



INSTITUTE

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New Title IX Regulations | Compliance Training

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Agenda

9:30 – 9:45	Introductions and Overview
9:45 – 10:45	Title IX Terminology and Process
10:45 – 10:55	BREAK
10:55 – 11:30	Impartiality
11:30 – 12:15	Evidentiary Matters
12:15 – 1:00	LUNCH BREAK
1:00 – 2:15	Investigations
2:15 – 3:15	Live Hearings and Appeals
3:15 – 3:30	BREAK
3:30 – 4:00	Informal Resolution Process
4:00'ish – 4:30	Q&A

Title IX

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, Sexual Harassment is:
 - Sexual Harassment
 - Sexual Assault
 - Domestic Violence
 - Dating Violence
 - Stalking

- Title IX also prohibits retaliation

Chronology of New Regulations

Proposed Rulemaking:	November 29, 2018
Comments Received:	Over 124,000
Regulations Issued:	May 20, 2020
Effective Date:	August 14, 2020
Citation:	34 C.F.R. Part 106
Enforced by:	U.S. Dept of Education, Office for Civil Rights (OCR)

FYI

- 25 pages of regulations
- 2,008 pages of agency response to comments
- Last set of Title IX regulations was issued in 1975

Key Provisions of the New Title IX Regulations (according to DOE)

- 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

Key Provisions of the New Title IX Regulations (according to DOE)

- 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

Key Provisions of the New Title IX Regulations (according to DOE)

- 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 Process

Guiding Principles

- 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))

Title IX Sexual Harassment

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))

Title IX Sexual Harassment

- 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)

*See September 2, 2020 OCR Q&A, question 4, *inter alia*, for discussion of effective denial

Title IX Sexual Assault

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.

Title IX Sexual Assault

- **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.

Title IX Sexual Assault

- **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)

Title IX Dating Violence

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)

Title IX Domestic Violence

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)

Title IX Stalking

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)

Title IX Retaliation

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

(Section 106.71(a))

Scope: Education Program or Activity

- **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 Sexual Harassment 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))

Application of Regulations

- The Title IX regulations apply to all employees (faculty, staff, and all other employees) and students
- All allegations of Title IX Sexual Harassment 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))

Parties and Witnesses

Parties

Complainant: An individual who is alleged to have been the target of conduct that could constitute Title IX Sexual Harassment 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

Required Definition of Consent in New York State

(required by New York State Education Law Article 129-B section 6441)

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**

Responsibilities of the Title IX Coordinator

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, and 106.45)

Reports

- 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))

Upon Receipt of a Report

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

- 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 Sexual Harassment
- 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))

Supportive Measures

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)

Overview of Title IX Process

- 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)**

Overview of Title IX Process

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
 - *See Section 106.44(d)*

Overview of Title IX Process

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 Sexual Harassment against a Respondent(s) and requesting that the allegation(s) be investigated (Section 106.30 and 106.45)**

Overview of Title IX Process

9. Title IX Coordinator

- (a) dismisses the formal complaint or
- (b) initiates the grievance process

Grievance process: the process for investigating and resolving a formal complaint established in section 106.45

Overview of Title IX Process

9.(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

(Sections 106.45(b)(3) and 106.45(b)(8))

Overview of Title IX Process

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)**

Overview of Title IX Process

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 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

Requirement of Impartiality

What's Not Really New But Now Clear in the Regulations?

- **Impartiality and lack of prejudice are critical to fairness, due process, and reliable 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))

Requirement of Impartiality

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**

Requirement of Impartiality

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)

Evaluating Bias

“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”
- “[C]autions 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)

Evaluating Bias

- **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)

Evaluating Conflicts of Interest

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 (Sec. 106.45(b)(1)(iv))

How to Serve Impartially and Avoiding Prejudgment of Facts

- 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)

Evidentiary Matters

Standard of Proof

- 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))

- **The University of Rochester selected preponderance of the evidence**

Relevance

- Information that is relevant directly relates to the allegations in dispute, and, therefore, is probative of a material fact concerning the allegations.
- Pursuant to the preponderance of evidence standard adopted by the University: evidence is relevant if it tends to make it more or less likely 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.

Relevance

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.**

Rape Shield Protections*

- **Protect Complainants from questions about or submission of evidence regarding the Complainant's sexual predisposition and, 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**
 - **consent, where consent is at issue (and it concerns specific instances of sexual behavior with Respondent)**

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

***This concept is not raised until the hearing section of the regulations (106.45(b)(6)(i)).**

Credibility

- 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 officers 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

- 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

What's New?

- **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**

Investigation in a Nutshell

During the investigation, the investigator(s) gather information that answers the following question:

What does everyone say happened?

Required Notice Before Interviews

- **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))

Investigation Guidelines

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

Investigation Protocols

- **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 Officer will consider**

Interview Preparation

- 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

Interview Outlines

- **Review the applicable policy definitions**
 - 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**

The “Single Admissibility Rule”

- 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)

Scope of Potentially Relevant Information to be Gathered During Investigation

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)

Rape Shield Protections

- 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 Sexual Harassment
- “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)

Rape Shield Protections

- **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)

Rationale for Complainant-Only Rape Shield Protections

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)

Prior Sexual History

■ 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**

Balancing Federal Admissibility Standards with New York Law

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))

Issues to Address in All Interviews

- **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)**

Party Interviews

- 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.

Witness Interviews

- 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.”

Witness Interviews

- **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.**

When There are No Witnesses

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, but 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 or establish that something occurred.)
- 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.

Before Closing an Interview

- **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 would further corroborate the Complainant? Respondent? Witness?

Non-testimonial Evidence

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

Non-testimonial Evidence

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

Assembling and Sharing Evidence

- **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))

Assembling and Sharing Evidence

- 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 for relevance comes at the investigation report and decision-making phase.
- 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.

Assembling and Sharing Evidence

- DOE has concluded that sharing information that would fall within the rape shield protection during the evidence-sharing phase is permissible 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*. The final regulations permit exchange of all evidence ‘directly related to the allegations in a formal complaint’ during the investigation, but require the investigator to only summarize ‘relevant’ evidence in the investigative report (which would exclude sexual history information deemed by these final regulations to be ‘not relevant’), and require the decision-maker to objectively evaluate only ‘relevant’ evidence during the hearing and when reaching the determination regarding responsibility.” (Preamble p. 1194)
- “If a recipient obtains evidence about a party’s sexual predisposition or prior sexual behavior that is directly related to the allegations raised in a formal complaint, the recipient should allow both parties an equal opportunity to inspect and review such evidence to be able to prepare to respond to it or object to its introduction in the investigative report or at the hearing.” (Preamble p. 1469)

Assembling and Sharing Evidence

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)

Assembling and Sharing Evidence

That said, at this stage, 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 must be redacted.

(Preamble pp. 1016-1020)

Assembling and Sharing Evidence

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)

Discretionary Opportunities for Parties to Submit and Respond to Potentially Relevant Evidence

- 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

(Preamble pp. 1029-30)

Preparing the Investigation Report

- 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.

Preparing the Investigation Report

- 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)

Required Party/Advisor Review & Response

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))

Live Hearings and Appeals

What's New?

- **Live hearings with required cross-examination conducted by advisors**
- **Expansion of information that must be allowed if deemed relevant (e.g., character evidence)**
- **Parties can introduce and argue relevance of information gathered during investigation but not included in the investigation report**
- **The option to appeal is required (already required in New York)**

Hearing in a Nutshell

By the institution's standard of proof (preponderance of the evidence):

- 1. What happened?**
- 2. Why does the Hearing Officer believe that is what happened?**
- 3. Does what happened violate institutional policy?**
- 4. Why does the Hearing Officer believe what happened did or did not violate the institution's policy?**
- 5. If a determination of responsibility is made, what should the institution do about it?**
- 6. Why should the institution do that?**

Notice of Hearing

The hearing process begins with the issuance of a written notice of hearing (not technically required by, but practically necessary). The notice of hearing should include the following information:

- The date, time, and location of the hearing;
- A brief factual summary of the conduct alleged to have violated the policy, including date, time, and location;
- The specific policy provision(s) at issue;
- Possible sanctions associated with a finding of responsibility for the alleged policy violation(s);
- The name of the Hearing Officer selected by the Title IX Coordinator;
- The parties' right to be accompanied by an advisor at the hearing and the obligation to notify the Title IX Coordinator within a specified time period of: (1) the name, title, and contact information for their advisors, (2) whether they will continue to be advised by the same advisor as during the investigation (if applicable) or (3) that they do not intend to select an advisor;
- A statement that there is a presumption of no responsibility on the part of the Respondent until a determination regarding responsibility is made at the conclusion of the grievance process; and
- Information regarding the informal resolution process (as applicable).

Pre-hearing Planning Suggestions

- The Hearing Officer will have received the investigation materials and the notice of hearing, and the parties will have reviewed these materials as well
- The Hearing Officer should consider (1) the applicable policy provisions, definitions, and elements, (2) witnesses who should be called to speak with the Hearing Officer, (3) areas of questioning for each policy code provision, and (4) information sufficiently addressed in the investigation materials versus topic areas for further discussion and inquiry at the hearing
- In addition to pre-planning, after each person provides information at the hearing and at the conclusion of all of the testimony, the Hearing Officer should always take a pause or break to ensure that all necessary questions have been asked and to evaluate the need to ask about information that (a) was not provided in the investigation materials and (b) may be relevant to deliberations

Equity and Fact-Finding

- Regardless of the nature of the charges or material prepared in the course of the investigation, ***there is no presumption of responsibility or violation***
- Hearing Officers are fact-finders
- It is critical for Hearing Officers to ask questions in a manner that elicits facts and perceptions as narrative responses
 - Allow the parties and witnesses to give complete answers before moving on to the next question
- The integrity of the process depends upon listening to all information presented without preconception, asking all necessary questions to understand the nature of the charges and conduct, and deliberating as long as necessary to reach a decision

Gathering Information

- **The Hearing Officer must come to their own findings of fact**
- **The Hearing Officer has the right and responsibility to ask questions and elicit information from parties and witnesses on the Hearing Officer's own initiative to aid the Hearing Officer in obtaining relevant information, both inculpatory and exculpatory**
- **Only the Hearing Officer may ask questions of any person testifying, except in connection with cross-examination questions asked by advisors**
- **The Hearing Officer is responsible for ensuring that they have sought and probed all information necessary to make an informed decision**
- **At times, the Hearing Officer will need to ask difficult or sensitive questions in order to understand the allegations, related information, and to gain a full understanding of the context**

Questioning

- The Hearing Officer may ask the parties questions based on all information provided, as well as anything new or different offered at the hearing
- The Hearing Officer's approach should take into account and reflect sensitivity to the situation that brings the parties before the Hearing Officer
- Sensitivity to the Complainant does not mean that the Complainant is not asked questions, just as sensitivity to the Respondent does not mean the Respondent is not asked questions
- As necessary, the parties should be allowed an opportunity to respond to information introduced at the hearing
- The Hearing Officer should advise the parties that it may need to call the parties back based on other, subsequent testimony

Questioning

- Although the Hearing Officer will have seen information setting forth the allegations of the formal complaint, it is important to understand each person's perception of the events that occurred and not to prematurely draw conclusions
- In order to do this, the Hearing Officer should employ a questioning style that is open-ended and elicits narrative responses
- Indeed, asking open-ended questions that require narrative responses is a method for assessing credibility based on consistency of a party's version of events
- It also will bring to light conflicting information revealing important material fact issues to be resolved

Questioning

- **Funnel approach — start with general, broad questions, requiring narrative responses, then choose more narrow subject areas based on information provided in the response**
- **For example:**
 - What? Where? When? How? Why?
 - Explain...
 - Describe...
 - Tell me/us...
 - What happened next?
 - What else?
 - What else do you want me/us to know?

Questioning

- **Base questions on policy definitions in order to obtain the information you need to determine whether a policy violation occurred:**
 - Ask questions about the policy elements
 - Focus on areas of conflicting information or gaps of information
 - As needed, clarify or confirm relevant timelines and details
 - Don't leave a relevant question or gap unanswered
- **Be comfortable with silence while:**
 - the party/witness considers the question
- **Wait for complete answers; interrupting impedes the flow of the narrative, can result in changing topics before a line of narrative is completed, and can make individuals meeting with the Hearing Officer feel that they are being badgered or not heard**

Questioning

- Questions should not assume anything:
 - You must have been scared while you were waiting alone in the room, right?
VERSUS
 - What were you feeling while you were alone in the room?
- Listen carefully to answers to ensure that each question is answered
- If a party/witness doesn't answer the question:
 - Ask whether they understand the question
 - Pose it a different way
 - Ask why they won't answer it
- Try to elicit one fact per question
- No compound questions:
 - Did you get your first drink for yourself or did someone give it to you?
VERSUS
 - How did you get the first drink you had that night?

Questioning

- Do not expect to lead any party or witness to an admission or agreement with you
- If you do not understand slang or jargon used by a party or witness, ask them to explain the meaning of the word or phrase
- Remember that the goals of questioning are to learn the relevant, material facts, establish a timeline, and understand each person's perceptions
- You may find it helpful to explain to a party or witness why you are asking a particular question
 - This approach provides transparency and may help to avoid speculation or misperceptions about your intentions

Consent

- **Decide what questions, if any, you need to ask to apply the definition of affirmative consent**
 - **Start with nature of relationship**
 - **Ask about prior communication styles for consent, if any**
 - **Ask questions to understand any **specific words or actions by the Complainant that the Respondent considered to indicate consent** for each of the sexual activities that took place**
- **Focus on circumstances of the Complainant's disclosure to others (e.g., temporal proximity, substance of disclosure, etc.)**

Consent

Ask questions to help evaluate the effect of any alcohol use on ability to consent:

- Be sensitive, but ask direct questions
- Ask questions about pre-incident behavior
- Ask questions about quantity/quality of alcohol use
- Identify expectations/mind-set of each party
- Ask questions about ability to reasonably know level of intoxication of other party
- Seek relevant information from other individuals as to parties' consumption, behavior, and conduct
- Ask questions about post-incident behavior
- Ask questions about circumstances of disclosure and reaction to disclosure

Mental Health and Medical Information

- **Mental health**
 - If a party wishes to include information about their own mental health (note, by NYS law, each party has the right to prevent the *other party* from offering such information):
 - » Ask for what purpose the party is providing it
 - » Consult with the Title IX Coordinator and legal advisor (as applicable) to determine whether expert guidance is necessary and before asking substantive questions
 - » Under Enough is Enough, parties have the right to exclude their own mental health diagnosis and/or treatment from admittance in the institution's disciplinary stage that determines responsibility (New York Education Law Section 6444 (5)(c)(iv))
- **Medical information (including use of prescription medications)**
 - If a party offers medical information during a hearing:
 - » Ask for what purpose the party is providing it
 - » Consult with the Title IX Coordinator and legal advisor (as applicable) to determine whether expert guidance is necessary and before asking substantive questions
- The institution must obtain a party's written consent to access, consider, disclose or use medical or mental health records (Section 106.45(b)(5)(i))

Evaluating Information

- **The Hearing Officer must objectively evaluate all admissible, relevant evidence for weight or credibility, including both inculpatory evidence and exculpatory evidence**
 - **Inculpatory evidence:** Evidence that shows or suggests that a Respondent engaged in the alleged Title IX Sexual Harassment
 - **Exculpatory evidence:** Evidence that shows or suggests that a Respondent did not engage in the alleged Title IX Sexual Harassment
- **The Hearing Officer must focus on evidence pertinent to finding material facts using the institution's standard of proof**

Credibility Overview

- **Determinations of credibility must be based on objective evaluation of relevant evidence, not on a person's status as a Complainant, Respondent or witness or inferences from party or witness status**
- **Credibility determinations are based on a number of factors, including:**
 - Demeanor;
 - Opportunity and capacity to observe the event;
 - Contradiction or consistency with other evidence;
 - Availability of corroboration;
 - Level of detail in statement or testimony;
 - Motive to be untruthful (but not based on party status); and
 - Inherent plausibility or implausibility.
- **The evaluation of credibility should also take into account the normal fallibility of human memory**

Credibility

- **Demeanor (but never demeanor alone)**
 - Focusing only on demeanor could unfairly fail to account for cultural differences or the effect of the incident on the parties
- **Opportunity and capacity to observe the event**
 - Was each individual able to see, hear or know the information that individual provided?
 - Was the individual's ability to see, hear, know, remember or describe those things affected by any physical, mental or intellectual deficiency?
- **Contradiction or consistency with other evidence; availability of corroboration (where it should logically exist)**
 - Was the information offered at the hearing uncertain, confused, self-contradictory or evasive?
 - Prior inconsistent statements
- **Level of detail in statement or testimony**
 - How well could the individual discuss the detail of what they saw, heard, and remembered?
 - Did the individual provide information in a convincing manner?

Credibility

- **Motive to be untruthful (but not based on party status)**
 - Does the individual have any interest, bias, prejudice or other motive that might affect the information provided?
- **Inherent plausibility or implausibility**
 - How does the information provided by the individual fit with other information revealed during the grievance process, including the information provided by the parties and others?
 - Is it contradicted or supported by the other information provided?
 - Does it make sense?
 - Is it plausible in light of the known information?
 - Does it make sense in the context of these individuals? This setting?
 - Does it ring true?

Credibility

DOE explained:

“[T]he degree to which any inaccuracy, inconsistency or implausibility in a narrative provided by a party or witness should affect a determination regarding responsibility is a matter to be decided by the decision-maker after having the opportunity to ask questions of parties and witnesses, and to observe how parties and witnesses answer the questions posed by the other party.”

(Preamble p. 1053)

Evaluating Information

- 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 should not be unfairly judged if they 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
- These factors will also be considered as part of the credibility assessment

(Preamble p. 1089)

Evaluating Information Related to Consent

Three Key Considerations

1. What is the evidence indicating use of force, if any?

- Evidence of force points to a violation of the Policy

2. Is there evidence that the Complainant was incapacitated (as applicable)?

- Evidence of incapacitation may include that the Complainant was: asleep; unconscious; involuntarily restrained; a minor; or developmentally disabled
- “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.”
 - In most cases, the Hearing Officer will evaluate intoxication from alcohol or drugs as a layperson would (i.e., evaluating information about observations of slurring speech, stumbling, incoherency, etc.)
 - If the Hearing Officer intends to rely on medical records or other scientific evidence offered to establish incapacitation, then the Hearing Officer will need to consult with a medical and/or forensic expert who can interpret and explain the information

3. What specific words or actions by the Complainant reasonably indicated to the Respondent that they had consent for each of the sexual activities that took place?

- If statements and evidence provide enough information to determine that words or actions were used that provide reasonable indication of consent, then there was no policy violation.

Evaluating Information Related to Consent

- **The Hearing Officer must evaluate the specific words or actions Respondent believed indicated consent for each of the sexual activities that took place and evaluate whether the Complainant's words or actions did provide indication of consent, by applying the institution's standard of proof**
- **In order to do this, the Hearing Officer must understand the legally required definition of consent:**
 - **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. (N.Y. Educ. Law §§ 6441(1) and (2))**
 - **See additional information regarding principles of affirmative consent in New York in Title IX Terminology slides**

Gathering and Evaluating Information When There are No Witnesses

In the situation where there are no witnesses—the Complainant’s word against the Respondent’s—the Hearing Officer will have to evaluate all the facts and circumstances surrounding the allegations to determine whether the conduct did or did not occur through application of the institution’s evidentiary standard. Consider the following:

- “Complainant says/Respondent says” cases are typical, but this fact alone never means the complaint cannot be resolved simply because the Respondent issues a blanket denial, nor does it automatically follow that the Complainant should prevail
- The Hearing Officer can assess and note Complainant and Respondent demeanor, non-verbal behavior, and inherent credibility
- As much as possible, credibility assessments should be tied to concrete behavior or incidents and objective fact
- A formal 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 or establish that something occurred)

Gathering and Evaluating Information When There Are No Witnesses

Consider the following (cont'd):

- 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
- Has the Complainant told anyone else of the alleged harassment?
- Did others witness any change in behavior by the Complainant or Respondent after the alleged harassment?
- The timing of the complaint in relation to the occurrence of the behavior (but timing is not dispositive)

Advisors

- **Advisors must be professionals (e.g., attorneys or experienced advocates) or at least adults capable of understanding the purpose of cross-examination (Preamble p. 1109)**
- **Advisors may be restricted from speaking during the hearing process, except in connection with cross-examination questions and may be otherwise restricted from speaking to the Hearing Officer, making statements or arguments or answering questions on behalf of a party (Section 106.45(b)(5)(iv) (b)(6)(i))**
- **Equal competency between the parties' advisors is not required (Preamble p. 1150)**
- **When conducting cross-examination, advisors need not be advocates for parties, but simply may be individuals who ask questions**
- **If the institution's policy so provides, advisors cannot direct the party how to answer a question: parties should provide their own responses to questions, not the responses their advisor believes would be best**

Location of the Hearing

- Hearings may be conducted with all parties physically present in the same geographic location or, at the institution's discretion, any or all parties, witnesses, and other participants may appear virtually at the hearing, with the parties being able to see and hear each other and witnesses live.
- Institutions may decide that all hearings will be held virtually
- At the request of either party, the institution will provide for the entire hearing (including cross-examination) to occur with the parties located in separate rooms with technology enabling the parties to see and hear each other. Unlike parties, witnesses do not have the right to demand to testify in a separate room, but the institution, in its discretion, may permit any participant to appear remotely.

(Section 106.45(b)(6)(i))

Scope of the Hearing

- The hearing will relate solely to charges set forth in the notice of hearing sent to the parties. If the parties or any witnesses share information that goes beyond these charges, the Hearing Officer will redirect the speaker to the charges at hand.
- Parties may be accountable for additional violations discovered through the grievance process even if they do not appear in the notice of allegations/notice of hearing. In this instance, a separate grievance process under the Title IX Policy or under other applicable policies will commence.

Attendance at the Hearing

- The hearing is closed, meaning it is not open to the public
- Advisors and parties may be present throughout the proceeding
- Witnesses may be present only for their individual meeting with the Hearing Officer
- If a party does not appear at the hearing after having been given notice and the institution's policy so allows, the hearing will be conducted in their absence, and the party's advisor may appear and conduct cross-examination
- In the event neither a party nor their advisor appears at the hearing, the institution must provide an advisor to appear on behalf of the non-appearing party

Expectation of Honesty and Rules of Decorum

- **If an institution’s conduct code requires honesty, parties must be notified at the outset of this obligation and its continuing nature throughout the grievance process** (Section 106.45(b)(2)(i)(B))
- **A party or witness who intentionally provides false or misleading information may be subject to discipline under the Title IX Policy or other applicable policies** (Section 106.71(b)(2))
- **Institutions may impose rules of decorum on the conduct of everyone in the process, including parties and advisors (so long as applied equally), and may prohibit disrespectful, abusive, and badgering questions** (Preamble p. 812)
- **Advisors may not ask questions in an “abusive, intimidating or disrespectful manner.”** (University of Rochester Title IX Policy)

Cross-Examination

- **Advisors conduct cross-examination** (Section 106.45(b)(6)(i))
- **Advisors are allowed, on behalf of the party they are advising, to cross-examine the other party and witnesses by asking relevant questions and follow-up questions, including questions challenging credibility** (Section 106.45(b)(6)(i))
- **The purpose of cross-examination is to promote the perspective of the party whose advisor is asking questions** (Preamble p. 1075)
- **Cross-examination questions may not be submitted in writing in advance of the hearing or during the hearing for purposes of seeking an evaluation of relevance** (Preamble pp. 1112, 1132)

Cross-Examination

Relevance Determination Before Answering

- Before a party or witness answers a cross-examination question, the Hearing Officer must determine whether the question is relevant. The Hearing Officer must explain their reasoning for deeming any question irrelevant. (See third bullet.)
- A layperson determination of relevance is made by applying logic (Preamble p. 1159)
- DOE explained: “[A] decision-maker [is not required] to give a lengthy or complicated explanation [of a relevancy determination]; it is sufficient, for example, for a decision-maker to explain that a question is irrelevant because the question calls for prior sexual behavior information without meeting one of the two exceptions, or because the question asked about a detail that is not probative of any material fact concerning the allegations.” (Preamble p. 1161)

Cross-Examination

Relevance Determination Before Answering (cont'd)

- Institutions may not adopt a rule excluding relevant evidence because it may be unduly prejudicial, concern prior bad acts or constitute character evidence (Preamble p. 812)
- The requirement of relevancy applies throughout the hearing, including during cross-examination, and will be determined by the Hearing Officer.
- Institutions may adopt a rule that the decision-maker will send to the parties after the hearing any revisions to the decision-maker's relevance explanation provided during the hearing. (Preamble p. 1160)

Effect of Not Submitting to Cross-Examination

- If a party or witness does not submit to live cross-examination by advisors at the hearing, the Hearing Board must not rely on any **statement** of that party or witness in reaching a determination regarding responsibility (Section 106.45(b)(6)(i))
- ***Key concept:*** Only statements that have been tested for credibility will be considered by the decision-maker in reaching a determination of responsibility (Preamble p. 1168)
 - “[T]he decision-maker must consider only those statements that have benefited from the truth-seeking function of cross-examination.” (Preamble p. 1179)
- This rule does not apply if a party or witness refuses to answer a question or questions posed by the Hearing Officer

Effect of Not Submitting to Cross-Examination

- **Statement:** Evidence that constitutes a person's intent to make factual assertions
- Statement has its ordinary meaning, but would not include evidence (such as videos) that do not constitute a person's intent to make factual assertions, or to the extent that such evidence does not contain a person's statements
- Thus, police reports, SANE reports, medical reports, and other documents and records may not be relied on in making a final determination after the completion of the hearing to the extent that they contain the statements of a party or witness who has not submitted to cross-examination (Preamble p. 1181)
- The hearing is the parties' first opportunity to present information to the decision-maker about the credibility and implications of such evidence
- Probing the credibility and reliability of statements asserted by witnesses contained in such evidence requires the parties to have the opportunity to cross-examine the witnesses making the statements

Effect of Not Submitting to Cross-Examination

- **Submit to cross-examination:** Answering those cross-examination questions that are relevant, as determined by the Hearing Officer, in real time during the hearing
- If a party or witness disagrees with the Hearing Officer's determination that a question is relevant, they may either (a) abide by the Hearing Officer's determination and answer the question or (b) refuse to answer the question
- In the event the party or witness refuses to answer the question, unless the Hearing Officer reconsiders the relevance determination, the Hearing Officer cannot rely on any statement of that party or witness

Effect of Not Submitting to Cross-Examination

- **Examples:**
 - This rule applies to law enforcement reports, SANE reports, medical reports, and any other documents and records that contain the statements of a party or witness who has not submitted to cross-examination
 - If one party to a text message or email exchange submits to cross-examination and the other does not, only the messages of the individual who submits to cross-examination may be considered
 - Where a party refuses to answer cross-examination questions, but video evidence exists showing the underlying incident, the Hearing Officer may still consider the available evidence and make a determination
 - If the matter does not depend upon a party's or witness's statements, but on other evidence (e.g., video evidence that does not consist of "statements" or to the extent the video contains non-statement evidence), the Hearing Officer can still consider this other evidence and reach a determination, but without drawing any inference based upon lack of party or witness testimony

Rape Shield Protections

- All questions and evidence about Complainant's sexual predisposition are always irrelevant
- Questions and evidence about Complainant's prior sexual behavior are irrelevant unless (a) offered to prove that someone other than the Respondent committed the alleged misconduct or (b) offered to prove consent

Thoroughness is Required

- While it is important to provide a prompt resolution, it is equally important to conduct a thorough fact-finding process and deliberation
- As the Hearing Officer hears testimony, identify areas or topics requiring further evidentiary development in order to make a determination regarding responsibility and explain the basis of that decision in detail
- In that event, consider whether the Complainant and/or Respondent must be consulted again and, if so, give equal opportunity for each to respond

Deliberations

When the hearing concludes, the Hearing Officer will privately deliberate and make their decision in accordance with the institution's standard of evidence

Deliberations in Sum

The Hearing Officer must answer the following questions based on their evaluation of the evidence using the institution's standard of proof:

1. What happened? (Findings of Fact)
2. Why does the Hearing Officer believe that is what happened? (Rationale for Findings of Fact)
3. Does what happened violate institutional policy? (Determination of Responsibility)
4. Why does the Hearing Officer believe what happened did or did not violate institutional policy? (Rationale for Determination of Responsibility)
5. If a determination of responsibility is made, what should the institution do about it? (Sanctions and Remedies)
6. Why should the institution do that? (Rationale for Sanctions and Remedies)

Deliberations

What type of information did the Hearing Officer receive?

- Decision-makers have to assess the evidentiary value of each piece of information. Is it:
 - Fact
 - Opinion
 - Circumstantial evidence
- How should it be weighed?

Sanctions

- Title IX requires that the institution provide notice of a range of sanctions
- The lists on the next slides are possible remedies and disciplinary sanctions
- Remember, when providing the notice of possible sanctions, it does not reflect: (a) the probability that any particular outcome will occur or (b) a presumption of responsibility
- Respondent's lack of comprehension that conduct constituting Title IX Sexual Harassment violates the bodily or emotional autonomy and dignity of a victim does not excuse the misconduct, though genuine lack of understanding may, in the institution's discretion, factor into the sanction decision (Preamble p. 434)

Sanctions – Examples

Students

- **Expulsion (permanent separation)**
- **Suspension**
- **Deferred Suspension**
- **Disciplinary Probation**
- **Disciplinary Probation with deferred removal from the residence halls**
- **Loss of housing contract**
- **Residence hall probation**
- **Conduct warning**
- **Title IX Sexual Harassment education or other relevant education**
- **Parent or guardian notification (subject to privacy restrictions)**

Sanctions – Examples

Students (continued)

- Financial restitution
- Organizational sanctions including probation and rescinding recognition or other organizational restrictions
- Fine
- Community restoration and/or community service
- Loss of campus privileges
- Loss of campus employment and/or opportunities for campus employment
- Withholding records or degree
- Revocation of admission and/or degree
- Bar against registration
- Discretionary action
- Substance abuse education and/or evaluation

Sanctions – Examples

Employees

- Termination of employment
- Revocation or denial of tenure (depending upon terms of policy)
- Suspension
- Demotion
- Progressive discipline
- Warning
- Loss of pay or other pay adjustments
- Job transfer
- Change or restrictions in work location and/or job responsibilities
- Title IX Sexual Harassment education
- Restrictions on the employee's communications
- Limitations on the employee's movement in or on campus, programs, and activities

Remedies

- **The Hearing Officer may consider remedial actions that may be taken to address and resolve any incident of Title IX Sexual Harassment and to prevent its recurrence, including: strategies to protect the Complainant and any witnesses from retaliation; providing counseling for the Complainant; steps to address any impact on the Complainant, any witnesses, and the broader campus community; and any other necessary steps reasonably calculated to prevent future occurrences of harassment**
- **The Title IX Coordinator must implement remedies** (Section 106.45(b)(7)(iv))

Failure to Comply

Failure to comply with the sanctions or conditions imposed by the Hearing Officer will result in action under the institution's student code of conduct or Faculty or Employee Handbooks, as applicable

Written Determination

- After deliberations have concluded—meaning the Hearing Officer has made their decision in accordance with the institution’s standard of evidence—the Hearing Officer must issue a written determination (Section 106.45(b)(7))
- **Written determination:** a letter delivered simultaneously to the parties that describes the Hearing Officer’s decision regarding responsibility or no responsibility, which must be supported by evidence

Required Content of Written Determination

1. Procedural History
2. Summary of allegations in notice of allegations/notice of hearing
3. Policy provisions at issue
4. Findings of fact related to each allegation potentially constituting Title IX Sexual Harassment, made by the applicable standard of evidence
5. Rationale (or evidentiary basis) for the findings of fact related to each allegation (while the regulations are unclear as to the order of this step, we believe this step is best placed here; see also Preamble pp. 981, 1114, 1137, and 1326 for a discussion of the relationship between findings of fact and credibility evaluation)

(Section 106.45(b)(7))

Required Content of Written Determination

6. A determination of whether the conduct found to have occurred violates the Title IX Policy (determination of responsibility) or not (determination of no responsibility)
7. Rationale (or evidentiary basis) for the determination of responsibility or no responsibility
8. A statement of any disciplinary sanctions imposed on the Respondent and the rationale for the sanctions
9. Whether remedies will be provided to the Complainant, using the phrase: “Remedies designed to restore or preserve equal access to institution’s education program or activity will be provided by institution to the Complainant.”
 - The nature of such remedies will not appear in the written determination
 - Remedies that do not directly affect the Respondent must not be disclosed to the Respondent
10. Information about how to file an appeal and how to access the transcript or recording before the time to file an appeal lapses.

(Section 106.45(b)(7))

Required Content of Written Determination: Procedural History

Procedural History: A section of the written determination describing the procedural steps taken from the receipt of the formal complaint through the determination, including notifications to the parties; the date Respondent received the Notice of Investigation; the investigation process; and hearings held.

Regarding the description of the **investigation process**, the procedural history section should include:

- Which parties and witnesses were interviewed and when
- Site visits
- Methods used to gather evidence
- What type of evidence was reviewed
- The process undertaken to inspect and review the evidence and to disseminate the investigation report, including timelines
- Actual or perceived procedural issues (e.g. timeline extensions for good cause; reasonable inability to follow “leads” at party request based on a lack of time, resources, or the unavailability of witnesses).

Effective Date of the Written Determination

The written determination becomes final only after the time period to file an appeal has expired or after the appeal decision has been sent to the parties, if such decision upholds the written determination.

Appeals

Filing an Appeal from a Written Determination

- The parties have equal rights to file an appeal
- **Appeal:** An objective review of the prior process (including the dismissal of a formal complaint) and outcome, unless new evidence must be considered
- Appeals must be submitted to the individual identified in the written determination on or before the date specified in the written determination

Appeal Grounds

An appeal is not intended to be a rehearing of the information presented at the hearing

The regulations require the following grounds for appeal:

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

Institutions have discretion to adopt other appeal grounds, which must be equally available to the parties. **The University of Rochester added a ground: The sanction imposed was inappropriate.** (University of Rochester Title IX Policy)

***Procedural irregularity:** A failure to follow the institution's own procedures, which could include an institution's failure to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence (Preamble p. 815)

Actions Upon Receipt of Appeal

- **Appeal is provided to the appeal decision-makers**
 - **Appeal decision-makers:** At least two persons (NYS Education Law Article 129-B) who make decisions when parties submit an appeal
 - An appeal decision-maker cannot be the investigator, the Title IX Coordinator or the Hearing Officer
- **The appellant should be given notice of the receipt of the appeal, the non-appealing party must be given notice of the appeal, and the parties should be given notice of the names of the appeal decision-makers (Section 106.45(b)(8))**
- **The parties may request that the Title IX Coordinator remove the appeal decision-makers based on reasonable and articulated grounds of bias, conflict of interest or an inability to be fair and impartial**

Actions Upon Receipt of Appeal

- The appeal decision-makers will first determine whether the appeal will be accepted based upon the threshold determination as to whether one or more of the appeal grounds is met. The appeal decision-makers will send written notice to the parties simultaneously:
 - That the appeal has been rejected due to insufficient grounds, with the appeal decision-makers' rationale, or
 - That the appeal has been accepted and considered
- If the appeal is accepted, the non-appealing party/ies will be entitled to submit a response to the appeal (Section 106.45 (b)(8)(iii)(D))
- The appeal decision-makers will then analyze all of the materials related to the appeal and may take the actions set forth in the institution's policy, which *typically* include:
 - Uphold the original decision
 - Send the matter back to the Hearing Officer for further consideration
 - Refer the matter to the Title IX Coordinator for further investigation or a new hearing with a new Hearing Officer
 - Or another action set forth in the institution's policy
- The written appeal decision, which will include the appeal decision-makers' rationale, must be sent to the parties simultaneously

Are Appeal Decisions Final?

- **Yes, under University policy**

When an Appeal is Not Filed

The parties should be notified if the time to file an appeal has expired without any appeal having been submitted

Transcript Notations

- New York law requires that institutions make specific notations on the transcripts of Respondents found responsible for the following conduct prohibited by the Title IX Policy: sexual assault, dating violence, domestic violence, and stalking.
- Students suspended after a finding of responsibility should receive the following notation on their transcript: “suspended after a finding of responsibility for a code of conduct violation.” Such notations will remain for at least one year after the conclusion of the suspension, at which point a suspended student can seek removal of the notation by following the institution’s stated process.
- Students expelled after a finding of responsibility should receive the following notation on their transcript: “expelled after a finding of responsibility for a code of conduct violation.” Such notation shall not be eligible for removal.
- Students who withdraw pending resolution of alleged violations will receive the following notation on their transcript: “withdrew with conduct charges pending.” Such notation shall not be eligible for removal unless the charges are later resolved.
- If the institution vacates a finding of responsibility for any reason, any such transcript notation shall be removed.

Informal Resolution

What's New?

The regulations:

- Allow institutions the discretion to offer voluntary informal resolution to resolve any type of Title IX Sexual Harassment without a full investigation and/or hearing and adjudication, except when an employee is accused of sexually harassing a student
- Prohibit offering informal resolution unless a formal complaint is filed
- Require specific notices and written consent before informal resolution can proceed
- Prohibit conditioning enrollment/continued enrollment, employment/continued employment or enjoyment of any other right on waiver of right to investigation and adjudication of formal complaint of Title IX Sexual Harassment

(Section 106.45(b)(9))

Department of Education Estimate

- **The Department conservatively estimated that 25 percent of formal complaints will be resolved through an informal resolution process**

(Preamble p. 1993)

Issues to Consider

- **Who on your campus could successfully serve in the facilitator role?**
- **Areas of institutional discretion**
 - **When is this process is available (after a formal complaint and, e.g., upon parties' request, upon one party's request and consent of other party/ies or upon Title IX Coordinator suggestion and party consent)?**
 - **At what point is the process no longer available (e.g., only available before the written determination is issued by a Hearing Officer)?**
 - **Will there be a requirement that the institution approve the commencement and outcome of the process?**
 - **What is the time period the institution will pause the grievance process to work on informal resolution? Will the informal resolution process count as part of the overall grievance process timeline established in policy?**
 - **What information shared during the informal resolution process, if any, may be disclosed or used in a continuing investigation or hearing process?**
 - **Can a facilitator be called as a witness in a later investigation or hearing?**
- **How will you memorialize an agreement reached through informal resolution?**
- **What informal resolution records will the institution maintain?**

Required Notice

Prior to beginning the informal resolution process, the institution must give the parties notice of:

- The allegations of the formal complaint
- The requirements of the process including circumstances that preclude resumption of the grievance process of a formal complaint arising from the same allegations
- The right to withdraw from the informal resolution process and resume grievance process with respect to the initiating formal complaint
- Any consequences from participating in the informal resolution process, including records that will be maintained or could be shared
- *Advised:* identity of facilitator(s)
- *Discretionary:* the requirement that each party sign a written consent before the informal resolution process can begin

(Section 106.45(b)(9))

Written Consent Required

**The regulations explicitly
require parties to consent in writing
to their voluntary participation
in the informal resolution process**

(Section 106.45(b)(9)(ii))



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