

# New Title IX Regulations | Compliance Training **SEPTEMBER 2, 2020**

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# Introductions

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Title IX of the Education Amendments of 1972 (20 U.S.C. §1681, *et seq.*) and its implementing regulations (34 C.F.R. Part 106) prohibit discrimination on the basis of sex in education programs and activities:

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

- Under Title IX, discrimination on the basis of sex is:
  - Title IX Sexual Harassment
  - Sexual Assault
  - Domestic Violence
  - Dating Violence
  - Stalking
  
- Title IX also prohibits retaliation
  
  
- Defines sexual harassment to include sexual assault, dating violence, domestic violence, and stalking as unlawful discrimination on the basis of sex
  
- Provides a consistent, legally sound framework on which survivors, the accused, and schools can

rely

- Requires schools to offer clear, accessible options for any person to report sexual harassment
- Empowers survivors to make decisions about how a school responds to incidents of sexual harassment
- Requires the school to offer survivors supportive measures, such as class or dorm reassignments or no-contact orders
- Holds colleges responsible for off-campus sexual harassment at houses owned or under the control of school-sanctioned fraternities and sororities

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- Restores fairness on college and university campuses by upholding all students' right to written notice of allegations, the right to an advisor, and the right to submit, cross-examine, and challenge evidence at a live hearing
- Shields survivors from having to come face-to-face with

the accused during a hearing and from answering questions posed personally by the accused

- Requires schools to select one of two standards of evidence – the preponderance of the evidence standard or the clear and convincing evidence standard – and to apply the selected standard evenly to proceedings for all students and employees, including faculty
- Provides "rape shield" protections and ensures survivors are not required to divulge any medical, psychological, or similar privileged records
- Requires schools to offer an equal right of appeal for both parties to a Title IX proceeding

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- Gives schools flexibility to use technology to conduct Title IX investigations and hearings remotely
- Protects students and faculty by prohibiting schools from using Title IX in a manner that deprives students and faculty of rights guaranteed by the First

## Amendment

<https://www.ed.gov/news/press-releases/secretary-devos-takes-historic-action-strengthen-title-ix-protections-all-students#:~:text=Key%20provisions%20of%20the%20Department, on%20the%20basis%20of%20sex&text=Requires%20schools%20to%20offer%20clear, person%20to%20report%20sexual%20harassment>

# Title IX Terminology and

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# Process



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- All entitlements apply equally to all parties

- The process is grounded in a presumption that a Respondent is not responsible unless and until a determination of responsibility at the conclusion of the process

(Sections 106.45(b) and (b)(1)(iv))

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Conduct:

- On the basis of sex,
- That occurs within the institution's education program or activity,
- Within the United States, and

- Involves
  - Title IX sexual harassment » An institution's employee conditioning the provision of an aid, benefit, or service on an individual's participation in unwelcome sexual conduct **OR** » Unwelcome conduct that is determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the institution's education program or activity;
  - Sexual assault;
  - Dating violence;
  - Domestic violence; or
  - Stalking ➤ And Title IX prohibits retaliation

(Sections 106.30 and 106.71(a))

- An employee of the institution conditioning the provision of an aid, benefit, or service of the institution on an individual's

participation in unwelcome sexual conduct

**OR**

- 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 institution's education program or activity

(Section 106.30)

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Any conduct that would constitute a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.

Sexual Assault includes the following:

- **Rape** (Except Statutory Rape) - the carnal knowledge of a person, without the consent of the person, including instances where the person is incapable of giving consent because of their age or because of their temporary or permanent mental or physical incapacity. “Carnal knowledge” means contact between the penis and the vulva or the penis and the anus, including penetration of any sort, however slight.
- **Sodomy** - oral or anal sexual intercourse with another person, without the consent of the person, including instances where the person is incapable of giving consent because of their age or because of their temporary or permanent mental or physical incapacity.



- **Sexual Assault with An Object** - to use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the consent of the person,

including instances where the person is incapable of giving consent because of their age or because of their temporary or permanent mental or physical incapacity.

- **Fondling** - touching of the private body parts of another person for the purpose of sexual gratification without the consent of the person, including instances where the person is incapable of giving consent because of their age or because of their temporary or permanent mental or physical incapacity.

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- **Incest** - nonforcible sexual intercourse between persons who are related to each

other within the degrees wherein marriage is prohibited by law.

- **Statutory Rape** - nonforcible sexual intercourse with a person who is under the statutory age of consent.

Section 106.30 of the Title IX regulations requires the use of the above definitions from 20 U.S.C. 1092 (f)(6)(A)(v)

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Violence committed by a person: (a) who is or has been in a social relationship of a romantic or intimate

nature with the victim; and, (b) where the existence of such a relationship shall be determined by (i) the length of the relationship; (ii) the type of relationship; and (iii) the frequency of interaction between the persons involved in the relationship.

Section 106.30 of the Title IX regulations requires the use of this definition from 34 U.S.C. 12291(a)(10)

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Violence committed by a current or former spouse or intimate partner of the victim, by a person with whom

the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the state, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the state.

Section 106.30 of the Title IX regulations requires the use of this definition from 34 U.S.C. 12291(a)(8)



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Engaging in a course of conduct directed at

a specific person that would cause a reasonable person to: (a) fear for their safety or the safety of others; or (b) suffer emotional distress.

Section 106.30 of the Title IX regulations requires the use of this definition from 34 U.S.C. 12291(a)(30)

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**Intimidation, threats, coercion or**

discrimination, including charges against an individual for code of conduct violations that do not involve Title IX Sex Discrimination, but arise out of the same facts or circumstances as a report or formal complaint of Title IX Sex Discrimination, for the purpose of interfering with any right or privilege secured by Title IX.

(Section 106.71(a))

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- Locations, events or circumstances in the United

States over which the institution exercised substantial control over the Respondent and the context in which the conduct allegedly constituting Title IX Sex Discrimination occurred

- Education program or activity includes any building owned or controlled by the institution and/or by a student organization that is officially recognized by the institution

(Sections 106.8(d) and 106.44(a))

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- The Title IX regulations apply to all employees (faculty, staff, and all other

employees) and students

- All allegations of Title IX Sex Discrimination **must** be addressed in accordance with the regulations and the policy adopted by the institution to comply with the Title IX regulations

(Sections 106.8(c), 106.44(a) & (b))



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## **Parties**

**Complainant:** An individual who is alleged to have

been the target of conduct that could constitute Title

IX Sex Discrimination as defined under the institution's Title IX Policy, whether or not the individual has filed a formal complaint

**Respondent:**

An individual who has been alleged to have engaged in conduct that could violate the institution's Title IX

Policy

## **Witness**

A person who has seen, heard or otherwise has

knowledge or information relevant to an alleged

violation of the institution's Title IX Policy, but not

including the investigator

Affirmative consent is a knowing, voluntary, and mutual decision among all

participants to engage in sexual activity. Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity. Silence or lack of resistance, in and of itself, does not demonstrate consent. The definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity, or gender expression.

- Consent to any sexual act or prior consensual sexual activity between or with any party does not necessarily constitute consent to any other sexual act
- Consent is required regardless of whether the person initiating the act is under the influence of drugs and/or alcohol
- Consent may be initially given but withdrawn at any time
- Consent cannot be given when a person is incapacitated, which occurs when an individual lacks the ability to knowingly choose to participate in sexual activity. Incapacitation may be caused by the lack of consciousness or being asleep, being involuntarily restrained, or if an individual otherwise cannot consent. Depending on the degree of intoxication, someone who is under the influence of alcohol, drugs, or other intoxicants may be incapacitated and therefore unable to consent
- Consent cannot be given when it is the result of any coercion, intimidation, force, or threat of harm
- When consent is withdrawn or can no longer be given, sexual activity must stop

## The Title IX Coordinator

coordinates the institution's efforts to comply with Title IX, including overseeing the Title IX Policy and the publication and dissemination of information required by Title IX. The Title IX Coordinator's responsibilities include:

- Receiving and responding to reports of conduct that may constitute a violation of the institution's Title IX policy
- Coordinating the effective implementation of supportive measures
- Designating investigators, facilitators, and decision-makers to act, without bias or conflict of interest, pursuant to the grievance process
- Ensuring that the technology needed to conduct and record hearings is available;
- Implementing effectively any remedies or discipline imposed by a decision- maker upon a finding of a violation of the institution's Title IX policy
- Complying with the record-keeping requirements of the institution's Title IX policy

(Sections 106.8(a), 106.44, & 106.45)

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- Any person may make a report of a potential violation to the Title IX Coordinator in person, by mail, by telephone or by electronic mail
- A report does not constitute a formal complaint

- An individual may speak with the Title IX Coordinator prior to submitting a formal complaint, and the Title IX Coordinator can assist in filling out a formal complaint with the understanding that the formal complaint cannot be accepted without the Complainant's signature
- Any campus official\* who receives information or who otherwise has information about a potential violation of the Title IX Policy is required to share the information received, in full, with the Title IX Coordinator

**\*Campus official:** An employee of the institution who has authority to institute corrective measures on behalf of the institution

(Sections 106.8(a) and 106.44(a))

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When the Title IX Coordinator or a campus official receives a report, the institution will respond by:

- Equitably offering supportive measures to the Complainant and Respondent, whether or not a formal complaint is filed
- Refraining from imposing upon Respondent disciplinary sanctions or other actions that are not supportive measures unless and until the Respondent is found responsible for a violation of the Title IX Policy through a completed grievance process. Notwithstanding the foregoing, the institution may impose an emergency removal or administrative leave.

(Section 106.44(a))



- Supportive measures are available with or without the filing of a formal complaint
- In evaluating the supportive measures to be provided, the Title IX Coordinator will make an

individualized determination, considering

Complainant's wishes and other relevant factors, of the non-disciplinary, non-punitive measures that will

be provided to the Complainant and Respondent to

restore or preserve equal access to the institution's education programs or activities, to protect the

safety of the parties, and/or to deter Title IX Sex

Discrimination

- All supportive measures must be provided without

fee or charge and without unreasonably burdening

the other party

- Supportive measures will be maintained as

confidential by the institution to the extent that

confidentiality will not impair the ability to provide the supportive measures

(Sections 106.30 and 106.44(a))

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Examples of supportive measures that may be

implemented include, but are not limited to:

- Academic extensions or adjustments
- Campus escort services
- Changes in housing
- Counseling
- Increased security or monitoring of certain

areas of the campus

- Modifications of class or work schedules
- Mutual restrictions on contact between the parties
- Appropriate supportive measures should also

be made available to employees

(Section 106.30)

**1. Report:** The submission of information to the Title IX Coordinator or a campus official regarding a potential violation of the institution's Title IX Policy; a report is not a formal complaint and, therefore, does not trigger the

grievance process

2. Under the Clery Act, the institution assesses reported conduct for the need for a timely warning and, as applicable, enters the report into its daily crime log

3. If applicable, the Title IX Coordinator may refer the report for action  
under a different institutional policy

4. Title IX Coordinator contacts the Complainant and Respondent (if identified or identifiable based upon the report) to discuss the availability of supportive measures, which are available with or without filing a formal complaint (Section 106.44)

5. Title IX Coordinator evaluates risk of harm to individuals or to the campus community, any need to address the immediate physical safety and emotional well-being of the Complainant, and effectuates, as necessary, emergency removal or placement of employee on leave

- An emergency removal of a student does not equate to a determination of responsibility for a policy violation and must not

result in a presumption of responsibility in any subsequent grievance process

- An emergency removal can take place at any time during the process
- Institutions must follow a specific process and respect rights under disability laws
- Individuals may seek review of an emergency removal decision
- See Section 106.44(c)
- An institution may place an employee-Respondent on administrative leave in emergency and non-emergency situations in order to allow a temporary separation of the employee while the process is ongoing, again without a presumption of responsibility, and with the institution determining the terms and conditions of the leave on a case-by-case basis
- The decision process for placing an employee-Respondent on leave must respect their rights under Title VII, Americans with Disabilities Act, and all other applicable employment laws

Section 106.44(d)

6. Title IX Coordinator explains the support and procedural options to the Complainant, including filing a formal complaint (Section 106.44(a))



7. If applicable, Title IX Coordinator evaluates Complainant's

request not to proceed with process against the institution's obligation to provide a safe, non-discriminatory environment for all community members (Preamble pp. 386-87)

8. Filing of a formal complaint (a document signed by a Complainant or a Title IX Coordinator alleging Title IX Sex Discrimination against a Respondent(s) and requesting that the allegation(s) be investigated [Section 106.30 & 106.45])

9. Title IX Coordinator **(a)** dismisses the formal complaint or **(b)** initiates

the grievance process (the process for investigating and resolving a formal complaint established in section 106.45) **(a) Dismissal of Formal Complaint:** A Notice of Dismissal must be issued to the Complainant

if the Title IX Coordinator determines the misconduct alleged in a formal complaint does not fall within the scope of Title IX because: the Complainant is not participating in or attempting to participate in an education program or activity; the conduct did not occur within the institution's education program or activity; the conduct did not occur within the United States; or the Respondent is no longer enrolled or employed by the institution. Parties have the right to appeal from dismissal of a formal complaint on the following grounds:

1. Procedural irregularity that affected the outcome of the matter;
2. New evidence that was not reasonably available at the time the determination regarding dismissal was made, that could affect the outcome of the matter; and/or,
3. 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 (Section 106.45(b)(3) & 106.45(b)(8))

## **9. (b) Initiate Grievance Process:**

- If the Title IX Coordinator determines that the alleged misconduct falls within the institution's Policy and:
  - a formal complaint has already been submitted, the Title IX

Coordinator will initiate an investigation (unless informal resolution is being pursued)

- a formal complaint has not yet been submitted, the Title IX Coordinator will advise the Complainant that a formal complaint is required to initiate an investigation and provide the Complainant a formal complaint form for completion and signature

- Once a signed formal complaint is submitted and the Title IX Coordinator determines that the alleged misconduct falls within the institution's Policy, the Title IX Coordinator will initiate an investigation (Section 106.45)

- The Title IX Coordinator may initiate the grievance process without a formal complaint signed by the Complainant if the Title IX Coordinator determines that a "non-deliberately indifferent response to the allegations requires an investigation" (Preamble p. 386)

## 10. Grievance Process

- a. Notice of Investigation (referred to as “notice of allegations” in regulations)
- b. Challenge to investigator
- c. Investigation
- d. Party review of information gathered and written response
- e. Complete investigation
- f. Party review of investigation report and written response
- g. Notice of Live Hearing (not technically required, but practically

necessary) h. Challenge to Hearing Board member i. Live Hearing: a hearing where all parties can see and hear each other in real time j. Hearing Board deliberations: findings of fact, determination regarding responsibility, sanctions, remedies k. Hearing Board written determination l. Time to appeal expires (process ends) or appeal filed (see m-o) m. Appeal of a written determination n. Challenge to appeals panel member o. Appeal decision

11. Informal resolution: optional voluntary process for resolution of formal complaints

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# Requirement of Impartiality



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- Impartiality and lack of prejudice are critical to fairness, due process, and reliability

outcomes

- Specific direction not to draw conclusions regarding responsibility until conclusion of process
- Regulations contemplate two types of potential conflict of interest/bias:
  - against specific involved parties
  - against parties based solely on their status

(Section 106.45(b)(iii))

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Parties have the right to request that  
someone other than the Title IX Coordinator

oversee the grievance process or that the Title IX Coordinator remove an investigator, informal resolution facilitator or hearing/appeal decision-maker based on reasonable and articulated grounds of bias, conflict of interest or an inability to be fair and impartial

- Section 106.45(b)(8) requires that both parties have an equal right to appeal on the basis that the Title IX Coordinator, investigator or hearing decision-maker had a conflict of interest or bias that affected the outcome

In the Preamble, DOE states its agreement:

- “[W]ith commenters who noted that prohibiting conflicts of interest and bias, including racial bias, on the part of

people administering a grievance process is an essential part of providing both parties a fair process and increasing the accuracy and reliability of determinations reached in grievance processes”

- That “recipients should have objective rules for determining when [a Title IX Coordinator, investigator, adjudicator or person who facilitates an informal resolution process] is biased, and ... leaves [institutions] discretion to decide how best to implement the prohibition on conflicts of interest and bias, including whether a recipient wishes to provide a process for parties to assert claims of conflict of interest or bias during the investigation”

(Preamble pp. 820-821)

“Whether bias exists requires examination of the particular facts of a situation[.]” DOE:

- Declines to adopt an “appearance of bias” standard; the focus should be on “bias that impedes impartiality”
- Encourages application of an “objective (whether a reasonable person

would believe bias exists), common sense approach” to evaluate potential bias

- Cautions institutions not to use “generalizations that might unreasonably conclude that bias exists (for example, assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against Complainants or Respondents)”
- Notes that the training required by 106.45(b)(1)(iii) “is intended to provide Title IX personnel with the tools needed to serve impartially and without bias such that the prior professional experience of a person whom a recipient would like to have in a Title IX role need not disqualify the person from obtaining the requisite training to serve impartially in a Title IX role”
- “cautions parties and recipients from concluding bias, or possible bias, based solely on the outcomes of grievance processes decided under the final regulations; for example, the mere fact that a certain number of outcomes result in determinations of responsibility, or non- responsibility, does not necessarily indicate or imply bias on the part of Title IX personnel”

(Preamble pp. 827-29)



- DOE contemplates that institutions might include implicit bias as part of a

mandated training program for Title IX personnel, but does not require it.

(Preamble p. 216)

- DOE advises that emergency removal decisions must also be free from bias, including stereotypes about and implicit bias against students with disabilities. (Preamble pp. 739-40)

## DOE:

- “declines to define certain employment relationships or administrative hierarchy arrangements as *per se* prohibited conflicts of interest” (Preamble p. 826)

- Explains that the final regulatory language regarding mandated training “is intended to reinforce that recipients have significant control, and flexibility, to prevent conflicts of interest and bias by carefully selecting training content focused on impartiality and avoiding prejudgment of the facts at issue, conflicts of interest, and bias” (Preamble p. 828)
- Notes that, while unnecessary to ensure compliance, institutions may consider outsourcing Title IX roles to external individuals if there is too much risk of conflict of interest when using an employee/affiliate of the institution (Preamble p. 826)

***Related concept:*** Decision-makers must be able to serve in compliance with the principle of a presumption of non-responsibility (106.45(b)(1)(iv))

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- Be aware of your own biases
- Be aware of your reactions to and thoughts about each matter

- Actively avoid reaching a conclusion until end of grievance process
- Approach each matter as unique
- Treat parties equitably
- Do not apply stereotypes based on party status or type of allegations
- Review the information and evidence with an eye toward identifying what additional information you need to fulfill your role (e.g., prepare an investigation report that fairly summarizes all relevant exculpatory evidence; apply policy to reach a determination regarding responsibility)

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# Evidentiary Matters

- The standard of proof or evidence reflects the degree of confidence that a decision-maker has in the correctness of the factual conclusions reached
- Two standards of proof are acceptable under the



## Title IX regulations:

- **Preponderance of the evidence:** the evidence shows that it is more likely than not that an allegation is true
- **Clear and convincing:** the evidence demonstrates that an allegation is substantially more likely than not to be true; the fact finder must be convinced that the contention is highly probable (Preamble p. 1314)
  - Institutions ***must select one*** and use the same standard of proof for all matters falling within the Title IX Policy regardless of status of the parties (i.e., faculty, staff or student)

(Section 106.45(b)(1)(vii))

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- Information that is relevant directly relates to the allegations in dispute, and, therefore, is probative of

a material fact concerning the allegations. Evidence is relevant if it tends to make it more or less likely **OR** substantially more or less likely [as determined by institution's standard of proof] that the conduct occurred.

- Personal knowledge is key, whether it is personal knowledge of the alleged misconduct or of information directly related to the incident in question.

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Information that is not relevant includes: 1.  
Information protected by a legally recognized  
privilege unless

the privilege is waived; 2. Evidence about a Complainant's prior sexual predisposition; 3. Evidence about a Complainant's prior sexual behavior unless offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant or offered to prove consent, where consent is at issue (and it concerns specific instances of sexual behavior with Respondent); 4. Any party's medical, psychological, and similar records unless the party has given voluntary, written consent; 5. Party or witness statements that have not been subjected to cross-examination at a live hearing; and 6. Evidence duplicative of other evidence.

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- Protect Complainants from questions about or submission of evidence regarding the Complainant's sexual predisposition or, except in very limited circumstances, Complainant's prior sexual behavior

- All questions and evidence about Complainant's sexual predisposition are irrelevant
- All questions and evidence about Complainant's prior sexual behavior are irrelevant unless offered to prove that someone other than the Respondent committed the alleged misconduct or offered to prove consent, where consent is at issue (and it concerns specific instances of sexual behavior with Respondent)

(Section 106.45(b)(1)(iii) & (b)(6))

- The worthiness of belief of information shared by a party or witness
- Assessing credibility is not a determination of truthfulness; it is a determination of reliability



- Institutions may decide whether investigators will evaluate credibility, but hearing boards cannot rely upon an investigator's credibility evaluation
- Decision-makers will need to evaluate credibility and may find it prudent to explain their assessments to support their determinations
- Credibility assessments may not be based upon a person's status as a Complainant, Respondent or witness or inferences from party or witness status
- The decision-maker(s) must objectively evaluate all admissible, relevant evidence for weight or credibility

- Credibility determinations are based on a number of factors, including demeanor (but ***never*** only demeanor); opportunity and capacity to observe the event; contradiction or consistency with other evidence; availability of corroboration (where it should logically exist, noting that

corroborating evidence is not required); level of detail in statement or testimony; motive to be untruthful; and inherent plausibility or implausibility.\*

- “A party's answers to cross-examination questions will be evaluated by the Hearing Board in context, taking into account that a party may experience stress while answering cross-examination questions. Parties will not be unfairly judged if they experience stress while answering cross-examination questions or are unable to recount every specific detail in sequence, whether such inability is due to trauma, the effects of drugs or alcohol or simple fallibility of human memory.” (Preamble p. 1089)

- All of these factors will be considered as part of a credibility assessment.

\* See also U.S. Equal Employment Opportunity Commission: Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999) < <https://www.eeoc.gov/laws/guidance/enforcement-guidance-vicarious-liability-unlawful-harassment-supervisors> >

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# Investigations

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- Scope of potentially relevant, admissible information
- Requirement to:
  - Include in notice of allegations/investigation the conduct code provision prohibiting “knowingly submitting false information during the grievance process”

- Assemble all inculpatory and exculpatory evidence gathered during the investigation that is directly related to the allegations of the formal complaint, including information upon which the institution does not intend to rely in reaching a determination regarding responsibility, and share with parties and advisors in hard copy or an electronic format for their review and written response within ten (10) days of sharing
- Create an investigation report that fairly summarizes relevant, admissible evidence and share with parties and advisors in electronic or hard copy format for their review and written response within ten (10) days of sharing
  - Depending on the nature of the information and evidence shared at the pre-report phase, institutions may require parties and their advisors to agree to restrictions or sign a non-disclosure agreement prohibiting dissemination and/or use of such evidence for any purpose unrelated to this grievance process
  - *Open question*: the extent to which investigators are obligated to pursue party suggestions and requests related to relevant evidence

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During the investigation, the investigator(s)

gather information that answers the  
following question:

***What does everyone say happened?***



- Written notice to parties of the date, time, location, participants, right to accompaniment by an advisor of choice, and purpose of any requested meeting(s) with sufficient time for the party to prepare to participate

- If this is the first communication after accepting a formal complaint, this notice must also refer to the grievance process and the conduct code provision, if any, prohibiting knowingly providing false information (Section 106.45(b)(2))

The investigator(s) should:

- Conduct a thorough, impartial and fair investigation, gathering the most complete

set of facts

- Learn, not assume
- Search for corroboration
- Treat all individuals with sensitivity and respect
- Respect individual privacy concerns, but note that absolute confidentiality cannot be promised
- Complete the investigation in a timely manner, without sacrificing thoroughness

- Develop an investigation plan with Title IX Coordinator and co-investigator, if applicable, including (1) list of witnesses and order of interviews, noting that timing of party interviews may be important; (2) possible sources of evidence; and (3) plan for obtaining evidence

- Maintain a working chronology of investigation process
- Build a timeline of the incident and the relationship/interactions between parties and witnesses
- Maintain regular communications with the Title IX Coordinator (and, as applicable, parties) regarding timing and status
- Document interviews and contacts
- Maintain interview documentation in investigation file
- Address privacy and retaliation considerations in interviews
- Gather physical evidence
- Prepare interview summaries or transcripts
- Plan for the evidence-sharing phase of the investigation process
- Prepare a thorough and impartial investigation report
- Remember that students have a right to view the report and any information the hearing board/decision-maker will consider

- Prepare for an interview by listing all questions and/or subject matters to be covered, but always be sure to listen
- Maintain flexibility to identify and explore what you

may not have known or appreciated was relevant until the interview

- If working with a co-investigator, meet to discuss areas of interest and inquiry
- If working as a team, consider assigning responsibility for questioning
  - By topic
  - By witness
- In advance of the interview, determine the method for recording information
  - If taking notes and working in a team, determine who will take notes in each interview
  - Select a method that will result in a detailed record

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- **Review the applicable policy definitions**
  - Basic questions should relate directly to whether you need to know the information



- Ask yourself: Will an answer to this question help a decision maker understand if a violation of policy occurred?
  - Take the report from start to finish
- Plan your questions about the allegations, the information presented and the policy elements
- Focus on areas of conflicting information or gaps of information
- Drill down on relevant timelines and details
- Don't leave a relevant question or gap unanswered
  - Ensure you set aside time to ask parties for witness and other evidentiary suggestions

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- DOE “expects decision-makers to apply

a single admissibility rule”: relevance

- “This approach leaves the decision-maker discretion to assign weight and credibility to evidence, but not to deem evidence inadmissible or excluded, except on the ground of relevance[.]”

(Preamble pp. 1189-92)

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The regulations:

- “do not speak to admissibility of hearsay,

prior bad acts, character evidence, polygraph (lie detector) results, standards for authentication of evidence, or similar issues concerning evidence,” but “require recipients to gather and evaluate relevant evidence, with the understanding that this includes both inculpatory and exculpatory evidence”

- “deem questions and evidence about a Complainant’s prior sexual behavior to be irrelevant with two exceptions”
- “preclude use of any information protected by a legally recognized privilege (e.g., attorney-client)” unless the privilege is waived

(Preamble p. 811)

- All evidence (and questions) about a Complainant's ***sexual predisposition*** are **irrelevant**, with no exceptions
- A Complainant's ***prior sexual behavior*** is

**irrelevant unless** it meets one of two enumerated exceptions:

- Relates to parties' prior sexual history and is offered to prove consent
- Is offered to prove that someone other than the Respondent engaged in the alleged Title IX Sex Discrimination
  - “Questions and evidence about a Respondent’s sexual predisposition or prior sexual behavior are not subject to any special consideration but rather must be judged like any other question or evidence as relevant or irrelevant to the allegations at issue” (see later slides related to NYS law)
- “Evidence of a pattern of inappropriate behavior by an alleged harasser must be judged for relevance as any other evidence must be.” (Preamble 1195-96)

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- DOE deemed these enumerated categories of information irrelevant because:
  - “[i]f the Department permitted decision-makers to



balance ambiguous factors like ‘unfair prejudice’ to make admissibility decisions, the final regulations would convey an expectation that a non-lawyer decision-maker must possess the legal expertise of judges and lawyers.”

(Preamble pp. 1189-92)

- “that open-ended, complicated standard of admissibility [“probative value” versus “potential harm or undue prejudice”] would render the adjudication more difficult for a layperson decision-maker competently to apply.”

(Preamble 1197-98)

- DOE has clarified that the “if offered to prove consent” rape shield language could allow questions or evidence offered “by either party, or by the investigator, or solicited on the decision-maker’s own initiative.” (Preamble p. 1199)

In the Preamble, DOE explained the rationale for not extending rape shield protections to Respondents:

- “The Department does not wish to impose more

restrictions on relevance than necessary to further the goals of a Title IX sexual harassment adjudication, and does not believe that a Respondent's sexual behavior requires a special provision to adequately protect Respondents from questions or evidence that are irrelevant.”

- “The Department cautions recipients that some situations will involve counter-claims made between two parties, such that a Respondent is also a Complainant, and in such situations the recipient must take care to apply the rape shield protections to any party where the party is designated as a ‘Complainant’ even if the same party is also a ‘Respondent’ in a consolidated grievance process.”

(Preamble pp. 1189-92)

- **Reminders:**
  - Mere fact of a current or previous consensual dating or sexual relationship

between parties does not itself imply consent or preclude a finding of sexual violence (Enough is Enough section 6441(2)(a))

- Investigators should approach this topic carefully in both their investigation planning and investigation interviews
- Investigators should notify the Title IX Coordinator that the information was presented during the interview

Institutions must balance with Enough is Enough:

- The lack of rape shield protections for Respondents:
  - Parties have the right to “exclude their own prior sexual history with persons other than the other party in the judicial or conduct process ... from

admittance in the institution disciplinary stage that determines responsibility.”

- Treating pattern allegations and findings of prior misconduct of the Respondent as potentially relevant to decision-making:

- “Past findings of domestic violence, dating violence, stalking or sexual assault may be admissible in the disciplinary stage that determines sanction”

(N.Y. Education Law § 6444(5)(c)(vi))

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- The information an investigator gathers in the interview:
  - will be shared with school personnel

- will be shared as part of internal disciplinary process
- may be shared with law enforcement under certain circumstances (e.g., release or subpoena)
- will not be shared with others beyond those who need to know
  - Discuss retaliation and how the institution will respond
  - Discuss availability of supportive measures (parties) and support services (witnesses)



- An investigator should allow parties to share information they wish to share and follow up on all information shared as the investigator deems necessary.
- An investigator's approach to an interview should not change

based on party status.

- Sensitivity to the parties does not mean that either party is not asked difficult questions.
- As necessary, each party should be allowed an opportunity to respond to new or different information provided during the investigation.
- Depending on the timing of the investigator's meeting with each party, the investigator(s) should advise of the potential need to call them back based on other, subsequent interviews.
- The investigator(s) should allow each party to respond to information offered during the investigation.
- The investigator's approach should take into account and reflect sensitivity to the situation that brings each party before them.
- The investigator(s) should ask each party for any questions for the other party(ies) or any witness.

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- To provide context and create a comfort level that encourages openness and truthfulness, consider addressing these possible concerns to start witness interviews:

- “Am I being investigated?”

- “What are you really investigating?”
- “How will you use the information I provide?”
- “Is this confidential?”
- “Will I get into trouble by sharing information?”
- “I don’t want to cooperate.”
- “Do I need my parents or a lawyer present?”
  - Consider describing the conduct without labeling it as “sexual misconduct” or “sexual harassment”
  - Reassure witness that you are not expecting them to take sides:
    - “I’m looking for facts.”
    - “I will not educate you about what you do not know.”
    - “I know you are in a tough position because you know the individuals involved here, and we appreciate you providing us information despite that.”

- Witnesses will be interviewed one at a time.
- As necessary after each witness's interview, the investigator(s) will consider new or different

information offered to determine its relevance.

- If the investigator(s) decide that any of the information is relevant, the investigator(s) should allow the parties an opportunity to respond to it and/or to submit questions about it that the investigator(s) may decide to direct to the relevant witness(es).

- The investigator(s) can request that any person with whom they have met come back in for additional discussion.

- The investigator(s) should also consider the information they have heard during their meetings to evaluate whether there is anyone else whom they should interview.

In the situation where there are no witnesses—each party’s word against the other’s—the investigators will have to look at all the facts and circumstances surrounding the allegations to collect information helpful to a determination regarding responsibility. Consider the following:

- “Complainant says/Respondent says” cases are typical, and this fact alone

never means the formal complaint cannot be resolved simply because the Respondent issues a blanket denial, nor does it automatically follow that the Complainant should prevail.

- A complaint or response replete with factual detail can be assessed against blanket accusations or denials that do not have any supporting detail. (But a lack of detail alone does not necessarily implicate credibility.)
- The substance, timeline, and chronology of statements should be carefully reviewed for internal consistency.
- Follow up on any admissions of behavior and/or re-examine denials in a subsequent interview.
- Ask the Respondent if they have any theory or explanation as to why a complaint would be made.
- Consider the inherent plausibility of any explanations given and ask questions to test and probe any implausibility.
- Search for sources of corroboration for information provided by parties and witnesses, as well as all available inculpatory and exculpatory information.
- Ask parties and witnesses for information related to any change in behavior by the Complainant or Respondent after the alleged conduct.
- Consider the timing of the complaint in relation to the occurrence of the behavior and any potential motive given timing.



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- Look beyond the initial information
- Ask the party or witness:
  - “What else would you want me to know?”

- “What do you think it is important I know?”
  - Ask yourself:
    - What else would I want to know?
    - What is missing here?
    - Have I asked questions to obtain all information needed based on the Policy’s definitions of relevant misconduct?
    - What questions do I still have?
    - What would further corroborate the Complainant? Respondent? Witness?

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The search for potentially relevant evidence and information should

include, as applicable and for example:

- Documentary evidence (text messages, emails, social media posts, journals)
- Video or photographic evidence
- Personnel records and performance evaluations
- Academic transcripts

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- **Medical and Mental Health  
Records**

- Note that you cannot accept this information without the offering party's express written consent for use in the grievance process (Section 106.45(b)(5)(i))
- Ask for what purpose the party is providing the information
- Consult with the Title IX Coordinator before asking substantive questions » Do you need an expert to interpret the information presented in the records?

- At the conclusion of the investigation, the parties and their advisors must be provided, in hard copy or electronic format, a copy of

all inculpatory and exculpatory information gathered during the investigation that is directly related to the allegations of the formal complaint, including information upon which the institution does not intend to rely in reaching a determination regarding responsibility

- “All” includes information gathered from *all* sources, not just parties. (Preamble p. 1015)
  - Parties must have at least ten (10) days to review and submit a written response (Section 106.45(b)(5)(vi))
  - That parties and advisors have the right to review and inspect evidence “directly related to the allegations” means that the “universe of evidence is not screened for relevance, but rather is measured by whether it is ‘directly related to the allegations.’”
  - Filtering of information comes at the investigation



report and decision-making phase, specifically:

- Given investigation reports must summarize “relevant” evidence, it is at the report-writing phase that the rape shield protections would apply to preclude inclusion in the investigation report of irrelevant evidence. » DOE has concluded that sharing such information during the evidence-sharing phase is permissible despite the rape shield protections because “[a]s noted by the Supreme Court, rape shield protections generally are designed to protect Complainants from harassing, irrelevant inquiries into sexual behavior *at trial*.” (Preamble p. 1194)
- Decision-makers retain discretion regarding the weight or credibility to assign to particular evidence but are precluded from relying on statements of a party or witness who has not submitted to cross- examination at the live hearing.

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In the Preamble, DOE explained its rationale for this provision:

“We believe that this provision provides Complainants and Respondents an equal opportunity to inspect and review evidence and provides transparent disclosure of the universe of relevant and

potentially relevant evidence, with sufficient time for both parties to meaningfully prepare arguments based on the evidence that further each party's view of the case, or present additional relevant facts and witnesses that the decision-maker should objectively evaluate before reaching a determination regarding responsibility, including the right to contest the relevance of evidence. [...] The Department believes that the right to inspect all evidence directly related to the allegations is an important procedural right for both parties, in order for a Respondent to present a defense and for a Complainant to present reasons why the Respondent should be found responsible. This approach balances the recipient's obligation to impartially gather and objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence, with the parties' equal right to participate in furthering each party's own interests by identifying evidence overlooked by the investigator and evidence the investigator erroneously deemed relevant or irrelevant and making arguments to the decision-maker regarding the relevance of evidence and the weight or credibility of relevant evidence."

(Preamble pp. 1014-15)

That said, an investigator may redact information that is unrelated to the allegations of the formal complaint or

otherwise not admissible in the grievance process because it:

- Is subject to an unwaived legally-recognized privilege
- Relates to Complainant's sexual predisposition
- Constitutes prior sexual history not offered to establish: (i) consent or (ii) that Respondent did not engage in the alleged misconduct

(Preamble pp. 1016-1020)

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Because this process is borne of DOE's desire that parties have the opportunity to argue relevance, institutions may decide to create a list describing information redacted or removed as irrelevant,

inadmissible or not directly related to the allegations of the formal complaint, which it may allow the parties to inspect during the investigation:

- “Even though a recipient has some discretion as to what evidence is directly related to allegations raised in a formal complaint, the Department may determine that a recipient violated § 106.45(b)(vi) if a recipient does not provide evidence that is directly related to allegations raised in a formal complaint to the parties for review and inspection. A recipient may choose to log information that it does not produce and allow the parties to dispute whether the information is directly related to the allegations. Although the Department does not impose a requirement to produce such a log during an investigation under § 106.45, recipients are welcome to do so and may use such a log to demonstrate that both parties agreed certain evidence is not directly related to the allegations raised in a formal complaint.”

(Preamble p. 1507)

- DOE contemplates the following additional process steps at this stage:
  - Requiring all parties to submit any evidence that they would like the investigator(s) to consider prior to when the parties’ time to inspect and review evidence begins

- Allowing parties to provide additional evidence in response to their inspection and review of the evidence
- Allowing parties to respond to the other party's additional evidence
- Providing a copy of each party's written response to the other party "to ensure a fair and transparent process and to allow the parties to adequately prepare for any hearing that is required or provided under the grievance process."
  - Any such steps must be equally available to both parties
  - If an institution does not allow the parties to respond to additional evidence provided by another party, parties will still receive an opportunity to inspect and review all relevant evidence at any hearing and to refer to such evidence during the hearing, including for purposes of cross-examination
  - If parties are permitted to provide additional evidence after reviewing the assembled evidence, any such additional evidence that is summarized in the investigation report will not qualify as new evidence that was not reasonably available at the time the determination regarding responsibility was made for purposes of an appeal



- After considering the parties' responses to the evidence shared and conducting any additional investigation indicated by those responses, the investigator(s) must prepare a report summarizing all

of the relevant, admissible information obtained during the investigation, including inculpatory evidence and exculpatory evidence.

- The investigator(s) should incorporate the parties' responses to the report, as well as an explanation of any additional steps taken after receipt of party responses, and include any related materials.
  - If the investigation report includes assessment of party and witness credibility, credibility determinations should be based on standard credibility factors and may not be based upon a person's status as a Complainant, Respondent or witness.
- As much as possible, credibility assessments should be tied to concrete behavior or incidents and objective facts.

- Investigation reports may include recommended findings or conclusions, but “the decision-maker

is under an independent obligation to objectively evaluate relevant evidence, and thus cannot simply defer to recommendations made by the investigator[s] in the investigative report.”

- This is to “ensure that independent evaluation of the evidence gathered is made prior to reaching the determination regarding responsibility.”

(Preamble pp. 1031-32)

The institution must share the investigation report with the parties

and their advisors either in hard copy or an electronic format with at least 10 days to review and submit a written response (a/k/a at least 10 days prior to a hearing).

(Section 106.45(b)(5)(vii))

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