



TITLE IX TEAM TRAINING

Carroll University

AUGUST 10, 2023

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Agenda

- Themes
- Issues related to Dating Violence, Domestic Violence, Sexual Assault, and Stalking – Investigations and Adjudications
 - Hypotheticals
- Overview of Policy/Process

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Training Requirements 1 of 2

	Def. Sexual Harassment	Scope of Ed. Prog./Activity	Conducting grievance process	Serving impartially	Tech training	Drafting investigative report
Coordinator	X	X	X	x		
Investigator	X	X	X	X		X
Decision-Maker	X	X	X	X	*	
Appeals	X	X	X	X	*	
Informal Res. Facilitator	x	X	x	X		
Advisor						

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Training Requirements 2 of 2

Under Clery Act, must receive annual training on:

- Issues related to sexual assault, domestic violence, dating violence, stalking
- How to conduct an investigation and hearing process that protects the safety of victims and promotes accountability

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Presentation Rules

- Questions are encouraged
- “For the sake of argument...” questions help to challenge the group, consider other perspectives, and move the conversation forward
- Be aware of your own responses and experiences
- Follow-up with someone if you have any questions or concerns
- Take breaks as needed

Themes

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Themes (1 of 2)

- Title IX meant to ensure equitable access, regardless of sex
- We have an obligation to protect our community – including both parties
- Transparency in the process encourages participation, reduces stress, and increases trust in the outcome

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Themes (2 of 2)

- Use language of the policy (complainant, respondent, report), not language of criminal law (victim/survivor, perpetrator, allegation)
- Be incredibly mindful not to prejudge the outcome of the case
- Base decisions on evidence, not your “gut”

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Sexual Harassment - IX


- **Sexual harassment** means conduct on the basis of sex that satisfies one or more of the following:
 - **Quid pro quo** An employee of the University conditioning the provision of an aid, benefit, or service of the University on an individual's participation in unwelcome sexual conduct;
 - **Unwelcome conduct** 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 University's education program or activity; or
 - **Clery crimes** Sexual assault, dating violence, domestic violence, or stalking

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- **Sexual Assault** (**Definitions from National Incident-Based Reporting System)
 - Rape (non-consensual penile/vaginal penetration)
 - Sodomy (non-consensual oral/anal penetration)
 - Sexual Assault with an Object (penetration with object or body part other than genitalia)
 - Fondling – Must be done “for the purpose of sexual gratification”
 - Incest
 - Statutory rape

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Hypothetical – Sexual Harassment

Review of Hypothetical Scenario and Discussion of Elements

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“Dating Violence” means **an act of violence** committed **on the basis of sex** by a person who is or has been **in a romantic or intimate relationship with the complainant**. The existence of such a romantic or intimate relationship is determined by the length of the relationship, the type of relationship, and the frequency of interactions between the individuals involved in the relationship.

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Sexual Harassment: Domestic Violence



"Domestic violence" is an act of violence committed on the basis of sex by:

- A current or former spouse or intimate partner of the complainant;
- A person with whom the complainant shares a child in common;
- A person who is cohabitating with, or has cohabitated with, the complainant as a spouse or intimate partner;
- A person similarly situated to a spouse of the victim under the domestic/family violence laws of the jurisdiction;
- Any other person against an adult or youth victim who is protected from that person's acts under the domestic/family violence laws of the jurisdiction

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Sexual Harassment: Stalking



"Stalking" is engaging in a course of conduct directed at a specific person on the basis of sex that would cause a reasonable person with similar characteristics under similar circumstances to:

- Fear for the person's safety or the safety of others; or
- Suffer substantial emotional distress.

As mentioned before, to qualify under Title IX, it must be sex-based stalking. (30172 fn. 772)

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Stalking: Course of Conduct



"Course of Conduct"

- Under VAWA regulations: means **two or more acts**, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.

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Stalking: Reasonable Person

“Reasonable person”

Under VAWA regulations: means a reasonable person under similar circumstances and with similar identities to the victim.

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Stalking: Substantial Emotional Distress

“Substantial emotional distress”

Under VAWA regulations: means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

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Impact of Stalking on Victims

- **46%** of stalking victims fear not knowing what will happen next.
[Baum et al., (2009). "Stalking Victimization in the United States." BJS.]
- **29%** of stalking victims fear the stalking will never stop.
[Baum et al.]

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More Impact of Stalking

- **1 in 8** employed stalking victims **lose time from work** as a result of their victimization and **more than half** lose **5 days of work or more**.
- 1 in 7 stalking victims move as a result of their victimization.

[Baum et al.]

- The prevalence of anxiety, insomnia, social dysfunction, and severe depression is much higher among stalking victims.

[Eric Blauuw et al. "The Toll of Stalking," Journal of Interpersonal Violence 17, no. 1(2002):50-63.]

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Overview of Your Policy/Process

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Overview of the Process

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graph TD; Report[Report] --> Informal[Informal Resolution]; Report --> Formal[Formal Complaint]; Supportive[Supportive Measures] --> Formal; Formal --> Informal; Formal --> Dismissal[Dismissal]; Formal --> FormalGrievance[Formal Grievance Process]; subgraph FormalGrievance; Investigation[Investigation]; Hearing[Hearing?]; Determination[Determination]; Appeal[Appeal]; end; FormalGrievance --> Appeal; Appeal --> FormalGrievance;
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**Overview of the Process:
Supportive Measures (1 of 5)**

- Non-disciplinary and non-punitive
- Individualized
- “As reasonably available”
- Without fee or charge to either party
- Available at any time (regardless of whether a formal complaint is filed)

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**Overview of the Process:
Supportive Measures (2 of 5)**

Designed to:

- *restore or preserve access* to the University’s education program or activity, without unreasonably burdening the other party;
- protect the safety of all parties and the University’s educational environment; and
- deter sexual harassment

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**Overview of the Process:
Supportive Measures (3 of 5)**

• Counseling	• Changes in work or housing locations
• Extensions of deadlines (course-related adjustments)	• Leaves of absence
• Modifications of work/class schedules	• Increased security and monitoring of certain areas of the campus
• Campus escort services	• “and other similar measures”
• Mutual contact restrictions	

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**Overview of the Process:
Supportive Measures (4 of 5)**

Role of the TIXC upon receiving a report:

- promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30,
- consider the complainant's wishes with respect to supportive measures,
- inform the complainant of the availability of supportive measures with or without the filing of a formal complaint

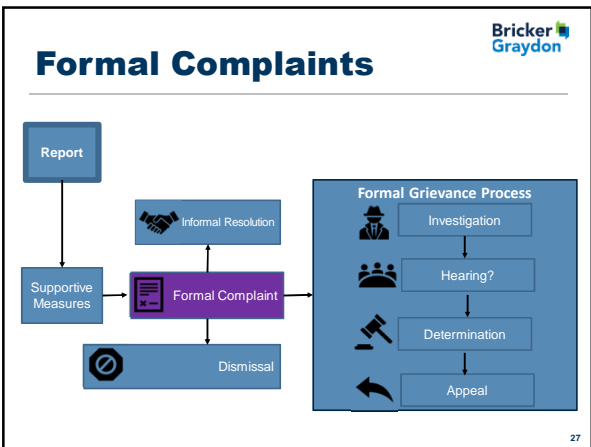
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**Overview of the Process:
Supportive Measures (5 of 5)**

- Must maintain confidentiality to the greatest extent possible
- Note: Title IX Coordinator may ask you to help with accommodations and may not be able to tell you all the details as to *why*.

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**Overview of the Process:
Formal Complaint (1 of 2)**

A document filed by a complainant or signed by the Title IX Coordinator alleging Prohibited Conduct against a respondent and requesting the University investigate the allegations

- In response to a formal complaint, University must follow a grievance process (set by 106.45)
- Title IX Coordinator must offer complainant supportive measures (regardless if files formal complaint – if complainant does not want to file a formal complaint)

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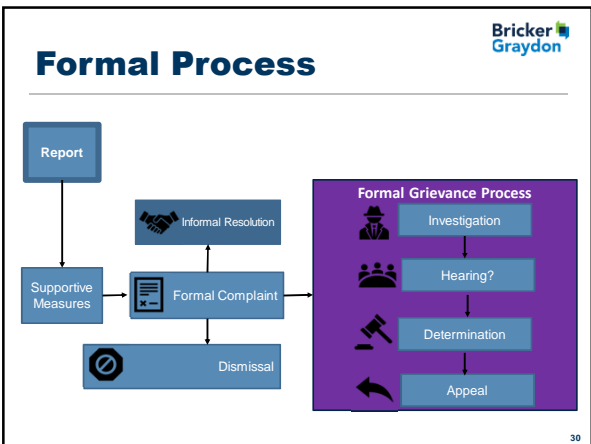
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**Overview of the Process:
Formal Complaint (2 of 2)**

Once a Formal Complaint is filed, there are four possibilities:

- Informal Resolution
- Formal Grievance Process (Hearing)
- Mandatory Dismissal from Hearing Process and Resolution through Investigative Process
- Formal Complaint is withdrawn

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**Overview of the Process:
Formal Grievance Process**

Basic requirements:

- Treat complainants and respondents equitably
- Follow grievance process
- Only impose any disciplinary sanctions against a respondent after grievance process followed

Includes the presumption that respondent is not responsible for the alleged conduct until a determination regarding responsibility is made through the grievance process

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**Overview of the Process:
Written Notice**

- University's grievance **process** and informal resolution process
- **Allegations** with sufficient time for review with sufficient detail, such as date, location if known
- Parties may have an **advisor of choice**

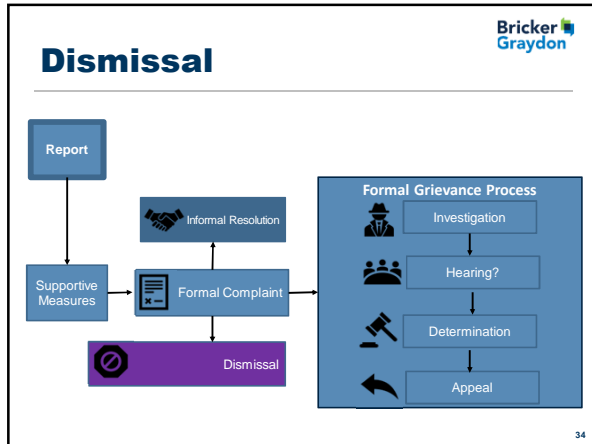
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**Overview of the Process:
Investigation**

- Only of a formal complaint
- Burden of proof and evidence gathering rests with University
- Cannot access, require, disclose, or consider treatment records of a party without that party's voluntary, written consent
- Provide equal opportunity for parties to present witnesses (fact and expert)
- Cannot restrict ability to discuss complaint or gather information
- Advisors of choice (But compare to Advisors in Title IX Hearing)
- Ability to review report and to provide written response (TIX)

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- ## Dismissal (1 of 3)
- University MUST investigate allegations in a formal complaint
 - BUT University MUST dismiss from the hearing process is
 - if conduct alleged would **not** constitute Sexual Harassment – Title IX, even if proven, OR
 - Conduct did not occur within University's education program or activity or in the United States
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Conducting a Hearing


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Overview of the Title IX Process: Hearings 

- Must provide a live, cross-examination hearing
- Parties must have an advisor and the University must provide an advisor for a party if the party does not have one
- Advisors ask only relevant cross-examination questions—no party-on-party questioning
- May be virtual, but must be recorded or transcribed


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Advisors 

If a party does not have an advisor present at the live hearing, the recipient **must provide** without fee or charge to that party, an advisor **of the recipient's choice**, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party. (106.45(b)(6)(i) and preamble 30339)

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Live Cross-Examination: Regulations 

In this process:

- Decision-maker 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**
- Must be conducted directly, orally, and in real time by the party's advisor, but never party personally
- Only relevant cross-examination and other questions may be asked of a party or witness

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Reminders

- **Withhold pre-judgment:** The parties may not act as you expect them to
- Be aware of your own biases as well as those of the complainant, respondent, and witnesses
- Let the available facts and standard of proof guide your role in overseeing the live cross-examination hearing, not unfair victim-blaming or societal/personal biases

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More Reminders

- Individual cases are not about statistics
- Decision in every case must be based on preponderance of evidence or clear and convincing evidence presented
- Cannot fill in evidentiary gaps with statistics, personal beliefs or information about trauma
- Process must be fair and impartial to each party
- Institution may proceed without active involvement of one or both parties; base conclusions on impartial view of evidence presented

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Overview of the Process: Written Determinations (1 of 2)

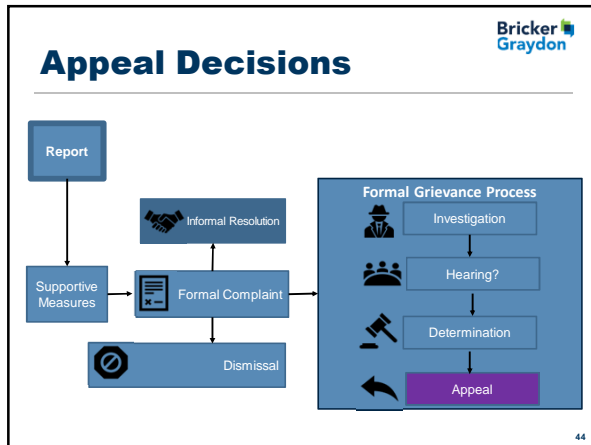
- Procedures
- Findings of fact
- Conclusions
- Statement of and rationale for each result of each allegation, including determination of responsibility and any disciplinary imposition and whether remedies designed to restore or preserve access to educational program or activity will provided to complainant

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Overview of the Process: Determinations (2 of 2) Bricker Graydon

- Procedures and bases for appeal by both parties
- Provide written determination to parties simultaneously

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Overview of the Process: Appeals (1 of 2) Bricker Graydon

- University must offer to both parties the following bases of appeal:
 - Procedural irregularity that affected outcome
 - New evidence not reasonably available at the time regarding responsibility or dismissal that could affect outcome
 - Conflict of interest or bias by the Title IX Coordinator, investigator, and/or decision-maker that affected the outcome

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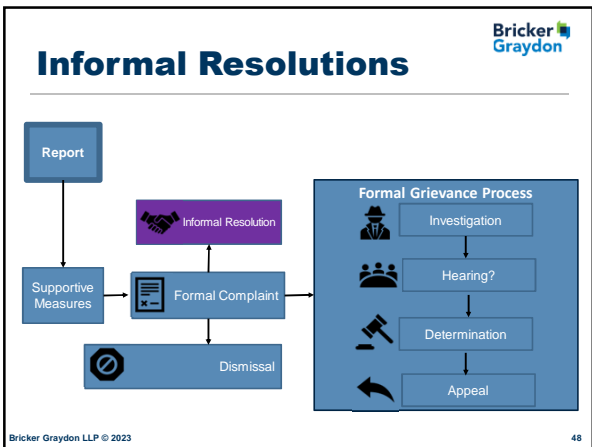
Overview of the Process: Appeals (2 of 2)

- The decision-maker for the appeal cannot be the same decision-maker from the hearing, or the Title IX Coordinator or investigator
- Must provide both parties a reasonable, equal opportunity to submit a written statement in support of or challenging the determination
- Must issue a written decision describing the result of the appeal and rationale and provide the decision simultaneously to the parties

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Informal Resolution


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**Overview of the Process:
Informal Resolution (1 of 2)**

- At any time prior to the determination regarding responsibility, the University may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication
- University cannot require this and also cannot offer unless a formal complaint is filed




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**Overview of the Process:
Informal Resolution (2 of 2)**


- University can offer informal resolution if:
 - Provides written notice to the parties
 - Obtains the parties' voluntary, written consent to the informal process

University cannot offer this option in certain cases of employee sexual harassment of a student




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Questions?



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Proposed Title IX Regulations


A primer on what to expect and how to prepare now.

Agenda **Bricker Graydon**

- Big Picture
- Details:
 - *Bostock* protections
 - Athletics?
 - Sex Discrimination vs. Sex-Based Harassment
 - Pregnancy/Parenting
 - Off-Campus Conduct
 - Title IX Coordinator Duties/Training Requirements
- Supportive Measures
- Emergency Removal
- Informal resolution
- Two new grievance procedures

Basics **Bricker Graydon**

- Unofficial version was released June 23, 2022
- Published in the Federal Register on July 12, 2022 at 87 FR 41390
- 60 day notice and comment period runs through September 12, 2022
- 190 page PDF – proposed amendments starts on page 178 (87 FR 41567)
- Potential release in October of 2023(?)



Definitional Shifts

Expansions of coverage


Bostock Protections **Bricker Graydon**

- Title IX prohibits discrimination “on the basis of sex”
- “Discrimination on the basis of sex” would include “discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.”
 - See newly proposed 106.10, page 666.
- Policy that prevent a person from participating in an education program/activity consistent with the person’s gender identity “subjects a person to more than de minimis harm on the basis of sex” – see 106.31(a)(2).
- Religious exemptions still apply.

Athletics Implications §106.41 **Bricker Graydon**

- Relevant to definition of sex discrimination, which now includes sexual orientation, gender identity, and sex characteristics
- NPRM: Prohibits schools from separating or treating any person differently based on sex in a manner that subjects that person to more than minimal harm (unless otherwise permitted by Title IX).
- The Department recognizes that exclusion from a particular male or female athletics team may cause some students more than de minimis harm, and yet that possibility is allowed under current § 106.41(b).

- Where we currently stand in athletics
- Where we are going in athletics
- Why separate rule-making



“The Department will engage in **separate rule-making** to address Title IX’s application to the context of athletics and, in particular, what criteria recipients may be permitted to use to **establish students’ eligibility to participate on a particular male or female athletic team.**” (p. 542-54)

Sex Discrimination and Sex-Based Harassment (1 of 2)



- prohibit **all forms of sex discrimination**, including discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity. (Proposed § 106.10)
- Quid pro quo sex-based harassment
- Sexual misconduct, domestic violence, dating violence, stalking
- Hostile environment

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Sex Discrimination and Sex-Based Harassment (2 of 2)



Compare Proposed and Current Definitions of Hostile Environment

Current: "so severe, pervasive, and objectively offensive that it effectively denies a person **equal access** to the recipient's education program or activity." (Current § 106.30)

Proposed: "unwelcome sex-based conduct that is **sufficiently severe or pervasive** that, based on the totality of the circumstances and evaluated subjectively and objectively, it **denies or limits** a person's **ability to participate in or benefit from** the recipient's education program or activity." (Proposed § 106.2)

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Non-Discrimination on the Basis of Parental, Family, or Pregnancy/Related Conditions (1/2)



1. Expanded Non-Discrimination prohibition (34 C.F.R §§ 106.40 (a) and (b));
2. Added definitions of Family Status and Pregnancy or Related Conditions (34 C.F.R § 106.2);
3. Imposed an obligation to provide information (34 C.F.R § 106.40(b)(2)); and
4. Imposed obligations to take action to prevent sex-discrimination on the basis of Parental, Family or Pregnancy and Related Conditions once Title IX Coordinator is aware of Pregnancy or Related Condition (34 C.F.R § 106.40(b)(3)).

Note: 34 C.F.R § 106.57 addresses a recipient's obligations regarding the parental, family, or marital status and pregnancy or related conditions of employees.

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Off Campus Conduct

Yep, they go there.

Two Types of Off-Campus Conduct



- **Off-Campus Consistency:** If you typically consider off-campus conduct within the scope of your disciplinary authority, then Title IX would also reach off-campus to the same extent.
- **On-Campus Hostile Environment:** If off-campus conduct creates a hostile environment on campus, you are required to **address** the hostile environment.
 - Supportive measures
 - Does this mean you must discipline for the on campus hostile environment even if no actual conduct was committed within your disciplinary authority?

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Title IX Coordinators

More responsibility. More team training.

Coordinator Duties



Expanded requirements specific to the Title IX Coordinator in section 106.44 (Note: Express permission to delegate at 106.8(a)(2))

- Equitable treatment of complainant and respondent - (f)(1)
- Notification of parties re grievance and informal resolution procedures when complaint made - (f)(2)
- Offer and coordinate supportive measures - (f)(3)
- Initiate grievance procedures/informal resolution - (f)(4)
- Determine whether to initiate a complaint process to address conduct that may constitute sex discrimination - (f)(5)
- "Take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur..." - (f)(6)

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Training Requirements (1 of 2)



Expanded to encompass all employees, even those outside of grievance process 106.8

All employees – (g)(1)

- When to notify Title IX Coordinator of potential sex discrimination
- How students can report sex discrimination for (1) confidential assistance, and (2) to initiate grievance procedures

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Training Requirements (2 of 2)



Investigators, decisionmakers, others responsible for grievance procedures or who have authority to modify or terminate supportive measures – (g)(2)

- Response obligations, grievance procedures, impartial service, meaning of term "relevant"

Facilitators of informal resolution – (g)(3)

- Rules associated with informal resolution process, impartial service

Title IX Coordinator and designees – (g)(4)

- All training for others in process, recordkeeping system and recordkeeping requirements, any other necessary training

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Mandatory Reporting "Lite" – 106.44(c)



Who	Duty if Student Complainant	Duty if Employee Complainant
Confidential Employees	Not discussed (state law)	Not discussed (state law)
Administrator, Teaching, Advising	Report to Coordinator	Report to Coordinator or Provide Notice of How to Report
All Other Employees	Report to Coordinator or Provide Notice of How to Report	Report to Coordinator or Provide Notice of How to Report
Student Employees	Fact-Specific Inquiry	Fact-Specific Inquiry
Employee is Complainant	No Requirement	No Requirement

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Supportive Measures

Not as equitable?

Supportive Measures – Burden?

- Supportive measures can now burden respondent during pendency of a grievance procedures.
- * Respondent provided the opportunity (prior to or asap) to seek modification or reversal of issued measures. (Proposed 106.44(g)(4))

Emergency Removals - Expanded

Summary:

Institution may remove a respondent from its program or activity on an emergency basis after conducting an individualized health and risk analysis and determining that respondent poses an immediate (and serious) threat to physical or non-physical health or safety

Respondent is entitled to notice and immediate opportunity to challenge removal

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Informal Resolutions

More opportunities to get together?

IR - Proposals

- Can offer the option of IR before a complaint is filed
- Institution has discretion whether to offer IR, but must exercise discretion in an equitable manner and must not require or pressure the parties to participate
- More detailed notice requirement, including explanation of the process, confidentiality expectations, and the types of terms the parties might agree to as a part of an IR process
- Supportive measures that only burden the respondent are not an option during IR
- Even if parties come to an agreement through IR, the institution must take steps to ensure that discrimination does not continue or recur

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New Grievance Procedures

- 106.45 – Sex Discrimination
- 106.46 – Sex-Based Harassment involving a Student

Which applies?

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Sex Discrimination – 106.45

Sex-Based Harassment involving a Student – 106.46

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Single Investigator Model is Back

- Decision-maker may now be the Coordinator or the Investigator
- Remember: this may not apply to you, depending on court decisions in your jurisdiction
- Question: How might your campus community respond to a shift away from a hearing?

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Streamlining Process



- No more "formal complaint" requirement
- No more mandatory dismissals
- Less lengthy evidentiary review requirements
- Option to provide summary report or evidence

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Sex-Based Harassment Grievance Procedure (§106.46)



2020 Final Rule	2022 NPRM
Applies to Title IX Sexual Harassment that occurs against any person in the U.S.	Applies to Sex-Based Harassment complaints* involving student complainants or student respondents at postsecondary schools
No Single Investigator Model	Permits Single Investigator Model
Hearing Required for Title IX Sexual Harassment	Hearing OPTIONAL for Title IX Sexual Harassment <ul style="list-style-type: none"> • BUT requires mandatory process for assessing credibility
Advisor-conducted questions at live hearing	Continued
Relevance determinations by decision-maker	Continued
Emphasis of relevance, but no definition	Relevance definition included
Exclusion of certain evidence (rape shield, treatment records, privileged communications)	Continued
Simultaneous written determination to the parties	Continued (required components reorganized)
Opportunity to Appeal on a minimum of 3 grounds	Continued

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Next Steps?

Your Title IX Coordinator is **KEY**.

Now:

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- Has your institution communicated with stakeholders about the proposed regulations?
 - Does it need to?
- Does your Board want to hear from your Coordinator about community reactions?
- Does your Board have talking points if they are asked questions about the proposal by alumni, donors, and campus community members? (Or should members refer questions to the Coordinator?)
- Does your institution want to provide any comment through the official process?

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Questions?

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