

# Title IX Regulations

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## Who Monitors Title IX Compliance and Why?

- Department of Education, Office for Civil Rights
- The Office for Civil Rights enforces several Federal civil rights laws that prohibit discrimination in programs or activities that receive federal financial assistance from the Department of Education.



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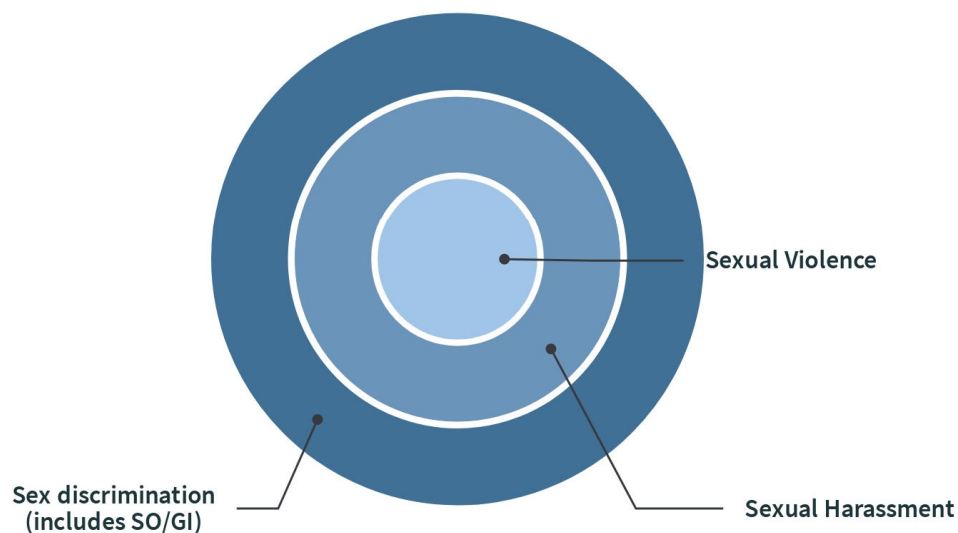
## Title IX- the law

Title IX of the Education Amendments Act of 1972

- 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.

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## Pre-Trump



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## Title IX- some history...and some that remains

- 1998/1999 Gebser and Davis- deliberate indifference
- 2001- Sexual Harassment guidance
- 2007- Dear Colleague on Single Sex Programs
- 2010- Dear Colleague on Harassment and Bullying
- 2011- Dear Colleague Letter on Sexual Harassment (rescinded)
- 2014- Q&A (rescinded)

## Title IX background, continued

- 2015- Dear Colleague Letter on Title IX Coordinators
- 2016- Dear Colleague Letter on Transgender Students (Rescinded)
- 2018- Revised case processing manual
- 2018- Proposed new regulations Trump administration
- May 6, 2020- Final regulations Trump administration
- July 12, 2022- Proposed new regulations Biden administration
- October 2023....*Final regulations Biden administration??*

## Title IX- what it covers

What does the school pay for or enable?

- employees, students
- employment, benefits, opportunities
- the ability to engage in what the school has to offer
- athletics
- academics
- extra-curriculars
- on-campus, off-campus in certain situations
- discipline

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# 2020 Title IX Regulations

PRESS ROOM / SENIOR STAFF

## Betsy DeVos, Secretary of Education—Biography

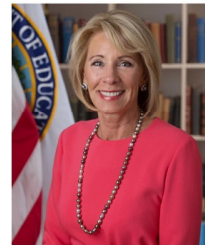
Betsy DeVos serves as the 11<sup>th</sup> U.S. Secretary of Education. She was confirmed by the U.S. Senate on February 7, 2017 after being nominated by President Donald J. Trump.

Secretary DeVos has been involved in education policy for nearly three decades as an advocate for children and a voice for parents. She is especially passionate about reforms that help underserved children gain access to a quality education.

DeVos' interest in education was sparked at an early age by her mother, a public school teacher. It grew when she sent her own children to school and was confronted with the reality that not every child in America is granted an equal opportunity to receive a great education. DeVos saw firsthand the work leaders in her hometown were doing to increase educational opportunities for students and choices for parents, and she has been involved in the fight to provide better educational options across the nation ever since.

For 15 years, DeVos served as an in-school mentor for at-risk children in the Grand Rapids (Michigan) Public Schools. Her interactions there with students, families and teachers, according to DeVos, "changed my life and my perspective about education forever."

A leader in the movement to empower parents, DeVos has worked to support the creation of new educational choices for students in 25 states and the District of Columbia.



[Print photos](#)

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**Know Your IX** 10.6K Tweets Following

**Know Your IX** @knowyourIX · May 18  
About a third of survivors are pushed out of school in the aftermath of violence. DeVos' rule will exacerbate dropout rates and reduce reporting.

Survivors are already experiencing an unacceptable status quo that will be made far worse by DeVos' changes to Title IX:

**Alexandra Brodsky** @azbrodsky · Apr 14  
Few things give me a headache like anti-Title IX advocates claiming DeVos's new rules are necessary because the status quo for \*survivors\* is unacceptable. Let's be clear: Far from solving existing problems, the new Title IX regulations will \*exacerbate\* them, and severely.  
[Show this thread](#)

1 26 45

**Know Your IX** @knowyourIX · May 15  
DeVos' Title IX rule holds survivors of sexual violence to a higher standard than other forms of harassment and discrimination.

That's not unintentional — that's sex discrimination.



**Nine For All** 5,511 Tweets Following

Nine For All Retweeted  
**Suzanne** @suzeq479 · May 8  
[#ThankYouBetsy](#) and the [@usedgov](#) for restoring [#DueProcess](#) on our college campuses. It has been stripped away since the 2011 DCL. No one in this country should be presumed guilty upon accusation.

**Secretary Betsy DeVos** @BetsyDeVosED · May 7  
Our new #TitleX reg codifies into law sexual harassment as the discrimination it is. Before now, it was only addressed through Dear Colleague letters. We owe students more than letters and good intentions. We owe them accountability through the law.



0:19 8K Views 3 9

Nine For All Retweeted  
**Heather Mac Donald** @HMDatMI · May 7  
Joined [@TuckerCarlson](#) last night to discuss Biden's history of stripping due process rights from accused students. What would happen if he were judged by a campus tribunal?

Watch:

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## DOE's 2020 “Summary of Major Provisions of This Regulatory Action”

- 1 Define the conduct constituting sexual harassment for Title IX purposes
- 2 Specify the conditions that activate a recipient's obligation to respond to allegations of sexual harassment and impose a general standard for the sufficiency of the schools response
- 3 Specify situations that require a school to initiate its procedures
- 4 Establish procedural safeguards that must be incorporated into a recipient's grievance procedures to ensure a fair and reliable factual determination when a school investigates and adjudicates complaints

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## What the Regulations Mean for Institutions

- Due process focus  
“Presumption of innocence”
- Notice notice notice notice notice notice
- Narrow and focused involvement by OCR/DOE, *but think Clery a bit here....*
- More seeming legality to proceedings
- Trained process participants
- Advisors required for hearing
- More time for evidence review (10 days) and report review (10 days)
- Informal option
- Mandatory reporters changed
- Documentation & record-keeping
- More information shared

## Scope of Title IX is limited

- Applies only to exclusion from participation, denial of benefits, or discrimination based on the basis of sex occurring against a person in the United States (106.8 (d))
- Applies only to conduct within the school’s education program or activity (106.30, 106.44(a))

Clery still applies. An institution's other policies still apply.

## 106.30 Definitions

### Sexual Harassment

- 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 on the basis of sex that is so severe, pervasive, AND objectively offensive that it effectively denies a person equal access to the recipient's education program or activity
- 3 Sexual assault, as defined in 20 USC 1092(f)(6)(A)(v), dating violence as defined in 34 USC 12291(a)(10), domestic violence as defined in 34 USC 12291(a)(8) or stalking as defined in 34 USC 12291(a)(30)

## 106.30 Definitions- FORMAL COMPLAINT

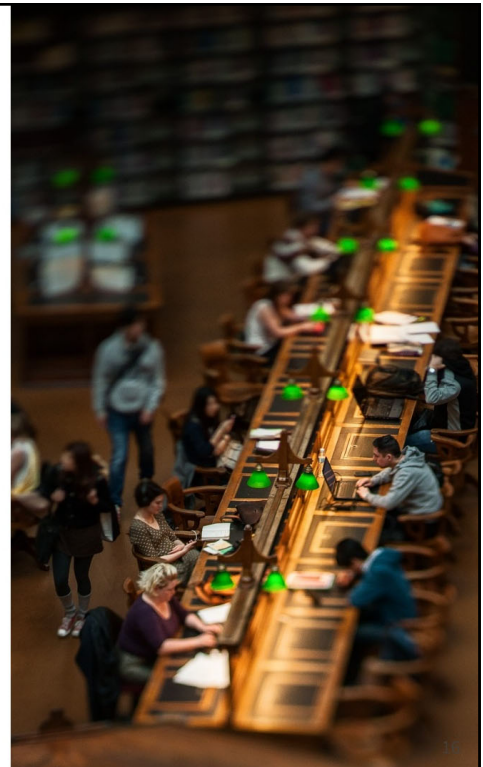
- 1 alleging sexual harassment against a respondent,
- 2 about conduct within its educational program or activity,
- 3 requesting initiation of the school's grievance procedures, and
- 4 filed by a complainant at a time when they are participating or attempting to participate in the school's education program or activity.

## Further Limits to the Scope of School's Responsibility

- **Actual knowledge** means notice of SH or allegations of SH to a recipient TIXC or any official of the recipient who has authority to institute corrective measures on behalf of the recipient.
- The mere ability or obligation to report sexual harassment does not qualify an employee, even if that employee is an official, as one who has authority to institute corrective measures on behalf of the school.

## Dismissal

- **MUST** dismiss, as Title IX complaints, complaints that do not satisfy requirements of “Formal Complaint”
- **MAY** dismiss for other reasons such as request from complainant, respondent no longer at the school, or no ability to gather the information necessary, etc.
- **NB:** Appeal rights attach, however.





## 106.30 Definitions: Supportive Measures- TIXC responsible

Document basis for decision (that meets these elements) and add it to the record-keeping system

- **Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to C and R before and after the filing of a formal complaint *or where no complaint has been filed***
- **Such measures are designed to (1) restore or preserve access to the recipient's education program or activity, without unreasonably burdening the other party, (2) protect the safety of all parties and the recipient's educational environment and (3) deter sexual harassment**

## No formal complaint? Just a report?

- **Recipient must offer and implement supportive measures designed to effectively restore or preserve the complainant's access to the recipients educational program or activity.**
- **At the same time it offers supportive measures, Recipient must inform complainant of the right to file a formal complaint at that time or a later date**

## 106.45: Grievance Procedures MUST:

- **Treat complainants and respondents equitably**

Equitable resolution for C must include remedies (where responsibility is found) that must be designed to restore or preserve access to the school's program or activity

Equitable resolution for R must include due process protections before any disciplinary sanctions are imposed

- **Require objective evaluation of all relevant evidence**

Includes both in/ex-culpatory evidence

Credibility determinations may not be based on someone's status as R or C

- **Coordinators, investigators, and decision makers may not have a conflict of interest or bias**

Must receive training

Training materials must not promote stereotypes and must promote impartial investigations and adjudications

- **Include presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of grievance process**

## 106.45: Grievance Procedures & Time frames MUST:

- **Include reasonably prompt time frames for conclusion of the grievance process, including for filing and resolving appeals, if any, and a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to C & R of the delay or extension and the reasons why.**

Good cause includes considerations such as the absence of the parties or witnesses, concurrent law enforcement activity, or the need for language assistance or accommodation of disabilities



## 106.45 Grievance Procedures- Notice of allegations

- Upon receipt of a *formal complaint*, school must provide the following written notice to the parties who are known:
  - A) Notice of the school's grievance procedures
  - B) Notice of the allegations constituting a potential violation of the school's code of conduct
    - including sufficient details known at the time and with sufficient time to prepare a response before any initial interview
    - SEE THIS SECTION FOR *LAUNDRY LIST* OF WHAT MUST BE IN THE NOTICE
  - Ongoing notice requirement when new allegations added to investigation

## Grievance Procedures, contd

- Provide party whose participation is invited or expected with written notice of date, time, location, participants, purpose of all meetings, with sufficient time for party to prepare to participate.
- Must provide live hearing
  - Each party must be able to ask the other party and any witnesses all relevant questions, including those challenging credibility
  - Such cross examination must be conducted by the party's advisor of choice
- Schools must provide advisor to those who do not have one.

## Evidence and Report Review add 20+ business days

- Prior to completion of the report, the recipient must send the parties the evidence that is subject to review and inspection. Parties shall have at least **TEN BUSINESS DAYS** to provide a written response which the investigator shall consider prior to completion of the written report.
- all evidence must be available at hearing so that the parties can refer to it. (what if school and parties disagree whether something is relevant?)
- Create an investigative report that **FAIRLY** summarizes **RELEVANT EVIDENCE** and, **AT LEAST TEN BUSINESS DAYS** prior to a hearing, provide a copy of the report to the parties for their review and written response.

## Advisor requirement

- Advisor of choice
- Schools must provide in certain circumstances
- Cross examination only
- “Only relevant cross-examination and other questions may be asked of a party or witness.”

## Title IX Quiz: relevant or permissible?

- Questions and evidence about complainant's sexual predisposition or prior sexual behavior
- Questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege
- Expert witnesses

## Hearing- Live with Cross Examination.

- The decision-maker must explain to the party's advisor asking questions any decision to exclude questions as not-relevant (include relevant).
- Provide both parties equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including evidence that the recipient *does not intend to rely upon in reaching a determination regarding responsibility.*

## Written Decision Must Include...

- Identification of the code alleged to have been violated
- Description of the procedural steps taken from receipt of the complaint through determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held
- Findings of fact used to support the determination
- Conclusions regarding the application of the code of conduct to the facts.
- Statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility.
- Any sanctions the recipient imposes on the respondent, and any remedies provided by the recipient to the complainant designed to restore or preserve access to the program or activity.
- The procedures and bases for an appeal.

## Appeal grounds

- 1 **Procedural irregularity**
- 2 **New evidence that was not reasonably available at the time of determination regarding responsibility or dismissal was made, that would affect the outcome of the matter**
- 3 **The Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias for or against parties generally or the individual party that affected the outcome of the matter**
- 4 **Other bases determined by the school, provided offered to both parties**

## Informal Process

- **At ANY TIME prior to reaching a determination**  
May include mediation  
That does not involve full investigation and adjudication
- **Must provide parties written notice disclosing:**  
Allegations  
Requirements of the informal resolution process  
incl. the circumstances under which it precludes parties from resuming a formal complaint arising from the same allegations
- **Must inform parties of the consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared**
- **Obtain parties' voluntary written consent**

## Record-keeping

For a period of SEVEN YEARS

- **Each sexual harassment investigation (including determination regarding responsibility, discipline, remedies, etc. )**
- **Any appeal and result therefrom**
- **Informal resolutions**
- **All materials used to train coordinators, investigators, and decision-makers with regard to sexual harassment.**



## Additional Record-keeping- For Seven years

- **Records of any actions, including any supportive measures, taken in response to a REPORT or FORMAL COMPLAINT of sexual harassment**

In each instance, school must document the basis for its conclusion that its response was not clearly unreasonable

Must document that it has taken measures designed to restore or preserve access to the recipient's educational program or activity

The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.

## Training. 106.45

- **All key actors must receive specific training on skills and abilities required by the grievance procedures.**
- **Training must be put on website.**



**RELEVANCE. BIAS. PROCESS.**



## Title IX Still Applies to Other Forms of Sex Discrimination

- Athletics
- Pregnancy and parenting
- Employment, etc.

## What about behavior that falls outside of Title IX?



## But what about sex discrimination?

# Impact of Drugs and Alcohol

## Research Studies:

- About half of sexual assaults on college campuses involve a situation in which the perpetrator, the victim, or both were consuming alcohol.
- Sexual assaults are more likely to occur in setting where alcohol was consumed (parties, bars).

## Addressing the Myths:

- Consumption of drugs and alcohol does not mean that a person is at fault for being assaulted
- Alcohol is not an excuse for behavior
- "Because victimization is something that happens to a person, rather than something that one does, [a person's] drinking cannot be said to directly cause victimization."

# Impact of Drugs and Alcohol

## Studies Indicate that:

- Alcohol's motor impairments reduce someone's ability to resist effectively
- Alcohol's cognitive impairments reduce the ability of someone to evaluate risk and perceive someone's cues
- Alcohol consumption is associated with aggression and loss of inhibition.



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## RWU's Definition of Incapacitation

**Incapacitation** is a state where an individual is temporarily or permanently impaired to the extent where that person can no longer make a rational and informed decision to consent to sexual activity. Incapacitation may be caused by mental or physical disability, or when a person has consumed alcohol or other drugs, including prescribed medication. Individuals who are asleep or unconscious are incapacitated. A person who does not comprehend the “who, what, when, where, why or how” of a sexual interaction may be incapacitated.

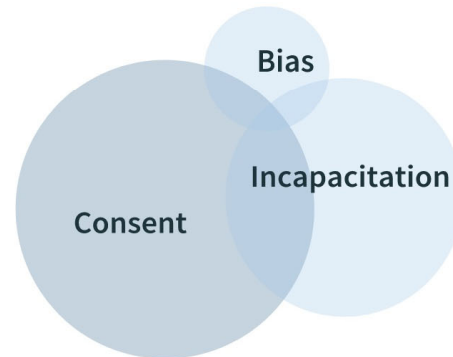
Indicators of alcohol-related incapacitation may include, but are not limited to, stumbling or shaky equilibrium, vomiting, slurred speech, bloodshot eyes, smell of alcohol, outrageous or unusual behavior, unconsciousness (for short or long periods of time), elevated blood alcohol level, sleeping, blackout, or loss of memory.

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## Consent & Incapacitation



Where is the intersection and what does it mean?  
How do bias and assumptions about alcohol consumption impact an interaction between parties as well as the grievance process?



## Roles- How do Law & Policy Affect Each Role?

Advisor

Investigator

Hearing Officer

Informal Resolution Facilitator

## 2023 Biden Regulations And now for something different...

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### DOE's intent with the proposed regulations

Require recipients to adopt grievance procedures that provide for the prompt and equitable resolution of complaints of sex discrimination and take other necessary steps to provide an educational environment free from sex discrimination;

Clarify the Department's view of the scope of Title IX's prohibition on sex discrimination, including related to a hostile environment under the recipient's education program or activity, as well as discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity

Clarify a recipient's obligations to students and employees who are pregnant or experiencing pregnancy-related conditions.

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## DOE Summary of Major Provisions

**With regard to sex-based harassment** (as defined in proposed § 106.2), the proposed regulations would:

Define sex-based harassment to include but not be limited to sexual harassment;

Provide and clarify, as appropriate, definitions of various terms related to a recipient's obligations to address sex discrimination, including sex-based harassment;

Clarify how a recipient is required to take action to end any sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effects; and

Clarify a recipient's obligations related to the grievance procedures and other necessary steps when it receives a complaint of sex discrimination.

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## DOE Summary of Major Provisions cont'd

**With regard to discrimination against individuals who are pregnant or parenting**, the proposed regulations would:

Define the term “pregnancy or related conditions” and the term “parental status,” and prohibit discrimination against students and applicants for admission or employment on the basis of current, potential, or past pregnancy or related conditions; and

Clarify a recipient's obligations to students and employees who are pregnant or experiencing related conditions. *Leave of absence, lactation rooms.*

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## DOE Summary of Major Provisions cont'd

*Articulate the Department's understanding that sex discrimination includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity;*

Clarify and streamline administrative requirements with respect to designating a Title IX Coordinator, disseminating a nondiscrimination notice, adopting grievance procedures, and recordkeeping;

Specify that a recipient must train a range of relevant persons on the recipient's obligations under Title IX;

Clarify that, unless otherwise provided by Title IX or the regulations, a recipient must not carry out any otherwise permissible different treatment or separation on the basis of sex in a way that would cause more than de minimis harm, including by adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with their gender identity; and

Clarify a recipient's obligation to address retaliation.

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## Let's Talk about Hostile Environment Sexual Harassment

**Unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from the recipient's education program or activity (i.e., creates a hostile environment).**

Whether a hostile environment has been created is a fact specific inquiry that includes consideration of the following:

(i) The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity; (ii) The type, frequency, and duration of the conduct; (iii) The parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the alleged unwelcome conduct; (iv) The location of the conduct, the context in which the conduct occurred, and the control the recipient has over the respondent; and (v) Other sex-based harassment in the recipient's education program or activity.

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## When School Response is Implicated

- Sex discrimination- *new!!*
- Sexual Harassment
- Conduct or IMPACT within a program or activity (*within an institution's disciplinary authority*)
  - So, even if the act occurred outside program or activity....if the impact was within the program or activity
- If the complainant was admitted or was seeking to participate in a program or activity
- Broader categories of notice requiring response- change from Trump "Actual Notice"
  - Schools have two options- notify the TIXC or provide TIXC contact information to individual
- Pregnant students

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## Complaints

- Can be oral or written
- Current community member or someone trying to participate in P&A
- Unwilling complainant? Factors to consider....
- Offer supportive measures
  - They may now burden the respondent
  - Must offer appeal to respondent of supportive measures
- Informal Resolution changes- including no formal complaint required!

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## Grievance Procedure

- **Presumption of not responsible REMAINS**
- **Single investigator model is a-okay**
- **Decision-maker can be the Title IX Coordinator or investigator**
- **Once grievance procedures are commenced, parties must be provided notice**
  - Known information, prohibition against retaliation, and updated notices

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## Grievance Procedure cont.

- **PERMISSIVE, not mandatory, DISMISSALS:**
  - Respondent cannot be identified or is not participating in program or activity.
  - Complaint is withdrawn and without the allegations, even if proven, it would not constitute sex discrimination.
  - The alleged conduct, even if proven, would not constitute sex discrimination.
- **Credibility assessments**
- **Notice of outcome**
- **Title IX Coordinator must provide remedies and take steps to prevent recurrence**

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## What about Hearings?

- Not required!
- But if they happen, cross remains
- Relevancy determinations remain
- Credibility- if in dispute and relevant to evaluating alleged behavior
- *If a party does not respond to questions related to their credibility, the decisionmaker must not rely on any statement of that party that supports that party's position. The decisionmaker must not draw an inference about whether sex-based harassment occurred based solely on a party's or witness's refusal to respond questions related to their credibility.*
- Rules of Decorum

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## Relevant

**Relevant** means related to the allegations of sex discrimination under investigation as part of the grievance procedures under § 106.45, and if applicable § 106.46.

Questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred, and evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred.

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## Retaliation

Retaliation means intimidation, threats, coercion, or discrimination against any person by a student, employee, person authorized by the recipient to provide aid, benefit, or service under the recipient's education program or activity, or recipient for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the person has reported information, made a complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part, including in an informal resolution process under § 106.44(k), in grievance procedures under § 106.45, and if applicable § 106.46, and in any other appropriate steps taken by a recipient in response to sex discrimination under § 106.44(f)(6).

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## Training

- Yes! Still required.
- On school obligations, school policy and procedure- all employees
- Relevance
- Conflicts of interest, and bias
- Then there is additional role-specific training too.

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## Pregnancy

Pregnancy or related conditions means:

- (1) Pregnancy, childbirth, termination of pregnancy, or lactation;
- (2) Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation;  
or
- (3) Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or their related medical conditions.

*Let's talk lactation spaces, leaves of absences, accommodations.*

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## What's going on with Athletics?

**Proposed language amending Title IX:**

If a recipient adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity, such criteria must, for each sport, level of competition, and grade or education level:

- (i) be substantially related to the achievement of an important educational objective, and
- (ii) minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.

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