

The Title IX Evolution: Navigating the Expanded Terrain

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Context

- July 12, 2022, NPRM published
- More than 240,000 comments received
- April 19, 2024, final rule published
- August 1, 2024, effective date

When Do the New Regulations Take Effect?

Conduct occurring
between Aug. 14, 2020, and July 31, 2024

Conduct occurring
after Aug. 1, 2024

2020 Regs Apply

New Regs Effective

New Regs Apply

Aug. 1, 2024

NOTE: The date
of the conduct -
not the date of
report -
controls.

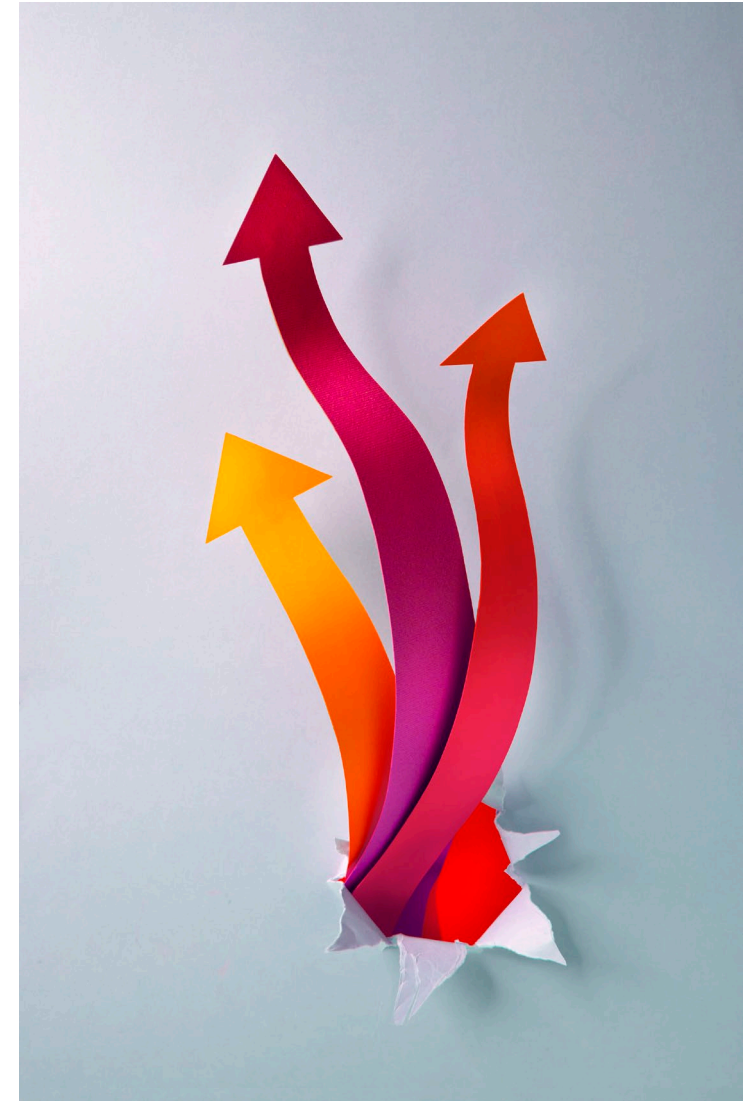


Definitions & Jurisdiction

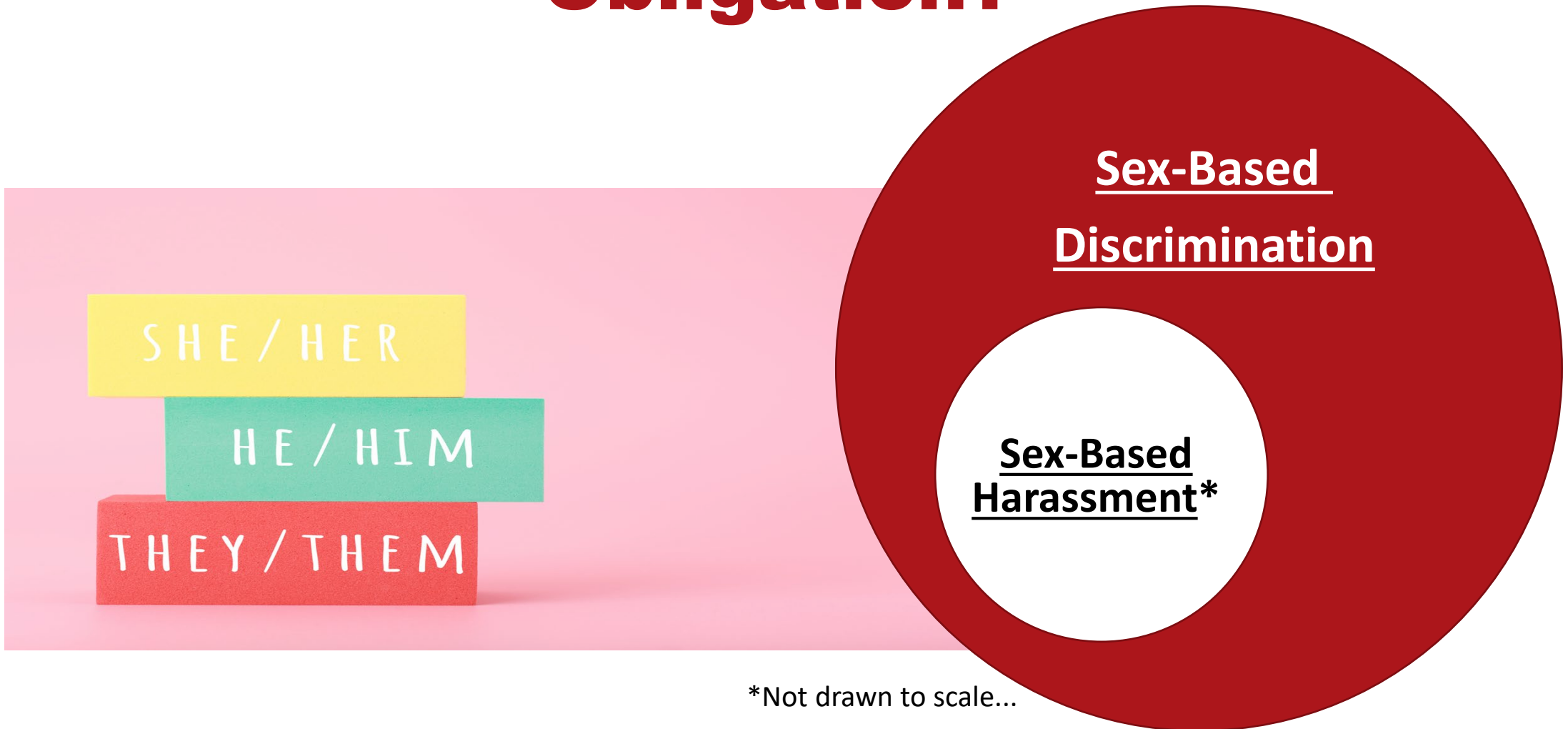
Big Picture

Recipients have an obligation to respond appropriately to notice of sex discrimination in its programs and activities.

The reach and scope of each of these terms has changed, and generally to broaden both what triggers an institutional response *and* what that response needs to be.



What Triggers a Response Obligation?



What Triggers a Response Obligation?

Sex Discrimination

- Sex stereotypes
- Sex characteristics
- Sexual orientation
- Gender identity
- Pregnancy/parental status

Sex-Based Harassment

- Quid pro quo
- Hostile environment
- Clery crimes

What Triggers a Response Obligation?

Hostile Environment Sex-Based Harassment Definition

Much broader than 2020 regulations

- Severe **or** pervasive
- Subjectively **and** objectively offensive
- Denies **or** limits
- Totality of circumstances, considering:
 - Degree of limitation on access
 - Type, frequency, and duration of conduct
 - Parties' ages, roles, and previous interactions
 - Location and context of conduct
 - Other sex-based harassment in recipient's program or activity



What Triggers a Response Obligation?

Conduct or impact in education program or activity, in the United States

- “All operations”
- Buildings owned or controlled by officially recognized student orgs and/or
- **Subject to institution’s disciplinary authority**



What Triggers a Response Obligation?

No obligation to address conduct that happens outside of the United States or outside of the recipient's education program or activity BUT

A recipient must evaluate the totality of the circumstances when determining whether there is a sex-based hostile environment in its education program or activity which may require that the recipient consider allegations about conduct that occurred outside of the education program or activity that may be contributing to the alleged sex-based hostile environment.

Preamble, p. 202

What Triggers a Response Obligation?

"A person who has gained admission"



Student



Employee



Visitor?



Stranger?

Any other person who was participating or attempting to participate in the P&A at the time of the conduct

De Minimis Standard

- In the limited circumstances that TIX permits different treatment or separation on the basis of sex (such as, housing, fraternities/sororities, single sex institutions), the different treatment or separation must be no more than de minimis harm.
- *Per se violation:* Adopting a policy or practice that prevents a person from participating in an education program/activity consistent with their gender identity subjects a person to more than de minimis harm on the basis of sex.

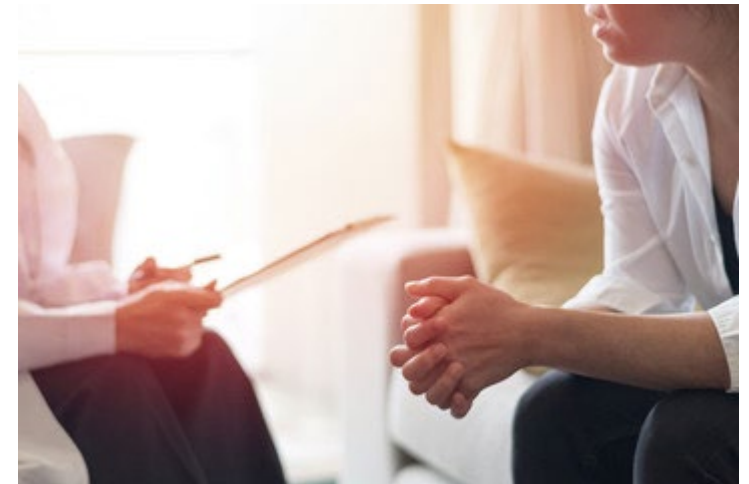
§106.31(a)(2)



Response Obligations

Notification Requirements

- Actual knowledge is no longer the sole factor triggering notice and a school's response obligation.
- Instead, all employees – even confidential employees – must do something when they become aware of conduct that may constitute sex discrimination.
- Much broader than officials with authority to institute corrective measures under the current regulations.



Notification Requirements

Notify Title IX Coordinator

- Any employee with authority to institute corrective measures on behalf of recipient
- Any employee with responsibility for administrative leadership, teaching, or advising

Notify Title IX Coordinator or Provide Reporting Information

- All other employees who are not confidential employees

*Do not apply to an employee who has personally been subject to possible sexual discrimination.

§106.44(c)

Notification Requirements

Employees with
authority to institute
corrective measures



All other non-confidential
employees



Employees with administrative leadership,
teaching, or advising responsibilities

Confidential Employees

Who is a Confidential Employee?

1

An employee whose communications are privileged or confidential under state/federal law

2

An employee designated as confidential by the school

3

Researchers conducting IRB approved human research

*The employee's confidential status is limited to information received about sex discrimination in connection with providing those services/conducting research.

§106.44(d)

Confidential Employees

What Must a Confidential Employee Explain?

1

They are confidential employees and not required to notify TIX Coordinator

2

How to contact TIX Coordinator

3

That the TIX Coordinator may be able to offer and coordinate supportive measures

§106.44(d)

Confidential Employee – Public Awareness Event Exception

- School **not** obligated to respond to information that was provided by someone at a *Take Back the Night* event or its equivalent unless;
- Imminent and serious threat to the health or safety of any person.

Title IX Coordinator Responsibilities

TIXC must:

- 106.8: Retain ultimate oversight over compliance responsibilities; if there are more than one TIXC, one must be designated as the one with ultimate oversight
- 106.8(d): Be trained
- 106.8(f): Maintain records of -
 - Resolution/outcome for all complaints of sex discrimination
 - Reports received of conduct that could be sex discrimination and actions taken
 - Training materials - make available upon request (no longer needs to be posted!)
- **106.40(b)(3): Take specified actions following notice of student's pregnancy or related condition**
- 106.44(b): Monitor for barriers to reporting AND reasonably address
- **106.44(f) - Notice requirements for TIXC**

TIXC may:

- 106.8(e): Consult with disability support
- 106.44(e): Public awareness events - TIXC is NOT required to use information gathered from such an event to respond as they normally would unless there is an immediate and serious threat to the community
- 106.45(b)(2) - TIXC may be the decisionmaker in the grievance process



Title IX Coordinator Responsibilities

Notice Requirements for a TIX Coordinator

- Treat complainant and respondent equitably
 - Notify complainant of grievance procedures
 - If complaint made, notify respondent of grievance procedures
 - Offer/coordinate supportive measures
 - If complaint made, initiate grievance or IR procedures
 - If no complaint made, determine whether to initiate a complaint
 - Take other “appropriate prompt and effective” action to ensure that sex discrimination does not occur or recur (including remedies for the complainant)
- * If TIXC reasonably determines that the alleged conduct could not constitute sex discrimination under TIX, then these requirements do not apply



§106.44(f)

Pregnancy or Related Conditions

- Definition of pregnancy or related conditions:
 - Pregnancy, childbirth, termination of pregnancy, or lactation
 - Medical conditions related to [above]
 - Recovery from [above]

§106.2

- Notice requirement re: pregnancy or related conditions - when an employee learns of a student's pregnancy or related condition, the employee must provide the TIXC's contact info and inform them that the TIXC can coordinate specific actions to prevent sex discrimination and ensure student's equal access

§106.40

Pregnancy or Related Conditions

After receiving notice, a TIXC must:

- Notify the student of the school's obligations re: pregnancy and related conditions
- Provide the student with voluntary reasonable accommodations to policies/practices/procedures
- Allow voluntary access to separate and comparable portion of program or activity
- Allow voluntary leave of absence (and reinstate to same academic/extracurricular status as pre-leave)
- Ensure availability of lactation space
- Comparable treatment to other temporary medical conditions
- Very limited situations where a certification to participate is permissible

§106.40

Pregnancy or Related Conditions

§106.21 - Admissions

- Treat pregnancy or related conditions the same as it treats a temporary disability or physical condition under the same policies
- Must not adopt any policy, practice, or procedure concerning the current, past, future, or potential parental, family or marital status that treats persons differently on basis of sex
- Must not make pre-admission inquiry into marital status (including Miss/Mrs. designation)

§106.57 - Employment

- Cannot discriminate against employees/applicants for employment on basis of current, potential, or past pregnancy or related conditions
- Comparable treatment to other temporary medical conditions
- Voluntary leaves of absence*
- Access to lactation time and space

Training Requirements

Who?

- All employees;
- Investigators, decisionmakers, appellate reviewers, and anyone else responsible for implementing grievance procedures or providing or terminating supportive measures;
- Informal resolution facilitators; and
- TIX Coordinators and designees

When?

- "Promptly upon hiring" or "change in position that alters duties under Title IX;" and
- "Annually thereafter"

§106.8(d)

Training Requirements

"All employees"

- School's obligation to address sex discrimination in education program or activity
- The scope of conduct that constitutes sex discrimination, including sex-based harassment
- Notification requirements re: student pregnancy
- Notification requirements re: sex discrimination

§106.8(d)

Training Requirements

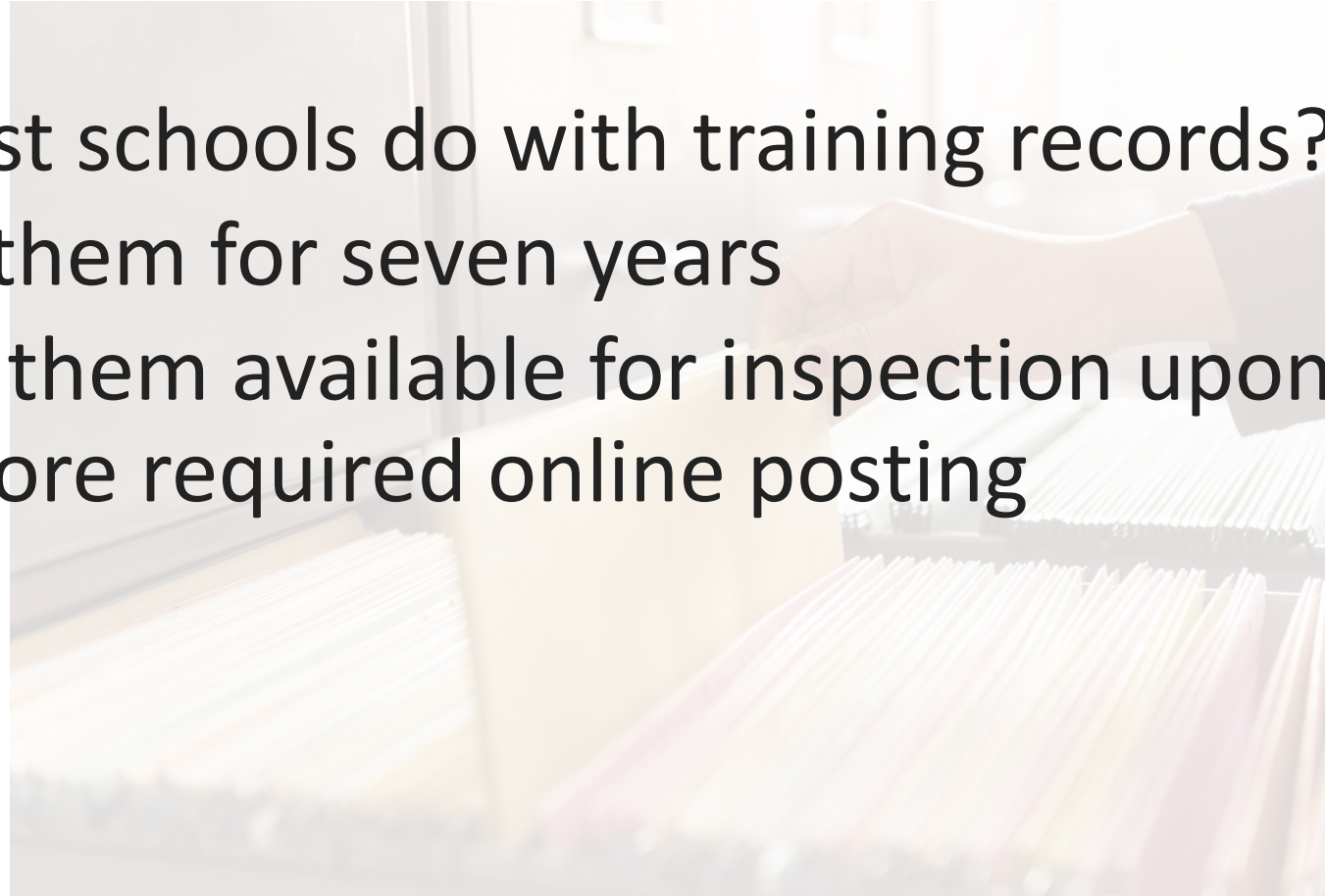
	All Employees	Grievance Process	How to Serve Impartially	Meaning & Application of Term Relevant	Informal Resolution Process	TIX Coordinator Duties & Obligations	Record Keeping Systems	Training
All Employees	X							
Anyone implementing grievance process / deciding supportive measures	X	X	X	X				
Informal Resolution Facilitators	X		X		X			
TIX Coordinators and Designees	X	X	X	X	X	X	X	X

§106.8(d)(1)-(4)

Training Requirements

What must schools do with training records?

- Keep them for seven years
- Make them available for inspection upon request - no more required online posting



§106.8(f)

Supportive Measures

"[I]ndividualized measures offered as appropriate...without unreasonably burdening a complainant or respondent, not for punitive or disciplinary reasons, and without fee or charge to the complainant or respondent to

- (1) Restore or preserve that party's access to the recipient's education program or activity ...; or
- (2) Provide supportive during the recipient's grievance procedures . . . or during the informal resolution process..."

§106.2

Supportive Measures

Factors to Consider

- Ages of the parties involved
- The nature of the allegations and their continued effect on the complainant or the respondent
- Whether the parties continue to act directly in the school's education program or activity
- Whether steps have been taken to mitigate the harm from the parties' interactions, such as implementation of a protective order

Preamble, p. 484

Supportive Measures

Supportive measures can now burden both complainants and respondents, but neither party can be unreasonably burdened

- The fact that a measure is burdensome does not determine whether it is a supportive measure or a disciplinary measure.
- The Department expects schools to engage in a fact-specific inquiry to determine whether supportive measures constitute a reasonable burden on parties.



§106.44(g)(2)

Supportive Measures

Parties must have an opportunity to challenge the supportive measures:

- Decisionmaker cannot be the same person who implemented the measures;
- The parties can seek modification or reversal of the school's decision to provide, deny, modify, or terminate supportive measures;
- If the circumstances that impact a party change materially after the appeal, the school must provide another opportunity to challenge; and
- Can only challenge supportive measures that are applicable to them.

§106.44(g)(4)

Initiating The Grievance Process

Who is a complainant?

- A student or employee who is alleged to have experienced sex discrimination; or
- Third-parties participating or attempting to participate in the school's education or program activity at the time of the alleged sex discrimination.

§106.2

Initiating the Grievance Process

2020 Regulations

- Formal Complaint
 - Signed, written, formal request



2024 Regulations

- Complaint
 - Oral or written request;
 - No magic words



§106.40; Preamble, p. 36

Initiating Grievance Process (Unwilling Complainant)

Factors to consider

Complainant's
request not to
proceed

Complainant's
reasonable
safety
concerns

Risk that
additional sex
discrimination
occurs

Severity of
alleged sex
discrimination

Age and
relationship of
parties

Scope of
alleged sex
discrimination

Availability of
evidence

Whether
school could
end sex
discrimination
within its
grievance
procedures

Initiating The Grievance Process (Unwilling Complainant)

The TIX Coordinator must determine whether the conduct as alleged

- Presents an imminent and serious threat to the health or safety of a person; or
- Prevents the school from ensuring equal access to an education program or activity.

If either are present, the TIX Coordinator may initiate a complaint.

§106.44(f)(v)(B)

If initiating, notify complainant and address reasonable safety concerns.

§106.44(f)(vi)



Questions?



The Grievance Process

The Grievance Process: Overview

§106.45	§106.46
Applies to sex discrimination complaints that are not sex-based harassment <u>and</u> sex-based harassment complaints without a student party	Applies to sex-based harassment complaints involving a student party (either complainant or respondent)
Must comply with procedural requirements of §106.45	Must comply with §106.45 <u>and</u> §106.46

Note: Grievance procedures for both sections must be in writing.

Note: If a party is a student-employee then the recipient must consider whether the party's primary relationship to the institution is to receive an education and if the alleged sex-based harassment occurred while the party was performing employment-related work.

Dismissals: §§106.45(d) and 106.46(d)

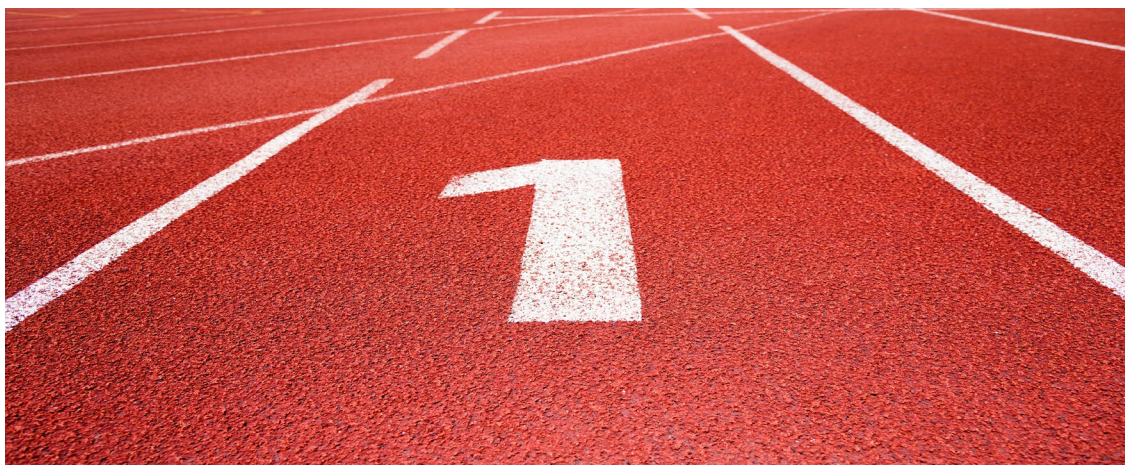
- Recipient may dismiss a complaint for sex discrimination if:
 1. Recipient is not able to identify respondent after taking reasonable steps to do so;
 2. Respondent is no longer enrolled or employed by the recipient;
 3. Complainant voluntarily withdraws any/all allegations [in writing if under §106.46(d)] and the TIXC declines to initiate themselves; or
 4. Recipient determines that even if proven, conduct is not sex discrimination
- Notice required to complainant (and respondent if already notified of allegations) re: basis for dismissal and appeal rights [in writing if under §106.46(d)]

Grievance Process §106.45: Snapshot

- Basic requirements §106.45(b)(1)-(8)
- Single investigator model okay §106.45(b)(2)
- Respondents presumed not responsible §106.45 (b)(3)
- Reasonable timeframes for major stages of the grievance procedures §106.45 (b)(4)
- Requirement to evaluate relevant evidence §106.45(b)(6)
- Notice of allegations §106.45(c)
- Dismissal of sex discrimination complaint §106.45(d)
- Provision of evidence to parties §106.45(f)(4)
- Credibility of Assessments §106.45(g)
- Standard of evidence §106.45(h)(1)
- Notice of outcome to parties §106.45(h)(2)
- Sanctions and Remedies §106.45(h)(3)
- False statements §106.45(h)(5)
- Additional provisions §106.45 (j)

The Grievance Process: §106.45(b)(2)

**The decisionmaker may be the same person as the TIXC or investigator.
Single investigator model is back to being an option.**



The Grievance Process: §106.45

General Requirements for Procedures

- When a sex discrimination complaint alleges a recipient's policy/practice discriminates on basis of sex – recipient ≠ respondent
- TIXC, investigator, and decisionmaker must be free from conflict of interest/bias
- Presumption of non-responsibility until a determination is made
- Recipient required to take reasonable steps to protect privacy of witnesses and parties, without restricting parties' ability to present evidence, speak with witnesses, consult with advisors/family/confidential resources, or otherwise prepare for grievance process

The Grievance Process: §106.45

Reasonably Prompt Timeframes

“Establish reasonably prompt timeframes for the major stages of the grievance procedures, including a process that allows for the reasonable extension of timeframes on a case-by-case basis for good cause with notice to the parties that includes the reason for the delay.”

§106.45 (b)(4)

Major Stages:

1. Evaluation/dismissal determinations
2. Investigation
3. Determination
4. Appeal (if any)

Note: Under §106.46, must provide written notice of extensions.



The Grievance Process: §106.45

Notices of Allegations

- Notices of allegations must include:
 - Recipient's grievance procedures, including §106.46-related procedures (if applicable) and informal resolution process;
 - Sufficient information to allow parties to respond, including conduct alleged and dates/times of alleged incidents;
 - Statement on prohibition of retaliation; and
 - Statement that parties are entitled to equal opportunity to access relevant, not impermissible evidence
- If investigation reveals additional allegations of sex discrimination, recipient must provide amended Notice.

§106.45(c)

The Grievance Process: §106.45

Complaint Investigation §106.45(f)

Burden on recipient –
not on the parties

Parties have equal
opportunity to present
evidence

Recipient must review
all evidence
(relevant, not
impermissible)

Recipient to provide
access to all rel.
evidence or description
of evidence to parties

Parties must have
reasonable
opportunity to respond
to evidence

Recipient must take
steps to prevent
unauthorized
disclosure

The Grievance Process: §106.45

Objective Evaluation of All Relevant Evidence §106.45(b)(6) and (b)(7)

- Require objective evaluation of all relevant evidence – both inculpatory and exculpatory.
 - Relevant: related to the allegations of sex discrimination; "evidence is relevant when it may aid a decisionmaker in determining whether the sex discrimination occurred" §106.2.
- Exclude the following types of evidence:
 - Evidence protected by privilege (unless privilege waived)
 - Medical records unless party/witness provides written consent to their use
 - Information re: complainant's sexual interests or prior sexual conduct, unless used to prove (1) someone other than respondent committed the alleged conduct, or (2) offered to prove consent by showing prior sexual conduct with the respondent

The Grievance Process: §106.45

Questioning and Credibility Assessment §106.45 (g)

"A recipient must provide a process that enables the decisionmaker to adequately assess the credibility of the parties and witnesses to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination."

*This will be
much more
involved under
§106.46.
Stay tuned!*

The Grievance Process: §106.45

Standard of Proof, Notice of Outcome



- Notify parties in writing of the determination, rationale for determination, and permissible bases for appeal (if applicable).
- If determination is sex discrimination occurred, TIXC is responsible for implementing remedies, coordinating disciplinary sanctions on respondent, and notifying complainant of disciplinary sanctions.
- False statement: recipient **cannot** discipline any party/witness for making a false statement based solely on the determination of whether sex discrimination occurred.

§106.45(c)

The Grievance Process: §106.45

Appeals

- Recipient must provide appeal processes:
 - For dismissal of the complaint; and
 - That are the same as it offers in all comparable proceedings, if any, including proceedings related to discrimination complaints.

§106.45(i)

The Grievance Process: §106.46

Reminders:

- §106.46 applies to sex-based harassment complaints with a student complainant and/or student respondent
- §106.46 requires all the procedures of §106.45, plus what is covered in this section.

The Grievance Process: §106.46

Notice of Allegations

- Written notice of allegations must include:
 - Everything required under §106.45(c); and
 - Respondent is presumed not responsible;
 - Parties may have advisor of choice who may be an attorney;
 - Parties are entitled to equal opportunity to access relevant, not impermissible evidence or investigative report; and
 - If applicable, recipient's code of conduct prohibits knowingly making false statements or submitting false information during grievance procedure.
- If investigation reveals additional allegations of sex-based harassment, recipient must provide amended Notice.



§106.46(c)

The Grievance Process: §106.46

Complaint Investigation

- Everything in §106.45(f) and the following:
 - Written notice to parties of date/time/location/participants/purpose of all meetings with sufficient time for party to prepare;
 - Provide both parties same opportunities to be accompanied by advisor and apply same restrictions to advisors' participation to both parties;
 - Provide both parties same opportunities to be accompanied by someone other than advisor (i.e., case manager, support person) during any meeting;
 - Recipient has discretion re: whether parties are permitted to present expert witnesses;
 - Must allow for reasonable extension of timeframes for good cause (with written notice to parties re: delays); AND ...

§106.46(e)

The Grievance Process: §106.46

Complaint Investigation, cont'd

- Equal opportunity to access relevant, not impermissible evidence OR written investigative report;
- Reasonable opportunity to review and respond to the evidence/investigative report prior to the determination; and
 - If recipient conducts live hearings, then review must be before hearing, but response could be prior, during, or both prior and during hearing
- Reasonable steps to prevent and address parties' and advisors' unauthorized disclosure of information and evidence obtained solely through grievance process.

§106.46(e)

The Grievance Process: §106.46

Live Hearing is not required.



The Grievance Process: §106.46

Questioning & Credibility Assessments §106.46(f)

OPTION 1: NO LIVE HEARING

- Allow investigator/decisionmaker to ask questions during individual meetings with party/witness;
- Allow each party to propose questions they want asked of other party/witness;
- Have those questions asked by investigator/decisionmaker during individual meetings and follow-up meetings; and
- Provide each party with an audio/audiovisual recording or transcript with enough time for party to propose more follow-up questions.

OPTION 2: LIVE HEARING

- Allow each party to propose questions they want asked of other party/witness and have decisionmaker ask the relevant questions; OR
- Allow each party's advisor to ask party/witness relevant questions.
 - If a party does not have an advisor, the recipient must provide an advisor without charge for purpose of questioning.
 - Recipient-appointed advisor cannot be a confidential employee.

The Grievance Process: §106.46

Decisionmaker Evaluating Questions §106.46(f)(3)

- Decisionmaker must determine whether a proposed question is relevant and not impermissible before question is posed and must explain any decision to exclude.
 - Unclear or harassing questions are not permitted, but decisionmaker must give party an opportunity to clarify/revise question.
 - Recipient may adopt reasonable rules of decorum.
-

Refusal to Respond to Questions §106.46(f)(4)

- Decisionmaker may choose to place less/no weight upon statements by a party/witness who refuses to respond to questions deemed relevant, not impermissible.
- Decisionmaker may not draw inference that sex-based harassment occurred solely on party/witness's refusal to respond.

The Grievance Process: §106.46

Written Determination

- Determination must be written and provided to parties simultaneously.
- Written determination must include:
 - Description of alleged sex-based harassment;
 - Information about policies and procedures used;
 - Decisionmaker's evaluation of relevant, not impermissible evidence and determination whether sex-based harassment occurred;
 - Sanctions and remedies, if applicable; and
 - Information on appeals process.

§106.46(h)

The Grievance Process: §106.46

Appeals

- Appeals process must be offered on the following bases:
 - Procedural irregularity that would change the outcome;
 - New evidence that would change the outcome and was not reasonably available when determination/dismissal was made; and
 - TIXC, investigator, or decisionmaker had a conflict of interest or bias.
- Additional bases for appeals can be offered equally to all parties.
- Parties must be provided:
 - Notice of appeal;
 - Reasonable opportunity to make a statement in support or opposing the appeal; and
 - Notice of the result of the appeal and the rationale for the result.

§106.46(i)

Informal Resolution: §106.44(k)

“[A] recipient has discretion to determine whether it is appropriate to offer an informal resolution process when it receives information about conduct that reasonably may constitute sex discrimination under Title IX or this part when a complaint of sex discrimination is made and may decline to offer informal resolution despite one or more of the parties’ wishes.”

§106.44(k)(ii)

Informal Resolution: §106.44(k)

Most significant changes:

- Formal complaint is no longer required;
- Prohibition against informal resolution by employee against a student is eliminated; and
- Additional notice requirements regarding potential outcomes, resolution agreement binding only on parties, and record-keeping.

§106.44(k)



Miscellaneous

Retaliation (§106.71)



Retaliation

- Schools must prohibit retaliation, **including peer retaliation**, and must respond to conduct that may reasonably constitute retaliation **using the same procedures it uses for other forms of sex discrimination**.
 - The identity of any individual who has made a report or complaint is generally confidential.
- **Who is protected?**
 - Any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing related to the Title IX regulations.

Retaliation

- **What constitutes retaliation?**
 - Intimidation
 - Threats
 - Coercion
 - Discrimination
 - Charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment.
- **The exercise of rights protected under the First Amendment and charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a Title IX proceeding do NOT constitute retaliation.**

Preemption

- Title IX preempts State or local laws that are in conflict with the regulations
- A State law that requires discrimination on the basis of sexual orientation or gender identity would "generally" be preempted by Title IX
- No preemption of federal Due Process or First Amendment rights
- But State laws protecting free speech are preempted to extent they conflict with the regulations



Questions?

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