



Title IX of the Amendments of 1972: 2020 Regulation

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In November of 2018, the Office for Civil Rights (OCR) in the Department of Education (ED) released proposed changes to title 34 of the Code of Federal Regulations part 106. After an extensive submission, review, and response period with over 100,000 submitted comments, OCR posted the final regulation on May 6, 2020. For institutions of higher education receiving federal funds, this means evaluating policies, procedures, and training relating to complaints of sex discrimination and aligning them with the new regulation. The new federal regulation goes into effect on August 14, 2020. This paper provides a summary of changes made to 34 CFR part 106.

Student Conduct Practice and Educational Mission

As student conduct professionals evaluate the changes to title 34, many questions arise regarding staying true to an educational mission and the foundation of student conduct work. Process is important. Compliance with federal and state law binds that process along with applicable case law. This has been the case for decades. In the midst of that, student conduct professionals have found ways to continue to educate students, to help students make values-based decisions, to help students grow, and modify how they engage with others. Readers will find that parts of the regulation overlap with fundamental ethics and practices as outlined by ASCA (n.d.), including principles of: confidentiality; truthfulness in information provided to parties and campus partners; impartiality avoiding conflicts of interest; training; and more. In other ways, student conduct professionals are tasked with weaving student conduct principles into their policy and practice. Readers are encouraged to consider the educational mission and to remind others of that mission. This will not always be easy, but will ultimately serve students to a better end.

Philosophy of Changes and Application

From 1997 to date, there has been an ongoing interchange between the U.S. Department of Education (ED) and educational entities regarding the purview of Title IX as it relates to sexual harassment. This started with *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (1997). Since that time, guidance from the Office for Civil Rights in the ED has been updated, removed, and rewound. Student conduct and civil rights professionals in higher education have worked relentlessly to adhere to this guidance, case law, and the ever changing social landscape of the United States. Their work, nevertheless, has been met with scrutiny and criticism. In the press release announcing the codification of the new regulation, current U.S. Secretary of Education, Betsy DeVos was quoted as saying “Too many students have lost access to their education because their school inadequately responded when a student filed a complaint of sexual harassment or sexual assault....This new regulation requires schools to act in meaningful ways to support survivors of sexual

misconduct, without sacrificing important safeguards to ensure a fair and transparent process. We can and must continue to fight sexual misconduct in our nation's schools, and this rule makes certain that fight continues” (Press Office, 2020, para. 2). Ultimately, the regulation is intended to combat sexual harassment and ensure due process. While this is certainly no new concept for student conduct professionals in the wide range of student misconduct they address, it does take on a new, more rigid form, in this regulation.

Reliance on *Gebser* and *Davis*

The reader is encouraged to read *Gebser* (524 U.S. at 292) and *Davis* (526 U.S. at 640) as these cases are heavily relied upon. These seminal cases influence many aspects of the regulation including the definition of sexual harassment, jurisdiction of Title IX, and the obligation of recipients. *Gebser* related to sexual harassment by an employee. As the focus of ASCA is student conduct, more attention in this section is paid to *Davis*. Specifically, there is substantial discussion regarding the *Davis* definition of sexual harassment in the preamble of the regulation (starting on page 449 of the unofficial copy of the regulation) and the use of “and” versus the use of “or.” The ED stands by their decision to use “and” indicating they believe this assists in providing a consistent standard for recipients, but does not let recipients “off the hook” (p. 452) from addressing sexual harassment. The ED further explains that the *Davis* standard prevents recipients from chilling or restricting speech.

Accountability

The Office for Civil Rights (OCR) has chosen to follow court standards, specifically referencing *Davis*, regarding their enforcement of Title IX and will assess complaints on whether the recipient has been deliberately indifferent to a complaint. OCR asserted in the proposed regulation that if a recipient follows the regulations, they would not be found deliberately indifferent to a complaint of sex discrimination, establishing a safe harbor for recipients. The safe harbor portion of the proposed regulation, §106.44(b), was removed as discussed on page 248 in the preamble in the unofficial copy of the regulation. Instead, OCR indicates it has replaced this concept with “mandatory steps that a recipient must take as part of every response to sexual harassment” (p. 248).

In situations where an institution of higher education fails to adhere to the requirements of the regulation, there are a variety of ways that OCR can respond and hold recipients accountable for noncompliance with Title IX. One such way is to require a recipient to engage in remedial action. §106.3(a) is an added requirement in the regulation that recipients must take remedial action as indicated by the Assistant Secretary if the recipient has discriminated against a person based on sex.

While the definition of sexual harassment, as referenced below, is more limited in its scope than previously suggested through guidance by OCR, and OCR has provided ways to demonstrate an institution is not deliberately indifferent, following the expectations of the regulation will not necessarily protect an institution of higher education from litigation and action by a court. Individuals developing policy and procedures should pay close attention to all jurisdictions of accountability, which may include relevant case law, state law, and, as applicable, system policies.

State Law

Evaluations of policy and practice will need to be done within the context of existing state laws that may have different definitions or other conflicting standards. Section 106.6(h) clearly indicates that conflicts with state laws do not alleviate obligations to comply with 34 CFR §§106.30 (definitions), 106.44 (recipient’s response to sexual harassment), and 106.45 (grievance process for formal complaints of

sexual harassment). Discussions with general counsel and legislative liaisons will be a necessity for many. Where state law directly conflicts with the regulation, the regulation takes precedence. Where state law does not directly conflict, institutions will need to find ways to follow both.

Religious Exemption

Section 106.12 provides clarity on the assurance of exemption for religious organizations. The provision allows religious entities seeking assurance of their exemption to submit a written statement to the Assistant Secretary. This provision further clarifies that this assurance is not required and that a recipient may assert its exemption at the time of notification from the Department that it is under investigation for noncompliance. An assertion may be submitted at this time even if the recipient has sought assurance of exemption previously. The assertion should be submitted to the Assistant Secretary. In any situation where a recipient is submitting an assertion of exemption, the written statement should be submitted by “the highest ranking official of the institution” (34 CFR §106.12(b)) and should identify “the provisions of this part which conflict with a specific tenet of the religious organization” (34 CFR §106.12(b)).

Definitions

Throughout the regulation, there are a number of terms it is important for the reader to understand. Some of these terms are defined in section 106.30. The terms referenced in section 106.30 are: *actual knowledge*, *complainant*, *consent*, *formal complaint*, *respondent*, *sexual harassment*, and *supportive measures*. A portion of these definitions as well as some other terms are found below along with brief commentary regarding some considerations relating to each term.

Actual Knowledge: “*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” (34 CFR §106.30(a)).

Many states, systems, colleges, and universities have requirements for employees to report any disclosure of sexual harassment to their Title IX Coordinator or other authority on campus. Section 106.30 includes a statement that “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.” Institutions should be clear on who “has authority to institute corrective measures on behalf of the recipient.”

Complainant: “*Complainant* means an individual who is alleged to be the victim of conduct that could constitute sexual harassment” (34 CFR §106.30(a)).

Some institutions have moved away from using the term *complainant* in their policies as some feel this term has negative connotations. Policy makers may wish to consider the ongoing implications of this term in combination with ensuring clear communication to those bound by policy and ensuring alignment with the regulation.

Consent: While the regulation does not define consent, there is guidance regarding their expectation on this topic. “The Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault, as referenced in this section” (34 CFR §106.30(a)).

While the ED does not define consent in the regulation, policymakers need to ensure that they continue to have a definition as required by the Violence Against Women Act.

Decision-maker: Makes the decision regarding the outcome of a hearing. Makes determinations regarding relevancy of questions in cross-examination. Writes and issues written decision letter.

This definition of a decision-maker does not restrict recipients from utilizing a panel for decisions in Title IX cases so long as those involved in decision-making are not the Title IX Coordinator, did not investigate the case, and are not the appellate authority. Should a recipient choose to utilize a panel for their Title IX cases, they are encouraged to create clear roles regarding making relevancy determinations on cross-examination questions and putting the outcome in writing.

Deliberately Indifferent: A recipient is *deliberately indifferent* when its response to sexual harassment is “clearly unreasonable in light of the known circumstances” (34 CFR §106.44(a)).

This is the standard that OCR has formally adopted to evaluate whether a recipient has discriminated based on sex. Documentation of outcomes, including the dismissal of formal complaints, needs to be thorough and provide rationales that may help demonstrate that the recipient was not deliberately indifferent in its response to a formal complaint.

Formal Complaint: “*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” (34 CFR §106.30(a)). The definition further describes the multiple means by which a complainant may file a formal complaint. One of these means includes electronic submissions with a scanned physical or digital signature and other means of authentication.

While a formal complaint is required for a recipient’s Title IX response (including formal and informal resolutions), other types of complaints may result in action by a recipient. Policies and notices need to be clear about differentiating between Title IX responses and other conduct action.

Investigator: Collects statements and other evidence regarding a formal complaint of sexual harassment. Writes a summary report.

Investigators need to be trained on evaluating relevance of information to be included in the investigation summary report. The investigator may not be the Title IX Coordinator or a decision-maker in the process. Many institutions will have to rework investigation templates and formats to remove the decision-making aspects of existing investigations and ensure investigators know where the boundaries lie in writing their reports.

Parties: Complainant(s) and respondent(s) involved in a formal complaint.

While the regulation and much discussion on Title IX tends to limit an incident to one complainant and one respondent, there are situations in which there are multiple complainants and/or respondents. Understanding this is the case, institutions should be prepared to provide more than two advisors if necessary. The advisor requirement is discussed in a later section.

Postsecondary institution: Postsecondary institutions include graduate, undergraduate, professional, and vocational education as defined in §§106.2(l) - 106.2(o). See 34 CFR §106.30(b).

ASCA serves conduct administrators working for postsecondary institutions, and thus this paper focuses on implications for higher education. The regulation, however, applies to elementary and secondary schools as well. There are portions of the regulation that speak specifically to primary and secondary schools, one such instance is in reference to parental rights under FERPA. When reading the regulation, it is important to contextualize the information related to the educational setting.

Program or Activity “For the purposes of this section [§106.44], §§ 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” (34 CFR §106.44(a)). Title IX responsibilities only apply to sexual harassment occurring in an “education program or activity of the recipient against a person in the United States” (34 CFR §106.44(a)).

This definition narrows the scope of what Title IX covers. This has implications for education abroad, international branch campuses, as well as education on international waters. While obligations under Title IX do not apply to behaviors occurring outside of the United States or in situations where the sexual harassment was not a part of a program or activity of recipient, a recipient may still choose to address those behaviors, but need to be clear that this response is not part of the Title IX response. This is particularly important as a recipient has the obligation to dismiss formal complaints under Title IX if the reported behavior did not occur within the context of a program or activity.

Recipient: An educational entity receiving federal funds.

If pulling language directly from the regulation for policy, individuals are encouraged to ensure that language is consistent. The regulation consistently utilizes *recipient* throughout Title 34, if the rest of a recipient’s policy references *the University* or utilizes another term, *recipient* should be replaced with that term for clarity.

Remedies: “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” (34 CFR §106.45(b)(1)(i)).

The Merriam-Webster dictionary defines *remedy* as “something that corrects or counteracts” or “the legal means to recover a right or to prevent or obtain redress for a wrong.” It can be reasonably argued that there is no true remedy for a sexual assault; no true action that can repair the harm, though perhaps there may be remedies that restore the opportunity for a complainant to pursue their educational goals should a respondent be found responsible for sexual misconduct. If utilizing *remedies* in policy, policy makers are encouraged to ensure the meaning of this term is clear in the context of the applicable rule(s).

Respondent: “*Respondent* means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment” (34 CFR §106.30(a)).

Many institutions will likely use a broader definition of this term as the conduct allegedly perpetrated by a respondent will likely apply to more than just sexual harassment.

Sexual Harassment under Title IX: “*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
3. 'Sexual assault' as defined in 20 U.S.C. 1092(f)(6)(A)(v), 'dating violence' as 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)" (34 CFR §106.30(a)).

As referenced above, a key component of this definition is the use of "and" versus the use of "or" in the second bullet indicating that unwelcome conduct must be so severe, pervasive, "and" objectively offensive that it denies a person of equal access. Another important note is that this definition does not include reference to prohibitions on creating a hostile environment, which can be found in Title VII definitions and in prior guidance from OCR in the ED. While recipients must dismiss any complaint that falls outside of this definition under Title IX, a recipient may engage in other processes to address that conduct. Policies should be written to differentiate between sexual harassment as defined under 34 CFR §106.30 and other forms of sexual misconduct that may be addressed through other policy.

While the focus here is on student misconduct, many readers may have responsibility over employee conduct. For employees, there is additional nuance as it applies to multiple jurisdictions in managing Title VII requirements. Not only is the definition of sexual harassment broader under Title VII, but the supreme court held on June 15, 2020 in *Bostock v. Clayton County* that under the protections against discrimination based on sex, that "an employer who fires an individual merely for being gay or transgender violates Title VII. Pp.4-33" (p. 1). While OCR provided guidance in May 2016 indicating that they would interpret Title IX to provide protections for transgender students, this guidance was rescinded in 2017.

Policy makers, prevention education specialists, and conduct practitioners should be aware of the multiple jurisdictions and which definitions apply in which contexts. This may assist in helping students and employees better understand their responsibilities and the responsibilities of others. Further consideration, particularly as it relates to quid pro quo and hostile environment harassment, must be given when an individual holds the roles of student and employee, such as an employee taking continuing education classes, a resident assistant, or graduate teaching or research assistant.

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. 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." (34 CFR §106.30(a)). The definition further provides some examples of supportive measures and that the measures must be confidential "to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures" (34 CFR §106.30(a)).

Recipients are encouraged to review all existing supportive measures or other interim measures utilized throughout their institution in response to a complaint of sexual harassment. This includes evaluating interim actions by athletics, student organizations - particularly those with significant oversight or supervisions by university employees, residence life, academic colleges, and other entities on campus who have direct control over access to resources and services of the institution.

Title IX Coordinator: Individual identified by a recipient to handle that recipient's compliance with Title IX. The Title IX Coordinator receives and submits formal complaints regarding sexual harassment.

Institutions who have chosen to name their Title IX Coordinator a Title IX Officer or other variation of the term will need to ensure that they have someone with the Title IX Coordinator title. Requirements regarding the posting of this person's information shifted slightly giving recipients the option to post the Title IX Coordinator's name or title. This may assist in reducing the number of times and places contact information needs to be updated when transitions occur with who serves in that role.

What is Allowed

Prohibited Behavior: The final guidance ensures Title IX is more closely aligned with the Clery Act by adding dating violence, domestic violence, and stalking to the definition of sexual harassment. However, institutions may have prohibited behavior not contained within the 2020 Regulations such as sexual exploitation.

The 2020 Regulation clarifies that the 2017 Q&A document and the 2001 Sexual Harassment Guidance "remain the baseline against which these final regulations make further change to enforcement of Title IX obligations" (Office of Civil Rights, 2020, p. 17). Therefore, according to the Revised Sexual Harassment Guidance of 2001, gender-based discrimination remains a prohibited behavior (Office of Civil Rights, 2001).

In order to adjudicate non-sexual harassment prohibited behavior, such as sexual exploitation and gender-based discrimination, a recipient may offer a similar set of procedures for prohibited behavior excluded from Title IX. "Nothing in these final regulations prevents a recipient from addressing conduct that is outside the Department's jurisdiction due to the conduct constituting sexual harassment occurring outside the recipient's education program or activity, or occurring against a person who is not located in the United States" (Office of Civil Rights, 2020, p. 46). Additionally, a similar set of procedures may assist with offering a fair process for sexual harassment that occurred outside of the Title IX geography (such as off-campus residences or international study abroad). In order to do so, it is imperative that the recipient keep parties informed as to whether the formal complaint and subsequent procedures are governed by Title IX.

Consolidation: The recipient may consolidate formal complaints when there is more than one respondent, more than one complainant against one or more respondent, or one party against the other party where the incident arises out of the same facts or circumstances. (34 CFR § 106.45(b)(4))

Emergency Removal (Interim Suspensions): Recipients may remove students from educational programs as long as there is an individualized safety and risk analysis conducted to determine "an immediate threat to physical health or safety of any student or other individuals" (34 CFR §106.44(c)). In addition, the recipient must provide the respondent with notice and an opportunity to challenge the decision (34 CFR § 106.45(b)(3)(iii)). The recipient should determine the definition of an educational program; meaning is an "educational program" solely access to attend classes and be on campus or does it include housing, athletics, events, programs, or switching classes?

Informal Resolutions: "Improving and sustaining a healthy campus climate is a shared community responsibility that must not rest solely on the back of those targeted by incidents that leave them feeling left out in the cold (Schrage & Giacomini, 2009, p. 20)." A blend of procedural protections found in an informal resolution process recognizes the various "social, educational, and developmental needs"

(Schrage & Giacomini, 2009, p. 20) of students. In addition, being able to offer an informal resolution that recognizes multiculturalism and social justice may be enticing to a diverse campus population.

Therefore, according to the guidance, recipients may offer informal resolutions, but recipients cannot make the informal resolution a condition of continued enrollment, or deny an investigation or formal adjudication (34 CFR § 106.45(b)(9)). Informal resolutions cannot be used to facilitate employee sexual harassment of a student (34 CFR § 106.45(b)(9)(iii)).

A formal complaint must be filed to proceed with an informal resolution. Parties may commence with an informal resolution in between formal complaint and decision of responsibility in the adjudicative process. When offering a formal resolution, the recipient must provide written notification that includes: the allegation; procedures including how to resume adjudication; the right to withdraw from formal resolution; possible consequences; and record keeping (34 CFR § 106.45(b)(9)(i)). In addition, recipients must seek written agreement from all parties to participate (34 CFR § 106.45(b)(9)(ii)).

Standard of Evidence: Recipients must state the standard of evidence, which may be either preponderance or clear and convincing. The chosen standard must be applied to all sexual harassment cases, regardless of whether the respondent is a student or employee (34 CFR § 106.45(b)(1)(vii)).

Concurrent Student Conduct Charges: To avoid retaliation, the recipient should consider how to address concurrent student conduct charges that arise out of an incident with Title IX charges. 34 CFR § 106.71(a) “prohibits 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 report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX or its implementing regulations.” (p.1876)

What is Required

Timeframes: When the recipient has actual knowledge, it must respond in a manner that is prompt and not deliberately indifferent. The procedures to resolve allegations of sexual harassment must be reasonably prompt (34 CFR § 106.45(b)(1)(v)). The recipient must provide a reasonable process to temporarily delay procedures when there is good cause. Such cases include when a party, advisor or witness is absent, concurrent legal proceedings, need for language assistance, or disability accommodations (34 CFR § 106.45(b)(1)(v)).

Notice of Allegation: The recipient is required to notify the parties in writing that a formal complaint was filed (34 CFR § 106.45(b)(2)). The notification must include: the recipient’s process for resolution (informal and adjudication); sufficient details known at that time about the allegation (identification of parties, behavior alleged to violation, date and location); presumption of not responsible statement; that a determination of responsibility is made at the end of the process; that parties may have an advisor of their choosing; the right to review and inspect evidence; and the location of applicable policy(ies) that knowingly making a false statement is prohibited. Prior to the next step of the process, the recipient must provide the parties sufficient time to prepare (34 CFR § 106.45(b)(2)(B)).

Presumption of Not Responsible: A statement must be included that the respondent is presumed not responsible until a determination of responsibility is made (34 CFR § 106.45(b)(1)(iv)). The recipient can include additional statements to clarify the institution’s philosophy. For example, “The University starts by believing the complainant. At the same time, the University presumes the respondent is not responsible. Decisions of responsibility will occur at the conclusion of the grievance process, after all evidence is presented and evaluated.”

Dismissal: The recipient must investigate all formal complaints. The recipient must dismiss a formal complaint when the behavior does not constitute sexual harassment, did not occur in an educational program or activity, or did not occur in the United States (34 CFR § 106.45(b)(3)(i)). The recipient may dismiss a formal complaint at any point between the investigations and hearing if the complainant withdraws the complaint in writing, the respondent is not enrolled as a student, or there are circumstances that prevent the collection of evidence (34 CFR § 106.45(b)(3)(ii)).

When an allegation is dismissed, the recipient notifies the parties in writing and must offer an appeal on the decision. An alternate adjudicative process, such as another student conduct process, may adjudicate the incident (34 CFR § 106.45(b)(3)(iii)).

Advisors: All parties have the opportunity to be accompanied to a meeting or proceeding by an advisor of their choosing, which may be a lawyer. While the recipient cannot limit the choice of the advisor, the recipient is able to restrict an advisor's participation within the process, as long as it is applicable to both parties (34 CFR § 106.45(b)(5)(iv)). For the purpose of the hearing, the recipient must provide an advisor to a party that is without one. The advisor need not be an attorney and must be offered to the parties free of charge. (34 CFR § 106.45(b)(6)(ii))

In the event either party believes their advisor is inadequate in their responsibilities, the party can dismiss their advisor. The absence of an advisor to cross examine a party can result in a delay to the live hearing. To avoid delays, readers should consider what and how the recipient is communicating to parties and their advisors regarding the expectations of the advisor role. The impact of the following discussion points may vary with each campus:

- Particularly for victims, the hearing process can be a triggering event. Having a trauma-informed or trusted support person can be emotionally beneficial. However a support person or advocate may not have the skill set to cross examine. Is it the expectation that the advisor act in the capacity of a support person, or is the party able to obtain a victim advocate? Lastly, if an accommodation due to a disability is an advocate, does that person become the advisor or does the policy allow for a separate individual?
- The recipient is able to set expectations for behavior of the advisors. Ensure the advisor is aware of circumstances in which the investigator or decision maker can excuse the advisor from a proceeding or hearing.
- The recipient is required to communicate with the advisors upon completion of the investigative report and in preparation for the hearing (34 CFR § 106.45(b)(5)(vi-vii)). Recipients should ensure methods of communication allow for external correspondence. For instance, if the recipient typically requires authentication for students or employees to retrieve letters and documents, they may need to find an alternative way to provide that information to advisors. Further, for consistency, ensure all administrators who may communicate with parties understand the guidelines for communication with the advisors. Lastly, determine if FERPA protected information is being shared and address how to maintain compliance.

Investigation: The burden of proof and responsibility to collect evidence and reach a determination of responsibility is on the recipient and not the parties (34 CFR § 106.45(b)(5)(i)). Each party is provided equal opportunity to present evidence and witnesses, including expert witnesses (34 CFR § 106.45(b)(5)(ii)).

The recipient cannot access, consider, disclose, or otherwise use information protected under a legally recognized privilege, such as documents by physician, psychiatrist, psychologist, unless that party provides written consent (34 CFR § 106.45(b)(5)(i)).

Evidence Review: Both parties have equal opportunity to review all information collected during the investigation. Information that will be used to make a decision, as well as information that does not speak to the allegation, are to be included. Information can be presented electronically or hard copy and should be made available to the parties and their advisor for at least ten days. Parties may then submit a response to the review of evidence for the investigator to consider prior to the conclusion of the investigation. The evidence should continue to be accessible to the parties and their advisors for hearing preparation. (34 CFR § 106.45(b)(5)(vi))

Investigative Report: At the conclusion of the investigation, the investigator will prepare an investigative report that summarizes relevant evidence. “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” (34 CFR § 106.45(b)(5)(vi)). Any response submitted by a party must be considered prior to drafting the final report. A decision of responsibility cannot be determined prior to the live hearing, and therefore cannot be included in the investigative or final report. The investigative report is sent to the parties and their advisor at least ten days prior to a hearing. (34 CFR § 106.45(b)(5)(vii))

Hearing: Recipients must provide a live hearing. Hearings may occur in separate rooms with the use of technology in order for all parties to participate simultaneously. The recipient must create an audio, audiovisual recording or transcript of the hearing. The media file or transcript of the hearing must be made available to the parties for inspection and review. The decision maker is an individual tasked with making a decision regarding responsibility. The decision maker cannot be the Title IX Coordinator or investigator (34 CFR § 106.45(b)(6)(i)).

The recipient should consider whether to use an individual decision maker or a panel. An individual decision maker will provide less schedules to consider when determining the date and time of hearing. Limiting the decision maker to an individual will also make tracking and uploading training to the recipient’s website less difficult. On the other hand, a panel of decision makers will provide diversity of thought. A diversity of perspectives and lenses to see points that require clarification can create a more inclusive and insightful process. Please note, if using a panel of decision makers, consideration needs to be given as to the procedures for determining relevancy and communicating rationales.

Cross Examination: During the hearing, the recipient must allow the advisor for each party to question the other party and any witnesses. Questions must be direct, oral, and in real time. Questions must be relevant and can include challenges to credibility. Before answering a question, the decision maker must determine if each question is relevant and explain, if not deemed not relevant, why a question is excluded. If a party or witness does not participate in questioning, the decision maker must not rely on any statement of that party in reaching a determination of responsibility. The hearing officer cannot use the lack of participation as a factor in making determinations of responsibility. (34 CFR § 106.45(b)(6)(i))

Relevancy: Questions regarding prior sexual behavior are irrelevant. Exceptions include questions or evidence that prove someone other than the respondent committed the conduct, or provide evidence between the complainant and respondent that shows how consent was communicated previously (34 CFR § 106.45(b)(6)(i)).

Outcome: The decision maker must provide written notification of the determination of responsibility. Notification must be provided to all parties simultaneously (34 CFR § 106.45(b)(7)(iii)). Written notification must include the following:

- Pinpointing the allegation that would be defined as sexual harassment (34 CFR § 106.45(b)(7)(ii)(A))
- Interpretation of procedures from the formal complaint through determination, “including any notification to parties, interview with parties and witnesses, site visits, methods used to gather evidence, and the hearings held” (34 CFR § 106.45(b)(7)(ii)(B))
- “Finding of facts that support the outcome”(34 CFR § 106.45(b)(7)(ii)(C))
- A conclusion applying the policy definition (34 CFR § 106.45(b)(7)(ii)(D))
- Statement and rationale for each allegation regarding determination of responsibility, sanctions on the respondent and remedies for the complainant (34 CFR § 106.45(b)(7)(ii)(E))
- Procedures for the parties to appeal (34 CFR § 106.45(b)(7)(ii)(F))

Appeal: The recipient must offer all parties an appeal regarding determination of responsibility and dismissal of formal complaint (34 CFR § 106.45(b)(8)(i)). The recipient must provide an opportunity for the parties to provide a written statement, which can be in support of or challenging the outcome (34 CFR § 106.45(b)(8)(iii)(D))

Appeal procedures must be applied equally to all parties. Appeals can be filed “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
- 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.”(34 CFR § 106.45(b)(8)(i))

The recipient may add additional bases for appeal, which must apply to all parties, at their discretion.

All parties must be notified in writing when an appeal is filed (34 CFR § 106.45(b)(8)(iii)(A)). The decision maker for the appeal cannot be the Title IX Coordinator, investigator, or decision maker from the hearing (34 CFR § 106.45(b)(8)(iii)(B)). The outcome of the appeal is a written document that includes the results and rationale for the appeal decision (34 CFR § 106.45(b)(8)(iii)(E)). The decision must be sent simultaneously to both parties (34 CFR § 106.45(b)(8)(iii)(E)).

A decision becomes final when the parties are sent notification of outcome of appeal. If an appeal is not filed, the decision becomes final on the date a request for appeal is no longer accepted (34 CFR § 106.45(b)(7)(iii)).

Recordkeeping: The recipient must maintain records for seven years. Records that must be maintained including supportive measures, investigative reports, hearing outcome, hearing media files or transcripts, sanctions, remedies, appeal, and informal resolutions (34 CFR § 106.45(b)(10)(i-ii)).

Training: The training materials for the Title IX Coordinator, investigators, decision makers and informal resolution facilitators must be made available on the recipient’s website (34 CFR § 106.45(b)(10)(i)(D)). Training topics include:

- Definition of sexual harassment;

- Definition of educational program or activity;
- Instructions and procedures for investigations and adjudication including hearing, appeals, and informal resolution;
- How to serve impartially, avoiding prejudgment of the evidence, conflict of interest and bias;
- Technology used during live hearings;
- How to determine if a question is relevant along with rape shield protections; and
- For investigators, how to develop a fair investigative report when addressing relevancy (34 CFR § 106.45(b)(1)(iii)).

Conclusion

This document has provided some of the key elements and concepts for consideration as institutions move forward with modifying education, policy, and practice regarding Title IX as it applies to sexual harassment. This document should not be used in place of directly reading the new regulation, but has, hopefully, provided some insight into critical considerations for conduct practitioners. The following resources are tools that may assist in communicating process requirements to others and in working towards ensuring compliance with the regulation.

Resources

**Minimum Personnel Required for
Formal Process Resolution of Sexual Harassment Complaints
under Title IX of the Education Amendments of 1972 as defined by 34 CFR §106**



1 Title IX Coordinator

Responsible for compliance with Title IX, and receiving & submitting formal complaints



1 Investigator

Responsible for collecting evidence, interviewing parties and witnesses, evaluating information, & writing summary report



1 Decision Maker

Responsible for running hearing, determining relevance of cross-examination questions, & writing and sending hearing decision



1 Appellate Authority

Responsible for reviewing appeals & writing and sending appeal decision



***1 Institution Provided Advisor**

If the complainant does not have an advisor of their own

Responsible for being in alignment with and advising complainant & questioning respondent during cross examination



***1 Institution Provided Advisor**

If the respondent does not have an advisor of their own

Responsible for being in alignment with and advising respondent, & questioning complainant during cross examination

***?# Institution Provided Advisors**

If other involved parties do not have an advisor of their own

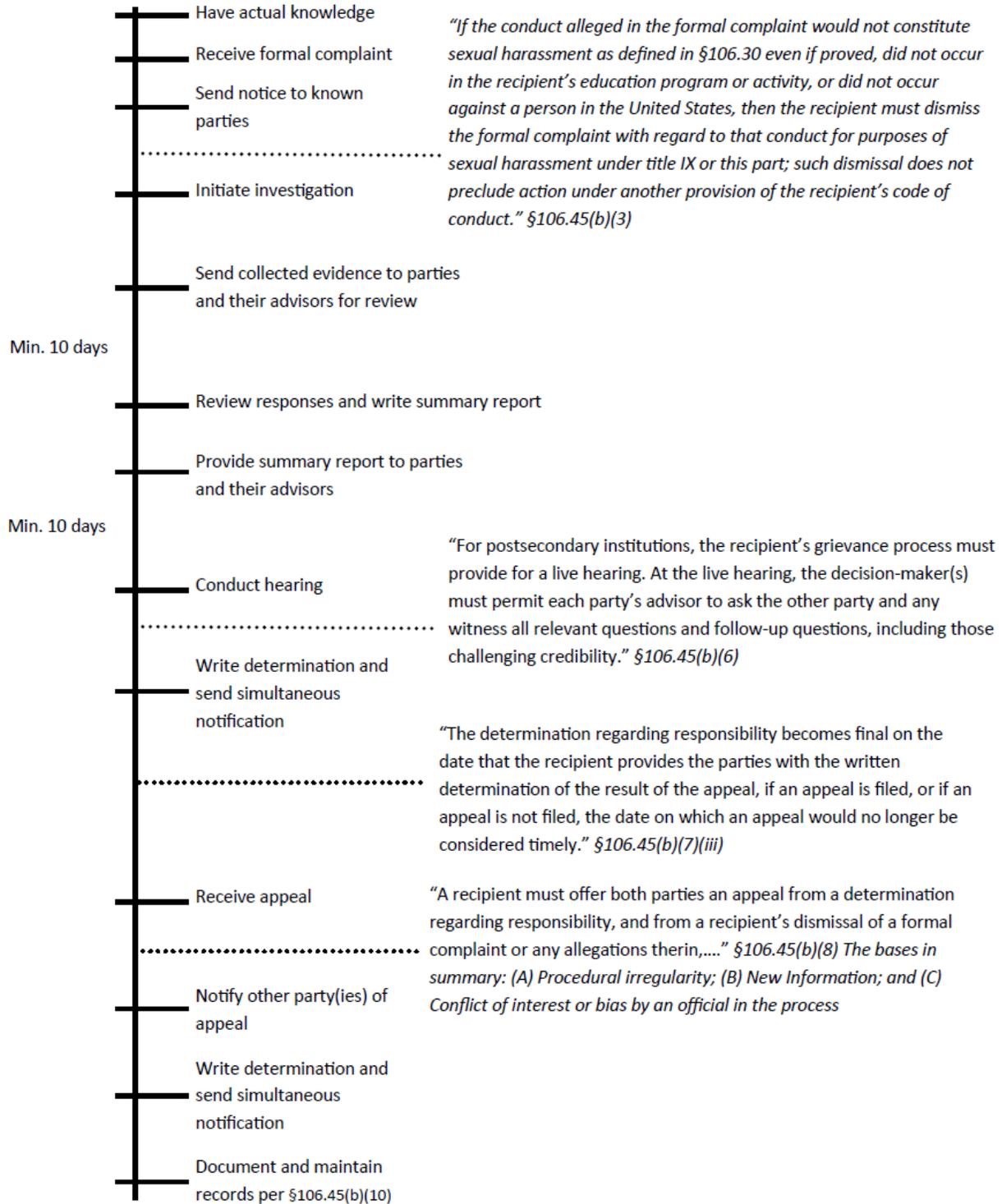
Some cases may involve multiple complainants or respondents. An example may be a situation where sexual harassment is part of an organization hazing event.



Summarized Flow of Title IX Grievance Process for Formal Complaints

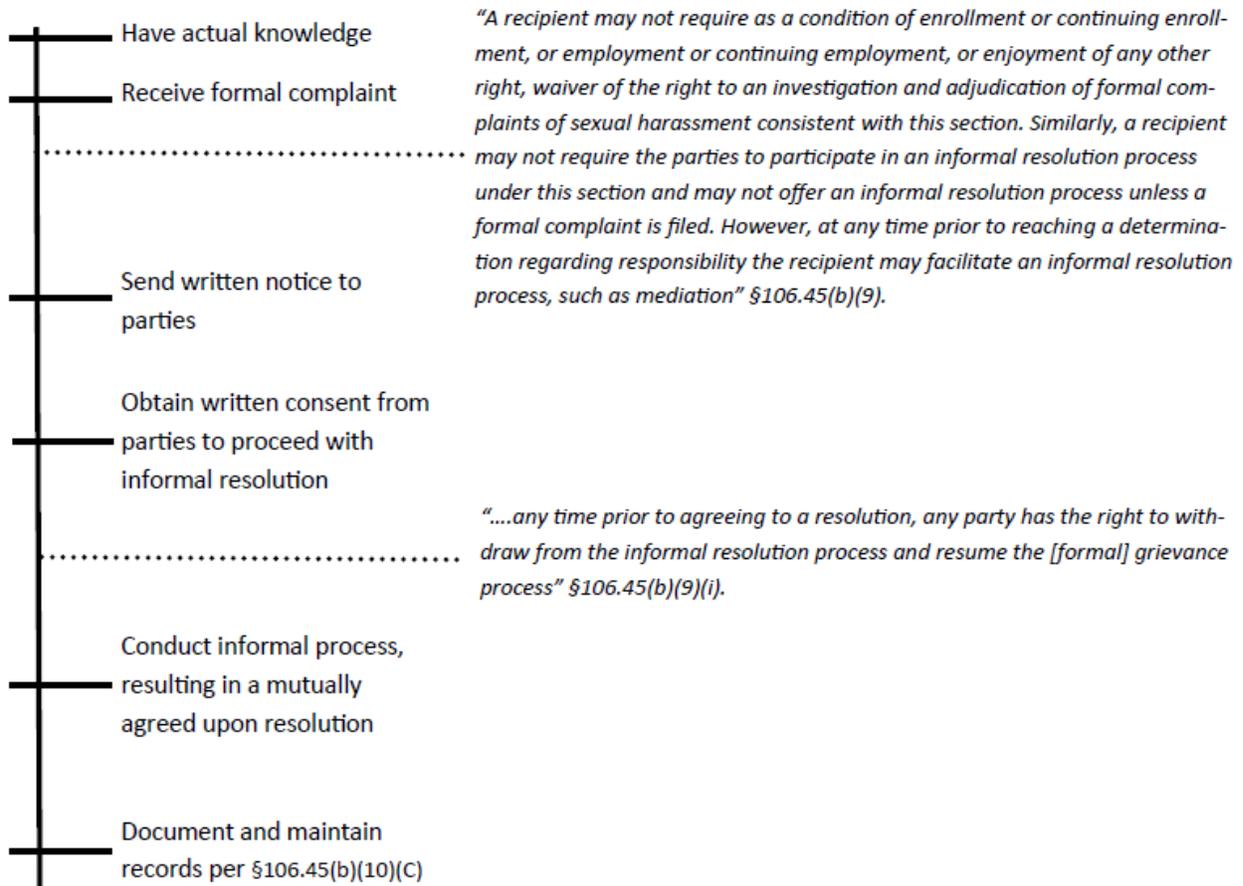
34 CFR §106.45

This diagram is not intended to be exhaustive and does not constitute a checklist



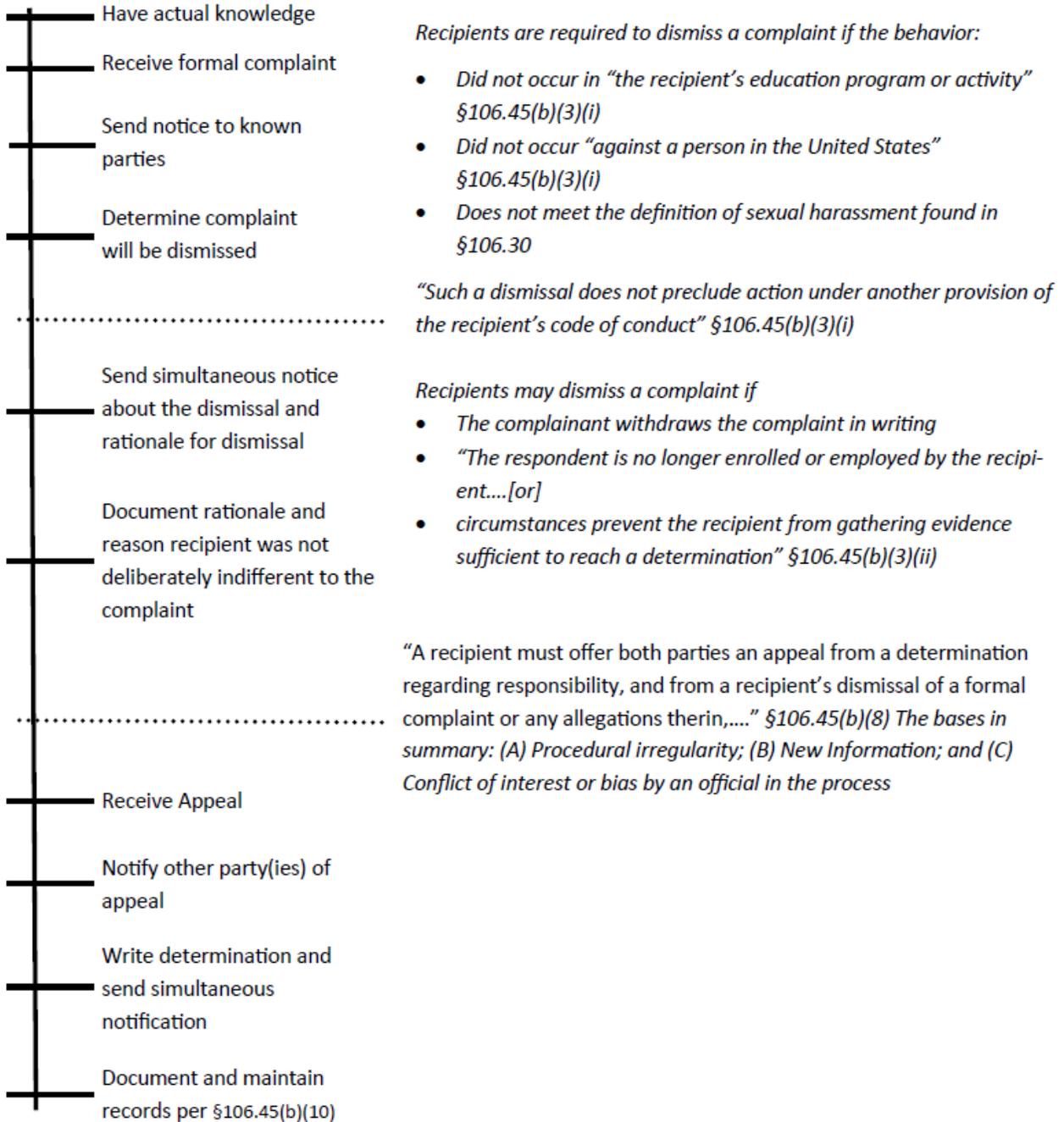
Summarized Flow of Title IX Process for Informal Resolutions 34 CFR §106.45(b)(9)

This diagram is not intended to be exhaustive and does not constitute a checklist



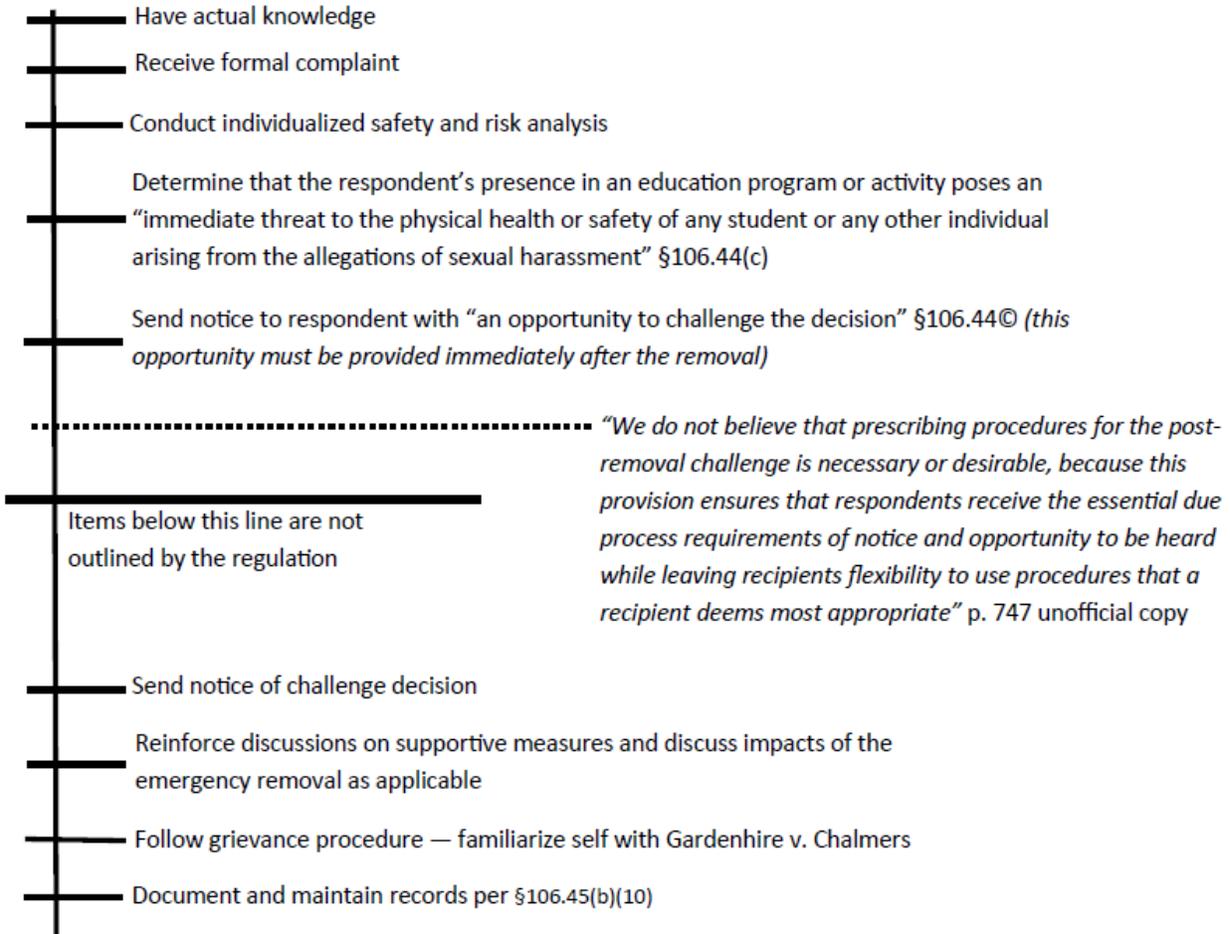
Summarized Flow of Title IX Dismissals 34 CFR §106.45(b)(9)

This diagram is not intended to be exhaustive and does not constitute a checklist



Summarized Flow of Title IX Emergency Removals (Interim Suspension) 34 CFR §106.44(c)

This diagram is not intended to be exhaustive and does not constitute a checklist



Task Checklist

ASCA has identified documents and tasks that each institution should be reviewing, revising, and or developing prior to August 14, 2020. These include:

Documents

- Initial outreach to Complainant
 - Consider how and when to send
 - Supportive measures irrespective of formal complaint
 - How to file formal complaint
- A document to provide to Complainant during initial meeting
 - Review rights and options
 - Process for filing a formal complaint
 - Provide the choice for formal complaint
- A document to explain the procedures within the process
 - Possible flow chart
 - Widely shared throughout the University
- A document to provide the Respondent during initial meeting
 - Discussing rights
 - Provide supportive measures
 - Emergency Removal and appeal process
 - Description of the process
 - Standard of evidence
 - Notice of allegation
 - Dismissal of formal complaint
- The formal complainant and associated tasks
 - Contains physical or digital signature of Complainant or Title IX Coordinator
 - Accepted in person, by mail, or email
 - Provide
 - Procedures for grievance or informal resolution process
 - List of supportive measures
 - Standard of evidence
 - Notice of allegation
 - Dismissal of formal complaint
- Notice that the University has a policy against discrimination on basis of sex
 - Title IX Coordinator contact information
 - The location of the policy
 - Widely shared throughout the University
 - A prompt and equitable resolution process
- Notification to those who have authority to institute corrective measures
 - Tracking form of irrelevant or re-worded questions used by investigator and decision maker
 - Includes rationale decisions for each question
- Hearing Outcome
 - Summary of allegation
 - Identification of prohibited behavior
 - Procedural steps from receipt of formal complaint to hearing
 - Findings of fact
 - Conclusion summarizing how the behavior is applied to the policy
 - Determination of responsibility for each allegation including a rationale
 - Disciplinary sanctions including a rationale
 - Restorative remedies including a rationale

- Appeal procedures
- Advisor expectation form (for parties and advisors)
 - Expectations of advisor
 - Procedures where advisor is included
 - Communication with an advisor
 - Behavior not allowed of advisors
 - Removal from position

Policy Items

- Update responsible employee to authorities who can take corrective action (may still have “responsible” employees, but need to define and distinguish between the two)
- Update interim measures to supportive measures
- Emergency Removal
- Definition of Sexual Harassment
- Definition of Complainant
- Definition of Respondent
- Confidentiality
- Concurrent Student Conduct violations
- False allegation
- Dismissing a formal complaint
- Definition of education program or activity
- Add remedies
- Sanctions
- Jurisdiction
- Actual knowledge
- Formal complaint vs formal notice/report
- Presumption of not responsible
- Reasonably prompt timeframes and when able to delay
- Checks for conflict of interest
- Standard of evidence
- Burden of proof
- Time frames and ability to evidence
- Protected evidence (ie medical records)
- Advisors
- Hearings procedures
- Notification of Outcome
- Appeal
- Retaliation
- Informal Resolution
- Record keeping
- Process when outside jurisdiction
- Is language legalistic or understandable by all
- Is policy in line with state laws
- Update other handbooks
 - Study Abroad
 - Employee Handbook
 - Student Handbook
 - Residence Life Handbook
 - Grievance

Tasks

- Updated campus stakeholders
 - Individuals updating policy
 - Deputy Title IX Coordinators
 - Threat assessment team
 - Individuals with authority to institute corrective action
 - President/Board of Trustee/Cabinet
 - Confidential Employees
 - Statement to campus
 - Entities who previously implemented interim measures
- Emergency Removal
 - Procedure for individuals safety and risk analysis
 - Opportunity to appeal by Respondent
- Determine staffing
 - Informal Resolution facilitator
 - Investigator
 - Decision Maker
 - Single person
 - Board
 - Advisors
 - Appeal authority
- Training
 - Positions
 - Title IX Coordinator
 - Deputy Title IX Coordinator
 - Investigator
 - Decision Maker
 - Advisor offered by the University
 - Appeal authority
 - Informal Resolution facilitator
 - Logistics
 - Who will facilitate
 - Length of training
 - When to occur
 - In person or electronic
 - Topics
 - Implicit Bias
 - Prejudgment of facts
 - Conflict of interest
 - Definitions
 - Scope of educational activities/jurisdiction
 - How to conduct the process
 - Technology used within hearing
 - Relevance of questions and evidence including exceptions
- Update website
 - Contact information of Title IX Coordinator
 - How and where to file report
 - Training materials
- Updates to reporting formats
 - Any person may report, even those not connected to University
- Update case management platforms

- Update or add hearing procedures
- Technology to assist with live hearing
 - Identify
 - Purchase
 - Train
- Review and update procedures for review of documents in preparation for hearing
- Communication plan to update campus community
- Update or add Informal Resolution process
 - Identify properties off campus that are owned or controlled by a recognized student organizations

Index of May 2020 Changes to 34 CFR Section 106

This index includes the most helpful sections for the terms below, it is not an exhaustive list of every mention of each term.

Page numbers are gathered from the unofficial copy made available on May 6, 2020 of the Department of Education Final Rule on Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

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