TITLE IX PART IV - ADDITIONAL TITLE IX CHALLENGES FOR COMMUNITY COLLEGES

December 8, 2020

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Juris Doctorate, University of San Francisco School of Law (2003); Master of Science in Gerontology, University of Southern California (1999); Bachelor of Science in Gerontology, University of Southern California (1998).

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Title IX Part IV –
Additional Title IX Challenges for Community Colleges

December 8, 2020

Page

Presentation Slides .................................................................................................................. 1


2. Title IX Regulations .............................................................................................................46

3. Questions and Answers Regarding the DOE’s Final Title IX Rule – OCR ......72


5. Summary of Major Provisions of the DOE’s Title IX Final Rule .....................84

6. Summary of Major Provisions of the DOE’s Title IX Final Rule and Comparison to NPRM ........................................................................................................ 93

7. CCD Flowchart ................................................................................................................ 105

8. SCLS Sample Policy Revision Items for CCDs ........................................ 106


10. Revised Title V Regulations – Unlawful Discrimination (Eff. 9/18/20) ........122

11. 20 U.S.C. § 1092 (Text of Clery Act) ................................................................. 136


13. Clery Act Appendix for FSA Handbook ................................................................. 150

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<table>
<thead>
<tr>
<th></th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>15.</td>
<td>Office of Attorney General’s Template MOU</td>
<td>181</td>
</tr>
<tr>
<td>16.</td>
<td>Case Study</td>
<td>194</td>
</tr>
</tbody>
</table>
Title IX Part IV: Additional Title IX Challenges for Community Colleges

December 8, 2020

Presented by:
Monica D. Batanero, Sr. Associate General Counsel
School & College Legal Services of California

Agenda

• Workshop series
• Brief overview of Title IX and the Clery Act
• Title IX’s intersection with Clery
• Coordination with campus and local law enforcement
• Respondents’ due process rights
• Title IX and Title 5 conflicts
• Case study
• Questions

Fall 2020
Title IX Workshop Series

• Part 1 – Title IX Coordinator Essentials, September 15, 2020
• Part 2 – Conducting Title IX Investigations, October 14, 2020
• Part 3 – Nuts and Bolts of the Title IX Coordinator’s Role, November 10, 2020
• Part 4 – CCD Only – Additional Title IX Challenges for Community Colleges, December 8, 2020
I. Brief Overview of Title IX

What is Title IX?

“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 educational program or activity receiving federal financial assistance.”


Title IX Sexual Harassment Definition

(1) Unwelcome conduct on the basis of sex that a reasonable person would determine is so “severe, pervasive and objectively offensive” that it effectively denies a person equal access to the recipient’s education program or activity;

(2) Quid pro quo harassment; or

(3) Sexual assault, dating violence, domestic violence, or stalking as defined in the Clery Act/Violence Against Women Act (“VAWA”).
Enforcement of Title IX

- Title IX is enforced by the U.S. Department of Education, Office for Civil Rights (OCR).
- A possible penalty for violating Title IX is the loss of all federal funding.
- In 1979, the U.S. Supreme Court upheld a private right of action under Title IX.
- OCR may seek to enter a Resolution Agreement with the district that requires the district to take various corrective measures.
- OCR may refer the case to the Department of Justice.

II. Brief Overview of the Clery Act

Image Source: UC Berkeley Police Department

Why the Clery Act?

- Jeanne Anne Clery was a 19 year old college student who was brutally raped and murdered in her dorm room at Lehigh University (Pennsylvania) in 1986.
- Ms. Clery’s parents believed that their daughter had died due to the campus’s lackadaisical security measures.
- The Clery Act aims to provide transparency around campus crime statistics and policies.
What is the Clery Act?

• Clery Act:
  • Requires colleges and universities participating in federal financial aid under Title IV of the Higher Education Act to maintain and disclose campus crime statistics and security information
  • Includes a number of policy, procedure, and training requirements within the crime statistics and security disclosure requirements

• The Clery Act is set forth at 20 U.S.C § 1092(f) (Attachment 2); implementing regulations are at 34 C.F.R. § 668.46

2013 VAWA Amendments

• In 2013, the reauthorized Violence Against Women Act amended the Clery Act

• The changes require institutions to:
  • Disclose statistics, policies and programs related to dating violence, domestic violence, sexual assault, and stalking;
  • Have a policy statement that addresses the jurisdiction of security personnel;
  • Establish prevention programs to stop Clery crimes;
  • Address compliance with applicable confidentiality laws in recordkeeping and data sharing under Clery; and
  • Disclose statistics on new categories of hate crimes.

Clery Act/VAWA Definitions


2. Dating violence – 34 U.S.C. 12291(a)(10) – “The term “dating violence” means violence committed by a person—(A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (B) where the existence of such a relationship shall be determined based on a consideration of the following factors: (i) The length of the relationship. (ii) The type of relationship. (iii) The frequency of interaction between the persons involved in the relationship.”
### Clery Act/VAWA Definitions

**Domestic Violence** – 34 U.S.C. 12291(a)(8) – “The term “domestic violence” includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction.”

**Stalking** – 34 U.S.C. 12291(a)(8) – “The term “domestic violence” includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction.”

### Clery Requirements

- The Clery Act requires institutions to:
  - Collect, classify, and count crime reports and crime statistics
  - Issue campus alerts: (1) timely warnings; and (2) emergency notifications
  - Provide educational programs and campaigns
  - Have procedures for institutional disciplinary action in cases of dating violence, domestic violence, sexual assault, and stalking
- Publish an Annual Security Report
- Submit crime statistics to the U.S. Department of Education
- Maintain a daily crime log
- Publish an Annual Fire Safety Report
- Maintain a fire log
- Submit fire statistics to the U.S. Department of Education
- Have numerous safety and security-related policies in place
- Postsecondary institutions must develop and distribute a statement of policy that informs victims (of certain Clery crimes) of their options to:
  - Notify proper law enforcement authorities, including campus and local police; and
  - Be assisted by campus personnel in notifying such authorities.
- **Practice tip:** The policy must notify students of existing counseling, mental health, or other student services for victims of sexual assault, both on campus and in the community.
Clery Requirements (Disciplinary Proceedings)

• The statement of policy must also include the institution’s disciplinary procedures in cases involving VAWA crimes:
  • descriptions of types of proceedings (and how determined), the steps, timelines, decision-making processes, and how to file a complaint;
  • the standard of evidence;
  • list of possible sanctions;
  • the range of protective measures;
  • a requirement that the proceedings – conducted by trained officials – will include a prompt, fair, and impartial process;
  • assurance that the accuser and accused will have the same opportunities to have others present, including an advisor of the individual’s choosing, in any disciplinary-related meeting;
  • the requirement of simultaneous written notification to both parties of the result of the proceedings, process for appeal, and when such findings become final.

Clery Training

• Disciplinary action in cases of alleged dating violence, domestic violence, sexual assault, or stalking must be conducted by officials who receive annual training on these issues.
  • Practice Tip: Consider this requirement in establishing student and employee discipline procedures.

• Officials must also be trained in how to conduct an investigation and hearing process that “protects the safety of victims and promotes accountability.”

Title IX Training

• Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must receive training on:
  1. The definition of sexual harassment,
  2. The scope of the recipient’s education program or activity,
  3. How to conduct an investigation,
  4. How to conduct a grievance process including hearings, appeals, and informal resolution processes, as applicable, and
  5. How to serve impartially.
Title IX Training, Cont’d.

- **Decision-makers** must receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant.
- **Investigators** must receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence.

Clery Training & Programming

- Programs to prevent dating violence, domestic violence, sexual assault, and stalking:
  - Primary prevention programs offered to all new employees and incoming students
  - Ongoing prevention and awareness campaigns for students and employees
- For institutions with on-campus student housing, safety education programs and fire safety training
- Training for “campus security authorities” is recommended, but not required:
  - Practice tip: The role of the Clery Act, sample reporting materials, the importance of documentation, need for timely report submission

Clery Compliance Dream Team

- Take a few minutes to think about what positions at your institution would ideally be on your Clery Compliance Team
Clery Enforcement (Federal)

- U.S. DOE reviews and evaluates institutions' compliance with Clery.
- **Federal Audits**
  - DOE may conduct a review under four distinct circumstances.
  - Financial aid audits include Clery compliance review.
- **Fines**
  - DOE may impose a fine of up to $58,328 per violation.
  - University of Michigan was recently fined $4.5 million for four serious findings of Clery Act noncompliance (Sept. 2019).
  - University of Montana was recently fined $966,614 for “inaccurate and misleading” crime statistics from 2012-2015.
  - In late 2016, Penn State was fined a record $2.4 M for Clery violations in 11 serious cases from 1998 to 2011.

Clery Enforcement (State)

- Education Code section 67382 requires the State Auditor, every 3 years, to report results of an audit of at least six institutions of postsecondary education that receive federal student aid.

  - The audit is to:
    - Evaluate compliance with the Clery Act; and
    - Evaluate compliance with California law governing crime reporting and the development and implementation of policies and procedures under various Education Code sections.

III. Title IX’s Intersection with Clery

*Image Source: Magna Publications*
Intersection of Title IX and Clery

- WHO – Officials with authority to institute corrective measures and Campus Security Authorities
- WHAT – Reporting Sexual Violence
- WHERE – “Geography”
- WHEN – Notification of the Outcome of Investigation
- WHY – Enforcement

Officials with authority to institute corrective measures & Campus Security Authorities

- Once a recipient has actual knowledge of sexual harassment in an education program or activity of the recipient, it must respond promptly in a manner that is not deliberately indifferent.
- A response is deliberately indifferent only if it’s response to sexual harassment is clearly unreasonable in light of the known circumstances.
- Actual knowledge means notice of sexual harassment or allegations of sexual harassment by the Title IX Coordinator or any official who has authority to institute corrective measures on behalf of the recipient.
Campus Security Authorities

- A CSA's function is to report allegations of Clery crimes that they receive directly.
- CSAs are responsible for:
  - reporting allegations of Clery crimes that are reported to them in their capacity as a CSA.
- CSAs are not responsible for:
  - investigating or reporting incidents that they learn about in an indirect manner.
  - determining whether a crime took place.
  - apprehending the alleged perpetrator(s).
  - convincing the victim to contact law enforcement.

Officials with authority to institute corrective measures & Campus Security Authorities

**Title IX**

- "Officials with authority to institute corrective measures" include:
  - Title IX coordinator
  - Assistant or Deputy Title IX Coordinator
  - President or Chancellor
  - Dean of students
  - Directors
  - Department heads
  - Supervisory Employees

**Clergy**

- "Campus Security Authorities" include:
  - A campus police department or campus security department,
  - Other individual(s) with responsibility for campus security,
  - Individual(s) specified in college’s procedures, or
  - Officials with significant responsibility for student and campus activities.

Reporting Sexual Violence
### Title IX & Clery: Prohibited Acts

<table>
<thead>
<tr>
<th>Title IX</th>
<th>Clery</th>
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<tbody>
<tr>
<td>• Sexual harassment</td>
<td>• Criminal offenses</td>
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<tr>
<td>• Sex discrimination</td>
<td>• Hate crimes</td>
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<tr>
<td>• VAWA offenses</td>
<td>• Arrests and referrals for disciplinary action</td>
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<tr>
<td>• Dating violence</td>
<td>• VAWA offenses</td>
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<td>• Domestic violence</td>
<td>• Dating violence</td>
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<td>• Stalking</td>
<td>• Domestic violence</td>
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<td>• Sexual assault</td>
<td>• Stalking</td>
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<td>• Sexual assault</td>
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### Title IX & Clery: How to Report

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<th>Title IX</th>
<th>Clery</th>
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<td>• All relevant details of the incident, including:</td>
<td>• 4 things:</td>
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<tr>
<td>• Date, time, location</td>
<td>• Type of crime</td>
</tr>
<tr>
<td>• Nature of incident</td>
<td>• Location of incident</td>
</tr>
<tr>
<td>• Alleged perpetrator</td>
<td>• When it happened</td>
</tr>
<tr>
<td>• Other individuals involved</td>
<td>• When it was reported</td>
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<tr>
<td>• Report should include personally identifiable information (i.e., victim’s and others’ identities)</td>
<td>• Should <em>not</em> include personally identifiable information</td>
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### Clery “Geography”

![Clery Geography Image]
Clery “Geography” (i.e., jurisdiction)

Title IX
- In a school’s educational programs and activities
- Includes:
  - Locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the content in which the harassment occurs.
  - Any building owned or controlled by a student organization that is officially recognized by the CCD.
  - In programs, activities, or trips sponsored by the college at another location.
  - Extracurricular activities.
- Sexual harassment that occurs off campus and does not occur in an education program or activity of the recipient will not be covered under Title IX.

Clery
- Buildings or property owned or controlled by college that support college’s educational purposes:
  - In a reasonably contiguous area to campus.
  - Not in a reasonably contiguous area to campus.
- Buildings or property owned by a recognized student organization.
- All public property within a reasonably contiguous area of the institution that is adjacent to or accessible from a facility owned by college.

Notice of Outcome of Investigation

Title IX
- A written determination regarding responsibility must contain:
  - Identification of the allegations.
  - A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews, witness, and hearings held.
  - Findings of fact supporting the determination.
  - Conclusions regarding the application of the recipient’s code of conduct to the facts.
  - A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the education program or activity will be provided to the complainant; and
  - The recipient’s procedures and permissible bases for the complainant and respondent to appeal.

Clergy
- Results of institutional disciplinary proceedings.
- Must simultaneously notify complainant and respondent of outcome.
- For crimes of violence, or rape and other sexual assaults:
  - Final results of any disciplinary proceedings against respondent.
  - “Final results” – name of student, findings, sanctions, rationale for findings and sanctions.
  - Names of any other student may only be included with that student’s consent.
  - May not require complainant to abide by nondisclosure agreement.
Enforcement of Title IX and Clery

**Title IX**
- US Department of Education, Office for Civil Rights
- Possible penalty for violating Title IX is loss of all federal funding
- Can enter into resolution agreements
- May refer cases to Department of Justice

**Clery**
- US Department of Education, Student Financial Aid Enforcement Unit
- Authorized to take fine, limitation, suspension, or termination action for violations
- Maximum penalty for violating Clery is fines of $58,328 for each violation

Review of Clery Data

- As part of its Title IX investigations, OCR may review colleges’ Clery Act statistics with regard to the offense(s) being investigated.
- OCR will consider the statistics alongside the number of reports filed using the Title IX grievance procedures.
- OCR may consider the statistics as part of the larger picture of whether there is a hostile environment on campus.
- In at least one case, OCR found that Clery data “raised concerns” that more prevention and training efforts focused on preventing sexual assault should be provided to students.
IV. Coordination with Law Enforcement

Education Code 67381.1

(b) The governing board of each community college district shall adopt rules requiring each of their respective campuses to enter into written agreements with local law enforcement agencies that clarify operational responsibilities for investigations of Part 1 violent crimes occurring on each campus.

(c) Local law enforcement agencies shall enter into written agreements with community college campus law enforcement agencies if there are community college campuses located in the jurisdictions of the local law enforcement agencies.

(d) Each written agreement entered into pursuant to this section shall designate which law enforcement agency shall have operational responsibility for the investigation of each Part 1 violent crime and delineate the specific geographical boundaries of each agency’s operational responsibility, including maps as necessary.

Sexual Assault Investigations: Coordinating with Law Enforcement

• A district should coordinate with any other ongoing school or criminal investigations.
• Establish fact-finding roles for each investigator.
• Consider whether information can be shared among investigators to limit re-traumatizing victim.
• If applicable, consult with forensic expert to ensure evidence is correctly interpreted by school officials.
• Consider a memorandum of understanding with local law enforcement and local prosecutor’s office.
Sexual Assault Investigations: Parallel Criminal Investigations

- A criminal investigation does not alleviate districts of their duty to conduct an independent Title IX investigation.
- There may be circumstances in which a school’s fact-finding process may be delayed when police are gathering evidence.
  - During delay, consider interim remedies for complainant.
  - In that case, school must promptly resume its investigation once police have finished gathering evidence.
- Under no circumstances should the school delay its investigation until the ultimate outcome of a criminal investigation or the filing of charges.

Recommended Provisions in MOU with Law Enforcement

- Law enforcement will advise individuals reporting incidents of sexual or gender-based harassment, assault, or violence of their right to pursue a criminal action with law enforcement and a Title IX complaint through the college simultaneously.
- Law enforcement will assist the college in obtaining relevant evidence.
  - Clearly identify when the college will refer a matter to local law enforcement.
  - Prompt notification of one another when either receives a complaint of sexual or gender-based harassment, assault, or violence.

Recommended Provisions in MOU with Law Enforcement, Cont’d.

- Protocols and procedures for:
  - How parties will conduct contemporaneous investigations
  - How investigation(s) will be documented
  - How information will be shared
- Police dept. will:
  - Appoint a specialized, trained investigator in matters of sexual or gender-based assault or violence
  - Help the complainant obtain a protection order against respondent if he/she wants one
  - Training for police staff who will respond to sexual or gender-based violence complaints
MOU with Law Enforcement: Lessons Learned from OCR

- Should specifically address the coordination of investigations of sexual harassment and sexual assault
- Under what conditions the college will temporarily suspend a Title IX investigation during a law enforcement investigation
- When the police department and/or DA's office will share information with the college

V. Decision Making

Who Can Serve as a Decision Maker?

- A single individual
- A panel of individuals
- Multiple individuals who each adjudicate specific portions of the grievance process
- May use existing personnel, hire new personnel, or delegate the functions of a decision maker to an outside contractor, or to a consortium, regional center, or other group of schools.
- Decision maker may not have a conflict of interest or bias.
- Must be trained in Title IX rules (including outside decision makers).
- May not be the Title IX Coordinator or investigator.
- Decision maker for appeal, cannot be original decision maker.
Responsibilities of Decision Makers

• During the grievance process, the decision maker must:
  • Weigh the relevant evidence, and decide whether it meets the school's standard of evidence for sexual harassment allegations.
  • Determine the relevance of each cross-examination question before a party or witness answers.
  • After a decision has been reached, decision makers must issue a written determination, which includes among other elements, the facts and reasons for conclusions reached in the case.
• A non-Decision maker, such as a hearing officer, Title IX Coordinator, or facilitator, may perform certain limited tasks such as maintaining decorum of the hearing.

Title IX Training

• Decision-makers must receive training on:
  1. The definition of sexual harassment,
  2. The scope of the recipient’s education program or activity,
  3. How to conduct an investigation,
  4. How to conduct a grievance process including hearings, appeals, and informal resolution processes, as applicable, and
  5. How to serve impartially.
  6. Any technology to be used at a live hearing.
  7. Issues of relevance of questions and evidence, including when questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant.

Standard of Evidence

• There are two permissible standards of evidence for Title IX investigations:
  • Preponderance of the Evidence (>50%)
  • Clear and Convincing (>75%)
• For investigations under Title 5, districts must use the preponderance of evidence standard.
• Exception: student sexual misconduct subject to Title IX must follow Title IX regulations requirements.
Conducting a Live Hearing

• Live hearing must be held at the postsecondary level.
• A school may hold entire live hearing virtually.
• If any party requests it, the entire hearing must be held with the parties located in separate rooms, with technology enabling everyone to see and hear each other.
• Must create an audio or audiovisual recording or transcript of any live hearing and make it available to the parties for inspection and review.
• Other civil rights laws must be complied with, such as Section 504/ADA. For example, an individual with disability must be appropriately accommodated with respect to use of technology and reliance of visual, auditory, or written modes of communication.
• Schools may hold these live hearing on their own or coordinate with outside entities or other schools in order to find efficiencies and streamline the way that adjudications proceed.

Cross-examination

• Cross-examination means that a party’s advisor asks questions that might challenge the party’s statement or allegations.
• By hearing each party’s version of events and hearing each party’s answers to questions about their version of events, the neutral, unbiased decision maker is more likely to reach an accurate determination regarding responsibility.

Cross-examination

• Before a complainant, respondent, or witness answers a cross-examination or other question, the decision maker must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.
• If a party or witness chooses to not appear at the live hearing, or opts not to answer cross-examination questions, the decision maker merely excludes that party’s or witness’s statements, and evaluates any evidence that does not involve those statements. The decision maker must never make inferences, positive or negative, about an individual’s choice not to be cross-examined or to decline to answer certain cross-examination questions.
Cross-examination

• A party’s advisor must be allowed to cross-examine the other party and all witnesses.
• Cross-examination must be conducted directly, orally and in real time by advisor and never by a party personally.
• If party does not have an advisor, without fee or charge, an advisor of the recipient’s choice who can convey the questions that the party would like to have asked.

Relevancy

• All relevant evidence, inculpatory and exculpatory, must be admitted
• However the Title IX Regulations deem certain evidence not relevant:
  • Evidence of the Complainant’s sexual predisposition.
  • Evidence of the Complainant’s prior sexual behavior except for two limited exceptions:
    1. Offered to prove that someone other than the Respondent committed the conduct alleged, or
    2. Concerns specific incidents of the Complainant’s sexual behavior with respect to the Respondent and is offered to prove consent
  • A party’s treatment records without the party’s voluntary, written consent.
  • The use of information protected by any legally recognized privilege (e.g., attorney-client).

Relevancy, Cont’d.

• Relevant = If the information helps to prove or disprove a fact at issue, it should be admitted.
• Title IX regulations do not define relevance; however, recipients cannot exclude relevant evidence because such evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence.
Relevancy, Cont’d.

• Recipients have discretion governing how admissible, relevant evidence must be evaluated for weight or credibility by a decision-maker.
• The weight assigned to evidence depends on the type of evidence and its credibility:
  - Direct evidence (personal observation or experience)
  - Real evidence (knife)
  - Documentary evidence (emails, texts, photos, videos)
  - Circumstantial evidence (not direct observation, but compelling)
  - Hearsay evidence (something heard from another person)

Relevancy, Cont’d.

• An investigator’s opinion on credibility, findings of fact, whether policy was violated, the weight given to evidence, etc., is not binding on the decision-maker.
• Decision-maker has to independently and freely issue a decision and is free to accept or reject an investigator’s recommendations.

Reaching a Determination

Following a hearing, “[t]he decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility.”
Written Determination

- Must provide to parties simultaneously and in one document only.
- Ensures both parties know factual basis for outcome of the grievance process.
- Requiring decision makers to provide findings of fact helps verify whether the decision maker is exercising independent judgment and making an evaluation free from bias.
- The determination must contain:
  - Identification of the allegations potentially constituting sexual harassment;
  - A description of the procedural steps taken from the receipt of the formal complaint through the 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 supporting the determination;

Written Determination, Cont’d.

- Conclusions regarding the application of the recipient’s code of conduct to the facts;
- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient’s education program or activity will be provided by the recipient to the complainant; and
- The recipient’s procedures and permissible bases for the complainant and respondent to appeal.

Written Determination, Cont’d.

- The written determination must be based on an objective evaluation of the evidence, and the procedural steps described must conform to the presumption of innocence and the correct standard of evidence.
Title 5 Requirements
Administrative Determination

• In any case not involving employment discrimination, within ninety (90) days of receiving a complaint, the district shall complete its investigation and forward a copy or summary of the report and written notice to the complainant setting forth all of the following:

1. The chief executive officer’s or their designee’s determination as to whether unlawful discrimination occurred with respect to each allegation in the complaint based on the preponderance of evidence standard;

2. In the event a discrimination allegation is substantiated, a description of actions taken, if any, to prevent similar acts of unlawful discrimination from occurring in the future;

3. The proposed resolution of the complaint;

4. The complainant’s right to appeal to the district governing board and the Chancellor; and

5. In matters involving student sexual misconduct, the respondent’s right to appeal to the district governing board any disciplinary sanction imposed upon the respondent.

Title 5 Requirements
Administrative Determination, cont’d.

• In any case involving employment discrimination, within ninety (90) days of receiving a complaint, the district shall complete its investigation and forward a copy or summary of the report and written notice to the complainant setting forth all of the following:

1. The chief executive officer’s or their designee’s determination as to whether unlawful discrimination occurred with respect to each allegation in the complaint based on the preponderance of evidence standard;
Title 5 Requirements
Administrative Determination, cont’d.

2. If a discrimination allegation is substantiated, a description of actions taken, if any, to prevent similar acts of unlawful discrimination from occurring in the future;
3. The proposed resolution of the complaint; and
4. The complainant’s right to appeal to the district governing board or to file a complaint with Department of Fair Employment and Housing (DFEH).

Title 5 Requirements
Administrative Determination, cont’d.

• In any case involving unlawful discrimination, when a district provides the complainant with any information pursuant to this subdivision, the district shall also provide to the respondent the following:
  1. The chief executive officer’s or their designee’s determination as to whether unlawful discrimination occurred with respect to each allegation in the complaint based on the preponderance of evidence standard;
  2. The proposed resolution of the complaint, including any disciplinary action against the respondent; and
  3. In matters involving misconduct governed by section 59337(b) (Title IX and Student Discipline), the respondent’s right to appeal to the local governing board any disciplinary sanction imposed upon the respondent.
VI. Conflicts Between Title 5 and Title IX

Title 5 Regulations Updated

• New Title 5 regulations do not require the unlawful discrimination complaint, the investigative report, and final district decision rendered by the governing board to be sent to the Chancellor’s Office, unless the Chancellor’s office requests it.
• Complaints may be made in writing or verbally. If the complaint is made to a “responsible employee” under CA law or Title IX, the complaint shall be forwarded to the Title IX Coordinator.
• A complaint shall be filed within two years of the date of the alleged unlawful discrimination or one year of the date on which the complainant knew or should have known of the facts underlying the allegation of unlawful discrimination.
• The District will retain on file for a period of at least five years (used to be 3 years) after closing the case copies of:
  - The original complaint;
  - The investigative report;
  - The summary of the report if one is prepared;
  - The notice provided to the Complainant of the District’s administrative determination and his or her right to appeal;
  - Any appeal; and
  - The District’s final decision.

Title 5 Requirements
Title IX and Student Discipline Procedures (5 CCR 59337)

• In cases of student sexual misconduct subject to Title IX, district must comply with the federal DOE’s Title IX regulations.
Title 5 Requirements
Student Discipline Procedures
(5 CCR 59337)

• In cases of student sexual misconduct that are not subject to Title IX, when an accused student is subject to severe disciplinary sanctions, and the credibility of witnesses was center to the investigative findings, the district student discipline procedures must provide the following:
1. An opportunity for the accused student to cross-examine witnesses indirectly at a live hearing, either in person or by videoconference; and
2. A live hearing conducted by a neutral decision-maker other than the investigator.

Title IX - Investigation Report

• Report should:
  • Fairly summarize relevant evidence, and
  • Be provided to complainant and respondent (and their advisors) for comment at least 10 days before a hearing or final determination.

Title 5 – Investigation Report

• Written report required under Title 5 regulations
• Report must include:
  (1) a description of the circumstances giving rise to the complaint;
  (2) a summary of the testimony provided by each witness, including the complainant and any available witnesses identified by the complainant in the complaint;
  (3) an analysis of any relevant data or other evidence collected during the course of the investigation;
  (4) a specific finding as to whether each factual allegation in the complaint occurred based on the preponderance of the evidence standard; and
  (5) any other information deemed appropriate by the district.
Appeals

- Under the Title IX regulations, the complainant and respondent both have a right to appeal the determination regarding responsibility.
- Title 5 regulations provide for a right of appeal of the administrative determination to both parties in cases of student sexual misconduct subject to Title IX.
- In cases of student sexual misconduct not subject to Title IX, Title 5 regulations give the complainant the right to appeal to the governing board and the Chancellor’s office (or DFEH in employment matters).
- In cases of student sexual misconduct not subject to Title IX, Title 5 regulations give the respondent the right to appeal to the governing board only.

Who Can File a Complaint

- Under Title IX, only the complainant or Title IX Coordinator can file a complaint alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment.
- Title 5 regulations provide that only the following individuals may file a complaint (5 C.C.R. § 59328(a)):
  - Student;
  - Parent of a minor; or
  - An individual with legal authority on behalf of a student or employee.

You Decide: Is There a Title IX Violation?

a) College uses clear and convincing evidence standard for all disciplinary cases except those involving sexual misconduct, which are subject to the preponderance of the evidence standard.

b) The respondent was given the wrong policies and procedures relating to the investigation process.

c) College provides the following details of the allegation to the respondent: “A fellow student has alleged that you engaged in sexual harassment from September 2016 to June 2017.”

d) The respondent was notified of the outcome of the disciplinary proceeding against him two weeks after the reporting party was notified.
VII. Case Study

Case Study

VIII. Questions
Resources

- Department of Education, Technical Assistance, email T9questions@ed.gov
- Department of Education, Office for Civil Rights, https://www.ed.gov/OCR
- Clery Center, https://clerycenter.org/
- Know Your IX: Clery Act, https://www.knowyourix.org/college-resources/clery-act/

Questions?

Information in this presentation, including but not limited to PowerPoint handouts and presenter’s comments, is summary only and not legal advice. We advise you consult with legal counsel to determine how this information may apply to your specific facts and circumstances.

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The Department of Education on May 6, 2020, issued much-awaited final regulations on how K-12 school districts and college campuses must respond to allegations of sexual harassment. Secretary of Education Betsy DeVos said the final regulations under Title IX — which prohibits sex discrimination in federally funded educational institutions — were issued after considering various stakeholder comments and as many as 124,000 public comments made since the proposed guidelines were issued in November 2018.

The overall intent of the new Title IX regulations is to provide students accused of sexual misconduct with stronger due process protections. As a result, there are many additional requirements that include very specific grievance and investigation procedures that must be adopted by educational institutions.

The new regulations are scheduled to take effect August 14, 2020, and will require modification of current sexual harassment policies, including investigation procedures.

This office is offering a webinar, entitled “New Title IX Regulations for 2020-2021,” on June 3, 2020, from 1:00 p.m. to 4:00 p.m. where we will cover in more detail the new requirements under Title IX. You may register here: DETAILS/REGISTER.¹

¹ https://sclscal.org/workshop/new-title-ix-regulations-for-2020-2021-k-12-ccd/
Some of the more notable changes are detailed below:

**NEW TERMINOLOGY**

The regulations define the following terms to ensure consistency and clarity:

- **Complainant** means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.
- **Respondent** means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.
- **Recipient** means elementary and secondary schools, as well as postsecondary institutions, that receive Federal financial assistance.

**DEFINITION OF SEXUAL HARASSMENT**

The new regulations provide that there are only three categories of conduct that could constitute sexual harassment under Title IX:

1. unwelcome conduct on the basis of sex that a reasonable person would determine is so “severe, pervasive and objectively offensive” that it effectively denies a person equal access to the recipient’s education program or activity;

2. quid pro quo harassment;

3. sexual assault, dating violence, domestic violence, or stalking as defined in the Clery Act/Violence Against Women Act (“VAWA”).

**What this means:** The final regulations continue the 1997 Guidance and 2001 Guidance approach of including as sexual harassment unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature by an employee, by another student, or by a third party. However, when determining whether conduct meets the definition of sexual harassment, particularly under category 1 (hostile environment), the conduct must be severe, pervasive and objectively offensive. Previously, the legal standard was that the conduct has to be either severe or pervasive. This will result in a huge shift in how we analyze whether sexual conduct creates a hostile environment for a complainant and will make it more difficult for a complainant to argue that he/she has been subjected to a hostile environment due to sexual harassment. Notably, under the new regulations a single instance of harassment on the basis of sex can no longer be considered sexual harassment pursuant to the hostile environment analysis.

2 34 CFR § 106.30
3 Quid pro quo sexual harassment is defined as “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.”
5 34 U.S.C. § 12291(a)(10)
6 34 U.S.C. § 12291(a)(8)
7 34 U.S.C. § 12291(a)(30)
It is important to note that conduct that falls under the other two categories – quid pro quo and Clery Act/VAWA offenses - do not have to meet the elements of “severe, pervasiveness, and objective offensiveness” such that a single instance of sufficiently severe harassment on the basis of sex may have the systemic effect of denying the victim equal access to an education program or activity.

Lastly, recipients may continue to address harassing conduct that does not meet the Title IX definition of sexual harassment under other provisions of the recipient’s own code of conduct.

**DESIGNATION OF A TITLE IX COORDINATOR**

The Department of Education (“DOE”) has clarified that each recipient must designate and authorize at least one employee to coordinate its efforts with its responsibilities under Title IX. The employee must be referred to as the “Title IX Coordinator” and the recipient must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, of the name and title, office address, electronic mail address, and telephone number of the employee designated as the Title IX Coordinator.

**What this means:** The DOE has expanded the groups of individuals/organizations that must be notified of the Title IX Coordinator’s information. The recipient must prominently display on its website, if any, of the Title IX Coordinator’s contact information and the recipient’s sexual harassment prevention policy and in each handbook catalog that it makes available to the individuals who now must be notified of the Title IX Coordinator’s information. In addition, the contact information of the Title IX Coordinator must now include either the name or title of the individual and the email address (which was not required previously).

Most importantly, the regulations clarify the independent compliance and investigatory responsibilities of the Title IX Coordinator. Title IX Coordinators must be given independent authority to monitor and implement a recipient’s compliance under Title IX. The Title IX Coordinator must be free from conflicts of interest and bias, and must be trained on, among other things, how to serve impartially.

**GENERAL RESPONSE TO SEXUAL HARASSMENT**

A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

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8 34 CFR § 106.8
9 34 CFR § 106.45(b)(1)(iii)
10 34 CFR § 106.44
Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school.

Notice results whenever any elementary and secondary school employee, any Title IX Coordinator, or any official with authority: witnesses sexual harassment; hears about sexual harassment or sexual harassment allegations from a complainant (i.e., a person alleged to be the victim) or a third party (e.g., the complainant’s parent, friend, or peer); receives a written or verbal complaint about sexual harassment or sexual harassment allegations; or by any other means.

Education program or activity includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution, e.g., off-campus housing, fraternity/sorority houses, etc.

These final regulations emphasize that any person may trigger a recipient’s response obligations by reporting sexual harassment to the Title IX Coordinator using contact information that the recipient must post on the recipient’s website. The person who reports does not need to be the complainant (i.e., the person alleged to be the victim); a report may be made by “any person” who believes that sexual harassment may have occurred and requires a recipient’s response.

A recipient’s response must treat complainants and respondents equitably by offering supportive measures to a complainant, and by following a grievance process now required under the new Title IX regulations before the imposition of any disciplinary sanctions or other actions that are not supportive measures, against a respondent. The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures, consider the complainant’s wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.

Supportive measures means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment or deter sexual harassment.

Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations,

11 34 CFR § 106.44(a)
12 34 CFR § 106.30
leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures.

The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.13

With or without a formal complaint, a recipient must comply with the requirement to offer supportive services.14

**What this means:** Previously, a recipient’s duty to investigate and remediate sexual misconduct was triggered when a “responsible employee” knew or should have known about the sexual harassment/sex discrimination. Not only do the new regulations no longer use the term “responsible employee,” the regulations also eliminated the concept of constructive notice (aka “should have known”).

For post-secondary educational institutions, notice of sexual harassment/sex discrimination only occurs when that institution’s Title IX Coordinator or any official who has authority to institute corrective measures on behalf of the recipient receives notice of sexual harassment or allegations of sexual harassment. Notice includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator and the filing of a formal complaint.

For K-12 educational institutions, when *any* employee receives notice from a student or employee of sexual harassment or allegations of sexual harassment, the recipient is deemed to have actual knowledge, thereby triggering the recipient’s duty to promptly respond. So, all K-12 employees are considered officials with authority to institute corrective measures and schools may not exempt any classification of employee, such as counselors or classified employees.

The new regulations also eliminated the previously-used term “interim measures” and instead use the term “supportive services.”

**JURISDICTIONAL ISSUES**15

Sexual harassment that occurs off campus and does not occur in an *education program or activity* of the recipient (as defined above) will not be covered under Title IX. Therefore, sexual harassment that occurs off campus via social media that targets a student, for example, may not fall under the provision of Title IX. However, this type of misconduct may still be in violation of the recipient’s code of conduct and so the recipient’s response would be pursuant to that policy.

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13 34 CFR § 106.30
14 34 CFR § 106.45
15 34 CFR § 106.44(a)
In addition, Title IX no longer applies for acts committed outside the United States even if the misconduct occurred in a recipient’s education program or activity, e.g., study abroad program.\textsuperscript{16} However, other policies may apply, e.g., a code of conduct policy, that would require a response from the recipient.

\textbf{What this means:} Recipients must be careful to first identify if they have jurisdiction over sexual misconduct in order to determine if Title IX applies. However, even if a recipient does not have jurisdiction under Title IX, it may have jurisdiction under another policy or provision. For example, for K-12 school districts, bullying via social media that occurs off campus may be within a recipient’s jurisdiction and subject the offending student to discipline. However, that same conduct may not require a recipient to investigate under Title IX.

\textbf{FORMAL COMPLAINT}\textsuperscript{17}

A formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed. A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail.

\textbf{What this means:} The definition of “formal complaint” precludes a third party from filing a formal complaint, which is defined as a document that must be filed by a complainant or signed by the Title IX Coordinator. However, as mentioned earlier, any person who believes that sexual harassment may have occurred may report sexual harassment which would then trigger a recipient’s responsibility to determine if supportive services are necessary under the circumstances. Furthermore, a complainant may not submit a formal complaint anonymously, as it requires their physical or digital signature. While a Title IX Coordinator may sign a formal complaint based upon an anonymous report, the identity of the complainant will be disclosed if known.

\textbf{NOTICE OF ALLEGATIONS}\textsuperscript{18}

Upon receipt of a formal complaint, a recipient must provide the following information through written notice to the parties who are known:

1. Notice of the recipient’s grievance process that complies with this section, including any informal resolution process.

2. Notice of the allegations of sexual harassment potentially constituting sexual harassment, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the

\textsuperscript{16} 34 CFR § 106.8(d)
\textsuperscript{17} 34 CFR § 106.30
\textsuperscript{18} 34 CFR § 106.45(b)(2)
parties involved in the incident, if known, the conduct allegedly constituting sexual harassment, and the date and location of the alleged incident, if known.

The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process. The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, and may inspect and review evidence obtained during the investigation.

The written notice must inform the parties of any provision in the recipient’s code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

If, in the course of an investigation, the recipient decides to investigate allegations about the complainant or respondent that are not included in the notice, the recipient must provide notice of the additional allegations to the parties whose identities are known.

What this means: The intent of the new Title IX regulations is to provide an equitable process that affords due process to the parties involved, particularly the respondent. Providing respondents with specific details about the allegations provides them a better opportunity to defend themselves, which is central to due process.

RESPONSE TO A FORMAL COMPLAINT

In response to a formal complaint, a recipient must adopt and follow a grievance process that complies with the following elements:

1. Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. Remedies must be designed to restore or preserve equal access to the recipient’s education program or activity. Such remedies may include the same individualized services described in § 106.30 as “supportive measures”; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent;

2. Require an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence – and provide that credibility determinations may not be based on a person’s status as a complainant, respondent, or witness;

3. Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

19 34 CFR § 106.45(b)(1)
A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment in § 106.30, the scope of the recipient’s education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. A recipient must ensure that decision-makers receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant. A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence. Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment;

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

5. Include reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes, 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 the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party’s advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities;

6. Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility;

7. State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment;

8. Include the procedures and permissible bases for the complainant and respondent to appeal;

9. Describe the range of supportive measures available to complainants and respondents; and
10. Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

**What this means:** The two most notable changes are the never before required training requirements for Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process and the requirement that recipients apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty. For example, if a collective bargaining agreement requires a clear and convincing standard for formal complaints against employees, then that same standard would have to be applied for formal complaints against students. The two standards of evidence that a recipient must choose from are preponderance of the evidence (more likely than not or >50%) or clear and convincing evidence (substantially more likely than not or ~75%).

Regarding the new training requirements for Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, there is no minimum hourly training requirement, but instead the training must include the following components: the definition of sexual harassment, the scope of the recipient’s education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. Decision-makers specifically must receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant. A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence.

**DISMISSAL OF A FORMAL COMPLAINT**

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

The recipient may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein. Upon dismissal of a formal complaint, the recipient must promptly send written notice of the dismissal and reason(s) therefore simultaneously to the parties.

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20 34 CFR § 106.45(b)(3)
What this means: The Title IX regulations now specify when a recipient must dismiss a complaint under Title IX. In addition, a complainant can request to dismiss a formal complaint, but the recipient is not required to dismiss the complaint.

EMERGENCY REMOVAL\(^{21}\)

Nothing in this part precludes a recipient from removing a respondent from the recipient’s education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.

What this means: A recipient may only remove a respondent from his/her education program or activity after considering several criteria in order to determine if the respondent must be removed to ensure the physical health or safety of any student. In addition, a respondent is entitled to some form of due process immediately following his/her removal from his/her education program or activity. This “due process” may be a hearing or meeting with an administrator responsible for conducting the individualized safety and risk analysis for the sole purpose of providing the respondent the opportunity to challenge the decision.

INVESTIGATION OF A FORMAL COMPLAINT\(^{22}\)

When investigating a formal complaint and throughout the grievance process, a recipient must—

1. Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the recipient and not on the parties. Furthermore, the recipient cannot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party’s voluntary, written consent to do so for a grievance process under this section (if a party is not an “eligible student,” as defined in 34 CFR § 99.3, then the recipient must obtain the voluntary, written consent of a “parent,” as defined in 34 CFR § 99.3);

2. Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;

3. Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;

\(^{21}\) 34 CFR § 106.44(c)
\(^{22}\) 34 CFR § 106.45(b)(5)
4. Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties;

5. Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate;

6. Provide both parties an 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 the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. Prior to completion of the investigative report, the recipient must send to each party and the party’s advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject to the parties’ inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination; and

7. Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required or otherwise provided) or other time of determination regarding responsibility, send to each party and the party’s advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.

**What this means:** The investigation procedure that recipients must now adopt must be followed in order to provide the parties, particularly the respondent, with due process. The regulations make clear that it is the recipient’s responsibility, not the parties’, to gather evidence sufficient to reach a determination regarding responsibility and the burden of proof rests with the recipient.

Each party is now entitled to review, prior to the completion of the investigation report, all evidence, inculpatory and exculpatory, that is directly related to the allegations raised in the formal complaint. Practically speaking, this will be accomplished by the investigator providing a copy of the draft investigation report prior to the completion of the report and allow each party at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report.
HEARINGS

For postsecondary institutions, the recipient’s grievance process must provide for a live hearing. At the live hearing, the decision-maker(s) must permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.

Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party’s advisor of choice and never by a party personally, notwithstanding the discretion of the recipient to otherwise restrict the extent to which advisors may participate in the proceedings. At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions.

Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.

If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient’s choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.

Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.

If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions. Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient’s discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other.

Recipients must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

For recipients that are elementary and secondary schools, and other recipients that are not postsecondary institutions, the recipient’s grievance process may, but need not, provide for a

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23 34 CFR § 106.45(b)(6)(i)
hearing. With or without a hearing, after the recipient has sent the investigative report to the parties and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.

With or without a hearing, questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent. The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.

**What this means:** Postsecondary institutions are now required to conduct a live hearing conducted by a neutral decision-maker (hearing officer or panel) who will review the evidence and make a decision as to culpability. The decision-maker cannot be the Title IX Coordinator or the investigator. The hearing can be conducted via video conference and it must always be recorded. The parties must be allowed to ask relevant questions and cross-examine witnesses.

If a party does not have an advisor present at a live hearing, the recipient must provide an advisor of the recipient’s choice to conduct cross-examination on behalf of that party. A party cannot conduct questioning on their own behalf. Therefore, if a party does not have an advisor, the recipient will need to provide one, which can be an employee of the recipient; however, the recipient chooses the advisor.

Recipients that are elementary and secondary schools are not required to conduct live hearings to determine culpability. However, the parties must be given the opportunity to submit written, relevant questions they wanted asked of any party or witness after receiving the investigation report. The recipient will then provide each party with the answers to their questions and then allow for additional, limited follow-up questions from each party.

**STANDARD OF EVIDENCE**

The final regulations were revised to clearly require a recipient’s grievance process to state up front which of the two permissible standards of evidence the recipient has selected and then to apply that selected standard to all formal complaints of sexual harassment, including those against employees.

**DETERMINATION REGARDING RESPONSIBILITY**

The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the recipient must apply the standard of evidence that it applies to all formal
complaints of sexual harassment – either preponderance of the evidence or clear and convincing evidence.

The written determination must include the following elements:

1. Identification of the allegations potentially constituting sexual harassment;

2. A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;

3. Findings of fact supporting the determination;

4. Conclusions regarding the application of the recipient’s code of conduct to the facts;

5. A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient’s education program or activity will be provided by the recipient to the complainant; and

6. The recipient’s procedures and permissible bases for the complainant and respondent to appeal.

The recipient must provide the written determination to the parties simultaneously. The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

The Title IX Coordinator is responsible for effective implementation of any remedies.26

**What this means:** A recipient must now ensure that an individual, other than the Title IX Coordinator or investigator, reviews all the evidence and makes a determination regarding a respondent’s responsibility under Title IX. In small elementary and secondary districts, this will require that the Title IX Coordinator be an employee other than the chief administrative officer.

**APPEALS**27

A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient’s dismissal of a formal complaint or any allegations therein, on the following bases:

1. Procedural irregularity that affected the outcome of the matter;

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26 34 CFR § 106.45(b)(7)(iv)
27 34 CFR § 106.45(b)(8)
2. New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and

3. The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

A recipient may offer an appeal equally to both parties on additional bases. As to all appeals, the recipient must:

1. Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;

2. Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;

3. Ensure that the decision-maker(s) for the appeal is unbiased and meets the training requirements under Title IX;

4. Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;

5. Issue a written decision describing the result of the appeal and the rationale for the result; and

6. Provide the written decision simultaneously to both parties.

**What this means:** Both parties must now be offered the opportunity to appeal a determination regarding responsibility. Previously, recipients generally only provided the complainant with an opportunity to appeal a determination regarding responsibility. Also, the decision-maker for the appeal must meet the same training requirement as the Title IX Coordinator.

**INFORMAL RESOLUTION**

A recipient may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section. Similarly, a recipient may not require the parties to participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed.

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28 34 CFR § 106.45(b)(9)
However, at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient –

1. Provides to the parties a written notice disclosing: the allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;

2. Obtains the parties’ voluntary, written consent to the informal resolution process; and

3. Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

**What this means:** Recipients are not required to develop and implement an informal resolution process. However, if a recipient chooses to develop an informal resolution process, it cannot be offered unless a formal complaint has been filed.

**RECORDKEEPING**

A recipient must maintain for a period of seven (7) years records of –

1. Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required under Title IX, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient’s education program or activity;

2. Any appeal and the result therefrom;

3. Any informal resolution and the result therefrom; and

4. All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website, the recipient must make these materials available upon request for inspection by members of the public.

**What this means:** Recipients must now maintain records regarding every phase of a sexual harassment investigation under Title IX for at least seven years. Previously, there was no express requirement on maintaining records for a specific period of time.

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29 34 CFR § 106.45(b)(10)
TRAINING MATERIALS PUBLICATION REQUIREMENT\textsuperscript{30}

Each recipient must publish on its website the training materials used to train its Title IX Coordinator.

\textbf{What this means:} If the training materials are proprietary, and thus copyrighted, we recommend you list the materials by its title, but not make them available on your website. You can further state on your website that the materials may be available for inspection with the Title IX Coordinator.

REMEDIAL ACTION\textsuperscript{31}

The DOE has clarified that it may require a recipient to take remedial action for discriminating in violation of Title IX \textit{and} for violating Title IX regulations.

\textbf{What this means:} A recipient that does not follow the requirements of Title IX, such as not designating an employee as a Title IX Coordinator, failing to offer supportive services, failing to send written notice after dismissing a complainant’s allegations, or not following its grievance procedures, may be found to have violated Title IX, even if the violation does not, itself, constitute sex discrimination.

RIGHTS OF PARENTS\textsuperscript{32}

The regulations expressly recognize the legal rights of parents/guardians to act on behalf of a complainant or respondent on any Title IX matter.

\textbf{What this means:} Parents/guardians cannot be prevented from representing their child or acting on their behalf on any Title IX matter. However, once a child attains the age of majority (18), he/she holds his/her educational rights, unless he/she is conserved, and can act on their own behalf. However, an adult child can assign his/her educational rights to his/her parent/guardian so that the parent/guardian can act on their child’s behalf.

Please contact our office with questions regarding this Legal Update or any other legal matter.

\textit{The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.}

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\textsuperscript{30} 34 CFR § 106.45(b)(10)(i)(D)
\textsuperscript{31} 34 CFR § 106.3
\textsuperscript{32} 34 CFR § 106.6(g)
For the reasons discussed in the preamble, the Secretary amends part 106 of title 34 of the Code of Federal Regulations as follows:

PART 106—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION

PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

1. The authority citation for part 106 continues to read as follows:

Authority: 20 U.S.C. 1681 et seq., unless otherwise noted.

2. Section 106.3 is amended by revising paragraph (a) to read as follows:

§106.3 Remedial and affirmative action and self-evaluation.

(a) Remedial action. If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity under this part, or otherwise violated this part, such recipient must take such remedial action as the Assistant Secretary deems necessary to remedy the violation, consistent with 20 U.S.C. 1682.

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3. Section 106.6 is amended by revising the section heading and adding paragraphs (d), (e), (f), (g), and (h) to read as follows:

§ 106.6 Effect of other requirements and preservation of rights.

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(d) Constitutional protections. Nothing in this part requires a recipient to:

(1) Restrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution;

(2) Deprive a person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution; or
(3) Restrict any other rights guaranteed against government action by the U.S. Constitution.

(e) Effect of Section 444 of General Education Provisions Act (GEPA)/Family Educational Rights and Privacy Act (FERPA). The obligation to comply with this part is not obviated or alleviated by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99.

(f) Title VII of the Civil Rights Act of 1964. Nothing in this part may be read in derogation of any individual’s rights under title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. or any regulations promulgated thereunder.

(g) Exercise of rights by parents or guardians. Nothing in this part may be read in derogation of any legal right of a parent or guardian to act on behalf of a “complainant,” “respondent,” “party,” or other individual, subject to paragraph (e) of this section, including but not limited to filing a formal complaint.

(h) Preemptive effect. To the extent of a conflict between State or local law and title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.

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4. Section 106.8 is revised to read as follows:

§ 106.8 Designation of coordinator, dissemination of policy, and adoption of grievance procedures.

(a) Designation of coordinator. Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the “Title IX Coordinator.” The recipient must notify applicants
for admission and employment, students, parents or legal guardians of elementary and secondary
school students, employees, and all unions or professional organizations holding collective
bargaining or professional agreements with the recipient, of the name or title, office address,
electronic mail address, and telephone number of the employee or employees designated as the
Title IX Coordinator pursuant to this paragraph. Any person may report sex discrimination,
including sexual harassment (whether or not the person reporting is the person alleged to be the
victim of conduct that could constitute sex discrimination or sexual harassment), in person, by
mail, by telephone, or by electronic mail, using the contact information listed for the Title IX
Coordinator, or by any other means that results in the Title IX Coordinator receiving the person’s
verbal or written report. Such a report may be made at any time (including during non-business
hours) by using the telephone number or electronic mail address, or by mail to the office address,
listed for the Title IX Coordinator.

(b) Dissemination of policy—(1) Notification of policy. Each recipient must notify
persons entitled to a notification under paragraph (a) of this section that the recipient does not
discriminate on the basis of sex in the education program or activity that it operates, and that it is
required by title IX and this part not to discriminate in such a manner. Such notification must
state that the requirement not to discriminate in the education program or activity extends to
admission (unless subpart C of this part does not apply) and employment, and that inquiries
about the application of title IX and this part to such recipient may be referred to the recipient’s
Title IX Coordinator, to the Assistant Secretary, or both.

(2) Publications. (i) Each recipient must prominently display the contact information
required to be listed for the Title IX Coordinator under paragraph (a) of this section and the
policy described in paragraph (b)(1) of this section on its website, if any, and in each handbook

2010
or catalog that it makes available to persons entitled to a notification under paragraph (a) of this section.

(ii) A recipient 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 or this part.

(c) Adoption of grievance procedures. A recipient must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part and a grievance process that complies with § 106.45 for formal complaints as defined in § 106.30. A recipient must provide to persons entitled to a notification under paragraph (a) of this section notice of the recipient’s grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond.

(d) Application outside the United States. The requirements of paragraph (c) of this section apply only to sex discrimination occurring against a person in the United States.

5. Section 106.9 is revised to read as follows:

§ 106.9 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.
6. Section 106.12 is amended by revising paragraph (b) to read as follows:

§ 106.12 Educational institutions controlled by religious organizations.

* * * * *

(b) Assurance of exemption. An educational institution that seeks assurance of the exemption set forth in paragraph (a) of this section may do so by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part that conflict with a specific tenet of the religious organization. An institution is not required to seek assurance from the Assistant Secretary in order to assert such an exemption. In the event the Department notifies an institution that it is under investigation for noncompliance with this part and the institution wishes to assert an exemption set forth in paragraph (a) of this section, the institution may at that time raise its exemption by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization, whether or not the institution had previously sought assurance of an exemption from the Assistant Secretary.

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7. Add § 106.18 to subpart B to read as follows:

§ 106.18 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.
8. Add § 106.24 to subpart C to read as follows:

§ 106.24 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

9. Add § 106.30 to subpart D to read as follows:

§ 106.30 Definitions.

(a) As used in this part:

*Actual knowledge* means notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is the respondent. The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient. “Notice” as used in this paragraph includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator as described in § 106.8(a).

*Complainant* means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.

*Consent.* The Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault, as referenced in this section.

2013
Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed. A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under § 106.8(a), and by any additional method designated by the recipient. As used in this paragraph, the phrase “document filed by a complainant” means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint. Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party under this part or under § 106.45, and must comply with the requirements of this part, including § 106.45(b)(1)(iii).

Respondent means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

(1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct;

(2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity; or
defined in 34 U.S.C. 12291(a)(10), “domestic violence” as defined in 34 U.S.C. 12291(a)(8), or
“stalking” as defined in 34 U.S.C. 12291(a)(30).

Supportive measures means non-disciplinary, non-punitive individualized services
offered as appropriate, as reasonably available, and without fee or charge to the complainant or
the respondent before or after the filing of a formal complaint or where no formal complaint has
been filed. Such measures are designed to restore or preserve equal access to the recipient’s
education program or activity without unreasonably burdening the other party, including
measures designed to protect the safety of all parties or the recipient’s educational environment,
or deter sexual harassment. Supportive measures may include counseling, extensions of
deadlines or other course-related adjustments, modifications of work or class schedules, campus
escort services, mutual restrictions on contact between the parties, changes in work or housing
locations, leaves of absence, increased security and monitoring of certain areas of the campus,
and other similar measures. The recipient must maintain as confidential any supportive measures
provided to the complainant or respondent, to the extent that maintaining such confidentiality
would not impair the ability of the recipient to provide the supportive measures. The Title IX
Coordinator is responsible for coordinating the effective implementation of supportive
measures.

(b) As used in §§ 106.44 and 106.45:

Elementary and secondary school means a local educational agency (LEA), as defined in
the Elementary and Secondary Education Act of 1965, as amended by the Every Student
Succeeds Act, a preschool, or a private elementary or secondary school.
Postsecondary institution means an institution of graduate higher education as defined in § 106.2(l), an institution of undergraduate higher education as defined in § 106.2(m), an institution of professional education as defined in § 106.2(n), or an institution of vocational education as defined in § 106.2(o).

10. Add § 106.44 to subpart D to read as follows:

§ 106.44 Recipient’s response to sexual harassment.

(a) General response to sexual harassment. A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances. For the purposes of this section, §§ 106.30, and 106.45, “education program or activity” includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. A recipient’s response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant’s wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. The Department may not deem a
recipient to have satisfied the recipient’s duty to not be deliberately indifferent under this part based on the recipient’s restriction of rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment.

(b) Response to a formal complaint. (1) In response to a formal complaint, a recipient must follow a grievance process that complies with § 106.45. With or without a formal complaint, a recipient must comply with § 106.44(a).

(2) The Assistant Secretary will not deem a recipient’s determination regarding responsibility to be evidence of deliberate indifference by the recipient, or otherwise evidence of discrimination under title IX by the recipient, solely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence.

(c) Emergency removal. Nothing in this part precludes a recipient from removing a respondent from the recipient’s education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.

(d) Administrative leave. Nothing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45. This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.
§ 106.45 Grievance process for formal complaints of sexual harassment.

(a) Discrimination on the basis of sex. A recipient’s treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX.

(b) Grievance process. For the purpose of addressing formal complaints of sexual harassment, a recipient’s grievance process must comply with the requirements of this section. Any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in § 106.30, must apply equally to both parties.

(1) Basic requirements for grievance process. A recipient’s grievance process must—

(i) Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. Remedies must be designed to restore or preserve equal access to the recipient’s education program or activity. Such remedies may include the same individualized services described in § 106.30 as “supportive measures”; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent;

(ii) Require an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence – and provide that credibility determinations may not be based on a person’s status as a complainant, respondent, or witness;
(iii) Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment in § 106.30, the scope of the recipient’s education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. A recipient must ensure that decision-makers receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section. A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section. Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment;

(iv) Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process;

(v) Include reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes, 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 the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party’s advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities;

(vi) Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility;

(vii) State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment;

(viii) Include the procedures and permissible bases for the complainant and respondent to appeal;

(ix) Describe the range of supportive measures available to complainants and respondents; and

(x) Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

(2) Notice of allegations—(i) Upon receipt of a formal complaint, a recipient must provide the following written notice to the parties who are known:
(A) Notice of the recipient’s grievance process that complies with this section, including any informal resolution process.

(B) Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in § 106.30, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment under § 106.30, and the date and location of the alleged incident, if known. The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process. The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section. The written notice must inform the parties of any provision in the recipient’s code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

(ii) If, in the course of an investigation, the recipient decides to investigate allegations about the complainant or respondent that are not included in the notice provided pursuant to paragraph (b)(2)(i)(B) of this section, the recipient must provide notice of the additional allegations to the parties whose identities are known.

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

(ii) The recipient may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

(iii) Upon a dismissal required or permitted pursuant to paragraph (b)(3)(i) or (b)(3)(ii) of this section, the recipient must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties.

(4) **Consolidation of formal complaints.** A recipient may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances. Where a grievance process involves more than one complainant or more than one respondent, references in this section to the singular “party,” “complainant,” or “respondent” include the plural, as applicable.

(5) **Investigation of a formal complaint.** When investigating a formal complaint and throughout the grievance process, a recipient must—

(i) Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties provided that the recipient cannot access, consider, disclose, or otherwise use a party’s records
that are made or maintained by a physician, psychiatrist, psychologist, or other recognized
professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or
assisting in that capacity, and which are made and maintained in connection with the provision of
treatment to the party, unless the recipient obtains that party’s voluntary, written consent to do so
for a grievance process under this section (if a party is not an “eligible student,” as defined in 34
CFR 99.3, then the recipient must obtain the voluntary, written consent of a “parent,” as defined
in 34 CFR 99.3);

(ii) Provide an equal opportunity for the parties to present witnesses, including fact and
expert witnesses, and other inculpatory and exculpatory evidence;

(iii) Not restrict the ability of either party to discuss the allegations under investigation or
to gather and present relevant evidence;

(iv) Provide the parties with the same opportunities to have others present during any
grievance proceeding, including the opportunity to be accompanied to any related meeting or
proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and
not limit the choice or presence of advisor for either the complainant or respondent in any
meeting or grievance proceeding; however, the recipient may establish restrictions regarding the
extent to which the advisor may participate in the proceedings, as long as the restrictions apply
equally to both parties;

(v) Provide, to a party whose participation is invited or expected, written notice of the
date, time, location, participants, and purpose of all hearings, investigative interviews, or other
meetings, with sufficient time for the party to prepare to participate;

(vi) Provide both parties an 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 the evidence upon which the recipient does not intend to rely in reaching a
determination regarding responsibility and inculpatory or exculpatory evidence whether obtained
from a party or other source, so that each party can meaningfully respond to the evidence prior to
closure of the investigation. Prior to completion of the investigative report, the recipient must
send to each party and the party’s advisor, if any, the evidence subject to inspection and review
in an electronic format or a hard copy, and the parties must have at least 10 days to submit a
written response, which the investigator will consider prior to completion of the investigative
report. The recipient must make all such evidence subject to the parties’ inspection and review
available at any hearing to give each party equal opportunity to refer to such evidence during the
hearing, including for purposes of cross-examination; and

(vii) Create an investigative report that fairly summarizes relevant evidence and, at least
10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or
other time of determination regarding responsibility, send to each party and the party’s advisor, if
any, the investigative report in an electronic format or a hard copy, for their review and written
response.

(6) Hearings. (i) For postsecondary institutions, the recipient’s grievance process must
provide for a live hearing. At the live hearing, the decision-maker(s) must permit each party’s
advisor to ask the other party and any witnesses all relevant questions and follow-up questions,
including those challenging credibility. Such cross-examination at the live hearing must be
conducted directly, orally, and in real time by the party’s advisor of choice and never by a party
personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this
section to otherwise restrict the extent to which advisors may participate in the proceedings. At
the request of either party, the recipient must provide for the live hearing to occur with the
parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions. Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant. If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient’s choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party. Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent. If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions. Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient’s discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other. Recipients must create an audio
or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

(ii) For recipients that are elementary and secondary schools, and other recipients that are not postsecondary institutions, the recipient’s grievance process may, but need not, provide for a hearing. With or without a hearing, after the recipient has sent the investigative report to the parties pursuant to paragraph (b)(5)(vii) of this section and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party. With or without a hearing, questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent. The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.

(7) Determination regarding responsibility. (i) The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the recipient must apply the standard of evidence described in paragraph (b)(1)(vii) of this section.

(ii) The written determination must include—

(A) Identification of the allegations potentially constituting sexual harassment as defined in § 106.30;
(B) A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;

(C) Findings of fact supporting the determination;

(D) Conclusions regarding the application of the recipient’s code of conduct to the facts;

(E) A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient’s education program or activity will be provided by the recipient to the complainant; and

(F) The recipient’s procedures and permissible bases for the complainant and respondent to appeal.

(iii) The recipient must provide the written determination to the parties simultaneously. The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

(iv) The Title IX Coordinator is responsible for effective implementation of any remedies.

(8) Appeals. (i) A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient’s dismissal of a formal complaint or any allegations therein, on the following bases:

(A) Procedural irregularity that affected the outcome of the matter;
(B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and

(C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

(ii) A recipient may offer an appeal equally to both parties on additional bases.

(iii) As to all appeals, the recipient must:

(A) Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;

(B) Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;

(C) Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of this section;

(D) Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;

(E) Issue a written decision describing the result of the appeal and the rationale for the result; and

(F) Provide the written decision simultaneously to both parties.

(9) **Informal resolution.** A recipient may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section. Similarly, a recipient may not require the parties to
participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed. However, at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient –

(i) Provides to the parties a written notice disclosing: the allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;

(ii) Obtains the parties’ voluntary, written consent to the informal resolution process; and

(iii) Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

(10) Recordkeeping. (i) A recipient must maintain for a period of seven years records of –

(A) Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required under paragraph (b)(6)(i) of this section, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient’s education program or activity;

(B) Any appeal and the result therefrom;

(C) Any informal resolution and the result therefrom; and
(D) All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.

(ii) For each response required under § 106.44, a recipient must create, and maintain for a period of 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, the recipient must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient’s education program or activity. If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.

12. Add §106.46 to subpart D to read as follows:

§ 106.46 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.
13. Add § 106.62 to subpart E to read as follows:

§ 106.62 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

14. Subpart F is revised to read as follows:

Subpart F–Retaliation

Sec.

106.71 Retaliation

106.72 Severability

Subpart F–Retaliation

§ 106.71 Retaliation.

(a) Retaliation prohibited. No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part. Intimidation, threats, coercion, or discrimination, including 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, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation. The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or
filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).

(b) Specific circumstances. (1) The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under paragraph (a) of this section.

(2) Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

§ 106.72 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

15. Add subpart G to read as follows:

Subpart G – Procedures

Sec.

106.81 Procedures

106.82 Severability
Subpart G – Procedures

§ 106.81 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 34 CFR 100.6-100.11 and 34 CFR part 101. The definitions in § 106.30 do not apply to 34 CFR 100.6-100.11 and 34 CFR part 101.

§ 106.82 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

Subject Index to Title IX Preamble and Regulation [Removed]

16. Remove the Subject Index to Title IX Preamble and Regulation.

17. In addition to the amendments set forth above, in 34 CFR part 106, remove the parenthetical authority citation at the ends of §§ 106.1, 106.2, 106.3, 106.4, 106.5, 106.6, 106.7, , 106.11, 106.12, 106.13, 106.14, 106.15, 106.16, 106.17, 106.21, 106.22, 106.23, 106.31, 106.32, 106.33, 106.34, 106.35, 106.36, 106.37, 106.38, 106.39, 106.40, 106.41, 106.42, 106.43, 106.51, 106.52, 106.53, 106.54, 106.55, 106.56, 106.57, 106.58, 106.59, 106.60, and 106.61.
Questions and Answers Regarding the Department's Final Title IX Rule

Office for Civil Rights
N/A

September 4, 2020

Related Index Numbers
505. TITLE IX [OF THE EDUCATION AMENDMENTS OF 1972 - SEX DISCRIMINATION]

Ruling

In a Q&A document clarifying certain provisions of the 2020 Title IX regulations, OCR advised districts that sexual harassment is actionable when a reasonable person would find the unwelcome conduct to be so severe, pervasive, and objectively offensive that it denies equal access to an education. It also emphasized that districts must permit a complainant to file a formal Title IX complaint if she is participating or attempting to participate in the district's programs or activities.

Meaning

An alleged victim of sexual harassment isn't required to suffer a "concrete injury" to seek and receive the district's assistance under Title IX. As long as the alleged harassment is so severe, pervasive, and objectively offensive that it impacts the victim's equal access to her educational program, the district must take steps to resolve the harassment. For example, if a student skips class or has difficulty concentrating in class due to alleged sexual harassment, the district's Title IX coordinator should contact the student to ensure she receives supportive measures and has the opportunity to file a formal sexual harassment complaint.

Case Summary

Highlighting that individuals react to sexual harassment in a wide variety of ways, OCR stated that districts have a duty under Title IX to address such harassment if the alleged victim shows "signs of enduring unequal educational access." It emphasized that a district must properly respond to sexual harassment regardless of whether the alleged victim is presently a student or not. In a Q&A, OCR explained that the 2020 Title IX regulations adopted the definition of sexual harassment outlined in Davis v. Monroe County Board of Education, 3 GASLD 12 (U.S. 1999). According to that Supreme Court case, one form of sexual harassment is "unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the [district's] education program or activity." However, OCR emphasized that neither the Davis decision nor the 2020 Title IX rule requires that a student drop out of school, fail a class, have a panic attack, or otherwise reach a "breaking point" to report sexual harassment and receive a district's support. Rather, OCR stated that a district must respond to sexual harassment when the student shows "signs of enduring unequal access," such as skipping class to avoid a harasser, a decline in GPA, and difficulty concentrating in class. Moreover, OCR stressed that districts must promptly respond to a report of sexual harassment, whether the alleged victim is presently a student or not, in a manner that is not deliberately indifferent or clearly unreasonable. It pointed out that an individual may file a formal Title IX complaint as long as she is participating or attempting to participate in the district's program or activities. For example, a complainant who has graduated may still be "attempting to participate" in the district's program if she intends to remain involved in the district's alumni activities. Additionally, a complainant who left school but expresses a desire to re-enroll is "attempting to participate" in the district's education program, OCR concluded.

Full Text

Questions and Answers Regarding the Department's Final Title IX Rule

The Department of Education's Office for Civil Rights, through its new Outreach, Prevention,
Education and Non-discrimination (OPEN) Center, issues the following technical assistance document to support institutions with meeting their obligations under the Title IX Rule, which was announced on May 6, 2020, and which became effective on August 14, 2020. Many of the questions were derived from questions posed to the OPEN center through e-mail.

OCR may periodically release additional Question and Answer documents addressing the Title IX Rule.

All references and citations are to the unofficial version of the Title IX Rule, which is available here. A link to the official version of the Rule published in the Federal Register is here.

Disclaimer: Other than statutory and regulatory requirements included in the document, the contents of this guidance do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

**Effective Date of the Final Rule**

Question 1: Can you please clarify whether the new Title IX rules that went into effect on August 14, 2020, will be applied retroactively?

Answer 1: The Title IX Rule will not be enforced retroactively. In the Preamble to the Rule at page 127, the Department states unambiguously that the Department will not enforce these final regulations retroactively. The Department also notes, in footnote 290 of the Rule, the general principle that:

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

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

**Title IX Coordinator and Other Personnel Issues**

Question 2: Does the Title IX Rule specify whether each recipient must have a Title IX Coordinator, or is each school required to have a separate Title IX Coordinator, or both?

Answer 2: The Title IX Rule states in § 106.8(a):

"Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the "Title IX Coordinator." (emphasis omitted).

Question 3: The Title IX Rule allows schools to continue to address misconduct that does not meet the definition of sexual harassment. Can Title IX personnel still review these complaints, and follow procedures similar to those allegations that do meet the definition of sexual harassment?

Answer 3: Yes. The Title IX Rule does not preclude a recipient from using the same Title IX personnel (including the Title IX Coordinator, who must be an employee of the recipient, and Title IX investigators and decision-makers, who may be a recipient's employees or the employees of a third-party, such as a consortium of schools) to review and investigate allegations of misconduct that fall outside the scope of Title IX. Similarly, the Rule
does not preclude a recipient from using a grievance process that complies with § 106.45 with respect to allegations that fall outside the scope of Title IX. In the Preamble to the Rule at pages 481-82, for example, the Department states:

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

The Definition of Sexual Harassment

Question 4: One form of sexual harassment is conduct on the basis of sex that constitutes "[u]nwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity." In this sentence, does "reasonable person" modify only "severe, pervasive, and objectively offensive" only, or the effective denial clause as well? To clarify, can an "effective denial" be something that a reasonable person would experience, even if there is not evidence to show that the Complainant was in fact effectively denied?

Answer 4: The "reasonable person" standard in the second prong of the definition of sexual harassment under § 106.30(a) applies to each of the elements drawn from the U.S. Supreme Court's decision in Davis v. Monroe County Bd. of Ed., 526 U.S. 629 (1999). These elements include: severity, pervasiveness, objective offensiveness, and the effective denial of equal educational access. In the Preamble to the Rule, at page 515, the Department states: "The Davis standard ensures that all students, employees, and recipients understand that unwelcome conduct on the basis of sex is actionable under Title IX when a reasonable person in the complainant's position would find the conduct severe, pervasive, and objectively offensive such that it effectively denies equal access to the recipient's education program or activity."

With respect to the denial of the equal access element in particular, in the Preamble to the Title IX Rule, at page 525, states:

Neither the Supreme Court, nor the final regulations in § 106.30, requires showing that a complainant dropped out of school, failed a class, had a panic attack, or otherwise reached a "breaking point" in order to report and receive a recipient's supportive response to sexual harassment. The Department acknowledges that individuals react to sexual harassment in a wide variety of ways, and does not interpret the Davis standard to require certain manifestations of trauma or a "constructive expulsion." Evaluating whether a reasonable person in the complainant's position would deem the alleged harassment to deny a person "equal access" to education protects complainants against school officials inappropriately judging how a complainant has reacted to the sexual harassment. The § 106.30 definition neither requires nor permits school officials to impose notions of what a "perfect victim" does or says, nor may a recipient refuse to respond to sexual harassment because a complainant is "high-functioning" or not showing particular symptoms following a sexual harassment incident.

Similarly, the Preamble to the Title IX Rule, at pages 526-27, states:

With respect to the denial of equal access element, neither the Davis Court nor the Department's
final regulations require complete exclusion from an education, but rather denial of "equal" access. Signs of enduring unequal educational access due to severe, pervasive, and objectively offensive sexual harassment may include, as commenters suggest, skipping class to avoid a harasser, a decline in a student's grade point average, or having difficulty concentrating in class; however, no concrete injury is required to conclude that serious harassment would deprive a reasonable person in the complainant's position of the ability to access the recipient's education program or activity on an equal basis with persons who are not suffering such harassment.

(emphasis omitted).

Filing of a Formal Complaint

Question 5: The Title IX Rule states: "At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the school with which the formal complaint is filed." If a complainant either withdraws from school because of sexual harassment and then files a complaint, or files a complaint but then withdraws as a result of the sexual harassment or stress of the grievance process, how would the regulations affect the complainant's ability to pursue a formal complaint?

Answer 5: Under the Title IX Rule, recipients must promptly respond to a report that an individual has been allegedly victimized by sexual harassment, whether the alleged victim is presently a student or not, in a manner that is not "deliberately indifferent," or clearly unreasonable in light of known circumstances. Students and others who are participating or attempting to participate in the school's program or activity also have the right to file a formal complaint.

In the Preamble to the Title IX Rule, at pages 411-12, the Department further explains:

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

(emphasis omitted). Additionally, the Rule permits Title IX Coordinators to sign a formal complaint, regardless of whether a complainant is "participating or attempting to participate" in the school's education program or activity. A Title IX Coordinator's decision to sign a formal complaint (or not) is evaluated under the deliberate indifference standard: whether the decision was clearly unreasonable in light of the known circumstances.

Conducting an Investigation Hearing

Question 6: May a recipient delegate many of the functions required by the Title IX Rule to an outside entity, such as a Regional Center or consortium of schools?

Answer 6: Yes. In particular, many of the elements of the investigation and hearing processes lend themselves to delegation. The recipient itself remains ultimately responsible for ensuring compliance with the legal obligations under the Title IX Rule.

At page 273 of the Preamble to the Title IX Rule, the Department expressly contemplates and encourages recipients to consider innovative approaches such as consortiums and regional centers:

The Department appreciates commenters' recommendations for using regional center models
and similar models involving voluntary, cooperative efforts among recipients to outsource the investigation and adjudication functions required under the final regulations. The Department believes these models represent the potential for innovation with respect to how recipients might best fulfill the obligation to impartially reach accurate factual determinations while treating both parties fairly. The Department encourages recipients to consider innovative solutions to the challenges presented by the legal obligation for recipients to fairly and impartially investigate and adjudicate these difficult cases, and the Department will provide technical assistance for recipients with questions about pursuing regional center models.

To be sure, there are limitations on the extent to which a recipient may delegate certain responsibilities to other entities. For instance, each recipient must itself employ a Title IX Coordinator. See § 106.8 ("Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the "Title IX Coordinator."). Similarly, each recipient is responsible for ensuring that its grievance procedures satisfy the Title IX Rule. See § 106.44(c) ("A recipient must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part and a grievance process that complies with § 106.45 for formal complaints as defined in § 106.30"). Still, despite these limitations, the Title IX Rule offers ample opportunity for recipients to find efficiencies in cooperation with other recipients, particularly with respect to investigation and adjudication.

Question 7: What are the rules of evidence at a hearing? Do courtroom rules like the Federal Rules of Evidence apply to a hearing under Title IX?

Answer 7: The Title IX Rule does not adopt the Federal Rules of Evidence for hearings conducted under Title IX. For instance, with respect to which evidence may be introduced, the Rule uses "relevance" as the sole admissibility criterion. See § 106.45(b)(1)(ii) (the recipient's grievance process must provide for objective evaluation of all relevant evidence, including evidence that is inculpatory and exculpatory).

The Title IX Rule also deems certain evidence and information to be not relevant or otherwise precludes the recipient from using it: (i) a party's treatment records, without the party's prior written consent [§ 106.45(b)(5)(i)]; (ii) information protected by a legally recognized privilege [§ 106.45(b)(1)(x)]; (iii) questions or evidence about a complainant's sexual predisposition, and questions or evidence about a complainant's prior sexual behavior unless it meets one of two limited exceptions [§ 106.45(b)(6)(i)-(ii)]; and, for postsecondary institutions, the decision-maker cannot rely on the statements of a party or witness who does not submit to cross-examination [§ 106.45(b)(6)(i)].

In the Preamble to the Title IX Rule, at pages 980-82, the Department explains:

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

Question 8: Do recipients have latitude to define relevance on their own?

Answer 8: In the Preamble to the Title IX Rule, at page 811, footnote 1018, the Department states: "The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied." At page 812 of the Preamble, the Department states:

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

However, there is a difference between the admission of relevant evidence, and the weight, credibility, or persuasiveness of particular evidence. At pages 981-82 of the Preamble, the Department further explains:

However, the § 106.45 grievance process does not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by a recipient's decision-maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with § 106.45 and apply equally to both parties. In response to commenters' concerns that the final regulations do not specify rules about evaluation of evidence, and recognizing that recipients therefore have discretion to adopt rules not otherwise prohibited under § 106.45, the final regulations acknowledge this reality by adding language to the introductory sentence of § 106.45(b): "Any provisions, rules, or practices other than those required by § 106.45 that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment, as defined in § 106.30, must apply equally to both parties." A recipient may, for example, adopt a rule regarding the weight or credibility (but not the admissibility) that a decision-maker should assign to evidence of a party's prior bad acts, so long as such a rule applied equally to the prior bad acts of complainants and the prior bad acts of respondents. Because a recipient's investigators and decision-makers must be trained specifically with respect to "issues of relevance," any rules adopted by a recipient in this regard should be reflected in the recipient's training materials, which must be publicly available.

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

(emphasis omitted). And at page 1181 of the Preamble to the Title IX Rule, the Department states:

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

(emphasis omitted) (footnotes omitted). For a further discussion of this topic and how it relates to unprotected speech that itself constitutes sexual harassment under the Title IX Rule, readers are invited to review OCR's blog post on this topic here.

Question 10: When a post-secondary institution holds a live hearing, is the questioning limited to certain subjects?

Answer 10: The Rule requires that schools provide the opportunity for cross-examination, and that party advisors must be permitted to ask all relevant questions (including follow-up questions), and only relevant questions.

Question 11: At the postsecondary level, are party advisors expected to cross-examine witnesses?

Answer 11: The Title IX Rule, at § 106.45(b)(6)(i), states that a postsecondary institution must hold a live hearing. At the hearing, each party's advisor of choice must be "permitted" to cross-examine witnesses. (Note that the same provision requires the recipient to provide a party with an advisor of the recipient's choice, if the party appears at the hearing without an advisor of the party's choice.)

Question 12: If a party's advisor fails to cross-examine another party on a key statement related to credibility, what is the effect of this on the statement made by the complainant? May the decision-maker consider the key statement?

Answer 12: The Title IX Rule, in § 106.45(b)(6)(i), states: "At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility."

In the Preamble to the Rule at page 1181, the Department states (emphasis omitted):

Probing the credibility and reliability of statements asserted by witnesses contained in such evidence requires the parties to have the opportunity to cross-examine the witnesses making the statements.
The Department appreciates the opportunity to clarify here that to "submit to cross-examination" means answering those cross-examination questions that are relevant; the decision-maker is required to make relevance determinations regarding cross-examination in real time during the hearing in part to ensure that parties and witnesses do not feel compelled to answer irrelevant questions for fear of their statements being excluded.

(emphasis omitted).

Thus, the decision-maker is obligated to "permit" each party's advisor to ask all relevant questions. However, this provision provides only an "opportunity" for each party (through an advisor) to conduct cross-examination; this provision does not purport to require that each party conduct cross-examination or will conduct cross-examination to the fullest extent possible. If a party chooses not to conduct cross-examination of another party or witness, that other party or witness cannot "submit" or "not submit" to cross-examination. Accordingly, the decision-maker is not precluded from relying on any statement of the party or witness who was not given the opportunity to submit to cross-examination. The same is true if a party's advisor asks some cross-examination questions but not every possible cross-examination question; as to cross-examination questions not asked of a party or witness, that party or witness cannot be said to have submitted or not submitted to cross-examination, so the decision-maker is not precluded from relying on that party's or witness's statements.

Conversely, if a party or witness answers one, or some, but not all, relevant cross-examination questions asked by a party's advisor at the live hearing, then that party or witness has not submitted to cross-examination and that party's or witness's statements cannot be relied on by the decision-maker. See Preamble at page 1183 ("the Department declines to allow a party or witness to "waive" a question because such a rule would circumvent the benefits and purposes of cross-examination as a truth-seeking tool for postsecondary institutions' Title IX adjudications").

Question 13: Does an advisor or party have an opportunity to provide input about how evidence should be weighted by the decision-maker?

Answer 13: Yes. The parties must have an equal opportunity to inspect, review, and respond to evidence directly related to the allegations (see § 106.45(b)(5)(vi)), and an equal opportunity to review and respond to the recipient's investigative report (see § 106.45(b)(5)(vii)), allows each party the opportunity to provide input and make arguments about the relevance of evidence and how a decision-maker should weigh the evidence. In the Preamble to the Rule at p. 1015, the Department states that the Rule:

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

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

Question 14: Are all witnesses expected to appear at a hearing, or do decision-makers have the flexibility to request witnesses as they deem necessary?

Answer 14: The Title IX Rule does not require that all witnesses appear at a hearing, although it does provide the parties an equal right to present witnesses. At page 1176 of the Preamble of the Title IX Rule, the Department acknowledges that recipients do not have subpoena powers to compel attendance of parties or witnesses at a hearing:
The Department understands that complainants (and respondents) often will not have control over whether witnesses appear and are cross-examined, because neither the recipient nor the parties have subpoena power to compel appearance of witnesses. Some absences of witnesses can be avoided by a recipient thoughtfully working with witnesses regarding scheduling of a hearing, and taking advantage of the discretion to permit witnesses to testify remotely.

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

Question 15: Some recipients divide hearings between a "responsibility" phase and a "sanctions" phase. Is that bifurcation possible under Title IX?

Answer 15: Yes. The Rule does not preclude a recipient from using one decision-maker to reach the determination regarding responsibility, and having another decision-maker determine appropriate remedies or a complainant or appropriate disciplinary sanctions for the respondent. However, the end result must be that the written determination regarding responsibility includes the remedies and disciplinary sanctions decided upon in the written determination issued under § 106.45(b)(7).

That provision, at § 106.45(b)(7), requires a recipient's decision-maker(s) to issue a written determination that must include, among other items, the result as to each allegation and rationale for the result, any disciplinary sanctions imposed by the recipient against the respondent, and whether remedies will be provided by the recipient to the complainant. The issuance of a written determination cannot be a piecemeal process that is broken down into chronologically occurring sub-parts.

Recipients should also remain aware of their obligation to conclude the grievance process within the reasonably prompt time frames designated in the recipient's grievance process, under § 106.45(b)(1)(v). Additionally, each decision-maker--whether an employee of the recipient or an employee of a third party such as a consortium of schools--owes an individual and ongoing duty not have a conflict of interest or bias for or against complainants or respondents generally, or with respect to an individual complainant or respondent, pursuant to § 106.45(b)(1)(iii).

If you have questions for the Office for Civil Rights (OCR), want additional information or technical assistance, or believe that a school is violating federal civil rights law, visit OCR's website at www.ed.gov/ocr, or the Department's Title IX page at www.ed.gov/titleix. You may contact OCR at (800) 421-3481 (TDD: 800-877-8339), ocr@ed.gov, or contact OCR's Outreach, Prevention, Education and Non-discrimination (OPEN) Center at OPEN@ed.gov, or e-mail the OPEN Center with additional questions about the Title IX Final Rule at T9questions@ed.gov. Additional information regarding the Title IX Final Rule is available here. You may also fill out a complaint form online at https://www2.ed.gov/about/offices/list/ocr/complaintintro.html.
U.S. Department of Education Title IX Final Rule Overview

GUIDING PRINCIPLES

• **Historic Recognition of Sexual Harassment as Sex Discrimination**

For the first time, the Department’s Title IX regulations recognize that sexual harassment, including sexual assault, is unlawful sex discrimination. The Department previously addressed sexual harassment only through guidance documents, which are not legally binding and do not have the force and effect of law. Now, the Department’s regulations impose important legal obligations on school districts, colleges, and universities (collectively “schools”), requiring a prompt response to reports of sexual harassment. The Final Rule improves the clarity and transparency of the requirements for how schools must respond to sexual harassment under Title IX so that every complainant receives appropriate support, respondents are treated as responsible only after receiving due process and fundamental fairness, and school officials serve impartially without bias for or against any party.

• **Supporting Complainants & Respecting Complainants’ Autonomy**

Under the Final Rule, schools must offer free supportive measures to every alleged victim of sexual harassment (called “complainants” in the Final Rule). Supportive measures are individualized services to restore or preserve equal access to education, protect student and employee safety, or deter sexual harassment. Supportive measures must be offered even if a complainant does not wish to initiate or participate in a grievance process. Every situation is unique, and individuals react to sexual harassment differently. Therefore, the Final Rule gives complainants control over the school-level response best meeting their needs. It respects complainants’ wishes and autonomy by giving them the clear choice to file a formal complaint, separate from the right to supportive measures. The Final Rule also provides a fair and impartial grievance process for complainants, and protects complainants from being coerced or threatened into participating in a grievance process.

• **Non-Discrimination, Free Speech, and Due Process**

The Final Rule reflects core American values of equal treatment on the basis of sex, free speech and academic freedom, due process of law, and fundamental fairness. Schools must operate free from sex discrimination, including sexual harassment. Complainants and respondents must have strong, clear procedural rights in a predictable, transparent grievance process designed to reach reliable outcomes. The Final Rule ensures that schools do not violate First Amendment rights when complying with Title IX.

A SCHOOL’S RESPONSE TO SEXUAL HARASSMENT

• Under the Final Rule, any of the following conduct on the basis of sex constitutes sexual harassment:
  - A school employee conditioning an educational benefit or service upon a person’s participation in unwelcome sexual conduct (often called “quid pro quo” harassment);
  - Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school’s education program or activity; or
  - Sexual assault, dating violence, domestic violence, or stalking (as those offenses are defined in the Clery Act, 20 U.S.C. § 1092(f), and the Violence Against Women Act, 34 U.S.C. § 12291(a)).
U.S. Department of Education Title IX Final Rule Overview

- Consistent with Supreme Court precedent and the text of Title IX, a school must respond when: (1) the school has actual knowledge of sexual harassment; (2) that occurred within the school’s education program or activity; (3) against a person in the United States. The Final Rule expands “actual knowledge” to include notice to any elementary or secondary school employee, and states that any person (e.g., the alleged victim or any third party) may report to a Title IX Coordinator in person or by e-mail, phone, or mail. The Final Rule also specifies that a school’s “education program or activity” includes situations over which the school exercised substantial control, and also buildings owned or controlled by student organizations officially recognized by a postsecondary institution, such as many fraternity and sorority houses.

- Consistent with Supreme Court precedent, a school violates Title IX when its response to sexual harassment is clearly unreasonable in light of the known circumstances, and the Final Rule adds mandatory response obligations such as offering supportive measures to every complainant, with or without a formal complaint.

- Schools must investigate every formal complaint (which may be filed by a complainant or by a school’s Title IX Coordinator). If the alleged conduct does not fall under Title IX, then a school may address the allegations under the school’s own code of conduct and provide supportive measures.

A Fair Grievance Process

The Final Rule requires schools to investigate and adjudicate formal complaints of sexual harassment using a grievance process that incorporates due process principles, treats all parties fairly, and reaches reliable responsibility determinations. A school’s grievance process must:

- Give both parties written notice of the allegations, an equal opportunity to select an advisor of the party’s choice (who may be, but does not need to be, an attorney), and an equal opportunity to submit and review evidence throughout the investigation;
- Use trained Title IX personnel to objectively evaluate all relevant evidence without prejudgment of the facts at issue and free from conflicts of interest or bias for or against either party;
- Protect parties’ privacy by requiring a party’s written consent before using the party’s medical, psychological, or similar treatment records during a grievance process;
- Obtain the parties’ voluntary, written consent before using any kind of “informal resolution” process, such as mediation or restorative justice, and not use an informal process where an employee allegedly sexually harassed a student;
- Apply a presumption that the respondent is not responsible during the grievance process (often called a “presumption of innocence”), so that the school bears the burden of proof and the standard of evidence is applied correctly;
- Use either the preponderance of the evidence standard or the clear and convincing evidence standard (and use the same standard for formal complaints against students as for formal complaints against employees);
- Ensure the decision-maker is not the same person as the investigator or the Title IX Coordinator (i.e., no “single investigator models”);
- For postsecondary institutions, hold a live hearing and allow cross-examination by party advisors (never by the parties personally); K-12 schools do not need to hold a hearing, but parties may submit written questions for the other parties and witnesses to answer;
- Protect all complainants from inappropriately being asked about prior sexual history (“rape shield” protections);

2 of 3
U.S. Department of Education Title IX Final Rule Overview

- Send both parties a written determination regarding responsibility explaining how and why the decision-maker reached conclusions;
- Effectively implement remedies for a complainant if a respondent is found responsible for sexual harassment;
- Offer both parties an equal opportunity to appeal;
- Protect any individual, including complainants, respondents, and witnesses, from retaliation for reporting sexual harassment or participating (or refusing to participate) in any Title IX grievance process;
- Make all materials used to train Title IX personnel publicly available on the school’s website or, if the school does not maintain a website, make these materials available upon request for inspection by members of the public; and
- Document and keep records of all sexual harassment reports and investigations.

**Sex Discrimination Regulations**

Relating to sex discrimination generally, and not only to sexual harassment, the final regulations also:

- Affirm that the Department may require schools to take remedial action for discriminating on the basis of sex or otherwise violating the Department’s Title IX regulations;
- Expressly state that in response to any claim of sex discrimination under Title IX, schools are never required to deprive an individual of rights guaranteed under the U.S. Constitution;
- Account for the interplay of Title IX, Title VII, and FERPA, as well as the legal rights of parents or guardians to act on behalf of individuals with respect to exercising Title IX rights;
- Update the requirement for schools to designate and identify a Title IX Coordinator, disseminate their non-discrimination policy and the Title IX Coordinator’s contact information to ensure accessible channels for reporting sex discrimination (including sexual harassment), and notify students, employees, parents, and others of how the school will respond to reports and complaints of sex discrimination (including sexual harassment); and
- Clarify that an institution controlled by a religious organization is not required to submit a written statement to the Department to qualify for the Title IX religious exemption.
# Summary of Major Provisions of the Department of Education’s Title IX Final Rule

<table>
<thead>
<tr>
<th>Issue</th>
<th>The Title IX Final Rule: Addressing Sexual Harassment in Schools</th>
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<tbody>
<tr>
<td>1. Notice to the School, College, University (“Schools”): Actual Knowledge</td>
<td>The Final Rule requires a K-12 school to respond whenever <em>any</em> employee has notice of sexual harassment, including allegations of sexual harassment. Many State laws also require all K-12 employees to be mandatory reporters of child abuse. For postsecondary institutions, the Final Rule allows the institution to choose whether to have mandatory reporting for all employees, or to designate some employees to be confidential resources for college students to discuss sexual harassment without automatically triggering a report to the Title IX office. For all schools, notice to a Title IX Coordinator, or to an official with authority to institute corrective measures on the recipient’s behalf, charges a school with actual knowledge and triggers the school’s response obligations.</td>
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<td>2. Definition of Sexual Harassment for Title IX Purposes</td>
<td>The Final Rule defines sexual harassment broadly to include any of three types of misconduct on the basis of sex, all of which jeopardize the equal access to education that Title IX is designed to protect: Any instance of <em>quid pro quo</em> harassment by a school’s employee; any unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it denies a person equal educational access; any instance of sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA).</td>
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<td>- The Final Rule prohibits sex-based misconduct in a manner consistent with the First Amendment. <em>Quid pro quo</em> harassment and Clery Act/VAWA offenses are <em>not</em> evaluated for severity, pervasiveness, offensiveness, or denial of equal educational access, because such misconduct is sufficiently serious to deprive a person of equal access.</td>
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<td>- The Final Rule uses the Supreme Court’s <em>Davis</em> definition (severe <em>and</em> pervasive <em>and</em> objectively offensive conduct, effectively denying a person equal educational access) as one of the three categories of sexual harassment, so that where unwelcome sex-based conduct consists of speech or expressive conduct, schools balance Title IX enforcement with respect for free speech and academic freedom.</td>
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<td>- The Final Rule uses the Supreme Court’s Title IX-specific definition rather than the Supreme Court’s Title VII workplace standard (severe <em>or</em> pervasive conduct creating a hostile work environment). First Amendment concerns differ in educational environments and workplace environments, and the Title IX definition provides First Amendment protections appropriate for educational institutions where students are learning, and employees are teaching. Students, teachers, faculty, and others should enjoy free speech and academic freedom protections, even when speech or expression is offensive.</td>
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<td>3. Sexual Harassment Occurring in a School’s “Education Program or Activity” and “in the United States”</td>
<td>The Title IX statute applies to persons in the United States with respect to education programs or activities that receive Federal financial assistance. Under the Final Rule, schools must respond when sexual harassment occurs in the school’s education program or activity, against a person in the United States. - The Title IX statute and existing regulations contain broad definitions of a school’s “program or activity” and the Department will continue to look to these definitions for the scope of a school’s education program or activity. Education program or activity includes locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurred, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution (such as a fraternity or sorority house). - Title IX applies to all of a school’s education programs or activities, whether such programs or activities occur on-campus or off-campus. A school may address sexual harassment affecting its students or employees that falls outside Title IX’s jurisdiction in any manner the school chooses, including providing supportive measures or pursuing discipline.</td>
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<td>4. Accessible Reporting to Title IX Coordinator</td>
<td>The Final Rule expands a school’s obligations to ensure its educational community knows how to report to the Title IX Coordinator. - The employee designated by a recipient to coordinate its efforts to comply with Title IX responsibilities must be referred to as the “Title IX Coordinator.” - Instead of notifying only students and employees of the Title IX Coordinator’s contact information, the school must also notify applicants for admission and employment, parents or legal guardians of elementary and secondary school students, and all unions, of the name or title, office address, e-mail address, and telephone number of the Title IX Coordinator. - Schools must prominently display on their websites the required contact information for the Title IX Coordinator. - Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by e-mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person’s verbal or written report. - Such a report may be made at any time, including during non-business hours, by using the telephone number or e-mail address, or by mail to the office address, listed for the Title IX Coordinator.</td>
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<td>5. School’s Mandatory Response Obligations: The Deliberate Indifference Standard</td>
<td>Schools must respond promptly to Title IX sexual harassment in a manner that is not deliberately indifferent, which means a response that is not clearly unreasonable in light of the known circumstances. Schools have the following mandatory response obligations: - Schools must offer supportive measures to the person alleged to be the victim (referred to as the “complainant”).</td>
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### Summary of Major Provisions of the Department of Education’s Title IX Final Rule

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| - The Title IX Coordinator must promptly contact the complainant confidentially to discuss the availability of supportive measures, consider the complainant’s wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.  
- Schools must follow a grievance process that complies with the Final Rule before the imposition of any disciplinary sanctions or other actions that are not supportive measures, against a respondent.  
- Schools must not restrict rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment, when complying with Title IX.  
- The Final Rule requires a school to investigate sexual harassment allegations in any formal complaint, which can be filed by a complainant, or signed by a Title IX Coordinator.  
- The Final Rule affirms that a complainant’s wishes with respect to whether the school investigates should be respected unless the Title IX Coordinator determines that signing a formal complaint to initiate an investigation over the wishes of the complainant is not clearly unreasonable in light of the known circumstances.  
- If the allegations in a formal complaint do not meet the definition of sexual harassment in the Final Rule, or did not occur in the school’s education program or activity against a person in the United States, the Final Rule clarifies that the school must dismiss such allegations for purposes of Title IX but may still address the allegations in any manner the school deems appropriate under the school’s own code of conduct. |

| When responding to sexual harassment (e.g., by offering supportive measures to a complainant and refraining from disciplining a respondent without following a Title IX grievance process, which includes investigating formal complaints of sexual harassment), the Final Rule provides clear definitions of complainant, respondent, formal complaint, and supportive measures so that recipients, students, and employees clearly understand how a school must respond to sexual harassment incidents in a way that supports the alleged victim and treats both parties fairly. |

The Final Rule defines “complainant” as an individual who is alleged to be the victim of conduct that could constitute sexual harassment.  
- This clarifies that any third party as well as the complainant may report sexual harassment.  
- While parents and guardians do not become complainants (or respondents), the Final Rule expressly recognizes the legal rights of parents and guardians to act on behalf of parties (including by filing formal complaints) in Title IX matters.  

The Final Rule defines “respondent” as an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.
## Summary of Major Provisions of the Department of Education’s Title IX Final Rule

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<th>7. <strong>Grievance Process, General Requirements</strong></th>
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<td>The Final Rule prescribes a consistent, transparent grievance process for resolving formal complaints of sexual harassment. Aside from hearings (see Issue #9 below), the grievance process prescribed by the Final Rule applies to all schools equally including K-12 schools and postsecondary institutions. The Final Rule states that a school’s grievance process must:</td>
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<td>- Treat complainants equitably by providing remedies any time a respondent is found responsible, and treat respondents equitably by not imposing disciplinary sanctions without following the grievance process prescribed in the Final Rule.</td>
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<td>- Remedies, which are required to be provided to a complainant when a respondent is found responsible, must be designed to maintain the complainant’s equal access to education and may include the same individualized services described in the Final Rule as supportive measures; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent.</td>
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<td>- Require objective evaluation of all relevant evidence, inculpatory and exculpatory, and avoid credibility determinations based on a person’s status as a complainant, respondent, or witness.</td>
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<td><strong>Summary of Major Provisions of the Department of Education’s Title IX Final Rule</strong></td>
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<tr>
<td>- Require Title IX personnel (Title IX Coordinators, investigators, decision-makers, people who facilitate any informal resolution process) to be free from conflicts of interest or bias for or against complainants or respondents.</td>
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<td>- Training of Title IX personnel must include training on the definition of sexual harassment in the Final Rule, the scope of the school’s education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.</td>
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<td>- A school must ensure that decision-makers receive training on any technology to be used at a live hearing.</td>
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<td>- A school’s decision-makers and investigators must receive training on issues of relevance, including how to apply the rape shield protections provided only for complainants.</td>
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<td>- Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.</td>
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<td>- Recipients must post materials used to train Title IX personnel on their websites, if any, or make materials available for members of the public to inspect.</td>
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<td>- Include reasonably prompt time frames for conclusion of the grievance process, including appeals and informal resolutions, with allowance for short-term, good cause delays or extensions of the time frames.</td>
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<td>- Describe the range, or list, the possible remedies a school may provide a complainant and disciplinary sanctions a school might impose on a respondent, following determinations of responsibility.</td>
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<tr>
<td>- State whether the school has chosen to use the preponderance of the evidence standard, or the clear and convincing evidence standard, for all formal complaints of sexual harassment (including where employees and faculty are respondents).</td>
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<td>- Describe the school’s appeal procedures, and the range of supportive measures available to complainants and respondents.</td>
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<td>- A school’s grievance process must not use, rely on, or seek disclosure of information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.</td>
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<tr>
<td>- Any provisions, rules, or practices other than those required by the Final Rule that a school adopts as part of its grievance process for handling formal complaints of sexual harassment, must apply equally to both parties.</td>
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### Summary of Major Provisions of the Department of Education’s Title IX Final Rule

#### 8. Investigations

The Final Rule states that the school must investigate the allegations in any formal complaint and send written notice to both parties (complainants and respondents) of the allegations upon receipt of a formal complaint. During the grievance process and when investigating:

- The burden of gathering evidence and burden of proof must remain on schools, not on the parties.
- Schools must provide equal opportunity for the parties to present fact and expert witnesses and other inculpatory and exculpatory evidence.
- Schools must not restrict the ability of the parties to discuss the allegations or gather evidence (e.g., no “gag orders”).
- Parties must have the same opportunity to select an advisor of the party’s choice who may be, but need not be, an attorney.
- Schools must send written notice of any investigative interviews, meetings, or hearings.
- Schools must send the parties, and their advisors, evidence directly related to the allegations, in electronic format or hard copy, with at least 10 days for the parties to inspect, review, and respond to the evidence.
- Schools must send the parties, and their advisors, an investigative report that fairly summarizes relevant evidence, in electronic format or hard copy, with at least 10 days for the parties to respond.
- Schools must dismiss allegations of conduct that do not meet the Final Rule’s definition of sexual harassment or did not occur in a school’s education program or activity against a person in the U.S. Such dismissal is only for Title IX purposes and does not preclude the school from addressing the conduct in any manner the school deems appropriate.
- Schools may, in their discretion, dismiss a formal complaint or allegations therein if the complainant informs the Title IX Coordinator in writing that the complainant desires to withdraw the formal complaint or allegations therein, if the respondent is no longer enrolled or employed by the school, or if specific circumstances prevent the school from gathering sufficient evidence to reach a determination.
- Schools must give the parties written notice of a dismissal (mandatory or discretionary) and the reasons for the dismissal.
- Schools may, in their discretion, consolidate formal complaints where the allegations arise out of the same facts.
- The Final Rule protects the privacy of a party’s medical, psychological, and similar treatment records by stating that schools cannot access or use such records unless the school obtains the party’s voluntary, written consent to do so.

#### 9. Hearings:

The Final Rule adds provisions to the “live hearing with cross-examination” requirement for postsecondary institutions and clarifies that hearings are optional for K-12 schools (and any other recipient that is not a postsecondary institution).
### Summary of Major Provisions of the Department of Education’s Title IX Final Rule

| (a) Live Hearings & Cross-Examination (for Postsecondary Institutions) | (a) For postsecondary institutions, the school’s grievance process must provide for a live hearing:  
- At the live hearing, the decision-maker(s) must permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.  
- Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party’s advisor of choice and never by a party personally.  
- At the request of either party, the recipient must provide for the entire live hearing (including cross-examination) to occur with the parties located in separate rooms with technology enabling the parties to see and hear each other.  
- Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker must first determine whether the question is relevant and explain to the party’s advisor asking cross-examination questions any decision to exclude a question as not relevant.  
- If a party does not have an advisor present at the live hearing, the school must provide, without fee or charge to that party, an advisor of the school’s choice who may be, but is not required to be, an attorney to conduct cross-examination on behalf of that party.  
- If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions.  
- Live hearings may be conducted with all parties physically present in the same geographic location or, at the school’s discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually.  
- Schools must create an audio or audiovisual recording, or transcript, of any live hearing. |
| --- | --- |
| (b) Hearings are Optional, Written Questions Required (for K-12 Schools) | (b) For recipients that are K-12 schools, and other recipients that are not postsecondary institutions, the recipient’s grievance process may, but need not, provide for a hearing:  
- With or without a hearing, after the school has sent the investigative report to the parties and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party. |
| (c) Rape Shield Protections for Complainants | (c) The Final Rule provides rape shield protections for complainants (as to all recipients whether postsecondary institutions, K-12 schools, or others), deeming irrelevant questions and evidence about a complainant’s prior sexual behavior unless offered to prove that someone other than the respondent committed the alleged misconduct or offered to prove consent. |
### 10. Standard of Evidence & Written Determination

The Final Rule requires the school’s grievance process to state whether the standard of evidence to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard. The Final Rule makes each school’s grievance process consistent by requiring each school to apply the same standard of evidence for all formal complaints of sexual harassment whether the respondent is a student or an employee (including faculty member).

- The decision-maker (who cannot be the same person as the Title IX Coordinator or the investigator) must issue a written determination regarding responsibility with findings of fact, conclusions about whether the alleged conduct occurred, rationale for the result as to each allegation, any disciplinary sanctions imposed on the respondent, and whether remedies will be provided to the complainant.
- The written determination must be sent simultaneously to the parties along with information about how to file an appeal.

### 11. Appeals

The Final Rule states that a school must offer both parties an appeal from a determination regarding responsibility, and from a school’s dismissal of a formal complaint or any allegations therein, on the following bases: procedural irregularity that affected the outcome of the matter, newly discovered evidence that could affect the outcome of the matter, and/or Title IX personnel had a conflict of interest or bias, that affected the outcome of the matter.

- A school may offer an appeal equally to both parties on additional bases.

### 12. Informal Resolution

The Final Rule allows a school, in its discretion, to choose to offer and facilitate informal resolution options, such as mediation or restorative justice, so long as both parties give voluntary, informed, written consent to attempt informal resolution. Any person who facilitates an informal resolution must be well trained. The Final Rule adds:

- A school may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to a formal investigation and adjudication of formal complaints of sexual harassment. Similarly, a school may not require the parties to participate in an informal resolution process and may not offer an informal resolution process unless a formal complaint is filed.
- At any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint.
- Schools must not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

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**Summary of Major Provisions of the Department of Education’s Title IX Final Rule**
| **13. Retaliation** | The Final Rule expressly prohibits retaliation.  
- Charging an individual with code of conduct violations that do not involve sexual harassment, but arise out of the same facts or circumstances as a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX constitutes retaliation.  
- The school must keep confidential the identity of complainants, respondents, and witnesses, except as may be permitted by FERPA, as required by law, or as necessary to carry out a Title IX proceeding.  
- Complaints alleging retaliation may be filed according to a school’s prompt and equitable grievance procedures.  
- The exercise of rights protected under the First Amendment does not constitute retaliation.  
- 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 grievance proceeding does not constitute retaliation; however, a determination regarding responsibility, alone, is not sufficient to conclude that any party made a bad faith materially false statement. |

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**Summary of Major Provisions of the Department of Education’s Title IX Final Rule**
<table>
<thead>
<tr>
<th>Issue</th>
<th>Provisions in Final Rule</th>
<th>Provisions in NPRM</th>
</tr>
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<tbody>
<tr>
<td><strong>1. Notice to Schools, Colleges, Universities, and other Recipients of Federal Funds (“Schools”):</strong></td>
<td>Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a school’s Title IX Coordinator or any official of the school who has authority to institute corrective measures on behalf of the school, or to any employee of an elementary and secondary school. “Notice” includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator as described in the Final Rule.</td>
<td>Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a school’s Title IX Coordinator or any official of the school who has authority to institute corrective measures on behalf of the school, or to a teacher in the elementary and secondary context with regard to student-on-student harassment.</td>
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<tr>
<td><strong>2. Definition of Sexual Harassment for Title IX Purposes</strong></td>
<td>Sexual harassment means conduct on the basis of sex that satisfies one or more of the following: (i) A school employee conditioning education benefits on participation in unwelcome sexual conduct (i.e., quid pro quo); or (ii) Unwelcome conduct that a reasonable person would determine is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school’s education program or activity; or (iii) Sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA).</td>
<td>Sexual harassment means: (i) A school employee conditioning education benefits on participation in unwelcome sexual conduct (i.e., quid pro quo); or (ii) 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 school’s education program or activity; or (iii) Sexual assault (as defined in the Clery Act regulations).</td>
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</table>
Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM

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<tr>
<th>3. Sexual Harassment Occurring in a School’s “Education Program or Activity” and “in the United States”</th>
<th>Schools must respond when sexual harassment occurs in the school’s education program or activity, against a person in the United States. <strong>Education program or activity includes locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.</strong></th>
<th>School must respond when sexual harassment occurs in the school’s education program or activity, against a person in the United States.</th>
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</table>
| 4. Accessible Reporting to Title IX Coordinator; Adoption & Publication of Title IX Procedures | The Final Rule expands a school’s obligations to ensure its educational community knows how to report to the Title IX Coordinator by stating:  
- Each school must designate and authorize at least one employee to coordinate its efforts to comply with its Title IX responsibilities, **which employee must be referred to as the “Title IX Coordinator.”**  
- The school must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions, of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator.  
- Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person’s verbal or written report. | The NPRM stated:  
- Each school must designate at least one employee to coordinate its efforts to comply with its Title IX responsibilities.  
- The school must notify **all its** students and employees of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated **pursuant to this paragraph.** |
Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM

| 5. School’s Mandatory Response Obligations: Deliberate Indifference Standard | A school must respond **promptly** to Title IX sexual harassment in a manner that is not deliberately indifferent, which means in a way that is not clearly unreasonable in light of the known circumstances. A school’s mandatory response must include:  
- Offering supportive measures to the complainant (i.e., the person alleged to be the victim).  
- The Title IX Coordinator promptly contacting the complainant to discuss the availability of supportive measures, consider the complainant’s wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.  
- Following a grievance process that complies with the Final Rule before the imposition of any disciplinary sanctions or other actions that are not supportive measures, against a respondent.  
- Must not restrict rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment, as a way of responding in a non-deliberately indifferent manner. |
|---|---|
| - Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator.  
- Schools must prominently display on their websites the required contact information for the Title IX Coordinator. | A school must respond to Title IX sexual harassment in a manner that is not deliberately indifferent, which means in a way that is not clearly unreasonable in light of the known circumstances.  
The NPRM offered postsecondary institutions a “safe harbor” against a finding of deliberate indifference where, in the absence of a formal complaint, a postsecondary institution implemented supportive measures for the complainant. **This “safe harbor” has been removed in the Final Rule.** The Final Rule requires all schools to offer supportive measures to every complainant, eliminating the need to incentivize supportive measures through a safe harbor. |
## Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM

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<tr>
<th>6. School’s Mandatory Response Obligations: Investigating a Formal Complaint</th>
<th>The Final Rule requires schools to investigate formal complaints of sexual harassment and does not offer schools any safe harbors against the Department finding that a school responded deliberately indifferently or otherwise in a manner that constitutes sex discrimination or violates Title IX or Title IX regulations. In response to a formal complaint, a recipient must follow a grievance process that complies with the Final Rule. With or without a formal complaint, a recipient must comply with all the mandatory response obligations described in Issue #5 above.</th>
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<td>The NPRM required schools to investigate and adjudicate formal complaints of sexual harassment consistent with the grievance procedures described in § 106.45. - The NPRM offered schools a “safe harbor” against a finding of deliberate indifference (or other finding that the school committed sex discrimination) if schools followed procedures consistent with § 106.45 in response to a formal complaint. This “safe harbor” has been removed in the Final Rule. - The NPRM required a school’s Title IX Coordinator to file a formal complaint any time the school had notice of multiple reports of sexual harassment against a particular respondent (and then offered a “safe harbor” for following procedures consistent with § 106.45). This mandate for the Title IX Coordinator to file a formal complaint, and corresponding “safe harbor,” have been removed in the Final Rule.</td>
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Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM

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<th>7. School’s Mandatory Response Obligations:</th>
<th>When responding to sexual harassment (e.g., by offering supportive measures to a complainant, refraining from disciplining a respondent without following a Title IX grievance process, or investigating formal complaints of sexual harassment), the Final Rule clarifies the definitions of complainant, respondent, and formal complaint so that schools, students, and employees clearly understand how a school must respond to sexual harassment incidents in a way that supports the alleged victim and treats both parties fairly.</th>
<th>The NPRM defined complainant, respondent, formal complaint, and supportive measures as follows:</th>
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<tr>
<td>Defining “Complainant,” “Respondent,” “Formal Complaint” and “Supportive Measures”</td>
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<td>The NPRM defined “complainant” as an individual who has reported being the victim of conduct that could constitute sexual harassment, or on whose behalf the Title IX Coordinator has filed a formal complaint. For purposes of this definition, the person to whom the individual has reported must be the Title IX Coordinator or another person to whom notice of sexual harassment results in the school’s actual knowledge.</td>
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<tr>
<td>“Complainant”</td>
<td>The Final Rule defines “complainant” as an individual who is alleged to be the victim of conduct that could constitute sexual harassment. - The Final Rule expressly recognizes the legal rights of parents and guardians to act on behalf of parties (including by filing formal complaints) in Title IX matters.</td>
<td>The NPRM defined “complainant” as an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.</td>
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<tr>
<td>“Respondent”</td>
<td>The Final Rule defines “respondent” as an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.</td>
<td>The NPRM defined “respondent” as an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.</td>
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<tr>
<td>“Formal Complaint”</td>
<td>The Final Rule defines “formal complaint” as a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment. - At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the school with which the formal complaint is filed.</td>
<td>The NPRM defined “formal complaint” as a document signed by a complainant or by the Title IX Coordinator alleging sexual harassment against a respondent about conduct within its education program or activity and requesting initiation of the school’s grievance procedures consistent with § 106.45.</td>
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<td>The Final Rule expands the definition of the kind of document that may constitute a formal complaint, and expands the ways in which a formal complaint may be</td>
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Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM

| “Supportive Measures” | - A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under the Final Rule, and by any additional method the school designates.  
  - The phrase “document filed by a complainant” means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the school) that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.  
  - Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party during a grievance process, and must comply with requirements for all Title IX personnel to be free from conflicts and bias. |
| --- | --- |
| The Final Rule retains the NPRM’s definition of “supportive measures” but clarifies that the purpose of supportive measures is equal access to education.  
  - The Final Rule clarifies that a school must treat a person as a complainant any time the school has notice that the person is alleged to be the victim of conduct that could constitute sexual harassment (regardless of whether the person themselves reported, or a third party reported the sexual harassment), and irrespective of whether the complainant ever chooses to file a formal complaint.  
  - There is no time limit or statute of limitations on a complainant’s decision to file a formal complaint.  
  - When a Title IX Coordinator signs a formal complaint, such action is not taken on behalf of a complainant, and the Title IX Coordinator does not become a party. |
| The NPRM defined “supportive measures” to mean:  
  - Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, without fee or charge, to the complainant or respondent, before or after the filing of a formal complaint or where no formal complaint has been filed.  
  - Such measures are designed to restore or preserve access to the recipient’s education program or activity, without unreasonably burdening the other party; protect the safety of all parties and the recipient’s educational environment; and deter sexual harassment.  
  - Supportive measures may include counseling, course-related adjustments, modifications of work or class schedules, campus escort services, increased security and monitoring of certain areas of campus, and mutual restrictions on contact between the parties. |
### 8. Investigations

Similarly to the NPRM, the Final Rule states that the school must investigate the allegations in any formal complaint, send written notice to both parties of the allegations upon receipt of a formal complaint.

The Final Rule adds the following privacy protection for parties during a Title IX sexual harassment investigation:

- **The Final Rule states that the school cannot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the school obtains that party’s voluntary, written consent to do so.**

### 9. Hearings:

- **(a) Live Hearings & Cross-Examination (for Postsecondary recipients)**

  (a) For **postsecondary institution recipients**, the school’s grievance **process** must provide for a live hearing:
  - At the **live** hearing, the decision-maker(s) must permit each party’s **advisor** to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.
  - Such cross-examination must be conducted **directly, orally, and in real time** by the party.

  **Under the NPRM, adjudication of formal complaints differed for postsecondary institution recipients, and K-12 schools. The Final Rule retains this approach with clarifications.**

  (a) For **institutions of higher education** the school’s grievance **procedure** must provide for a live hearing:
  - At the hearing the decision-maker must permit each **party** to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.
  - Such cross-examination must be conducted by the party’s advisor of choice; if a party does not have an advisor present at the hearing, the school must provide that party...
### Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM

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<th><strong>party’s advisor of choice and never by a party personally.</strong></th>
<th><strong>an advisor aligned with that party</strong> to conduct cross-examination.</th>
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<tr>
<td>- At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party answering questions.</td>
<td>- At the request of either party the recipient must provide for cross-examination to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party answering questions.</td>
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<tr>
<td>- Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.</td>
<td>The Final Rule removes the “aligned with that party” language. If a school must provide a party with an advisor, such a provided advisor need not be an attorney providing legal representation to the party. No training or qualification is necessary for a person to serve as a provided advisor. Parties retain the opportunity to select their own advisor of choice. If a party does not exercise that opportunity then the school must provide an advisor of the school’s own choosing, to that party, merely for the purpose of relaying the party’s cross-examination questions to the other party and witnesses so that a party never personally conducts cross-examination.</td>
</tr>
<tr>
<td>- If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the school’s choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.</td>
<td>- If a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions.</td>
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<tr>
<td>- If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions.</td>
<td>- If a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility.</td>
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<td>- Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the school’s discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with</td>
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Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM

| (b) Hearings are Optional, Written Questions Required (for K-12 schools) | technology enabling participants simultaneously to see and hear each other.  
- Schools must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.  
(b) For recipients that are elementary and secondary schools, and other recipients that are not postsecondary institutions, the school’s grievance process may, but need not, provide for a hearing:  
- With or without a hearing, after the school has sent the investigative report to the parties and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.  
- The decision-maker(s) must explain to the party proposing the questions any decision to exclude questions as not relevant.  
(b) For recipients that are elementary and secondary schools the school’s grievance procedure may require a live hearing:  
- With or without a hearing, the decision-maker must, after the school has incorporated the parties’ responses to the investigative report, ask each party and any witnesses any relevant questions and follow-up questions, including those challenging credibility, that a party wants asked of any party or witness. If no hearing is held, the decision-maker must afford each party the opportunity to submit written questions, provide each party with the answers, and allow for additional, limited follow-up questions.  
- The decision-maker must explain to the party proposing the questions any decision to exclude questions as not relevant. |
| (c) Rape Shield Protections for Complainants | (c) The Final Rule keeps the rape shield protections for complainants (as to all recipients whether postsecondary, K-12 or others), clarified to state: Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant’s sexual behavior.  
(c) The NPRM provided rape shield protections for complainants in postsecondary institutions and K-12:  
All questioning must exclude evidence of the complainant’s sexual behavior or predisposition, unless such evidence about the complainant’s sexual behavior is offered to prove someone other than the respondent committed the conduct alleged by the complainant, or if the evidence concerns specific incidents of the complainant’s sexual behavior. |
### Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM

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<th>Section</th>
<th>Description</th>
<th>NPRM Description</th>
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<tr>
<td>10. <strong>Standard of Evidence</strong></td>
<td>The Final Rule requires the school’s grievance process to state whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty. - The Final Rule removes the NPRM’s restriction on use of the preponderance of the evidence standard.</td>
<td>The NPRM proposed that to reach the determination regarding responsibility, the decision-maker must apply either the preponderance of the evidence standard or the clear and convincing evidence standard, although the recipient may employ the preponderance of the evidence standard only if the school uses that standard for conduct of code violations that do not involve sexual harassment but carry the same maximum sanction.</td>
</tr>
<tr>
<td>11. <strong>Appeals</strong></td>
<td>The Final Rule states that a school must offer both parties an appeal from a determination regarding responsibility, and from a school’s dismissal of a formal complaint or any allegations therein, on the following bases: procedural irregularity that affected the outcome of the matter; new evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and/or the Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias that affected the outcome of the matter. - A school may offer an appeal equally to both parties on additional bases.</td>
<td>The NPRM provided that a school may choose to offer an appeal: - If a school offers an appeal, it must allow both parties to appeal. - Although a complainant may appeal on the ground that the remedies are not designed to restore or preserve the complainant’s access to the school’s education program or activity, a complainant is not entitled to a particular sanction against the respondent. - The Final Rule removes the NPRM’s restriction on complainants appealing the severity of sanctions.</td>
</tr>
<tr>
<td>12. <strong>Informal Resolution</strong></td>
<td>The Final Rule retains a school’s discretion to choose to offer informal resolution options, if both parties give voluntary, informed, written consent. The Final Rule adds: - A school may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints.</td>
<td>The NPRM allowed schools to choose to offer informal resolution options, only with the voluntary, informed, written consent of all parties.</td>
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### Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM

<table>
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<tr>
<th>13. Retaliation Prohibited</th>
<th>The Final Rule expressly prohibits retaliation against any individual for exercising Title IX rights:</th>
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<tr>
<td>- A school may not require the parties to participate in informal resolution and may not offer informal resolution unless a formal complaint is filed.</td>
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<td>- At any time prior to agreeing to a resolution, any party has the right to withdraw from informal resolution and resume the grievance process with respect to the formal complaint.</td>
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<tr>
<td>- Schools must not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.</td>
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<td>- No school or person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in a Title IX investigation, proceeding, or hearing.</td>
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<tr>
<td>- 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, for the purpose of interfering with any right or privilege secured by Title IX, constitutes retaliation.</td>
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<tr>
<td>- The school must keep confidential the identity of complainants, respondents, and witnesses, except as may be permitted by FERPA, or as required by law, or as necessary to carry out a Title IX proceeding.</td>
<td></td>
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<tr>
<td>- Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination that schools must adopt and publish.</td>
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<tr>
<td>Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM</td>
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</table>
| - The exercise of rights protected under the First Amendment does not constitute retaliation.  
- Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation; provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a bad faith materially false statement. |
SAMPLE POLICY REVISION ITEMS FOR COMMUNITY COLLEGE DISTRICTS

2020 Title IX Amendments as they apply to CCD’s Sexual Harassment/Sexual Violence Policy

TABLE OF CONTENTS

1. Definitions
2. Jurisdiction
3. Responding to Reports
4. Dismissal of Complaint
5. Investigation Time Frames
6. Standard of Proof
7. Investigation Guidelines
8. Hearing Guidelines
9. Remedies and Disciplinary Consequences
10. Appeal of Determination
11. Informal Resolution
12. Title IX Nondiscrimination Statement

This guide is not meant to replace your District’s Sexual Harassment/Sexual Violence Policy in its entirety. The information contained herein is meant to assist your District with amending your current policy in light of the new Title IX regulations, effective August 14, 2020. Many aspects of your policy are required and were not revised with these regulations (for example, definition of affirmative consent and anti-retaliation language), these sections are not addressed in this guide as your current language is likely sufficient.

Please note, in some instances your obligations under Title IX may now be different from your obligations pursuant to the Clery Act/VAWA. When this is the case, the sample language strives to clarify that the Title IX language update will only apply when investigating a formal complaint that falls within the definition of sexual harassment pursuant to Title IX.

For assistance with using this guide, please contact either Monica Batanero or Kaitlyn Schwendeman, or your preferred attorney at School and College Legal Services.
Sample Definitions

1. **Sexual Harassment**: Sexual harassment under Title IX means conduct on the basis of sex that satisfies one or more of the following:
   
   a. An employee of the District conditioning the provision of an aid, benefit, or service of the District on an individual’s participation in unwelcome sexual conduct;
   
   b. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the District’s education program or activity; or
   

2. **Complainant**: Complainant means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.

3. **Respondent**: Respondent means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

4. **Actual Knowledge**: Actual knowledge, for purposes of Title IX, means notice of sexual harassment or allegations of sexual harassment to the District’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient. “Notice” includes, but is not limited to, a report of sexual harassment to the District’s Title IX Coordinator.

5. **Formal Complaint**: Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment pursuant to Title IX against a respondent and requesting that the District investigate the allegation of sexual harassment. The phrase “document filed by a complainant” means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.

6. **Supportive Measures**: Supportive measures means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.
Sample Jurisdiction Language

Allegations of sexual harassment pursuant to Title IX committed by District students and employees, and third parties (such as contractors, vendors, visitors, guests, patients and volunteers), and allegations of sexual harassment pursuant to Title IX committed against students, employees and third parties, are within the scope of this Policy when the conduct occurs:

1. on District property; or
2. in connection with District employment or in the context of a District employment or education program, activity or service conducted within the United States.

The District’s Title IX Coordinator has the responsibility to determine whether an allegation falls within the parameters of this Policy. If a determination is made that the Policy does not apply, the Title IX Coordinator is obligated to dismiss the complaint.

Allegations of sexual harassment pursuant to Title IX committed by or against District students, employees, or third parties, or against the same, which may not fall within the scope of this Policy may still be the basis for investigation and disciplinary or other consequences, based upon the District’s Code of Conduct and other relevant policies.
Sample Responding to Report Language

The District shall investigate all Title IX formal complaints made pursuant to this Policy. The District will provide prompt and effective supportive measures to the complainant and, as appropriate, respondent, whenever a complaint is made pursuant to this Policy, even if the alleged conduct is not investigated.

The District's response process is intended to provide prompt and equitable means to respond to allegations of unlawful gender discrimination, sexual harassment and assault, and sexual misconduct in accordance with federal and state due process requirements. All procedures, from initial investigation to a final disciplinary result, are intended to be prompt, fair, and impartial.

Allegations of violation of this Policy may be filed by the complainant or by anyone else with knowledge of the incident. If the District receives actual notice of an incident of sexual harassment or other violations of this Policy, it will investigate even in the absence of an allegation or complaint from an individual.

These procedures are not intended to substitute for criminal or civil complaints that may be initiated simultaneously. The District shall maintain memoranda of understanding (i.e., MOU's) with local law enforcement agencies for the sharing of information from incidents reported to law enforcement with the intent of relieving the complainant from unnecessary repetition of information that may be traumatic.

When a complainant or the Title IX Coordinator initiates a formal complaint, the Title IX Coordinator, on behalf of the District, will provide written notice to all known parties of:

a. The District’s grievance process;
b. The allegations, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview;
c. A statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process;
d. That the parties may have an advisor of their choice, who may be, but is not required to be, an attorney; and
e. If applicable, a statement that the District’s Code of Conduct prohibits any participant in the investigation from knowingly making false statements or knowingly submitting false information during the grievance process, and reference to the applicable section of the Code of Conduct.

Both during an investigation and upon a determination of findings, the District will offer supportive measures to the complainant and respondent, consistent with applicable complaint resolution and grievance procedures.
Sample Complaint Dismissal Language

The Title IX Coordinator is required to dismiss a formal complaint at any time when:

a. The conduct alleged does not meet the definition of a Prohibited Act, as set forth within this Policy;
b. The conduct alleged did not occur in the District’s education program or activity; or
c. The conduct alleged did not occur against a person in the United States.

The Title IX Coordinator may choose to dismiss a formal complaint at any time when:

a. The complainant notifies the Title IX Coordinator in writing that they would like to withdraw the formal complaint or any allegations therein;
b. The respondent is no longer enrolled in or employed by the District; or
c. If specific circumstances prevent the investigator from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

Dismissal of a formal complaint by the Title IX Coordinator does not preclude the District from investigating the conduct and taking appropriate action under its Code of Conduct, Education Law, collective bargaining agreement or other applicable Policy or procedures.

If the Title IX Coordinator dismisses a complaint, they will promptly send written notice of the dismissal and reasons therefore to the complainant and respondent, as well as their advisors, if any. All parties have an opportunity to appeal a dismissal of a formal complaint, pursuant to [reference to appeal process section].
Sample Investigation Time Frames

Note, where the time frames are in italics and underlined, the District has discretion to change the length of time. Time frames that are not italicized and underlined are required by regulation. In choosing alternative time frames, keep in mind that the Title IX regulations require that a District “promptly” resolve complaints.

All parties involved in a formal complaint are entitled to prompt resolution of the complaint. Extensions of the below time frames for formal complaint investigations may be granted by the Title IX Coordinator, investigator or decision maker(s) only for good cause and with written notice to both the complainant and respondent with explanation of the extension and the reasons therefor.

In the event the complainant or Title IX Coordinator elects to move forward with a formal complaint, the following time frames apply:

1. The Title IX Coordinator will appoint an appropriately trained investigator, if necessary, within five (5) business days following receipt of the formal complaint.
2. The Title IX Coordinator or investigator will provide written notice to all parties of the formal complaint within ten (10) business days following appointment of investigator, or receipt of formal complaint, as applicable.
3. The Title IX Coordinator or investigator will complete their investigation within sixty (60) business days following receipt of the formal complaint.
4. The Title IX Coordinator or investigator will provide copies of the draft investigation report, including a copy of all evidence relied upon in the report (in either electronic or hard copy format), to all parties and their respective advisors within twenty (20) business days following completion of investigation.
5. The parties and their respective advisors shall have ten (10) business days following receipt of the draft report to submit a written response to the draft report.
6. The Title IX Coordinator or investigator shall have ten (10) business days following receipt of the parties’ written responses to issue a final investigation report, and provide such report to all parties and their advisors simultaneously.
7. At least ten (10) business days and no more than sixty (60) business days following distribution of the final investigation report, the District shall schedule and hold a live hearing.
8. The parties will be provided at least ten (10) business days’ notice of the date and time of the scheduled hearing.
9. By no more than twenty (20) business days following the completion of the live hearing, the decision maker(s) will issue a written determination, which shall be provided to all parties and their advisors simultaneously.
10. Request to appeal the written decision of the decision maker(s) shall be received, in writing, by the Title IX Coordinator within five (5) business days following issuance of the written decision.
11. All parties will be provided an opportunity to submit a written statement in support of or challenging the written decision within fifteen (15) business days following notice of appeal.
12. A written final decision regarding appeal shall be issued to all parties and their advisors simultaneously within *forty-five (45)* business days following receipt of the parties’ written statements.
Sample Standard of Proof Language

The Title IX regulations specify that a District must use either the preponderance of the evidence standard or the clear and convincing standard, and must clearly state in their policy which standard will be applied. The standard chosen must be the same for investigations involving employees as those involving students. We have provided two language options, depending on which standard your District chooses to apply:

Preponderance of the Evidence:
The District shall apply the preponderance of the evidence standard throughout the investigation and hearing in making determinations regarding resolution and credibility assessments. Preponderance of the evidence means that it is more likely than not that the evidence is true. Often, this standard is represented as a percentage, where it is greater than 50% likely that the evidence is true.

Clear and Convincing:
The District shall apply the clear and convincing standard of evidence throughout the investigation and hearing in making determinations regarding resolution and credibility assessments. Clear and convincing means the evidence is highly and substantially more likely to be true than untrue. Often, this standard is represented as a percentage, where it is greater than 75% likely that the evidence is true.
Sample Investigation Guidelines

When investigating a formal complaint, the Title IX Coordinator shall ensure:

a. The Title IX Coordinator, investigator, decision maker(s) and/or any person responsible for facilitating an informal resolution process will be free from conflicts of interest, bias for or against complainants and respondents (both individually and generally), and be appropriately trained in administering their role within the District’s Title IX program.

b. The burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the District and not on the parties;

c. The District cannot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the District obtains voluntary, written consent from the party or their legal guardian to do so;

d. Parties are provided an equal opportunity to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;

e. Parties are not restricted from discussing the allegation(s) under investigation or from gathering or presenting relevant evidence;

f. Parties are provided an equal opportunity to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding (although the Title IX Coordinator, investigator, and/or decision maker(s) may establish restrictions on the ability of advisors to participate in the proceedings, which must apply equally to all parties);

g. Written notice is provided to all parties invited or expected to participate of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate;

h. Parties are provided an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations, including the evidence upon which the Title IX Coordinator or investigator does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that the party can meaningfully respond to the evidence prior to conclusion of the investigation;

i. Prior to completion of the investigative report, the Title IX Coordinator or investigator must send to each party and the party’s advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and a copy of the draft investigation report;

j. Parties shall have 10 business days to submit a written response to the draft investigation report and evidence, which the investigator will consider prior to completion of the investigative report;

k. The Title IX Coordinator or investigator will issue an investigation report that fairly summarizes all relevant evidence.
Sample Hearing Guidelines

The District will hold a live hearing at the completion of the investigation process for every formal complaint. The decision maker(s) at this hearing shall be persons trained in the administration of a hearing and familiar with Title IX and this Policy, and shall be different from the Title IX Coordinator or investigator.

At a hearing, the following shall apply:

a. The District shall bear the burden of proof in gathering evidence sufficient to reach a determination regarding responsibility rest on the District and not on the parties;

b. At the discretion of the decision maker(s) or at the request of either party, the hearing may occur with the parties located in separate rooms with technology enabling the decision maker(s) and parties to simultaneously see and hear the party or the witness answering questions;

c. Each party shall be provided the opportunity to have an advisor of their choosing, who may be, but is not required to be, an attorney, at the hearing;

d. If a party does not have an advisor present at the live hearing, the District will provide without fee or charge to that party, an advisor of the recipient’s choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party;

e. Each party’s advisor shall be permitted to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility;

f. The decision maker(s) shall rule on the relevancy of each question prior to the party subjected to cross-examination answering, and must explain any decision to exclude a question as not relevant;

g. If a party or witness does not submit to cross-examination at the live hearing, the decision maker(s) will not rely on any statement of that party or witness in reaching a determination regarding responsibility;

h. The decision maker(s) will not draw any inference regarding responsibility solely based upon a party or witness’ absence from the live hearing or refusal to answer cross-examination or other questions;

i. An audio or audiovisual recording or transcript will be created for each hearing, and shall be made available to all parties for inspection and review.

j. The decision maker(s) will issue a written determination regarding responsibility at the conclusion of the hearing, within the time frames set forth in this policy. The written determination shall be transmitted to all parties and their advisors simultaneously.
Sample Language for Remedies and Disciplinary Consequences

A range of remedies and consequences may apply in the event that a decision maker establishes that a party has committed the conduct alleged in the formal complaint.

A comprehensive list of potential disciplinary consequences when the respondent is a student may be found in the District’s Code of Conduct. Consequences may range from [list lowest possible disciplinary consequence] to expulsion, depending on the severity of the conduct.

A comprehensive list of potential disciplinary consequences when the respondent is an employee may be found in the District’s Employee Policies, Education Code, and applicable collective bargaining agreements. Consequences may range from a verbal warning to termination, depending on the severity of the conduct.
Sample Appeal of Determination Language

Parties may seek an appeal of a decision maker(s) determination of responsibility, or the Title IX Coordinator’s dismissal of a formal complaint, provided the appeal is based upon either:

a. A procedural irregularity that affected the outcome of the matter;
b. New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and/or
c. Conflict of interest or bias by the Title IX Coordinator, investigator, or decision maker(s) for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

Written notice of appeal must be received by the Title IX Coordinator within five (5) business days following receipt of determination or notice of dismissal. The decision maker(s) of the appeal will be different from the individual reaching the determination that is being appealed, nor will the decision maker be the Title IX Coordinator or investigator of the allegations.

Following receipt of notice, the District will notify the other party of the appeal. All parties will be provided an opportunity to submit a written statement in support of or challenging the determination or dismissal. Written statements must be received by the decision maker(s) within fifteen (15) business days following notice of the appeal.

The decision maker(s) will issue a written decision describing the result of the appeal and the rationale for the result within forty-five (45) business days following receipt of written statements, and will provide such decision simultaneously to both parties.
Sample Informal Resolution Language

Parties involved in a Title IX formal complaint may be offered the opportunity to engage in informal resolution prior to the issuance of a determination of responsibility. Informal resolution may include mediation, restorative justice, or another method of resolution which is appropriate based upon the allegations.

Parties are not required as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, to participate in informal resolution. Likewise, parties are not required to waive of the right to an investigation and adjudication of formal complaints of sexual harassment under Title IX as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right.

Informal resolution is not available when a District student is the complainant and a District employee is the respondent. Informal resolution is never available in the absence of a formal complaint.

Parties that choose to engage in informal resolution are choosing to waive their right to resuming the formal complaint. However, at any time prior to conclusion of the informal resolution, a party may withdraw from the informal resolution process and resume the formal complaint investigation process.

Parties that choose to engage in informal resolution must sign consent indicating that they are voluntarily engaging in this process.
Sample Title IX Nondiscrimination Statement

Pursuant to its obligations under Title IX and its implementing regulations, Title VII, the Americans with Disabilities Act and other applicable federal and state law, the District does not discriminate on the basis of race, religious creed, color, national origin, ancestry, ethnic group identification, physical disability, mental disability, medical condition, genetic condition, marital status, sex, gender, gender identity, gender expression, genetic information or sexual orientation in any of its policies, procedures or practices; nor does the District discriminate against any employees or applicants for employment on the basis of their age or sex. This nondiscrimination policy covers admission, access and treatment in District programs and activities including but not limited to academic admissions, financial aid, educational services and athletics and application for District employment.

The District is an equal opportunity employer. Inquiries regarding this statement or the District’s nondiscrimination practices may be directed to the Title IX Coordinator, to the Department of Education, or both.
Existing law governing California Community Colleges provides for the removal, suspension, and expulsion of a community college student for “good cause,” as defined by Education Code §76033. In September of 2015, Governor Brown signed Senate Bill 186 which goes into effect on January 1, 2016. The Bill adds “sexual assault” and “sexual exploitation” to the list of offenses that constitute “good cause” for student discipline under Education Code §76033. The Bill also authorizes the governing board of a community college to remove, suspend, or expel a student for sexual assault or sexual exploitation, regardless of the victim’s affiliation with the community college, even if the offense is not related to college activity or attendance.

Education Code §76033, as amended, defines sexual assault and sexual exploitation as follows:

(g) Sexual assault, defined as actual or attempted sexual contact with another person without that person’s consent, regardless of the victim’s affiliation with the community college, including, but not limited to, any of the following:

1. Intentional touching of another person’s intimate parts without that person’s consent or other intentional sexual contact with another person without that person’s consent.

2. Coercing, forcing, or attempting to coerce or force a person to touch another person’s intimate parts without that person’s consent.

3. Rape, which includes penetration, no matter how slight, without the person’s consent, of either of the following:
(A) The vagina or anus of a person by any body part of another person or by an object.

(B) The mouth of a person by a sex organ of another person.

(h) Sexual exploitation, defined as a person taking sexual advantage of another person for the benefit of anyone other than that person without that person’s consent, regardless of the victim’s affiliation with the community college, including, but not limited to, any of the following:

1. Prostituting another person.

2. Recording images, including video or photograph, or audio of another person’s sexual activity, intimate body parts, or nakedness without that person’s consent.

3. Distributing images, including video or photograph, or audio of another person’s sexual activity, intimate body parts, or nakedness, if the individual distributing the images or audio knows or should have known that the person depicted in the images or audio did not consent to the disclosure and objected to the disclosure.

4. Viewing another person’s sexual activity, intimate body parts, or nakedness in a place where that person would have a reasonable expectation of privacy, without that person’s consent, and for the purpose of arousing or gratifying sexual desire.

Further, Education Code §76034 currently states that a community college is prohibited from removing, suspending, or expelling a student unless the conduct for which the student is disciplined is related to college activity or attendance.

Senate Bill 186 amends Education Code §76034 to provide an exception for conduct specifically related to sexual assault or sexual exploitation. The law authorizes the governing board of a community college to remove, suspend, or expel a student for sexual assault or sexual exploitation, regardless of the victim’s affiliation with the community college, even if the offense is not related to college activity or attendance.

The purpose of the bill is to align community colleges with that of University of California and California State University campuses by providing community colleges with the means to hold a student accountable for sexual assault or sexual exploitation that the student commits while enrolled, whether the offense occurs on or off campus.

We recommend that community college districts amend their board policies and administrative procedures before this new law takes effect on January 1, 2016.

Please contact our office with questions regarding this Legal Update or any other legal matter.

The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

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### A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. **SUBJECT OF NOTICE**  
   N/A

   **TITLE(S)**  
   N/A

   **FIRST SECTION AFFECTED**  
   N/A

2. **REQUESTED PUBLICATION DATE**  
   N/A

### B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. **SUBJECT OF REGULATION(S)**  
   Unlawful Discrimination Regulation

   **SECTION(S) AFFECTED**  
   (List all section number(s))  
   59337, 59352

   **TITLE(S)**  
   59300, 59311, 59320, 59327, 59328, 59334, 59336, 59338, 59339, 59340, 59342, 59350

2. **SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) (Including title 26, if toxics related)**

   AMEND  
   59300, 59311, 59320, 59327, 59328, 59334, 59336, 59338, 59339, 59340, 59342, 59350

3. **TYPE OF FILING**

   - [ ] Regular Rulemaking (Gov. Code §11346)
   - [ ] Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §511346.3, 11349.4)
   - [ ] Emergency (Gov. Code, §11346.1)

4. **CERTIFICATE OF COMPLIANCE**

   - [ ] Emergency (Adopt) (Gov. Code, §11346.1(b))
   - [ ] File & Print
   - [ ] Print Only
   - [ ] Changes Without Regulatory Effect (Cal. Code Regs., Title 1, §100)
   - [ ] Other (Specify)

5. **EXPIRATION DATE**

   - [ ] Effective January 1, April 1, July 1, or October 1 (Gov. Code §511346.40(b))
   - [ ] Effective on filing with Secretary of State
   - [ ] 30 days after filed w/Secretary of State

6. **CONTACT PERSON**

   Tanya Bosch - Regulations Coordinator

   **TELEPHONE NUMBER**  
   (916) 445-4826

   **FAX NUMBER (Optional)**

   **E-MAIL ADDRESS (Optional)**

7. **SIGNATURE OF AGENCY HEAD OR DESIGNEE**

   [Signature]

   **DATE**  
   8-18-2020

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**AGENCY WITH RULEMAKING AUTHORITY**

Board of Governors of the California Community Colleges

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**FOR USE BY OFFICE OF ADMINISTRATIVE LAW (OAL) ONLY**

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**SIGNATURE OF AGENCY HEAD OR DESIGNEE**

[Signature]

**DATE**

8-18-2020

**PRINT NAME AND TITLE OF SIGNATORY**

Marc A. LeForestier, General Counsel

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**EXPECTEDERED - FILED**

In the office of the Secretary of State  
of the State of California  
AUG 19 2020
Final Text of Regulatory Action, Unlawful Discrimination,

Board of Governors of the California Community Colleges
Final Revisions to Title 5 Regulations Concerning Unlawful Discrimination

**TITLE 5, SECTION 59300**

Section 59300 of article 1 of subchapter 5 of chapter 10 of division 6 of title 5 of the California Code of Regulations is amended to read:

§ 59300. Purpose.
The purpose of this subchapter is to implement provisions of state and federal law which together prohibit discrimination or retaliation: the provisions of California Government Code sections 11135 through 11139.5, the Sex Equity in Education Act (Ed. Code § 66250 et seq.), title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), title IX of the Education Amendments of 1972 (20 U.S.C. § 1681), section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), the Americans with Disabilities Act of 1990 (42 U.S.C. § 12100 et seq.) and the Age Discrimination Act (42 U.S.C. § 6101), to the end that no person in the State of California shall, in whole or in part, against persons or groups, or those associated with them on the basis of an actual or perceived characteristic related to ethnic group identification, national origin, immigration status, religion, age, sex, or gender, gender identification, gender expression, military and veteran status, marital status, medical condition, race, color, ancestry, sexual orientation, or physical or mental disability, or any other characteristic protected under applicable federal or state law, or on the basis of these perceived characteristics or based on association with a person or group with one or more of these actual or perceived characteristics, be unlawfully These laws require that protected persons and groups, or those associated with them, shall neither be denied full and equal access to the benefits of, nor be unlawfully subjected to discrimination under, any program or activity that is administered by, funded directly by, or that receives any financial assistance from, the Chancellor or Board of Governors of the California Community Colleges, based upon an actual or perceived characteristic listed in this section.

Note: Authority cited: Sections 66271.1, 66700 and 70901, Education Code; and Section 11138, Government Code. Reference: Sections 66250, 66251, 66252, 66270 et seq. and 72011, Education Code; Sections 11135-, 11136, 11137, 11139 and 11139.5, 11139.8, Government Code; Sections 422.6 and 422.55, Penal Code; Title 20, United State Code, Section 1681; Title 29, United States Code, Section 794; and Title 42, United States Code, Sections 2000d, 6101, 12101, 12112 and 12132, and 12100, et seq.

**TITLE 5, SECTION 59311**

Section 59311 of article 2 of subchapter 5 of chapter 10 of division 6 of title 5 of the California Code of Regulations is amended to read:
§ 59311. Definitions.
For purposes of this subchapter, the following definitions shall apply:
(a) “Appeal” means a request by a complainant made in writing to a community college district governing board pursuant to section 59338 and/or to the Chancellor’s Office pursuant to section 59339 to review the administrative determination of a community college district regarding a complaint of discrimination.
(b) “Complaint” means a written or verbal and signed statement meeting the requirements of section 59328 that alleges unlawful discrimination in violation of this subchapter.
(c) “Days” means calendar days.
(d) “Unlawful discrimination” means unfair or unequal treatment of an individual (or group) based upon an actual or perceived characteristic related to ethnic group identification, national origin, immigration status, religion, age, sex, gender, gender identification, gender expression, military and veteran status, marital status, medical condition, race, color, ancestry, sexual orientation, physical or mental disability, or any other characteristic protected under applicable federal or state law.
(d) Except for purposes of section 59306, “disability” means any mental or physical disability as defined in Government Code section 12926.
(e) “Discrimination on the basis of sex” means sexual harassment or discrimination on the basis of gender.
(f) “Gender” means sex, and includes a person’s gender identity and gender-related appearance and behavior whether or not stereotypically associated with the person’s assigned sex at birth.
(g) “Sex” includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth. “Sex” also includes, but is not limited to, a person’s gender, as defined in section 422.56 of the Penal Code. Discrimination on the basis of sex or gender also includes sexual harassment.
(h) “Sexual orientation” means heterosexuality, homosexuality, or bisexuality.

Note: Authority cited: Sections 66271.1, 66700 and 70901, Education Code; and Section 11138, Government Code. Reference: Sections 66250, 66251, 66252, 66270 et seq. and 72011, Education Code; Sections 11135 and 12926, Government Code; and Sections 422.6 and 422.55, Penal Code.

TITLE 5, SECTION 59320
Section 59320 of article 3 of subchapter 5 of chapter 10 of division 6 of title 5 of the California Code of Regulations is amended to read:

§ 59320. District Responsibilities.
Each community college district has primary responsibility to ensure that its programs and activities are available to all persons without unlawful discrimination, regard to their actual or perceived ethnic group identification, national origin, religion, age, sex or gender, race, color, ancestry, sexual orientation, or physical or mental disability, or to their association with a person or group with one or more of these actual or perceived characteristics. Therefore, each community college district shall
investigate complaints of unlawful discrimination in their programs or activities, and seek to resolve those complaints in accordance with the provisions of this subchapter.

Note: Authority cited: Sections 66271.1, 66700 and 70901, Education Code; and Section 11138, Government Code. Reference: Sections 66250, 66251, 66252, 66270 et seq. and 72011, Education Code; Sections 11135 and 12926, Government Code; and Sections 422.6 and 422.55, Penal Code.

TITLE 5, SECTION 59327
Section 59327 of article 3 of subchapter 5 of chapter 10 of division 6 of title 5 of the California Code of Regulations is amended to read:

§ 59327. Informal Resolution.
(a) Whenever any person brings charges of unlawful discrimination are brought to the attention of the responsible district officer, the district may designate pursuant to section 59324, that officer shall: undertake efforts to informally resolve the charges with the complainant's consent. The district must advise complainants that they need not participate in informal resolution.
(1) undertake efforts to informally resolve the charges;
(2) advise the complainant that he or she need not participate in informal resolution;
(3) notify the person bringing the charges of his or her right to file a complaint, as defined in section 59311, and of the procedure for filing such a complaint pursuant to section 59328;
(4) advise the complainant that he or she may file his or her nonemployment based complaint with the Office for Civil Rights of the U.S. Department of Education (OCR) where such a complaint is within that agency's jurisdiction; and
(5) advise the complainant that he or she may file his or her employment based complaint with the U.S. Equal Employment Opportunity Commission (EEOC) and/or the California Department of Fair Employment and Housing (DFEH) where the complaint is within the jurisdiction of those agencies.
(b) Efforts at informal resolution pursuant to subdivision (a) may, but need not include any investigation, unless The responsible district officer determines that when an investigation is warranted, by the seriousness of the charges;
(c) Efforts at informal resolution may continue after the filing of a formal written or verbal complaint is made, but after a complaint is filed an investigation is required to be conducted pursuant to section 59334 and The investigation must be completed unless the matter is informally resolved and the complainant dismisses the formal complaint, or the complaint files with the DFEH and the Chancellor elects not to require further investigation pursuant to section 59328(f)(2). The district may proceed with an investigation notwithstanding an informal resolution.
(d) Any efforts at informal resolution after the filing of a written or verbal complaint is made shall not exceed the completed within ninety (90) days period for rendering the administrative determination pursuant to section 59336.
TITLE 5, SECTION 59328

Section 59328 of article 3 of subchapter 5 of chapter 10 of division 6 of title 5 of the California Code of Regulations is amended to read:


An investigation of alleged unlawful discrimination prohibited by this subchapter will be initiated by filing a complaint that meets the following requirements:

(a) Complaints of unlawful discrimination may be written or verbal, and shall be made by a student, an employee, a parent of a minor, or an individual with legal authority on behalf of a student or employee, who alleges that the student or employee has personally suffered unlawful discrimination or by one who has learned of such unlawful discrimination in his or her official capacity as a faculty member or administrator.

(b) Any complaints to a responsible employee under California law or Title IX of the Education Amendments Act of 1972, 20 U.S.C. §§ 1681-1688, shall be forwarded to the responsible district officer or designee.

(c) Written complaints shall be provided to the Chancellor of the California Community Colleges or with the responsible district officer or designee designated pursuant to section 59324 by the appropriate community college district.

(d) The complaint shall be in writing, but shall not be required, to submit the complaint on a form prescribed by the Chancellor or the community college district.

(e) Verbal complaints shall be lodged with the responsible district officer or designee. The responsible district officer or designee shall record the verbal complaint in writing. The district shall take appropriate steps to ensure the writing accurately reflects the facts alleged by the complainant.

(f) In any complaint not involving employment, the complaint shall be filed within one year of the date of the alleged unlawful discrimination or within one year of the date on which the complainant knew or should have known of the facts underlying the allegation of unlawful discrimination:

1. the complaint shall be filed within one year of the date of the alleged unlawful discrimination or within one year of the date on which the complainant knew or should have known of the facts underlying the allegation of unlawful discrimination;

2. districts shall advise student complainants that they may file their nonemployment-based complaint with the Office for Civil Rights of the U.S. Department of Education (OCR) where such a complaint is within that agency's jurisdiction.

(ge) In any complaint alleging discrimination in employment, the complaint shall be filed within 180 days of the date the alleged unlawful discrimination occurred, except that this period should be extended by no more than 90 days following the expiration of the 180 days if the complainant first obtained knowledge of the facts of the alleged violation after the expiration of the 180 days.
(1) the complaint shall be filed within 180 days of the date the alleged unlawful
discrimination occurred, except that this period should be extended by no more than 90
days following the expiration of the 180 days if the complainant first obtained knowledge
of the facts of the alleged violation after the expiration of the 180 days;
(2) advise complainants that they may file the complaint with the U.S. Equal Employment
Opportunity Commission (EEOC) and/or the Department of Fair Employment and Housing
(DFEH) where the complaint is within the jurisdiction of those agencies.
(f) In any complaint alleging discrimination in employment, the district shall:
(1) advise the complainant that he or she may
file

the complaint with the U.S. Equal
Employment Opportunity Commission (EEOC) and/or the Department of Fair Employment
and Housing (DFEH) where the complaint is within the jurisdiction of those agencies;
and
(2) forward a copy of any filing by the complainant with the DFEH or the EEOC to the
Chancellor's Office for a determination of whether the issues presented require an
independent investigation of the matter under the provisions of this subchapter.

Note: Authority cited: Sections 66271.1, 66700 and 70901, Education Code; and Section
11138, Government Code. Reference: Sections 66250, 66251, 66252, 66270 et seq. and
72011, Education Code; and Sections 11135 and 11136, Government Code.

TITLE 5, SECTION 59330
Section 59330 of article 3 of subchapter 5 of chapter 10 of division 6 of title 5 of the
California Code of Regulations is repealed:

§ 59330. Notice to Chancellor.
Immediately upon receiving a complaint filed in accordance with section 59328,
regardless of whether the complaint is brought by a student or by an employee, the
district shall forward a copy of the complaint to the Chancellor.

Note: Authority cited: Sections 66271.1, 66700 and 70901, Education Code; and Section
11138, Government Code. Reference: Sections 66250 et seq. and 72011, Education Code;
and Sections 11135 and 11136, Government Code.

TITLE 5, SECTION 59334
Section 59334 of article 3 of subchapter 5 of chapter 10 of division 6 of title 5 of the
California Code of Regulations is amended to read:

§ 59334. District Investigation.
(a) Upon receiving a complaint that is properly
made
filed in accordance with section
59328, the district will shall notify the complainant that the district will commence an
impartial fact-finding investigation of the allegations contained in the complaint and
notify the complainant and Chancellor that it is doing so.
(b) The results of the investigation shall be set forth in a written report that shall include
at least all of the following:
(a1) a description of the circumstances giving rise to the complaint;
(b2) a summary of the testimony provided by each witness, including the complainant and any available viable witnesses identified by the complainant in the complaint;
(c3) an analysis of any relevant data or other evidence collected during the course of the investigation;
(d4) a specific finding as to whether there is probable cause to believe that discrimination occurred with respect to each factual allegation in the complaint occurred based on the preponderance of the evidence standard; and
(e5) any other information deemed appropriate by the district.

Note: Authority cited: Sections 66271.1, 66700 and 70901, Education Code; and Section 11138, Government Code. Reference: Sections 66250, 66251, 66252, 66270, et seq., 67386 and 72011, Education Code; and Sections 11135 and 11136, Government Code.

TITLE 5, SECTION 59336
Section 59336 of article 3 of subchapter 5 of chapter 10 of division 6 of title 5 of the California Code of Regulations is amended to read:

§ 59336. Administrative Determination.
(a) In any case not involving employment discrimination, within ninety (90) days of receiving a complaint, the district shall complete its investigation and forward a copy of the investigative report required pursuant to section 59334 to the Chancellor; a copy or summary of the report to the complainant, and written notice to the complainant setting forth all of the following to both the complainant and the Chancellor:
(1) the determination of the chief executive officer’s or his/her designee’s determination as to whether there is probable cause to believe unlawful discrimination occurred with respect to each allegation in the complaint based on the preponderance of the evidence standard;
(2) if a discrimination allegation is substantiated, a description of actions taken, if any, to prevent similar problems acts of unlawful discrimination from occurring in the future;
(3) the proposed resolution of the complaint; and
(4) the complainant’s right to appeal to the district governing board and the Chancellor pursuant to sections 59338 and 59339; and
(5) in matters involving student sexual misconduct, the respondent’s right to appeal to the district governing board any disciplinary sanction imposed upon the respondent.
(b) In any case involving employment discrimination, within 90 days of receiving a complaint, the district shall complete its investigation and forward a copy or summary of the report to the complainant, and written notice to the complainant setting forth all the following to the complainant:
(1) the determination of the chief executive officer’s or his/her designee’s determination as to whether there is probable cause to believe discrimination occurred with respect to each allegation in the complaint based on the preponderance of the evidence standard;
(2) if a discrimination allegation is substantiated, a description of actions taken, if any, to prevent similar problems acts of unlawful discrimination from occurring in the future;
(3) the proposed resolution of the complaint; and
(4) the complainant’s right to appeal to the district governing board and to file a
complaint with Department of Fair Employment and Housing.
(c) In any case involving unlawful discrimination, when a district provides the
complainant with any information pursuant to this subdivision, the district shall also
provide to the respondent the following:
(1) The chief executive officer’s or their designee’s determination as to whether unlawful
discrimination occurred with respect to each allegation in the complaint based on the
preponderance of the evidence standard;
(2) The proposed resolution of the complaint, including any disciplinary action against the
respondent; and
(3) In matters involving misconduct governed by section 59337, subdivision (b), the
respondent’s right to appeal to the local governing board any disciplinary sanction
imposed upon the respondent.

Note: Authority cited: Sections 66271.1, 66700 and 70901, Education Code; and Section
11138, Government Code. Reference: Sections 66250, 66251, 66252, 66270 et seq. and
72011, Education Code; and Sections 11135 and 11136, Government Code.

TITLE 5, SECTION 59337
Section 59337 of article 3 of subchapter 5 of chapter 10 of division 6 of title 5 of the
California Code of Regulations is added to read:

§ 59337. Title IX and Student Discipline Procedures.
(a) In cases of student sexual misconduct subject to Title IX of the Education Amendments
Act of 1972, 20 U.S.C. §§ 1681–1688, districts must comply with the federal Department of
Education’s Title IX regulations, 34 C.F.R. Part 106.
(b) In cases of student sexual misconduct that are not subject to Title IX, when an accused
student is subject to severe disciplinary sanctions, and the credibility of witnesses was
central to the investigative findings, district student discipline procedures must provide
the following:
(1) An opportunity for the accused student to cross-examine witnesses indirectly at a live
hearing, either in person or by videoconference; and
(2) A live hearing conducted by a neutral decision-maker other than the investigator.
(c) For purposes of this section, “indirect” cross-examination shall be conducted as
follows:
(1) Any question to the witness shall be asked by a neutral party appointed by the district
for the sole purpose of asking questions. The neutral party shall not be the accused
student, the accused student’s representative, or a member of the hearing panel; and
(2) The accused student may submit written questions before and during the cross-
examination, including any follow-up questions. The neutral party asking questions shall
not exclude any questions unless there is an objection to the question by the hearing
panel.
(d) Nothing in this section shall prohibit a district from providing a live hearing or neutral decision-maker for other student discipline proceedings, including for other forms of discrimination.

Note: Authority cited: Sections 66271.1, 66700 and 70901, Education Code. Reference: Sections 66271.6 and 66271.7, Education Code; Title 20, United States Code, Section 1681; Title 34, Code of Federal Regulations, Section 106.31.

TITLE 5, SECTION 59338
Section 59338 of article 3 of subchapter 5 of chapter 10 of division 6 of title 5 of the California Code of Regulations is amended to read:

§ 59338. Final District Decision; Appeals to Local Governing Board.
(a) If the complainant is not satisfied with the results of the administrative determination rendered pursuant to section 59336, the complainant may submit a written appeal to the district governing board within fifteen (15) thirty (30) days from the date of the notice pursuant to required by section 59336 that sets forth the administrative determination and the complainant’s appeal rights. The governing board shall review the original complaint, the investigative report, the administrative determination, and the appeal and issue a final district decision in the matter within forty-five (45) days after receiving the appeal. In student sexual misconduct cases subject to section 59337, subdivision (b), respondents who are not satisfied with the results of the administrative determination rendered pursuant to section 59336, subdivision (a), may submit a written appeal to the district governing board within thirty (30) days from the date of the notice required by section 59336. The governing board shall review the original complaint, the investigative report, the administrative determination, and the appeal and issue a final district decision within forty-five (45) days after receiving the appeal.
(b) If the governing board does not act within forty-five (45) days, the administrative determination shall be deemed approved on the forty-sixth (46) day and shall become the final district decision. The district shall promptly notify the complainant and the respondent of the board’s action, or if the board took no action that the administrative determination is deemed approved.
(c) In any case not involving employment discrimination, the district shall promptly forward to the complainant, and the respondent, and to the Chancellor a copy of the final district decision rendered by the governing board, if any, that includes notice of the complainant’s right to appeal the district’s decision to the Chancellor pursuant to section 59339.
(d) In any case involving employment discrimination, the district shall promptly forward to the complainant a copy of the final district decision rendered by the governing board that includes the complainant’s right to file a complaint with the Department of Fair Employment and Housing (DFEH), where the case is within the jurisdiction of that agency. The district shall promptly notify the complainant, and the respondent, and to the Chancellor a copy of the final district decision rendered by the governing board, if any, that includes notice of the complainant’s right to appeal the district’s decision to the Chancellor pursuant to section 59339.
(d) If the governing board does not act within forty-five (45) days the administrative determination shall be deemed approved and shall become the final district decision in the matter.
(1) The district shall promptly notify the complainant and, in any case not involving employment discrimination, the Chancellor, that the board took no action and the administrative determination is deemed approved pursuant to this section.
(2) In any case not involving employment discrimination, the complainant shall also be notified of his or her right to appeal the district's decision to the Chancellor pursuant to section 59339.
(3) In any case involving employment discrimination, the complainant shall also be notified of his or her right to file a complaint with the Department of Fair Employment and Housing (DFEH), where the case is within the jurisdiction of that agency.

Note: Authority cited: Sections 66271.1, 66700 and 70901, Education Code; and Section 11138, Government Code. Reference: Sections 66250, 66251, 66252, 66270 et seq. and 72011, Education Code; and Sections 11135 and 11136, Government Code.

TITLE 5, SECTION 59339
Section 59339 of article 3 of subchapter 5 of chapter 10 of division 6 of title 5 of the California Code of Regulations is amended to read:

§ 59339. Appeal to the Chancellor.
(a) In any case not involving employment discrimination, the complainant may have the right to file a written appeal with the Chancellor within thirty (30) days from the date of the governing board issues the district's notice of final district decision, or permits the administrative determination to become final pursuant to section 59338, or from the date of the notice provided pursuant to section 59338(b) or (d), whichever is later. Such appeals shall be processed pursuant to the provisions of article 4 (commencing with section 59350) of this subchapter. The appeal must be accompanied by a copy of the complaint, the decision of the governing board, and the notice of final decision or evidence showing the date on which the complainant filed an appeal with the governing board and a statement under penalty of perjury that no response was received from the governing board within forty-five (45) days from that date.
(b) In any case involving employment discrimination, the complainant may, at any time before or after the final district decision is rendered, file a complaint with the Department of Fair Employment and Housing (DFEH) where the complaint is within the jurisdiction of that agency.
(c) For any appeal under subdivision (a), the district shall provide all relevant, non-privileged documents upon request of the Chancellor.

Note: Authority cited: Sections 66271.1, 66700 and 70901, Education Code; and Section 11138, Government Code. Reference: Sections 66250, 66251, 66252, 66270 et seq. and 72011, Education Code; and Sections 11135 and 11136, Government Code.

TITLE 5, SECTION 59340
Section 59340 of article 3 of subchapter 5 of chapter 10 of division 6 of title 5 of the California Code of Regulations is amended to read:
§ 59340. Provision of Information Disclosures to the Chancellor.

(a) Within 150 days of receiving a complaint which does not involve employment discrimination, the district will either: Upon request of the Chancellor, a district shall provide copies of all documents related to a discrimination complaint, including the following:

1. the complaint forward the following to the Chancellor;
2. any investigative report, unless subject to the attorney-client privilege;
3. A copy of the final district decision rendered by the governing board or a statement indicating the date on which the administrative determination became final pursuant to section 59338(a) or (d);
4. A copy of the notice to the complainant required by pursuant to section 59338(a) or (d);
5. A copy of the complainant's appeal of the district's administrative determination pursuant to section 59338(a); and
6. Such any other non-privileged documents or information as the Chancellor requests, may require; or

(b) Districts shall provide to the Chancellor an annual report with the following information:

1. the number of employment and non-employment discrimination complaints and informal charges received in the previous academic year,
2. the number of complaints and informal charges resolved in the previous academic year,
3. the number of complaints of unlawful discrimination received in the previous academic year, and the number of those complaints that were sustained in whole or in part,
4. any other information requested by the Chancellor.

(2) Notify the Chancellor that the complainant has not filed an appeal with the district governing board and that the district has closed its file.

(3c) Districts shall retain all records arising from informal discrimination charges and formal discrimination complaints for a period of five years after closing a case, including a case involving employment discrimination, the district shall retain and make available to the Chancellor upon request the original complaint, the documents referenced in sections 59336 and 59338, and the documents identified in subdivision (a) of this section.

Note: Authority cited: Sections 66271.1, 66700 and 70901, Education Code; and Section 11138, Government Code. Reference: Sections 66250, 66251, 66252, 66270 et seq. and 72011, Education Code; and Sections 11135 and 11136, Government Code.

TITLE 5, SECTION 59342
Section 59342 of article 3 of subchapter 5 of chapter 10 of division 6 of title 5 of the California Code of Regulations is amended to read:
§ 59342. Extensions; Failure to Comply.
(a) If a district, for reasons beyond its control, is unable to comply with the 90-day or 150-day deadline pursuant to specified in sections 59327 and 59336 or 59340, the district may file a written request that the Chancellor grant an extension extend the time to respond by up to 45 additional days. An extension may be taken only once without permission from the Chancellor's Office, and must be necessary for one of the following reasons: of the deadline. Where an extension is deemed necessary by the district, it must be requested from the Chancellor regardless of whether or not the case involves employment discrimination. The request shall be submitted no later than ten (10) days prior to the expiration of the deadline established pursuant to sections 59336 or 59340 and shall set forth the reasons for the request and the date by which the district expects to be able to submit the required materials.
(1) a need to interview a party or witness who has been unavailable;
(2) a need to review or analyze additional evidence, new allegations, or new complaints related to the matter; or
(3) to prepare and finalize an administrative determination.
(b) Districts shall send a written notice to the complainant, and to a respondent who is aware of an investigation, indicating the necessity of an extension, the justification for the extension, and the number of days the deadline will be extended.
(c) Notice of an extension shall be sent to the complainant, and to a respondent who is aware of an investigation, no later than 10 days prior to the initial time to respond pursuant to section 59336.
(bd) Districts may request additional extensions from the Chancellor after the initial 45-day extension. A copy of the extension request for an extension shall be sent to the complainant, and to a respondent who is aware of an investigation, who shall be notified that he or she The complainant and respondent may each file a written objections with the Chancellor within five (5) days of receipt.
(ee) The Chancellor may grant the extension for good cause request unless delay would be unduly prejudicial to the complainant or investigation. If the Chancellor grants an extension of the 90-day deadline, the 150-day deadline is automatically extended by an equal amount.
(dd) If a district fails to comply with the requirements of this section or sections 59336 or 59340 by the required deadline, including any extension granted pursuant to this section, the Chancellor may proceed to review the case as provided in article 4 (commencing with section 59350) of this subchapter based on the original complaint and any other relevant information then available.

Note: Authority cited: Sections 66271.7, 66700 and 70901, Education Code; and Section 11138, Government Code. Reference: Sections 66250, 66251, 66252, 66270 et seq. and 72011, Education Code; and Sections 11135 and 11136, Government Code.

TITLE 5, SECTION 59350
Section 59350 of article 4 of subchapter 5 of chapter 10 of division 6 of title 5 of the California Code of Regulations is amended to read:

(a) The Chancellor shall review the materials submitted by the district pursuant to sections 59336 and 59340, together with the complainant's appeal, and determine whether there is reasonable cause to believe the district has violated the requirements of this subchapter. The Chancellor's review on appeal is limited to the following issues:

1. whether there was a procedural error in violation of this subchapter;
2. whether there was a defect in the investigation;
3. whether new evidence unavailable during the investigation despite the complainant's due diligence would substantially impact the outcome of the investigation;
4. whether correct legal standards were applied; and
5. whether the district's determination was an abuse of discretion.

(b) Failure by the complainant to file an appeal pursuant to section 59339 shall not preclude the Chancellor from finding reasonable cause to believe the district has violated the requirements of this subchapter. The Chancellor shall issue a determination within ninety (90) days of receiving the appeal and appellate file from the appropriate district. The Chancellor shall send the determination to both the complainant and the district.

(c) If the Chancellor finds there is no reasonable cause to believe a violation has occurred, the Chancellor shall immediately notify both the complainant and the district.

Note: Authority cited: Sections 66271.1, 66700 and 70901, Education Code; and Section 11138, Government Code. Reference: Sections 66250, 66251, 66252, 66270 et seq. and 72011, Education Code; and Sections 11135 and 11136, Government Code.

TITLE 5, SECTION 59352

Section 59352 of article 4 of subchapter 5 of chapter 10 of division 6 of title 5 of the California Code of Regulations is repealed and adopted to read:

§ 59352. Investigation.

If the Chancellor finds there is reasonable cause to believe a violation has occurred, the Chancellor shall investigate to determine whether there is probable cause to believe a violation has occurred.

Note: Authority cited: Sections 66271.1, 66700 and 70901, Education Code; and Section 11138, Government Code. Reference: Sections 66250 et seq. and 72011, Education Code; and Sections 11135 and 11136, Government Code.

§ 59352. Remand.

(a) The Chancellor may remand any matter to the originating district for any of the following reasons:

1. to cure defects in the investigation or in procedural compliance;
2. to consider new evidence not available during the investigation despite the complainant's due diligence that would substantially impact the outcome of the investigation; or
3. to modify or reverse a decision of the local governing board based upon misapplication of an applicable legal standard or an abuse of discretion.
(b) If a matter is remanded to the district, the district shall take necessary action and issue a decision after remand within sixty (60) days.
(c) In any case not involving employment discrimination, the complainant may appeal the district’s amended determination to the Chancellor within thirty (30) days pursuant to section 59339.

Note: Authority cited: Sections 66271.1, 66700 and 70901, Education Code. Reference: Sections 66250, 66251, 66252, 66270 and 72011, Education Code; and Sections 11135 and 11136, Government Code.

TITLE 5, SECTION 59356
Section 59356 of article 4 of subchapter 5 of chapter 10 of division 6 of title 5 of the California Code of Regulations is repealed:

§ 59356. Formal Resolution:
Within 120 days of initiating the investigation, the Chancellor shall take one of the following actions:
(a) Notify the district and the complainant that there is probable cause to believe the district has violated the provisions of this subchapter. The Chancellor shall allow the district to acquiesce in this finding prior to filing an accusation against the district.
(b) Notify the district and the complainant that there is no probable cause to believe the district has violated the provisions of this subchapter.

Note: Authority cited: Sections 66271.7, 66700 and 70901, Education Code; and Section 11138, Government Code. Reference: Sections 66250 et seq. and 72011, Education Code; and Sections 11135 and 11136, Government Code.
Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act

20 U.S.C.A. § 1092

(f) Disclosure of campus security policy and campus crime statistics

(1) Each eligible institution participating in any program under this subchapter and part C of subchapter I of chapter 34 of Title 42, other than a foreign institution of higher education, shall on August 1, 1991, begin to collect the following information with respect to campus crime statistics and campus security policies of that institution, and beginning September 1, 1992, and each year thereafter, prepare, publish, and distribute, through appropriate publications or mailings, to all current students and employees, and to any applicant for enrollment or employment upon request, an annual security report containing at least the following information with respect to the campus security policies and campus crime statistics of that institution:

(A) A statement of current campus policies regarding procedures and facilities for students and others to report criminal actions or other emergencies occurring on campus and policies concerning the institution's response to such reports.

(B) A statement of current policies concerning security and access to campus facilities, including campus residences, and security considerations used in the maintenance of campus facilities.

(C) A statement of current policies concerning campus law enforcement, including--

(i) the law enforcement authority of campus security personnel;

(ii) the working relationship of campus security personnel with State and local law enforcement agencies, including whether the institution has agreements with such agencies, such as written memoranda of understanding, for the investigation of alleged criminal offenses; and

(iii) policies which encourage accurate and prompt reporting of all crimes to the campus police and the appropriate law enforcement agencies, when the victim of such crime elects or is unable to make such a report.

(D) A description of the type and frequency of programs designed to inform students and employees about campus security procedures and practices and to encourage students and employees to be responsible for their own security and the security of others.

(E) A description of programs designed to inform students and employees about the prevention of crimes.

(F) Statistics concerning the occurrence on campus, in or on noncampus buildings or property, and on public property during the most recent calendar year, and during the 2 preceding calendar years for which data are available--
(i) of the following criminal offenses reported to campus security authorities or local police agencies:

(I) murder;

(II) sex offenses, forcible or nonforcible;

(III) robbery;

(IV) aggravated assault;

(V) burglary;

(VI) motor vehicle theft;

(VII) manslaughter;

(VIII) arson;

(IX) arrests or persons referred for campus disciplinary action for liquor law violations, drug-related violations, and weapons possession; and

(ii) of the crimes described in subclauses (I) through (VIII) of clause (i), of larceny-theft, simple assault, intimidation, and destruction, damage, or vandalism of property, and of other crimes involving bodily injury to any person, in which the victim is intentionally selected because of the actual or perceived race, gender, religion, national origin, sexual orientation, gender identity, [FN1] ethnicity, or disability of the victim that are reported to campus security authorities or local police agencies, which data shall be collected and reported according to category of prejudice; and

(iii) of domestic violence, dating violence, and stalking incidents that were reported to campus security authorities or local police agencies.

(G) A statement of policy concerning the monitoring and recording through local police agencies of criminal activity at off-campus student organizations which are recognized by the institution and that are engaged in by students attending the institution, including those student organizations with off-campus housing facilities.

(H) A statement of policy regarding the possession, use, and sale of alcoholic beverages and enforcement of State underage drinking laws and a statement of policy regarding the possession, use, and sale of illegal drugs and enforcement of Federal and State drug laws and a description of any drug or alcohol abuse education programs as required under section 1011i of this title.

(I) A statement advising the campus community where law enforcement agency information provided by a State under section 14071(j) of Title 42, concerning registered sex offenders may be obtained, such as the law enforcement office of the institution, a local law enforcement agency with jurisdiction for the campus, or a computer network address.
(J) A statement of current campus policies regarding immediate emergency response and evacuation procedures, including the use of electronic and cellular communication (if appropriate), which policies shall include procedures to--

(i) immediately notify the campus community upon the confirmation of a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or staff occurring on the campus, as defined in paragraph (6), unless issuing a notification will compromise efforts to contain the emergency;

(ii) publicize emergency response and evacuation procedures on an annual basis in a manner designed to reach students and staff; and

(iii) test emergency response and evacuation procedures on an annual basis.

(2) Nothing in this subsection shall be construed to authorize the Secretary to require particular policies, procedures, or practices by institutions of higher education with respect to campus crimes or campus security.

(3) Each institution participating in any program under this subchapter and part C of subchapter I of chapter 34 of Title 42, other than a foreign institution of higher education, shall make timely reports to the campus community on crimes considered to be a threat to other students and employees described in paragraph (1)(F) that are reported to campus security or local law police agencies. Such reports shall be provided to students and employees in a manner that is timely, that withholds the names of victims as confidential, and that will aid in the prevention of similar occurrences.

(4)(A) Each institution participating in any program under this subchapter and part C of subchapter I of chapter 34 of Title 42, other than a foreign institution of higher education, that maintains a police or security department of any kind shall make, keep, and maintain a daily log, written in a form that can be easily understood, recording all crimes reported to such police or security department, including--

(i) the nature, date, time, and general location of each crime; and

(ii) the disposition of the complaint, if known.

(B)(i) All entries that are required pursuant to this paragraph shall, except where disclosure of such information is prohibited by law or such disclosure would jeopardize the confidentiality of the victim, be open to public inspection within two business days of the initial report being made to the department or a campus security authority.

(ii) If new information about an entry into a log becomes available to a police or security department, then the new information shall be recorded in the log not later than two business days after the information becomes available to the police or security department.

(iii) If there is clear and convincing evidence that the release of such information would jeopardize an ongoing criminal investigation or the safety of an individual, cause a suspect to flee or evade detection, or result in the destruction of evidence, such information may be withheld until that damage is no longer likely to occur from the
release of such information.

(5) On an annual basis, each institution participating in any program under this subchapter and part C of subchapter I of chapter 34 of Title 42, other than a foreign institution of higher education, shall submit to the Secretary a copy of the statistics required to be made available under paragraph (1)(F). The Secretary shall--

(A) review such statistics and report to the authorizing committees on campus crime statistics by September 1, 2000;

(B) make copies of the statistics submitted to the Secretary available to the public; and

(C) in coordination with representatives of institutions of higher education, identify exemplary campus security policies, procedures, and practices and disseminate information concerning those policies, procedures, and practices that have proven effective in the reduction of campus crime.

(6)(A) In this subsection:

(i) The terms “dating violence”, “domestic violence”, and “stalking” have the meaning given such terms in section 13925(a) of Title 42.

(ii) The term “campus” means--

(I) any building or property owned or controlled by an institution of higher education within the same reasonably contiguous geographic area of the institution and used by the institution in direct support of, or in a manner related to, the institution's educational purposes, including residence halls; and

(II) property within the same reasonably contiguous geographic area of the institution that is owned by the institution but controlled by another person, is used by students, and supports institutional purposes (such as a food or other retail vendor).

(iii) The term “noncampus building or property” means--

(I) any building or property owned or controlled by a student organization recognized by the institution; and

(II) any building or property (other than a branch campus) owned or controlled by an institution of higher education that is used in direct support of, or in relation to, the institution's educational purposes, is used by students, and is not within the same reasonably contiguous geographic area of the institution.

(iv) The term “public property” means all public property that is within the same reasonably contiguous geographic area of the institution, such as a sidewalk, a street, other thoroughfare, or parking facility, and is adjacent to a facility owned or controlled by the institution if the facility is used by the institution in direct support of, or in a manner related to the institution's educational purposes.

(v) The term “sexual assault” means an offense classified as a forcible or nonforcible sex offense under the
uniform crime reporting system of the Federal Bureau of Investigation.

(B) In cases where branch campuses of an institution of higher education, schools within an institution of higher education, or administrative divisions within an institution are not within a reasonably contiguous geographic area, such entities shall be considered separate campuses for purposes of the reporting requirements of this section.

(7) The statistics described in clauses (i) and (ii) of paragraph (1)(F) shall be compiled in accordance with the definitions used in the uniform crime reporting system of the Department of Justice, Federal Bureau of Investigation, and the modifications in such definitions as implemented pursuant to the Hate Crime Statistics Act. For the offenses of domestic violence, dating violence, and stalking, such statistics shall be compiled in accordance with the definitions used in section 13925(a) of Title 42. Such statistics shall not identify victims of crimes or persons accused of crimes.

(8)(A) Each institution of higher education participating in any program under this subchapter and part C of subchapter I of chapter 34 of Title 42 and title IV of the Economic Opportunity Act of 1964, other than a foreign institution of higher education, shall develop and distribute as part of the report described in paragraph (1) a statement of policy regarding--

(i) such institution's programs to prevent domestic violence, dating violence, sexual assault, and stalking; and

(ii) the procedures that such institution will follow once an incident of domestic violence, dating violence, sexual assault, or stalking has been reported, including a statement of the standard of evidence that will be used during any institutional conduct proceeding arising from such a report.

(B) The policy described in subparagraph (A) shall address the following areas:

(i) Education programs to promote the awareness of rape, acquaintance rape, domestic violence, dating violence, sexual assault, and stalking, which shall include--

(I) primary prevention and awareness programs for all incoming students and new employees, which shall include--

(aa) a statement that the institution of higher education prohibits the offenses of domestic violence, dating violence, sexual assault, and stalking;

(bb) the definition of domestic violence, dating violence, sexual assault, and stalking in the applicable jurisdiction;

(cc) the definition of consent, in reference to sexual activity, in the applicable jurisdiction;

(dd) safe and positive options for bystander intervention that may be carried out by an individual to prevent harm or intervene when there is a risk of domestic violence, dating violence, sexual assault, or stalking against a person other than such individual;
(ee) information on risk reduction to recognize warning signs of abusive behavior and how to avoid potential attacks; and

(ff) the information described in clauses (ii) through (vii); and

(II) ongoing prevention and awareness campaigns for students and faculty, including information described in items (aa) through (ff) of subclause (I).

(ii) Possible sanctions or protective measures that such institution may impose following a final determination of an institutional disciplinary procedure regarding rape, acquaintance rape, domestic violence, dating violence, sexual assault, or stalking.

(iii) Procedures victims should follow if a sex offense, domestic violence, dating violence, sexual assault, or stalking has occurred, including information in writing about--

(I) the importance of preserving evidence as may be necessary to the proof of criminal domestic violence, dating violence, sexual assault, or stalking, or in obtaining a protection order;

(II) to whom the alleged offense should be reported;

(III) options regarding law enforcement and campus authorities, including notification of the victim's option to-

(aa) notify proper law enforcement authorities, including on-campus and local police;

(bb) be assisted by campus authorities in notifying law enforcement authorities if the victim so chooses; and

(cc) decline to notify such authorities; and

(IV) where applicable, the rights of victims and the institution's responsibilities regarding orders of protection, no contact orders, restraining orders, or similar lawful orders issued by a criminal, civil, or tribal court.

(iv) Procedures for institutional disciplinary action in cases of alleged domestic violence, dating violence, sexual assault, or stalking, which shall include a clear statement that--

(I) such proceedings shall--

(aa) provide a prompt, fair, and impartial investigation and resolution; and

(bb) be conducted by officials who receive annual training on the issues related to domestic violence, dating violence, sexual assault, and stalking and how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability;
(II) the accuser and the accused are entitled to the same opportunities to have others present during an
institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or
proceeding by an advisor of their choice; and

(III) both the accuser and the accused shall be simultaneously informed, in writing, of--

(aa) the outcome of any institutional disciplinary proceeding that arises from an allegation of domestic
violence, dating violence, sexual assault, or stalking;

(bb) the institution's procedures for the accused and the victim to appeal the results of the institutional
disciplinary proceeding;

(cc) of any change to the results that occurs prior to the time that such results become final; and

(dd) when such results become final.

(v) Information about how the institution will protect the confidentiality of victims, including how publicly-
available recordkeeping will be accomplished without the inclusion of identifying information about the victim,
to the extent permissible by law.

(vi) Written notification of students and employees about existing counseling, health, mental health, victim
advocacy, legal assistance, and other services available for victims both on-campus and in the community.

(vii) Written notification of victims about options for, and available assistance in, changing academic, living,
transportation, and working situations, if so requested by the victim and if such accommodations are reasonably
available, regardless of whether the victim chooses to report the crime to campus police or local law enforcement.

(C) A student or employee who reports to an institution of higher education that the student or employee has been a
victim of domestic violence, dating violence, sexual assault, or stalking, whether the offense occurred on or off
campus, shall be provided with a written explanation of the student or employee's rights and options, as described in
clauses (ii) through (vii) of subparagraph (B).

(9) The Secretary, in consultation with the Attorney General of the United States, shall provide technical assistance
in complying with the provisions of this section to an institution of higher education who requests such assistance.

(10) Nothing in this section shall be construed to require the reporting or disclosure of privileged information.

(11) The Secretary shall report to the appropriate committees of Congress each institution of higher education that
the Secretary determines is not in compliance with the reporting requirements of this subsection.

(12) For purposes of reporting the statistics with respect to crimes described in paragraph (1)(F), an institution of
higher education shall distinguish, by means of separate categories, any criminal offenses that occur--

(A) on campus;
(B) in or on a noncampus building or property;

(C) on public property; and

(D) in dormitories or other residential facilities for students on campus.

(13) Upon a determination pursuant to section 1094(c)(3)(B) of this title that an institution of higher education has substantially misrepresented the number, location, or nature of the crimes required to be reported under this subsection, the Secretary shall impose a civil penalty upon the institution in the same amount and pursuant to the same procedures as a civil penalty is imposed under section 1094(c)(3)(B) of this title.

(14)(A) Nothing in this subsection may be construed to--

(i) create a cause of action against any institution of higher education or any employee of such an institution for any civil liability; or

(ii) establish any standard of care.

(B) Notwithstanding any other provision of law, evidence regarding compliance or noncompliance with this subsection shall not be admissible as evidence in any proceeding of any court, agency, board, or other entity, except with respect to an action to enforce this subsection.

(15) The Secretary shall annually report to the authorizing committees regarding compliance with this subsection by institutions of higher education, including an up-to-date report on the Secretary's monitoring of such compliance.

(16)(A) The Secretary shall seek the advice and counsel of the Attorney General of the United States concerning the development, and dissemination to institutions of higher education, of best practices information about campus safety and emergencies.

(B) The Secretary shall seek the advice and counsel of the Attorney General of the United States and the Secretary of Health and Human Services concerning the development, and dissemination to institutions of higher education, of best practices information about preventing and responding to incidents of domestic violence, dating violence, sexual assault, and stalking, including elements of institutional policies that have proven successful based on evidence-based outcome measurements.

(17) No officer, employee, or agent of an institution participating in any program under this subchapter and part C of subchapter I of chapter 34 of Title 42 shall retaliate, intimidate, threaten, coerce, or otherwise discriminate against any individual for exercising their rights or responsibilities under any provision of this subsection.

(18) This subsection may be cited as the “Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act”.
Posted Date: October 09, 2020

Author: Office of Postsecondary Education

Subject: Rescission of and Replacement for the 2016 Handbook for Campus Safety and Security Reporting

This electronic announcement addresses the rescission of and replacement for the 2016 Handbook for Campus Safety and Security Reporting (“2016 edition”). This announcement also identifies and explains the significant changes between the 2016 edition and the new Clery-related Appendix of the Federal Student Aid (FSA) Handbook.

Other than the statutory and regulatory requirements included in this document, the contents of the new Appendix do not have the force and effect of law and are not meant to bind the public. The document is intended only to provide clarity to the public regarding existing requirements under the applicable statutory and regulatory provisions.

The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (“Clery Act”) contains specific campus safety- and security-related requirements that can be challenging for some institutions of higher education to understand and satisfy. The 2016 edition, as well as the previous versions, created additional requirements and expanded the scope of the statute and regulations. Despite the fact that the guidance found in the 2016 edition did not have the force of law or regulations, some institutions may have felt pressured to satisfy the non-regulatory or non-statutory based aspects of the guidance, calculating that the financial and reputational consequences of non-compliance were too great. This is precisely one of the concerns raised in Executive Order 13891, “Promoting the Rule of Law Through Improved Agency Guidance Documents,” which noted that “[e]ven when accompanied by a disclaimer that it is non-binding, a guidance document issued by an agency may carry the implicit threat of enforcement action if the regulated public does not comply.” See: Exec. Order No. 13891, Sec. 1, 84 FR 55235.
Similarly, the Senate Report of the Task Force on Federal Regulation of Higher Education, “Recalibrating Regulation of Colleges and Universities,” specifically identified the Clery Handbook as an example of guidance that is “unnecessarily voluminous.” For some institutions, the result was an overriding focus on lengthy annual statistical reports, which may have taken resources away from the mission of campus safety, including potentially reallocating resources on hiring additional security staff.

As part of Secretary DeVos’s commitment to reducing the regulatory burden on institutions, her efforts to respond to the recommendations of the Senate Task Force on Federal Regulation of Higher Education, and consistent with Exec. Order 13891, the Department evaluated its interpretation of the Clery Act and listened to legitimate concerns that the Department’s enforcement actions were an example of regulatory overreach. Our goal was to provide guidance to institutions that would enable them to focus on maintaining a safe and secure environment, rather than spending time and resources generating reports that few students or parents consult, and that could overwhelm them with excessive data that obscures the most important and helpful parts of these reports. Though no statutory or regulatory requirements related to Clery Act reporting have changed, this revised approach is consistent with the goals of Exec. Order 13891, which emphasizes that agencies may use guidance to “clarify existing obligations” and promotes transparency in agencies’ guidance documents. See: Exec. Order No. 13891, Sec. 1.

The Department has made the determination that the 2016 edition did not achieve the Department’s goal of ensuring that adequate information is available to the public to foster improved campus safety and security. Following an extensive review of the 2016 edition, the Department concluded that much of the guidance provided was outside of the scope of the relevant statutory (20 U.S.C. 1092) and regulatory (34 CFR 668.41 and 668.46) authority. As a result, the Department began a holistic process of eliminating guidance that extended beyond the statutory and regulatory requirements from the 2016 edition with the intention of reducing regulatory confusion, and carefully tailoring the guidance to language directly supported by statute and regulation. While this rescission will inform the Department’s views moving forward, the rescission will not retroactively apply to previous Department determinations regarding Clery Act violations, fines, enforcement actions, or any other related actions by the Department.
In addition, the new Appendix in the FSA Handbook will be accompanied by a renewed emphasis on technical assistance, including a robust schedule of future webinar offerings. These Department supports will assist institutions in satisfying the strict statutory and regulatory requirements, while reversing the overreach of past guidance and reducing the complexity and confusion surrounding Clery compliance.

The Department recognizes that many Clery practitioners have become accustomed to the 2016 edition, as well as previous editions, and may continue to rely on it for direction. Instead of rescinding all Clery-related guidance, the Department has determined that the better path forward is to provide direction in the Federal Student Aid (FSA) Handbook. The language in the Appendix will replace the limited Clery language already present in the current FSA Handbook. In addition, moving forward, while the Department will not advise institutions to rely upon it, the 2016 edition will be archived on the Department’s website, but, where appropriately applied to prior calendar years, will continue to be referenced in program review reports, final program review determinations, and final audit determinations.

The following is a list of the significant changes to the 2016 edition that are found in the new Appendix. A brief explanation accompanies each change or deletion.

- **Clery Geography** –

  For many institutions, determining what does – and does not – constitute Clery geography can be very difficult. While Chapter 2 of the 2016 edition attempts to clarify some of the details, it may have expanded the definition beyond the intent and authority of the legislation and resulted in confusion and unhelpful over-reporting. The revised language applies the specific regulatory requirements and attempts to provide clarity, without additional requirements, to terms defined in 34 CFR 668.46(a).

  As an example of our revised approach, the Department will no longer apply any specific measurable distance definition to “reasonably contiguous” geographic area. For example, the 2016 edition states that, with some exceptions, “generally speaking, it is reasonable to consider locations within one mile of your campus border to be reasonably contiguous with your campus.” (Pg. 2-3) The 2016 edition similarly advises that, with limited exceptions, institutions “extend the reporting area one mile into the area of” a public park and “a river, lake, ocean,
etc., that borders your campus.” (Pg. 2-15) This is an expansion of the scope of the Clery Act and goes beyond any reasonable expectation a student or parent might have regarding the institution’s responsibility for ensuring student safety.

The Appendix also emphasizes the regulatory definitions for “public property” (Pg. 2-11) and “non-campus building or property.” (pg. 2-18) Further, it removes definitions not found in regulation or statute, such as “owned or controlled by” (Pg. 2-2) and “directly supports.” (Pg. 2-4)

The 2016 edition explanation of the definition of public property in 34 CFR 668.46(a) (“within or immediately adjacent to and accessible from the campus”) – including the “sidewalk, street, sidewalk” instruction (Pg. 2-12) – is not provided for in statute or regulation and, therefore, is not included in the Appendix.

The Appendix has also addressed the issues identified in the above-referenced Senate Report regarding reporting crimes that occur during institution sponsored stay-away trips and similar mandates placed upon trips to international destinations, that require institutions to obtain crimes statistics from foreign law enforcement agencies.

Finally, while potentially helpful to some institutions with very similar circumstances, the illustrations provided in Chapter 2 of the 2016 edition are not generally applicable and may create more confusion than they resolve. Thus, the illustrations are not included in the Appendix.

- **Clery Crimes –**

  The new Appendix has deleted all definitions for Clery crimes from Chapter 3 of the 2016 edition and replaced them with references to the appropriate regulatory-defined sources at 34 CFR 668.46(c)(9) and Appendix A to subpart D of part 668. The explanations, summaries, and examples provided may have, at times, created misperceptions and confusion for institutions attempting to properly interpret and apply the definitions.

- **Campus Security Authorities –**

  The Appendix will strictly adhere to the definition of campus security authority (CSA) and will respect institutions’ discretion in their reasonable determinations of who constitutes a CSA. The 2016 edition expanded the definition of a CSA to
include individuals on campus that should likely not be designated so under a strict interpretation of the regulatory framework. The 2016 edition took an expansive view of the phrase “significant responsibility for student and campus activities” found at 34 CFR 668.46(a). As a result, it captured groups of individuals who did not have “significant responsibility.” Even if the 2016 edition’s guidance was drawn from Department experience, it was not applicable to every situation and may have resulted in creating more confusion than clarity. As a result, the Department’s new guidance makes clear that it is up to an institution to identify which individuals are CSAs and it is beyond the Department’s authority to disagree with that reasonable determination.

The Clery Act is an important part of the regulatory framework on campus safety. The Department anticipates that this rescission and publication of the new Appendix will help simplify Clery compliance. The Appendix will ensure that campuses can devote resources to the primary goal of keeping students, faculty, and staff safe, while also recognizing that most members of their community are adults who share responsibility for their personal safety and security. The Appendix will also help students understand the limits of campus safety responsibilities so that they do not take unnecessary risks under a mistaken assumption about the reach of campus safety and security. Finally, the Appendix will assist institutions that are working hard to satisfy the regulatory requirements, and to keep students and their families safe and well-informed.

Note: None of the changes in the Appendix impact the July 10, 2020 temporary extension (to December 31, 2020) that the Department provided, regarding Clery reporting due to COVID-19.

Attachments

Clery Act Appendix for FSA Handbook in PDF Format, 13 Pages, 245KB
(/sites/default/files/attachments/2020-10/CleryAppendixFinal.pdf)
Clery Act Appendix for FSA Handbook

In 1990, Congress passed the Crime Awareness and Campus Security Act (CACSA) amendments to the Higher Education Act of 1965 (HEA). Amendments to CACSA in 1998 renamed the law the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (the Clery Act) in memory of a student who was murdered in her dorm room. In 2013, Congress passed the Violence Against Women Reauthorization Act (VAWA), which included additional amendments to the Clery Act.

The Clery Act requires that all postsecondary institutions participating in title IV student financial assistance programs disclose campus crime statistics and other security information to students and the public. The VAWA amendments added requirements that institutions disclose statistics, policies and programs related to dating violence, domestic violence, sexual assault, and stalking, among other changes.

Consistent with the statutory and regulatory framework, and interpretive principles, the Department will continue to apply the plain meaning of terms contained within each Clery requirement. The Department will accept an institution’s reasonable interpretation of terms as long as those terms are defined clearly to individuals who review the campus’ Clery Act reports. In the event that the Department believes that more specific definitions are required, it will engage in future negotiated rulemaking to ensure that institutions and the public have an opportunity to comment on those definitions.

The Clery Act requires institutions to develop and implement specific campus safety and crime prevention policies and procedures. Previous versions of the Department’s Clery guidance created additional requirements or expanded the scope beyond what is strictly required by statute or regulation. Despite the fact that guidance does not have the force of law or regulations, institutions felt pressured to satisfy requirements found in the guidance or risk serious financial and reputational consequences. This Appendix provides simple, plain-language explanations of Clery Act requirements found in, and adherent to, relevant statutory and regulatory authority.

<table>
<thead>
<tr>
<th>Clery Act Requirements – The Basics</th>
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<tbody>
<tr>
<td>● Collect, classify, and count crime reports and statistics</td>
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<tr>
<td>● Issue campus alerts and warning notices</td>
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<tr>
<td>● Disclose missing student notification procedures, when applicable</td>
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<tr>
<td>● Disclose procedures for institutional disciplinary actions</td>
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<tr>
<td>● Keep a daily crime log, when applicable</td>
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</table>
The Department is committed to ensuring institutional compliance with the Clery Act and providing guidance to institutions that will enable them to maintain a safe and secure campus environment. This Appendix is intended to assist institutions in satisfying the statutory and regulatory requirements.

Other than the statutory and regulatory requirements included in this document, the contents of this guidance do not have the force and effect of law and are not meant to bind the public. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

As appropriate, this Appendix is effective for the reporting year following publication. The Appendix describes and incorporates the above basic requirements into the following sections: I) Clery Crimes and Reporting; II) Clery Geography; and III) Reporting, Procedures, Policy, and Notification Requirements.

Part I: Clery Crimes and Reporting –

Under the Clery Act, a school must report to the Department and disclose in its Annual Security Report statistics for the three most recently completed calendar years. Institutions also must submit their crime statistics to the Department as part of the annual data collection and survey, including the number of each of the following crimes – listed in the box below – that occurred on or within its Clery Geography and that are reported to local police agencies or to another official (as determined by the institution) campus security authority (CSA). As outlined in 34 CFR 668.46(c)(2), Clery Act reporting does not require the institution to initiate an investigation or disclose personally identifiable information (PII) about the victim.

The following chart provides a list of the crimes that must be reported and resources for where definitions for each Clery Crime can be found.

<table>
<thead>
<tr>
<th>Clery Crime Definitions by Source:</th>
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<tbody>
<tr>
<td>SUMMARY REPORTING SYSTEM USER MANUAL:</td>
<td>NATIONAL INCIDENT-BASED REPORTING SYSTEM:</td>
</tr>
<tr>
<td>Murder</td>
<td>Rape</td>
</tr>
<tr>
<td>Robbery</td>
<td>Aggravated Assault</td>
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<tr>
<td>Burglary</td>
<td>Motor Vehicle Theft</td>
</tr>
<tr>
<td>Arson</td>
<td>Drug Abuse Violations</td>
</tr>
<tr>
<td>Liquor Law Violations</td>
<td>Weapons Carrying, Possessing, etc. Law Violations</td>
</tr>
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Note: The FBI has announced that it will retire the SRS and transition to using only the NIBRS in January 2021.
Note: Per 34 CFR 668.46 (c)(1)(iii)B), institutions must disclose hate crime statistics for all Clery-reportable offenses and the crimes of larceny-theft, simple assault, intimidation, and vandalism/destroy of property that are determined to be hate crimes.

Campus Security Authorities: 34 CFR 668.46(a) –

While not defined in statute, regulations provide that CSAs include: campus police or security department personnel; individuals or organizations identified in institutional security policies; and individuals with security-related responsibilities. The definition at § 668.46(a)(iv) states that a CSA also includes an official “who has significant responsibility for student and campus activities.”

The Department will defer to an institution’s designation of CSAs as authoritative and provide any technical assistance necessary to work with institutions to help ensure proper identification and notification of CSAs consistent with the regulations. The regulations do not require that an employee with minimal responsibilities for student and/or campus activities necessarily be considered CSAs. On a case by case basis, institutions may apply the regulations to not designate CSA responsibilities for Clery Act reporting purposes to an individual. Individuals determined not to have significant responsibility for student and campus activities, which may, in some cases, include those individuals who, for example, have irregularly scheduled duties or duties that are not part of an employee’s primary job description. If paragraphs (i)-(iii) of the definition of CSAs are not applicable, institutions should focus on the “significant responsibilities” of an employee when determining whether that employee is a CSA for Clery purposes. Note that a CSA for Clery purposes may or may not include employees who meet the definition of “any official…who has the authority to institute corrective measures” for Title IX purposes under 34 CFR 106.30(a).
Part II: Clery Geography –

In the Annual Security Report, institutions are required to record crimes by location. Explained below, the three categories of locations subject to reporting are: 1) on-campus; 2) noncampus building or property; or 3) public property.

1) “Campus” is defined in 34 CFR 668.46(a) as “(i) Any building or property owned or controlled by an institution within the same reasonably contiguous geographic area and used by the institution in direct support of, or in a manner related to, the institution’s educational purposes, including residence halls; and (ii) any building or property that is within or reasonably contiguous to the area identified in paragraph (i) of this definition, that is owned by the institution but controlled by another person, is frequently used by students, and supports institutional purposes (such as a food or other retail vendor).”

The Department does not apply any specific or measurable distance definition to “reasonably contiguous geographic area.” Many institutions employ an approach that any property included on a campus map or designated by signage as a campus facility is considered to be included in the definition of “reasonably contiguous geography area.” If an additional location, branch campus, school within the institution, or an administrative location is not within a reasonably contiguous area, such location would be considered a separate campus for reporting purposes.

2) “Noncampus building or property,” as defined in 34 CFR 668.46(a), means “(i) [a]ny building or property owned or controlled by a student organization officially recognized

The Purpose of Clery Geography –

Clery Geography requirements are intended to inform the campus community of crimes and keep them aware and safe. In the past, institutions have struggled with the complexities of Clery Geography and, as a result, have taken an unnecessarily expansive view to ensure compliance. However, too much information could be detrimental because information overload may prevent a student or parent from identifying the most significant or serious threats. For institutions seeking to avoid findings of underreporting, the result was an overwhelming amount of statistics and information that could often cause students, employees, and their families to tune out, which is especially troubling with certain Clery requirements, such as timely warnings. The Department understands that institutions want to keep their communities safe. For Clery Geography reporting purposes, remember these principles:

1) Consistent with the regulatory framework, institutions should determine which buildings, facilities, parking lots, and real estate are included in the definition of the “campus.”
2) Too much information can be just as detrimental as too little information.
3) When in doubt, apply the plain meaning of regulatory and statutory requirements.
by the institution; or (ii) any building or property owned or controlled by an institution that is used in direct support of, or in relation to, the institution’s educational purposes, is frequently used by students, and is not within the same reasonably contiguous geographic area of the institution.”

Institutions have asked questions about what is meant by the term “officially recognized.” Regulations do not define this term; therefore, institutions should determine how they identify recognized organizations. Some institutions, for example, limit the list of officially recognized organizations to those that receive financial support from the institution.

Examples of noncampus buildings or property that satisfy the first part of the definition include, but are not limited to, officially recognized fraternity and sorority-owned chapter houses, institution-owned campus bookstores that are located off-campus, apartment buildings that are owned and controlled by the university, or campus-owned event facilities that support activities that include students who work in or utilize the facility.

To satisfy the second part of the definition, the property must: 1) be owned or controlled by the institution (e.g., leased by the institution); 2) be used in direct support or in relation to the institution’s educational purposes; 3) be frequently used by students; and 4) not within a reasonably contiguous geographic area of the institution. Examples of this type of property would include, but not be limited to, institution-owned, off-campus apartment units that are rented to students, ancillary research or athletic facilities utilized by students and faculty, and event facilities located off-campus and utilized for campus activities.

3) “Public Property” is defined in statute as “all public property that is within the same reasonably contiguous geographic area of the institution, such as a sidewalk, a street, other thoroughfare, or parking facility, and is adjacent to a facility owned or controlled by the institution if the facility is used by the institution in direct support of, or in a manner related to the institution’s educational purposes.” The regulatory definition of “public property” in 34 CFR 668.46(a) includes “all public property, including thoroughfares, streets, sidewalks, and parking facilities, that is within the campus, or immediately adjacent to and accessible from the campus.”

In order for this definition to apply, the property in question must satisfy all three conditions: 1) public (e.g., publicly-owned); 2) within or adjacent to campus; and 3) accessible from campus. This definition excludes any private property, and may in some cases exclude areas such as property divided by a fence or wall, or property with clearly posted signs indicating that it is not part of the campus or that trespassing is prohibited. Private property where students have established regular usage – whether legal, illegal, open, or inconspicuous – that is not otherwise campus or noncampus property, is not public property for Clery reporting purposes. The Department applies no specific measurable distance definition into adjacent public property. When the campus is adjacent to a public park, that does not otherwise meet the definition of a public property, some institutions have employed the practice of clearly designating campus boundaries through posted
signage, such as warnings that individuals are entering a “non-campus area” or through “no trespassing” signs, where applicable.

**Clery Geography and Title IX –**

Under Title IX, an institution’s obligations to address sexual harassment in a recipient’s “education program or activity” is a separate inquiry from an institution of higher education’s obligations with respect to Clery Geography. While the two concepts may overlap, they are not coterminous and the two laws (Clery Act and Title IX) serve separate purposes and have separate obligations for entities covered by both laws.

When an institution has officially recognized a student organization, and sexual harassment occurs in an off-campus location *not* owned or controlled by the student organization but involving members of the officially recognized student organization, the recipient’s Title IX obligations depend upon whether the recipient exercised substantial control over the respondent and the context of the harassment, or whether the circumstances may otherwise be determined to have been part of the “operations of” the institution. Sexual harassment, under Title IX and as defined in 34 CFR 106.30(a), covers a wider range of misconduct than the sex offenses covered under the Clery Act.

At 34 CFR 106.44(a), the Title IX regulations cover incidents in an institution’s “education program or activity,” which includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. The 2020 Title IX regulations do not impose a geographical limit on an institution’s responsibilities, with the exception of the limitation of Title IX’s scope to incidents that occur “against a person in the United States.”
Part III: Reporting, Procedures, Policy, and Notification Requirements –

Institutions must publish and disseminate an Annual Security Report by October 1st of each year. Institutions that have on-campus residential facilities must also publish, by that same date, a Fire Safety Report. The required contents of those reports, along with related notification, procedures, and policy requirements, are discussed in this section.

Each year, the Department sends a letter to presidents or chief executive officers of institutions with information on accessing the Campus Safety and Security Survey website (See: https://surveys.ope.ed.gov/security), where schools submit Clery Act crime statistics for the three most recent calendar years for which there is available data. The website explains how to tabulate these statistics. The letter explains any changes to the survey, the collection dates for the survey, the name of the person who completed the reporting at the school the previous year, and a new ID and password for completing the survey.

Schools with on-campus student housing facilities must also submit an annual Fire Safety Report to the Department. The report must include statistics on the number of fires and causes of each fire, as well as fire-related injuries, deaths, and/or fire-related property damage for each on-campus student housing facility. The Fire Safety Report is due at the same time as the Annual Security Report.

The Annual Security Report 34 CFR 668.46(b) and Crime Statistics 34 CFR 668.46(c) –

Each institution’s Annual Security Report must include a list of titles of each person or organization to whom students and employees should report Clery Act crimes for the purpose of making both timely warning reports and the annual statistical disclosure. The Annual Security Report must also include institutional policies and procedures for victims or witnesses to report Clery Act crimes on a voluntary, confidential basis for inclusion in the annual disclosure of crime statistics. Additionally, institutions must include current policies concerning the security of, and access to, campus facilities and residencies, as well as security considerations in the maintenance of campus facilities.

An institution is not required to include (or may remove) a reported crime from its statistics when sworn or commissioned law enforcement personnel have fully investigated the reported crime and have made a formal determination that the crime report is false or baseless and, therefore, “unfounded.” Institutions must report to the Department and disclose in their Annual Security Report statistics that include the total number of crime reports that were “unfounded” and subsequently withheld from its crime statistics during each of the three most recently completed calendar years.
The following are the required contents of the Annual Security Report. Note that this chart is not intended to be all-inclusive and institutions must review the statute and regulations to identify all the information that must be included in their Annual Security Report.

<table>
<thead>
<tr>
<th>1) Policies regarding alcoholic beverages and underage drinking laws</th>
<th>8) Campus crime statistics</th>
</tr>
</thead>
<tbody>
<tr>
<td>2) Policies regarding illegal drugs and applicable federal and state drug laws</td>
<td>9) Policies regarding procedures for reporting criminal actions or other emergencies on campus</td>
</tr>
<tr>
<td>3) Programs on substance abuse</td>
<td>10) Policies on security of and access to campus facilities</td>
</tr>
<tr>
<td>4) Programs to prevent dating violence, domestic violence, sexual assault and stalking, and the procedures institutions will follow when such crimes are reported</td>
<td>11) Policies on enforcement authority of security personnel; working relationship of campus security personnel with State and local police agencies; accurate and prompt reporting of crimes; pastoral and professional counselors</td>
</tr>
<tr>
<td>5) Information regarding sex offenders</td>
<td>12) Programs on campus security procedures and practices</td>
</tr>
<tr>
<td>6) Descriptions of emergency response and evacuation procedures</td>
<td>7) Policies regarding missing student notifications</td>
</tr>
</tbody>
</table>
Institutions must include policies regarding the possession, use, and sale of alcoholic beverages and illegal drugs, as well as policies regarding the enforcement of State underage drinking laws and Federal and State drug laws. Such policies must provide a description of any drug or alcohol abuse education programs required by § 120(a) – (d) of the HEA and the Department’s regulations at 34 CFR Part 86.

The institution must provide a statement that it will simultaneously provide in writing to both the accused and accuser: the results of any disciplinary proceeding conducted by such institution against a student accused of dating violence, domestic violence, sexual assault, or stalking. The institution must also provide the institution’s procedures for the accused and accuser to appeal the result of the institutional disciplinary hearing, if such procedures are available; any changes to the result; and when the results become final.

The Daily Crime Log: 34 CFR 668.46(f) –

Any institution that has a campus police or security department must create, maintain, and make available an easily understood daily crime log. The daily crime log must include the nature, date, time, general location of each crime that occurs within the institution’s Clery Geography, and the disposition of the complaint, if known. Entries must be made within two business days of the report of the information, unless the disclosure is prohibited by law or would jeopardize the confidentiality of the victim. An institution may withhold this information if there is clear and convincing evidence that releasing it would jeopardize an ongoing criminal investigation or safety of the individual, cause the suspect to flee or evade detection, or result in the destruction of evidence. The school must disclose any withheld information once the adverse effect is no longer likely to occur. An institution is required to make the crime log for the most recent 60-day period open to public inspection during normal business hours. The school must make any portion of the log older than sixty days available within two business days of a request for public inspection.

Statement of Policy and Procedures for Specific Offenses: 34 CFR 668.46(b)(11) –

Each institution’s Annual Security Report must include a statement of policy that addresses institutional programs to prevent dating violence, domestic violence, sexual assault, and stalking, as well as the procedures the institution will follow when one of these crimes is reported.

The statement of policy must include the following components:

1) A description of the institution’s educational programs and campaigns to promote the awareness of dating violence, domestic violence, sexual assault, and stalking. The statement must describe the institution’s primary prevention and awareness programs for all incoming students and new employees. Primary prevention and awareness programs must define said crimes, state that the institution prohibits such crimes, provide a definition of “consent” in reference to sexual activity, in the applicable
jurisdiction, describe safe and positive options for bystander intervention, and information on risk reduction.

2) The procedures victims should follow if a crime of dating violence, domestic violence, sexual assault, or stalking has occurred, including written information about:
   a. The importance of preserving evidence that may assist in proving that the alleged criminal offense occurred or may be helpful in obtaining a protection order
   b. How and to whom the alleged offense should be reported
   c. Options about the involvement of law enforcement and campus authorities, including notification of the victim’s option to:
      i. Notify proper law enforcement authorities, including on-campus and local police;
      ii. Be assisted by campus authorities in notifying law enforcement authorities if the victim so chooses; and
      iii. Decline to notify such authorities
   d. Rights of victims and institutional responsibilities for orders of protections or similar lawful orders

The statement must also include information about how the institution will protect the confidentiality of victims and other necessary parties, including how the institution will complete publicly available recordkeeping, while maintaining the confidentiality of any accommodations or protective measures provided. Written notification about existing counseling, health, advocacy, and other services available for victims, both on- and off-campus must be provided. Institutions must include that they will notify victims about options for requests for changes to academic, living, transportation, and working situations or protective measures.

An institution must include a clear policy statement that addresses procedures for disciplinary action in cases of alleged dating violence, domestic violence, sexual assault, or stalking, including:
1) descriptions of types of proceedings (and how determined), the steps, timelines, decision-making processes, and how to file a complaint; 2) the standard of evidence; 3) the list of possible sanctions; 4) the range of protective measures; 5) a requirement that the proceedings – conducted by trained officials – will include a prompt, fair, and impartial process; 6) assurance that the accuser and accused will have the same opportunities to have others present, including an advisor of the individual’s choosing, in any disciplinary-related meeting; and 7) the requirement of simultaneous written notification to both parties of the result of the proceedings, process for appeal, and when such findings become final.

**Annual Fire Safety Report: 34 CFR 668.49(b)** –

As stated above, if an institution maintains an on-campus student housing facility, it must also publish an Annual Fire Safety Report. The report must contain the following:
The Fire Log: 34 CFR 668.49(d) –

Any institution that maintains on-campus housing facilities must maintain a fire log. The fire log must be a written and easily understood record of any fire that occurred in an on-campus student housing facility. The log must include the nature, date, time, and general location of each fire. Fires must be recorded in the log within two business days. Institutions must make the fire log for the most recent 60-day period open to public inspection, and any portion of the log older than 60 days available within two business days of a request for public inspection.

Notice and Distribution of Reports –

Institutions must provide notice of the availability of the Annual Security Report and the Annual Fire Safety Report (if applicable) to all current and prospective students and employees. This notice must include: 1) a statement of the report’s availability; 2) a statement that a paper copy will be provided upon request and how to obtain one; 3) a brief description of the contents; and 4) the exact electronic address of the report. The two reports may be published together or separately. If separate, each report must contain information on how to directly access the other report.

Appropriate publications and mailings of the Annual Security Report and the Annual Fire Safety Report include:

- Direct mail to each individual through the post office, campus mail, or e-mail
- Publications provided directly to individuals
- Posting on an Internet or intranet website (subject to specifications in 34 CFR 668.41(e)(2) and (3))

Missing Persons Policies and Procedures: 34 CFR 668.46(h) –

If an institution maintains on-campus housing, the institution must establish a missing student notification policy and include a description of the policy in its Annual Security Report.
In short, the policy must include the following:

1) List of titles of persons to which individuals should report that a student has been missing for 24 hours
2) Require that any missing student report be referred immediately to campus security or, in the absence of an institutional police or campus security department, to the local law enforcement agency that has jurisdiction in the area
3) Include an option for each student to identify a contact person, whom the institution will notify within 24 hours upon a determination that the student is missing

Each student must be advised that: their contact information will be kept confidential (except to authorized campus officials and law enforcement); if they are under 18 years of age and not emancipated, the institution must notify, within 24 hours, a custodian, parent, or guardian that the student is missing; and the institution will notify law enforcement within 24 hours that the student is missing.

Emergency Response, Evacuation Notifications, and Timely Warnings: 34 CFR 668.46(g) –

Each institution must develop emergency response and evacuation procedures, and include a description of its procedures in its Annual Security Report. The statement must include the procedures the institution will use to immediately notify the campus community upon the confirmation of a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or employees occurring on the campus. At a minimum, an institution must have procedures to: (1) confirm significant emergencies or dangerous situations; (2) determine the appropriate community to notify and the content of the notification; and (3) initiate the notification system. The institution must also compile a list of persons or organizations responsible for these activities. In addition, the institution must have procedures for disseminating emergency information to the larger community and must test emergency and evacuation procedures on at least an annual basis.

In an emergency or a dangerous situation, an institution must, without delay and accounting for the safety of the community, determine the content of the notification and initiate the notification system, unless such notification will compromise efforts to assist a victim or contain, respond to, or mitigate the emergency.

An institution must develop procedures to immediately notify the campus community upon the confirmation of a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or employees occurring on the campus.

Institutions are required to provide emergency notifications or timely warnings based upon the circumstances. Emergency notifications are required to provide immediate notification to the campus community upon confirmation of a significant emergency or dangerous situation occurring.
on campus that involves an immediate threat to the health or safety of students or employees. Timely warnings are required for all Clery Act crimes that occur on Clery Geography that are reported to CSAs or local police agencies and are considered by the institution to represent a serious or continuing threat to students and employees.

The following chart identifies the differences between emergency notifications and timely warnings:

<table>
<thead>
<tr>
<th></th>
<th>Emergency Notifications</th>
<th>Timely Warnings</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Scope</strong></td>
<td>Significant emergency or dangerous situation</td>
<td>Clery crimes, reported to CSAs</td>
</tr>
<tr>
<td><strong>Triggered by?</strong></td>
<td>Event that is currently occurring on or imminently threatening campus</td>
<td>Crimes that occurred and represent an ongoing threat</td>
</tr>
<tr>
<td><strong>Where event occurs?</strong></td>
<td>Only on campus</td>
<td>Anywhere on Clery Geography</td>
</tr>
<tr>
<td><strong>How soon to issue?</strong></td>
<td>Immediately upon confirmation of situation</td>
<td>As soon as information is available</td>
</tr>
</tbody>
</table>
HOW-TO GUIDE
MODEL MEMORANDUM OF UNDERSTANDING

The How-To Guide is a step-by-step guide for stakeholders to create an MOU that reflects local needs and capacity. It is intended to provide context, suggested supplemental content, and points of discussion to assist parties as they tailor the Template MOU to their unique circumstances. The How-To Guide is organized in the same structure as the Template MOU.

I. PARTIES

Communities may choose to have representatives from several agencies and organizations as Parties to the MOU depending on local needs, resources, and personnel. Initial suggestions are included in the Template.

At a minimum, Parties should include the institution of higher education, one or more local law enforcement agencies, and partner organizations required under Education Code section 67386(c). Parties are encouraged to include, as appropriate, both on-campus and off-campus resources, including Rape Crisis Centers, as Parties to the MOU.

For purposes of this MOU, we use [Campus] to refer to the college or university’s administration, with the understanding that the institution as a whole is a party to the MOU and should designate the appropriate point(s) of contact for law enforcement collaboration. Depending on the unique circumstances of each campus and on local administrative needs, more than one department within a college or university may need or wish to be represented in this MOU. For example, campuses with sworn police officers might simply designate someone in the police department as the sole point of contact. If a campus contracts with an external security firm, that firm might also be included as a Party along with the campus administration, assuming the campus resolves any legal questions regarding information-sharing between sworn and non-sworn officers or other security personnel. Campuses may also want to include the Title IX officer or other designated individual. Campuses should make these decisions based on local needs to ensure that the appropriate parties necessary to fully implement their agreement are included in this MOU.

Parties may wish to attach a contact list as an addendum to their MOU.

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1 “In order to receive state funds for student financial assistance, the governing board of each community college district, the Trustees of the California State University, the Regents of the University of California, and the governing boards of independent postsecondary institutions shall, to the extent feasible, enter into memoranda of understanding, agreements, or collaborative partnerships with existing on-campus and community-based organizations, including rape crisis centers, to refer students for assistance or make services available to students, including counseling, health, mental health, victim advocacy, and legal assistance, and including resources for the accused.” (Ed. Code, § 67386, subd. (c).)

http://oag.ca.gov/campus-sexual-assault
II. PURPOSE

The Template MOU describes three purposes of this agreement between law enforcement and campuses:

- To meet the statutory requirements established by AB 1433 (Gatto, 2014);
- To promote collaboration between the Parties to enhance the reporting, investigation, and appropriate response to sexual assault and other covered crimes; and
- To comply with other state and federal laws.

Parties may have additional purposes to address as part of an MOU, which might warrant supplemental sections to the Template MOU.

III. STATEMENT OF PRINCIPLES

A joint Statement of Principles is recommended to memorialize the Parties’ common goals and spark discussion amongst stakeholders about the outcomes expected from their agreement. Each component of the Statement should be discussed by Parties before signing, and local communities may choose to incorporate some or all of the proposed language into their MOU based on local needs and preferences.

In addition to the language proposed in the Template MOU, we recommend discussing the following additional details for possible inclusion:

A. Improving Communication, Coordination, and Collaboration: The MOU is designed to help parties enhance communication, coordination, and collaboration to respond efficiently and effectively to sexual assault and violence. Parties should use the MOU and accompanying efforts to improve coordination regarding crime reporting, victim engagement and support, investigative processes, and general campus and community safety. Such coordination should include:

- Clear lines of communication and points of contact between each entity to ensure effective coordination and communication in the prevention of—and response to—sexual assault and violence;
- Clarified roles for campus police and their local law enforcement counterparts to ensure the effective investigation and prosecution of criminal behavior and avoid any jurisdictional confusion or miscommunication;
- Use of cross-reporting for each incident of violent crime, sexual misconduct, and hate crime to avoid communication gaps or inconsistent responses;
- Collaboration with victim advocates throughout the reporting and investigative processes, including partnerships as required by Education Code section 67386 (SB 967, De León, 2014); and
- Shared understanding of the needs and means to protect confidential and privileged communications.
B. **Championing Campus and Community Safety:** Parties should strive to establish a culture of trust and safety across the entire campus community by increasing community participation and securing community support and engagement in the prevention of sexual violence. Such community engagement and support should include:

- Community education about the procedures and protocols in place to address sexual violence, in order to ensure that students know how to report a violation and understand the subsequent steps that will be taken in response to each violation;
- Use of transparency to demystify the reporting and response processes in order to encourage reporting by victims, bystanders, and other community members and reiterate the critical importance reporting plays on the overall health of the campus community; and
- Collaborative disseminations of public safety threat notifications, when required, following instances of sexual assault or violence, in order to achieve consistency in response protocols.

C. **Upholding Civil Rights, Civil Liberties, and Victims' Rights:** Parties should commit to the enforcement of both civil rights and criminal law protections. To realize both goals, Parties should:

- Explicitly recognize the distinctions between criminal law and civil law in the handling of sexual assault and violence that arise under both state and federal statutory frameworks;
- Work collaboratively and in compliance with state and federal law to achieve the best possibilities for prosecution in the criminal context and adjudication in the campus administrative process;
- Share information in a manner that complies with confidentiality and privacy obligations, and ensure that information will be used only for authorized purposes and in ways that protect the privacy, civil liberties, and civil rights of students consistent with state and federal laws;
- Coordinate investigations to preserve evidence and improve prosecution; and
- Ensure institutional adjudications do not interrupt criminal prosecutions and vice-versa.

D. **Centering the Victim's Needs in Responses to Sexual Assault:** The MOU promotes trauma-informed responses developed in consultation with victim advocates. This response is intended to increase the likelihood of victim engagement with law enforcement, improve the investigation and reporting experience for victims, and thereby strengthen sexual assault investigations. Parties should:

- Design and implement a first responder plan for all instances of sexual misconduct that preserves evidence and ensures access to the appropriate resources that foster healing and includes victims’ advocates when possible as stated in Penal Code section 679.04.2
- Ensure that each of their relevant stakeholders receives initial and follow-up training on trauma-informed responses to sexual assault victims, which should include educational materials from victim advocates and Rape Crisis experts; and

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2 Penal Code section 679.04 entitles victims of sexual assault to a victim advocate as described in Evidence Code section 1035.2 (the section of the code that defines a sexual assault counselor).

http://oag.ca.gov/campus-sexual-assault
● Enforce clear lines of communication between each other, so that victims are able to engage in the reporting and adjudication process in a way that fosters healing. For example, where possible, Parties should conduct comprehensive victim interviews to decrease the need for the victim to recount the sexual assault incident repeatedly.

E. Ensuring Accountability and Auditing: This MOU is designed to promote greater transparency and accountability in the reporting of sexual assault and other violent crimes. Parties should:

● Implement a means to monitor, record, and accurately maintain all reports of Part 1 violent crimes, hate crimes, and campus sexual assaults, their outcomes, and processes while maintaining confidentiality where the law provides; and

● To the extent permissible by law, share reports of sexual assault and violence with the public, the campus community, the local community, and other partners, without disclosing protected information such as the identity of the sexual assault victim.

F. Specialized Training and Knowledge: Adequate training reduces the likelihood that explicit and implicit biases, including stereotypes regarding women and sexual assault reporters, will permeate. For this reason, the Parties should:

● Provide in-depth training on sexual assault and investigations to all personnel who conduct such investigations;

● Provide training to all campus and law enforcement supervising personnel and command-level staff on the review of sexual assault prevention, response, and investigations to detect and address indications of bias; and

● Ensure that any trainings provided to peace officers are POST-certified or provided by a trauma and sexual violence expert.

G. Respecting the Unique Needs of Undocumented Individuals: Parties should strive to promote policies and practices that address the unique needs of undocumented individuals, including implementing culturally and linguistically appropriate campus- and law enforcement services. Nationally, undocumented individuals encounter sexual violence at the same rate as other victims, but are significantly less likely to seek out help after a sexual assault. A few reasons for an undocumented individual’s reluctance to seek help include: 1) the threat of deportation or other immigration action; 2) lack of documentation to access medical care; 3) distrust of law enforcement; and more. To ensure undocumented individuals’ unique needs are addressed, Parties should:

● Maintain the confidentiality of an individual’s immigration status, inclusive of any law enforcement actions, where appropriate;³

● Ensure staff have the requisite knowledge and skills to create safe spaces for undocumented individuals through specialized trainings and skill development;

● Designate an individual liaison, as appropriate, for the undocumented community. These

³ For more information on the legal responsibilities of local law enforcement agencies in dealing with undocumented individuals under state law and federal regulations, please see: Attorney General Kamala D. Harris, California Department of Justice Information Bulletin No. 14-01 (June 25, 2014), available at: http://oag.ca.gov/sites/all/files/agweb/pdfs/law_enforcement/14-01_le_info_bulletin.pdf

http://oag.ca.gov/campus-sexual-assault
designated points of contact should be able to answer questions, provide guidance, and provide assistance on victim services to members of the undocumented campus community;

- Engage in partnerships with local legal aid providers or immigration attorney associations to provide additional resources for undocumented individuals seeking relief, as their legal considerations vary considerably because of their immigration status; and
- Ensure adequate translation and interpreter services that reflect their jurisdiction’s composition of linguistic needs.

IV. DEFINITIONS

The MOU should include relevant definitions. Below are suggested terms and definitions Parties should consider.

**Affirmative Consent**: Affirmative, conscious, and voluntary agreement to engage in sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time. The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent. (Ed. Code, § 67386, subd. (a)(1).)

**Campus Security Authorities (CSAs)**: A CSA is defined as: (1) an institution’s campus police or campus security department, (2) an individual who has responsibility for campus security, (3) an individual specified in an institution’s statement of campus security policy to receive reports of criminal offenses, or (4) an institution’s official who has significant responsibility for student and campus activities (e.g., student housing, discipline). (34 C.F.R. § 668.46(a); see also Ed. Code, § 67383, subd. (a) (incorporating the federal law definition of CSAs).)

**Clergy Member and Pastoral Counselor**: For state evidentiary code purposes, a clergy member “means a priest, minister, religious practitioner, or similar functionary of a church or of a religious denomination or religious organization.” Evid. Code, § 1030. Communications made in confidence with a clergy member may be privileged under the “clergy-penitent privilege” described in Evidence Code sections 1032-1034. A person who meets this statutory definition may also meet the definition of a pastoral counselor for purposes of Title IX and Clery Act, which dictate various campus officials’ obligations to report sexual assault to campus authorities. A pastoral counselor is defined as a person who is associated with a religious order or denomination, is recognized by that religious order or denominations as someone who provides confidential counseling, and is functioning within the scope of that recognition. 34 C.F.R. §§ 668.46(a). In this context, a pastor or priest who is functioning as an athletic director or as a student advocate would not be exempt from the reporting obligations under Clery and Title IX. (See U.S. Dept. of Education, Handbook for Campus Safety and Security Reporting (February 2011) pp. 77–78; U.S. Dept. of Education, Questions and Answers on Title IX and Sexual Violence (April 2014) pp. 22–23 n. 26.)
Concurrent Jurisdiction: Statutory jurisdiction for performance of peace officer functions. For example, if campus property is located within a municipality, the city police department has concurrent jurisdiction with the campus police department.

Confidential Resources: Confidential resources are counselors, advocates, and other staff such as ombudspersons, explicitly designated as such by the campus. Confidential resources may not meet the definitions of professional or pastoral counselor, but nonetheless provide assistance to victims of sexual assault and may not be protected by legal privilege. They may work or volunteer in on-campus sexual assault centers, victim advocacy offices, women’s centers, or health centers (including front desk staff and students). Conversations with confidential resources do not trigger a Campus Title IX investigation. (See U.S. Dept. of Education, Questions and Answers on Title IX and Sexual Violence (April 2014) E-3.)

First Responder: The law enforcement agency that will respond to 911 calls and other emergency calls and notify the law enforcement agency with operational responsibility. The First Responder may make the initial report for further investigation when the circumstances do not require the immediate involvement of the law enforcement agency with operational responsibility. When appropriate, the First Responder will be responsible for documenting the agency’s involvement in conducting investigations or enforcing the law.

Hate Crime: A criminal act committed, in whole or in part, because of one or more of the following actual or perceived characteristics of the victim:

1. Disability;
2. Gender;
3. Nationality;
4. Race or ethnicity;
5. Religion;
6. Sexual orientation;
7. Association with a person or group with one or more of these actual or perceived characteristics.
(Penal Code, §§ 422.55, 422.6.)

Holder of the Privilege: The holder of the Sexual Assault Counselor or Psychotherapist privilege is:

a. The victim/patient when such person has no guardian or conservator;
b. A guardian or conservator of the victim/patient when the victim/patient has a guardian or conservator; or
c. The personal representative of the victim/patient if the victim/patient is dead.
(Evid. Code §§ 1013, 1035.6.)
The holder of the Clergy-Penitent Privilege can be either the penitent or the clergy member.
(Evid. Code, §§ 1033, 1034.)
Only the holder of the privilege can give voluntary, informed, and time-limited consent to the disclosure of privileged communications.
Implicit Bias: An implicit bias is a positive or negative mental attitude towards a person, thing, or group that a person holds at an unconscious level. In contrast, an explicit bias is an attitude that a person is consciously aware of having.

Medical Evidentiary Examination: To "perform a medical evidentiary examination" means to evaluate, collect, preserve, and document evidence, interpret findings, and document examination results. (Penal Code, § 13823.93, subd. (a)(2).)

Operational Responsibility: A term referring to the law enforcement agency with responsibility for preventing crime; preserving peace and order; enforcing laws and ordinances; receiving citizens’ arrests; evaluating persons who may be subject to Welfare and Institutions Code section 5150; investigating and collecting evidence; investigating reportable traffic accidents; reporting and accounting criminal offenses; and providing such other police services as the statutes and standard operating procedures of the respective departments may require.


Pastoral Counselor: See definition of Clergy Member.

Privilege: A victim of a sexual assault has a privilege to refuse to disclose a confidential communication between the victim and a Sexual Assault Counselor, Psychotherapist, or Clergy Member. For communications with a Sexual Assault Counselor, Psychotherapist or Clergy Member, the privilege may be claimed by any of the following:
   (a) The holder of the privilege;
   (b) A person who is authorized to claim the privilege by the holder of the privilege; or
   (c) The person who was the Sexual Assault Counselor or Psychotherapist at the time of the confidential communication.
   (Evid. Code, §§ 1014, 1035.8, 1036.) A privilege applies to prevent disclosure of confidential information not only in state judicial proceedings, but in “all proceedings of any nature in which testimony can be compelled by law.” (Evid. Code, § 910 & Comment.) This includes “any action, hearing, investigation, inquest, or inquiry” conducted by administrative agencies, hearing officers, arbitrators, legislative bodies, or “any other person authorized by law.” (Id. at § 901.)

Psychotherapist and Professional Counselor: For state evidentiary code purposes, a psychotherapist generally means a licensed psychologist, psychiatrist, clinical social worker, professional clinical counselor, psychiatric-mental health nurse, family or marriage therapist, or a credentialed school psychologist. (Evid. Code, § 1010, subds. (a)-(e), (n) (providing specific definitions).) It also may include a trainee, psychological assistant or intern, associate clinical
social worker, family therapist intern, or clinical counselor intern or trainee, provided that he or she is supervised by certain licensed practitioners. (Evid. Code, § 1010, subds. (f), (g), (o), (p).) Communications made in confidence with a Psychotherapist may be privileged under Evidence Code section 1014. A person who meets this statutory definition may also meet the definition of a Professional Counselor for purposes of Title IX and Clery Act, which dictate various campus officials’ obligations to report sexual assault to campus authorities. A Professional Counselor is defined as a person whose official responsibilities include providing mental health counseling to members of the institution’s community and who is functioning within the scope of his or her license or certification. (34 C.F.R. § 668.46(a).) This definition applies even to Professional Counselors who are not employees of the institution, but are under contract to provide counseling at the institution. This also includes an individual who is not yet licensed or certified as a counselor, but is acting in that role under the supervision of an individual who is licensed or certified. An example is a Ph.D. counselor-trainee acting under the supervision of a licensed or certified counselor.


**Rape Crisis Counseling Center (RCC):** A center commonly known as a rape crisis center that provides, among other services: crisis intervention; follow-up and in-person counseling services; accompaniment and advocacy services; and information and referrals to victims and the general public. (See generally Penal Code, § 13837.)

**Responsible Employee:** Any employee who (1) has authority to redress sexual violence, (2) has been given the duty to report sexual violence or other covered misconduct, or (3) a student could reasonably believe has this authority or duty. (U.S. Dept. of Education, Office for Civil Rights, Revised Sexual Harassment Guidance (January 2001) p. 13.) Reportable incidents of sexual violence known by a Responsible Employee must be disclosed to [Campus’s] Title IX Coordinator with all relevant information, including personally identifiable information about the victim, the accused, or other witnesses. (See U.S. Dept. of Education, Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence (April 2014) D-3.)

**Sexual Assault:**

See, e.g., Ed. Code, § 67380 et seq.; see also Penal Code, §§ 243.4 (sexual battery), 261 (rape).)

**Sexual Assault Counselor:** A Sexual Assault Counselor is a certified counselor who is authorized under the California Evidence Code to assert the privilege against disclosing any confidential communications between a victim and the counselor. Section 1035 of the Evidence Code defines a Sexual Assault Counselor as a person engaged in any office, hospital, institution, or center commonly known as a rape crisis center, whose primary purpose is to give advice or assistance to sexual assault victims, who has completed training by a rape crisis counseling center (as defined in Penal Code section 13837), and who meets either of the following: (1) is a

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psychotherapist, has a master’s degree in counseling, or one year of counseling experience with six months of rape crisis experience; or (2) has 40 hours of training and is supervised by a qualified counselor. (Evid. Code, § 1035.2.) It also includes a person employed to counsel or assist sexual assault victims by a public or nonprofit agency that provides assistance to victims and witnesses of crimes (as specified by Penal Code section 13835.2), and who: (1) is a psychotherapist, has a master’s degree in counseling or a related field, or has one year of counseling experience, at least six months of which is in rape assault counseling; or (2) has the minimum training for sexual assault counseling set for victim-witness services organizations, and is supervised by a qualified counselor. (Evid. Code, § 1035.2, subd. (b).)

**Sexual Assault Forensic Examination (SAFE Examination):** A SAFE exam is an exam, commonly referred to as a rape kit, conducted at a qualified health facility to collect forensic evidence from a sexual assault victim that can be used to identify the perpetrator of that crime as well as other crimes to the extent the perpetrator is a repeat offender. (See, e.g., Penal Code, §§ 13823.5, 13823.7.) California protocol for SAFE exams is available at: [http://www.calema.ca.gov/PublicSafetyandVictimServices/Documents/Forms%202013/Medical%20Forms/2-923-2-950_Protocol.pdf](http://www.calema.ca.gov/PublicSafetyandVictimServices/Documents/Forms%202013/Medical%20Forms/2-923-2-950_Protocol.pdf).

Additional information about SAFE exams and victims’ rights are available at: [http://www.calema.ca.gov/PublicSafetyandVictimServices/Pages/Medical-Forms.aspx](http://www.calema.ca.gov/PublicSafetyandVictimServices/Pages/Medical-Forms.aspx).

**Trauma-Informed:** Trauma-informed services are not specifically designed to treat symptoms or syndromes related to sexual violence, but they are informed about and sensitive to trauma-related issues present in survivors. A trauma-informed organization—whether a hospital, community mental health agency, rape crisis center, or dual/multi-service advocacy agency—is one which all components have been reconsidered and evaluated in light of a basic understanding of the role violence and exposure to trauma plays in the lives of survivors. (Harris & Fallot, 2001.) A trauma-informed approach also integrates an understanding of a survivor’s history and the entire context of his or her experience. The attributes of the community to which the survivor belongs also can influence how a survivor is affected by trauma. The individual, the event, and the environmental factors can shape a survivor’s reaction to trauma and the healing process. In practice, trauma-informed services involve striving to be culturally competent and to understand survivors within their familial, social, and community contexts and life experiences. (Proffitt, 2010, p. 3; See National Sexual Violence Resource Center, Building Cultures of Care: A Guide for Sexual Assault Services Programs (2013), [http://www.nsvrc.org/publications/nsvrc-publications-guides/building-cultures-care-guide-sexual-assault-services-programs](http://www.nsvrc.org/publications/nsvrc-publications-guides/building-cultures-care-guide-sexual-assault-services-programs).) Additional information about trauma-informed practices is available from the National Substance Abuse and Mental Health Services Administration (SAMHSA) at: [http://www.samhsa.gov/nctic/trauma-interventions](http://www.samhsa.gov/nctic/trauma-interventions).

**Undocumented Individual:** An undocumented individual is a foreign-national who (1) entered the United States unlawfully, without the proper authorization and documents; or (2) entered the United States legally as a nonimmigrant but has since violated the terms of his or her status and remained in the United States without authorization.
**Victim:** As used in the MOU, someone who is observed to or who states that a Part 1 violent crime, hate crime, or sexual assault has been committed against him or her. Parties may elect to also or instead use the term Survivor.

**Victim Advocate:** A Sexual Assault Counselor, as defined in section 1035.2 of the Evidence Code, or a victim advocate working in a center established under Article 2 (commencing with section 13835) of Chapter 4 of Title 6 of Part 4. (Penal Code, § 679.04, subd. (a).)

**Victim Support Person:** Under California law, a victim of sexual assault has the right to have a support person of the victim's choosing present at any interview by law enforcement authorities, district attorneys, or defense attorneys. However, the support person may be excluded from an interview by law enforcement or the district attorney if the law enforcement authority or the district attorney determines that the presence of that individual would be detrimental to the purpose of the interview. (Penal Code, § 679.04, subd. (a).)

**Victims of Crime Fund:** This refers to the state Victim-Witness Assistance Fund created by Penal Code section 13835.7. The fund is held in the state treasury and dispensed by “the Office of Emergency Services exclusively for the purposes specified in [sections 13835 to 13835.10 of the Penal Code], and for the support of the centers specified in section 13837.” (Penal Code, § 13835.7.)

**Victim-Witness Assistance Program:** Any public or private nonprofit agency that provides assistance to victims and witnesses of crimes and meets the requirements set out by Penal Code section 13835.2. This includes: (1) providing comprehensive services to victims and witnesses of all types of crime; (2) recognition by the county board of supervisors as the major provider of comprehensive services to victims and witnesses in the county; (3) selection by the board of supervisors as the agency to receive funds pursuant to this article; (4) assistance to victims of crime in the preparation, verification, and presentation of their claims to the California Victim Compensation and Government Claims Board; and (5) cooperation with the California Victim Compensation and Government Claims Board in verifying the data required for these claims. (Penal Code, § 13835.2, subd. (a).)

V. JURISDICTION FOR LAW ENFORCEMENT SERVICES

A. Maps

We recommend including a copy of each map as Appendices to the MOU.
B. Operational Responsibility & First Responders

Under California law, the jurisdictional boundaries and operational responsibilities of campuses and law enforcement are designated by geographic and jurisdictional maps.\(^4\) Campus law enforcement jurisdiction is shared with local law enforcement agencies. The county sheriff’s department has concurrent jurisdiction on all campuses and upon all properties owned or controlled by the campus located within the county. If the campus or property is located within a municipality, the city police department has concurrent jurisdiction. Parties should review the suggested language in the Template MOU carefully and tailor it to their unique circumstances.

For example, some campuses have a Department of Campus Security (non-peace officers) or contract with non-law enforcement agencies. Campus Safety Officers who are non-sworn, non-peace officers, can arrest for any misdemeanor or felony committed within their presence, but must use California Penal Code section 837—arrest by a private person—to accomplish the arrest. Campuses that do not have sworn peace officers may need to adapt the Template MOU with local law enforcement partners to further define their respective responsibilities relating to crimes committed on the campus.

C. Collaboration

For campuses that employ non-sworn or non-peace officers, or contract with non-law enforcement agencies, this section may need to account for scenarios in which non-sworn or non-law enforcement personnel are first responders to a scene. Note that only sworn law enforcement officers have authority to secure evidence to maintain chain of custody, and to authorize a forensic sexual assault examination. However, non-law enforcement personnel can assist in preserving evidence in many circumstances (e.g., keeping people away from a location before law enforcement arrives, etc.). Parties should discuss any additional protocols that may be warranted in order to promote effective preservation of evidence and investigation of an incident.

D. Disputes Over Responsibility

Parties should describe how they will resolve any disputes over responsibility for investigating or responding to a case.

VI. REPORTING OBLIGATIONS

Accurate, timely reporting between Parties is important to coordinate resources in responding to sexual assault and other crimes, to minimize or prevent further victimization, to trigger appropriate institutional investigative action, and to adequately inform the campus community of serious immediate or serious ongoing threats to health and safety. Parties should ensure all

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\(^4\) (See, e.g., Ed. Code, §§ 89560, 92600.)

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Parties may wish to attach addenda to their MOU with contact information for any additional relevant personnel, including the Clery Act Official, Title IX Officer, Campus Security Authorities, etc.

A. [Campus] Reports to [Agency]

Describe all incident reports the campus will make to other Parties, including describing the content and timeliness expected for these reports. Under AB 1433, a campus’s policies and procedures must provide for reporting to both Campus Security Authorities and local law enforcement.5

B. [Agency] Reports to [Campus]

Describe all incident reports other Parties will make to the campus or others who are party to the MOU, including describing the content and timeliness expected for these reports. Additional categories or content may be necessary to the extent you wish to describe expected reports to/from the DA’s office, to/from rape crisis centers, etc.

C. Clery Warnings

This section facilitates compliance with the Clery Act which requires campuses to issue timely warnings for Clery crimes on- and off-campus that pose a serious threat to students and employees and emergency notifications for a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or employees on campus.

Parties should explore ways in which they can optimize Clery and other notifications according to students’ preferred methods of receiving information, including the use of mobile-compatible technology, text messaging, and other methods similar to those used for AMBER Alerts.

VII. CONFIDENTIALITY & PRIVILEGE REQUIREMENTS

This section describes how Parties can set clear expectations regarding requests for confidentiality and the limitations on those requests depending on who is communicating with the victim. It also suggests information Parties should share with each other and with victims

5 (See Ed. Code, §§ 67380, subd. (a)(6)(A), 67383, subd. (d)(2); see also Attorney General’s campus sexual assault bulletin, p. 3, for additional information:  http://oag.ca.gov/sites/all/files/agweb/pdfs/law_enforcement/info-bulletin-die-2015-01.pdf.)

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regarding levels of confidentiality and privilege available under state and federal law and campus policies.

A. Communications Between Parties

This section describes how Parties can navigate the confidentiality and privilege protections that accompany certain sources of victim assistance, so that victims can receive accurate information about the implications of their decisions and parties can understand what kind of information they should or should not expect from certain personnel.

B. Privileged & Confidential Resources for Victims

California law identifies who can assert the privilege (as defined in Section IV) of confidential communication between a sexual assault victim and a Sexual Assault Counselor, Clergy Member, or Psychotherapist. These privileged resources can assert legal privilege on behalf of the victim. This privilege covers all confidential communications with the counselors and psychotherapists, and those who work or volunteer in their offices when the communications are reasonably necessary for the accomplishment of the purpose for which the counselor was consulted. Under Title IX, and for administrative purposes only, a campus may designate non-professional or non-pastoral counselors as “Confidential Resources” to address incidents of sexual violence, such as staff or volunteers at a women’s center. Confidential Resources may be required to disclose information about reportable incidents of sexual violence, but they cannot disclose personally identifiable information about the victim without the victim’s voluntary and informed consent and may disclose only general information about a reportable incident.6 In a criminal proceeding, Confidential Resources may be required to disclose such information unless they qualify as a privileged resource. Victims should be informed about the limitations of confidential communications.

If the campus does not employ privileged resources, Parties should include qualified CBOs and/or RCCs as parties to this MOU so that privileged resources are provided. Campuses that do offer privileged resources are also encouraged to include in this MOU or otherwise partner with qualified CBOs and/or RCCs to provide multiple options for victims to access privileged resources if they choose.

Parties should consider the following specific notifications to victims as additional components of the MOU:

- Provide the victim with a list of points of contact on- and off-campus where the victim can obtain:
  - Privileged services of Sexual Assault Counselors and Professional and/or Pastoral counselors;

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6 While non-professional counselors may have responsibilities that would qualify them as “Responsible Employees” for Title IX purposes, if the IHE designates them as “Confidential Resources,” they need report only general, non-personally identifiable information to the Title IX Coordinator. (U.S. Dept. of Education, Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence (April 2014) E-3.)
Campus-designated Confidential Resources; and
- Resources and assistance from Responsible Employees (making clear that communication with these employees would trigger certain reporting requirements).
- Inform the victim that
  - The Confidential Resource will need to report only general, non-personally identifiable information to the Title IX Officer; and
  - In a criminal proceeding, the Confidential Resource may be required to disclose the content of communications with the victim unless that resource is a qualified Sexual Assault Counselor or Professional or Pastoral Counselor.

Parties will identify the specific circumstances when shared communications are not privileged or confidential. For example, mandatory reporting to law enforcement is required where a health care provider suspects a physical injury may have resulted from sexual assault or a firearm or reasonable suspicion of child abuse.

VIII. COMMUNICATION AND COORDINATION

The purpose of the information-sharing described in this section is to ensure the delivery of appropriate services, to facilitate full and fair investigations, to prevent acts of retaliation against the victim or witnesses, and to assess special threats posed by offenders within the respective jurisdictions as part of an overall effort to prevent the occurrence of similar crimes. Parties should seek to improve processes and protocols in a collaborative atmosphere that seeks to improve systems without assigning blame for conduct.

A. General

Describe planned meetings, frequency and timeliness of reporting. We recommend meeting at least once per quarter, but parties should adjust frequency based on local needs.

B. Victim Response and Evidence Collection/Preservation

Depending on local circumstances and needs, Parties may wish to include additional detail or addenda to this section regarding the division of responsibility for victim services in the immediate aftermath of a sexual assault, including transportation to a health center that can conduct an examination and referral to other needed services. In addition, campuses with non-sworn or non-peace officers may need to adapt the Template MOU to ensure proper collection of evidence and maintenance of chain of custody.
1. **SAFE Exams and Evidence Collection/Preservation**

This section describes potential agreements among Parties to arrange for victims to get rape kits and to take measures to ensure rape kits are created, stored, tested, and processed for use in the criminal justice system.

2. **Victim Communication and Interviews**

In addition to the basic components included in the Template MOU on victim and witness interviews, Parties should consider additional commitments described below:

- Inform the victim that under California law, he or she is entitled to a SAFE, at no cost to the victim, irrespective of whether the victim engages with law enforcement or participates in the investigation;
- Encourage the victim to provide whatever time-sensitive, case-related information the victim is able to provide;
- Advise the victim of how the investigation and charging process will proceed generally and inform the victim of his or her options with respect to participation in that process;
- Inform the victim that under California law, Penal Code section 679.04, a sexual assault victim is entitled to have an advocate and support person during contact with law enforcement, the prosecutor and defense attorney and any representatives of the same;
- Not coerce the victim into making any immediate decisions with respect to future participation in any investigative process;
- Not require a victim who decides not to engage with law enforcement or participate in the investigation or prosecution to sign a waiver form, as this decision can be documented in police reports and case files;
- Inform a victim who decides not to participate that his or her case can be reopened at his or her request, and give the victim appropriate information about the timing and process for doing so. A victim will be recontacted within 48 hours if he or she has initially stated he or she does not want to make a report to law enforcement;
- Provide the victim with information about confidentiality and privilege as described in Section VII of this How-To Guide above;
- Discuss the services provided by RCCs or other qualified third parties on sexual assault, including contact information, location, and distinct services that they can provide, and offer to refer the victim to a local RCC or other qualified community resource; and
- Provide the victim with a written document at the time of the report that contains the victim’s rights under the California Constitution, article 1, section b, otherwise known as “Marsy’s Law.” This document will include information on available services (including contact information such as specific contacts, addresses, phone numbers and websites), options for pursuing an investigation or prosecution, and the extent to which and with whom information (including personally identifiable information) provided by the victim will be shared. Copies of this document will be provided to the victim at the time of report and maintained in the case file.

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Parties should commit that the campus will provide certain information to students, including:

- Ensuring victims know of the right to report the sexual assault to law enforcement
- Assisting victims who wish to report to do so promptly, in order to facilitate preservation of evidence and an effective response by trained criminal investigators.
- Providing victims with information about how to file Title IX complaints, criminal complaints, and/or initiate a campus disciplinary proceeding.

C. Victim Services

Parties may wish to use this section to coordinate referrals for support services for sexual assault victims, including the Victim-Witness Assistance Program and the Victims of Crime Fund.

D. Sexual Assault Response Team (SART)

In the context of this MOU, the term “SART” refers to an interdisciplinary team responsible for reviewing and assessing the community’s response to sexual assault in general, but not for discussing individual cases. If a similar interdisciplinary team is used to review specific cases, the campus should, to the extent possible, include the Title IX coordinator and law enforcement to be involved in such reviews. In cases where a victim seeks confidentiality and does not wish to have the campus investigate the sexual assault, the campus may consider whether the team should be reformatted to accommodate the request of the victim.

E. Coordination During Investigation

Parties should use this section to describe any bilateral or multilateral information-sharing during the course of an active campus or law enforcement investigation.

IX. SEXUAL ASSAULT PREVENTION AND TRAINING

This section offers suggested training arrangements between Parties to the MOU. Parties may tailor this section to account for the frequency of trainings, types of personnel to be included, any cost-sharing arrangements, types of curricula to be used, etc. Parties may wish to consult with a sexual assault community expert, and may wish to adapt or add to this section to include additional cross-agency training opportunities, including multi-disciplinary trainings with the California District Attorneys Association (CDAA), the California Coalition Against Sexual Assault (CalCASA), and the California Medical Training Center, among others.

A. Training Offered by [Agency], [Campus], and [Qualified CBOs/RCCs]

Parties should list any training law enforcement, campuses, or other Parties agree to provide to their fellow Parties, and the data that will be collected to determine its effectiveness.

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B. Campus Community Training and Collaboration

Parties should describe any outreach or other efforts on which they might be able to collaborate to the benefit of student and community awareness of rights and responsibilities to prevent and respond to sexual assault.

Additional potential agreements for Parties to consider include:

- Agree to engage in outreach and collaboration with the campus community to promote positive working relationships between law enforcement and students, faculty, staff, and other stakeholders;
- Agree to collaborate in the conduct of meetings with students, victim advocates, and other stakeholders, to discuss ways in which Parties can better respond to and prevent crime with special attention to campus sexual assault;
- Agree to work with internal and external individuals and organizations with expertise in sexual assault prevention and response efforts within their respective jurisdictions, and to hold at least one annual public meeting to solicit feedback on the effectiveness of their prevention and response policies, procedures and efforts;
- Agree to hold annual trainings that include students and staff actively involved in student life activities, including security, counselors, medical, resident advisors, Greek system officials, sporting event coaches and executive administration. Training will include information on Title IX rights as well as victims’ rights under the California Penal Code and Constitution (Marsy’s Law), and requirements under the Education Code section 67386;
- Agree that all incoming students should complete an awareness class, orientation, or training specifically to address sexual assault and what to do if one is a victim or witness. Information on how to report a sexual assault—whether on or off campus—should be made clear and available to all students, including, for example, on the back of student ID cards. The Parties agree to provide [Campus] with information needed for these classes and disclosures, including, for example, points of contact for students who wish to contact local law enforcement; and
- Agree to provide training to the campus community at least annually to address alcohol and drug use and its relation to sexual assault and other violent crimes, including how intoxication relates to culpability in campus and criminal proceedings.\

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X. ACCOUNTABILITY

This section addresses the data and analysis Parties can use to determine the effectiveness of their efforts and ways they can improve. Parties should consider the data available to them to collect or analyze as they consider this section.

XI. MISCELLANEOUS

Parties should include any additional provisions here that do not fit in the above sections.
TEMPLATE MOU
MODEL MEMORANDUM OF UNDERSTANDING

The Template MOU provides sample language for parties to incorporate into their local agreement. Parties may wish to adapt the Template to ensure consistency with other agreements already in place between some or all of the Parties, and to revisit any preexisting agreements to reconcile any changes in law or practice. Please consult the How-To Guide for context and additional suggestions Parties may wish to use to supplement various sections of the Template.

I. PARTIES

This Memorandum of Understanding is between [Campus],1 [Local Law Enforcement Agency, or “Agency”], [Sheriff],2 [District Attorney], [Qualified Community-Based Organizations (“CBOs”) or Rape Crisis Centers (“RCCs”)], and [Local Medical Facility and/or Sexual Assault Response Team associated with a Medical Facility (“Medical”)]3 (“the Parties”).

The Parties agree to each identify a central point of contact for the other with respect to this MOU. [Insert or attach points of contact for each Party].

Unless otherwise agreed to, all information-sharing between the Parties described in this MOU will flow between these points of contact. The Parties agree to share a contact list with their point of contact for implementation of this MOU, and to notify the Parties of any changes to their points of contact as soon as practicable.

II. PURPOSE

The purpose of this MOU is to meet the statutory requirements established by AB 1433 (Gatto, 2014), specified in the California Education Code (Ed. Code, § 67383, subd. (a) and Ed. Code, § 67381), and requiring covered institutions to adopt and implement written policies and

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1 For purposes of this MOU, we use [Campus] to refer to the college or university’s administration, with the understanding that the institution as a whole is a party to the MOU and should designate the appropriate point of contact for law enforcement collaboration. Depending on the unique circumstances of each Campus, more than one department within a college or university may need or wish to be represented in this MOU, depending on local administrative needs. For example, for those institutions with sworn police officers, the institution might simply designate someone in the police department as the sole point of contact. If a campus contracts with an external security firm, that firm might also be included as a Party, assuming the campus resolves any legal questions regarding information-sharing between sworn and non-sworn officers or other security personnel. Institutions may also want to include the Title IX officer or other designated individual. Institutions should make these decisions based on local needs to ensure that the appropriate parties are included in this MOU to fully implement the agreement.

2 The Sheriff’s Department has concurrent jurisdiction over any campus located within its county boundaries.

3 Based on local needs, the parties may or may not need or desire to include all the Parties listed above, e.g., the local medical facility where sexual assault forensic exams are conducted, as they may already have an MOU or Agreement with local law enforcement to conduct exams.
procedures to ensure that reports of Part 1 violent crimes, hate crimes, or sexual assaults are immediately, or as soon as practicably possible, disclosed to local law enforcement.

It is further the purpose of this MOU to promote collaboration between the Parties to enhance the reporting, investigation, and appropriate response to sexual assault and other covered crimes.

Finally, it is the purpose of this MOU to promote compliance with the numerous state and federal laws that provide specific requirements related to these issues, as outlined in California Education Code sections 67380, 67381 (the Kristin Smart Campus Safety Act of 1998) and 67383; SB 967 (de León, 2014), specified in California Education Code section 67386; the federal Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (“Clery Act”); and Title IX of the Higher Education Amendments of 1972 (“Title IX”); as well as the California Penal Code and applicable state laws related to health and confidentiality/privacy.

III. STATEMENT OF PRINCIPLES

The Parties agree to the following set of principles:

A. Improving Communication, Coordination, and Collaboration: The Parties agree to enhance communication, coordination, and collaboration to remedy sexual assault and violence and hate crimes, and protect the victim’s confidential information.

B. Championing Campus and Community Safety: The Parties will receive training to assist in the recognition that any allegation regarding sexual misconduct requires sensitive treatment and also directly impacts the real and perceived safety of all members of a campus community.

C. Upholding Civil Rights, Civil Liberties, and Victims’ Rights: The Parties agree to comply with state and federal laws in a manner that protects individuals’ civil rights and liberties, while prosecuting crimes and championing justice for survivors. The Parties explicitly recognize the distinctions between criminal law and civil law in the handling of sexual assault and violence that arise under both state and federal statutory frameworks.

D. Centering the Victim’s Needs in Responses to Sexual Assault: The Parties agree to institute specialized, trauma-informed responses developed in consultation with campus and community-based victim advocates and delineated in this agreement.

E. Ensuring Accountability & Auditing: In an effort to promote greater transparency, the Parties have, or will implement a means to monitor, record, and accurately maintain all reports of Part 1 violent crimes, hate crimes, and sexual assaults, their outcomes, and processes, while maintaining confidentiality where the law provides.
F. **Specialized Training and Knowledge:** The Parties agree that sexual assault and hate crimes require specialized, trauma-informed training for the Parties and other potential first responders.

G. **Respecting the Unique Needs of Undocumented Individuals:** Parties should strive to promote policies and practices that address the unique needs of undocumented individuals, including implementing culturally and linguistically appropriate campus and law enforcement services.

IV. **DEFINITIONS**

Parties should include all relevant definitions in this section. The How-To Guide includes suggested terms and definitions for the Parties to use based on local needs.

V. **JURISDICTION FOR LAW ENFORCEMENT SERVICES**

A. **Maps**

The Parties agree to share patrol and sector maps to clarify jurisdictional boundaries. Such maps will depict all buildings and properties that are owned or controlled by the [Campus], as well as all buildings and properties that are owned or controlled by recognized student and alumni organizations. All maps will be reviewed and updated on an annual basis or when a significant change is made to [Campus] property or local law enforcement reporting sectors. All modified maps will be shared with all Parties to this MOU. In addition, all maps will indicate any federal or tribal lands that are included in the jurisdictional boundaries, and if any such lands are present, all maps and action plans will be shared with those federal and tribal authorities. A copy of each map will be attached as Appendices to this MOU.

B. **Operational Responsibility & First Responders**

*Parties should review the suggested language below carefully and tailor it to their unique circumstances. Additional considerations are included in the Guidance Document.*

[Campus] has operational responsibility for any crimes, including Part 1 violent crimes, hate crimes, and sexual assault, occurring on [Campus] (Appendix A) as well as any [Campus] facilities that are identified in Appendix B. [Agency] has operational responsibility for any crimes, including Part 1 violent crimes, hate crimes, and sexual assault, that occur within the municipality in which [Agency] serves as the Police Department (Appendix C).

[Sheriff] shall have concurrent jurisdiction over [Campus] property and facilities, as well as municipalities within the County in which [Sheriff] has jurisdictional authority and operational responsibilities (Appendix D).
Model MOU Part 2 – Template MOU

[Campus] will act as the first responder to incidents, and have responsibility for the investigation of crimes and reporting to [Agency] of Part I violent crimes, hate crimes, and sexual assault, occurring on [Campus] (Appendix A) as well as any campus owned, operated and/or occupied facilities listed in Appendix B.

[Agency] will act as the first responder to incidents, and have responsibility for the investigation of crimes and reporting to [Campus] of Part I violent crimes, hate crimes, and sexual assault, occurring at all other locations within [Agency’s] jurisdictional boundaries (Appendix C) unless by separate agreement between [Agency] and [Campus].

[Sheriff] will act as the first responder to incidents, and have responsibility for the investigation of crimes and reporting to [Campus] of Part I violent crimes, hate crimes, and sexual assault, occurring at all locations within [Sheriff’s] jurisdictional boundaries not covered by Appendices A, B, and C, unless by separate agreement between [Sheriff], [Agency] and/or [Campus].

If incidents occur that involve police action from both [Campus] and [Agency] and/or [Sheriff], law enforcement supervisors from each department will confer and decide which will have primary responsibility for investigating and reporting the incident based on the location of the incident.

C. Collaboration

The Parties recognize that regardless of which law enforcement agency ultimately has operational responsibility in responding to a sexual assault, hate crime or other Part 1 violent crime, other Parties may be the first responder to the report of the crime. Thus each of the Parties has a responsibility to act in a manner that facilitates an effective law enforcement and institutional response, as well as appropriate treatment of the individual reporting the sexual assault or other violent crime. This includes ensuring the appropriate preservation of evidence and coordination with law enforcement to maintain chain of custody and authorize forensic sexual assault examinations.

D. Disputes Over Responsibility

If a dispute arises between the Parties regarding administrative, geographic or operational responsibility, and it cannot be resolved by referring to this MOU, the Party with jurisdictional responsibility for the incident will retain investigative responsibility. Other Parties will provide cooperation and resources in support of the investigation or resolution of the incident. The Party with responsibility for the incident will reasonably accommodate any requests from other Parties to conduct a parallel or joint response and/or criminal investigation.

VI. REPORTING OBLIGATIONS

The Parties agree to the following procedures through which each Party will transmit reports it receives to the other Parties. These reports shall comply with the confidentiality requirements

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described in Section VII below, and shall not identify the victim or the alleged assailant unless the victim has consented to being identified.

A. [Campus] Reports to [Agency]

Pursuant to California Education Code sections 67380(a)(6)(A) and 67383(a), [Campus] will report immediately or as soon as practicably possible to [Agency] all reports received by a Campus Security Authority of any Part 1 violent crime, sexual assault, or hate crime, committed on or off campus. This includes reports victims make directly to Campus Security Authorities as well as reports victims make to other [Campus] employees that are then conveyed to [Campus] security authorities. Such reports will include, where authorized:

- The name and characteristics of the victim;
- The name and characteristics of the perpetrator if known;
- Description of the incident, including location and date and time; and
- Any report number assigned to the police incident report documenting the investigation being conducted by the jurisdictional agency.

All such notifications to [Agency] will be documented in [Campus] records. In addition, [Campus] will maintain a public crime log documenting the "nature, date, time, and general location of each crime" and its disposition, if known. The log should be accessible to the public during normal business hours.

B. [Agency] Reports to [Campus]

Pursuant to the Clery Act, [Campus] must report aggregate data concerning certain enumerated crimes. To enable [Campus] to fulfill this requirement, [Agency] and [Sheriff] shall provide statistics on at least an annual basis to [Campus] on all crimes listed in 20 U.S.C. § 1092(f)(1)(F) for which [Agency] or [Sheriff] acted as a first responder or had operational responsibility.

[Agency] and [Sheriff] will promptly notify [Campus] when students or employees are identified as the victims or suspects of any Part 1 violent crime, sexual assault, or hate crime that occurs within [Agency’s] or [Sheriff’s] jurisdiction, and/or when [Agency] or [Sheriff] acts as first responder to an incident. Such reports will include, where authorized:

- The name and characteristics of the victim;
- The name and characteristics of the perpetrator if known;
- Description of the incident, including location and date and time; and
- Any report number assigned to the police incident report documenting the investigation being conducted by the jurisdictional agency.

All such notifications to [Campus] will be documented in [Agency] incident reports.

[Agency] will promptly notify [Campus] if it has referred the incident to [District Attorney] for charges to be filed, and of any charging decisions made by [District Attorney].
C. Clery Warnings

The Clery Act requires [Campus] to issue timely warnings for Clery crimes on- and off-campus that pose a serious threat to students and employees and emergency notifications for a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or employees on campus.

To facilitate the issuance of Clery Act-required timely warnings and emergency notifications, the Parties agree to coordinate the sharing of information as described above. The Parties acknowledge that [Campus] need not obtain the approval of an outside law enforcement agency to issue any warnings/notifications, nor is [Campus] required to seek preclearance of the content of any warning/notification. However, [Campus] will inform [Agency] about such warnings as soon as practicable through the points of contact listed in this MOU.

VII. CONFIDENTIALITY & PRIVILEGE REQUIREMENTS

The Parties will comply with applicable law and guidance regarding anonymous and confidential reporting of sexual violence, including when, how, and what information can or must be disclosed to local law enforcement officials or designated [Campus] officials.4

A. Communications Between Parties

The Parties agree that if a victim requests confidentiality regarding a reportable incident, the Parties will take all reasonable steps to comply with the victim’s request or inform the victim when the Parties cannot ensure confidentiality.5 A Party will not disclose the name of the victim to other Parties unless the victim provides written consent to being identified after being informed of his or her right to have identifying information withheld.6

Prior to obtaining consent from the victim to share personally identifying information, Parties will inform the victim of sexual assault that notification to [Campus] - including the confidential resources described in subsection B below - likely will also result in notice to the campus Title IX coordinator, but that notification to confidential resources will not result in disclosure of personally identifiable information to the Title IX coordinator.7 Parties will also inform the victim that he or she can agree to engage with local law enforcement and participate in the investigation and prosecution using a pseudonym (i.e., Jane or John Doe) instead of his or her

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4 Given the multiple entities that may need to respond to a reported instance of sexual violence, and the differing responsibilities of each entity, effective communication and coordination are critical.
6 Ed. Code, § 67380, subd. (a)(6)(A) and Penal Code, § 293, subd. (d).
7 While non-professional counselors may have responsibilities that would qualify them as “responsible employees” for Title IX purposes, if the IHE designates them as “confidential resources,” they need only report general, non-personal identifying information to the Title IX Coordinator. (U.S. Dept. of Education, Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence (April 2014) E-3.)

http://oag.ca.gov/campus-sexual-assault
true name. In that case, [Campus] may disclose the name of the alleged perpetrator to law enforcement (if known) while protecting the identity of the victim from public disclosure.

B. Privileged & Confidential Resources for Victims

The Parties acknowledge that communications between victims and Sexual Assault Counselors, Psychotherapists, or Clergy Members are privileged communications. The privilege covers all confidential communications with the Counselors or Psychotherapists, and those who work or volunteer in their offices when the communications are reasonably necessary for the accomplishment of the purpose for which the counselor was consulted. Such counselors generally are under no obligation to report incidents of sexual violence, unless the victim is a minor, and can generally claim the privilege in a criminal proceeding.

The Parties further acknowledge that communications between campus-designated “confidential resources” and victims are generally protected from disclosure of personally identifying information except in limited circumstances, including potentially in a criminal proceeding unless they qualify as privileged.

Finally, the Parties acknowledge that communications between victims and any Responsible Employees on [Campus] who are NOT designated “confidential resources” are not confidential and are subject to the reporting requirements described in Section VI above (in addition to other requirements under state and federal law).

The Parties agree to develop materials to share with each other, with victims, and with the campus community listing appropriate points of contact on- and off-campus within the above three categories, and including information about the levels of confidentiality and privilege applicable to resources in each category.

VIII. COMMUNICATION AND COORDINATION

A. General

The Parties will meet regularly – at least once per quarter – to:

- Share data and analysis about current trends and patterns in sexual assaults both on and off campus; and
- Share additional relevant crime data in furtherance of crime prevention goals.

[Agency] understands that once [Campus] becomes aware of an incident of sexual assault, it has obligations to take prompt and appropriate action to investigate, independent of any investigation by [Agency]. [Campus] understands that [Agency] may initiate an investigation and prosecution of an incident of sexual assault independent of any campus administrative proceeding.
B. Immediate Aftermath of an Incident - Victim Response and Evidence Collection/Preservation

1. **SAFE Exams and Evidence Collection/Preservation**

The Parties agree that in the immediate aftermath of a sexual assault, a victim should be directed to, and receive assistance (including transportation where appropriate) to access services, including referrals to counseling, a health examination and with the victim’s consent, a sexual assault forensic examination (SAFE), at no cost to the victim and irrespective of whether the victim engages with law enforcement. If a victim does engage with law enforcement and is transported to a hospital for a medical evidentiary or physical examination, the Parties acknowledge the law enforcement officer or agency must notify an RCC immediately.

The Parties agree that under all circumstances in which the victim consents to a medical examination and a SAFE exam, [Agency]8 will provide transportation to the local medical facility where SAFE exams are conducted. If the victim declines [Agency] transportation or if the victim reports to the medical facility, [Agency] will respond to the medical facility and will contact the local Rape Crisis Center to respond to the medical facility as well. With the consent of the victim, the medical facility can contact the local Rape Crisis Center to respond to the medical facility to provide support to and advocacy for the victim. [Agency] will pay for the SAFE exam, and the Parties agree that [Agency] will not directly or indirectly pressure the victim to report the offense.

The Parties agree to ensure the timely and proper collection of evidence, including that from the crime scene or from a SAFE exam, when the victim has made a report to a law enforcement Party and collection of evidence will not violate a victim’s request for confidentiality. The victim can be encouraged to report in order to permit the Party with operational responsibility to make a timely seizure of evidence even if the victim later chooses not to proceed with criminal charges. The Party with operational responsibility also agrees to collect, properly package, and maintain evidence by booking it into the property room of the Party to preserve the chain of custody and to take appropriate steps to preserve fragile or biological evidence or other evidence at risk of destruction.

When a SAFE exam is completed, [Agency] will collect the SAFE kit, submit it to the appropriate crime lab for analysis pursuant to California law, and ensure the proper handling, proper custody and proper control of all collected evidence, with particular attention paid to collecting evidence regarding drug-facilitated assaults.

2. **Victim Communication and Interviews**

Consistent with trauma-informed interview and investigatory practices, Parties will develop materials to inform the victim of his or her rights and options in both the short- and long-term,

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8 Based on local needs and agreements, [Campus] police may also provide such transportation.
http://oag.ca.gov/campus-sexual-assault
provide access to any necessary health or safety resources, and encourage the victim to engage with [Campus] personnel, [Agency] and privileged counseling services.

In no circumstances will [Campus] directly or indirectly discourage (or, alternatively, require) the victim from making a Title IX or criminal complaint.

Similarly, in no circumstances will [Agency] directly or indirectly discourage (or, alternatively, require) the victim from pursuing criminal charges or campus disciplinary action.

C. Victim Services

The Parties agree, with the victim’s consent, to coordinate referrals for support services for sexual assault victims that are made available by municipal and other governmental agencies, [Agency], [Sheriff], [Campus], [District Attorney], [Qualified CBOs/RCCs]. The Parties agree to have and share policies setting out their respective responsibilities related to victim support from the time of the report through resolution of the investigation, including prosecution or disciplinary proceedings, as applicable.

The Parties agree to notify the local Victim-Witness Assistance Program of the sexual assault when a police report is generated. The Victim-Witness Assistance professionals can support the victim during any criminal or campus disciplinary proceeding, including providing the appropriate referrals and resources, and can assist the victim with financial resources through the Victims of Crime Fund.

D. Sexual Assault Response Team (SART)

The Parties agree to support and participate in the existing interdisciplinary Sexual Assault Response Team (SART) within their jurisdictions or support the development of a SART that includes [Campus] representatives, the Title IX Coordinator or designee, advocates, counselors, medical providers (ideally to include a Sexual Assault Forensic Examiner or a Sexual Assault Nurse Examiner), law enforcement support, and other competencies that may be needed to adequately deliver essential support services.

The Parties agree to be part of the SART’s system-wide review and discussion of the community’s response to sexual assault. The Parties also agree to publicize information about SART resources to the campus community and to train SART members on all applicable confidentiality and victim privacy safeguards.

E. Coordination During Ongoing Investigation

The Parties will regularly confer on the status of an active investigation to ensure [Campus]’s compliance with federal requirements while maintaining the integrity of an active [Agency] criminal investigation.
The Parties agree, as soon as is practicable and as allowable by federal and state law, to share relevant documentation and other information created and/or maintained during [Campus] or [Agency] investigations (such as records of interviews and physical evidence gathered) when a victim of sexual assault and/or an alleged suspect are students or employees of [Campus].

Where possible and appropriate, [Campus] and [Agency] agree to conduct joint victim and witness interviews to avoid the need for duplicative interviews.

[Campus] will disclose to [Agency] when it has initiated a disciplinary proceeding against the alleged perpetrator, to the extent allowable by state and federal law. [Campus] will disclose the final results of a disciplinary proceeding to the Parties if it determines that: 1) a student is an alleged perpetrator of a crime of violence or non-forcible sex offense; and 2) with respect to the allegation made against him or her, the student has committed a violation of the institution’s rules or policies. In these circumstances, the disclosure may be made with or without the consent of the victim, and regardless of whether the victim pursues criminal charges.

[Agency] and [District Attorney] will share with [Campus] the result of a criminal investigation, whether any charges have been filed, and the outcome of any criminal proceeding, as soon as is practicable and as allowable by federal and state law.

IX. SEXUAL ASSAULT PREVENTION AND TRAINING

A. Training Offered by [Agency], [Campus] and [Qualified CBOs/RCCs]

[Campus] agrees to offer training to [Agency] regarding:

- The federal and state requirements regarding sexual assault prevention and response with which they must comply, including the Clery Act, Title IX, Title IV, the Safe Streets Act, Section 14141, FERPA, and other confidentiality and privacy statutes and policies; and
- The differing status of conduct offenses as defined and investigated by [Campus] as compared to similar criminal offenses.

[Agency] agrees to offer training and technical assistance to [Campus] security personnel and any personnel involved in a campus disciplinary investigation or proceeding regarding:

- [Agency]-based resources, reporting options for victims, the investigation process used in criminal cases, and the accommodations that [Agency] can provide or arrange for sexual assault victims.
- Investigative methods and best practices relating to evidence collection and preservation, victim and suspect interviewing, witness interviewing and preparation, review of sexual assault response and investigations to detect and address indications of explicit or implicit bias, and other matters as requested.
[Qualified CBO or RCC] agrees to offer training and technical assistance to [Campus] and [Agency] involved in campus disciplinary investigation or proceeding regarding:

- Services for survivors in the community.
- Overview of survivors’ rights.
- Dynamics and trauma associated with sexual assault from a trauma-informed lens.
- Strategies and practices in the prevention of sexual assault and shifting social norms that perpetuate sexual violence.
- Compliance with California Education Code section 67386.

[Agency] agrees to provide its officers and command-level staff with trauma-informed sexual assault training. Training provided by [Agency] will be Peace Officer Standards and Training (“POST”) certified or provided by a trauma and sexual assault expert.

The Parties agree that training should occur regularly, on at least an annual basis, [Insert Frequency] and be reinforced at management meetings, roll calls, and other gatherings periodically.

The Parties agree to collect data regarding the number and types of trainings provided pursuant to this section, to conduct regular evaluation of these trainings, and to include such evaluation in their data collection and management reviews to look for trends and areas that will need to be revised in future trainings.

B. Campus Community Training and Collaboration

[Agency] agrees to collaborate with [Campus] to provide outreach and training for the campus community about the awareness, prevention, intervention, investigation, and response to sexual assaults and other crimes of violence and to work with community-based resources and experts, including victim advocates, to provide these programs.

X. ACCOUNTABILITY

The Parties agree to collect data, including a baseline number of reports of Part 1 violent crimes, hate crimes, and sexual assault from the year prior to entering into the MOU, comparison of baseline numbers to current numbers of cases reported, and for each individual case:

- Whether the Parties met the MOU requirements and if not, why;
- Whether the case was successfully prosecuted and if not prosecuted, identification of the reason why the case was not pursued; and
- Feedback from the victim of his or her view of the process.

The Parties agree to collect data regarding the number and types of training each Party provides each year, to conduct regular evaluations of the efficacy of those trainings, and to include such evaluation in their data collection and management reviews to look for trends and areas that will need to be revised in future trainings. The Parties agree to determine common definitions to ensure a valid comparison of data collected.

http://oag.ca.gov/campus-sexual-assault
Data collection related to the Parties’ actions according to this MOU will be reviewed directly between the Parties on at least an annual basis and, for sexual assault data, through the SART on a quarterly basis. Parties will evaluate changes in the number of reports each year and discuss whether any increases or decreases in reporting are due to changes in actual crime levels or changes in levels of reporting. Performance improvement areas, including strategies to increase levels of reporting and decrease instances of crime, will be identified through review of the data and the responsible party will develop action steps to improve those areas.

Each Party representative responsible for implementation of this MOU will meet at least annually to discuss and evaluate effectiveness of the MOU to determine areas for improvement and discuss appropriate next steps.

**XI. MISCELLANEOUS**

This MOU is effective upon signature by each Party.

This MOU may be terminated upon 30 days’ notice by any Party. This MOU may be amended or terminated by mutual agreement of the Parties. An amendment or termination should be done in writing.

This MOU may be executed in counterparts.

The Parties agree that any costs associated with this MOU will be covered as follows [insert any necessary language].

Each Party agrees to act in good faith to observe the terms of this MOU; however, nothing in this MOU is intended to require any unlawful or unauthorized act by any Party. Nothing in this MOU shall be interpreted to limit or restrict each of the Parties’ legal, jurisdictional, or other rights or obligations with respect to the subject matter of this MOU.

No provision of this MOU shall form the basis of a cause of action at law or equity by any Party against any other Party, nor shall any provision of this MOU form the basis of a cause of action at law or equity by any third party.
[Campus] Signature

[Law Enforcement Agency] Signature

[Sheriff] Signature

[District Attorney] Signature

[Qualified CBO or RCC] Signature

[Medical Facility] Signature

[Other] Signature

[Other] Signature

Date
Case Study

On September 26, 2014, respondent and complainant, students at your college, met at a party. They consumed some alcohol, but were not impaired. They went to Respondent's room, began kissing, and by mutual consent, removed their clothing. Complainant said she did not want to have penetrative intercourse. By mutual consent, they performed oral sex on each other. At some point, Complainant said she did not want to continue, and Respondent stopped.

According to Respondent, he asked Complainant to “finish him off” so that he would not be left with “blue balls.” Complainant then masturbated him to ejaculation. According to Complainant, Respondent said, “Now you have to finish me off,” placed her hand on his penis, and held it there until he ejaculated. It is undisputed that complainant never explicitly said “no” or tried to pull her hand away.

Based on this incident, the college informed respondent that he was being charged with two violations of the 2014–2015 Handbook's Student Code of Conduct. Respondent prepared his defense to the charges based on the information in the Handbook. The letter enclosed and referred respondent to the college’s “Title IX Discrimination Policy,” which was updated and implemented in November 2014, for the “applicable procedures,” including his entitlement to an advisor in a limited role. However, respondent was also directed to consult the Student Code of Conduct in the Handbook for details of his “specific rights.”

At the hearing, which commenced in October 2015 (after the Title IX policy was in place), respondent submitted a written statement and orally presented his version of events. The college’s Conduct Review Board (CRB or Board) did not pose many of respondent’s proposed questions to witnesses, while it asked most of complainant’s proposed questions.

After the hearing, the CRB found that respondent had committed the alleged violations, and suspended him for two years. In its letter to respondent, the CRB referenced the two standards within the Handbook, and stated its finding that, more likely than not (the preponderance of the evidence standard), respondent violated “both of the standards of the Student Code of Conduct [in the Handbook] under which he was charged.”

In issuing its November 2015 sanction letter, the CRB did not rely on the provisions of the 2014–2015 Handbook, but on language contained in its Title IX policy (which it had provided to respondent when it notified him of the allegations against him and the investigation). This policy was not in effect in September 2014 when the parties had their sexual encounter.
According to the 2014-15 Handbook, the following definitions applied:

- **Consent**: “Sexual behavior without effective consent can lead to sexual misconduct, sexual assault, and/or sexual harassment. Consent is effective when it has been clearly communicated. Consent may never occur if a person is unconscious, unaware, or otherwise physically helpless.”

- **Sexual misconduct**: “Sexual misconduct refers to any form of physical contact or exploitation of another person of a sexual nature that is made without effective consent.”

According to the college’s Title IX Policy, the following definitions applied:

- **Coercion**: “Coercing someone into sexual activity violates this policy in the same way as physically forcing someone into sex. Coercion occurs when someone is pressurized for sex.”

- **Consent**: “Anything but a clear, knowing and voluntary consent to any sexual activity is equivalent to a ‘no.’”

- **Sexual assault**: “The term ‘sexual assault’ means any nonconsensual sexual act proscribed by Federal, tribal, or State law, including when the victim lacks capacity to consent. Sexual assault includes, but is not limited to: Coercing, forcing, or attempting to coerce or force a person to touch another person’s intimate parts without that person’s consent.”

**What issues do you see?**