

Regulation

2024 Title IX Final Rule Webinar

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Practice Group**

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Disclaimer

This presentation shall not constitute legal advice, nor create an attorney-client relationship.


This presentation is for informational purposes only.

If you have any specific legal questions or require legal advice for specific situations, please contact your institutional counsel, campus counsel, or outside counsel.





Roadmap

- 
- Implementation Date
 - Definitions – Sex-Based Harassment
 - Designations and Institutional Obligations
 - Including Training Requirements
 - Scope of Sex Discrimination
 - Application/Jurisdiction
 - Institutional Response
 - Grievance Procedures
 - Retaliation
 - Employees
 - Pregnancy or related conditions

Implementation Date for Title IX Final Regulations

- New rules are in effect – **August 1st, 2024**
- Individuals do not need to be trained by 8/1, it needs to be completed at least within a year*
- 2020 regulations are still in effect until this date
- Misconduct reported to have taken place prior to 8/1/24 *will still be adjudicated under the 2020 rules*
- Current training requirements for 2020 rules are still in effect



106.2 Definitions

First Impressions:

- All definitions moved and now apply to sex discrimination, not just sex-based harassment
- More comprehensive definitions
- Definition for “relevant”
- Major changes to sex-based harassment standards



Definitions - Sex-Based Harassment

Sex-based harassment prohibited is a form of sex discrimination, and means sexual harassment and other harassment on the basis of sex, including on the bases described in § 106.10 (sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation and gender identity), that is:

- (1) Quid pro quo harassment
- (2) Hostile environment harassment
- (3) Specific Offenses
 - (i) Sexual Assault
 - (ii) Dating Violence
 - (iii) Domestic Violence
 - (iv) Stalking

Dictionary

Sex-Based Harassment: Hostile Environment

Unwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the institution'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:

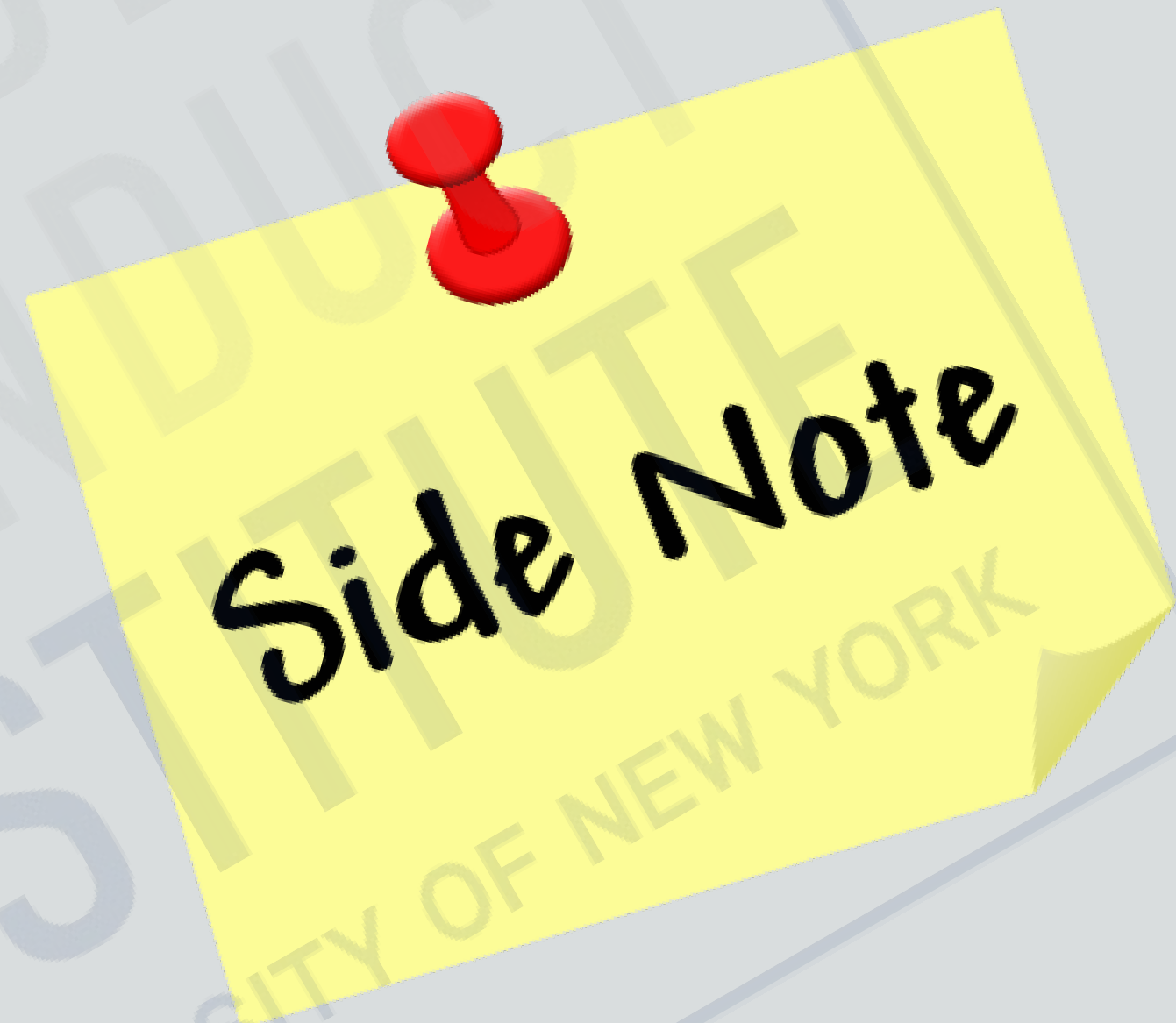
1. The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;
2. The type, frequency, and duration of the conduct;
3. The parties' ages, roles within the institution's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct;
4. The location of the conduct and the context in which the conduct occurred; and
5. Other sex-based harassment in the institution's education program or activity.



Note on Consent: Definition

ED will not require an institution to adopt a particular definition of consent, where that term is applicable with respect to sex-based harassment.

For New York institutions, must adopt the definition of affirmative consent under New York Education Law Art. 129-B.



Complaint

Complaint means an oral or written request to the institution that objectively can be understood as a request for the institution to investigate and make a determination about alleged discrimination under Title IX or this part.

- notable change from the 2020 regulations, which required a written and signed complaint to initiate the grievance procedure.



Complainant

A student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX or this part; or

A person other than a student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX or this part and who was participating or attempting to participate in the institution's education program or activity at the time of the alleged sex discrimination.



Pregnancy or Related Conditions

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 related medical conditions.



Relevant

- Related to the allegations of sex discrimination under investigation as part of the grievance procedures.
- 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.



Supportive Measures

Supportive measures means individualized measures offered as appropriate, as reasonably available, 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 institution's education program or activity, including measures that are designed to protect the safety of the parties or the institution's educational environment; or
2. Provide support during the institution's grievance procedures, or during the informal resolution process, if applicable.

106.8 – Designations and Institutional Obligations

01

Designation of Title IX Coordinator

02

Nondiscrimination Policy

03

Grievance Procedures

04

Notice of Nondiscrimination

05

Training

06

Students with Disabilities

07

Recordkeeping



Designation of Title IX Coordinator

Each institution must have at least one Title IX Coordinator.

- Institutions may designate more than one Title IX Coordinator/delegate responsibilities, but the institution must have one of its Title IX Coordinators to retain “ultimate oversight” and “ensure the recipient’s consistent compliance” with Title IX.
- “Oversight” does not mean the Title IX Coordinator needs to be the others’ supervisor, but it does mean that a single individual is vested with the responsibility for ensuring an institution's consistent compliance with its responsibilities under Title IX.
- The institution retains the ultimate responsibility for complying with Title IX.



Nondiscrimination Policy

Each institution must adopt, publish, and implement a policy stating that the institution does not discriminate on the basis of sex and prohibits sex discrimination in any education program or activity that it operates, as required by Title IX, including in admission and employment.



Grievance Procedures

An institution must adopt, publish, and implement grievance procedures consistent with the requirements of § 106.45 and § 106.46, that provide for the prompt and equitable resolution of complaints made by students, employees, or other individuals who are participating or attempting to participate in the institution's education program or activity, or by the Title IX Coordinator, alleging any action that would be prohibited by Title IX.

- **Note:** We will talk about the substance of the procedure later!

Policy AV

Procedure ST



Notice of Nondiscrimination

An institution must provide a notice of nondiscrimination to students (or authorized legal representative), employees, applicants for admission and employment, and all unions and professional organizations holding collective bargaining or professional agreements with the institution.



Notice of Nondiscrimination Content

The notice of nondiscrimination **must** contain the following five elements:

1. A statement that the institution does not discriminate on the basis of sex and prohibits sex discrimination in any education program or activity that it operates, as required by Title IX and this part, including in admission and employment;
2. A statement that any questions about the application of Title IX to the institution may be referred to the recipient's Title IX Coordinator, the Office for Civil Rights, or both;
3. The name or title, office address, email address, and telephone number of the institution's Title IX Coordinator;
4. How to locate the institution's nondiscrimination policy and the institution's grievance procedures, and
5. How to report information about conduct that may constitute sex discrimination under Title IX; and how to make a complaint of sex discrimination.



Publication of Notice of Nondiscrimination

Each institution must prominently include its notice of nondiscrimination on its website and in each handbook, catalog, announcement, bulletin, and application form that it makes available to persons entitled to notice (who I discussed two slides prior) or which are otherwise used in connection with the recruitment of students or employees.

If necessary due to the format or size of any publication, an institution may instead include in those publications a statement that the recipient prohibits sex discrimination in any education program or activity that it operates and that individuals may report concerns or questions to the Title IX Coordinator, and provide the location of the notice on the institution's website.

An institution must not use or distribute a publication stating that the recipient treats applicants, students, or employees differently on the basis of sex, except as such treatment is permitted by Title IX.



Annual Training Requirements

Four subcategories

These trainings must be received promptly upon hiring or change of position, especially if the change of position alters their duties under Title IX or this part and annually thereafter. It must also not rely on sex stereotypes.

01

All employees

02

Investigators, decision makers, and other persons responsible for implementation of grievance procedures OR have authority to modify or terminate supportive measures under §106.44(g)(4)

03

Facilitators of informal resolution process

04

Title IX Coordinator and designees



106.8(d)(1) - Annual Training: All Employees

All employees **MUST** be trained on:

- Institution's obligation to address sex discrimination in its education program of activity;
- Scope of conduct that constitutes sex discrimination under Title IX and this part, including the definition of sex-based harassment ; and
- All applicable notification and information requirements for:
 - Pregnancy and related conditions –responsibility to provide Title IX Coordinator contact and that the Title IX Coordinator can coordinate specific actions to prevent sex discrimination and ensure the student's equal access to the education program or activity
 - Notifying the Title IX Coordinator when the employee has information about conduct that may reasonably constitute sex discrimination under Title IX OR provide the contact information of the Title IX Coordinator and information about how to make a complaint of covered sex discrimination



106.8(d)(2) - Annual Training: Investigators, decisionmakers, etc.

In addition to the ALL employee requirements, all investigators, decisionmakers, and persons responsible for implementing the institution's grievance procedures or have the authority to modify or terminate supportive measures must be trained in:

- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias and
- The meaning and application of the term “relevant” in relation to questions and evidence



106.8(d)(3)

- Annual Training: Facilitators of Informal Resolution

In addition to the training requirements of the "all employees" section, **individuals facilitating an informal resolution process under § 106.44(k) must be trained on:**

- the rules and practices associated with the recipient's informal resolution process and on how to serve impartially, including by avoiding conflicts of interest and bias.



106.8(d)(4) - Annual Training: Title IX Coordinator and designees

In addition to all other training requirements detailed in the in the slides previous, **Title IX Coordinators and their designees MUST be trained on:**

Their specific duties and responsibilities including:

- Coordinate compliance with Title IX
- Take prompt and effective action to end any sex discrimination, prevent its recurrence and remedy its effects
- Equitable treatment
- Supportive measures
- Record keeping
- and any other training necessary to coordinate the recipient's compliance with Title IX.

Students With Disabilities

- If a complainant or respondent is a postsecondary student with a disability, the Title IX Coordinator may consult, with the individual or office that the institution has designated to provide support to students with disabilities to determine how to comply with Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794.
- Postsecondary students with a disability do not have to disclose their disability to their institution, but generally must provide information if they request an academic adjustment or other modification for consideration their request.
- Because the student with a disability may not have established a voluntary relationship with the institution's office that serves students with disabilities, 106.8(e) permits, but does not require consultation between the Title IX Coordinator and the appropriate office.
- The purpose of 106.8(e) is to ensure the needs of students with disabilities are met while also allowing students to maintain autonomy regarding their disclosure of their disability or relationship with the disability services office.
- **Change from 2020:** the previous regulations mention accommodation of disabilities in passing or in relation to delays. Creating a new section to spotlight this issue in the process shows ED's prioritization of ensuring 504 compliance in the context of TIX.





Recordkeeping

An institution must maintain for a period of at least seven years:

1. For each complaint of sex discrimination, records documenting the informal resolution process or the grievance procedures and the resulting outcome.
2. For each notification the Title IX Coordinator receives of information about conduct that reasonably may constitute sex discrimination under Title IX, records documenting the actions the recipient took to meet its obligations under § 106.44.
3. All materials used to provide training under paragraph (d) of this section. An institution must make these training materials available upon request for inspection by members of the public. Change: no longer required to post online.

106.10 - Scope of Sex Discrimination

First Impressions:

- Major changes to the definition of “sex” (as anticipated)
- Likely there will be legal challenge over this change





106.10 – Scope of Sex Discrimination

Includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation and gender identity.



106.11 - Application

First Impressions:

- Jurisdiction expanded from 2020 rules
- More guidance around “owned or controlled”
- **NY 129-B** vs. the regs: 6440(6) applies to study abroad as well as on- and off-campus conduct.





Addressing All Sex Discrimination Occurring Under the Institution's Program or Activity in the United States

Conduct that occurs under an institution's education program or activity includes, but is not limited to:

- Conduct that occurs in any building owned or controlled by a student organization that is officially recognized by a postsecondary institution; and
- Conduct that is subject to the institution's disciplinary authority.

Addressing All Sex Discrimination Occurring Under the Institution's Program or Activity in the United States

- Required to address all sex discrimination in the United States.
- An institution is required to address a sex-based hostile environment in its education program or activity in the United States, even when some conduct alleged to be contributing to the hostile environment occurred outside the institution's education program or activity or outside the United States.
- **2020 Change:** 106.44(a) does not address an institution's obligation to address a sex-based hostile environment in its education program or activity in the United States, where some conduct contributing to the hostile environment may have occurred outside of the institution's education program or activity, or outside of the United States.



106.31 – Education Programs or Activities



Education Program or Activities

- May not on the basis of sex be excluded from participation in, denied the benefits of, or otherwise be subjected to discrimination.
- Applies to any academic, extracurricular, research, occupational training, or other educational program or activity.
- In limited situations, Title IX permits different treatment or separation in a manner that discriminates on the basis of sex but the institution must not subject a person to more than de minimus harm.
- Student may be excluded from single sex athletic team even if it presents more than de minimus harm, if students have an equal opportunity to access the athletic program.



106.44 – Institutional Response to Sex Discrimination

- Barriers to Reporting
- Notification Requirements
- Confidential Employee Requirements
- Public Awareness Events
- Title IX Coordinator Requirements
- Supportive Measures
- Emergency Removal
- Administrative Leave
- Discretion to Offer Informal Resolution in Some Circumstances



First Impressions

- Much more detailed in relation to institutional obligations
- **Much clearer guidelines around Title IX Coordinator initiated complaints**
- Additional process around supportive measures required
- Removal of the word “physical” in emergency removal standard
- Changes to informal resolution process, including standards around who can facilitate the process

Barriers to Reporting

An institution must require its Title IX Coordinator to:

- Monitor the institution's education program or activity for barriers to reporting information about conduct that reasonably may constitute sex discrimination under Title IX; and
- Take steps reasonably calculated to address such barriers.



Notification Requirements

All institutions on the postsecondary level must, at a minimum, require:

- Any non-confidential employee and who has authority to institute corrective measures or has responsibility for administrative leadership, teaching, or advising to notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination under Title IX; and
- All other non-confidential employees other than those noted above must either:
 - Notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination under Title IX; or
 - Provide the contact information of the Title IX Coordinator and information about how to make a complaint to any person who provides the employee with information that reasonably may constitute sex discrimination.





Confidential Employee Requirements

An institution must:

- Notify all students and employees of how to contact its confidential employees
- Require a confidential employee to explain to any person who informs the confidential employee of conduct that may constitute sex discrimination that the employee is not required to notify the Title IX Coordinator, how to contact the Title IX Coordinator and make a complaint, and that the Title IX Coordinator may be able to offer and coordinate supportive measures, initiate informal resolution or an investigation under the grievance procedures

Public Awareness Events

- When a Title IX Coordinator is notified of information about conduct that reasonably may constitute sex-based harassment that was provided during a public awareness event, the institution is not obligated to act in response **UNLESS:**
 - **The information indicates an imminent and serious threat to the health or safety of a complainant, any students, employees or other persons.**
- Event sponsored by the institution on campus or through an online platform sponsored by the institution
- Institution must use this information to inform its efforts in prevention, which would include tailored training
- **Note:** NY Education Law Art. 129-B includes a similar exception.



Title IX Coordinator Requirements

Responsible for coordinating the institution's compliance

An institution, through its Title IX Coordinator, must take certain steps to promptly and effectively end any sex discrimination in its education program or activity, prevent its recurrence, and remedy its effects, when notified of conduct that may reasonably constitute sex discrimination.

- Treat the complainant and respondent equitably;
- Offer and coordinate supportive measures at appropriate times for complainants and respondents;
- Notify the complainant of the grievance procedures and informal resolution if available/appropriate;
- Initiate grievance procedures if a complaint is made;



Title IX Coordinator Requirements

These steps are to:

- Treat the complainant and respondent equitably;
- Offer and coordinate supportive measures at appropriate times for complainants and respondents;
- Notify the complainant of the grievance procedures and informal resolution if available/appropriate;
- Initiate grievance procedures if a complaint is made;
- In the absence of a complaint or withdrawal of allegations/complaint, determine whether to initiate a complaint
- Notify complainant prior to initiation of complaint and address reasonable concerns about safety; and
- Whether or not a complaint is initiated, take other prompt and effective steps to ensure that discrimination does not continue or recur.



Title IX Coordinator Requirements: Title IX Coordinator Initiated Complaints

- **2020 Major Change:** In the absence of a complaint or the withdrawal of any or all of the allegations in the complaint, and in the absence or termination of an informal resolution process, the Title IX Coordinator must determine whether to initiate a complaint of sex discrimination (factors on next slide).
- If the Title IX Coordinator determines that the conduct as alleged present an imminent and serious threat to the health or safety of the complainant or other person, or that the conduct as alleged prevents the recipient from ensuring equal access on the basis of sex, the Title IX Coordinator may initiate a complaint.
- If the Title IX Coordinator does initiate a complaint, the complainant must be notified prior and appropriately address any reasonable concerns about safety
- Regardless of whether a complaint is initiated, also have to take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the institution's program or activity.



Title IX Coordinator Requirements: Title IX Coordinator Initiated Complaints

Factors to consider:

- The complainant's request not to proceed;
- The complainant's reasonable safety concerns regarding initiation of a complaint;
- The risk that additional acts of sex discrimination would occur if a complaint is not initiated;
- The severity of the alleged discrimination, including whether the discrimination, if established, would require the removal of a respondent from campus;
- The age and relationship of the parties, including whether the respondent is an employee of the institution;
- The scope of the alleged discrimination, including information suggesting a pattern, ongoing discrimination, or discrimination alleged to have impacted multiple individuals;
- The availability of evidence to assist a decisionmaker in a determination of whether discrimination occurred; and
- Whether the institution could end the alleged discrimination and prevent its recurrence without initiating its grievance procedures.



Supportive Measures

- Title IX Coordinator responsible for offering and coordinating supportive measures
- May vary depending on what is reasonably available
- Must not unreasonably burden either party and must be designed to protect the safety of the parties or the institution's educational environment, or to provide support during the grievance procedures or informal resolution process
- Institution, as appropriate, may modify or terminate supportive measures at the conclusion of the grievance procedures or informal resolution process, or may continue beyond that point
- Cannot be disclosed to anyone other than to whom they apply except where necessary to provide the supportive measure or restore or preserve a party's access to the education program or activity



Supportive Measures: Process for Challenges

Change from 2020: Must provide complainant or respondent with a timely opportunity to seek modification or reversal of the institution's decision to provide, deny, modify or terminate supportive measures applicable to that person

- **Note:** the decisionmaker must be impartial and must not have helped institution the original supportive measure(s)
- Institutions also required to provide a party with the opportunity to seek additional modification or termination of a supportive measure applicable to them if circumstances change materially.





Emergency Removal

- Must undertake an individualized safety and risk analysis
- Determine that an imminent and serious threat to the health or safety of a complainant, or any students, employees, or other persons arising from allegations of sex discrimination justifies removal
- Provide the respondent with notice and opportunity to challenge the decision immediately following the removal
- **Note:** 2020 change – removed the word “physical”



Informal Resolution

- Still discretionary like 2020 amendments
- If provided, more guardrails than previous regulations
- Informal resolution facilitators cannot be the same person as the investigator or the decisionmaker in the institution's grievance procedures
- Discusses terms of agreements
- **Change from 2020:** allows informal resolution to resolve allegations that an employee engaged in sex discrimination, including sex-based harassment
- Allowable for both complaints of sex discrimination and sex-based harassment
- **Key takeaway:** this is discretionary/optional, and not required to be in an institution's policy.



106.45 & 106.46 – Grievance Procedures: Sex Discrimination & Sex-Based Harassment

First Impressions:

- Expanded responsibility to investigate all sex discrimination
- Additional requirements for investigations of sex-based harassment
- Live Hearings: Optional!
- ...but check your state laws
- Cross-Examination: Optional!

106.45 - Sex Discrimination Grievance Procedures: General

- Procedures must be prompt and equitable
- Determinations must be in writing
- Requirements related to a respondent: only apply to complaints alleging a person violated the recipient's prohibition on sex discrimination
- If the complaint alleges that an institution's policy or practice discriminates on the basis of sex, the institution is not considered a respondent.
 - **What does that mean for institutions?**
 - Obligated to respond, but the institution doesn't have due process rights of a respondent.



106.45 & 106.46 - Grievance Procedures: Advisors of Choice

- **Change from 2020:** back to “potted plant” model (if your institution does not offer cross-examination conducted by advisors
 - ...cross-examination not required! (will talk about this in a little bit)
- 106.45 (sex discrimination other than sex-based harassment): DOES NOT REQUIRE ADVISORS.
- 106.46 – Discusses advisors and their role in sex-based harassment cases
- **Note: Clery Act** – requires advisors for cases of sexual assault, domestic violence, dating violence and stalking.



106.45 - Sex Discrimination Grievance Procedures: Complaint

Who can make a complaint of sex discrimination or sex-based harassment?

- A student or employee (as the regs say, a Complainant as defined in 106.2);
- A parent, guardian, or other authorized legal representative with the legal right to act on behalf of a complainant (this is for primary/secondary);
- The Title IX Coordinator;
- With respect to complaints of sex discrimination **other than sex-based harassment:**
 - Any student or employee; or
 - Any person other than a student or employee who was participating or attempting to participate in the recipient's education program or activity.



106.45 - Sex Discrimination Grievance Procedures: Basic Requirements

- Treat parties equitably;
- Require that the Title IX Coordinator, investigator or decisionmaker not have a conflict of interest or bias
 - **NOTE:** for sex discrimination other than sex-based harassment, the decisionmaker may be the same person as the Title IX Coordinator or the investigator
- Include a presumption that the respondent is not responsible until a determination is made
- Establish reasonably prompt timeframes for the major stages of the procedures



106.45 - Sex Discrimination Grievance Procedures: Basic Requirements

- *Major timeframes:* evaluation, investigation, determination and appeal
- Require an objective evaluation of all relevant evidence and provide that credibility determinations must not be based on a person's status as a complainant, respondent or witness
- Exclude certain evidence as impermissible:
 - Evidence protected under a privileged as recognized by federal or state law, or evidence provided to a confidential employee unless there is a voluntary waiver of privilege;
 - Party or witness records maintained by a physician, psychologist or other professional in connection with treatment unless there's voluntary written consent for use in the procedure; and
 - Evidence that relates to the complainant's sexual interests or prior sexual conduct*
- Application of different procedures, if grievance procedures do not apply to the resolution of all complaints



106.45 - Sex Discrimination Grievance Procedures: Notice of Allegations

Must include:

- The institution's grievance procedures for sex discrimination, and any informal resolution process;
- Sufficient information available at the time to allow the parties to respond to the allegations: identities of parties involved in the incidents, the conduct alleged to constitute sex discrimination, and the dates and locations of the alleged incidents;
- A statement that retaliation is prohibited; and
- A statement that the parties are entitled to equal opportunity to access the relevant evidence or an accurate description of that evidence.
- **Note on Change from 2020:** Sex Discrimination complaints (that do not include sex based harassment), do not require a written notice of allegations.



106.46 - Sex-Based Harassment Grievance Procedures: Written Notice of Allegations

Must include information required under 106.45 and also inform parties that:

- The respondent is presumed not responsible until a determination is made, and that prior to the determination, parties will have an opportunity to present relevant evidence to a trained, impartial decision maker;
- They can have an advisor of choice;
- They are entitled to equal opportunity to access the relevant evidence, and investigative report if that is the method used to collect evidence;
- Code prohibits knowingly making false statements (if applicable)



106.46 - Sex-Based Harassment Grievance Procedures: Written Notice of Allegations

- If any additional allegations are added during the course of an investigation, the institution must provide written notice to the parties
- If an institution has reasonable concerns for the safety of any person as a result of providing this notice, the institution may reasonably delay providing written notice of the allegations in order to address the safety concern appropriately
 - Reasonable concerns must be based on individualized safety and risk analysis and not on mere speculation or stereotypes.



106.45 & 106.46 - Sex Discrimination/Sex-Based Harassment Grievance Procedures: Dismissal of Complaints

May dismiss when:

- The institution is unable to identify the respondent after taking reasonable steps to do so;
- The respondent is not participating in the institution's education program or activity and is not employed by the institution;
- The complainant voluntarily withdraws any or all of the allegations in the complaint and the Title IX Coordinator declines to initiate a complaint, and the institution determines that, without the withdrawn allegations, the conduct that remains would not constitute discrimination even if proven; or
- The institution determines the conduct alleged in the complaint would not constitute sex discrimination.

Note on change from 2020: no more mandatory dismissals.

Prior to dismissing a complaint, the institution must make reasonable efforts to clarify the allegations with the complainant!

106.45 - Sex Discrimination Grievance Procedures: Dismissal of Complaints

If dismissed, the complainant must be notified of the basis (and respondent if they had been notified) and it must be done promptly after, or if in writing, simultaneously.

- *Note on Change from 2020: Can occur before respondent has been notified of the allegations*
- Opportunity to appeal the dismissal

106.45 - Sex Discrimination Grievance Procedures: Dismissal of Complaints

If there is an appeal of a dismissal, the institution must:

- Notify the parties of any appeal, including notice of the allegations if notice was not previously provided to the respondent;
- Implement appeal procedures equally for the parties;
- Ensure the decisionmaker did not take part in an investigation of the allegations or dismissal of the complaint; ensure that the decisionmaker has been trained;
- Provide the parties a reasonable and equal opportunity to make a statement in support or challenging the outcome; and
- Notify the parties of the result and rationale



106.46 - Sex-Based Harassment Grievance Procedures: Dismissal of Complaints

Special note for Sex-Based Harassment complaint dismissals

- When dismissing a complaint involving a student complainant or a student respondent, an institution must:
 - Provide the parties with written notice of the dismissal and the basis simultaneously, except if the dismissal occurs before the respondent has been notified of the allegations; and
 - Obtain the complainant's withdrawal in writing if dismissing a complaint based on the complainant's voluntary withdrawal of the complaints or allegations.



106.45 - Sex Discrimination Grievance Procedures: Consolidation of Complaints

- Institution can consolidate complaints against more than one respondent, or by more than one complainant against one or more respondents, or by one party against another party, when the allegations arise out of the same facts or circumstances
- If a consolidated complaint includes allegations of sex-based harassment, it must comply with the 106.46 requirements in addition to these requirements



106.45 - Sex Discrimination Grievance Procedures: Investigation

- Burden is on the institution and **not the parties** to conduct an investigation;
- Provide an equal opportunity for the parties to present fact witnesses and other inculpatory/exculpatory evidence that is relevant;
- Provide each party with an equal opportunity to access evidence and respond to it; and
- Take reasonable steps to prevent and address parties' unauthorized disclosure of information and evidence obtained solely through the grievance procedures



106.46 - Sex-Based Harassment Grievance Procedures: Investigation

- **Change from 2020 Regulations: investigative report no longer required**
- Institutions may still provide an investigative report, however, they will have to allow access to both parties for underlying evidence for inspection and review if requested.
- Reasonable opportunity to review and respond to the evidence or the investigative report prior to determination
- **NOTE:** this must be done in advance of the live hearing
 - Institutional discretion as to when: prior to, during, or both prior to and during

106.46 - Sex-Based Harassment Grievance Procedures: Investigation

- Must provide written notice to parties of the date, time, location, participants, and purpose of all meetings or proceedings with sufficient time for the party to prepare to participate
- Advisor of choice
- Must provide parties with same opportunities, if any, to have persons other than advisors present at any meeting or proceeding
- Discretion on expert witnesses
- Must allow for reasonable extension of timeframes on a case-by-case basis for good cause with written notice to the parties that includes the reason for the delay; and
- Must provide each party/their advisor with an equal opportunity to access evidence that is relevant to the allegations



106.45 - Sex Discrimination Grievance Procedures: Questioning Parties and Witnesses

Institutions must provide a process that enables the decisionmaker to question parties and witnesses to adequately assess a party's or witness's credibility to the extent it is both in dispute and relevant to evaluating one or more allegations of sex discrimination



106.46 - Sex-Based Harassment Grievance Procedures: Questioning Parties and Witnesses

- **Process:** institutions must provide a process that enables the decisionmaker to question parties and witnesses to adequately assess a party's or witness's credibility to the extent it is in dispute and relevant to evaluating allegations
- **Change from 2020:** Regulations no longer require a live hearing – return to single investigator model option
- **Note to New York Institutions:** New York State Education Law 129-B requirements
- **Institutions in other states:** If you have a state law that covers any of these areas, ensure you talk with your institutional counsel to check for any preemption issues or intersections you may need to account for in a policy.



106.46 - Sex-Based Harassment Grievance Procedures: Questioning Parties and Witnesses/Sole Investigator Model

- **Process:** if no live hearing, institution must have a process for proposing and asking relevant and not otherwise impermissible questions and follow-up questions of parties and witnesses, including questions challenging credibility, which must:
 - **Allow the investigator or decisionmaker to ask such questions during individual meetings with a party or witness;**
 - **Allow each party to propose the questions that the party wants asked of any party or witness and have those asked by investigator or decisionmaker during one or more individual meetings; and**
 - **Provide each party with an audio or audiovisual recording or transcript with enough time for the party to have a reasonable opportunity to propose follow up questions.**



106.46 - Sex-Based Harassment Grievance Procedures: Live Hearings/Assessing Credibility

- **Process:** when an institution conducts a live hearing, the process for proposing and asking relevant, not otherwise impermissible questions, and follow-up questions of parties and witnesses, including questions challenging credibility, must allow the decisionmaker to ask such questions and either:
 - Allow each party to propose the questions that the party wants asked and have those asked by the decisionmaker; or
 - Allow each party's advisor to ask any party or witness such questions.

Major Change Alert: The regulations no longer require cross examination if your institution has a live hearing model!



106.46 - Sex-Based Harassment Grievance Procedures: Live Hearings/Assessing Credibility

- Questioning can never be conducted by a party personally (same as before 2020)
- If an institution does permit advisor-conducted questioning and a party does not have an advisor, the institution must provide the party with an advisor, which cannot be a confidential employee.



106.46 - Sex-Based Harassment Grievance Procedures: Live Hearings/Relevance of Questions

- Decisionmaker must determine whether a proposed question is relevant and not otherwise impermissible prior to the question being posed
- Must explain any decision to exclude a question
- If the decisionmaker determines the question is relevant it must be asked (except that institutions must not permit questions that are unclear or harassing of the party or witness being questioned)
- Decisionmaker must give an opportunity to clarify or revise the question, and if sufficient, question must be allowed to be asked
- Institutions may also provide other reasonable rules regarding decorum as long as they apply to all parties.



106.46 - Sex-Based Harassment Grievance Procedures: Live Hearings/Refusal to Answer Questions

- A decisionmaker may choose to place less or no weight upon statements by a party or witness who refuses to respond to questions deemed relevant and not permissible.
- **HOWEVER**, 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 to such questions.



106.46 - Sex-Based Harassment Grievance Procedures: Live Hearings - Logistics

- May conduct the live hearing with parties physically present in the same geographic location
- Institution also has discretion to conduct the hearing with the parties physically present in separate locations (can consider if either party requests such), with technology enabling the decisionmaker and parties to simultaneously see and hear the party or the witness while the person is speaking.
- **Note:** institutions are required to create an audio or audiovisual recording or transcript, of any live hearing and make it available to the parties for inspection and review.



106.45 - Sex Discrimination Grievance Procedures: Determination

- "Preponderance of the evidence" standard of proof to determine whether sex discrimination occurred*
- Notify the parties in writing of the determination and the rationale, along with the permissible bases for the parties to appeal
- If there is a determination sex discrimination occurred, require the Title IX Coordinator to coordinate the provision and implementation of remedies to a complainant and others identified as having had equal access limited or denied, coordinate the imposition of any disciplinary sanctions on a respondent, including complainant notification of the sanctions, and require the Title IX Coordinator to take other appropriate steps to ensure it does not continue
- Comply with all due process provisions before the imposition of any sanctions against a respondent; and
- Not discipline a party for making a false statement or for engaging in consensual sexual conduct based solely on the institution's determination whether sex discrimination occurred.



106.46 - Sex-Based Harassment Grievance Procedures: Written Determination

In writing to both parties simultaneously

Must include:

- a description of the alleged harassment;
- Information about the policies and procedures the institution used to evaluate the allegations;
- The decisionmaker's evaluation of the relevant and not otherwise impermissible evidence and determination whether the harassment occurred;
- If there is a determination harassment occurred, must include disciplinary sanctions on the respondent, remedies provided to the complainant, and, as appropriate, other students identified by the institution to be experiencing the effects of sex-based harassment; and
- The institution's procedures for appeal.

Determination becomes final either on the date that the institution provides the parties with the written determination of the result of any appeal, or if no appeals, the date on which an appeal would no longer be considered timely.



106.45 – Sex Discrimination Grievance Procedures: Appeals

Institutions must offer the parties an appeal process that, at a minimum, is the same as it offers in all other comparable proceedings, if any, including proceedings relating to other discrimination complaints.



APPEAL

106.46 - Sex-Based Harassment Grievance Procedures: Appeals

Required to offer appeals from a determination and from a dismissal of a complaint or any allegations in a complaint.

Bases:

- Procedural irregularity;
- New evidence not reasonably available at the time of the determination; and
- The Title IX Coordinator, investigator, or decisionmaker had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent would change the outcome.

May offer additional bases for appeal as long as equally available to all parties



106.45 – Sex Discrimination Grievance Procedures: Additional Provisions

If an institution adopts additional provisions as part of its grievance procedures for handling complaints of sex discrimination, including sex-based harassment, those must apply equally to the parties.



106.46 - Sex-Based Harassment Grievance Procedures: Student Employees

When a complainant or respondent is both a student and an employee, the institution must make a fact-specific inquiry to determine whether the requirements of this section apply

- **An institution, at a minimum, must consider:**
 - Whether the party's primary relationship with the institution is to receive an education; and
 - Whether the alleged sex-based harassment occurred while the party was performing employment-related work.



106.71 –
Retaliation



Retaliation

Institutions must prohibit retaliation, including peer retaliation

- When an institution has information about conduct that reasonably may constitute retaliation, the recipient must respond appropriately.
- Upon receiving a complaint of retaliation, an institution must initiate its grievance procedures for sex discrimination other than sex-based harassment, or as appropriate, allow for informal resolution.
- If the complaint is consolidated with a complaint of sex-based harassment involving a student complainant or respondent, the procedures for resolving must comply with both 106.45 and 106.46.



Employees

- Title IX applies to employees as well as students
- Title IX requires that procedures be provided for cases involving employees, whether at-will or unionized
- Title VII and Title IX:
Discrimination in different contexts

**106.40; 106.57 –
Parental, Family or
Marital Status;
Pregnancy or
Related Conditions**

First Impressions:

- Since 1975, Title IX has required that institutions not discriminate based on pregnancy or related conditions, including childbirth, termination of pregnancy, and recovery.
- Protections are updated and clarified that they apply to students, employees, and applicants

Parental, Family, or Marital Status; Pregnancy or Related Conditions

- Prohibits an institution from treating students, employees, or applicants differently based on sex in connection with parental, family, or marital status. (§§ 106.21(c), 106.40, 106.57).
- Prohibits discrimination against students, employees, or applicants, based on pregnancy or related conditions, and requires institutions to take actions to prevent sex discrimination and ensure equal access to the institution's education program or activity, such as by providing reasonable modifications for students, reasonable break time for lactation for employees, and lactation space for students and employees. (§§ 106.40(b)(3) and 106.57(e)).
- Prohibits schools from requiring documentation from students to obtain reasonable modifications or other actions unless such documentation is necessary and reasonable.
- Clarifies an institution's obligations to inform students of rights related to pregnancy or related conditions. (§ 106.40(b)(2) and (b)(3)(i)).



Employee Rights: Parental, Family, or Marital Status; Pregnancy or Related Conditions

- An institution must not adopt or implement any policy, practice, or procedure or take any employment action on the basis of sex.
 - Concerning the current, potential, or past parental, family, or marital status of an employee or applicant for employment; or
- Or based upon whether an employee or applicant is the head of household or principal wage earning in such employee's or applicant's family unit.
- **Pregnancy or Related Conditions:** discrimination is prohibited
- **Comparable Treatment to Other Medical Conditions:** Must treat pregnancy or other related conditions as any other temporary condition.
- **Voluntary Leaves of Absence:** Treat pregnancy or related condition as justification for voluntary LOA without pay for reasonable period.
- **Lactation Time and Space:** Provide reasonable break time to breastfeed or express milk in clean space free from view and intrusion of others.



Next Steps



- Watch for **SUNY Joint Guidance** launch in the coming weeks
- Gather relevant policies and procedures and begin creating a timeline for updating them
- Ensure anyone who will serve a role in the adjudication of violations of Title IX has access to the **SUNY SCI learning platform**
- Watch your email for updates and announcements as new trainings and toolkit resources are added to the SUNY SCI platform including:
 - Model policy documents,
 - Draft notices,
 - Checklists,
 - And more!