

NEW REGULATIONS GOVERNING TITLE IX ON COLLEGE CAMPUSES

Presented by Harold E. Johnson • September 17, 2020

WILLIAMS MULLEN

TODAY'S SPEAKER



Hal Johnson

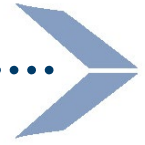
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- The Department of Education recently issued new regulations governing how colleges respond to sexual harassment on campus.
- Per those regulations, all participants (coordinators, investigators, decision-makers, mediators, etc.) must receive training on various topics. (See, *34 C.F.R. §106.45.*)
- We'll address most of those topics (and more!) in today's webinar.

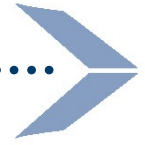
ROADMAP



- Each school may develop its own policies and procedures, and each institution may do things a little differently.
- However, **ALL** colleges and universities must adhere to the baseline requirements in the new regulations.
- What we cover today are the baseline requirements that apply all institutions.

AGENDA

- 1. Introduction to Title IX and the new regulations.**
- 2. The parameters of Title IX.**
 - When and how must a college respond to reports of sexual harassment or sexual assault?
 - Two phases:
 - A. Response – supportive measures
 - B. Grievance Process – investigation and hearing



3. The Grievance Process

- Fairness and due process
- Investigations
- Hearings
- Appeals
- Informal Resolution



WHAT IS TITLE IX?

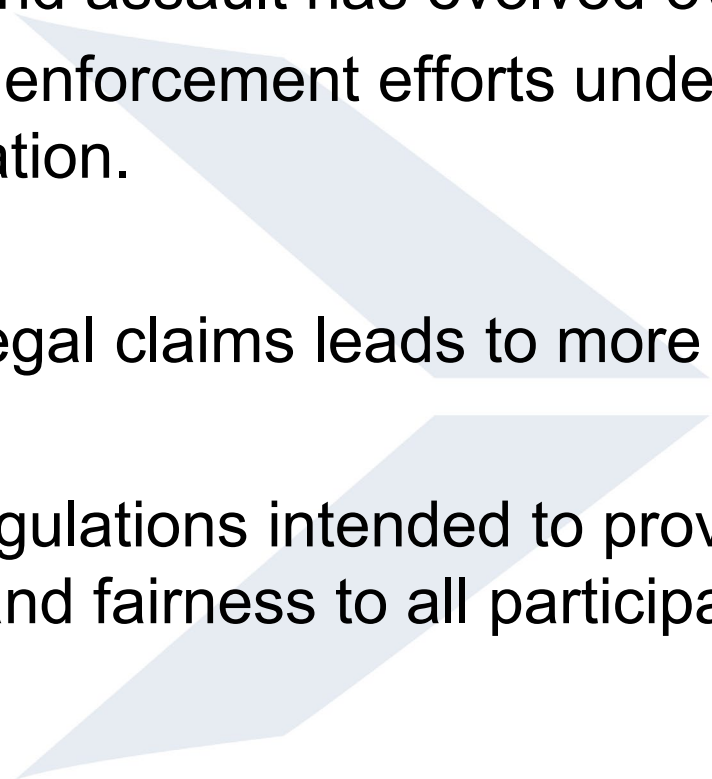


“No person in the United States shall, **based on sex**, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

- *Title IX of the Education Amendments of 1972*

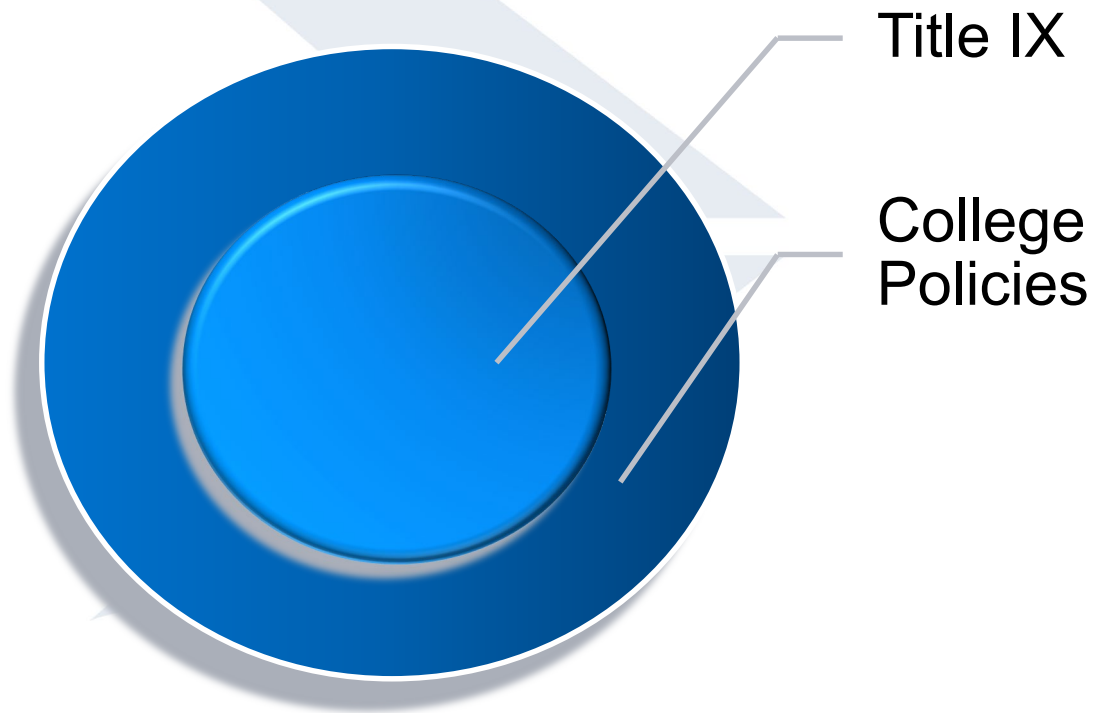
WHAT IS TITLE IX?



- Enforcement of Title IX in the context of sexual harassment and assault has evolved over time.
 - Renewed enforcement efforts under Obama administration.
 - Spike in legal claims leads to more judicial scrutiny.
 - Recent regulations intended to provide certainty to colleges and fairness to all participants.
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INTENDED SCOPE OF TITLE IX REGULATIONS

Title IX Regulations set **baseline** requirements, but they do not prohibit colleges from addressing misconduct beyond the scope of Title IX.



WHEN DOES TITLE IX APPLY?



“A [college] with actual knowledge of **sexual harassment** in an **education program or activity** of the [college] against a person in the United States, must respond promptly in a manner that is not **deliberately indifferent.**”

- 34 C.F.R. §106.44(a)



Three Categories of Sexual Harassment

1. **Quid Pro Quo**

2. **Sexual Assault**

- Clery Act Definitions: “Rape, fondling, incest or statutory rape” **plus** VAWA definitions “domestic violence, dating violence, and stalking.”

3. **Sexual Harassment:**

- “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 [college’s] education program or activity.”

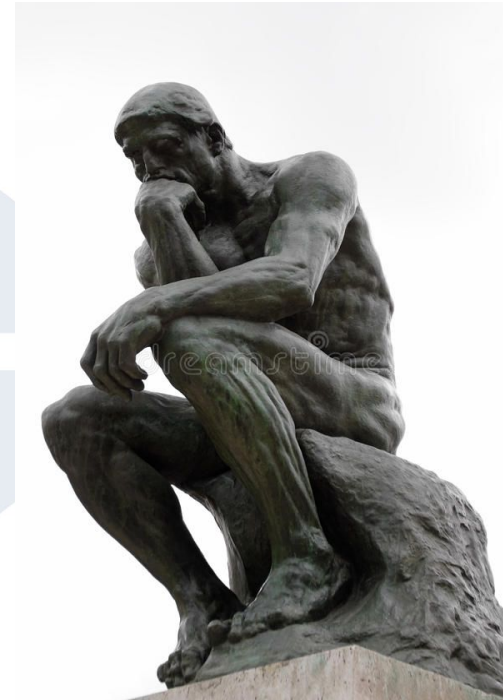
- This will require you to make judgment calls!

» (34 C.F.R. §106.30)

YOU BE THE JUDGE...

Studio art major hangs a nude portrait he painted on his wall, and another student complains.

- Is this severe, pervasive and objectively offensive to a reasonable person?
- What if painting was not his own work, but a reprint of a famous work of art?
- What if painting depicts a sexual act (i.e. pornography)?
- Does it matter if complainant is extremely sensitive to such content?



WHEN DOES TITLE IX APPLY?



“A [college] with actual knowledge of **sexual harassment** in an **education program or activity** of the [college] against a person in the United States, must respond promptly in a manner that is not **deliberately indifferent.**”

- 34 C.F.R. §106.44(a)

What is a college’s “**education program or activity**”?

- “Locations, events or circumstances over which the college exercised **substantial control over the respondent and the context** in which the alleged sexual harassment occurs.”
 - This is a fact-specific inquiry!
 - Generally applies to any incident occurring on campus, and **may** extend to off-campus incidents.
 - Includes buildings “occupied or controlled” by recognized student organizations – like fraternities.
 - But only “in the United States....”
 - Title IX does not require college to respond to harassment in travel abroad program.

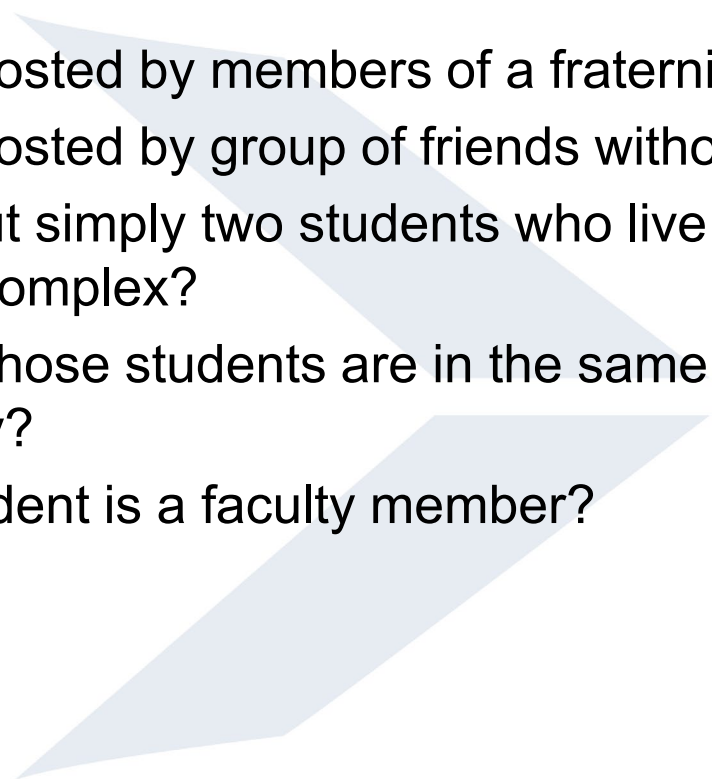
» 34 C.F.R. §106.44(a)

YOU BE THE JUDGE...



Report of sexual assault at off-campus apartment.

What if...

- Party was hosted by members of a fraternity?
 - Party was hosted by group of friends without organizational ties?
 - No party, but simply two students who live in the same apartment complex?
 - What if those students are in the same biology lab every Tuesday?
 - The respondent is a faculty member?
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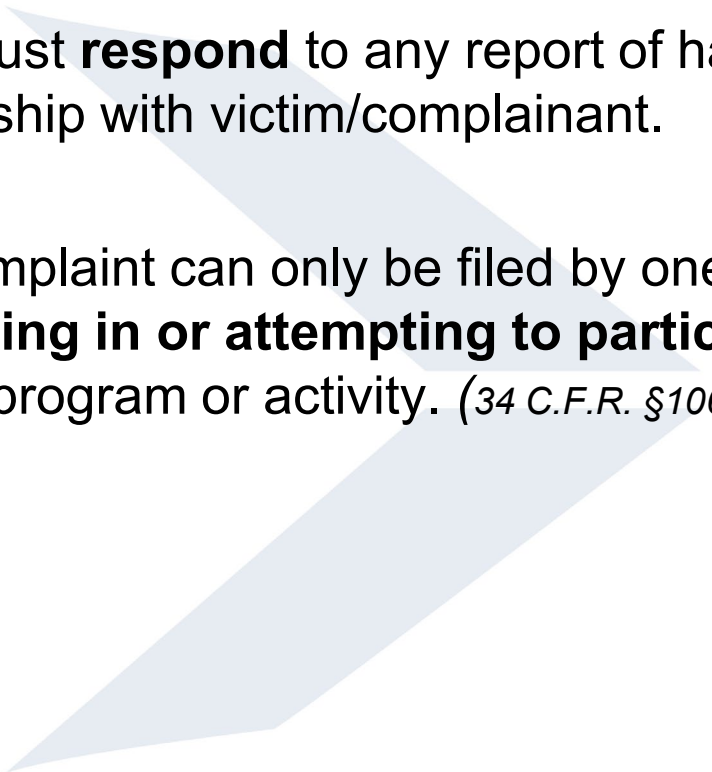
Takeaways:

1. There may not be clear, easy answers.
2. In every case, you must consider what it means for the college to have “substantial control over respondent and the context in which harassment occurs.”

TO WHOM DOES TITLE IX APPLY?



1. Complainants:

- a. College must **respond** to any report of harassment, regardless of relationship with victim/complainant.
 - b. Formal complaint can only be filed by one who is “**participating in or attempting to participate in**” the college’s education program or activity. (*34 C.F.R. §106.30(a)*).
- 

TO WHOM DOES TITLE IX APPLY?



2. Respondents:

- a. “[A]n individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.”

34 C.F.R. §106.30(a)

- b. Where a respondent is no longer participating in the education program or activity, college may not be required to investigate allegations.

TO WHOM DOES TITLE IX APPLY?

WHAT ABOUT FACULTY AND STAFF?



- “Students and employees should have the same protections with respect to regulations addressing sexual harassment.”

» *85 Fed. Reg. 30441*

- Employees are subject to same rights and responsibilities as complainants **and** respondents.
- Potential conflicts with grievance procedures in faculty and staff handbooks?
 - Regulations trump handbooks, not vice versa.
- Potential overlap with Title VII employment law, and the need to comply with both bodies of law.

RESPONDING TO REPORTS OF HARASSMENT

(1) College must “respond” to all reports of sexual harassment

- Must provide appropriate supportive measures to both parties
 - Counseling, class and living accommodations, etc.

» 34 C.F.R. §106.44(a)

(2) Response requires investigation and “grievance process” if:

- Complainant files a formal complaint; or
- Title IX Coordinator exercises discretion to file a formal complaint on victim’s behalf.

» 34 C.F.R. §106.44(b); 34 C.F.R. §106.30(a)

(3) School’s Response Must Not Be “Deliberately Indifferent”

» 34 C.F.R. §106.44(a)

Deliberate Indifference

- “A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.”
 - 34 C.F.R §106.44(a)
- Colleges “have flexibility to employ age-appropriate methods, exercise common sense and good judgment, and take into account the needs of the parties involved.”
 - 85 Fed. Reg. 30182



Confidentiality

- Colleges must consider a victim's requests for confidentiality when responding to a report of harassment and providing supportive measures; BUT...
- Once the grievance process begins, the college cannot guarantee confidentiality:
 - Complainant's identity cannot be withheld; and
 - College must "not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence."

» 34 C.F.R. §106.45(b)(5)(iii)

RESPONDING TO REPORT OF HARASSMENT



Formal Complaint **must** be dismissed where conduct:

1. Does not constitute sexual harassment;
2. Did not occur in education program or activity;
3. Did not occur against a person in the United States.

» 34 C.F.R. §106.45(b)(3)(i)

Formal Complaint **may** be dismissed where:

1. Complainant asks to withdraw the complaint;
2. Respondent no longer enrolled;
3. “Specific circumstances prevent the [college] from gathering evidence sufficient to reach a determination.”

» 34 C.F.R. §106.45(b)(3)(ii)

BREAK

**WE WILL RETURN AT 3:20
FOR PART II**

THE GRIEVANCE PROCESS



Informal Resolution

“At any time prior to reaching a determination regarding responsibility...”

Key Principles of Due Process

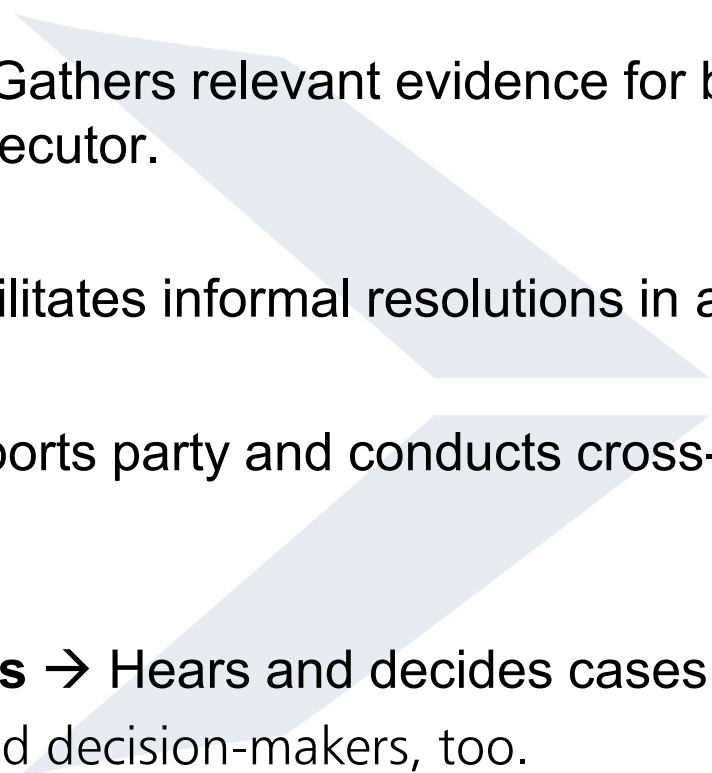
- Notice of allegations to respondent. (34 C.F.R. §106.45(b)(2))
- Opportunity to be heard. (34 C.F.R. §106.45(b)(5)(ii) – (vi))
 - Equal access to evidence (during investigation)
 - Equal opportunity to present, answer and explain evidence (at hearing)
- Rules applied equally to all participants.
- Elimination of bias. (34 C.F.R. §106.45 (b)(1)(ii)-(iii)).
- Presumption of innocence. (34 C.F.R. §106.45 (b)(1)(iv)).
- “Reasonably prompt” timeframes. (34 C.F.R. §106.45 (b)(1)(v)).

DUE PROCESS AND FAIRNESS



GRIEVANCE PROCESS – ROLES PEOPLE PLAY



- ❖ **Title IX Coordinator** → Oversees a fair process for all involved.
 - ❖ **Investigator** → Gathers relevant evidence for both parties. Not a detective or prosecutor.
 - ❖ **Mediator** → Facilitates informal resolutions in appropriate cases.
 - ❖ **Advisor** → Supports party and conducts cross-examinations at hearing.
 - ❖ **Decision-Makers** → Hears and decides cases.
 - ❖ Appeals need decision-makers, too.
- 

POP QUIZ...

Who is least likely to be responsible for sexual assault?

- A. The middle linebacker for the football team?
- B. The fraternity member with shaggy hair and a BMW?
- C. The 110 lb. female chemistry major who is president of the chess club?
- D. "I don't know, I just follow the evidence wherever it leads."

Did you get the correct answer?



INVESTIGATORS – JOB DESCRIPTION



1. Avoid bias and stereotypes.

- Develop opinions or conclusions based not on characteristics of the parties, but on the facts disclosed.

2. Find and share evidence with both sides.

3. Give each party meaningful opportunity to participate.

- Written notice before each meeting to enable party to prepare.
 - » *34. C.F.R. 106.45(b)(5)(v).*

EVIDENCE

- College bears the burden of gathering evidence for **both** parties.
 - Must present both parties with “inculpatory and exculpatory” evidence. (34 C.F.R. §106.45(b)(5)(ii))
 - Investigator’s job is to help parties identify sources of evidence.
 - Witnesses, texts, social media, campus safety, key cards, etc.

» 34 C.F.R. §106.45(b)(5))

The “10 day rule”

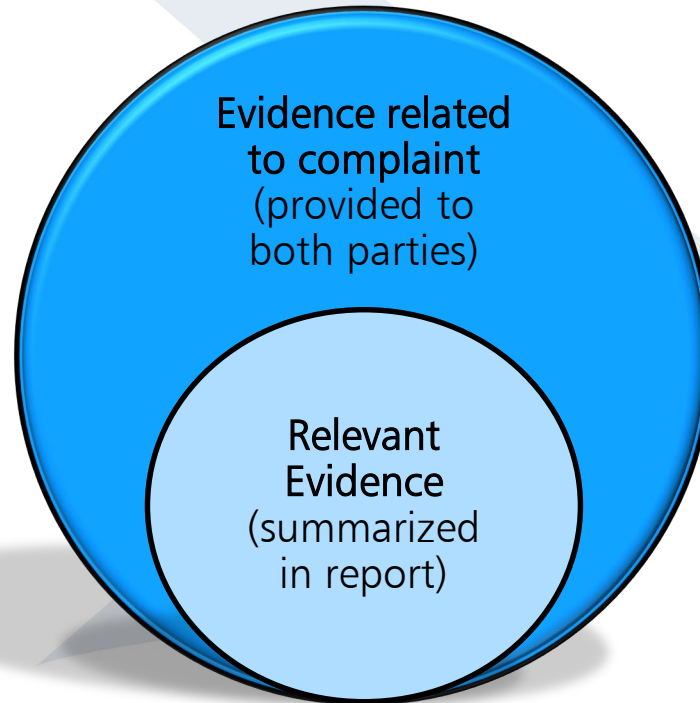
- Investigator must provide all evidence to each party at least 10 days before issuing report and must consider any comments from parties about the evidence or its relevance.
- Once report is finalized, it must be provided to each party at least 10 days before hearing, with an opportunity to provide a written response.

» 34 C.F.R. §106.45(b)(5)(vi)-(vii)

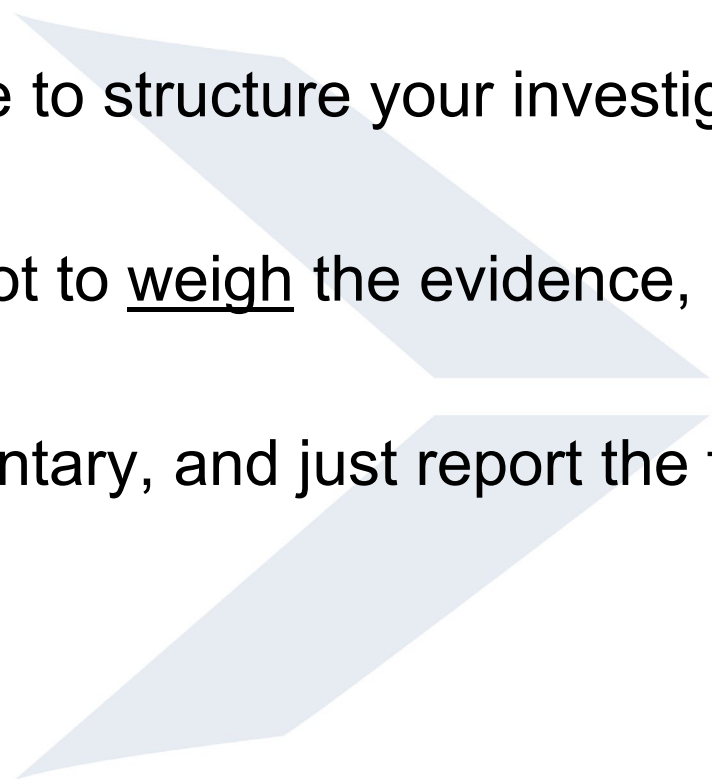
INVESTIGATORS – REPORT

- Only regulatory requirement for investigation report is that it must “**fairly** summarize **relevant** evidence.”

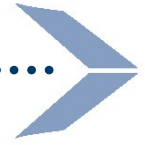
» 34 C.F.R. §106.45(b)(5)(vii)



Tips to Write an Impartial Investigation Report

- Use a timeline to structure your investigation and report.
 - Your role is not to weigh the evidence, but to find it.
 - Avoid commentary, and just report the facts.
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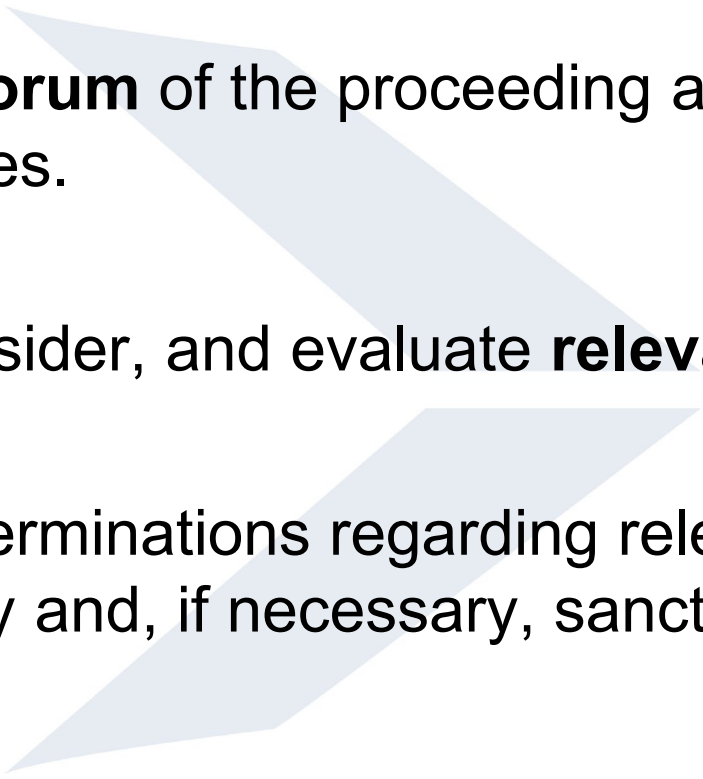
HEARINGS



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DECISION MAKERS – JOB DESCRIPTION



1. Be **impartial**. Serve without prejudice.
 2. Control **decorum** of the proceeding and ensure fairness to both parties.
 3. Identify, consider, and evaluate **relevant** evidence.
 4. **Explain** determinations regarding relevance, responsibility and, if necessary, sanctions.
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Logistical Requirements:

- ❖ Hearing must be **live** (in person or remote, but not on basis of written statements).
 - Either party can request to be in separate rooms using technology to connect all participants.
 - Decision makers must be trained on use of such technology.

- ❖ Hearing must be **recorded** (audio, video or transcript) and made available for parties to review.

❖ (34 C.F.R. §106.45(b)(6)(i))

First Rule of Evidence

1. Evidence must be relevant.

“The final regulations do not allow a recipient to impose rules of evidence that result in exclusion of relevant evidence; the decisionmaker **must** consider relevant evidence and **must not** consider irrelevant evidence.”

» 85 Fed. Reg. 30336-37.

WHAT IS RELEVANT?



Test for Relevant Evidence

“Evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true.”

» *85 Fed Reg. 30295*

- Regulations do not adopt legal evidentiary rules, and instead favor a common-sense approach to relevance.
- College’s policies may impact relevance. (e.g. how does your college define “consent”?)

WHAT IS RELEVANT?



Evidence Deemed NOT Relevant:

1. Information protected by legally recognized privilege.
2. Evidence about a complainant's prior sexual history.
3. Any party's medical, psychological, and similar records (unless that party gives written consent).
4. Party or witness statements that are not subject to cross-examination.

» 34 C.F.R. §106.45(b)(5) & (6)

The “Rape Shield”

“Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, **unless** such questions and evidence about the complainant’s prior sexual behavior are offered to prove:

- [1] that someone other than the respondent committed the conduct alleged by the complainant, or
- [2] 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.”

» 34 C.F.R. § 106.45(b)(6)(i)

YOU BE THE JUDGE...



Relevant or not?

1. Respondent refers to prior sexual encounters with complainant?
2. Respondent states that complainant was promiscuous and previously had sex with three of his fraternity brothers?
3. Evidence that respondent accused of dating violence was previously accused of abuse by former partner?
 - a. Evidence that Complainant accused prior partner of such violence?
4. Complainant's friend states that complainant has mental health issues, may be bipolar and lies a lot?
5. Friend says that he once saw respondent drink too much and force himself on a female student?

Second Rule of Evidence

2. Witnesses must be subject to cross-examination at a live hearing.

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

» 34 C.F.R. §106.45(b)(6)(i)

HEARINGS – LIVE TESTIMONY REQUIRED



All “statements” by a party or witness must be disregarded if that person does not submit to cross-examination!

This includes:

- Statements made in hearing prior to cross-examination;
- Statements reported by other witnesses;
- Statements in police or campus safety records;
- Statements in SANE or medical records; and
- Statements summarized or included in investigation report.

Unlike rules of court, the regulations include **no hearsay exceptions.**

» *85 Fed. Reg. 30348*

HEARINGS – CROSS-EXAMINATION



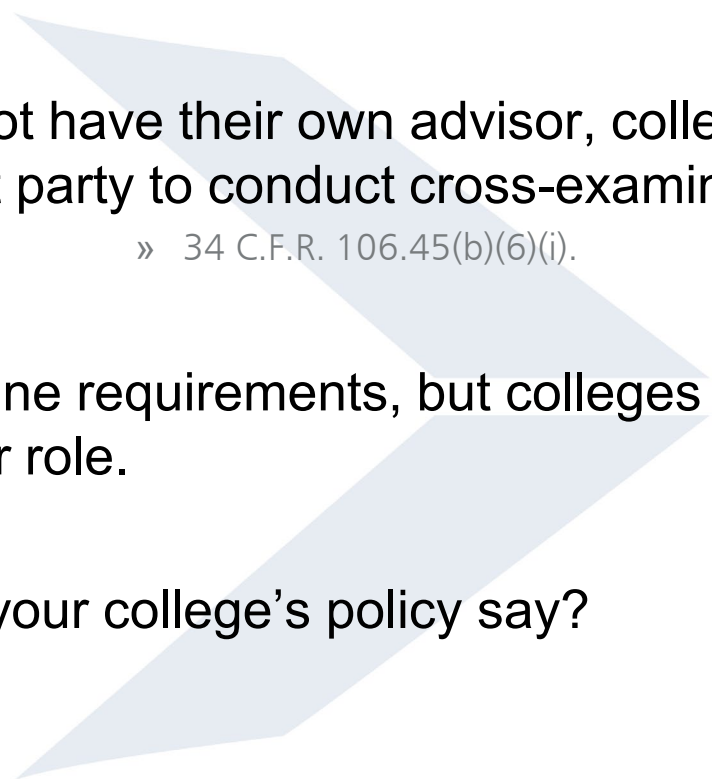
College **must** allow for cross-examination of parties and witnesses.

- However, cross-examination should not be conducted by the parties themselves.
- Instead, cross-examination **must** be performed by the parties' respective **advisors**.

➤ *34 .C.F.R. §106.45(b)(6)(i).*

HEARINGS – ROLE OF ADVISORS



- Parties **may** have advisors present throughout the process, but they **must** have an advisor at the hearing to conduct cross-examination.
 - If a party does not have their own advisor, college must appoint one at no cost to that party to conduct cross-examination at hearing.
 - » 34 C.F.R. 106.45(b)(6)(i).
 - These are baseline requirements, but colleges can allow advisors to take on a greater role.
 - What does your college's policy say?
- 

HEARINGS – ROLE OF ADVISORS



Advisor may be, but does not have to be, a lawyer.

➤ “[N]o particular skill or qualification is needed to perform that role.”

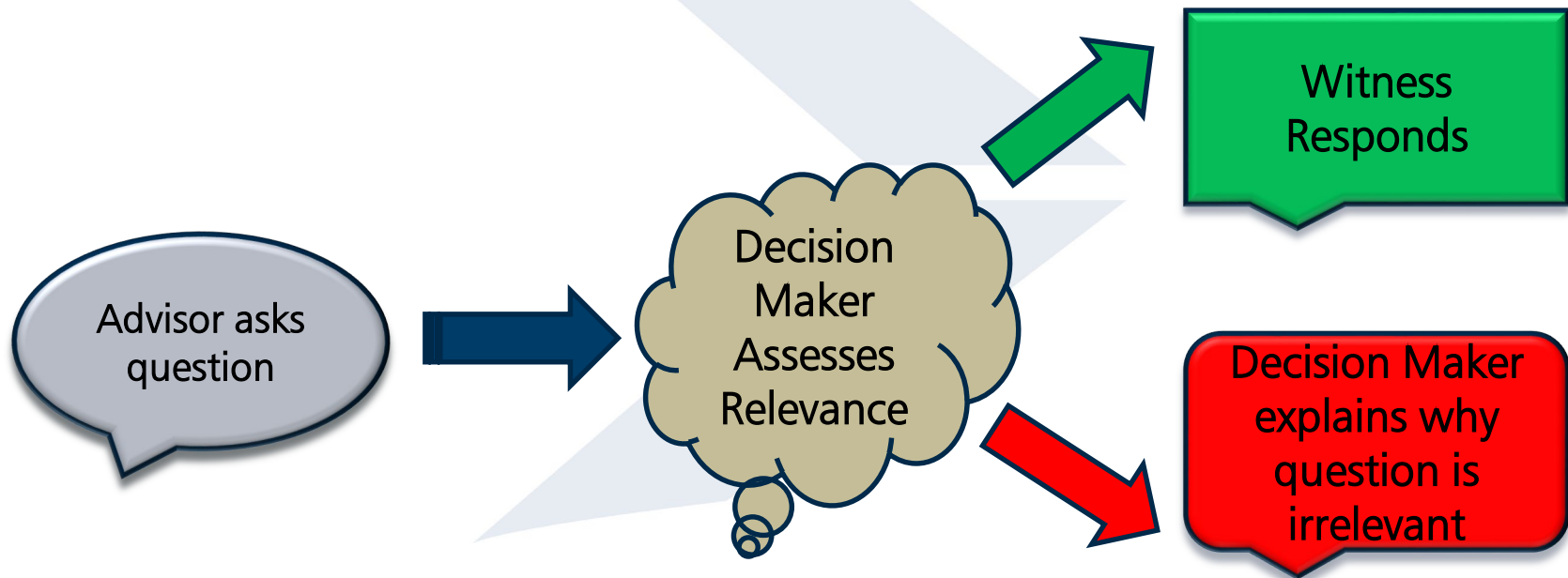
➤ *85 Fed. Reg. 30340.*

➤ Unlike other participants in process, advisor need not meet any particular standard of impartiality.

➤ *85 Fed. Reg. 30340*

CROSS-EXAMINATION SEQUENCE

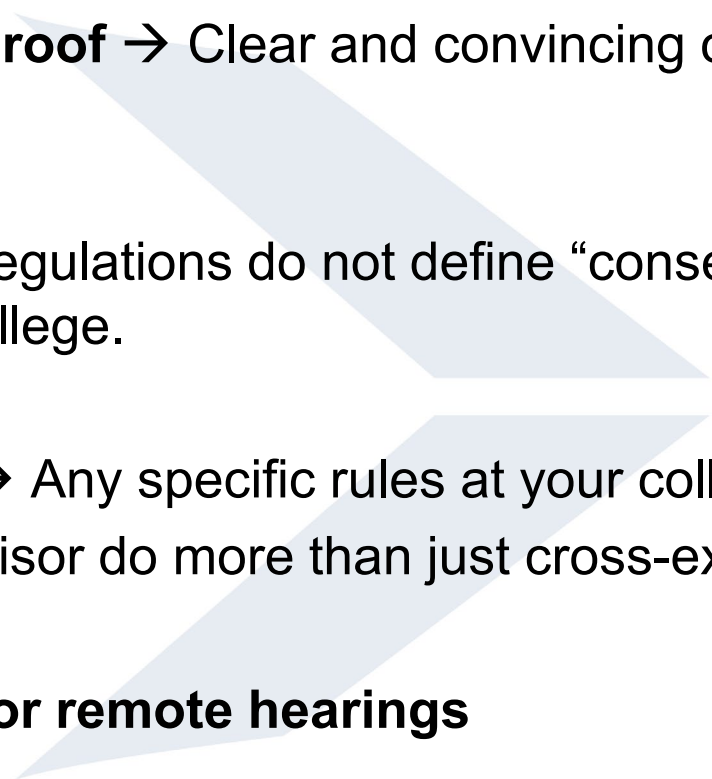
“Before a witness answers a question at hearing, “the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.” (34 C.F.R. §106.45(b)(6)(i))



DECISION-MAKERS – KNOW YOUR POLICY



Regulations provide baseline requirements, but each college's policy may differ in important ways:

1. **Standard of Proof** → Clear and convincing or preponderance of the evidence?
 2. **Consent** → Regulations do not define “consent,” and leave that up to each college.
 3. **Procedures** → Any specific rules at your college?
 - Can advisor do more than just cross-examination?
 4. **Technology for remote hearings**
- 

DECISION-MAKERS – WRITTEN DETERMINATION

- **Allegations** potentially constituting sexual harassment (i.e. what issues were addressed?);
- **Procedural history** (formal complaint, investigation, hearing);
- **Findings of fact** (i.e. which version of the facts do you find occurred?);
 - Explain these findings (credibility determinations, corroborating evidence, etc.)
- **Conclusions** regarding violations of code;
- **Sanctions** against respondent and why they are appropriate;
- **Remedies** for complainant and why they are appropriate;
- Rights and process for **appeal**.

» 34 C.F.R. §106.45(b)(7)(ii)

APPEALS



Colleges **must** allow **both** parties to appeal a finding on responsibility or a dismissal of a formal complaint on the following grounds:

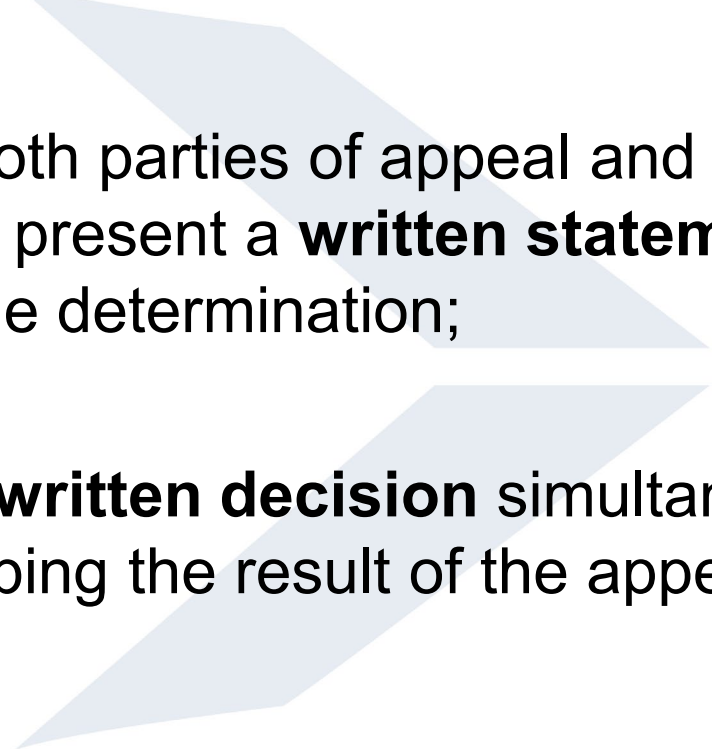
1. **Procedural irregularity** that affected the outcome;
 - Admission of irrelevant evidence, etc.
2. **New evidence** not previously available;
3. **Conflict of interest** or bias of Coordinator, Investigator or Decision-Maker.

College **may** allow for appeals on other grounds, too.

» 34 C.F.R. §106.45(b)(8)(i)-(ii).

APPEALS



- Must have a **new Decision-Maker** on appeal;
 - Subject to same rules on bias and impartiality.
 - Must **notify** both parties of appeal and give them equal opportunity to present a **written statement** supporting or challenging the determination;
 - Must provide **written decision** simultaneously to both parties describing the result of the appeal and rationale for that result.
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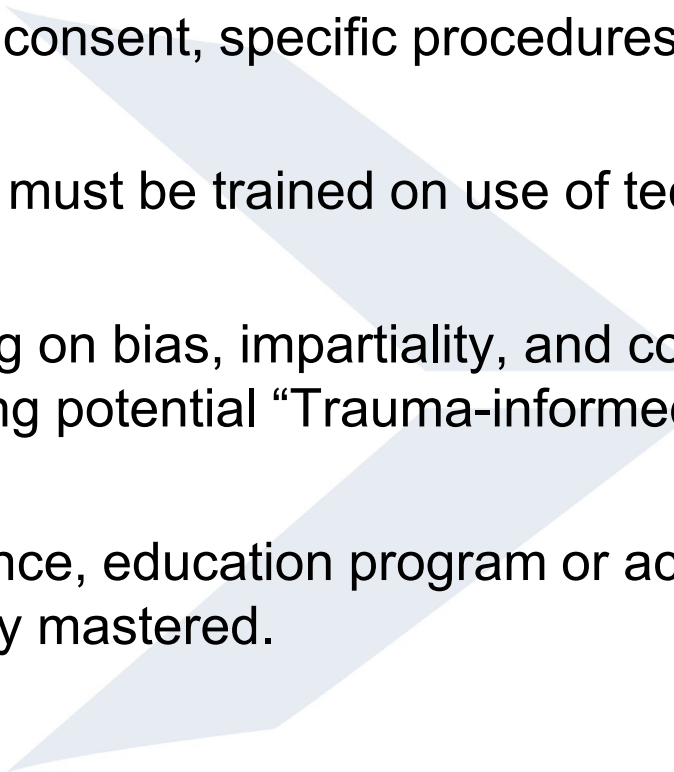
○ 34 C.F.R. §106.45(b)(8)(iii)

Colleges have flexibility to adopt and shape informal resolution process:

- Not mandatory, but College may facilitate such a resolution after a formal complaint is filed.
 - Exception – allegations that employee harassed a student.
- Voluntary process (each party must agree, and either party can withdraw at any time prior to reaching resolution).
 - 34. C.F.R. 106.45(b)(9).

OTHER TRAINING TOPICS



- All parties must be trained on each college's specific policies.
 - Definition of consent, specific procedures, etc.
 - Decision Makers must be trained on use of technology
 - Additional training on bias, impartiality, and conflicts of interests, including potential "Trauma-informed" training.
 - Issues on relevance, education program or activity, etc., can never be truly mastered.
- 

ADDITIONAL RESOURCES



- Regulation and Preamble in [Federal Register](#)
 - Office of Civil Rights [Blog](#)
 - Office of Civil Rights [Webinar](#) on New Regulations
 - Other short videos on specific aspects of Title IX regulations are posted to YouTube
- 

QUESTIONS?

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