

# Level 2 Title IX Coordinator Training

September 23-24, 2024



## Disclaimers and Basics

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- This presentation does not constitute legal advice.
- Yes, we will send the slides out.
- Watch for an email after this that will include the materials.
- Yes, you may post these slides!
  - If you are a 2020 Regulations institution, you must post them! 34 C.F.R. §106.45(b)(10)(i)(D)
  - If you are a 2024 Regulations you won't have to effective August 1<sup>st</sup>, 2024

## 2024 Regulations Injunctions

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- Enjoined in 26 states.
- Enjoined individually for hundreds of individual institutions.
- Applications for partial stay brought from the 5<sup>th</sup> and 6<sup>th</sup> Circuit Courts of Appeal to the Supreme Court *denied*.

WORK WITH LEGAL COUNSEL

## Presentation “Rules”

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- Questions are encouraged!
- “For the sake of argument...”
- Be aware of your own responses and experiences
- Follow-up with someone if you have questions and concerns
- Take breaks as needed

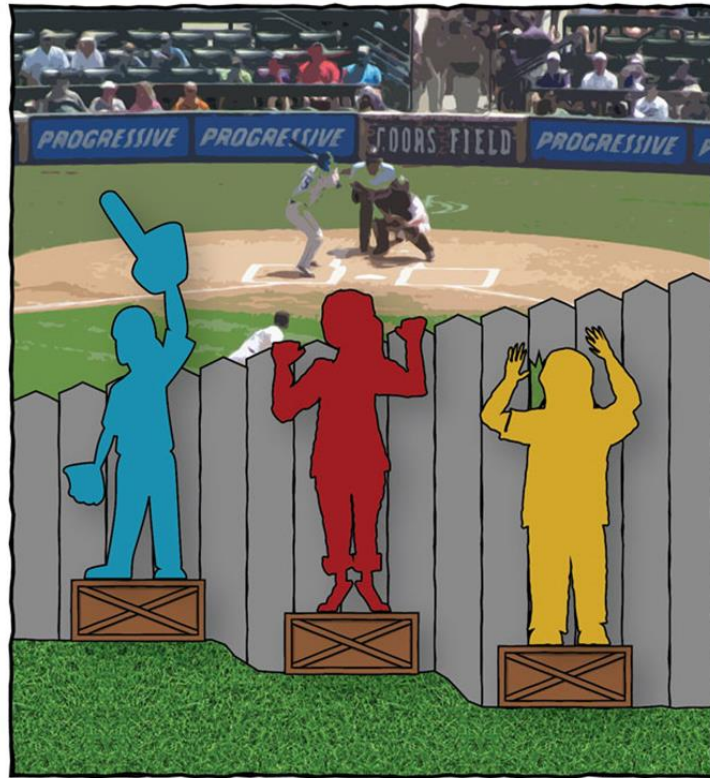
## Level 2 Title IX Coordinator Topics

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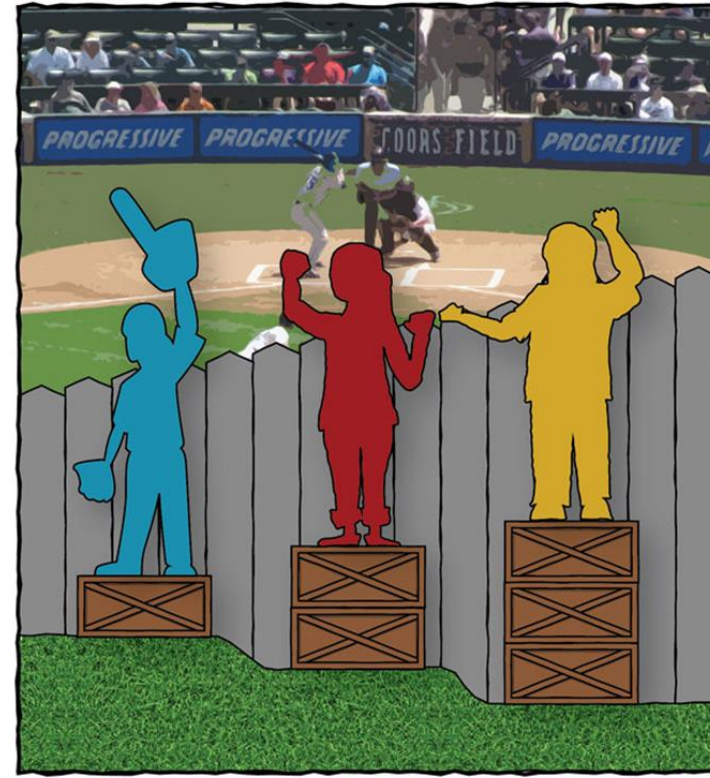
- Expectations/Role of the Title IX Coordinator
- Training
- Knowledge and Notice
- Complaints & Formal Complaints
- Initiation of the Process
- Jurisdiction
- Dismissals
- Supportive Measures
- Emergency Removal
- Informal Resolution
- The Grievance Process
- Relevancy
- Recordkeeping
- Serving without Bias and Conflicts of Interests

What hasn't  
changed?  
Title IX is *Still* Title IX

# Title IX is an Equity Statute



**EQUALITY**



**EQUITY**

# Overview of Themes

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Access

Protection

Transparency

Evidence

Improvement

No Bias



# Overview of the 2024 Title IX Regulations

## Big Picture Changes (1 of 2)

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- Definition of discrimination **on the basis of sex**,
- Definition of sex-based harassment, including hostile environment sex-based harassment
- Definition of "**actual knowledge**,"
- Broader jurisdiction (on/off campus distinction),
- Changes to the duties of the Title IX Coordinator,
- Definitions and procedures for supportive measures and emergency removal...

## Big Picture Changes (2 of 2)

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- Working with a student with a disability in your Title IX process,
- Updated information about informal resolution and when it can be used,
- More choices for your **grievance process (you will need to make a decision as to how your institution will use new grievance procedures)**,
- **New training requirements,**
- Definition of retaliation,
- **New reporting and resource requirements for pregnancy and parenting, and**
- New reporting requirements and definition of confidential employees.

# 106.46 - Many Choices under Heightened Procedures – Applies when a STUDENT is a party

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- Three options:
  - Asynchronous hearing
  - Hearing Officer led hearing
  - Cross-Examination hearing (parties must have advisors)
- You could choose one option for all Heightened cases
- You could choose different options depending on different factors:
  - Is Complainant participating?
  - Is Respondent participating?
  - Is there an issue of credibility to be resolved?
  - Has Respondent accepted responsibility for the violation(s)?

## Effective Date & Retroactivity (33840)

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- No retroactive enforcement by ED
  - 2024 regs only apply to conduct that occurs after August 1, 2024
  - "With respect to sex discrimination that allegedly occurred on or after August 1, 2024, **regardless of when the alleged sex discrimination was reported, the Department will evaluate the recipient's compliance against the Title IX statute and the Title IX regulations in place at the time that the alleged sex discrimination occurred.**" (33841)
- Ex:
  - On-campus sexual assault occurs on July 31, 2024
  - Reported on August 10, 2024
  - Must comply with 2020 regs (live hearing, cross-examination)

# Designation of a Title IX Coordinator

# Designation of a Title IX Coordinator – 106.8(a) Under the 2024 and 2020 Regulations

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- Institutions must designate a Title IX Coordinator to coordinate its efforts to comply with its responsibilities under Title IX
- If an institution has more than one TIXC, they must designate one to retain "ultimate oversight"
- Delegation of duties is permitted – think Deputy Title IX Coordinators
  - 2024 → 106.8(a)(2)
  - 2020 → 106.8(a), preamble 30463)

# Identifying your Team

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- Identify the TIX Team
  - Investigators, decision-makers, appeal entities, informal resolution facilitators
  - Define roles and identify the required separation between them
    - 2020 Regulations - TIXC can serve as an investigator, but cannot serve as the initial decision-maker or the decision-maker for the appeal
    - 2024 Regulations – Think of your process considerations. Who will you have in each role?



## Role of the Title IX Coordinator

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- “Coordinate efforts” to comply with Title IX
- Additional responsibilities under Clery that are likely assigned to TIXC
  - Prevention Programming
  - Clery reporting
- Review and update policies
- Work with stakeholders
- Oversee staff (potentially)
- Identify and address barriers to reporting/participating
- Pregnancy & Parenting

# Specific Duties in Response to Sex Discrimination

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- Treat the complainant and respondent equitably;
- Offer and coordinate supportive measures (as appropriate)
- Notify complainant/respondent of grievance procedures and informal resolution process (if applicable/appropriate)
- Initiate grievance procedures (or informal resolution process if applicable/appropriate/requested)
- Determine whether to initiate complaint in absence of complaint or withdrawal of allegations
  - 2024 Regulations - notify complainant prior and address reasonable concerns about safety
- Take steps to ensure that sex discrimination does not continue

# Publication of Grievance Procedures

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## Under 2024 Regulations - 106.8(b)(2)

- Must adopt, publish, and implement grievance procedures consistent with 106.45 and 106.46 (discussed later)
- Grievance procedures must "provide for the prompt and equitable resolution of complaints"

## Under 2020 Regulations - or 106.8(c)

- Must adopt and publish grievance procedures that provide for the “prompt and equitable resolution of the student and employee complaints”
- Must comply with 106.45 and 106.30

# 2020 Training Requirements

**106.45(b)(1)(iii)**

# Training Compliance – 2020 Regulations

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- Consider your policy and procedure options
  - Training
    - Title IX Team
    - Students and Employees
    - Counselors, Athletics, Greek organizations
  - Technology
- All TIX Team Members must be trained on:
  - Definition of Sexual Harassment
  - Scope of the institution's program or activity How to conduct an investigation and grievance process, including hearings, appeals, and informal resolution processes, as applicable, under YOUR policy
- How to serve impartially, avoid prejudice, avoid conflict of interest/bias, avoid relying on sex stereotypes

# Role Specific Training – 2020 Regulations

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All TIX **Investigators** must be trained on:

- Issues of relevance to create an investigative report that fairly summarizes relevant evidence

All TIX **Decision-Makers** must be trained on:

- Technology to be used at a live hearing
- Issues of relevance of questions and evidence
  - Including rape shield provisions in 34 C.F.R. §106.45(b)(6)

# 2024 Training Requirements

106.8(d), pp. 33885-33886

# The Who and the When of Training Requirements 106.8(d)

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## Who?

1. "All employees"
2. Investigators, decisionmakers, and "other persons who are responsible for implementing the recipient's grievance procedures or have authority to modify or termination supportive measures."
3. "Facilitators of informal resolution process"
4. Title IX Coordinators or Designees.

## When? Two periods of time:

1. "promptly upon hiring" or "change in position that alters duties under Title IX;  
and
2. "Annually thereafter"



## "All Employees"

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- Recipient's obligation to address sex discrimination in its education program or activity
- The scope of conduct that constitutes sex discrimination, including definition of sex-based harassment
- All applicable notification requirements regarding student pregnancy (106.40(b)(2) - providing TIXC contact information and information about actions to ensure equal access and avoid discr.)
- All applicable notification requirements regarding response to sex discrimination (106.44(c) - NOTE: reporting requirements will be different depending on employee roles and status as student-employee)

# Title IX Team - Training Requirement Summary



	All Employee Topics	Recipient's Response to Sex Disc. (106.44)	Recipients Grievance Procedures (106.45; poss. 106.46)	What is Relevant? What is Impermissible Evidence?	Serve impartially; Without Conflict of Interest and Bias.	Avoiding Prejudgment of Facts	Rules and Practices re: Informal Resolution (106.44(k))
Investigators	X	X	X	X	X	X	
Decisionmakers	X	X	X	X	X	X	
Resp. For Grievance Proc./Mod. Sup. Measures	X	X	X	X	X	X	
Informal Res.	X				X		X
Title IX Cord.*	X	X	X	X	X	X	X

• Title IX Coordinators and Designees have even more training requirements (106.8(d)(4))

# Title IX Coordinator/Designees

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Title IX Coordinators and Designees have more training requirements:

- Responsibilities to pregnant students
- Responsibilities under the grievance process, including with regard to supportive measures
- Recipient's recordkeeping system and Title IX recordkeeping requirements
- "Any other training necessary to coordinate the recipient's compliance with Title IX"

# Training Records

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- Keep training records for 7 years
- Must make them available for inspection upon request – not required to post

# Process Implementation

# TIXC: Process and Implementation Considerations 1 of 2

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Review your Title IX Policy for compliance

- Are you a 2020 or 2024 Regulations institution?
- Which definitions of prohibited conduct are you using?
- What is the scope of your policy?

Review your Title IX Policy for compliance

- Grievance Policy Requirements
- 2020 Regulations – 106.45
- 2024 Regulations – 106.45 and 106.46

# TIXC: Process and Implementation Considerations 2 of 2

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Under your policy...

- Train your TIX Team on how to explain your process
  - The process(es) required by the regulations can be confusing
  - Have your team members, particularly investigators, explain the new process to YOU
    - How did they do?
    - Would you understand if you were a participant?
    - Can they answer questions? Admit they need to get more information?

# 2020 What is a “Formal Complaint” – Refresher from Level 1



## 106.30

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- 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.
- “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.

# 2024 What is a “Complaint” – Refresher from Level 1

## 2024 What is a “Complaint” – 106.2

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

# 2020 Regulations TIXC Initiating the Complaint

## **TIXC: Signing a Formal Complaint**

### **34. C.F.R § 106.30(a)**

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“...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 section 106.45, and must comply with the requirements of this part, including section 106.45(b)(1)(iii).”

# TIXC: Signing a Formal Complaint

## Role of the TIXC 1 of 2

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### Considerations:

- 2018 NPRM § 106.44(b)(2) – previously required Title IX Coordinators to file a formal complaint after receiving multiple reports about the same respondent.
- This provision has been removed in the final regs – Preamble, p. 30216
- “Removing this proposed revision means that Title IX Coordinators retain discretion, but are not required, to sign formal complaints after receiving multiple reports of potential sexual harassment against the same respondent.”

# TIXC: Signing a Formal Complaint

## Role of the TIXC 2 of 2

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When a Title IX Coordinator does sign a formal complaint

- Doesn't act as a complainant under § 106.45 (during the grievance process)
  - Not participating in the investigation
  - Not cross-examining witnesses on behalf of the Claimant at the hearing
  - Must remain free from conflicts of interest and bias, and must serve impartially
  - Complainant is not obligated to participate in the ensuing grievance process

# 2024 Regulations TIXC Initiating the Complaint



## 2024 Specific - Initiation of Complaint by TIXC

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- 8 Considerations for initiation by TIXC (§ 106.44(f)(1)(v) – (vi))
  - (1) Complainant's request not to proceed
  - (2) Complainant's reasonable safety concerns re: initiation
  - (3) Risk that additional acts of sex discrimination might occur w/out a complaint
  - (4) Severity of the alleged sex discrimination
    - Would a finding of responsibility result in removal/imposition of another sanction?)
  - (5) Age and Relationship of the parties
    - Was Respondent an employee of the recipient?
  - (6) Scope of the alleged sex discrimination
    - Information suggesting a pattern? Ongoing sex discrimination? Impacting multiple individuals?
  - (7) Availability of evidence to assist a decisionmaker in determining whether sex discrimination occurred
  - (8) Whether the recipient could end the alleged sex discrimination and prevent its recurrence without initiating its grievance procedures

## 2024 Specific - Initiation of Complaint by TIXC – Tell Complainant

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- If initiating, notify Complainant and address reasonable concerns
- Regardless of initiating:
  - Take other appropriate prompt and effective steps to ensure sex discrimination does not continue
- NOTE: TIXCs are not required to analyze the 8 considerations if the conduct, as alleged, could not constitute sex discrimination

# Receipt of a Report or Complaint of Sexual Harassment

# 2020 Regulations

## Actual Knowledge

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“(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 construction notice is insufficient to constitute actual knowledge.

# Actual Knowledge – 106.30(a)

## 1 of 2

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Actual Knowledge definition:

- (1) Notice of sexual harassment or allegations of sexual harassment
- (2) To one of the following:
  - Title IX Coordinator, or
  - Any official of the recipient who has authority to institute corrective measures on behalf of the recipient

Notice is imputed not just when the TIXC is notified, but also when someone with authority to correct the harassment is put on notice

- Mere ability or obligation of an employee to report sexual harassment isn't enough
- Fact-sensitive analysis
- Work with legal counsel to determine who falls into this category
- What is your institutional ethic of care?

## Response to “Actual Knowledge”

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The TIX Coordinator has certain **specific required responses** to “actual knowledge” sexual harassment in an education program or activity of the recipient against a person in the United States:

- Promptly contact complainant to discuss availability of supportive measures
- Consider complainant’s wishes with respect to supportive measures
- Follow a grievance process that complies with 34 C.F.R. § 106.45(b)



# 2024 Regulations: Actual Knowledge & Reporting

# Reporting in Non-K12 Settings

Duties	Must Report to TIXC	Either report to TIXC or Provide contact info
Authority to institute corrective measures	x	
Administrators	x	
Faculty	X	
Advisors	X	
Non-confidential other employees		X
Confidential employees		X (with required explanations)
Student employees	Institution makes reasonable determination as to what applies	

# Section 106.44's Notice Requirements – Post-secondary recipients (and the rest) (1 of 2)

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## Required to report to TIXC:

Any employee who is not a confidential employee **and** who either

- Has authority to institute corrective measures on behalf of the recipient **or**
- Has responsibility for administrative leadership, teaching, or advising in the recipient's education program or activity

## Report what?

- Required to notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination under Title IX;

# Section 106.44's Notice Requirements – Post-secondary recipients (and the rest) (2 of 2)

## Required to report to TIXC OR Provide TIXC

All other employees not covered on the last slide, to:

- Notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination under Title IX; or
  - Provide the contact information of the Title IX Coordinator and information about how to make a complaint of sex discrimination to any person who provides the employee with information about conduct that reasonably may constitute sex discrimination under Title IX
- 
- Acknowledgement that post-secondary institutions have student-employees, and will have to make an individualize determination for any overlap in responsibilities above for student or employee role
  - Acknowledgement that the requirements above in (i) and (ii) do not apply where the employee is the subject of sex discrimination at issue

(106.44(C)(2)-(4))

## Definition of "Confidential Employees"

- Confidential/privileged under state law – only applies to information received while functioning in that confidential/privileged role
- Confidential/privileged as designated by policy
- Researchers who are conducting IRB-approved human research – only applies to information received while conducting the research

(Confidential employees can report to TIXC with consent; otherwise, they're providing contact information to the person.)



## Confidential employee requirements

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- A recipient must notify all participants in the recipient's education program or activity how to contact its confidential employees (exclusion of post-secondary IRB research)
- A recipient must require confidential employee to explain to any person who informs them of conduct that reasonably may constitute sex discrimination under Title IX:
  - Employee is a confidential employee and not required to notify Title IX Coordinator about conduct that reasonably may constitute sex discrimination
  - How to contact Title IX Coordinator and make a complaint
  - That the Title IX Coordinator may be able to offer and coordinate supportive measures, as well as initiate informal resolution or formal grievance process

## "Take Back the Night" Exception

- If you learn of sex-based discrimination through a public educational event, you don't have to act in response, but you do have to use it to inform your preventive efforts. See 106.44(e)



# Keys to Intake



## Key 1: Receiving the Report

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- Both parties may be emotional and may need access to supportive measures and resources.
  - “What we do for one, we do for the other”
- Be sensitive to the person making the report and refrain from comments that blame the victim, suggest disbelief, or discourage participation in the process.
- Document your interactions with each party **in writing** after you speak with them.
- Do not hesitate to report concerns regarding mental health to the appropriate University health office or Police.

## Key 2: Supportive Measures

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- Document the supportive measures, accommodations, and resources that are provided
  - Also document supportive measures that *are requested but not provided* and the rationale (e.g., changes to housing or class schedule)
  - Also document supportive measures that are *offered by rejected* and the rationale given
- The more options you can offer the parties, the more in control they will feel about the situation.

## Key 3: Be Transparent & Informative

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What to do when you or someone in your office receives a report of misconduct?

- Offer a meeting and discuss the process first
  - Form letters – updated in light of your process?
  - Include information re: process, retaliation, right to advisor, etc.
- At the meeting – give a copy of the Title IX Policy
- Explain the difference between privacy and confidentiality
- Discuss Supportive Measures
- Explain what a “Formal Complaint” or “Complaint” means under the applicable Title IX regulations
  - 2020 – Formal Complaint
  - 2024 - Complaint

## Key 4: What is the Process?

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- Explain the applicable investigation & hearing process
  - 2020 – Live hearing with cross examination
  - 2024 – Asynchronous, live hearing officer led, live advisor questioning?
- Explain the informal resolution process
  - 2020 – Not available when a student files complaint against employee
  - 2024 – Now available unless prohibited by law

**Make sure that you and/or the investigators/intake team are describing this process understands what the grievance procedures will look like and can answer questions about it.**

## Key 5: Jurisdictional Assessments

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What to do when you or someone in your office receives a report of misconduct?

- Determine which policy and procedure applies
  - Will depend on your Title IX Policy, Student/Employee Codes of Conduct
  - May change over time as more information comes in
  - Consider Jurisdiction and the definitions of prohibited conduct under your policy
- Does the TIXC make jurisdiction/definition decisions? What does that process look like?
  - “Exit Ramps”
  - Document, Document, Document

# Jurisdiction

# 2020 Jurisdiction

# Jurisdiction

## (Review from Level One) 1 of 2

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- A recipient with actual knowledge of sexual harassment in an educational 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 only deliberately indifferent if its response to sexual harassment is unreasonable in light of known circumstances.



# Jurisdiction

## (Review from Level One) 2 of 2

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- “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. “ §106.30(a)

## Education Program or Activity

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Locations, events, or circumstances with substantial control – the easy ones:

- Residence halls
- Classrooms
- Dining halls

# Off Campus? 1 of 2

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Any of the three conditions must apply to extend Title IX jurisdiction off campus:

- (1) Incident occurs as part of the recipient’s “operations” (meaning as a “recipient” as defined in the Title IX statute or the Regs 106.2(h));
- (2) If the recipient exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus; and

# Off Campus? 2 of 2

(3) Incident occurred in an off-campus building owned or controlled by a student organization officially recognized by a post secondary institution

- Discussion specifically addresses off campus sorority and fraternity housing and, as long as **owned by or under control of organization that is recognized by the postsecondary institution**, it falls within Title IX jurisdiction
- Must investigate in these locations (30196-97)

## Not an Education Program or Activity

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- Locations, events, or circumstances without substantial control:
  - Anything outside of the United States;
  - Privately-owned off campus apartments and residences that do not otherwise fall under the control of the postsecondary institution (example: privately owned apartment complex not run by a student organization)

## Language in 2020 Title IX Regulations

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- Under 2020 Title IX Regulations, we knew Title IX extended to a recipient's education programs or activities, against a person in the United States.
- We also knew that a recipient's education programs and activities could extend to some off-campus locations where the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurred, and any building owned or controlled by a student organization that is officially recognized by a post-secondary institution. (2020 Title IX Regulations 106.30(a) - the 2024 Title IX Regulations remove 106.30(a).)

# 2024 Jurisdiction

## Clarification of extra-jurisdictional conduct

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- Section 106.11 Application contemplates when conduct outside of the United States fall under Title IX.
- The Regulations apply "to every recipient and to all sex discrimination occurring under a recipient's **education program or activity in the United States**" (as in the 2020 Regulations)....

### AND

- "A recipient **has an obligation to address a sex-based hostile environment** under its education program or activity, **even when some conduct alleged to be contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States.**"



## Why it matters in sex-based hostile environments

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- Extra-jurisdictional conduct can impact the elements in sex-based harassment (106.2 definition, addressed above):
  1. The **degree** to which the **conduct affected the complaint's ability to access** the recipient's education program or activity;
  2. The type, **frequency**, and **duration** of the conduct;
  3. The parties' ages, roles within the recipient's education program or activity, **previous interactions**, and other factors about each party that may be relevant to evaluating the effects of the conduct;
  4. The location of the conduct and the **context** in which the conduct occurred; and
  5. Other sex-based harassment in the recipient's education program or activity.

# On/Off Campus?

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- Section 106.11:

"For purposes of this section, conduct that occurs under a recipient's education program or activity includes but is not limited to conduct that occurs in a building owned or controlled by a student organization that is officially recognized by a postsecondary institution, **and conduct that is subject to the recipient's disciplinary authority.**"

# What is the Reach of Your Policies?

- Student Conduct
- Employees
- Faculty



Page 33529:

- Recipients **are not responsible** for actions of the parties over which it lacks significant control
- Recipients **are responsible** for conduct over which it exercises disciplinary authority or otherwise has substantial control

"The Department therefore reiterates that a recipient should not focus its analysis on whether alleged conduct happened 'on' or 'off' campus but rather on **whether the recipient has disciplinary authority over the respondent's conduct in the context in which it occurred.**"

# Outside the US - Preamble Example (1 of 2)

Page 33529:

- Student A reports:
  - Student was sexually assaulted by Student B while studying abroad
  - After returning to campus, Student B has been taunting Student A with sexually suggestive comments
  - Student A cannot concentrate or participate fully in her classes and activities





## Outside the US - Preamble Example (2 of 2)

Page 33530:

- Must address the allegation of a hostile environment created by Student B's taunting
  - Requires a fact-specific inquiry into whether the encounters with Student B outside the U.S. gave rise to a hostile environment
- "The recipient would not, however, have a standalone **obligation** to address the underlying alleged sexual assault of Student A that allegedly occurred while Student A and Student B were abroad because Title IX's protections do not apply extraterritorially."
- So, no obligation... but *can* it be addressed? (see next slide)

# Application of Other Policies to conduct outside the U.S.

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Page 33532:

- No extraterritorial application
  - "No person in the United States shall..."
- However – conduct may be addressed under other codes of conduct or policies pertaining to study abroad programs

# Conduct Under a Recipient's Disciplinary Authority

Page 33532:

- "How a recipient determines whether conduct would be subject to its disciplinary authority and what constitutes a 'similar context' is a fact-specific analysis unique to each recipient;
- However, the Department reiterates that to the extent a recipient addresses other student misconduct or other interactions between students that occur off campus, a recipient **may not disclaim responsibility for sex discrimination that occurs in a similar context.**
  - **Ex:** one student steals from another at an off-campus location
  - **Ex:** nonsexual assault of a student at an off-campus location
  - What about employees?



## Jurisdiction Hypo: 1 of 3

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Complainant, Cady Cruise, was studying abroad with several classmates and student organization members. While on the study abroad, Cady reported she was sexually assaulted by Reese Reynolds, her classmate.

Does Jurisdiction exist under the 2020 regulations?

Does Jurisdiction exist under the 2024 regulations?

What information would you need to assess jurisdiction?

## Jurisdiction Hypo: 2 of 3

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Complainant, Cady Cruise, reported that upon return from the study abroad, Reese texted her on at least five occasions when the contact was unwanted.

Does Jurisdiction exist under the 2020 regulations?

Does Jurisdiction exist under the 2024 regulations?

What information would you need to assess jurisdiction?

## Jurisdiction Hypo: 3 of 3

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Reese reported that he experienced sexual harassment by Cady prior to the study abroad trip and during the study abroad trip.

Does Jurisdiction exist under the 2020 regulations?

Does Jurisdiction exist under the 2024 regulations?

What information would you need to assess jurisdiction?

# Dismissals

# 2020 Dismissals

# TIXC: Mandatory Dismissal

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## Mandatory Dismissals

- Would not constitute sexual harassment even if proved
  - Quid pro quo, unwelcome conduct, Clery crimes
- Did not occur in the recipient's education program or activity
- Did not occur against a person in the United States

## TIXC: Discretionary Dismissals

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- Jurisdictional Determination § 106.45(b)(3)
- **Discretionary Dismissals**
  - Complainant notifies TIX Coordinator in writing they would like to withdraw the formal complaint
  - Respondent is no longer enrolled or employed by the recipient
  - Specific circumstances prevent the recipient from gathering sufficient evidence

# Jurisdictional Determinations

## 34 C.F.R § 106.45(b)(3)

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- Preamble: Permitting recipient to dismiss because they deem allegation meritless or frivolous without following grievance procedure would defeat the purpose of the regulations
- Must promptly send written notice of dismissal/reasons simultaneously to the parties
- Jurisdictional issues can arise at any time, even during the investigation



# 2024 Dismissals

## Discretionary Dismissals – 106.45(d)(1)

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- If unable to identify the Respondent after making a reasonable effort to do so
- Respondent is not participating in the education program or activity and is not employed
- Complainant withdraws any/all of the allegations, the Title IX Coordinator declines to initiate, and the recipient determines that the remaining conduct would not constitute sex discrimination
- The recipient determines that the conduct would not constitute sex discrimination after making reasonable efforts to clarify the allegations

## After dismissal – 106.45(d)(2) – (3)

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- Notify Complainant of the basis for the dismissal, if Respondent has been notified, inform Respondent as well – simultaneously in writing.
- Notify Complainant that the dismissal is appealable
- Following appeal:
  - Notify the parties of the appeal
  - Implement appeal procedures equally
  - Ensure appeal decisionmaker did not have role in investigation or dismissal
  - Ensure appeal decisionmaker is trained
  - Provide parties with opportunity to make a statement in support/challenge of the appeal
  - Notify the parties of the result & rationale

## After dismissal – 106.45(d)(4)

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At a minimum the recipient must

- Provide supportive measures to Complainant
- Provide supportive measures to Respondent, if Respondent was notified of the allegations.
- Require Title IX Coordinator to take appropriate, prompt, and effective steps to ensure sex discrimination does not continue or reoccur

# Supportive Measures

# TIXC: Supportive Measures

## 2020 34 C.F.R § 106.30(a) 1 of 4

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### Elements of the Definition:

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

Title IX Coordinator Responsible!

# TIXC: Supportive Measures

## 2020 34 C.F.R § 106.30(a) 2 of 4

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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

# TIXC: Supportive Measures

## 34 C.F.R § 106.30(a) 3 of 4

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



# TIXC: Supportive Measures

## 34. C.F.R § 106.44(a) 4 of 4

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Role of the TIXC upon receiving a report:

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

Must maintain confidentiality to the greatest extent possible

- But, shouldn't impair the ability to provide the measures at issue (may have to tell campus PD, faculty, etc. *some* information)

# TIXC: Supportive Measures

Documentation per 2020 34. C.F.R § 106.45(b)(10)(ii)

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## Role of the TIXC:

- Your office must document the absence of deliberate indifference →→  
In other words, your office's (Title IX compliant) response to a Title IX report
- **Non-Provision of Supportive Measures**
  - “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.”
- **Maintain documentation for 7 years**

## 2024 Supportive Measures -106.2

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Individualized measures offered as appropriate, as reasonably available, without unreasonably burdening a complainant or respondent, not for punitive or disciplinary reasons, and without fee or charge to the complainant or respondent to:

- Restore or preserve that party's access to the recipient's education program or activity, including measures that are designed to protect the safety of the parties or the recipient's educational environment; or
- Provide support during the recipient's grievance procedures or during the informal resolution process. [NOTE: specific discussion of Supportive Measures in 106.44 and 106.45]

# 2024 List of Example Supportive Measures – 106.44(g)

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- Counseling
- Extensions of deadlines and other course-related adjustments
- Campus escort services
- Increased security and monitoring of certain areas of the campus
- Restrictions on contact **applied to one or more parties**
- Leaves of absence
- Changes in class, work, housing, or extracurricular or any other activity, **regardless of whether there is or is not a comparable alternative**
- **Training and education programs** related to sex-based harassment

## 2024 Supportive Measures Continued

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- Consult with Disability Services re Supportive Measures:
  - If a student is a student with a disability under Section 504, the Title IX Coordinator may consult with your office of disability services in determining appropriate supportive measures. See 106.44(g)(6)(ii)
- Appeals:
  - Must have the ability to seek modification or reversal from an appropriate and impartial employee

## Definition of Remedies – 106.2, p. 33884

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- Measures provided, as appropriate, to a complainant or any other person the recipient identifies as having had their equal access to the recipient's education program or activity limited or denied by sex discrimination.
- These measures are provided to restore or preserve that person's access to the recipient's education program or activity after a recipient determines that sex discrimination occurred.

# Notices of Allegations

# 2020 Regulations – NOIA



# Notice of Allegations to Respondent

## 34 C.F.R § 106.45(b)(2) 1 of 3

---

- Must include sufficient details known at the time, and with sufficient time to prepare a response before any initial interview
- Sufficient details include:
  - Identities of the parties
  - Conduct allegedly constituting sexual harassment
  - Date/location of alleged incident

# Notice of Allegations to Respondent

## 34 C.F.R § 106.45(b)(2) 2 of 3

---

- Needs to be supplemented if new allegations are to be included
- Must include statement that respondent is **presumed not responsible** for alleged conduct and that determination regarding responsibility is made at the conclusion of the grievance process
- Must inform the parties that they may have advisor of their choice who may be an attorney and who may inspect and review evidence

# Notice of Allegations to Respondent

## 34 C.F.R § 106.45(b)(2) 3 of 3

---

- Needs to be supplemented if new allegations are to be included
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- Must inform the parties that they may have advisor of their choice who may be an attorney and who may inspect and review evidence

# 2024 Regulations - NOIA

## Written Notice under 106.45

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- 106.45(c) requires that parties receive *Notice of the Allegations* upon initiation of 106.45 grievance procedures
- This notice doesn't have to be in writing
  - "... the Department leaves it to recipients' discretion to determine whether to provide written notice of allegations outside the context of complaints of sex-based harassment involving a postsecondary student." Preamble, 33638
  - In other words – written notice is required for 106.46, but not 106.45
- But... "a recipient may choose to reduce notices to writing..." 33681
- Consider your institutional ethic of care
- Discuss due process/state law concerns with your legal counsel

## 106.45(c) – Notice of Allegations

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- Grievance procedures under 106.45, 106.46 (if applicable), and informal resolution under 106.44(k).
- “Sufficient information available at the time to allow the parties to respond to the allegations. Sufficient information includes the identities of the parties involved in the incident(s), the conduct alleged to constitute sex discrimination under Title IX or this part, and the date(s) and location(s) of the alleged incident(s), to the extent that information is available to the recipient;”
- Non retaliation
- Equal opportunity to access evidence or an accurate description of the evidence (with opportunity to request access)

## 106.46 (c) – Notice of Allegations

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- Sex-Based Harassment involving a Student Complainant or Student Respondent at post secondary institutions MUST have written notice of allegations that includes everything on previous slide PLUS
- A statement that the Respondent is presumed not responsible,
- They may have an advisor
- They are entitled to access evidence
- Prohibition against knowingly making false statements/providing false information

## 106.46(c)(2) and (c)(3) - Additional considerations

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- If additional allegations are added, must provide updated notice
- If there is a “reasonable concern for the safety of any person” as a result of the provision of the notice, can delay providing notice to address safety concern.
  - Must be done on an individual basis



# Consolidation of Complaints

# 2020 TIXC: Consolidation of Formal Complaints 34. C.F.R § 106.45(b)(4)

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- “A recipient may consolidate formal complaints as to allegations of sexual harassment...by more than one complainant against one or more respondents... where the allegations of sexual harassment arise **out of the same facts or circumstances.**”
  - “May” = permissive, not required
  - What about similar conduct but different facts/circumstances?

## 106.45(e) - 2024 Consolidation of Formal Complaint

- A recipient may consolidate complaints of sex discrimination against more than one respondent, or by more than one complainant against one or more respondents, or by one party against another party, when the allegations of sex discrimination arise out of the same facts or circumstances. If one of the complaints to be consolidated is a complaint of sex-based harassment involving a student complainant or student respondent at a postsecondary institution, the grievance procedures for investigating and resolving the consolidated complaint must comply with the requirements of § 106.46 in addition to the requirements of this section. When more than one complainant or more than one respondent is involved, references in this section and in § 106.46 to a party, complainant, or respondent include the plural, as applicable.

# Engaging with Respondent

# TIXC: Keys to Respondent Contact

“What we do for one, we do for the other” 1 of 5

- Both parties may be emotional and may need access to supportive measures and resources.
  - “What we do for one, we do for the other”
- Be sensitive to both parties and refrain from comments that blame either party, suggest disbelief/prejudgment, or discourage participation in the process.
- Document your interactions with each party **in writing** after you speak with them.
- Again, monitor any concerns regarding mental health and do not hesitate to refer to counseling or police.

# TIXC: Keys to Respondent Contact

“What we do for one, we do for the other” 2 of 5

- Document the supportive measures, accommodations, and resources that are provided
  - YES! Discuss Supportive Measures with Respondent, too!
  - Document supportive measures that *are requested but not provided* and the rationale (e.g., changes to housing or class schedule)
  - Document supportive measures that are *offered by rejected* and the rationale given
- The more options you can offer the parties, the more in control they will feel about the situation.

# TIXC: Keys to Respondent Contact

“What we do for one, we do for the other” 3 of 5

First steps after providing notice to the Respondent?

- Offer a meeting and discuss the process first
  - Form letters – updated in light of your new process?
    - Right to bring an advisor
    - Availability of resources and accommodations
    - Reminder that retaliation is prohibited
- At the meeting – give the respondent a copy of the Title IX Policy
- Explain the difference between privacy and confidentiality
- Discuss Supportive Measures
- Explain the procedure the complainant has elected to pursue (if you know)
  - Formal Complaint, Informal Resolution, Hearing, etc.

# TIXC: Keys to Respondent Contact

“What we do for one, we do for the other” 4 of 5

Make sure Respondent understands the process before the meeting ends:

- Explain the Informal Resolution Process, if it's available
  - Make sure to explain that this option is only available if a Formal Complaint is filed (34 C.F.R. § 106.45(b)(9))
  - Explain the option to end the Informal Resolution Process and proceed with a hearing at any point before a determination of responsibility is made
- Explain the Hearing Process
  - Go step-by-step through your policy
  - Make sure that you and/or the investigators describing this process understands what the hearing will look like and can answer questions about it



# TIXC: Keys to Respondent Contact

“What we do for one, we do for the other” 5 of 5

You’ve talked to Complainant and Respondent. Now what?

- Determine which policy and procedure applies
  - Will depend on your Title IX Policy, Student/Employee Codes of Conduct
  - May change over time as more information comes in
  - Consider Jurisdiction and the definition of prohibited conduct
- Does the TIXC make jurisdiction/definition decisions? What does that process look like?
  - “Exit Ramps”
  - Document, Document, Document

# Emergency Removals

# 2020 Regulations

## TIXC: Emergency Removal 34. C.F.R § 106.44(c):

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It states “(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.”

# 2020 Regulations Continued

## TIXC: Emergency Removal 34. C.F.R § 106.44(c):

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Does this decision fall to the TIXC at your institution?

- Current policy and practice

2020 Regs require:

- Individualized safety and risk analysis
- The existence of an immediate threat to the physical health or safety of any student/individual arising from the allegations

Respondent is entitled to:

- Notice, and
- Opportunity to be heard
- Does not modify Section 504 or ADA rights
- Can place a non-student respondent on administrative leave

## Emergency Removal from educational program or activity

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- Must undertake an individualized safety and risk analysis
- Must determine that an "**imminent and serious threat** to the health or safety of **a complainant or any students, employees, or other persons** arising from the allegations of sex discrimination justifies removal"
- Must provide respondent with notice and an opportunity to challenge

Note: Institutions still have the right to put employee respondents on administrative leave. See 106.44(I).

Note: Reference to interaction with ADA/504

# Informal Resolution

# 2020 Regulations - Informal

# TIXC: Informal Resolution

## 34. C.F.R § 106.45(b)(9) 1 of 8

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- “I don’t want the respondent to be punished; I just want them to realize how bad this event was for me.” Preamble, p. 30399 (Official)
- Informal Resolution is permitted but not required
  - “... 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...”



# TIXC: Informal Resolution

## 34. C.F.R § 106.45(b)(9) 2 of 8

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No definition

- “unnecessary”
- “Informal resolution may encompass a broad range of conflict resolution strategies, including, but not limited to, arbitration, mediation, or restorative justice.” p. 1370 (Unofficial)

# TIXC: Informal Resolution

## 34. C.F.R § 106.45(b)(9) 3 of 8

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According to the Preamble,

- The final regs do not require any recipient to offer informal resolution and preclude a party from being required to participate. Preamble, p. 30404 (Official)
- “Recipients remain free to craft or not craft an informal resolution process to address sexual misconduct incidents.” Preamble, p. 30404 (Official)
- “Nothing in 106.45(b)(9) prohibits recipients from using restorative justice as an informal resolution process to address sexual misconduct incidents.” Preamble, p. 30406 (Official)

# TIXC: Informal Resolution

## 34. C.F.R § 106.45(b)(9) 4 of 8

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### Considerations:

- How will this affect reporting?
- Is Informal Resolution appropriate for some, all, or none of the reports at your institution?
- What role will the institution play in imposing sanctions as a result of an informal resolution?
- What if a complainant wants an admission of responsibility but doesn't want the respondent to be punished?

# TIXC: Informal Resolution

## 34. C.F.R § 106.45(b)(9) 5 of 8

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### Prohibition on Informal Resolution

- Recipients are categorically prohibited from offering or facilitating an informal resolution process to resolve allegations that an employee sexually harassed a student 106.45(b)(9)(iii)

# TIXC: Informal Resolution

## 34. C.F.R § 106.45(b)(9) 6 of 8

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### Requirements:

- Formal Complaint - § 106.45(b)(9)
- Facilitators must be free from conflicts of interest and bias
- Facilitators must be trained in accordance with 106.45(b)(1)(iii)
- Reasonably prompt time frames in accordance with 106.45(b)(1)(v)

# TIXC: Informal Resolution

## 34. C.F.R § 106.45(b)(9) 7 of 8

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### Requirements (continued):

- The initial written notice of allegations sent to both parties must include information about any informal resolution processes the recipient has chosen to make available – 106.45(b)(2)(i)
- Either party has the right to withdraw from informal resolution and resume a 106.45 grievance process at any time before agreeing to a resolution

# TIXC: Informal Resolution

## 34. C.F.R § 106.45(b)(9) 8 of 8

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### Different from Supportive Measures

- Supportive Measures ≠ punishment
- Informal resolution may result in disciplinary or punitive measures
  - What role will a complainant have in disciplinary or punitive measures?

# 2024 Informal Resolution



# Informal Resolution (IR) 106.44(k) - Expanded

Formal complaint no longer required. IR is permitted when a recipient

- Receives a formal complaint of sex discrimination, or
- Receives information about conduct that reasonably may constitute sex discrimination.

Expanded to higher ed student/employee claims. IR is not permitted

- For complaints that include allegations that an employee engaged in sex-based harassment of an elementary or secondary school student, or
- When such a process would conflict with federal, state or local law.

# The Formal Grievance Process

# 2020 Regulations - Formal

# Basic Requirements for Formal Grievance Process 34. C.F.R § 106.45(b)(1) 1 of 2

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- Treating complainants and respondents equitably
- Remedies designed to restore or preserve equal access to the institution's education program or activity
- Objective evaluation of all relevant evidence and credibility determinations
- Presumption that respondent is not responsible for alleged conduct

# Basic Requirements for Formal Grievance Process 34. C.F.R § 106.45(b)(1) 2 of 2

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- Reasonably prompt timeframes for filing and resolving appeals and informal resolution processes
- Providing a list, or describing a range, of possible disciplinary sanctions and remedies
- Describing standard of evidence to be used to determine responsibility
- Describing procedures and permissible bases for appeal
- Describing range of available supportive measures

## Facilitate Inspection/Review of Evidence 34. C.F.R § 106.45(b)(5)(vi)

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- **During** investigation, TIX Coordinator (or Investigator) will need to facilitate parties' opportunity to inspect and review any evidence obtained as part of the investigation
- Parties are to be provided **at least 10 days** to submit a written response to the evidence before completion of report

# Grievance Process Must Include



## File Review

Parties and advisors review all evidence collected for 10 days and provide written response



## Report Review

Investigative report is provided to parties (not necessarily advisor) for 10 days for review and written response.



## Hearing

Hearing occurs before a decision-maker that is not the Coordinator or the investigator.

## Providing Written Investigative Report 34. C.F.R § 106.45(b)(5)(vii)

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- After **completion** of investigation, TIX Coordinator (or Investigator) are responsible for providing the parties a copy of the written investigative report
- Parties are to be sent the report **at least 10 days** in advance of reaching a determination of responsibility



# Live Hearing

## 34. C.F.R § 106.45(b)(6)(ii)

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- Again, TIXC cannot be the Decision-Maker in case where they have previously served as TIXC
- TIXC will need to facilitate scheduling and completion of a live hearing

# Prohibition Against Retaliation

## § 106.71

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- Retaliation prohibited, including intimidation, threatening, coercion, or discrimination against any individual:
  - For purpose of interfering with any right or privilege secured by Title IX
  - Because an individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing
  - Includes charges for code of conduct violations that do not involve sex discrimination/harassment but arise out of the same facts/circumstances

# 2024 Regulations

*See* 106.44, 106.45, and 106.46

## Sex Discrimination

Discrimination on  
the basis of sex  
characteristics

Discrimination on  
the basis of sexual  
orientation

Discrimination on the  
basis of sex stereotypes

Discrimination on  
the basis of gender  
identity

Discrimination on the basis  
of Pregnancy or Related  
Conditions

### Sex-Based Harassment

- *Quid pro quo*
- Hostile environment
- Sexual assault
- Domestic violence
- Dating violence
- Stalking

## Application – 106.11

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- Applies to all sex discrimination occurring under a recipient's education program or activity in the United States
- Includes:
  - Conduct occurring in a building owned/controlled by recognized student organization; and
  - Conduct that is subject to the recipient's disciplinary authority
- Recipient has an obligation to address a sex-based hostile environment under its education program or activity, even when some conduct alleged to be contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States.

## Public Institutions in the 6th Circuit

- *Doe v. Baum* still applies, which means...
  - Still need to provide for live cross-examination when
    - Credibility is in dispute
    - Credibility is material to the outcome
    - The potential sanction is as serious as expulsion or suspension
  - Remember:
    - Only applies to matters involving student respondents
    - The parties will need advisors—the regs prohibit parties from cross-examining each other
    - Cross must, at a minimum, allow (1) the respondent to probe witness credibility and (2) the factfinder to observe the witness's demeanor under questioning
      - Cross examination does not require witnesses to answer every single question and courts recognize a school's interests in protecting victims of alleged sexual assault
    - Respondents can waive their right to cross-examination



## Remember your Clery obligations (1 of 3)

---

- VAWA Prevention Programming - Must have prevention and awareness programming for all incoming students and new employees which includes:
  - Definitions of VAWA crimes
  - Consent
  - A description of bystander intervention and information on risk reduction
  - A description of ongoing prevention and awareness campaigns
- Procedures for discipline re VAWA Crimes – Must include:
  - Steps, anticipated timelines, and decision-making process
  - Standard of evidence
  - Possible sanctions
  - Protective measures

## Remember your Clery obligations (2 of 3)

---

- Proceedings for VAWA Crimes:
  - *General* - Must be prompt, fair, and impartial
  - *Training of officials* - Must "[b]e conducted by officials who, at a minimum, receive annual training on the issues related to dating violence, domestic violence, sexual assault, and stalking and on how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability."
  - *Equal presence of others* - Must "[p]rovide the accuser and the accused with the same opportunities to have others present during any institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice"
  - *Limitations on advisor participation* - Must "[n]ot limit the choice of advisor or presence for either the accuser or the accused in any meeting or institutional disciplinary proceeding; however, the institution 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."
  - *Simultaneous notification* - Must require simultaneous notification in writing to both the accuser and the accused of result of disciplinary proceeding, procedures for appeal, change to results, and when results become final



## Remember your Clery obligations (3 of 3)

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- Notice to "victims" of procedures to follow for VAWA crimes:
  - Importance of preserving evidence
  - "Options about the involvement of law enforcement and campus authorities, including notification of the victim's option to—
    - Notify proper law enforcement authorities, including on-campus and local police;
    - Be assisted by campus authorities in notifying law enforcement authorities if the victim so chooses; and
    - Decline to notify such authorities"
  - "Where applicable, the rights of victims and the institution's responsibilities for orders of protection, "no-contact" orders, restraining orders, or similar lawful orders issued by a criminal, civil, or tribal court or by the institution"

# Recipient's Response to Sex Discrimination – 106.44, p. 33888

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- Recipient with knowledge of conduct that reasonably may constitute sex discrimination in its education program or activity must respond promptly and effectively
- Who has a responsibility to notify the Title IX Coordinator when they have "information about conduct that reasonably may constitute sex discrimination?"
  - Non-confidential employees who have authority to institute corrective measures on behalf of the recipient
  - Non-confidential employees who have responsibility for administrative leadership, teaching, or advising in the recipient's education program or activity
  - \*\*For all other non-confidential employees – must either 1) notify the Title IX Coordinator or Provide the contact information of the Title IX Coordinator and provide information about how to make a complaint of sex discrimination

# Regular Process versus Heightened Procedures (106.45 versus 106.46)

- You'll hear us refer to these numbers a lot in the next section and future trainings - two separate sections within the regulations
- Preamble, p. 33633: "Section 106.45 of these final regulations specifies grievance procedures for the prompt and equitable resolution of complaints of sex discrimination generally, while [section] 106.46 specifies further grievance procedures for the prompt and equitable resolution of complaints of sex-based harassment involving a student party in a postsecondary institution."
- 106.45: The decisionmaker **may** be the same person as the Title IX Coordinator or investigator.
- 106.46 - Can you have the same person? SHOULD you have the same person?
  - Talk to legal counsel about interpretation

## Grievance Procedures – Big Picture

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For **PRIVATE** institutions within the 6th Circuit:

- Single investigator model can be used for:
  - **All cases involving sex discrimination, regardless of party status (106.45)**
    - Remember – the decisionmaker must have the opportunity to question parties and witnesses to adequately assess credibility to the extent credibility is both in dispute and relevant
    - Cannot have a separate decisionmaker that reviews the investigation report and issues a decision.
    - If you have a separate decisionmaker, there must be an opportunity to question in order to assess credibility
  - **All cases involving sex-based harassment if the parties are NOT students (106.46(a))**

# Which Grievance Process Applies? (Assuming Jurisdiction)

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- Are you a postsecondary institution?
  - If yes: Go to next question.
  - If no: Regular (106.45) applies.
- Is one of the parties a student?
  - If yes: Go to next question.
  - If no: Regular (106.45) applies.
- Do the allegations include sex-based harassment?
  - If yes: Regular (106.45) + (Heightened) 106.46 apply.
  - If no: Regular (106.45) applies.

## Who can file a complaint? 106.45(a)(2)

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- Applies only to respondent individuals (not respondent institution)
- Sex-Based Harassment complaints can be filed by:
  - Complainant,
  - Parent/guardian or other authorized legal representative with the legal right to act on behalf of a complainant
  - Title IX Coordinator
- Sex Discrimination (non SBH) complaints can be filed by:
  - All of the above, plus any student or employee
  - Any other person who was participating or attempting to participate in the institution's education program or activity at the time of the alleged sex discrimination

## Other Notable Features of the Regular (106.45) Process

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- Must provide notice to parties if deadlines are delayed for various stages of the process
- If you have different procedures for different situations, you must explain this
- Must provide notice of allegations to the parties - but this notice includes less information than 2020 regulations require (see sample language in Resource Guide)
- All dismissal is discretionary - and you must offer an appeal process (see sample language in Resource Guide)
- Must provide evidence or description of evidence (but they can still see evidence upon request) for party's response ("reasonable opportunity")
- Prevent unauthorized disclosure of evidence

# Investigator as Decision-Maker in Regular Process (106.45)

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- Decision-maker must question parties and witnesses to assess credibility to the extent credibility is in dispute and relevant
- Simplified requirements for written determination
- Appeals must be comparable to other procedures
- Your policy must describe sanctions and supportive measures



# No Advisors Required Under Regular Process (106.45)

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- 106.45 does not require nor prohibit advisors
- Clery Act still requires advisor of choice in situations involving sexual assault, dating violence, domestic violence, and stalking
  - Ex: allegation of stalking between employees

## Considerations for Regular Process (106.45)

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- Think about your current procedures handling discrimination cases
- Do you want to carve out sex discrimination under Title IX or update a separate policy to include the requirements of the 2024 Title IX regulations?
- Does it make sense to have one process for 106.45 and 106.46 cases?
  - Might simplify things to have one process
  - Employees and students would be subjected to the same process, but
  - It will need to comply with greater procedural requirements of 106.46
  - Will need to comply with CBA, employee policies, faculty policies
  - Consider resources if you use a live hearing to resolve complaints of sex-based harassment – can you do the same for all sex discrimination complaints?

## Features of Heightened Process (106.46)

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- Notice of allegations is more robust; may delay provision of notice due to safety concerns
- Parties are entitled to advisor of choice
- Parties get notice/appeal for discretionary dismissal
- Discretion to determine whether parties may present expert witnesses - must apply equally to both parties
- Evidence or summary plus access to evidence

# Heightened Process Credibility Procedures (106.46(f))

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- **Asynchronous process** – Parties submit questions, decision-maker asks questions and provides recording/transcript, parties submit follow-up questions, repeat
  - Investigator is permitted to conduct this process
- **Live Hearing** -
  - **Hearing Officer Led Process** – Decision-maker asks relevant, permissible questions submitted by parties
  - **Cross-Examination Process** (current procedures) – Advisors and decision-maker ask questions

## Non-Participation - 106.46(f)(4)

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- A decisionmaker may choose to place less or no weight upon statements by a party or witness who refuses to respond to questions deemed relevant and not impermissible.
- The decisionmaker must not draw an inference about whether sex-based harassment occurred based solely on a party's or witness's refusal to respond to such questions.

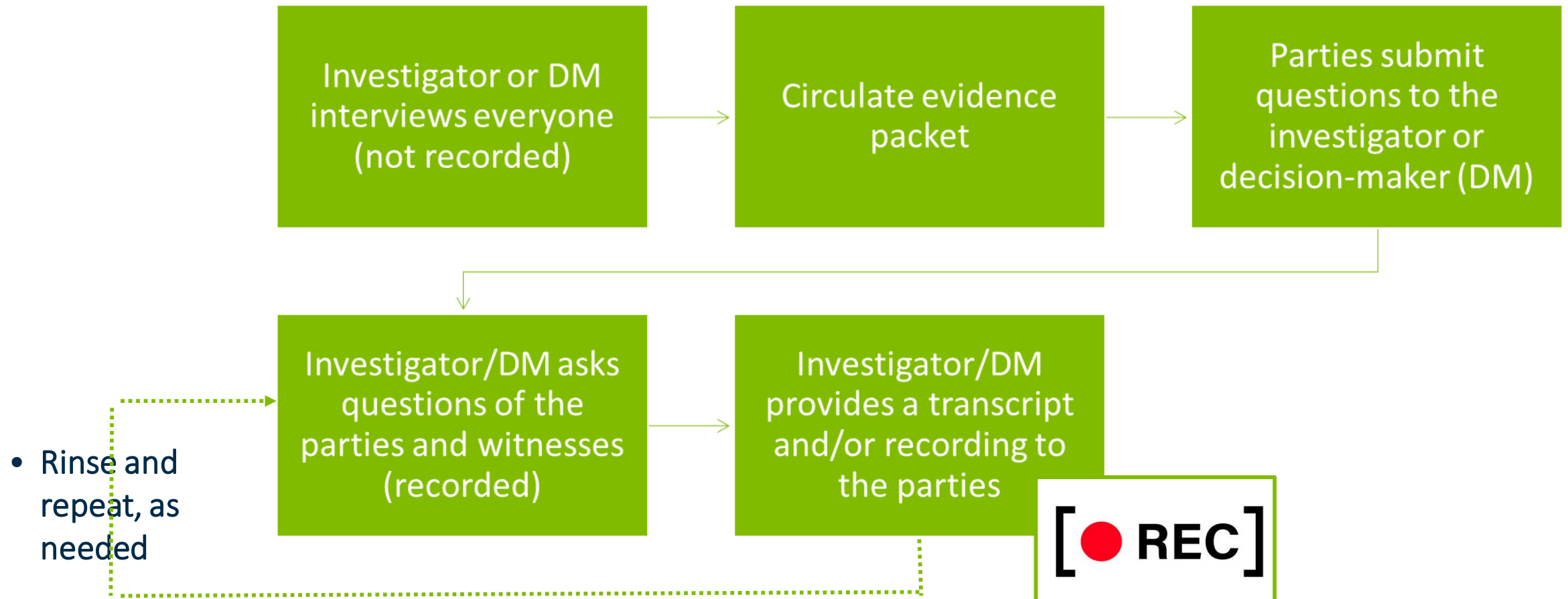
## Asynchronous Process 106.46(f)(1)(i)

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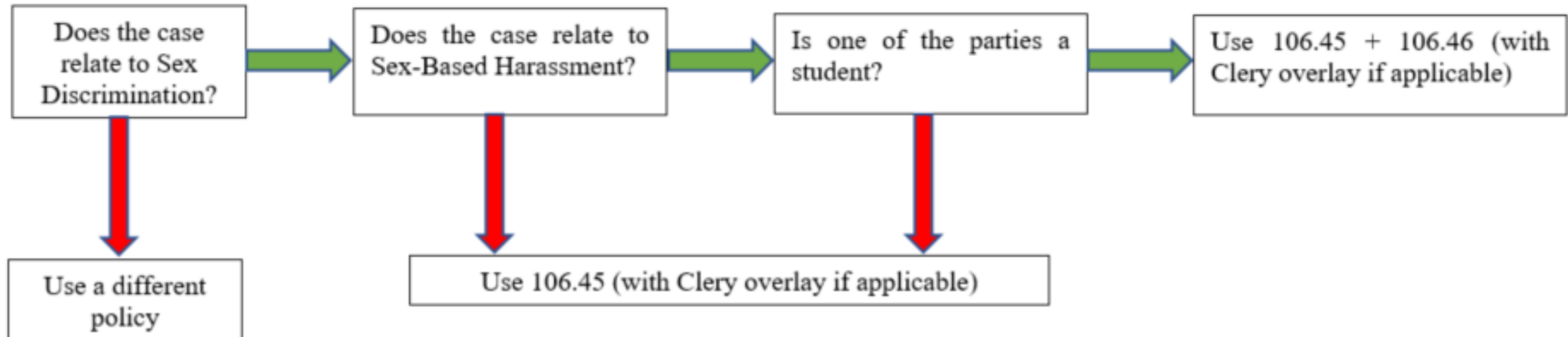
- Must allow the investigator or decisionmaker to ask questions during individual meetings
- Must allow parties to propose questions to be asked during the individual meetings
- Must provide an audio/audio visual recording to each party – then allow a reasonable opportunity for follow-up questions
  - Possible to do the first "individual meeting" during the investigation and follow-up meetings after the evidence is shared
  - Should this happen AFTER the evidence/summary of evidence has been shared?



## Consider this sequence - Asynchronous



# Which Procedures Apply?



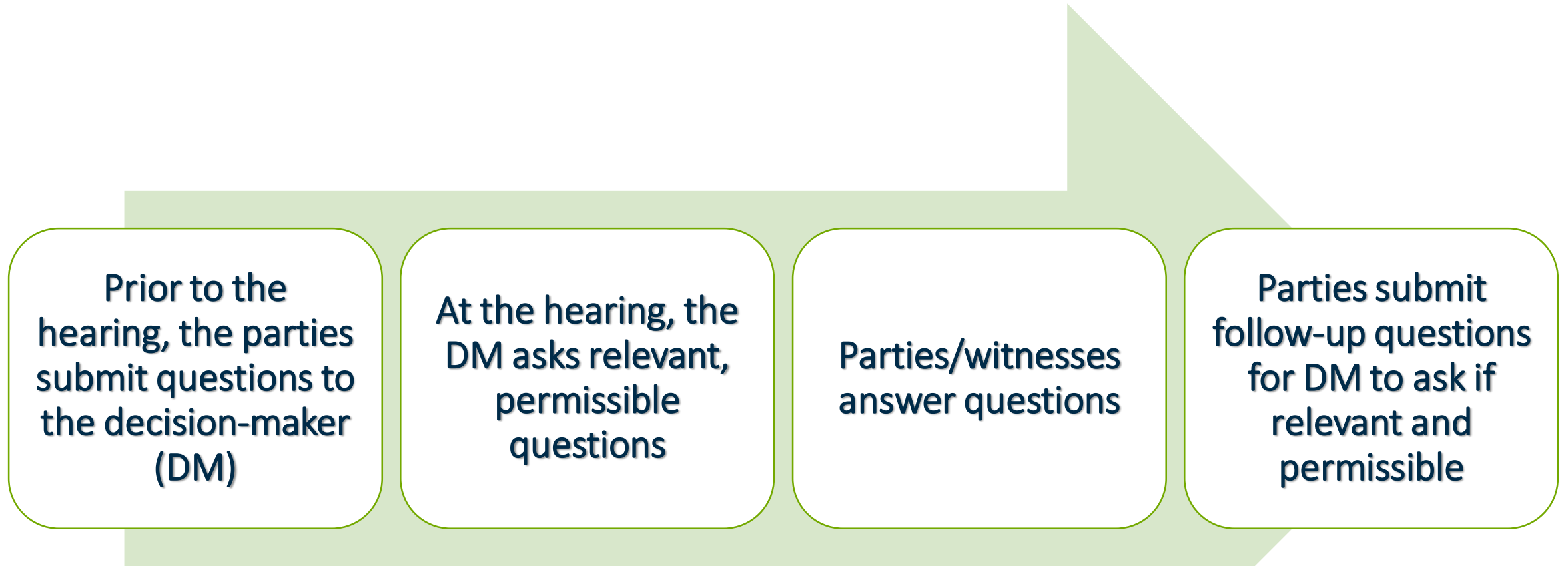


## Hearing Officer Led Process 106.46(f)(1)(ii)(A)

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- The decisionmaker asks all the questions
  - The decisionmaker can be the investigator?
- Allows each party to propose questions to be asked of other parties and witnesses
  - "Pass the list of questions-type hearing"
- Questions must be relevant and not otherwise impermissible
- Questions cannot be unclear or harassing
  - DM must give parties an opportunity to revise such questions
- Follow-up questions permitted

# Consider this sequence – Hearing Officer Led Process



Prior to the hearing, the parties submit questions to the decision-maker (DM)

At the hearing, the DM asks relevant, permissible questions

Parties/witnesses answer questions

Parties submit follow-up questions for DM to ask if relevant and permissible

# Considerations for Hearing Officer Led Process 106.46

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- Public v. Private?
  - This option is not compliant with *Baum*
- Will the parties feel heard without advisor questions?
- Necessary to train decisionmakers to make a record of their decisions re: questions
  - What is the process for acknowledging questions proposed by a party that will not be asked?
  - How will decisionmakers explain their thought process when re-phrasing a question

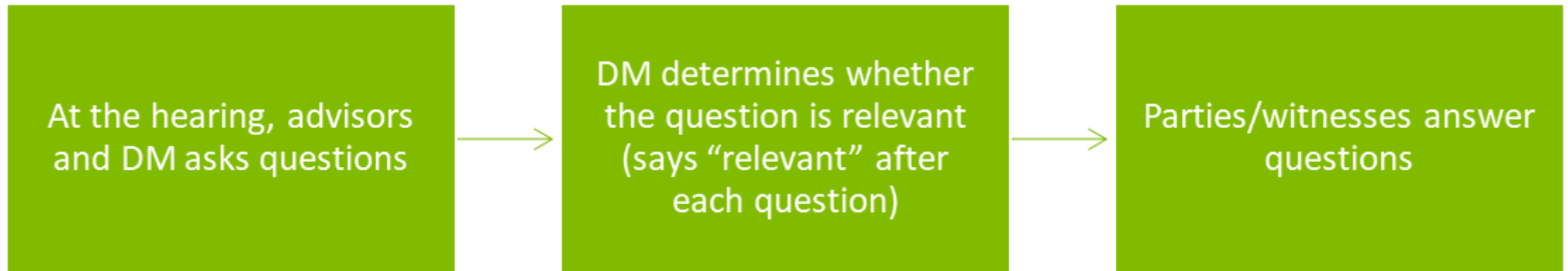
## Cross-Examination Process 106.46(f)(1)(ii)(B)

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- Think of your current hearing process under the 2020 regs
- Questions asked by a decisionmaker and advisors
  - Must appoint advisor if party does not have one
- Questions must be relevant and not otherwise impermissible
- Questions cannot be unclear or harassing
  - DM must give parties an opportunity to revise such questions
- Must determine relevance "prior to the question being posed"

# Consider this sequence – Cross-Examination Process

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# Considerations for Cross-Examination Hearing (106.46)

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- Only option for public institutions in the 6th Circuit (*Baum*)
- Risk of re-traumatizing parties?
  - Consider the experience of your Title IX office since August 14, 2020
- Consider the resources available to you
- Necessary to train decisionmakers to make real-time relevance determinations

# Relevant Evidence

## 2020 Regulations (1 of 5)

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- Per 34 C.F.R. 106. 45(b)(6)(i):
  - “Only **relevant** cross-examination and other questions may be asked of a party or witness.”
  - “[C]ross examination must focus only on questions that are **relevant** to the allegations in dispute.” (30319)



## 2020 Regulations (2 of 5)

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- Decisions regarding relevancy do not have to be lengthy or complicated:
- “... it is sufficient... to explain that a question is irrelevant because it calls for prior sexual behavior information without meeting one of the two exceptions, or because the question asks about a detail that is not probative of any material fact concerning the allegations.” (30343)

## 2020 Regulations (3 of 5)

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- Under the [clear and convincing](#) standard of evidence:
  - Does this help me in deciding if a fact is highly probable to be true?
  - Does it make it more or less probable?
  - Why or why not?
- If it doesn't move this dial: likely not relevant.

## 2020 Regulations (4 of 5)

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- Under the [preponderance of the evidence](#) standard:
- Does this help me in deciding if there was more likely than not a violation?
- Does it make it more or less likely?
- Why or why not?
  
- If it doesn't move this dial: likely not relevant.

## 2020 Regulations (5 of 5)

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- The Department has determined that recipients must consider relevant evidence with the following exceptions:
  - Complainant's sexual behavior (except for two narrow exceptions)
  - information protected by a legal privilege
  - party's treatment records (absent voluntary written waiver by the party) (30337)

## 2024 Regulations – 106.2

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- *Relevant* means related to the allegations of sex discrimination under investigation as part of the grievance procedures under [§ 106.45](#), and if applicable [§ 106.46](#). Questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred, and evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred.

# 2024 Regulations Exclusion of Evidence – 106.45 (b)(7)

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- Exclude the following types of evidence, and questions seeking that evidence, as impermissible regardless of whether they are relevant:
  - protected by a legal privilege unless waived
  - Treatment records unless voluntary & written consent
  - Evidence that relates to the **complainant's** *sexual interests or prior sexual conduct*, **unless** evidence about the complainant's prior sexual conduct is offered to **prove that someone other than the respondent** committed the alleged conduct or is evidence about specific incidents of the complainant's prior sexual conduct with the respondent that **is offered to prove consent** to the alleged sex-based harassment.

# Being Impartial and Avoiding Bias, Conflict of Interest, and Prejudgment of Facts

# 2020 Regulations – Bias/Conflict



## Impartiality and Avoiding Bias, Conflict of Interest and Prejudgment of Facts 1 of 2

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Section 106.45 **requires** that Title IX Coordinators (and investigators, decision-makers, informal resolution officers and appeals officers)

- be free from **conflict of interest, bias,** and
- be trained **to serve impartially** and **without prejudging facts.**

(30053)

## Impartiality and Avoiding Bias, Conflict of Interest and Prejudgment of Facts 2 of 2

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- We will discuss each of these individually and provide examples, but some of the factors for each overlap.
- For example, being impartial is greatly aided by not pre-judging facts.

(30249-30257; 30496)

# Impartiality

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- Be neutral
- Do not be partial to a complainant or a respondent, or complainants and respondents generally
- Do not judge: memory is fallible [and it's contrary to your neutral role] (30323)

## Bias: Concerns raised in comments in preamble

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- Neutrality of paid staff in Title IX positions
- Institutional history and “cover ups”
- Tweets and public comments
- Identifying as a feminist

## Perceived v. Actual Bias

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- Both can lead to the same perception (30252)
- On appeal of decisions, the Department requires the bias “that could affect the outcome of the matter”

# How the Department tried to prevent bias

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No single-investigator model (34 C.F.R. 106.45(b)(7)(i)):

- Decision-maker (or makers if a panel) must not have been the same person who served as the Title IX Coordinator or investigator (30367)
- Separating the roles protects both parties because the decision-maker may not have improperly gleaned information from the investigation that isn't relevant that an investigator might (30370)
- The institution may consider external or internal investigator or decision-maker (30370)

# Bias: Objective Rules and Discretion 1 of 2

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“[R]ecipients *should* have objective rules for determining when an adjudicator (or Title IX Coordinator, investigator, or person who facilitates an informal resolution) is biased, and the Department leaves recipients discretion to decide how best to implement the prohibition on conflicts of interest and bias...” (30250)

# Bias: Objective Rules and Discretion 2 of 2

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- **Discretionary**: Recipients have the discretion to have a process to raise bias during the investigation.
- **Mandatory**: Basis for appeal of decision-maker's determination per 34 C.F.R. 106.45(b)(8)(i)(C).



## Conflict of Interest: Concerns raised in comments in preamble

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- Financial and reputational interests of Title IX employee aligns with institution
- Past advocacy for a survivor's group
- Past advocacy for a respondent's group

# Preamble Discussion on Bias and Conflict of Interest 1 of 3

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- Final regulations “leave recipients flexibility to use their own employees, or to outsource Title IX investigation and adjudication functions, and the Department encourages recipients to pursue alternatives to the inherent difficulties that arise when a recipient’s own employees are expected to perform functions free from conflicts of interest and bias.” (30251)

## Preamble Discussion on Bias and Conflict of Interest 2 of 3

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- No *per se* prohibited conflicts of interest in using employees or administrative staff
  - including supervisory hierarchies (but see portion about decision-makers and Title IX Coordinator as supervisor)
- No *per se* violations for conflict of interest or bias for professional experiences or affiliations of decision-makers and other roles in the grievance process

(30352-30353)

# Preamble Discussion on Bias and Conflict of Interest 3 of 3

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- Example: it is not a *per se* bias or conflict of interest to hire professionals with histories of working in the field of sexual violence (30252)
- Cautions against using generalizations to identify bias and conflict of interest and instead recommends using a reasonable-person test to determine whether bias exists.

## Example of Unreasonable Conclusion that Bias Exists

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- “[F]or example, **assuming** that all self-professed **feminists**, or self-described **survivors**, are biased against men, or that a **male** is incapable of being sensitive to women, or that prior work as a **victim advocate**, or as a **defense attorney**, renders the person biased for or against complainants or respondents” is **unreasonable** (30252)

## Training, Bias, and Past Professional Experience

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This required training (that you are sitting in right now) can help protect against disqualifying someone with prior professional experience

(30252)

## Department: Review of Outcomes Alone Does Not Show Bias

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- Cautioned parties and recipients from concluding bias or possible bias “based solely on the outcomes of grievance processes decided under the final regulations.”
- Explained: the “mere fact that a certain number of outcomes result in determinations of responsibility, or non-responsibility, does not necessarily indicate bias.” (30252)

## Examples of Bias

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- An investigator used to supervise one of the parties;
- Information “gleaned” by the investigator is shared with the decision-maker outside the investigation report (in meetings to discuss pending cases, in passing while at work, etc.)



# Avoiding Prejudgment of Facts at Issue

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A good way to ensure impartiality and avoid bias:

- Keep an open mind and actively listen
- Each case is unique and different

# 2024 Regulations

# Bias & Conflict of Interest

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- 106.45(b)(2)
  - Any person designated as a Title IX Coordinator, investigator, decision maker, not have a conflict of interest or bias for or against Complainants or respondents generally or for an individual Complainant or Respondent
  - The decision maker may be the same person as the Title IX Coordinator or Investigator

## Anti-Bias in the 2024 Regulations

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- Treat Complainant and Respondent equally 106.45(b)(1)
- Presumption of non-responsibility 106.45(b)(3)
- Protect privacy of parties and witnesses 106.45(b)(5)
- Objective evaluation of evidence; and credibility cannot be determined based on role in the process as Complainant, Respondent, or witness. 106.45(b)(6)
- Required training on how to serve impartially, avoid prejudgment of the facts, avoid conflicts of interest, avoid bias. 106.8(d)

## Predetermination

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- Predetermination can lead to confirmation bias
- Anticipate that the last piece of evidence is what will make the case completely clear
- Trying to decide a case based on what's best for the institution creates risk
- Following your process and making a decision based on the evidence minimizes risk and is compliant with the law

# Recordkeeping

# 2020 Recordkeeping

## § 106.45(b)(10)

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- TIX Coordinator will want to develop a process for required recordkeeping, including:
  - Maintaining all investigatory and appeal records including recording /transcript of a hearing, disciplinary sanctions, remedies, for a period of seven years
  - All informal resolutions and the result
  - Collecting and publicly posting on its website **all** materials used to train TIX Team

# 2024 Recordkeeping

## § 106.8(f)

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- Keep the following records for 7 Years
  - For each complaint of sex discrimination, records documenting the informal resolution process or the grievance procedures under either 106.45 or .46 and the result.
  - For each notification the Title IX Coordinator receives of information about conduct that reasonably may constitute sex discrimination under Title IX and records regarding how the recipient met its obligations
  - All materials used to provide training under [paragraph \(d\)](#) of this section.
    - A recipient must make these training materials available upon request for inspection by members of the public.



Thank You

Bricker   
Graydon