further define "simultaneous," which should be given its plain and ordinary meaning, e.g., occurring at the same time.

**Question:** I appreciate your response and have been thinking about it over the course of the day. Our program allows clients to send letters to a Complainant and Respondent within minutes, if not seconds of each other. Is that acceptable and does it meet the common definition of at the same time? In other words, is that in compliance with simultaneous notification?

**Answer:** Thank you for your question regarding OCR's new Title IX Regulations. All references and citations are to the official version of the Regulation published in the Federal Register available is here. A link to the unofficial version of the final Regulations is available here.

Several provisions of the new Title IX Regulations require that the parties be provided with certain documents, or given access to materials or testimony, "simultaneously." *See, e.g.*, 34 C.F.R. § 106.45(b)(7)(iii). Title IX does not define the term "simultaneously," but the word should be given its plain and ordinary meaning, which in context means that the parties' access must occur at the same

time. Access that is provided at different points in time—albeit seconds or minutes—would thus not constitute "simultaneous" access under the Regulations.

**Question:** If a complainant files a report, which makes it a "formal complaint," does the notice to the complainant and respondent have to go out immediately, or can the Title IX Coordinator seek to meet with the complainant before the written notice goes out, to discuss supportive measures (as long as the written notice goes out promptly)? It seems very clear that if the reporter is NOT the complainant, the TIX coordinator must meet with the complainant to see if they want to file a formal complaint and discuss supportive measures. However, it's not as clear when the formal complaint (a report from a complainant) initiates the process. Must the written notice go out before the Title IX Coordinator has met with the complainant?

**Answer:** Thank you for your question regarding OCR's new Title IX Regulations. All references and citations are to the official version of the Regulation published in the Federal Register available is here. A link to the unofficial version of the final Regulations is available here.

The Final Title IX Regulations leave recipients flexibility to select the method of delivery of the written notices required under 34 C.F.R. § 106.45(b)(2) (including the initial notice and any subsequent notices), and while the initial notice must be sent ''upon receipt'' of a formal complaint, with ''sufficient time'' for a party to prepare for an initial interview, such provisions do not dictate a specific time frame for sending the notice, leaving recipients flexibility to, for instance, inquire of the complainant details about the allegations that should be included in the written notice that may have been omitted in the formal complaint, and draft the written notice, while bearing in the mind that the entire grievance process must conclude under the recipient's own designated time frames. (Preamble at 30283.) The Department will not interpret 34 C.F.R. § 106.45(b)(2) to require notice to be provided ''immediately'' (and the provision does not use that word), but rather notice must be provided early enough to allow the respondent ''sufficient time to prepare a response.'' The Department also notes that a recipient's discretion in this regard is constrained by a recipient's obligation to conduct a grievance process within the recipient's designated, reasonably prompt time frames.

## OCR Technical Assistance

**Question:** Hard copy of the May 6, 2020 Utube OCR presentation on the Title IX Final Regulations?

**Answer:** OCR is not providing a hard copy of the Webinar at this time.

**Question:** Can you please let me know if there is a version of the final regulations for Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (Title IX) that is available without the additional comments & explanation?

**Answer:** Thank you for your question regarding Title IX. You may access the Regulations without the preamble here. The official version of the Regulations published in the Federal Register is available here, and a link to the unofficial version of the Regulations is available here.

## Off-Campus Locations

**Question:** If a University student is attending a University sponsored study abroad program outside of the United States and experiences sexual harassment would this be within the jurisdiction of Title IX, as it is a University sponsored activity, despite occurring outside of the United States?

**Answer:** With respect to your question about conduct outside of the United States, the Title IX Rule recognizes the statutory jurisdiction of Title IX's language and applies only to persons in the United States. 20 U.S.C. § 1681(a) begins with the words, "No person in the United States . . . ." A university's study abroad program may be part of the university's "education program or activity," yet Title IX does not extend to conduct that occurs outside the United States.

**Question:** If a University student experiences an act of sexual harassment perpetrated by another University student, but the act occurs at an off campus location which is not under the control of the University, would this be within the jurisdiction of Title IX? Or would this be addressed as a possible student code of conduct violation?

**Answer:** With respect to your question about conduct that occurs at an off-campus location, the Title IX Rule requires a university to respond to actual knowledge of sexual harassment in the university's education program or activity against a person in the United States. § 106.44(a). The Rule states in § 106.44(a): "Education program or activity" includes "locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution."

The preamble to the Rule contains extensive discussion of the "education program or activity" jurisdictional condition, at pages 615-77, including, for example, the following statement from the Department at pages 623-25 (footnotes omitted here):

> For purposes of § 106.30, § 106.44, and § 106.45, the phrase "education program or activity" includes "locations, events, or circumstances over which the recipient exercised substantial

> control over both the respondent and the context in which the harassment occurs" and also includes "any building owned or controlled by a student organization that is officially recognized by a postsecondary institution." The Title IX statute and existing Title IX regulations, already contain detailed definitions of "program or activity" that, among other aspects of such definitions, include "all of the operations of" a postsecondary institution or local education agency. The Department will interpret "program or activity" in these final regulations in accordance with the Title IX statutory (20 U.S.C. 1687) and regulatory definitions (34 CFR 106.2(h)), guided by the Supreme Court's language applied specifically for use in sexual harassment situations under Title IX regarding circumstances over which a recipient has control and (for postsecondary institutions) buildings owned or controlled by student organizations if the student organization is officially recognized by the postsecondary institution.
>
> While "all of the operations of" a recipient (per existing statutory and regulatory provisions), and the additional "substantial control" language in these final regulations, clearly include all incidents of sexual harassment occurring on a recipient's campus, the statutory and regulatory definitions of program or activity along with the revised language in § 106.44(a) clarify that a recipient's Title IX obligations extend to sexual harassment incidents that occur off campus if any of three conditions are met: if the off-campus incident occurs as part of the recipient's "operations" pursuant to 20 U.S.C. 1687 and 34 CFR 106.2(h); if the recipient exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus pursuant to § 106.44(a); or if a sexual harassment incident occurs at an off-campus building owned or controlled by a student organization officially recognized by a postsecondary institution pursuant to §106.44(a).

With respect to your reference to code of conduct violations, at page 633 of the preamble to the Rule, the Department notes:

> "[N]othing in the final regulations prevents recipients from initiating a student conduct proceeding or offering supportive measures to students affected by sexual harassment that occurs outside the recipient's education program or activity. Title IX is not the exclusive remedy for sexual misconduct or traumatic events that affect students. As to misconduct that falls outside the ambit of Title IX, nothing in the final regulations precludes recipients from vigorously addressing misconduct (sexual or otherwise) that occurs outside the scope of Title IX or from offering supportive measures to students and individuals impacted by misconduct or trauma even when Title IX and its implementing regulations do not require such actions."

**Question:** First, we are wondering about the implications of the new definition of sexual harassment, including the new jurisdiction restriction which appears to exclude incidences that might occur in a study abroad scenario. We know the guidance allows schools to continue to address sexual harassment that falls outside of Title IX via the school's code of conduct. However, we're struggling with how to operationalize this. For instance, would we develop a separate policy and procedures and train a different group of people? For some context, our university currently bifurcates investigations and

adjudications whereby my office conducts the fact-finding and the student conduct office conducts the hearings for TIX incidences involving students. However, if my office has to dismiss a student-on-student rape allegation because it did not occur in the U.S., would it fall on student conduct to investigate? On the other hand, would the new rule allow the use of the same policies/procedures as those used for Title IX incidences to process such complaints?

**Answer:** The Title IX Rule does not preclude a recipient from using the same Title IX personnel—whether that be employees of the recipient or the employees of a third-party, such as a consortium of schools—to investigate allegations of misconduct that fall outside the scope of Title IX. Similarly, the Rule does not preclude a recipient from using a grievance process that complies with § 106.45 with respect to allegations that fall outside the scope of Title IX. In the Preamble of the Rule at pp. 481-82, for example, the Department notes:

> In response to commenters' concerns, the final regulations revise § 106.45(b)(3)(i) to clearly state that dismissal for Title IX purposes does not preclude action under another provision of the recipient's code of conduct. Thus, if a recipient is required under State law or the recipient's own policies to investigate sexual or other misconduct that does not meet the § 106.30 definition, the final regulations clarify that a recipient may do so. Similarly, if a recipient wishes to use a grievance process that complies with § 106.45 to resolve allegations of misconduct that do not constitute sexual harassment under § 106.30, nothing in the final regulations precludes a recipient from doing so. Alternatively, a recipient may respond to non-Title IX misconduct under disciplinary procedures that do not comply with § 106.45. The final regulations leave recipients flexibility in this regard, and prescribe a particular grievance process only where allegations concern sexual harassment covered by Title IX.

## Parents (Role, Filing Complaints)

**Question:** Query about parents filing formal complaints.

**Answer:** Section 106.6(g) of the Rule states (emphasis added): "Nothing in this part may be read in derogation of any legal right of a parent or guardian to act on behalf of a "complainant," "respondent," "party," or other individual, subject to paragraph (e) of this section, including but not limited to filing a formal complaint." Thus, a parent or guardian who has the legal right to act on behalf of their child does not become the complainant by virtue of filing the formal complaint on behalf of their child; the "complainant" continues to be defined under the Rule (§ 106.30) as the person "who is alleged to be the victim" of sexual harassment.

Section 106.6(g) applies to the entirety of 34 CFR 106, and is not restricted to the K-12 context. Section 106.6(g) does not apply only to minor children; rather, § 106.6(g) respects the underlying legal rights of a parent or guardian. Where, for example, State law gives a guardian the legal right to act on behalf of an individual even though the individual is not a minor child, § 106.6(g) would respect the legal right of such a guardian to act on the individual's behalf in all aspects of a Title IX matter. A parent or guardian acting on behalf of a complainant is doing so based on the underlying legal rights of the parent or

guardian; the rights granted to a "complainant" or to a "party" under the Rule are the rights of the complainant or party, and § 106.6(g) acknowledges that a parent or guardian may have the legal right to exercise those rights on behalf of the complainant or party. In the preamble to the Rule at page 1564, the Department states: "Whether or not a parent or guardian has the legal right to act on behalf of an individual would be determined by State law, court orders, child custody arrangements, or other sources granting legal rights to parents or guardians."

In the Rule at p. 352 the Department explains:

> The benefits of third-party reporting do not, however, require the third party themselves to become the 'complainant' because, for example, supportive measures must be offered to the alleged victim, not to the third party who reported the complainant's alleged victimization. Similarly, while we agree that where a parent or guardian has a legal right to act on behalf of an individual, the parent or guardian must be allowed to report the individual's victimization (and to make other decisions on behalf of the individual, such as considering which supportive measures would be desirable and whether to exercise the option of filing a formal complaint), in such a situation the parent or guardian does not, themselves, become the complainant; rather, the parent or guardian acts on behalf of the complainant (i.e., the individual allegedly victimized by sexual harassment). We have added § 106.6(g) to expressly acknowledge the legal rights of parents or guardians to act on behalf of a complainant (or any other individual with respect to exercising Title IX rights).

The Rule protects the right of every individual to choose to participate, or to choose not to participate, in a Title IX grievance process, free from retaliation. See § 106.71.

**Question:** Question Re: 106.6(g)

**Answer:** Section 106.6(g) of the Rule states (emphasis added): "Nothing in this part may be read in derogation of any legal right of a parent or guardian to act on behalf of a "complainant," "respondent," "party," or other individual, subject to paragraph (e) of this section, including but not limited to filing a formal complaint." Thus, a parent or guardian who has the legal right to act on behalf of their child does not become the complainant by virtue of filing the formal complaint on behalf of their child; the "complainant" continues to be defined under the Rule (§ 106.30) as the person "who is alleged to be the victim" of sexual harassment. Section 106.6(g) applies to the entirety of 34 CFR 106, and is not restricted to the K-12 context. In the Rule at p. 1564 the Department states: "Whether or not a parent or guardian has the legal right to act on behalf of an individual would be determined by State law, court orders, child custody arrangements, or other sources granting legal rights to parents or guardians."

The Rule imposes a duty on the recipient not to respond in a manner that is deliberately indifferent. See § 106.44(a). Thus, if it would be "clearly unreasonable in light of the known circumstances" for the recipient not to notify a parent or legal guardian of reported sexual harassment that affects that parent or guardian's student, the school must notify the parent or guardian of the Title IX matter. Further, to comply with § 106.6(g) (i.e., in order to not derogate the legal rights of parents and guardians) a

recipient may need to notify a parent or legal guardian so that the recipient is respecting any underlying legal rights of a parent or guardian to make decisions "on behalf of" a complainant, respondent, or other individual involved in a Title IX matter.

## Prior OCR Guidance

**Question:** How should recipients reconcile the validity of two regulatory documents under Title IX that do not agree with each other?

**Answer:** In the preamble to the Rule at page 1871, the Department explains: "On September 22, 2017, the Department expressly stated that its 2017 Q&A along with the 2001 Guidance 'provide information about how OCR will assess a school's compliance with Title IX.'" The Department further states on page 1871 of the preamble: "To the extent that these final regulations differ from any of the Department's guidance documents (whether such documents remain in effect or are withdrawn), these final regulations, when they become effective, and not the Department's guidance documents, are controlling." The Department also unequivocally states on page 17 of the preamble to the Title IX Rule that "guidance is not legally enforceable," and cites to Perez v. Mortgage Bankers Ass'n, 575 U.S. 92, 96-98 (2015) as supporting authority for that proposition. Additionally, on page 154, , the Department acknowledges that guidance documents do not have the force and effect of law and states: "Because guidance documents do not have the force and effect of law, the Department's Title IX guidance could not impose legally binding obligations on recipients."

## Program or Activity

**Question:** "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 school with which the formal complaint is filed" part of the regulation.

**Answer:** Schools must promptly respond to a report that an individual has been allegedly victimized by sexual harassment, whether the alleged victim is presently a student or not, in a manner that is not "deliberately indifferent" (or clearly unreasonable in light of known circumstances). Students and others who are participating or attempting to participate in the school's program or activity also have the right to file a formal complaint.

The phrase "participating or attempting to participate" used in § 106.30 (defining "formal complaint") is intentionally broader than whether a person is a "student" or "employee."

In the Rule at page 373, the Department explains:

> "Title IX obligates recipients to operate education programs or activities free from sex discrimination, and we do not believe Title IX's non-discrimination mandate would be furthered

> by imposing a time limit on a complainant's decision to file a formal complaint. The Department does not believe that a statute of limitations or 'without undue delay' requirement is needed to safeguard the rights of respondents, because the extensive due process protections afforded under the § 106.45 grievance process appropriately safeguard the fundamental fairness and reliability of Title IX proceedings by requiring procedures that take into account any effect of passage of time on party or witness memories or the availability or quality of other evidence. We have, however, revised the § 106.30 definition of formal complaint to state that at the time of filing a formal complaint, the complainant must be participating in or attempting to participate in the recipient's education program or activity. This ensures that a recipient is not required to expend resources investigating allegations in circumstances where the complainant has no affiliation with the recipient, yet refrains from imposing a time limit on a complainant's decision to file a formal complaint."

In the preamble to the Rule at pages. 411-12, the Department further explains (emphasis added):

> "A complainant who has graduated may still be 'attempting to participate' in the recipient's education program or activity; for example, where the complainant has graduated from one program but intends to apply to a different program, or where the graduated complainant intends to remain involved with a recipient's alumni programs and activities. Similarly, a complainant who is on a leave of absence may be 'participating or attempting to participate' in the recipient's education program or activity; for example, such a complainant may still be enrolled as a student even while on leave of absence, or may intend to re-apply after a leave of absence and thus is still 'attempting to participate' even while on a leave of absence. By way of further example, a complainant who has left school because of sexual harassment, but expresses a desire to re-enroll if the recipient appropriately responds to the sexual harassment, is 'attempting to participate' in the recipient's education program or activity."

**Question:** Can the respondent, who is no longer a student, and is not attempting to participate in the educational program, participate equitably in the appeal according to the regs or does their withdrawal terminate their rights under the regulations?

**Answer:** The new Title IX Rule grants complainants and respondents equal rights to appeal, and to participate in any filed appeal, pursuant to § 106.45(b)(8). The Rule does not condition those rights on whether a complainant or respondent is enrolled or employed by the recipient, participating in the recipient's education programs or activities, or otherwise has an affiliation or relationship to the recipient.

**Question:** I'm hoping one of your experts can provide some timely clarification for me. Our Title IX Grievance Policy captures the Title IX Final Rule definitions, jurisdiction, and extensive due process procedures for conduct that applies. However, we've expanded on ONE element only in which we alter the statement below to include and/or (the Title IX Final Rule version only provides an AND): The

conduct is alleged to have occurred in a XXX education program or activity and/or the Respondent attends The XXX. We have expanded this one element to capture student v student cases to afford them the same exceptional due process protections. This is permissible, correct? Is there anything additional we need to say or is it permissible simply because we outline it as a jurisdiction we cover within our policy? Thank you for your response and I hope you're all doing well and staying safe.

**Answer:** Thank you for your question regarding Title IX. All references and citations are to the unofficial version of the final regulations, which are available here. A link to the official version of the Rule published in the Federal Register is here. OCR's OPEN Center provides this response as technical assistance to answer stakeholders' questions about the Title IX Rule. Please note that the response provided to you by OCR is not legal advice and does not constitute an OCR determination regarding the compliance or non-compliance with respect to the Rule. OCR does not provide advisory opinions, and determinations about a recipient's compliance with civil rights laws like Title IX are made only after OCR has investigated a complaint filed with OCR, in accordance with OCR's Case Processing Manual.

The Title IX Rule requires a recipient of Federal financial assistance to respond to sexual harassment whenever the recipient has notice of sexual harassment that occurred in the recipient's own education program or activity, regardless of whether the complainant or respondent is an enrolled student or an employee of the recipient. The recipient must respond promptly when it has actual knowledge of sexual harassment in its education program or activity against a person in the United States.

Your question is ambiguous, but the OPEN Center assumes that you are asking whether the XXX may use the § 106.45 procedures in the new Title IX Rule even in cases where an incident of sexual harassment occurs outside of the school's education program or activity—and thus does not trigger the school's duties under § 106.44(a)—in those instances where it involves student-on-student misconduct, and the Respondent is an enrolled student at the XXX.

Assuming this assumption about your question is correct, nothing in the Title IX Rule precludes a recipient from responding under its Code of Conduct to sexual harassment that does not trigger its duties under § 106.44(a), using grievance procedures that nevertheless correspond with those described in § 106.45. The final regulations leave recipients flexibility in this regard.

**Question:** I wanted to know, if a university is claiming to adjudicate sexual assault of a nonstudent, nonemployee third party that took place out of the scope of a university activity, under a policy other than title IX policy, do they have to protect due process rights? Or can they Expel/suspend a student, without following the new due process protections?

**Answer:** Thank you for your question regarding OCR's new Title IX Regulations. All references and citations are to the official version of the Regulation published in the Federal Register available is here. A link to the unofficial version of the final Regulations is available here.

The § 106.45 grievance process obligates recipients to investigate and adjudicate allegations of sexual harassment for Title IX purposes; the Department does not have the authority to require recipients to

investigate and adjudicate misconduct that is not covered under Title IX, nor to preclude a recipient from handling misconduct that does not implicate Title IX in the manner the recipient deems fit.

For purposes of §§ 106.30, 106.44, and 106.45 of the final Title IX regulations, ''education program or activity'' includes locations, events, or circumstances over which the respondent had substantial control over both the respondent and the context in which the sexual harassment occurred, and also includes buildings owned or controlled by student organizations that are officially recognized by a postsecondary institution.

## Record-Keeping

**Question:** In the "Record-keeping" section, it states that "record-keeping duty extends for 7 years, ..."
**Question:** What will happen to the records after 7 years?

**Answer:** The Title IX Rule requires that the records described in § 106.45(b)(10) must be maintained for a period of seven years. The Rule does not specify what must or may happen to such records after the seven-year period has elapsed. In the Preamble to the Rule at page 1305, the Department notes that "while the final regulations require records to be kept for seven years, nothing in the final regulations prevents recipients from keeping their records for a longer period of time if the recipient wishes or due to other legal obligations."

## Religious Exemption

**Question:** I am the Title IX Coordinator at XXX University which is a XXX Institution that receives federal financial assistance. There is a question of whether or not the University would be eligible for the religious exemption. Is there a document that has additional information on defining when Title IX does and does not apply to religious institutions? Also, we are preparing to uphold the new regulations at this time. I have a question regarding to the training documentation on the University website. I read the blog post from 05/18/2020. Would it be sufficient to update training information on the University website on a monthly basis? Does it have to be updated more frequently? Would updating the information semesterly be sufficient? Any additional guidance you can provide would be greatly appreciated.

**Answer:** Thank you for your question regarding OCR's new Title IX Regulations. All references and citations are to the official version of the Regulation published in the Federal Register available is here. A link to the unofficial version of the final Regulations is available here.

On September 9, 2020, the Department published the *Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities* final Regulations, which were created, in part, to "ensure[]

the equal treatment and constitutional rights of religious student organizations at public institutions and provides clarity for faith-based institutions with respect to Title IX." Previously, neither Title IX nor its implementing regulations defined which schools were eligible for religious exemptions, since the statute and regulation merely referred to educational institutions "controlled by a religious organization." The Final Regulations gives schools and other stakeholder clarity on the meaning of this phrase. A fact sheet on the final Regulations is available here. A copy of the final Regulations is available here.

As to your questions regarding training materials, recipients are required to publish materials which are up-to-date and reflect the latest training provided to Title IX personnel. (Preamble 30411-30412). If a recipient conducts new training on a monthly basis, those training materials would need to be posted accordingly.

## Retaliation

**Question:** Could you clarify how clear and apparent violations within some communities will be address by the OCR? Who enforces consequences to those who have chosen to disregard sexual assaults and identify them as unfounded within 20 minutes? How and who enforce consequences to serious criminal violations of the civil rights laws related? How will the US DOE address law enforcement who state directly that ONLY they call Child Protective Services AFTER they determine legitimacy and credibility on abuse and/or a sex crime? *How will the OCR address direct retaliation which may be considered serious criminal civil rights violations by the DOJ OCR or does the DOE forward them to the DOJ under these circumstances?*

**Answer:** Thank you for your questions regarding OCR's new Title IX regulations. OCR's OPEN Center is pleased to respond. All references and citations are to the unofficial version of the final regulations, which are available here. A link to the official version of the Rule published in the Federal Register is here.

The new Title IX Rule does not alter a school's obligations under State or other laws such as the New Jersey law you cite regarding use of Child Advocacy Centers. Under the Rule, a school must promptly respond to a sexual harassment incident occurring in the school's education program or activity, against a person in the United States, whenever any K-12 school employee has notice of sexual harassment or allegations of sexual harassment. See § 106.30 (defining "actual knowledge"); § 106.44(a). The Rule defines "sexual harassment" to include any instance of quid pro quo harassment by a school employee; any single instance of sexual assault, dating violence, domestic violence, or stalking; or any unwelcome conduct on the basis of sex that a reasonable person would determine to be so severe, pervasive, and objectively offensive that it effectively denies a person equal educational access. See § 106.30 (defining "sexual harassment"). The Rule gives "any person" the right to report sexual harassment to the Title IX Coordinator, verbally or in writing, including by phone or email. See § 106.8(a). School personnel who report sexual harassment are protected from retaliation under the Rule. See § 106.71. The new Title IX

Rule contains express prohibitions against any Title IX personnel of a school having bias or conflicts of interest, as well as training requirements for all Title IX personnel. See § 106.45(b)(1)(iii).

The Rule acknowledges that a school's response to a sexual harassment incident may intersect with or occur concurrently with law enforcement investigation into the same misconduct, although a school's obligation to respond to sexual harassment under Title IX is independent from whether law enforcement is also investigating the same incident. See § 106.45(b)(1)(v). See also the Rule at page 20, where the Department explains: "Alleged victims of sexual harassment often have options to pursue legal action through civil litigation or by pressing criminal charges. Title IX does not replace civil or criminal justice systems. However, the way in which a school, college, or university responds to allegations of sexual harassment in an education program or activity has serious consequences for the equal educational access of complainants and respondents. These final regulations require recipients to offer supportive measures to every complainant, irrespective of whether the complainant files a formal complaint. Recipients may not treat a respondent as responsible for sexual harassment without providing due process protections. When a recipient determines a respondent to be responsible for sexual harassment after following a fair grievance process that gives clear procedural rights to both parties, the recipient must provide remedies to the complainant."

**Question:** If a person believes that he or she has been subjected to retaliation because of participation in the grievance process for Title IX sexual harassment under the new regulations, must the school use all of the procedures (including, e.g., a live hearing with cross examination for higher education) that are required under 106.44 to investigate and respond to the retaliation claim? Or can they use more general Title IX procedures used to address, say, a claim of different treatment based on sex?

**Answer:** Thank you for your question regarding OCR's new Title IX Regulations. All references and citations are to the official version of the Regulations published in the Federal Register available is here. A link to the unofficial version of the final Regulations is available here.

Section 106.71 of the final Regulations authorize parties to file complaints alleging retaliation under 34 C.F.R. § 106.8(c), which requires recipients to adopt and publish grievance procedures that provide for the prompt and equitable resolution of complaints of sex discrimination. A recipient has the discretion to use the grievance procedures outlined in 34 C.F.R. § 106.45 in response to an allegation of retaliation, but also retains discretion to use any grievance process that provide for the prompt and equitable resolution of the complaint.

## Retroactivity

**Question:** I understand that new regulations and the Final Rule will carry the force and effect of law as of August 14, 2020.Does it mean that starting from August 14, 2020 new regulations have to be applied to all cases including the ones that were started earlier than August, 2020?

**Answer:** In the preamble to the Rule, at page 127, the Department states:

The Department understands commenters' desire to require recipients who have previously conducted grievance processes in a way that the commenters view as unfair to reopen the determinations reached under such processes. However, the Department will not enforce these final regulations retroactively.

Footnote 290 in the Rule states:

> Federal agencies authorized by statute to promulgate rules may only create rules with retroactive effect where the authorizing statute has expressly granted such authority. See 5 U.S.C. 551 (referring to a "rule" as agency action with "future effects" in the Administrative Procedure Act); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.").

**Question:** If an investigation is ongoing now for a complaint made June 1 (for conduct that occurred May 1), and the investigation ends on August 1, with a hearing scheduled for the 20th, does the recipient have to apply Section 106.45 compliant procedures to that case?

**Answer:** The new Title IX Rule does not apply retroactively. The Department will enforce the Rule with respect to sexual harassment that allegedly occurred on or after the effective date of the Rule (i.e., August 14, 2020). This OCR Blog post has further information.

**Question:** What should recipients do with cases where responsibility has been found already, but the matter is either in the appeals or sanctioning phase and still will be when the regs become effective on August 14th? Are recipients required to roll everything back and hold a 106.45 hearing before they are able to sanction a respondent or can they continue with the current process for cases that have already established a finding?

**Answer:** The new Title IX Rule does not apply retroactively. The Department will enforce the Rule with respect to sexual harassment that allegedly occurred on or after the effective date of the Rule (i.e., August 14, 2020). This OCR Blog post has further information.

**Question:** We seek clarity on the prospective/retrospective application of the Final Rule to cases that are still in progress, and will be on August 14th. Is a recipient to switch procedures mid-case? Does the Final Rule only apply to conduct that occurred prior to August 14th, or to conduct reported after August 14th? Or, is there some other rule for application that recipients should follow?

**Answer:** The new Title IX Rule does not apply retroactively. The Department will enforce the Rule with respect to sexual harassment that allegedly occurred on or after the effective date of the Rule (i.e., August 14, 2020). This OCR Blog post has further information.

**Question:** My issue is whether the new hearing requirement will apply to a sexual harassment (verbal only) investigation that I have completed, and my report is with the parties for review. I anticipate that the parties will provide their comments by 8/14, but the findings won't be made until the 14th or after. Will I be required to have a hearing?

**Answer:** Thank you for your question regarding OCR's new Title IX Regulations. All references and citations are to the official version of the Regulation published in the Federal Register available is here. A link to the unofficial version of the final Regulations is available here.

The Department will only enforce the new regulations as to sexual harassment that allegedly occurred on or after August 14, 2020. With respect to sexual harassment that allegedly occurred prior to August 14, 2020, OCR will judge the school's Title IX compliance against the Title IX statute and the Title IX regulations in place at the time that the alleged sexual harassment occurred.

**Question:** I have a question regarding the retroactivity (or rather, lack thereof) of the new Title IX Rules. Specifically, I understand that while the new Rules are not retroactive in the sense that they do not govern a school's response to allegations initiated prior to August 14, 2020. However, I am curious if schools may choose to apply the new regulations to an ongoing case or investigation in which the alleged misconduct took place prior to August 14, 2020 (yet where the school's policy does not preclude or conflict with the new regulations). More concretely, is a school able to apply a discretionary dismissal to an open case in which the alleged misconduct took place prior to August 14, where the school's policy (and also prior Title IX Guidance) does not preclude the use of such a dismissal? : I know the new Rules do not require schools to retroactively apply the rules, but nothing precludes schools from choosing to apply the new Rules to open cases involving conduct that allegedly took place prior to August 14, 2020, correct?

**Answer:** Thank you for your question regarding OCR's new Title IX Regulations. All references and citations are to the official version of the Regulation published in the Federal Register available is here. A link to the unofficial version of the final Regulations is available here.

Consistent with the Department's statements in the preamble to the Title IX Rule regarding non-retroactivity, the Rule does not apply to schools' responses to sexual harassment that allegedly occurred prior to August 14, 2020. The Department will only enforce the Rule as to sexual harassment that allegedly occurred on or after August 14, 2020. With respect to sexual harassment that allegedly occurred prior to August 14, 2020, OCR will judge the school's Title IX compliance against the Title IX statute and the Title IX regulations in place at the time that the alleged sexual harassment occurred.

## Role of Investigator

**Question:** Can the investigator testify about their finding/determination opinions at the hearing? Can they volunteer, or only share if asked?

**Answer:** In the Preamble to the Rule at pages 1055-56, the Department contemplates that an investigator might be a witness:

> The Department further notes that § 106.45(b)(6)(i) already contemplates parties' equal right to cross-examine any witness, which could include an investigator, and § 106.45(b)(1)(ii) grants parties equal opportunity to present witnesses including fact and expert witnesses, which may include investigators.
>
> Note, however, that in the context of a hearing held by a post-secondary institution or on behalf of a post-secondary institution by a consortium or other third-party, an investigator may not testify as to statements made by others, including the complainant or respondent, if the individual who made a statement does not subject themselves to cross-examination. 106.45(b)(6)(i).

**Question:** Can the investigator and decision-maker have off-line conversations about the investigator's finding/determination opinions outside the hearing, as long as the decision-maker is not bound to follow them? Where is the line between the investigation function and the decision-making function is really what we are seeking to understand.

**Answer:** Nothing in the Title IX Rule prohibits an investigator and decision-maker from conversing about the investigator's opinions or recommendations, so long as such discussions do not interfere or inhibit the decision-maker from making an independent, objective evaluation of all relevant evidence in reaching a determination regarding responsibility. Both the investigator and decision-maker also must not have a conflict of interest or bias for or against complainants or respondents generally, or with respect to an individual complainant or respondent, pursuant to § 106.45(b)(1)(iii).

**Question:** Should the investigator avoid making a recommendation in their report as to whether policy was violated and/or avoid making a finding? Or is it enough that any finding or recommendation by the investigator is non-binding on the decision-maker? If the answer is that investigators should avoid making a finding or recommendation, but at the hearing the investigator somehow states a finding or recommendation, how should a recipient handle that?

**Answer:** The new Title IX Rule does not require or prohibit an investigator from making a recommendation with respect to a determination regarding responsibility. In the Preamble to the Rule

at page 1031, the Department stated, "The Department does not wish to prohibit the investigator from including recommended findings or conclusions in the investigative report. However, the decision-maker is under an independent obligation to objectively evaluate relevant evidence, and thus cannot simply defer to recommendations made by the investigator in the investigative report."

## Role of Title IX Coordinator

**Question:** Do the Final Rules specify if a school system should have a Title IX Coordinator for the system or is each school required to have a Title IX Coordinator or both?

**Answer:** The Title IX Rule states in § 106.8(a): "Each *recipient* must designate and authorize *at least one employee* to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the "'Title IX Coordinator.'" (emphasis added). The preamble to the Rule, at pages 337-39, states:

> The Department's regulatory authority under Title IX extends to recipients of Federal financial assistance which operate education programs or activities. *Requirements such as designation of a Title IX Coordinator therefore apply to each "recipient," for example to a school district, or to a university system, regardless of the recipient's size in terms of student enrollment or number of schools or campuses.* Title IX's non-discrimination mandate extends to every recipient's education programs or activities. These final regulations at § 106.8(a), similar to current 34 CFR 106.9, require recipients to designate "at least one" employee to serve as a Title IX Coordinator. As the Department has recognized in guidance documents, some recipients serve so many students, or find it administratively convenient for other reasons, that the recipient may need to or wish to designate multiple employees as Title IX Coordinators, or designate a Title IX Coordinator and additional staff to serve as deputy Title IX Coordinators, or take other administrative steps to ensure that the Title IX Coordinator can adequately fulfill the recipient's Title IX obligations, including all obligations imposed under these final regulations. . . . If a recipient needs more than one Title IX Coordinator in order to meet the recipient's Title IX obligations, the recipient will take that administrative step, but the Department declines to assume the conditions under which a recipient needs more than one Title IX Coordinator in order to meet the recipient's Title IX obligations.

(emphasis added) (internal footnotes omitted).

**Question:** A Title IX Coordinator can not be a decision maker but can they also serve as an investigator?

**Answer:** The Title IX Rule states in § 106.45(b)(7)(i) that the decision-maker "cannot be the same person(s) as the Title IX Coordinator or the investigator(s)." Similarly, the Title IX Rule states in § 106.45(b)(8)(iii)(B) states that a decision-maker for an appeal is "not the same person as the decision-

maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator."

However, neither of these provisions prevent a Title IX Coordinator from also serving as an investigator, as opposed to a decision-maker. Indeed, at page 1259 of the preamble to the Rule, the Department notes: "*The Department notes that the final regulations leave significant flexibility to recipients, including whether the Title IX Coordinator can also serve as the investigator*, whether to use a panel of decision-makers or a single decision-maker, and whether to use the recipient's own employees or outsource investigative and adjudicative functions to professionals outside the recipient's employ."

(emphasis added)

**Question:** If Complainant shares info and puts District on notice of sexual assault, shouldn't the Title IX Coordinator file the complaint? If the Title IX Coordinator files the complaint how do they do so without disclosing the identity of the complainant to the respondent? What about FERPA restrictions?

**Answer:** The new Title IX Rule does not contain contradictory directives. The Rule directs schools to respond promptly to each instance of notice of sexual harassment (or allegations of sexual harassment) in the school's education program or activity, against a person in the United States, by taking specific, required actions such as:

- offering supportive measures to the complainant;
- promptly contacting the complainant to discuss the availability of supportive measures as defined in § 106.30,
- considering the complainant's wishes with respect to supportive measures,
- informing the complainant of the availability of supportive measures with or without the filing of a formal complaint, and
- if a formal complaint is filed, following a grievance process that complies with § 106.45.
- See § 106.44(a); § 106.44(b)(1).

These obligations must be met in order for a school's response to comply with Title IX.

Additionally, the deliberate indifference standard for judging a school's response may require the school to take actions that are not specifically listed as mandatory response obligations. For example, as you note, depending on the specific facts of a situation, it may be "clearly unreasonable in light of the known circumstances" for a Title IX Coordinator not to sign a formal complaint even after having discussed the complainant's wishes and understanding that the complainant does not wish to file a formal complaint. We understand that deciding how to exercise discretion in each factual circumstance may be challenging, but the purpose is to give schools flexibility to respond appropriately to each situation, so

that the Rule neither automatically overrides the wishes of a complainant, nor restricts a school from investigating when specific circumstances dictate that an investigation is warranted.

In the preamble to the Rule at pages 398-400, the Department explains:

> While it is true that school administrators other than the Title IX Coordinator may have significant interests in ensuring that the recipient investigate potential violations of school policy, for reasons explained above, the decision to initiate a grievance process in situations where the complainant does not want an investigation or where the complainant intends not to participate should be made thoughtfully and intentionally, taking into account the circumstances of the situation including the reasons why the complainant wants or does not want the recipient to investigate. The Title IX Coordinator is trained with special responsibilities that involve interacting with complainants, making the Title IX Coordinator the appropriate person to decide to initiate a grievance process on behalf of the recipient. Other school administrators may report sexual harassment incidents to the Title IX Coordinator, and may express to the Title IX Coordinator reasons why the administrator believes that an investigation is warranted, but the decision to initiate a grievance process is one that the Title IX Coordinator must make. . . .
>
> In order to ensure that a recipient has discretion to investigate and adjudicate allegations of sexual harassment even without the participation of a complainant, in situations where a grievance process is warranted, the final regulations leave that decision in the discretion of the recipient's Title IX Coordinator. However, deciding that allegations warrant an investigation does not necessarily show bias or prejudgment of the facts for or against the complainant or respondent. The definition of conduct that could constitute sexual harassment, and the conditions necessitating a recipient's response to sexual harassment allegations, are sufficiently clear that a Title IX Coordinator may determine that a fair, impartial investigation is objectively warranted as part of a recipient's non-deliberately indifferent response, without prejudging whether alleged facts are true or not. Even where the Title IX Coordinator is also the investigator, the Title IX Coordinator must be trained to serve impartially, and the Title IX Coordinator does not lose impartiality solely due to signing a formal complaint on the recipient's behalf.

Please also see the discussion by the Department at pages 375-80.

**Question:** This is the Question: If the Title IX Coordinator files the complaint and investigates, how can he/she do so without disclosing the identity of the complainant to the respondent? Isn't that just a matter of fundamental fairness to know the identity of an accuser? But what about confidentiality requests by complainants? What about FERPA restrictions? Must the complainant provide consent for his/her name to be disclosed to the respondent in instance when a formal complaint is filed and when a Title IX Coordinator initiates a complaint and investigation based upon information shared? And what if he/she refuses to grant consent to disclosure?

**Answer:** The Rule balances a complainant's desire for confidentiality (in terms of, for instance, the complainant's identity not being disclosed to the respondent) with a school's discretion to pursue an investigation where factual circumstances warrant an investigation even though the complainant does not desire to file a formal complaint or participate in a grievance process. In the preamble to the Rule at pages 391-97, the Department discusses these issues at length, including the following:

> A complainant (or third party) who desires to report sexual harassment without disclosing the complainant's identity to anyone may do so, but the recipient will be unable to provide supportive measures in response to that report without knowing the complainant's identity. If a complainant desires supportive measures, the recipient can, and should, keep the complainant's identity confidential (including from the respondent), unless disclosing the complainant's identity is necessary to provide supportive measures for the complainant (e.g., where a no-contact order is appropriate and the respondent would need to know the identity of the complainant in order to comply with the no-contact order, or campus security is informed about the no-contact order in order to help enforce its terms). . . .
>
> A formal complaint initiates a grievance process (i.e., an investigation and adjudication of allegations of sexual harassment). A complainant (i.e., a person alleged to be the victim of sexual harassment) cannot file a formal complaint anonymously because § 106.30 defines a formal complaint to mean a document or electronic submission (such as an e-mail or using an online portal provided for this purpose by the recipient) that contains the complainant's physical or digital signature or otherwise indicates that the complainant is the person filing the formal complaint. The final regulations require a recipient to send written notice of the allegations to both parties upon receiving a formal complaint. The written notice of allegations under § 106.45(b)(2) must include certain details about the allegations, including the identity of the parties, if known.
>
> Where a complainant desires to initiate a grievance process, the complainant cannot remain anonymous or prevent the complainant's identity from being disclosed to the respondent (via the written notice of allegations). Fundamental fairness and due process principles require that a respondent knows the details of the allegations made against the respondent, to the extent the details are known, to provide adequate opportunity for the respondent to respond. The Department does not believe this results in unfairness to a complainant. Bringing claims, charges, or complaints in civil or criminal proceedings generally requires disclosure of a person's identity for purposes of the proceeding. Even where court rules permit a plaintiff or victim to remain anonymous or pseudonymous, the anonymity relates to identification of the plaintiff or victim in court records that may be disclosed to the public, not to keeping the identity of the plaintiff or victim unknown to the defendant. The final regulations ensure that a complainant may obtain supportive measures while keeping the complainant's identity confidential from the respondent (to the extent possible while implementing the supportive measure), but in order for a grievance process to accurately resolve allegations that a respondent has perpetrated sexual harassment against a complainant, the complainant's identity must be disclosed to the respondent, if the complainant's identity is known. However, the identities of complainants (and respondents, and witnesses) should be kept confidential from anyone not involved in the

> grievance process, except as permitted by FERPA, required by law, or as necessary to conduct the grievance process, and the final regulations add § 106.71 to impose that expectation on recipients.
>
> When a formal complaint is signed by a Title IX Coordinator rather than filed by a complainant, the written notice of allegations in § 106.45(b)(2) requires the recipient to send both parties details about the allegations, including the identity of the parties if known, and thus, if the complainant's identity is known it must be disclosed in the written notice of allegations. However, if the complainant's identity is unknown (for example, where a third party has reported that a complainant was victimized by sexual harassment but does not reveal the complainant's identity, or a complainant has reported anonymously), then the grievance process may proceed if the Title IX Coordinator determines it is necessary to sign a formal complaint, even though the written notice of allegations does not include the complainant's identity.

**Question:** Wondering if in the new regulations if there is specification on who can serve as an institutions Title IX Coordinator, or more specifically who cannot. Same goes for decision maker

**Answer:** The new Title IX Rule states in § 106.8(a): "Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the "'Title IX Coordinator.'" Thus, the restriction placed on a recipient's choice of a Title IX Coordinator is that the person(s) must be the recipient's "employee," and under § 106.45(b)(1)(iii), the Title IX Coordinator must serve without bias or conflicts of interest, and receive the training specified in that provision.

At page 1259 of the preamble to the Rule, the Department states: "The Department notes that the final regulations leave significant flexibility to recipients, including whether the Title IX Coordinator can also serve as the investigator, whether to use a panel of decision-makers or a single decision-maker, and whether to use the recipient's own employees or outsource investigative and adjudicative functions to professionals outside the recipient's employ." Thus, a decision-maker may be the recipient's employee or, at the recipient's discretion, may be a non-employee such as a consultant or contractor. The decision-maker, however, "cannot be the same person(s) as the Title IX Coordinator or the investigator(s)." § 106.45(b)(7).

At pages 825-26 of the preamble to the Rule, the Department states:

> The final regulations leave recipients flexibility to use their own employees, or to outsource Title IX investigation and adjudication functions, and the Department encourages recipients to pursue alternatives to the inherent difficulties that arise when a recipient's own employees are expected to perform these functions free from conflicts of interest and bias. The Department notes that several commenters favorably described regional center models that could involve recipients coordinating with each other to outsource Title IX grievance proceedings to experts free from potential conflicts of interest stemming from affiliation with the recipient. The Department declines to require recipients to use outside, unaffiliated Title IX personnel because

> the Department does not conclude that such prescription is necessary to effectuate the purposes of the final regulations; although recipients may face challenges with respect to ensuring that personnel serve free from conflicts of interest and bias, recipients can comply with the final regulations by using the recipient's own employees.

All Title IX personnel (i.e., Title IX Coordinators, investigators, decision-makers, persons who facilitate informal resolution processes) must serve free from bias and conflicts of interest. See § 106.45(b)(1)(iii). At page 820 of the preamble to the Rule, the Department states:

> The Department agrees with commenters who noted that prohibiting conflicts of interest and bias, including racial bias, on the part of people administering a grievance process is an essential part of providing both parties a fair process and increasing the accuracy and reliability of determinations reached in grievance processes. Recognizing that commenters recounted instances of experience with perceived conflicts of interest and bias that resulted in unfair treatment and biased outcomes, the Department believes that this provision provides a necessary safeguard to improve the impartiality, reliability, and legitimacy of Title IX proceedings. The Department agrees with a commenter who asserted that recipients should have objective rules for determining when an adjudicator (or Title IX Coordinator, investigator, or person who facilitates an informal resolution process) is biased, and the Department leaves recipients discretion to decide how best to implement the prohibition on conflicts of interest and bias, including whether a recipient wishes to provide a process for parties to assert claims of conflict of interest of bias during the investigation.

(internal footnotes omitted).

**Question:** While clear that the Title IX Coordinator cannot be the same person as the investigator, decision maker, or appeal officer, can the Title IX Coordinator be the same person to facilitate the informal resolution process?

**Answer:** The new Title IX Rule does not prohibit the Title IX Coordinator from serving as a person who facilitates an informal resolution process. The Rule does require persons who serve as a Title IX Coordinator, as well as persons who facilitate informal resolution processes, to be trained and to serve without bias or conflicts of interest, among other requirements. See § 106.45(b)(1)(iii).

**Question:** Does OCR have a view on whether the Title IX Coordinator can serve as a non-voting procedural facilitator during the live hearing?

**Answer:** The Rule does not preclude a Title IX Coordinator from serving as a hearing officer whose function is to control the order and decorum of the hearing, so long as that role as a hearing officer is distinct from the "decision-maker" whose role is to, among other obligations, objectively evaluate all

relevant evidence, apply the standard of evidence to reach a determine regarding responsibility, issue the written determination, and (during any live hearing with cross-examination) determine whether a question is relevant (and explain any decision to exclude a question as not relevant) before a party or witness answers a question. The Title IX Coordinator, however, like the decision-maker and other Title IX personnel, must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent pursuant to § 106.45(b)(1)(iii).

**Question:** The rule makes it clear that the Title IX Coordinator cannot be the decision-maker in the process. How does this comport with the Title IX Coordinator's role of assessing whether the allegations constitute sexual harassment as a threshold matter? Since this necessarily involves a subjective evaluation of the information, are you not both requiring and prohibiting the Title IX Coordinator to be a decision-maker?

**Answer:** The Rule uses the term "decision-maker" in a specific context, and does not use the term "decision-maker" to describe recipient employees, officials, or others who may reach decisions about a Title IX matter on the recipient's behalf, for example, with respect to evaluating whether alleged conduct meets the definition of sexual harassment under § 106.30, such that a response is required under § 106.44, or a decision to dismiss an allegation in a formal complaint under § 106.45(b)(3)(i).

With respect to the decision-maker's duty to determine whether a respondent is responsible for sexual harassment, the Rule requires a recipient's "decision-maker(s)" to "issue a written determination regarding responsibility" by applying the recipient's selected standard of evidence. The written determination must include, among other items, a "statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility[.]" § 106.45(b)(7).

The Title IX Coordinator is prohibited from serving only as a "decision-maker," as that term is used in § 106.45(b)(7), and elsewhere throughout § 106.45, *but the Title IX Coordinator is not precluded by the Rule from objectively evaluating whether the alleged conduct meets the Rule's definition of sexual harassment*, unless the Title IX Coordinator has a conflict of interest or bias or otherwise is precluded from making such an evaluation under § 106.45(b)(1)(iii).

**Question:** In regards to the Final Rules for Title IX, can the investigator and Title IX coordinator be the same person?

**Answer:** Yes. The Title IX Rule states, in § 106.45(b)(7)(i), that the decision-maker "cannot be the same person(s) as the Title IX Coordinator or the investigator(s)" and § 106.45(b)(8)(iii)(B) states that that the recipient must ensure that an appellate decision-maker is "not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator." At page 1259 of the preamble to the Rule, the Department states: "The Department notes that the final regulations leave significant flexibility to recipients, *including whether*

*the Title IX Coordinator can also serve as the investigator*, whether to use a panel of decision-makers or a single decision-maker, and whether to use the recipient's own employees or outsource investigative and adjudicative functions to professionals outside the recipient's employ" (emphasis added).

**Question:** The regulations state that the Decision-Maker cannot be the Title IX Coordinator or the investigator. Can the Title IX Coordinator also be the investigator?

**Answer:** Thank you for your question regarding Title IX. OCR's OPEN Center is pleased to respond. All references and citations are to the unofficial version of the final Regulations, which are available here. A link to the official version of the Regulations published in the Federal Register is here.

The Title IX Regulations state in 34 C.F.R. § 106.45(b)(7)(i) that the decision-maker "cannot be the same person(s) as the Title IX Coordinator or the investigator(s)." Similarly, the Title IX Regulations state in § 106.45(b)(8)(iii)(B) states that a decision-maker for an appeal is "not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator."

However, neither of these provisions prevent a Title IX Coordinator from also serving as an investigator, as opposed to a decision-maker. Indeed, at page 1259 of the preamble to the Regulations, the Department notes: "The Department notes that the final regulations leave significant flexibility to recipients*, including whether the Title IX Coordinator can also serve as the investigator*, whether to use a panel of decision-makers or a single decision-maker, and whether to use the recipient's own employees or outsource investigative and adjudicative functions to professionals outside the recipient's employ."

(emphasis added)

**Question:** Background to my question: Beginning in 2011, we have always investigated and adjudicated our cases with 2 people each – one female and one male as coordinators and an additional one female and one male as investigators. This has worked well for us and the feedback we have received from both complainant and respondent for this staffing has been very positive. We are a small University and, as such, have a limited number of people willing to serve in a Title IX capacity who have a passion for the work and the ability to coordinate or investigate without bias or a conflict of interest. We are now moving from a "civil rights" model to a "live hearing" model with a panel of 3 people. Therefore, I have to find and train an additional 3+ people to serve in that capacity that cannot be a coordinator or investigator. Therefore, my question is below. In the regulations there are several statements that coordinators, investigators, decision-makers, and informal resolution facilitators must be free of conflicts of interest and bias. Assuming that I, as the Title IX Coordinator, am free of any conflict of interest or bias . . . Is there anything in the regulations that would prevent me (Title IX Coordinator) from serving as an Informal Resolution Facilitator following all the stipulations identified in the new regulations?

**Answer:** Thank you for your question regarding OCR's new Title IX Regulations. All references and citations are to the official version of the Regulation published in the Federal Register available is here. A link to the unofficial version of the final Regulations is available here.

Section 106.45(b)(9) of the final Regulations permits informal resolutions as long as both parties voluntarily consent to attempt an informal process. Informal resolutions under the final regulations would not require more than one person to facilitate the process. In this regard, the Department recognizes the importance of giving recipients flexibility and discretion to satisfy their Title IX obligations in a manner consistent with their unique values and the needs of their educational communities, and the wishes of the parties to each formal complaint. (Preamble at 30371-30372). The final Regulations do not require a recipient to provide an informal resolution process pursuant to § 106.45(b)(9) and do not preclude the Title IX Coordinator from serving as the person designated by a recipient to facilitate an informal resolution process. (Preamble at 30558.)

**Question:** Can the title 9 coordinator role be part of the Dean of Nursing's role? Or would combining these roles be a conflict of interest?

**Answer:** Thank you for your question regarding OCR's new Title IX Regulations. All references and citations are to the official version of the Regulation published in the Federal Register available is here. A link to the unofficial version of the final Regulations is available here.

Your question lacks sufficient details to know whether a Dean of Nursing is precluded from serving as a Title IX Coordinator. The final regulations do not prescribe which recipient administrators are in the most appropriate position to serve as a Title IX Coordinator, investigator, or decision-maker, and leave recipients discretion in that regard, including whether a recipient prefers to have certain personnel serve in certain Title IX roles when the respondent is an employee. Under 34 C.F.R. § 106.45(b)(1)(i)–(x), recipients must adopt a grievance process that requires Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions to be free from conflicts of interest and bias, and trained to serve impartially without prejudging the facts at issue.

**Question:** Can the Title IX Coordinator be the "advisor" provided by the College, free of charge, to a complainant or respondent, for purposes of asking questions to the other party at the live hearing?

**Answer:** Addressing your second question, the Title IX Coordinator may not also serve as a party's advisor. The Final Title IX Regulations require that the Title IX Coordinator be an employee of the recipient or of a third-party, such as a consortium of schools, and serve impartially without conflicts of interest or bias for or against complainants or respondents generally, or for or against an individual complainant or respondent. In contrast, the parties (through their advisors) are not impartial, are not neutral, and are not objective. Precisely because the recipient must provide a neutral, impartial decision-maker, the function of adversarial questioning must be undertaken by persons who owe no

duty of impartiality to the parties. Advisors of choice, and advisors provided to a party by the recipient, are not subject to the requirements to serve impartially and without bias.

## Sanctions

**Question:** It's been a while since we have heard from you. I think we're waiting on a great number of pending responses, though I am sure you are very busy. Nevertheless, here is our next question. Are recipients allowed to place holds (transcript, registration, graduation) on a Respondent's account while the formal complaint process is pending or would that be considered an impermissible sanction prior to the final determination of responsibility? These are interim actions that can be reversed.

**Answer:** The new Title IX Rule prohibits a recipient from imposing "any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent" without following the § 106.45 grievance process. § 106.44(a); § 106.45(b)(1)(i). Even a temporary "hold" on a transcript, registration, or graduation will generally be considered to be disciplinary, punitive, and/or unreasonably burdensome, and appropriate supportive measures cannot be disciplinary, punitive, or unreasonably burdensome. See also Preamble to the Rule at, e.g., p. 570: "Removal from sports teams (and similar exclusions from school-related activities) also require a fact-specific analysis, but whether the burden is 'unreasonable' does not depend on whether the respondent still has access to academic programs; whether a supportive measure meets the § 106.30 definition also includes analyzing whether a respondent's access to the array of educational opportunities and benefits offered by the recipient is unreasonably burdened. Changing a class schedule, for example, may more often be deemed an acceptable, reasonable burden than restricting a respondent from participating on a sports team, holding a student government position, participating in an extracurricular activity, and so forth."

**Question:** Are postsecondary institutions free to issue the written "determination regarding responsibility" required by § 106.45(b)(7) in multiple parts, such that parties are first told the finding on responsibility and subsequently told the sanction, or must parties be informed of the responsibility finding and penalty via the same written communication?

**Answer:** Thank you for your question regarding OCR's new Title IX Regulations. All references and citations are to the official version of the Regulations published in the Federal Register available is here. A link to the unofficial version of the final Regulations is available here.

The Regulations do not preclude a recipient from using one decision-maker to reach the determination regarding responsibility, and having another decision-maker, who may be an employee or administrator of the recipient (e.g., a tenure committee) determine appropriate disciplinary sanctions (including making such a decision at a separate hearing), so long as the end result is that the decision-maker who reached the determination regarding responsibility includes the disciplinary sanctions imposed by the recipient against the respondent in the written determination issued under 34 C.F.R. § 106.45(b)(7). The

issuance of a written determination cannot be a piecemeal process that is broken down into chronologically occurring sub-parts. In other words, when a recipient uses a separate decision-maker to make disciplinary sanction decisions, the recipient must issue a single written determination containing all of the information required under § 106.45(b)(7).

**Question:** May a recipient divide its grievance process into two phases, in which one decision maker administers a hearing and makes a determination with respect to responsibility for Sexual Harassment, then, based on that finding and as applicable, a separate decision maker decide what remedies and sanctions may be appropriate. I ask because many recipients may use outside hearing officers, who are well situated and changed to serve a hearing officer but may be less well situated to make determinations about recipient-appropriate remedies and sanctions.

**Answer:** Thank you for your question regarding OCR's new Title IX Regulations. All references and citations are to the official version of the Regulations published in the Federal Register available is here. A link to the unofficial version of the final Regulations is available here.

The Regulations do not preclude a recipient from using one decision-maker to reach the determination regarding responsibility, and having another decision-maker, who may be an employee or administrator of the recipient (e.g., a tenure committee) determine appropriate disciplinary sanctions (including making such a decision at a separate hearing), so long as the end result is that the decision-maker who reached the determination regarding responsibility includes the disciplinary sanctions imposed by the recipient against the respondent in the written determination issued under 34 C.F.R. § 106.45(b)(7). The issuance of a written determination cannot be a piecemeal process that is broken down into chronologically occurring sub-parts. In other words, when a recipient uses a separate decision-maker to make disciplinary sanction decisions, the recipient must issue a single written determination containing all of the information required under § 106.45(b)(7).

**Question:** Our office has a question about the grievance process as it relates to Title IX matters: Do the new Title IX regulations prohibit institutions of higher education from permitting employees and faculty members to grieve sanctions issued in connection with Title IX matters, through an employee or faculty grievance process, where complainants are not required to be involved and the Title IX procedures do not allow parties to appeal sanctions? For context, many institutions of higher education have employee grievance processes for challenging disciplinary actions through a multi-step process, that may ultimately lead to the matter being addressed in an external administrative hearing office; faculty discipline is often addressed through a process set forth in faculty by-laws. In both of those scenarios, any complaining party that may have prompted action being taken against the respondent employee or faculty member, would not be involved in the grievance or bylaw process.

**Answer:** Thank you for your question regarding OCR's new Title IX Regulations. All references and citations are to the official version of the Regulation published in the Federal Register available is here. A link to the unofficial version of the final Regulations is available here.

In the Preamble to the Final Title IX Rule, the Department noted that: "If a recipient chooses to accept Federal financial assistance and thus become subject to these final regulations, then the recipient may negotiate a collective bargaining agreement that requires a pre- termination hearing consistent with the requirements for a hearing under § 106.45(b)(6)."

Nothing precludes a recipient and a union from renegotiating agreements to achieve the most suitable process that complies with these final regulations. For instance, after a respondent has been found responsible for sexual harassment, and after any appeal has been resolved, a recipient may impose a disciplinary sanction consistent with § 106.45(b)(1)(i). Notably, the disciplinary sanction does not need to be imposed by the same decision-maker who made a decision regarding responsibility, so long as the ultimate written determination meets the requirements of the new regulations. Separately, recipients are also free to generate their own procedures for employee conduct that is not covered by Title IX.

**Question:** We hope all is well. The preamble to the regulations seems to indicate that athletics staff would not be able to restrict a player who is a respondent, based on allegations, unless there is an emergency removal or a process that fully complies with 106.45. Is that correct? Does that apply to any restrictions on the student-athlete that would be a penalty? What is the athlete is also charged with collateral misconduct arising from the incident, such as alcohol or drug use. Can the athletics program restrict the athlete for those behaviors but not the 106.30 offenses?

**Answer:** Thank you for your question regarding OCR's new Title IX Regulations. All references and citations are to the official version of the Regulation published in the Federal Register available is here. A link to the unofficial version of the final Regulations is available here.

A recipient's response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and 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 as defined in § 106.30, against a respondent. Thus, if the respondent is not removed on an emergency basis, the recipient may not impose any disciplinary sanctions without complying with the §106.45 grievance process.

As to conduct that does not meet the § 106.30 definition of sexual harassment (or does not otherwise meet the jurisdictional conditions specified in § 106.44(a)), a formal complaint under Title IX regarding such conduct must be dismissed by the recipient for purposes of Title IX, although such conduct may be addressed by the recipient under its own code of conduct, within its discretion.

**Question:** The first question is regarding dual enrollment in both a K-12 program and college program. Should a sexual harassment allegation arise, would those students need to go through the university's formal Title IX process (with a live hearing) or the K-12's process that may not have the live hearing component.

The second question is regarding decision makers and remedy determinations. The regulations are clear that the decision maker must articulate the basis for any remedies in their determinations. I read this to mean that the decision maker must also issue any remedies/sanctions but wanted clarification from OCR. Currently many institutions have a bifurcated process where a responsibility determination is first made and then a different group of folks or one individual makes a sanctioning determination. My read is that this will not be allowed under this new process. Can you clarify?

**Answer:** Thank you for your question regarding OCR's new Title IX Regulations. All references and citations are to the official version of the Regulations published in the Federal Register available is here. A link to the unofficial version of the final Regulations is available here.

The Final Regulations direct recipients of Federal financial assistance to respond promptly to each instance of notice of sexual harassment (or allegations of sexual harassment) in the school's education program or activity, against a person in the United States, by taking specific, required actions such as offering supportive measures to the complainant.

Thus, the answer to your first question depends, in part, on whether the dual enrollment program constituted a part of the recipient's education program activity, and if so, which recipient was in fact responding to an allegation of sexual harassment in its education program or activity is an elementary or secondary school, or a post-secondary school. In the Preamble to the regulations, the Department noted that:

These final regulations require a recipient to respond to sexual harassment whenever the recipient has notice of sexual harassment that occurred in the recipient's own education program or activity, regardless of whether the complainant or respondent is an enrolled student or an employee of the recipient. The manner in which a recipient must, or may, respond to the sexual harassment incident may differ based on whether the complainant or respondent are students, or employees, of the recipient.

Preamble at 30488 (footnote omitted). The Regulations do not preclude a recipient from using one decision-maker to reach the determination regarding responsibility, and having another decision-maker, who may be an employee or administrator of the recipient (e.g., a tenure committee) determine appropriate disciplinary sanctions (including making such a decision at a separate hearing), so long as the end result is that the decision-maker who reached the determination regarding responsibility includes the disciplinary sanctions imposed by the recipient against the respondent in the written determination issued under 34 C.F.R. § 106.45(b)(7). The issuance of a written determination cannot be a piecemeal process that is broken down into chronologically occurring sub-parts. In other words, when a recipient uses a separate decision-maker to make disciplinary sanction decisions, the recipient must issue a single written determination containing all of the information required under § 106.45(b)(7).

## Scope of "Sexual Harassment"

**Question:** Are schools required to investigate a formal complaint prior to dismissing the complaint if it does not constitute sexual harassment or if it did not occur in the education program/activity or occur against a person in the United States?

**Answer:** The preamble to the Title IX Rule, at § 106.45(b)(3)(i), states:

> "The recipient must investigate the allegations in a formal complaint. If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; such a dismissal does not preclude action under another provision of the recipient's code of conduct."

Thus, if the allegations on their face do not meet the conditions specified in § 106.45(b)(3)(i), the recipient must dismiss such allegations *for Title IX purposes*, and follow § 106.45(b)(3)(iii) by giving the parties written notice of the dismissal.

(emphasis added).

## Single-Sex Programs

**Question:** With respect to single-sex programs, will OCR permit a postsecondary recipient to offer a separate, but equal equivalent opportunity for the other sex (assuming no single-sex exception is permitted by the regs), or must all opportunities be offered inclusively to all sexes (again, unless an exception permits)?

**Answer:** The new Title IX Rule does not affect existing Title IX regulations governing single-sex programs. The Rule does contain a provision that requires a recipient's rules governing a Title IX sexual harassment grievance process to apply equally to both parties (i.e., complainants and respondents) irrespective of a party's sex. § 106.45(b). The Rule also cautions recipients that treatment of complainants or respondents during a Title IX sexual harassment grievance process may constitute unlawful sex discrimination. § 106.45(a).

## Standard of Evidence

**Question:** In the requirement "Standard of Evidence" of the written grievance procedures, it states that schools can choose between the two evidence standards. Question: However, I am not sure what "schools" in this context mean? Does it mean the Title IX Coordinator, the investigators, and the decision-makers are those choosing the standard of evidence? In addition, the regulation also says

"whichever standard the school chooses, it has to use that standard for all formal complaints of sexual harassment..." Question: Does this mean that the chosen standard will have to be applied to all formal processes? Or there will be a different standard of evident [sic] choosing [sic] before a new investigation of a formal complaint of sexual harassment is conducted?

**Answer:** The Title IX Rule requires that "A recipient's grievance process must— . . . (vii) State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment" (see § 106.45(b)(1), § 106.45(b)(1)(vii), emphasis added). Thus, each recipient of Federal financial assistance must provide for a grievance process that states which standard of evidence the recipient has selected, and the recipient must apply that selected standard of evidence to all formal complaints of sexual harassment, whether they are conducted by the recipient itself or by a third party such as a consortium of schools.

**Question:** Under the former regulations, the federal government directed institutions to use a preponderance-of-evidence standard, or "more likely than not," to determine whether a sexual assault had occurred. The new regulations permit colleges to use "clear and convincing," a standard that is harder to reach. This requires schools to select one of two standards of evidence, the preponderance of the evidence standard or the clear and convincing evidence standard – and to apply the selected standard evenly to proceedings for all students and employees, including faculty. Could you please clarify for me if an institution must select one standard for all of its proceedings, or if one of the two standards can be selected on a case by case basis?

**Answer:** Thank you for your question regarding OCR's new Title IX Regulations. All references and citations are to the official version of the Regulations published in the Federal Register available is here. A link to the unofficial version of the final Regulations is available here.

Your question incorrectly states that under the former regulations, a "preponderance of the evidence" standard was required. In fact, the Department has never previously enshrined protections against sexual harassment into regulations. However, you are correct to note that sub-regulatory guidance issued by the Office for Civil Rights did contemplate that schools could only use the preponderance of the evidence standard.

Now, the Title IX Regulations require that "A recipient's grievance process must— . . . (vii) State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment." 34 C.F.R. § 106.45(b)(1) and § 106.45(b)(1)(vii); emphasis added. Thus, each recipient of Federal financial assistance must provide for a grievance process that states which standard of evidence the recipient has selected, and the recipient

must apply that selected standard of evidence to all formal complaints of sexual harassment, whether they are conducted by the recipient itself or by a third party such as a consortium of schools.

## Supportive Measures

**Question:** May there be an inherent conflict where supportive measures must be confidential, but the respondent's defense is that the complainant's complaint is false, and has only been made to facilitate access to academic supportive measures? Access to information about the measures might show the timeline of academic distress needed to prove this defense. In the event the respondent's right to due process conflicts with the confidentiality of supportive measures, what does the OPEN Center advise?

**Answer:** Section 106.30 (defining "supportive measures") states (emphasis added): "The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures." The Rule does not permit a recipient to breach this duty of confidentiality for a reason other than when keeping the supportive measure confidential would "impair the ability" of the recipient "to provide the supportive measure." In the preamble to the Rule at pages 392-93, for instance, the Department explains:

> A recipient's ability to offer supportive measures to a complainant, or to consider whether to initiate a grievance process against a respondent, will be affected by whether the report disclosed the identity of the complainant or respondent. In order for a recipient to provide supportive measures to a complainant, it is not possible for the complainant to remain anonymous because at least one school official (e.g., the Title IX Coordinator) will need to know the complainant's identity in order to offer and implement any supportive measures. Section 106.30 defining "supportive measures" directs the recipient to maintain as confidential any supportive measures provided to either a complainant or a respondent, to the extent that maintaining confidentiality does not impair the recipient's ability to provide the supportive measures. A complainant (or third party) who desires to report sexual harassment without disclosing the complainant's identity to anyone may do so, but the recipient will be unable to provide supportive measures in response to that report without knowing the complainant's identity. If a complainant desires supportive measures, the recipient can, and should, keep the complainant's identity confidential (including from the respondent), unless disclosing the complainant's identity is necessary to provide supportive measures for the complainant (e.g., where a no-contact order is appropriate and the respondent would need to know the identity of the complainant in order to comply with the no-contact order, or campus security is informed about the no-contact order in order to help enforce its terms).

(emphasis added).

If the school conducts a grievance process in response to a formal complaint, § 106.45 does not exempt the recipient from its obligation to keep supportive measures confidential. That expectation is buttressed by the Department's discussion of revision to the recordkeeping provision, § 106.45(b)(10), at page 1406 of the preamble to the Rule:

> In response to commenters' concerns that this provision giving the parties access to records might contradict the requirement to keep supportive measures confidential, the Department has revised § 106.45(b)(10)(i) to remove the language making records available to parties. Because the parties to a formal complaint receive written notice of the allegations, the evidence directly related to the allegations, the investigative report, and the written determination (as well as having the right to inspect and review the recording or transcript of a live hearing), the Department is persuaded that the parties' ability to access records relevant to their own case is sufficiently ensured without the risk that making records available to parties under proposed § 106.45(b)(10) would have resulted in disclosure to one party of the supportive measures (or remedies) provided to the other party.

While § 106.45 directs the recipient to objectively evaluate "all relevant evidence – including both inculpatory and exculpatory evidence" (§ 106.45(b)(1)(ii)) and to provide the parties a copy of the "evidence" that is "directly related to the allegations raised in a formal complaint" for review and response (§ 106.45(b)(5)(vi)), any supportive measures provided to the complainant are not "evidence" that is "directly related to the allegations" and the duty to keep supportive measures confidential applies throughout the grievance process.

In your example, the "timeline" that a respondent might wish to establish may consist of establishing when the school received notice of the alleged sexual harassment (e.g., when the incident was reported), combined with the fact that the Rule requires schools "promptly" to offer all complainants supportive measures which, under the Rule, may include academic coursework adjustments, without piercing the confidentiality of supportive measures by disclosing the recipient's records regarding supportive measures requested by or provided to this complainant.

See also the "Section 106.6(e) FERPA" subsection of the "Clarifying Amendments to Existing Regulations" section of the preamble to the Rule (pages 1442-1508) for discussion of FERPA and the Rule's requirement to disclose evidence "directly related to the allegations" to both parties during a grievance process.

As an additional note, the Rule does not grant respondents a general "right to due process," but does give complainants and respondents the specific procedural rights enumerated throughout § 106.45, which rights are rooted in concepts of due process and fundamental fairness for the benefit of complainants, respondents, witnesses, and recipients. See, e.g., Rule at pp. 82-83, FN 203:

> E.g., Association of Title IX Administrators (ATIXA), ATIXA Position Statement: Why Colleges Are in the Business of Addressing Sexual Violence 3-4 (Feb. 17, 2017) (acknowledging that due process has been denied in some recipients' Title IX proceedings but insisting that "Title IX isn't the reason why due process is being compromised. . . . Due process is at risk because of the small pockets of administrative corruption . . . and because of the inadequate level of training currently afforded to administrators. College administrators need to know more about sufficient due process protections and how to provide these protections in practice.") (emphasis added). The Department agrees that recipients need to know more about sufficient due process protections and what such protections need to look like in practice, and this belief underlies the Department's approach to the § 106.45 grievance process which prescribes specific procedural

features instead of simply directing recipients to provide due process protections, or be fair, for complainants and respondents. Edward N. Stoner II & John Wesley Lowery, Navigating Past the "Spirit Of Insubordination": A Twenty-First Century Model Student Conduct Code With a Model Hearing Script, 31 Journal of Coll. & Univ. L. 1, 10-11 (2004) (noting that the trend among colleges and universities has been to put into place written student disciplinary codes but, whether an institution is public or private, a "better practice" is to describe in the written disciplinary code exactly what process will be followed rather than making broad statements about "due process" or "fundamental fairness"). The Department agrees that it is more instructive and effective for the Department to describe what procedures a process must follow, rather than leaving recipients to translate broad concepts like "due process" and "fundamental fairness" into Title IX sexual harassment grievance processes, and unlike the NPRM the final regulations do not reference "due process" but rather prescribe specific procedural features that a grievance process must contain and apply.

## Timeframes and Page Limits

**Question:** Question on Timeline of the grievance process:

**Answer:** The Rule specifies two sequential time periods that must be incorporated into the grievance process. Section 106.45(b)(5)(vi) requires a ten-day period for the parties (and their advisors) to review and respond to the evidence collected by the recipient. Section 106.45(b)(5)(vii) then requires a second ten-day period for the parties to review and respond to the recipient's investigative report. The Rule does not specify any number of days between those two ten-day time periods. A recipient's expectation as to how much time elapses between the first ten-day and the second ten-day period should be governed by the recipient's ability to conclude the entire grievance process within the recipient's own designated "reasonably prompt" time frames as required under 106.45(b)(1)(v).

Section 106.45(b)(6)(ii) clarifies that for recipients that are elementary and secondary schools (or otherwise are not postsecondary institutions), the second ten-day time period (i.e., the ten days for parties and advisors to review the investigative report under 106.45(b)(5)(vii)) may overlap with the written question procedure under 106.45(b)(6)(ii), such that the parties could use the same ten-day period while reviewing and responding to the investigative report to also submit their written questions and answers directed to the other parties and witnesses.

Section 106.45(b)(6)(ii) states (emphasis added): "With or without a hearing, after the recipient has sent the investigative report to the parties pursuant to paragraph (b)(5)(vii) of this section and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party." Thus, the parties' rights under 106.45(b)(5)(vi)-(vii), and their rights to submit written questions under 106.45(b)(6)(ii), apply in K-12 regardless of whether the K-12 process ends in a hearing (live or otherwise) or no hearing. In the K-12 setting, the right to review and respond to the evidence and the

investigative report, and the right to pose written questions, is not necessarily for the purpose of "preparing for a hearing" but is for the purpose of enabling all parties to meaningfully submit their view of the case to the investigator, and to the decision-maker, prior to the decision-maker reaching a determination regarding responsibility.

**Question:** Inquiry on ten day period in regs:

**Answer:** The time frames referred to in the Rule (such as the 10-day time period in § 106.45(b)(5)(vi)) may be measured by calendar days, business days, school days, or any other reasonable method that works best with the school's administrative operations. In the preamble to the Rule, at page 591, for example, the Department states: "The Department appreciates the commenter's request for clarification as to how to calculate 'days' with respect to various time frames referenced in the proposed regulations and appreciates the opportunity to clarify that because the Department does not require a specific method for calculating 'days,' recipients retain the flexibility to adopt the method that works best for the recipient's operations; for example, a recipient could use calendar days, school days, or business days, or a method the recipient already uses in other aspects of its operations." See also pp. 268 FN 464, p. 1024, p. 1043, p. 1486.

**Question:** In the recently released Title IX regulations, there is a statement that outcome letters should be delivered simultaneously to the Complainant and Respondent. While it seems reasonable that simultaneous would mean seconds or moments apart, I am seeking clarification and definition from the Department.

**Answer:** The new Title IX Rule, § 106.45(b)(7)(iii), states: "The recipient must provide the written determination to the parties simultaneously." The Rule does not further define "simultaneous," which should be given its plain and ordinary meaning, e.g., occurring at the same time.

**Question:** I appreciate your response and have been thinking about it over the course of the day. Our program allows clients to send letters to a Complainant and Respondent within minutes, if not seconds of each other. Is that acceptable and does it meet the common definition of at the same time? In other words, is that in compliance with simultaneous notification?

**Answer:** Thank you for your question regarding OCR's new Title IX Regulations. All references and citations are to the official version of the Regulation published in the Federal Register available is here. A link to the unofficial version of the final Regulations is available here.

Several provisions of the new Title IX Regulations require that the parties be provided with certain documents, or given access to materials or testimony, "simultaneously." *See, e.g.*, 34 C.F.R. § 106.45(b)(7)(iii). Title IX does not define the term "simultaneously," but the word should be given its plain and ordinary meaning, which in context means that the parties' access must occur at the same time. Access that is provided at different points in time—albeit seconds or minutes—would thus not constitute "simultaneous" access under the Regulations.

**Question:** If a complainant files a report, which makes it a "formal complaint," does the notice to the complainant and respondent have to go out immediately, or can the Title IX Coordinator seek to meet with the complainant before the written notice goes out, to discuss supportive measures (as long as the written notice goes out promptly)? It seems very clear that if the reporter is NOT the complainant, the TIX coordinator must meet with the complainant to see if they want to file a formal complaint and discuss supportive measures. However, it's not as clear when the formal complaint (a report from a complainant) initiates the process. Must the written notice go out before the Title IX Coordinator has met with the complainant?

**Answer:** Thank you for your question regarding OCR's new Title IX Regulations. All references and citations are to the official version of the Regulation published in the Federal Register available is here. A link to the unofficial version of the final Regulations is available here.

The Final Title IX Regulations leave recipients flexibility to select the method of delivery of the written notices required under 34 C.F.R. § 106.45(b)(2) (including the initial notice and any subsequent notices), and while the initial notice must be sent ''upon receipt'' of a formal complaint, with ''sufficient time'' for a party to prepare for an initial interview, such provisions do not dictate a specific time frame for sending the notice, leaving recipients flexibility to, for instance, inquire of the complainant details about the allegations that should be included in the written notice that may have been omitted in the formal complaint, and draft the written notice, while bearing in the mind that the entire grievance process must conclude under the recipient's own designated time frames. (Preamble at 30283.) The Department will not interpret 34 C.F.R. § 106.45(b)(2) to require notice to be provided ''immediately'' (and the provision does not use that word), but rather notice must be provided early enough to allow the respondent ''sufficient time to prepare a response.'' The Department also notes that a recipient's discretion in this regard is constrained by a recipient's obligation to conduct a grievance process within the recipient's designated, reasonably prompt time frames.

**Question:** When a number of days are stated in the new Title IX grievance process, such as parties having ten days to respond to the evidence, are these calendar days, or business days? Thank you for any insight you can provide.

**Answer:** Thank you for your question regarding OCR's new Title IX Regulations. All references and citations are to the official version of the Regulations published in the Federal Register available is here. A link to the unofficial version of the final Regulations is available here.

The time frames referred to in the Regulations (such as the 10-day time period in § 106.45(b)(5)(vi)) may be measured by calendar days, business days, school days, or any other reasonable method that works best with the school's administrative operations. In the preamble to the Regulations, at page 30188, for example, the Department states: "The Department appreciates the commenter's request for clarification as to how to calculate 'days' with respect to various time frames referenced in the proposed regulations and appreciates the opportunity to clarify that because the Department does not require a specific method for calculating 'days,' recipients retain the flexibility to adopt the method that works best for the recipient's operations; for example, a recipient could use calendar days, school days, or business days, or a method the recipient already uses in other aspects of its operations."

## Training

**Question:** After 8/14/20, in order to use a third-party training entity, must the Recipient secure permission to post the materials publicly in order to use that training? If a third party is unwilling to grant permission to have their materials displayed publicly, may those materials be used as supplemental materials to the training materials created or obtained that are lawfully posted that sufficiently cover the topics in required in Section 106?

**Answer:** The new Title IX Rule does not, by its own terms, require a recipient to "secure permission to post" its Title IX training materials; the Rule, in broad terms, does require recipients to post "all materials" used to train that recipient's Title IX personnel on the recipient's website.

Nothing in the Title IX Rule abrogates intellectual property rights. Thus, if a recipient is unable to secure permission to lawfully post third-party, proprietary training materials, the recipient will need to create or use materials that the recipient can lawfully post on the recipient's website. If materials are used to train a recipient's Title IX personnel—even if those materials contain elements that "supplement" Title IX regulatory requirements—such materials are part of "all materials" that must be posted on the recipient's website under § 106.45(b)(10).

For further information on this topic, please review this blog post published by OCR.

**Question:** If ATIXA provides a link to our library that our clients/members can make accessible to the public, can we implement a registration system to access the link, meaning having members of the public sign up with their contact information in order to gain access?

**Answer:** The new Title IX Rule does not permit a recipient to comply with § 106.45(b)(10)(i)(D) by requiring a member of the public to register or sign up and provide their contact information in order to view "all materials" used by the recipient to train the recipient's Title IX personnel, because "all materials" must be "publicly available" on the recipient's website.

**Question:** I attended the webinar on the Title IX updated regulations & we have been looking around for Title IX coordinator training and investigator training. There are many out there & was hoping your organization had trainings that you would recommend.

I would appreciate any guidance on what Title IX training is recommended.

**Answer:** As stated in the preamble to the Title IX Regulations on Page 30257:

> [T]he Department encourages recipients to pursue training from sources that rely on qualified, experienced professionals likely to result in best practices for effective, impartial investigations. *The Department does not certify, endorse, or otherwise approve or disapprove of particular organizations (whether for profit or non-profit) or individuals that provide Title IX-related training and consulting services to recipients*. Whether or not a recipient has complied with § 106.45(b)(1)(iii) is not determined by the source of the training materials or training presentations utilized by a recipient.

(emphasis added).

Additionally, below are resources that the Department has released in order to better aid schools, students, and other stakeholder to understand the regulations.

- Title IX Website
- Title IX Q & A
- OCR Blog
- Secretary DeVos' May 6, 2020 Press Release addressing key provisions of the new Rule
- Title IX Final Rule Overview
- Summary of Major Provisions of the Department of Education's Title IX Final Rule
- Summary of Major Provisions of the Department of Education's Title IX Final Rule and Comparison to the NPRM
- Title IX Fact Sheet

OCR has also created a series of Title IX-related videos, which you may view on YouTube by using the following links:

The First Amendment and Title IX: An OCR Short Webinar (7/29/20)
OCR Short Webinar on How to Report Sexual Harassment under Title IX (7/27/20)
Conducting and Adjudicating Title IX Hearings: An OCR Training Webinar (7/23/20)
OCR Webinar on Due Process Protections under the New Title IX Regulations (7/21/20)
OCR Webinar on New Title IX Protections Against Sexual Assault (7/7/20)
OCR Webinar: Title IX Regulations Addressing Sexual Harassment (5/6/20)
OCR Short Webinar on Sexual Violence in Public Schools (3/19/20)

**Question:** If a recipient employs only a T9 Coordinator, but outsources the investigator and decision-maker roles in a grievance procedure, does the school have to post the training completed by these professionals on their institutional website? I have heard conflicting opinions on this, and I didn't see it explicitly addressed in the preamble to the final regs or in OCRs recent blog post related to the training/posting requirement.

**Answer:** Thank you for your question regarding OCR's new Title IX Regulations.

All references and citations are to the official version of the Regulation published in the Federal Register available is here. A link to the unofficial version of the final Regulations is available here.

The training materials referred to in 34 C.F.R. § 106.45(b)(1)(iii) must be made publicly available on a recipient's website, or if the recipient does not have a website, such materials must be made available upon request for inspection by members of the public. 34 C.F.R. § 106.45(b)(10)(D). Notably, the regulations do permit schools to delegate certain functions to a regional center, or to join a consortium of schools in order to implement the Rule. In these instances, recipients are permitted to publish written grievance procedures that satisfy the new Title IX regulation, as well as their training materials, by way of hosting these documents on a shared website.

The Preamble acknowledged commenters' concerns that a recipient may be unable to publicize its training materials because some recipients hire outside consultants to provide training, and the materials may be owned by the outside consultant and not by the recipient itself. In such a circumstance, the Department noted, a recipient would need to secure permission from the consultant to publish the training materials, or alternatively, the recipient could create its own training materials over which the recipient has ownership and control. (Preamble at 30412)

**Question:** My name is XXX and I'm the new Title IX Coordinator at my school. I am having trouble on what needs to be done to be compliant in regards to training the teachers and staff at my school. What exactly does their training need to cover? Any resources you have would be greatly appreciated.

**Answer:** Thank you for your question regarding OCR's new Title IX Regulations. All references and citations are to the official version of the Regulations published in the Federal Register available is here. A link to the unofficial version of the final Regulations is available here.

The final regulations require that a recipient ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on:

- the definition of sexual harassment in 34 C.F.R. § 106.30;
- the 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; and
- how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

A recipient must ensure that decision-makers receive training on:

- any technology to be used at a live hearing; and
- 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, as set forth in 34 C.F.R. § 106.45(b)(6).

A recipient also must ensure that investigators receive training on:

- issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in 34cfr 45(b)(5)(vii).

Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes, and must promote impartial investigations and adjudications of formal complaints of sexual harassment. 34 C.F.R. §106.45(b)(1)(iii). A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website, the recipient must make these materials available upon request for inspection by members of the public.

In the Preamble to the final Regulations, the Department explained that while Title IX personnel must be well trained in how to conduct a grievance process, recipients have flexibility to adopt additional training requirements concerning evidence collection or evaluation. Recipients are free to adopt additional education and training content that a recipient believes serves the needs of the recipient's community. The final Regulations do not impose an annual or other frequency condition on the mandatory training required in 34 C.F.R. § 106.45(b)(1)(iii).

The Department also expressed in the Preamble that it does not wish to be more prescriptive than necessary to achieve the purposes of the final regulations, and respects the discretion of recipients to choose how best to serve the needs of each recipient's community with respect to the content of training provided to Title IX personnel so long as the training meets the requirements in the final regulations. (Preamble at 30254).

The Department encourages recipients to pursue training from sources that rely on qualified, experienced professionals likely to result in best practices for effective, impartial investigations. The Department does not certify, endorse, or otherwise approve or disapprove of particular organizations (whether for-profit or non-profit) or individuals that provide Title IX-related training and consulting services to recipients. (Preamble at 30257).

**Question:** I have a question regarding the training requirements of Title IX for school district personnel/students and the appointed school district Title IX Coordinator, investigator, etc. What qualifications must the provider of the training programs or provider of training materials possess to meet the statutory training requirements of Title IX? Who can provide training to school district personnel and students, and what must the program provider's qualifications consist of to provide Title IX training? May the school district's solicitor provide Title IX training and materials to school personnel and students and to the recipient's appointed Title IX Coordinator, investigator, etc.? May the school district's solicitor create the school district's policy and guidance/program materials for responding to Title IX complaints? Could I have a response to my questions as soon as possible; we must begin training school personnel and prepare for the opening of public schools at the end of this month? Thank you for your anticipated cooperation regarding this inquiry.

**Answer:** Thank you for your question regarding OCR's new Title IX Regulations. All references and citations are to the official version of the Regulation published in the Federal Register available is here. A link to the unofficial version of the final Regulations is available here.

The final regulations require that a recipient ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on:

- the definition of sexual harassment in §106.30;
- the 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; and
- how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

A recipient must ensure that decision-makers receive training on:

- any technology to be used at a live hearing; and
- 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, as set forth in paragraph (b)(6) of this section.

A recipient also must ensure that investigators receive training on:

- issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section.

Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment. §106.45(b)(1)(iii). A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.

In the Preamble to the final regulations, the Department explained that while Title IX personnel must be well trained in how to conduct a grievance process, recipients have flexibility to adopt additional

training requirements concerning evidence collection or evaluation. Recipients are free to adopt additional education and training content that a recipient believes serves the needs of the recipient's community. The final regulations do not impose an annual or other frequency condition on the mandatory training required in § 106.45(b)(1)(iii).

The Department also expressed in the Preamble that it does not wish to be more prescriptive than necessary to achieve the purposes of the final regulations, and respects the discretion of recipients to choose how best to serve the needs of each recipient's community with respect to the content of training provided to Title IX personnel so long as the training meets the requirements in the final regulations. (Preamble 30254)

The Department encourages recipients to pursue training from sources that rely on qualified, experienced professionals likely to result in best practices for effective, impartial investigations. The Department does not certify, endorse, or otherwise approve or disapprove of particular organizations (whether for-profit or non-profit) or individuals that provide Title IX-related training and consulting services to recipients. (Preamble 30257).