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UPDATED MAY 2020

Highlights of the Department of Education Final Title IX Regulations (Summary and Comments)

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On May 6, 2020 the United States Department of Education ("DOE") issued final regulations regarding the obligations of U.S. colleges and universities to address incidents of sexual harassment under Title IX.

These regulations supersede previous guidance issued by DOE regarding sexual harassment and sexual assaults on colleges campuses.

Proposed regulations were open for public comments since initially proposed on November 16, 2018, and the preamble to the final regulations discusses many of the comments submitted regarding the proposed regulations and DOE's response to those comments.

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Summary of Regulations

I) Introduction

A) The final Title IX Regulations (34 CFR Part 106) (the "regulations") cover both secondary institutions of higher education, including graduate, undergraduate, vocational and professional schools as well as elementary and secondary schools, including preschools as well as private elementary and secondary schools. *§106.30(b)*

Some portions of the regulations apply equally to both postsecondary schools as well as elementary and secondary schools, while other provisions differentiate the requirements imposed upon each type of institution.

B) The effective date for all schools to come into compliance with the new regulations is August 14, 2020. *Preamble p. 13*

C) Schools must comply with the requirements of Title IX as outlined under the regulations. *§106.8(c); §106.44(b)(1)*; *§106.45(b)*

Subject to compliance with the regulations, schools may provide guidelines, policies or protocols through their codes of conduct beyond the scope of the regulations, and/or provide details regarding policies or procedures which are not addressed in the regulations. *§106.45 (b) (3)*

For example, the regulations only apply to sexual discrimination against a person "in the United States" based upon DOE's analysis of the statutory language of Title IX. However, a school may, within its code of conduct and sexual misconduct policy, address issues related to students while studying abroad. *Preamble p. 660*

Similarly, the regulations may only apply to sexual harassment related to activities on campus or sponsored by a school or in a facility occupied by an organization which is endorsed by the school. The institution's code of conduct may expand this scope of coverage.

Further, the regulations do not specify timelines or procedures for parties to submit exculpatory or inculpatory evidence following issuance of an investigative report. Consequently, the school may establish timelines and protocols for such submissions.

D) A guiding principle throughout the regulations is that a school must treat both parties equitably and equally throughout the process including supportive measures, investigations, and the grievance proceedings. *§106.44(a)* and *§106.45(b)(1)(i)*

E) "Recipient" is defined as a recipient of Federal financial assistance covered by Title IX of the Education Amendments of 1972 ("Title IX"). *Preamble p. 1*

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II) Definitions of "Sexual Harassment"—34 CFR §106.30(a)

A) "Sexual Harassment" is defined as conduct on the basis of sex that satisfies one or more of three types of behavior:

i) A recipient's employee conditioning provision of an aid, benefit or service of the recipient on an individual's participation in unwelcome sexual conduct ("quid pro quo" harassment);

ii) Unwelcome conduct determined by a reasonable person to be so severe, pervasive and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity, or

iii) "Sexual assault," "dating violence," "domestic violence" or "stalking" as defined in referenced statutes.

B) "Quid pro quo" harassment may be express or implied and need not be "severe" or "pervasive" as a single incident is inherently "offensive" and jeopardizes equal educational access. *Preamble p. 446-447*

C) "Sexual Assault" is defined as:

Forcible or nonforcible sex offenses under the FBI's Uniform Crime Reporting (U.C.R) program. *U.S.C. 1092 (f)(6)(A)(v*)

The U.C.R. contains the following definitions:

i) Sex Offenses, Forcible: Any sexual act directed against another person, without the consent of the victim including instances where the victim is incapable of giving consent.

(a) Forcible Rape: (Except Statutory Rape) The carnal knowledge of a person, forcibly and/or against that person's will or not forcibly or against the person's will in instances where the victim is incapable of giving consent because of his/her temporary or permanent mental or physical incapacity.

(b) Forcible Sodomy: Oral or anal sexual intercourse with another person, forcibly and/or against that person's will or not forcibly or against the person's will in instances where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.

(c) 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, forcibly and/or against that person's will or not forcibly or against the person's will in instances where the victim is incapable of giving consent because

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of his/her youth or because of his/her temporary or permanent mental or physical incapacity.

(d) Forcible Fondling: The touching of the private body parts of another person for the purpose of sexual gratification, forcibly and/or against that person's will or not forcibly or against the person's will in instances where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.

ii) Sex Offenses, Nonforcible: (Except Prostitution Offenses) Unlawful, nonforcible sexual intercourse.

(a) Incest: Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

(b) Statutory Rape: Nonforcible sexual intercourse with a person who is under the statutory age of consent.

D) "Dating Violence" is defined as:

i) 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 based on a consideration of the following factors:

(1) The length of the relationship.

(2) The type of relationship.

(3) The frequency of interaction between the persons involved in the relationship. *34 U.S.C. 12291 (a)(10)*

E) "Domestic Violence" is defined as:

i) Felony or misdemeanor crimes of 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 a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's

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acts under the domestic or family violence laws of the jurisdiction. 34 *U.S.C. 12291 (a)(8)*

F) "Stalking" is defined as:

i) Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

(a) Fear for his or her safety or the safety of others; or

(b) Suffer substantial emotional distress. *34 U.S.C. 12291 (a)(30)*

G) The regulations do not include a definition of consent and do not require recipients to adopt a particular definition of consent, including "affirmative consent," with respect to sexual assault. *34 CFR §106.30(a*)

H) Recipients must clearly define consent and must apply that definition consistently between men and women, generally, and complainant and respondents in particular cases. *Preamble p. 364*

I) Some states have statutes directed to sexual assault which contain definitions of "consent" that a school will necessarily include within its sexual misconduct policy. *Preamble p. 363*

J) **Comment:** Note the "consent" requirement under the definitions of sexual assault. (See II. B. above). This "consent" criteria will continue to focus, as under prior DOE guidelines, on the victim's ability to give consent, and inability to give such consent if impaired by alcohol, drugs or mental incapacity.

K) **Comment:** Note the subjective and conjunctive standards under Paragraph II.A.2. above:

> Unwelcome conduct determined by a reasonable person that is so severe, pervasive and objectively offensive that it effectively denies a person equal access to the school's education program or activity.

Each factor in this paragraph must be met in order for an alleged incident or behavior to constitute "sexual harassment" subject to the requirements under the regulation. The question of what conduct is "severe", "pervasive" and "objectively offensive" will be unique to virtually every situation and educational institution and the source of potential litigation in every case.

For instance, a single unwelcome act by a student against another student may not equate to "pervasive" conduct on a college campus. Consequently, that act may not give rise to any obligation on the college to investigate or respond to the victim's complaint under the regulation guidelines.

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On the other hand, if similar acts of sexual harassment involving different students is routine on a college campus the behavior may rise to the level of being "pervasive."

Similar questions regarding the definitions of "severe" and "objectively offensive" may arise in many cases, ultimately posing the potential for litigation in these incidents.

L) Online sexual harassment, if part of a recipient's educational program or activity, may be subject to the regulations. The preamble notes this is fact specific. A recipient may also cover such harassment under its code of conduct, even if not subject to the regulations. *Preamble p. 643-645*

III) Recipient's General Response—Threshold Criteria –34 CFR §106.44(a)

A) §106.44(a) provides:

i) A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.

B) The regulations set forth specific and limiting threshold criteria in which a school is required to respond to an alleged incident of sexual harassment:

i) The incident constitutes "sexual harassment" within the definitions outlined in Paragraph II. above.

ii) The school must have "actual knowledge" of an allegation of the incident of sexual harassment.

iii) The conduct must have occurred within the school's own "education program or activity."

iv) The alleged harassment must occur "in the United States."

C) Note that all four criteria must be met to constitute an incident of sexual harassment which is subject to the requirements of the regulations. A dismissal of a formal compliant due to failure to meet the requirements of Title IX does not preclude an action under other provisions of the school's code of conduct. *§106.45(b)(3)*

D) "Actual knowledge" is defined as:

i) Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient or to any employee of an elementary and secondary school. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge.

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This standard is not met when the only official of the recipient with actual knowledge is the respondent. The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient. "Notice" as used in this paragraph includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator as described in §106.8(a). *§106.30(a)*

E) At a postsecondary institution reporting sexual harassment to a Title IX coordinator always constitutes "actual knowledge." Reporting to a person "with authority to take corrective action" also constitutes "actual knowledge." *§106.30(a)*

F) At an elementary or secondary institution reporting to "any employee" constitutes "actual knowledge. *§106.30(a)*

G) Under the regulations the reporting of an incident to a resident assistant, professor, or campus counselor or advisor, does not rise to the definition of "actual knowledge." *§106.30(a)*

H) "Education program or activity" includes:

   i) Locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. *§106.44(a)*

I) This third criteria limits a school's responsibility to school related services, locations and activities. Outside locations, even involving students of a college, are outside of actionable events under the regulations though they may be subject to the school's code of conduct.

J) Incidents involving students in programs outside of the United States, i.e. exchange or study-abroad programs, are not subject to the regulation requirements, though the school may address sexual harassment involving students studying abroad, including supportive measures, in its code of conduct. *Preamble p. 660*

K) **Comment:** These threshold criteria are significantly more limited than under previous DOE guidelines and will presumably result in many incidents falling outside of the requirements of a school taking any responsive action. For instance, an incident of sexual assault (which would constitute sexual harassment under Paragraph II.A.3. above) by one student against a fellow student during a party at a privately rented home off campus would apparently not meet the second requirement under Paragraph III.A.3. above and the college would have no obligation to investigate or take any responsive action, even if the incident was reported to the Title IX Coordinator.

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IV) Recipient's Response—Deliberately Indifferent—34 CFR §106.44(a)-(b)

A) Under the proposed regulations a school will be held liable for violating its obligations under Title IX if it is found that the school's response was "deliberately indifferent" which is defined as "clearly unreasonable in light of the known circumstances." *§106.44(a)*

B) Regulation §106.44(b)(2) provides:

   i) The Assistant Secretary will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient, or otherwise evidence of discrimination under Title IX by the recipient, solely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence.

C) As noted above, only alleged incidents meeting the threshold criteria noted under Paragraph III above require a response by the institution.

V) Recipient's Response to Qualifying Incidents of Sexual Harassment—34 CFR §106.44

A) If an incident meets the criteria of: (1) constituting sexual harassment (as defined in Paragraph II.A. above); (2) the school has actual knowledge (as defined in Paragraph IIII.D above); and (3) the incident falls within the required jurisdictional criteria (as defined in paragraphs III.A.3. and 4. above) the school has a duty to respond as provided under the regulations. *§106.44(a)*

B) Regulation §106.44(a) provides:

   i) A recipient's response must treat complainants and respondents equitably by offering supportive measures as defined in §106.30 to a complainant, and by following a grievance process that complies with §106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in §106.30, against a respondent.

C) If a formal complaint is filed, the recipient must follow its grievance process. *§106.44(b)(1)*

D) Even if no formal complaint is filed (and consequently the school is not required to investigate) the school must offer the complainant supportive measures. *§106.44(b)(1)*

E) Regulation §106.44(a) provides:

   i) The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in §106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability

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of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.

F) Regulation §106.30(a) describes supportive measures as:

i) *Supportive measures* means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment. *§106.30(a)*

G) Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. *§106.30(a)*

H) The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the institution to provide the supportive measures. *§106.30(a)*

I) The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures. *§106.30(a)*

VI) Recipient's Response—Emergency Removal—34 CFR §106.44(c)

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

VII) Recipient's Response—Administrative Leave—34 CFR §106.44(d)

A) The regulations do not preclude a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that

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complies with § 106.45. This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.

VIII) Grievance Process—Formal Complaint—34 CFR §106.30(a) and §106.45(b)

A) A "formal complaint" is defined as:

i) A document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment.

ii) At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.

iii) A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under §106.8(a), and by any additional method designated by the recipient.

iv) As used in this paragraph, the phrase "document filed by a complainant" means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.

v) Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party under this part or under §106.45, and must comply with the requirements of this part, including §106.45(b)(1)(iii). *§106.30(a)*

B) In response to a formal complaint, a recipient must follow a grievance process that complies with §106.45. With or without a formal complaint, a recipient must comply with §106.44(a). *§106.44(b)(1)*

C) The recipient must investigate the allegations in a formal complaint. *§106.45(b)(3)(i)*

D) Dismissal of a formal complaint:

i) The recipient must dismiss a formal complaint if the conduct alleged in the formal complaint:

(a) Would not constitute sexual harassment as defined in §106.30 even if proved;

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(b) Did not occur in the recipient's education program or activity; or

(c) Did not occur against a person in the United States. *§106.45(b)(3)(i)*

(d) Such a dismissal does not preclude action under another provision of the recipient's code of conduct. *§106.45(b)(3)(i)*

ii) The recipient may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing:

(a) A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein;

(b) The respondent is no longer enrolled or employed by the recipient; or

(c) Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein. *§106.45(b)(3)(ii)*

iii) Upon a dismissal required or permitted pursuant to §106.45(b)(3)(i) or (b)(3)(ii) of this section, the recipient must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties. *§106.45(b)(3)(iii)*

E) Consolidation of formal complaints:

i) A recipient may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances. Where a grievance process involves more than one complainant or more than one respondent, references in the regulations to the singular "party," "complainant," or "respondent" include the plural, as applicable. *§106.45(b)(4)*

IX) Grievance Process—Process for Formal Complaints—34 CFR §106.45(b)

A) In addressing formal complaints of sexual harassment, a recipient's grievance process must comply with the requirements of the regulations. *§106.45(b)*

B) Any provisions, rules, or practices other than those required by the regulations that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in §106.30, must apply equally to both parties. *§106.45(b)*

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C) A recipient's grievance process must:

i) Treat complainants and respondents equitably by:

(a) Providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent; and

(b) By following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in §106.30, against a respondent.

Remedies must be designed to restore or preserve equal access to the recipient's education program or activity. Remedies may include the same individualized services described in §106.30 as "supportive measures"; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent

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

iii) Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

iv) A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training. See Paragraph XIX below.

v) Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process;

vi) Include reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes;

vii) Include a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities;

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

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

x) Include the procedures and permissible bases for the complainant and respondent to appeal;

xi) Describe the range of supportive measures available to complainants and respondents; and

xii) Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege. *§106.45(b)(1)(i)-(x)*

D) A recipient's treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under Title IX. *§106.45(a)*

E) **Comment:** Note that the "same standards" requirements noted under Paragraph IX. C.ix. above may necessitate a school's applying the higher standard of "clear and convincing evidence" due to the school's general code of conduct or employee/faculty contract criteria.

X) Grievance Process—Notice—34 CFR §106.45(b)(2)

A) In response to a formal complaint a school must give written notice of the allegations to the parties. This notice is to include:

i) Notice of the school's grievance process.

ii) Sufficient details of the allegations known at the time, including:

(a) Identities of the parties involved.

(b) The conduct allegedly constituting sexual harassment as defined in the regulation.

(c) The date and location of the alleged incident.

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iii) A sufficient time period for the parties to prepare a response before an initial interview.

iv) That the respondent is presumed to not be responsible until a final determination is made.

v) That a determination of responsibility will be made at the conclusion of the grievance process.

vi) That each party may have an advisor of their choice who may, but need not be, an attorney.

(a) The school may elect to pay for the advisor throughout the grievance process but is only required to ensure that a party has an advisor at the hearing. See Preamble p. 992. See Paragraph XII below

vii) The right of each of the parties to inspect and review all evidence gathered during the investigation.

viii) Reference to any policy in the school's code of conduct which prohibits knowingly making false statements or submitting false information during the grievance process. *§106.45(b)(2)(i)*

B) If the investigation is expanded, then notice must be given. *§106.45(b)(2)(ii)*

C) See Paragraph VIII above regarding handling, dismissal, and consolidation of complaints.

XI) Grievance Process—Investigation of Formal Complaints—34 CFR §106.45(b)(5)

A) A recipient must investigate a formal complaint. *§106.45(b)(3)*

B) The Title IX Coordinator also may serve as the investigator. *Preamble p. 1257 & 1957*

C) The burden of proof and gathering of evidence is on the recipient. *§106.45(b)(5)(i)*

D) Medical and similar privileged records are not available unless the party (or parent) gives written consent. *§106.45(b)(5)(i)*

E) Both parties must be given the equal opportunity to present fact and expert witnesses and evidence during the grievance process. *§106.45(b)(5)(ii)*

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F) Neither party may be restricted in their ability to discuss the allegations or gather and present relevant evidence. *§106.45(b)(5)(iii)*

G) Both parties have the right to an advisor (including an attorney) throughout the grievance process though the recipient may establish restrictions on the advisor's participation in proceedings provided the restrictions are equally applied. *§106.45(b)(5)(iv)*

H) The school must give written notice of any interview, meeting or hearing at which a party is to participate, including date, time, location and purpose, with sufficient time for the party to prepare. *§106.45(b)(5)(v)*

I) All parties and their advisors must be given equal access to inspect and review all evidence gathered during the investigation that is directly related to the allegations raised in the formal complaint, including evidence upon which the recipient does not intend to rely in reaching a determination and inculpatory as well as exculpatory evidence, regardless of source. The evidence must be provided in electronic format or hard copy. *§106.45(b)(5)(vi)*

J) The parties must be given at least 10 days to file a written response regarding the investigation evidence and the investigator must consider those responses prior to completion of the investigative report. The recipient may elect to use calendar or business days (Preamble p. 1963). *§106.45(b)(5)(vi)*

K) The evidence provided to the parties must also be available at the hearing with each party having equal access to refer to the evidence or use it in cross examination. *§106.45(b)(5)(vi)*

L) The investigator must complete an investigative report that fairly summarizes relevant information at least 10 days prior to a scheduled hearing and provide copies to each party and their advisors, in electronic or hard format, for their review and written response. *§106.45(b)(5)(vii)*

M) **Comment:** The rights of the parties to access investigative reports and evidence, and the obligation of a decision-maker in issuing a written determination (see Paragraph XIII.C. below), illustrates the need to have well-planned and implemented investigations, with organized and detailed evidentiary files, recordings, virtual interviews, etc.

N) **Comment:** Note the importance of the school's code of conduct expressly setting forth: the type of conduct which constitutes sexual harassment; the definition of consent; the standards of evidence; the prohibition upon making false statements or submitting false information; and timelines for responses (which may be longer than 10 days).

O) **Comment:** The school's code of conduct should also clearly set forth the investigation and grievance process.

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XII) Grievance Process—Hearings—34 CFR §106.45(b)(6)

A) The decision-maker(s) in a hearing cannot be the same person(s) as the Title IX Coordinator or the investigator(s). *§106.45(b)(7)(i)*

B) A postsecondary school must provide for a live hearing. *§106.45(b)(6)(i)*

C) A live hearing is optional for elementary and secondary schools, though the parties must be given the opportunity to review the investigative report, submit written relevant questions of any party or witness to the decision-maker, receive answers to those questions, and submit limited follow-up questions prior to a determination by the decision-maker. The decision-maker must explain the exclusion of any question as not being relevant. *§106.45(b)(6)(ii)*

D) The recipient may consolidate cases when allegations arise out of the same facts or circumstances. *Preamble p. 1038; §106.45(b)(4)*

E) Live hearings may be conducted either with all parties physically present at the same location or, at the recipient's election, any or all parties, witnesses and other participants may appear at the live hearing virtually, provided all participants can simultaneously see and hear each other. *§106.45 (b)(6)(i)*

F) The recipient must create an audio or audiovisual recording or transcript and make it available to both parties for inspection and review. *§106.45(b)(6)(i)*

G) Either party may request that a hearing be held with the parties in separate rooms with technology enabling the parties and the decision-maker(s) to see and hear witnesses. *§106.45(b)(6)(i)*

   i) Webcams, laptops or cell phones, utilizing available software will meet this requirement. *Preamble p. 1968*

H) If a party does not have an advisor at the live hearing, the recipient must provide an advisor of the party's choice, without charge to the party, who may be an attorney, to conduct cross examination. *§106.45(b)(6)(i)*

I) At the hearing each party must be given the opportunity for relevant questions and cross-examination to be conducted by the party's advisor of the other party and any witnesses, including challenging credibility. The cross examination must be conducted directly, orally and in real time and only by the party's advisor, never by the party. *§106.45(b)(6)(i)*

J) Only relevant questions may be asked of a party or witness in cross examination or other questions and before a question is answered the decision-maker must first determine whether the question is relevant and explain any decision to exclude a question as not relevant. *§106.45(b)(6)(i)*

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K) The regulations focus on the investigator and decision-maker considering relevant evidence. A recipient may not adopt evidentiary rules of admissibility that might serve to exclude relevant information (i.e. lie detector results or rape kits). *Preamble p. 981*

L) Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless offered to prove someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. *§106.45(b)(6)(i)*

M) If a party or witness does not submit to cross-examination at the live hearing the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination of responsibility. However, the decision-maker(s) cannot draw an inference regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions. *§106.45(b)(6)(i)*

XIII) Grievance Process—Determinations—34 CFR §106.45(b)(7)

A) The determination must be made by a decision-maker(s) who is/are not the Title IX Coordinator or investigator, and who does not have a conflict of interest or bias. *§106.45(b)(7)(i)*

B) In reaching a determination the recipient must apply the standard of evidence adopted by the school. *§106.45(b)(7)(i)* and *§106.45(b)(1)(vii)*. See Paragraph XIV below.

C) Following the hearing the decision-maker must issue a written determination which must include:

i) Identification of the allegations potentially constituting sexual harassment as defined in §106.30;

ii) A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;

iii) Findings of fact supporting the determination;

iv) Conclusions regarding the application of the recipient's code of conduct to the facts;

v) A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and

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vi) The recipient's procedures and permissible bases for the complainant and respondent to appeal. *§106.45 (b)(7)(ii)*

D) The recipient must provide the written determination to the parties simultaneously. *§106.45(b)(7)(iii)*

E) The determination is final either: 1) on the date the recipient provides the parties with written determination of an appeal if an appeal was filed; or 2) the date for filling an appeal expires without an appeal having been filed. *§106.45(b)(7)(iii)*

F) The Title IX Coordinator is responsible for implementation of any remedies. *§106.45(b)(7)(iv)*

G) **Comment:** In light of the requirement that the decision-maker must not have a conflict of interest or bias, schools should consider using an independent outside party as the decision-maker rather than a school employee or administrator who may be conflicted or biased, or perceived as being so.

H) **Comment:** Note that the decision-maker is charged with determining relevance of questions during the hearing.

XIV) Grievance Process—Standard of Evidence—34 CFR §106.45(b)(1)(vii)

A) A school may elect to apply either:

i) The preponderance of evidence; or

ii) The clear and convincing evidence standard of evidence.

B) The same standard of evidence must be used for formal complaints against students as is used for formal complaints against employees, including faculty, and the same standard must be applied to all formal complaints of sexual harassment. *§106.45(b)(1)(vii)*

C) **Comment**: Note that the "same standards" requirements noted under Paragraphs XIV. B. above may necessitate a school's applying the higher standard of "clear and convincing evidence" due to the school's general code of conduct or employee/faculty contract criteria.

XV) Grievance Process—Appeals—34 CFR §106.45(b)(8)

A) Recipients must offer an appeal process to both parties from a) a determination regarding responsibility, and b) from a recipient's dismissal of a formal complaint or any allegations therein on several bases:

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i) Procedural irregularity that affected the outcome. *§106.45(b)(8)(i)(A)*

ii) New evidence that was not reasonably available at the time of the determination or the dismissal, that could affect the outcome of the matter. *§106.45(b)(8)(i)(B)*

iii) The Title IX Coordinator, investigator or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or in the case that affected the outcome. *§106.45(b)(8)(i)(C)*

B) The recipient may offer additional bases to appeal provided they are equally available to both parties. *§106.45(b)(8)(ii)*

C) The appeal decision-maker(s) must also be free of bias or a conflict of interest; cannot be the Title IX Coordinator, investigator or decision-maker; and have required training. *§106.45(b)(8)(iii)(B)* and *§106.45(b)(8)(iii)(C)*

D) The recipient must notify the other party in writing of a party's appeal and implement equal rights to both parties on the appeal. *§106.45(b)(8)(iii)(A)*

E) Both parties must be offered a reasonable, equal opportunity to submit written arguments. *§106.45(b)(8)(iii)(D)*

F) The decision-maker(s) must issue a written decision simultaneously to both parties describing the result and the rationale of the decision. *§106.45(b)(8)(iii)(E) and (F)*

G) **Comment:** Schools should consider independent third parties to consider the appeal.

XVI) Grievance Process—Informal Resolutions—34 CFR §106.45(b)(9)

A) If a formal complaint is filed a school may offer informal resolutions of alleged incidents such as mediation or other forms of alternative dispute resolution, without a full investigation or adjudication. *§106.45(b)(9)*

B) Informal resolution must be voluntary, with the parties being fully informed of the process and options and the parties must consent in writing to the process. *§106.45(b)(9)(i)* and *(ii)*

C) Informal resolutions cannot be offered or facilitated by a recipient in a case involving an employee's sexual harassment of a student. *§106.45(b)(9)(iii)*

D) **Comment:** Schools should consider the use of trained and experienced mediators for informal resolution of cases.

E) **Comment:** In mediation three parties will be involved – the complainant, the respondent, and the school. Such situations may entail careful and comprehensive consideration of each party's role, concerns and responsibilities.

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F) **Comment:** Consider whether such informal proceedings might extend to encompass claims between the complainant and respondent in lieu of civil litigation.

XVII) Title IX Coordinator, Investigators and Decision-Makers—Training—34 CFR §106.45(b)(1)(iii) and (b)(10)

A) Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the "Title IX Coordinator." *§106.8*

B) The Title IX Coordinator may also be the investigator. The decision-maker(s) in a hearing cannot be the Title IX Coordinator or investigator. The decision-maker(s) in an appeal cannot be the Title IX Coordinator, investigator or decision-maker(s). *Preamble p. 1257 & 1957; §106.45(b)(7)(i); §106.45(b)(8)(iii)(B)*

C) The regulation requires that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. *§106.45(b)(1)(iii)*

D) A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on:

   i) The definition of sexual harassment in § 106.30;

   ii) The scope of the recipient's education program or activity;

   iii) How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable; and

   iv) How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. *§106.45(b)(1)(iii)*

E) Decision-makers must receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, as set forth in Regulation 106.45(b)(6). *§106.45(b)(1)(iii)*

F) Investigators must receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth Regulation 106.45(b)(5)(vii). *§106.45(b)(1)(iii)*

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G) Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment. *§106.45(b)(1)(iii)*

H) All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process must be maintained for 7 years by the recipient. *§106.45(b)(10)(i)(D)*

I) A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public. *§106.45(b)(10)(i)(D)*

J) Training is to be 8 hours with additional training annually. *Preamble p. 1958*

K) Training need not be live and may be online or virtual. *Preamble p. 1961*

L) **Comment:** As noted in Paragraph XI above, the investigative report, as well as all evidence gathered during an investigation must be made available to both parties for review prior to any determination. This requirement emphasizes the importance of designing and conducting comprehensive investigations which are well-documented and organized.

XVIII) Recordkeeping—34 CFR §106.45(b)(10)

A) Schools must maintain records of every Title IX sexual harassment investigation and determinations of responsibility, including informal resolutions. *§106.45(b)(10)(i)(A)-(C)*

B) Schools must keep records of responses to every allegation of sexual harassment under 106.44 even if no formal complaint was filed, and any response, including supportive measures offered and implemented. *§106.45(b)(10)(ii)*

C) Schools must document the facts upon which it was determined that they were "not deliberately indifferent" to the allegations of sexual harassment. *§106.45(b)(10)(ii)*

D) Schools must maintain all materials used to train Title IX Coordinators, investigators, decision-makers and any person who facilitates an informal resolution process, and post such materials on the school's website. *§106.45(b)(10)(i)(D)*

E) Records must be maintained for 7 years. *§106.45(b)(10)*

XIX) Remedial Action—34 CFR §106.3

A) DOE may require a recipient to take remedial action for discriminating in violation of Title IX or the regulations. *§106.3*

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B) DOE will not assess monetary damages against a school as a result of violations of the regulations. *Preamble p. 1412 et seq.*

C) DOE reserves the right to terminate Federal financial assistance as a "severe" remedy. *Preamble p. 1418-1419*

D) **Comment:** Under the new guidelines the threat of monetary damages from a school in violation is not an available sanction.

XX) Dissemination of Policy and Grievance Procedures—34 CFR §106.8

A) Each school must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the school (collectively referred to in this Paragraph XX as "Notice Parties") that it does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by Title IX and the regulations not to discriminate in such a manner. Such notification must state that the requirement not to discriminate in the education program or activity extends to employment and admissions (unless Subpart C does not apply to the institution) and that inquiries about the application of Title IX and the regulations to the school may be referred to the Title IX Coordinator or to the Assistant Secretary of DOE, or both. *§106.8(b)(1)*

B) A recipient must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited under the regulations and a grievance process that complies with § 106.45 for formal complaints as defined in § 106.30. A recipient must provide to Notice Parties notice of the recipient's grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond. *§106.8(c)*

C) A recipient must notify the Notice Parties of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator. *§106.8(a)*

D) A recipient must prominently display the contact information required to be listed for the Title IX Coordinator under Paragraph XX.C) above and the policy described in Paragraph XX.A) above on its website, if any, and in each handbook or catalog that it makes available to Notice Parties. *§106.8(b)(2)*

E) Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other

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means that results in the Title IX Coordinator receiving the person's verbal or written report. Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator. *§106.8(a)*

F) All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process must be publicly available on the recipient's website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public. *§106.45(b)(10)(D)*

XXI) Retaliation—34 CFR §106.71

A) No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or the regulations, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under the regulations. Any such act constitutes retaliation. *§106.71(a)*

B) Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination. *§106.71(a)*

C) Exercise of First Amendment rights does not constitute retaliation. *§106.71(b)(1)*

D) Charging a party with making a materially false statement in bad faith does not constitute retaliation. *§106.71(b)(2)*

XXII) Confidentiality—34 CFR §106.71

A) The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. *§106.71(a)*

XXIII) Exemption for Educational Institutions Controlled by Religious Organizations—34 CFR §106.12

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A) An educational institution controlled by a religious organization may apply for exemption from application of part or all of the regulations that conflict with the tenet of the organization. *§106.12(b)*

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