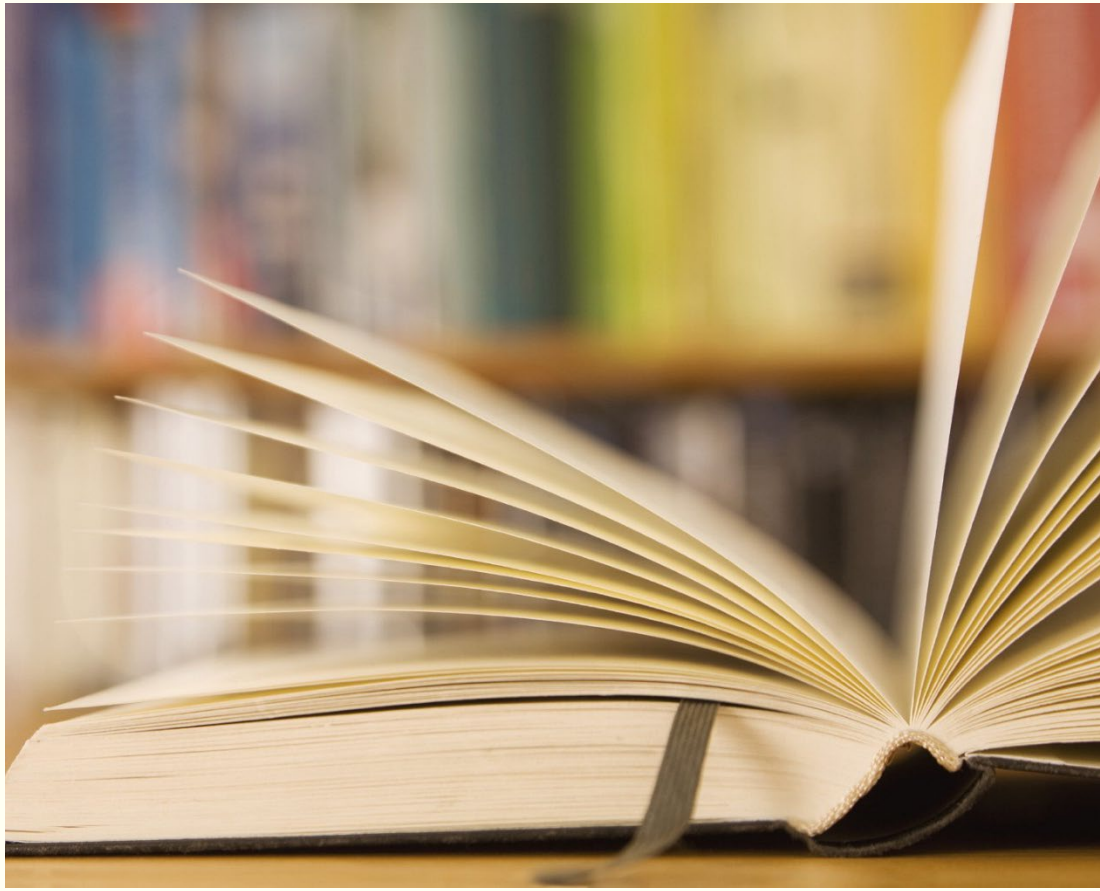
UNDERSTANDING THE NEW TITLE IX REGULATIONS

Sheilah Vance, Esq., Interim Chief Officer for EEO and Compliance; Title IX Coordinator
Office of Equal Opportunity and Institutional Compliance
Stockton University



New Regulations for Title IX of the Education Act of 1972

- Issued May 6, 2020 after Notice of Proposed Rulemaking published 11/29/18 New Title IX Regulations as Published Unofficially 5/6/2020
- 34 CFR Part 106; Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance; amending the regulations implementing Title IX of the Education Amendments of 1972 (Title IX).
- Notice and Comment period with over 124,000 comments
- Effective date August 14, 2020
- Lawsuits to enjoin the regulations filed by ACLU and several other organizations
- 7 pages of regulations (pp. 30572 - 30579) with 546 pages (30026 – 30572) of Supplementary Information, where Department of Education explained its reasoning behind regulations, summarized the comments, and responded to the comments

OCR's Stated goals & purposes of the new regulations

- "The final regulations specify how recipients of Federal financial assistance covered by Title IX, including elementary and secondary schools as well as postsecondary institutions [recipients or schools] must respond to allegations of sexual harassment consistent with Title IX's prohibition against sex discrimination."
- "These regulations are intended to effectuate Title IX's prohibition against sex discrimination by requiring recipients to address sexual harassment as a form of sex discrimination in education programs or activities."
- "The final regulations obligate recipients to respond promptly and supportively to persons alleged to be victimized by sexual harassment, resolve allegations of sexual harassment promptly and accurately under a predictable, fair grievance process that provides due process protections to alleged victims and alleged perpetrators of sexual harassment, and effectively implement remedies for victims."

- “The final regulations also clarify and modify Title IX regulatory requirements regarding remedies the Department may impose on recipients for Title IX violations, the intersection between Title IX, Constitutional protections, and other laws, the designation by each recipient of a Title IX Coordinator to address sex discrimination including sexual harassment, the dissemination of a recipient’s non-discrimination policy and contact information for a Title IX Coordinator, the adoption by recipients of grievance procedures and a grievance process, how a recipient may claim a religions exemption, and prohibition of retaliation for exercise of rights under Title IX.”

Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment (p. 25)

- *Cannon v. U. of Chicago*, 441 US 677, 717 (1979): judicially implied private right of action exists under TIX
- *Franklin v. Gwinnett County Public Schools*, 503 US 60, 76 (1992) : money damages are available remedy in private lawsuit alleging a school's intentional discrimination in violation of TIX; sexual harassment and sexual abuse of a student by a teacher may mean the school itself engaged in intentional sex discrimination
- *Gebser v. Lago Vista Independent School District*, 524 US 274, 281 (1998): analyzed conditions under which a school district will be liable for money damages for an employee sexually harassing a student
- *Davis v. Monroe County Board of Education*, 526 US 629 (1999): where sexual harassment is committed by a peer rather than an employee, same standards of actual knowledge and deliberate indifference apply; crafted a definition of when sex-based conduct becomes actionable sexual harassment, defining the conduct as "so severe ,pervasive, and objectively offensive" that it denies its victims equal access to education

Three Part Framework of when a school's response to sexual harassment constitutes the school itself committing discrimination (28)

- Gebser/Davis Three Part Framework:
- Conditions that must exist to trigger a school's response obligations:
  - 1) actionable sexual harassment
  - 2) the school's actual knowledge
  - 3) Deliberate indifference liability standard evaluating the sufficiency of the school's response
- In sum:
  - 1) actionable sexual harassment
  - 2) the school's actual knowledge
  - 3) the school's deliberate indifference

- “The Department chooses to build these final regulations upon the foundation established by the Supreme Court, to provide consistency between the rubrics for judicial and administrative Enforcement of Title IX, while adapting that foundation for the administrative process, in a manner that achieves important policy objectives unique to sexual harassment in education programs or activities.” – p. 33

Role of Due Process in the Grievance Process

- No Supreme Court case on what due process means in Title IX context, although several Court of Appeals cases
- Bound by Fifth Amendment: Notice and an opportunity to be heard
- Concepts of Fundamental Fairness apply
- ED noted that 106.45 contains "ten groups of provisions that together are intended to provide a standardized framework that governs recipients' responses to formal complaints of sexual harassment under Title IX:"

Background

- First TIX regulations to address recipient's obligations regarding sexual harassment as a form of discrimination
- ED OCR previously provided regulatory guidance – 1997 Guidance, 2001 Guidance, 2011 Dear Colleague Letter, 2014 Q & A, 2017 Q & A.
- ED highlights that the similarities and differences between regulatory guidance and 2020 regulations are explained in the preamble, including the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" and "Role of Due Process in the Grievance Process" sections
- Some TIX policies and procedures that recipients have in place due to following 2001 Guidance and withdrawn 2011 DCL remain viable for recipients to adopt while complying with final regulations.
- ED: Final regulations leave recipients flexibility to choose to follow best practices and recommendations made by non-Department sources, such as "Title IX consultancy firms, legal and social science scholars, victim advocacy organizations, civil libertarians and due process advocates, and other experts."

Released documents include:

- Summary of Major Provisions of the Department's Title IX Rule and Comparison to the NPRM (Notice of Proposed Rulemaking) https://www2.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf
- Overview of the Final Regulations (three pages) https://www2.ed.gov/about/offices/list/ocr/docs/titleix-overview.pdf
- Title IX: Fact Sheet: Final Title IX Regulations (one page)
- Summary of Major Provisions of the Department of Education's Title IX Final Rule (9 pp.) https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf
- OCR Webinar: Title IX Regulations Addressing Sexual Harassment (1.11 hr.) https://www.youtube.com/watch?v=TdfT5R8ibm4&feature=youtu.be
- All on US Department of Education's Newsroom, https://www2.ed.gov/about/offices/list/ocr/newsroom.html.
- 34 CFR Part 106; Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance; amending the regulations implementing Title IX of the Education Amendments of 1972 (Title IX).

Summary of Major Provisions of the Department of Education's Title IX Final Rule (from ED Document)

- 1. Notice to the School, College, University ("Schools"): Actual Knowledge

- 2 Definition of Sexual Harassment for Title IX Purposes

- 3. Sexual Harassment Occurring in a School's "Education Program or Activity" and "in the United States"

- 4. Accessible Reporting to Title IX Coordinator

- 5. School's Mandatory Response Obligations: The Deliberate Indifference Standard

- 6. School's Mandatory Response Obligations: Defining
  - Complainant
  - Respondent
  - Formal Complaint
  - Supportive Measures

- 7. Grievance Process, General Requirements

- 8. Investigations

- 9. Hearings
- (a) Live Hearings & Cross-Examination (for Postsecondary Institutions)
- (b) Hearings are Optional, Written Questions Required (for K-12 Schools)
- (c) Rape Shield Protections for Complainants

- 10. Standard of Evidence & Written Determination

- 11. Appeals

- 12. Formal Resolution

Review of the Regulations by Section

106.8 Designation of a coordinator, dissemination of policy, and adoption of grievance procedures

- Each recipient must designate at least one employee as Title IX Coordinator (TIXC) "to coordinate its efforts to comply with its responsibilities under this part"

- Must notify others of Title IX Coordinator(s) identity and contact information: applicants for admission and employment; student, parents/guardians of elementary and secondary students; unions/professional organizations with collective bargaining or professional agreements
- Notice must include name, office address, email address, phone number

(b) Dissemination of Policy

- Notice must state recipient does not discriminate on the basis of sex in its education program or activity, including admission and employment, and that inquiries about the application of Title IX must be referred to the TIXC, Assistant Secretary for Civil Rights, or both.

(2) Publications

- Each recipient must prominently display TIXC's contact information on its website and any handbook or catalog that it makes available to persons entitled to notification under (a).

(c) Adoption of grievance procedures

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

(d) Application outside the United States

- Only applies to “sex discrimination occurring against a person in the United States.”
- Different from current; leaves out study abroad programs.

106.12 Educational institutions controlled by religious organizations

- Educational institutions seeking an exemption may submit to the Asst. Secty. (AS) a statement by the highest ranking official of the institution identifying the provisions of the regulation that conflict with a specific tenant of the religious organization.
- Institution not required to seek advance assurance from the AS to assert the exemption.
- If ED notifies an institution that it is under investigation for noncompliance and the institution wishes to assert a religious exemption, institution's highest ranking official may submit a statement to the AS identifying the provisions that conflict with a specific tenent of the religious organization

106.30 Definitions

- Actual knowledge:
  - Notice to the TIXC or “any official of the recipient who has authority to institute corrective measure on behalf of he recipient” or “to any employee of an elementary and secondary school”
  - Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge.
  - Standard not met when only official of the recipient with actual knowledge is the respondent.
  - The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measure on behalf of the recipient.
  - “Notice” as used in this paragraph includes, but is not limited to, a report of sexual harassment to the TIXC.

Complainant and Respondent

- ED seems to be telling institutions to use these definitions to identify the parties to a complaint, instead of such terms as Reporting Party and Responding Party
- Complainant: an individual who is alleged to be the victim of conduct that could constitute sexual harassment
- Respondent: an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment

Consent

- “The [AS] will not require recipients to adopt a particular definition of consent with respect to sexual assault, as referenced in this section.”
- Query—so is the institution mandated to use the Clery Act/VAWA definition?

Formal Complaint

- A document filed by a complainant or signed by the TIXC 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 [change; student has to still be enrolled]
- Where the TIXC signs a formal complaint, TIXC is not a complainant or a party under this part or 106.45, and must comply with requirements of this part, including 106.45(b)(1)(iii)

Sexual harassment

- Conduct on the basis of sex that satisfies one or more of the following:
  - 1) An employee of the recipient conditions the provision of 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
  - Sexual assault as defined in 20 USC 1092(f)(6)(A)(v) [VAWA], dating violence as defined in 34 USC 12291(a)(10), domestic violence as defined in 34 USC 12291(a)(8) or stalking as defined in 34 USC 12291(a)(30).

  - Major change from previous guidance and regulations

Supportive measures

- 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 to prevent other sexual harassment.
- Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other measures.

- The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measure.
- The TIXC is responsible for coordinating the effective implementation of supportive measures.

Elementary and secondary school

- A local educational agency (LEA) as defined by Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act, a preschool, or a private elementary or secondary school.

Postsecondary institution

- An institution of graduate higher education as defined in 106.2(1), an institution of undergraduate higher education as defined in 106.2(m), an institution of professional education as defined in 106.2(n), or an institution of vocational education as defined in 106.2(o).

106.44 Recipient's response to sexual harassment (add to Subpart D)

- (a) General response to sexual harassment
- A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.
- A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.
- For purposes of section, 106.30 and 106.45, "education program or activity" includes locations, events or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

- A recipient's response must treat complainants and respondents equitably by offering supportive measures as defined in 106.30 to a complainant, and by following a grievance process that complies with 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in 106.30, against a respondent.
- The TIXC must promptly contact the complainant to discuss the availability of supportive measures as defined in 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.
- ED may not deem a recipient to have satisfied the recipient's duty to not be deliberately indifferent under this part based on the recipient's restriction of rights under the US Constitution, including the First, Fifth, and Fourteenth Amendments

- (b) Response to a formal complaint
- Response must follow a grievance process that complies with 106.45.
- With or without a formal complaint, recipient must comply with 106.44(a).
- AS will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient, or otherwise evidence of discrimination under Title IX by the recipient, solely because the AS would have reached a different determination based on an independent weighing of the evidence.

- (c) Emergency removal
- A recipient can remove a respondent from the education program or activity on an emergency basis, provided the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.

(d) Administrative Leave

- Nothing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with 106.45. This provision may not be construed to modify any rights under Sec. 504 of the Rehab. Act or the ADA.

106.45 Grievance process for formal complaints of sexual harassment (add to subpart D as follows)

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

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

(1) Basic requirements for grievance process

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

- (ii) Require an objective evaluation of all relevant evidence – both inculpatory and exculpatory evidence – and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness

- (iii) Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.
- A recipient must ensure that TIXCs, investigators, decision-makers, and any person who facilitates a resolution process, receive training on the definition of sexual harassment in 106.30, the scope of the recipient's education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.
- A recipient must ensure that decision-makers receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition on prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section.

- A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section.
- Any materials used to train TIXCs, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.

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

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

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

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

- (viil) Include the procedures and permissible bases for the complainant and respondent to appeal

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

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

(2) Notice of allegations

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

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

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

(3) Dismissal of a formal complaint

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

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

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

(4) Consolidation of formal complaints

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

(5) Investigation of a formal complaint

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

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

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

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

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

- (vi) Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding the responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to the conclusion of the investigation.
- Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination; and

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

(6) Hearings

- (i) For postsecondary institutions, the recipient's grievance process must provide for a live hearing. At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings. At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions.
- Only relevant cross examination and other questions may be asked of a party or witness. Before a complainant, respondent or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.

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

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

- If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witnesses' absence from the live hearing or refusal to answer cross-examination or other questions.

- Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipients, discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other. Recipients must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

- (ii) For elementary and secondary schools, and other recipients that are not postsecondary institutions, the recipient's grievance process may, but need not, provide for a hearing.
- With or without a hearing, after the recipient has sent the investigative report to the parties pursuant to (b)(5)(vii) of this section and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to
  - Submit written, relevant questions that a party wants asked of any party or witness,
  - Provide each party with answers,
  - And allow for additional, limited follow-up questions from each party.

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

(7) Determination regarding responsibility

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

- (ii) The written determination must include—
  - A) Identification of the allegations potentially constituting sexual harassment as defined in 106.30
  - B) A description of the procedural steps taken from the recipient of the formal complaint through determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
  - C) Findings of fact supporting the determination;
  - D) Conclusions regarding the application of the recipient's code of conduct to the facts;
  - E) A statement of, and rationale or, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and
  - F) The recipient's procedures and permissible bases for the complainant and respondent to appeal.

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

8) Appeals

- (i) A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:
  - A) Procedural irregularity that affected the outcome of the matter;
  - B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
  - C) The TIXC, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

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

- (iii) As to all appeals, the recipient must:
  - A) Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
  - B) Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the TIXC;
  - C) Ensure that the decision-maker(s) for the appeal complies with the standards set forth in (b)(1)(iii) of this section;
  - D) Give both parties a reasonable, equal opportunity to submit a written statement in support of or challenging the outcome;
  - E) Issue a written decision describing the result of the appeal and the rationale for the result; and
  - F) Provide the written decision simultaneously to both parties.

(9) Informal Resolution

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

- (i) Provides to the parties a written notice disclosing: the allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;
- (ii) Obtains the parties' voluntary, written consent to the informal resolution process; and
- (iii) Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

(10) Recordkeeping

- (i) A recipient must maintain for seven years, records of—
  - A) Each sexual harassment investigation, including any determination regarding responsibility and any audio or audiovisual recording or transcript required under (b)(6)(i), any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity;
  - B) Any appeal and the result;
  - C) Any informal resolution and the result;
  - D) All materials used to train TIXCs, investigators, decision-makers, and any person who facilitates an informal resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website, the recipient must make these materials available upon request for inspection by members of the public.

- (ii) For each response required under 106,44, a recipient must create, and maintain for seven years, records of any actions, including supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity. If a recipient does not provide a complaint with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.

(12) Add 106.46 to subpart D as follows:

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

Subpart F – Retaliation

- 106.71 Retaliation
- (a) *Retaliation prohibited*. No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the individual has made a report or compliant, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part. Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX of this part, constitutes retaliation. The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal compliant of sexual harassment, any complainant, any individual who has reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 USC 1233g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under 106.8©

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

- (2) Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.
- 106.72 Severability
- If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart of the application of its provisions to any person, act or practice shall not be affected thereby.

Subpart G -- Procedures

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

Questions?

Please contact Sheilah Vance, Esq. at:

Sheilah.Vance@Stockton.edu

610-652-4693 (office)

Thank you!