

Summer 2020 Cohort #1





#### Introduction: Critical Issues in Title IX and Sexual Misconduct

Peter Lake Professor of Law, Charles A. Dana Chair, and Director of the Center for Excellence in Higher Education Law and Policy Stetson University College of Law



<sup>1</sup>©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

This Module is Designed for:

TRACK 1 – Title IX Coordinators TRACK 2 – Title IX Decision-Makers and Student Conduct Administrators TRACK 3 – Title IX Investigators

Nothing presented in any module in the

NASPA Title IX Training Certificate is, or

should be considered, legal advice!

Know when to consult legal counsel.

Structure of the NASPA Title IX Training

- Why three tracks?
- Why combine Title IX decision-makers and student conduct administrators in the second track?
- Why will Title IX coordinators receive all of the Title IX investigator training?
- Combination of asynchronous pre-recorded videos and live virtual sessions.
- Quizzes, questions and assessment.
- Certificate of completion.

<sup>3</sup>©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

A Few Initial Thoughts on the New Regulation

- First new regulations in a very long time.
- Institutional response requirement—Supportive measures, sanctions, remedies
- Potentially unfamiliar dynamics with the Department of Education—Guidance, commentary, blogs
- Status of preexisting guidance and resolutions
- Expect enforcement if regulations survive legal challenges in court

### Some Key Features of the New Regulations 📆

- Title IX redefines sexual harassment and creates special grievance
  procedures for sexual harassment.
- What does this mean for your existing policies and Title IX compliance more generally?
- Term "hostile environment" disappears/"balancing test" with it.
- Allows for recipients to offer informal resolution (mediation). Can be used in most instances if parties (complainant and respondent) consent voluntarily when a formal complaint is filed.
- Informal resolution cannot be used when a student alleges sexual harassment by an employee
- "Formal complaints" and "allegations"
- · Live hearing with cross-examination by advisors

#### Some Key Features of the New Regulations me

- · Choice in evidentiary standard preserved
- "Preponderance of the evidence" or "clear and convincing"
- "Mandated reporters" supplants "responsible employees"
  Changes in jurisdiction and scope of Title IX
- Off campus; study abroad
- Emphasis on "impartial" processes free from bias and conflicts of interest
- "Supportive measures" supplants "interim measures"
- Separation of the decision-maker from other tasks
- No more single-investigator model, but single decision-maker permitted.
- Appeals required Training mandates
- "Not a court"/ "Not a criminal justice system"

7

<sup>8</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### Training Mandates Specific to the New Regulations Ame

"Schools must ensure that Title IX personnel [Title IX Coordinator, any investigator, any decision-maker, and any person who facilities an informal resolution (such as mediation)] receive training as follows:

- On Title IX's definition of "sexual harassment"
- On the scope of the school's education program or activity
- On how to conduct an investigation and grievance process
   On how to serve impartially, including by avoiding prejudgment of the facts at issue
- On how to avoid conflicts of interest and bias
- Decision-markers 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 a complainant's sexual predisposition or prior sexual behavior are not relevant
- Investigators must receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence"

# Posting Training Materials to Your Website

- o Must promote impartial investigations and adjudications of formal complaints of sexual
- harassment,Must be maintained by the school for at least 7 years,
- <u>Must be publicly available on the school's website</u>; if the school does not maintain a website the school must make the training materials available upon request for inspection by members of the public.\*

"Schools must publish training materials that are up to date and reflect the latest training provided to Title IX personnel."

"If a school's current training materials are copyrighted or otherwise protected as proprietary business information (for example, by an outside consultant), the school still must comply with the Title IX Rule. This may mean that the school has to secure permission from the copyright holder to publish the training materials on the school's website."

<sup>9</sup>©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Permission from NASPA and Speakers

#### TRAINING MATERIALS

We will give each institution permission to post training materials (PowerPoint slide handouts, other handouts) to their website **upon request**. This permission must be granted from NASPA in writing **before** posting any training materials to your institution's website.

#### Training Time Estimated by the Department

We assume all recipients will need to take time to review and understand these final regulations.... At the IHE level, we assume eight hours for the Title IX Coordinator and 16 hours for an attorney. The second s

We assume that all recipients will need to train their Title IX Coordinators, an investigator, any person designated by a recipient to facilitate an informal resolution process (e.g., a mediator), and two decision-makers (assuming an additional decisionmaker for appeals).... We assume this training will take approximately eight hours for all staff at the ... IHE level. ...

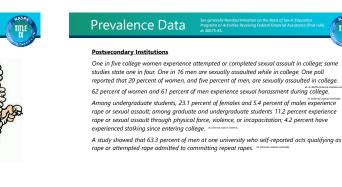
U.S. Dept. of Educ. Office for Civil Rights, Blog (May 18, 2020),

#### Personnel



- · Every institution must designate one Title IX investigator
- Can be the Title IX coordinator, cannot be a decision-maker or appellate officer (thus no single-investigator model)
- Title IX decision-maker
- Cannot be the investigator (thus no single-investigator model) or Title IX coordinator
- · Appellate officer
- Cannot be the original decision-maker or investigator Anyone implementing an informal process such a mediation, case management, records management, etc.

**Budgetary and operational concerns?** 



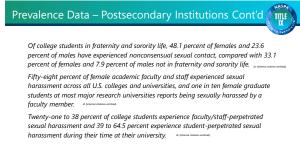
13

14 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Prevalence Data – Postsecondary Institutions Cont'd

More than 50 percent of college sexual assaults occur in August, September, October, or November, and students are at an increased risk during the first few months of their first and second semesters in college; 84 percent of the women who reported sexually coercive experiences experienced the incident during their first four semesters on campus.

Seven out of ten rapes are committed by someone known to the victim; for most women victimized by attempted or completed rape, the perpetrator was a boyfriend, ex-boyfriend, classmate, friend, acquaintance, or coworker.



<sup>15</sup>©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

The Controversial Science of Sexual Predation

- · Lisak D, Miller PM. Repeat rape and multiple offending among undetected rapists. Violence Vict. 2002;17(1):73-84. doi:10.1891/vivi.17.1.73.33638
- · Swartout KM, Koss MP, White JW, Thompson MP, Abbey A, Bellis AL. Trajectory Analysis of the Campus Serial Rapist Assumption, JAMA Pediatr. 2015;169(12):1148-1154. doi:10.1001/jamapediatrics.2015.0707
- · Johnson & Taylor, The Campus Rape Frenzy: The Attack on Due Process at America's Universities (Encounter Books, 2017).
- Foubert, J.D., Clark-Taylor, A., & Wall, A. (2019). "Is campus rape primarily a serial or single time problem? Evidence from a multi-campus study." Violence Against Women. DOI: 10.1177/1077801219833820.

#### Trauma-Based Approaches

Avoid or Use?

- · Some schools and training entities have moved away from using trauma-informed techniques for fear of appearing victim-leaning.
- Trauma can impact anyone in a grievance process or seeking supportive measures: Use research without stereotypes or gender bias.
- Credibility v. Reliability
- Read DOE's thoughts on trauma carefully...

17

|   | Trauma Cont'd   |
|---|---|
| The Department is sensitive to the effects of <b>trauma on sexual</b><br><b>harassment victims</b> and appreciates that choosing to make a<br>report, file a formal complaint, communicate with a Title IX<br>Coordinator to arrange supportive measures, or participate in a<br>grievance process are often difficult steps to navigate in the wake<br>of victimization. | The Department understands from anecdotal evidence and research studies that<br>sexual violence is a traumatic experience for survivors. The Department is aware<br>that the neurobiology of trauma and the impact of trauma on a survivor's<br>neurobiological functioning is a developing field of study with application to the<br>way in which investigators of sexual violence offenses interact with victims in<br>criminal justice systems and campus sexual misconduct proceedings. The final<br>regulations require impartiality in investigations and emphasize the truth-seeking<br>function of a grievance process. The Department wishes to emphasize that<br>treating all parties with dignity, respect, and sensitivity without bias, prejudice, or<br>seeking.<br>Justice offense infecting interactions with parties fosters impartiality and truth-<br>seeking. |
| <sub>9</sub><br>©NASPA/Hierophant Enterprises, Inc, 2020. Co  | 20<br>pyrighted material. Express permission to post  |
| •   | site has been granted to comply with 34 C.F.R. §  |
| 106.45(b)(10)(i)(D). This material is not intende entities of higher education, for their own train   |   |
|   | ing purposes for any reason. Use of this  |
| material for proprietary reasons, except by the   |   |
| -   |   |
| material for proprietary reasons, except by the   | original author(s), is strictly prohibited.   |

<sup>21</sup> ONASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

TITLE

Our Mission Has Not Changed...

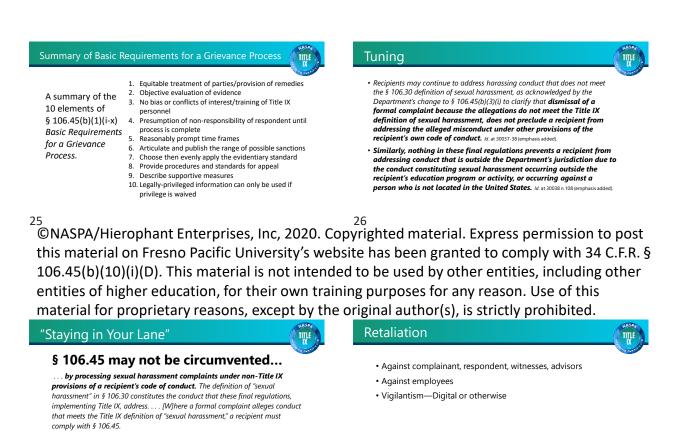
Enacted by Congress, Title IX seeks to reduce or eliminate barriers to educational opportunity caused by sex discrimination in institutions that receive federal funding.

#### This is the unchanged mission of Title IX!

#### Title IX: FINAL RULE

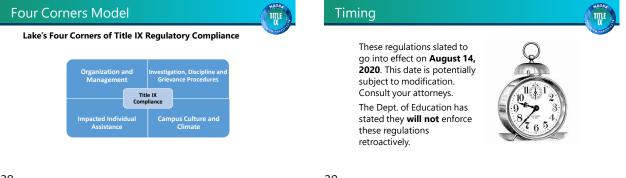
**34 CFR Part 106** Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

The final regulations obligate recipients to respond promptly and supportively to persons alleged to be victimized by sexual harassment, resolve allegations of sexual harassment promptly and accurately under a predictable, fair grievance process that provides due process protections to alleged victims and alleged perpetrators of sexual harassment, and effectively implement remedies for victims.



<sup>27</sup>©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Id at 30095



#### The Social Context



#### COVID-19

- Virtual hearings
- More online learning
  - More Clery/VAWA-type offenses?
- Budget cuts, hiring freezes, furloughs, etc. due to the pandemic

Social Justice Issues

#### Further training recommended...

- Training specific to your institution's policies.
  - There is not one universal policy for sex discrimination; differences exist in procedures, definitions, etc. from campus to campus.
- Your campus policies may be in transit now.
- Training on technology usage for live hearings on your campus. • Especially important for decision-makers.
- · Additional and continued training on bias is always a good idea.
- Continuing education at regular intervals.
- REMEMBER—It's always good to hear from multiple voices!

31

### <sup>32</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

# Thank You...

- to NASPA
- to my fellow presenters
- to **YOU!!!!**

**Post-Module Questions** 

NASPA. Student Affairs Administrators in Higher Education

### Detailed Legal Foundations and the New Regulations

#### Peter Lake

Professor of Law, Charles A. Dana Chair, and Director of the Center for Excellence in Higher Education Law and Policy Stetson University College of Law



<sup>33</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

This Module is Designed for:

TRACK 1 – Title IX Coordinators TRACK 2 – Title IX Decision-Makers and Student Conduct Administrators

#### What is Title IX? What is its mission?

 Enacted by Congress, Title IX seeks to reduce or eliminate barriers to educational opportunity caused by sex discrimination in institutions that receive federal funding. This is the mission of Title IX!

 Other federal laws also address sex discrimination. There are complex interactions with other federal laws, such as the Clery Act, the Family Educational Rights and Privacy Act (FERPA), and the Violence Against Women Act (VAWA). [These issues are addressed in a separate module.]

Title IX is concerned with *institutional response* to discrimination.



#### Title IX: FINAL RULE

34 CFR Part 106 Nondiscrimination on the Basis of Sex in Education

Programs or Activities Receiving Federal Financial Assistance The final regulations specify how recipients of Federal financial assistance covered by Title IX, including elementary and secondary schools as well as postsecondary institutions, (hereinafter collectively referred to as "recipients" or "schools"), must respond to allegations of sexual harassment consistent with Title IX's prohibition against sex discrimination. These regulations are intended to effectuate Title IX's prohibition against sex discrimination by requiring recipients to address sexual harassment as a form of sex discrimination in education programs or activities.

### Title IX: FINAL RULE

The final regulations obligate recipients to respond promptly and supportively to persons alleged to be victimized by sexual harassment, *resolve* allegations of sexual harassment promptly and accurately under a predictable, fair grievance process that provides due process protections to alleged victims and alleged perpetrators of sexual harassment, and effectively implement remedies for victims.

37

38 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### Title IX: FINAL RULE

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



<sup>39</sup>©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



#### Title IX and the Trump Administration



- · Education Secretary Betsy DeVos
- Rescission of Obama-Era Guidance in 2017
  - · Withdrawal of guidance on transgender students (Feb. 2017)
  - 2011 Dear College Letter (Sept. 2017) 2014 Questions & Answers on Title IX and Sexual Violence (Sept. 2017)
- · Instituted "interim" and "substantial" guidance in September 2017
- · Focus on respondents' rights/procedural protections/due process/bias and conflicts of interest
- Notice and comment period on the new regulations ended with a record-breaking number of comments (over 120,000)
- · Complex implications for protection from discrimination based on sexual orientation, or appearance thereof.

#### Title IX: Current and Former Guidance

- Sexual Harassment Guidance: Harassment of Students By School Employees, Other Students, or Third Parties, 62 FR 12034 (Mar. 13, 1997).
- · Revised Guidance on Sexual Harassment: Harassment of Students by School Employees, Other Students, or Third Parties (Jan. 19, 2001).
- · Dear Colleague Letter: Sexual Violence (April 4, 2011), WITHDRAWN by, U.S. Dep't. of Education, Office for Civil Rights, Dear Colleague Letter (Sept. 22, 2017).
- · Questions and Answers on Title IX and Sexual Violence (April 29, 2014) WITHDRAWN by, U.S. Dep't. of Education, Office for Civil Rights, Dear Colleague Letter (Sept. 22, 2017).
- O&A on Campus Sexual Misconduct (Sept. 22, 2017).

44

43 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

The New Regulations and Previous Guidance

- · Uncertain features of pre-existing guidance and status of "commentary" and blog posts.
- New regulatory dynamics....
- What about "straddle" cases?
- DOE has said they will not enforce new regulations retroactively.

# New Regulations and Court Activity Judicial activism and inactivism

- Lower courts and SCOTUS
- 6<sup>th</sup> Circuit in Baum
- 7<sup>th</sup> Circuit in Purdue
- 3rd Circuit in University of Sciences
- U.S. District Court for District of Tennessee in Rhodes College
- · See Jeremy Bauer-Wolf, Constitutional Due Process at Private Institutions? Inside Higher Ed (June 25, 2019).

<sup>45</sup>©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

48

#### Litigation Risk

- · Will the new regulations cause an increased risk of litigation?
- · The Department doesn't think so. For example: "[1]f recipients comply with these final regulations, these final regulations may have the effect of decreasing litigation because recipients with actual knowledge would be able to demonstrate that they were not deliberately indifferent in responding to a report of sexual harassment." Id. at 30115
- · Actual cases are rising in number even before the regulations. Courts are referring to the new regulations already.
- · Fee shifting? Will colleges have to pay for attorney's fees of plaintiffs?

# Challenges to the New Regulations

#### Congress

- The Department acknowledges that Congress could address Title IX sexual harassment through legislation, but Congress has not yet done so.
- · House of Representatives Committee on Oversight Reform, Letter to DeVos-DoED re: Title IX (June 22, 2020).
- Pending Litigation
  - · James Walker, Betsy DeVos Sued by Organizations Representing Student Victims of Sexual Violence, Newsweek (Jun. 11, 2020) (online at www.ne ek.com/betsvdevos-lawsuit-title-ix-rule-changes-sexual-harassment-1510147).
  - ACLU/NWLC
  - State Attorneys General
- 2020 General Election

#### Legal Mandates, Etc. Under Title IX — Where Is the Law



- · Title IX of the Education Amendments of 1972 (Title IX), 20
- U.S.C. §§ 1681 et seq.
- · Implementing Regulations, 34 C.F.R. Part 106
- · Notice and Comment
- Rule-making/Negotiated rule-making
- · Commentary/Blogs from the Dept. of Education
- Guidance
- · Resolution Letters and Agreements
- Other Sources—Speeches, Website, Participation with the Field
- · State Law Mandates [These are addressed in a separate module.]

Federal Regulators: Two Key Players

#### Department of Education Enforcement through Office for Civil Rights (regional offices) Historical K-12 focus Department of Justice Largely dormant in higher ed for years

"Crime fighters" dealing with violence, drugs, weapons, etc. [DOJ does not seem to have played a large role in the new Title IX regulations.]

50

49 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>51</sup>©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.





Free Speech and Academic Freedom in the New Regulations

55



56

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

More on the First Amendment

The Supreme Court has not squarely addressed the intersection between First Amendment protection of speech and academic freedom, and non-sex discrimination Federal civil rights laws that include sexual harassment as a form of sex discrimination (i.e., Title VII and Title VII). With respect to sex discriminatory conduct in the form of admissions or hiring and firing decisions, for example, prohibiting such conduct does not implicate constitutional concerns even when the conduct is accompanied by speech, and similarly, when sex discrimination occurs in the form of non-verbal sexually harassing conduct, or speech used to harass in a quid pro quo manner, stalk, or threaten violence against a victim, no First Amendment problem exists. However, with respect to speech and expression, tension exists between First Amendment protections and the government's interest in ensuring workplace and educational environments free from sex discrimination when the speech is unwelcome on the basis of sex. "Sex"

<sup>57</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### What is "sex" for Title IX purposes?

The modern concept of "sex" has evolved and represents a cultural shift. In past generations, "sex" usually meant the male/female assignment at birth based on biological or anatomical factors. "Sex" for Title IX purposes includes:

Gender based on biological or anatomical factors
 Actual or perceived gender identity

Sometimes individuals do not conform to stereotypical notions of masculinity or femininity.

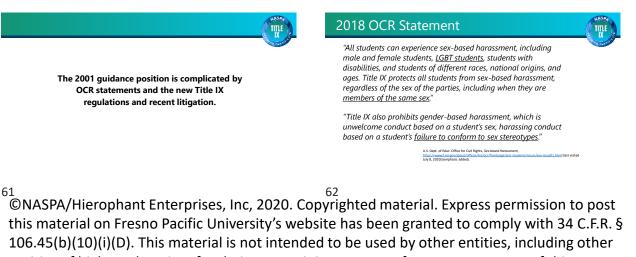
Helpful Resource UC Davis, LGBTQIA Resource Center Glossary, https://lgbtqia.ucdavis.edu/educated/glossary



Title IX: Does "sex" include actual or perceived sexual

participate in or benefit from the school's program, the school would need to respond promptly and effectively, as described in this guidance, just as it would if the victim were heterosexual. On the other hand, if students heckle another student with comments based on the student's sexual orientation (eg., "gay students are not velcome at this table in the cafeteria"), but their actions do not involve conduct of a sexual nature, their actions would not be sexual harassment covered by Title IX.

(emphasis added)



entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

ITLE

Is "sex" defined in the new regulations?

The word "sex" is undefined in the Title IX statute. The Department did not propose a definition of "sex" in the NPRM and declines to do so in these final regulations. The focus of these regulations remains prohibited conduct.

SCOTUS/Bostock and Implications for Title IX Bostock v. Clayton County (June 15, 2020) A consolidation of three cases of employment discrimination under Title VII Holding: Employees are protected from discrimination due to their sexual orientation or gender identity under Title VII of the Civil Rights Act of 1964.

nce, 85 Fed. Reg. 30026 (May 19, 2020) (final .3030.05.19 (nef/3020.10512 nef) at 30127

<sup>63</sup>©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

TIŢĻE

#### Bostock Quotes

"These terms generate the following rule: An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It makes no difference if other factors besides the plaintiff's sex contributed to the decision or that the employer treated women as a group the same when compared to men as a group.

"Few facts are needed to appreciate the legal question we face. Each of the three cases before us started the same way: An employer fired a long-time employee shortly after the employee revealed that he or she is homosexual or transgender—and allegedly for no reason other than the employee's homosexuality or transgender status."

#### Bostock Quotes

- · "An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.'
- "... homosexuality and transgender status are inextricably bound up with sex."
- · "We agree that homosexuality and transgender status are distinct concepts from sex. But, as we've seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second."

#### More Quotes from Bostock – The Bostock Cavea

"The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us: we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today."

#### More Quotes from Bostock

"As a result of its deliberations in adopting the law, Congress included an express statutory exception for religious organizations... this Court has also recognized that the First Amendment can bar the application of employment discrimination laws "to claims concerning the employment relationship between a religious institution and its ministers.

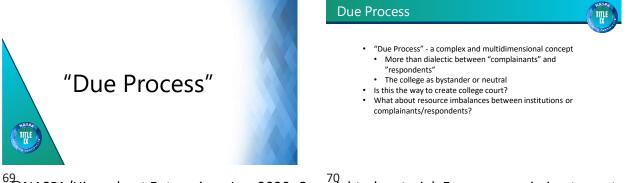
"Because the Religious Freedom Restoration Act (RFRA) operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases." "But how these doctrines protecting religious liberty interact with Title VII are questions for future cases too.

"So while other employers in other cases may raise free exercise arguments that merit careful consideration, none of the employers before us today represent in this Court that compliance with Title VII will infringe their own religious liberties in any way."

#### 67

68

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>69</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

| Due Process   | Due Process Cont'd*   |
|---|---|
| [T]he evolution of the American concept of due process of law has revolved<br>around recognition that for justice to be done, procedural protections must be<br>offered to those accused of even the most heinous offenses – precisely because<br>only through a fair process can a just conclusion of responsibility be made.<br>Further, the § 106.45 grievance process grants procedural rights to<br>complainants and respondents so that both parties benefit from strong, clear<br>due process protections. | The final regulations prescribe a grievance process grounded in principles of due process for the benefit of both complainants and respondents, seeking justice in each sexual harassment situation that arises in a recipient seducation program or activity.  Orare it is determined that due process applies, the question remains what process is due 'our + topot, 400 US 500, 577 (Starsback phones, 420 US 42, 440).  Procedural due process of law requires at a minimum notice and a meaningful apportunity to be heard. own, 410 US 45, 458.  Drear ot a technical conception with a fixed content unrelated to time, place and circumstances' Methow, 420 US 431 (logotogroup forming v 420 US 400, 457 (1997)).  Integrated, due process is flowing clement Westers v 442(59, 420 US 400, 457 (1997)).  The fundamental requirement of due process is the opportunity to be heard it a meaningful time and in a meaningful mannet.' Methow, 420 US 433 (logotogroup forming v 400 us 247), 411 (1972).  The fundamental requirement of due process is the opportunity to be heard it at meaningful time and in a meaningful mannet.' Methow, 420 US 433 (logotogroup forming v 400 us 247), 411 (1972). |
|   |   |

#### More Due Process

- Chevron//Article II
- State Farm
- Protected Interests
- · Matthews Balancing Test
- Citizens United → Associational Rights
- Originalism/Textualism

- Efficacy/Fairness to those not represented in a "hearing" New Fairness Issues Created by
- "College Court" · Horowitz/Ewing and Academic Freedom
- Substantive Due Process
- Slippery Slope Tenure for Students



[S]chools, colleges, and universities are educational institutions and not courts of law. The § 106.45 grievance process does not attempt to transform schools into courts, rather, the prescribed framework provides a structure by which schools reach the factual determinations needed to discern when victims of sexual harassment are entitled to remedies. The Department declines to import into \$ 106.45 comprehensive rules of evidence, rules of civil or criminal procedure, or constitutional protections available to criminal defendants. The Department recognizes that schools are neither civil nor criminal courts, and acknowledges that the purpose of the \$ 106.45 grievance process is to resolve formal complaints of sexual harassment in an education program or activity, which is a different purpose carried out in a different forum from private lawsuits in civil courts o criminal charges prosecuted by the government in criminal courts. Id. at 30097. The Department is not regulating sex crimes, per se, but rather is addressing a type of discrimination based on se Id. at 30099

The Department of Education reiterates that college

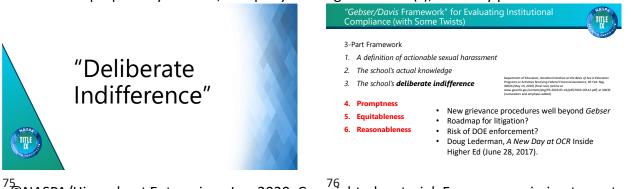
#### What is a "court?"

prosecuting crimes

A court is any person or institution, often as a government institution, with the authority to adjudicate legal disputes between parties and carry out the administration of justice in civil, criminal, and administrative matters in accordance with the rule of law. David Walker, *The Oxford Companion to Low*, Oxford University Press (1980), at 301.

#### 73

74 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>75</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### "Deliberate Indifference"

As the Supreme Court reasoned in Davis, a recipient acts with deliberate indifference only when it responds to sexual harassment in a manner that is "clearly unreasonable in light of the known circumstances."

Id. at 30091 (internal citation omitted). [U]nless the recipient's response to sexual harassment is clearly unreasonable in light of the known circumstances, the Department will not second guess such decisions. Id. at 30092 (internal citation omitted)

#### "Deliberate Indifference" Cont'd



[T]he final regulations apply a deliberate indifference standard for evaluating a recipient's decisions with respect to selection of supportive measures and remedies, and these final regulations do not mandate or scrutinize a recipient's decisions with respect to disciplinary sanctions imposed on a respondent after a respondent has been found responsible for sexual harassment. Id. at 30034 n.60.

[T]he Department will not deem a recipient not deliberately indifferent based on the recipient's restriction of rights protected under the U.S. Constitution, including the First Amendment, the Fifth Amendment, and the Fourteenth Amendment. Id. at 30091





§ 106.8 Designation of coordinator, dissemination of policy, and adoption of grievance procedures.

79

80 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

§106.8(a) Designation of coordinator.

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." The recipient 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 recipient, of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator pursuant to this paragraph. 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 argassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other 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(b) Dissemination of policy.

#### 1) Notification of policy.

Each recipient must notify persons entitled to a notification under paragraph (a) of this section that the recipient 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 this part 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 admission (unless subpart C of this part does not apply) and employment, and that inquiries about the application of title IX and this part to such recipient may be referred to the recipient's Title IX Coordinator, to the Assistant Secretary, or both.

<sup>81</sup>©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### §106.8(b) Dissemination of policy.

(2) Publications.

- (i) Each recipient must prominently display the contact information required to be listed for the Title IX Coordinator under paragraph (a) of this section and the policy described in paragraph (b)(1) of this section on its website, if any, and in each handbook or catalog that it makes available to persons entitled to a notification under paragraph (a) of this section.
- (ii) A recipient must not use or distribute a publication stating that the recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by title IX or this part.

#### §106.8(c) Adoption of grievance procedures

A recipient must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part and a grievance process that complies with § 106.45 for formal complaints as defined in § 106.30. A recipient must provide to persons entitled to a notification under paragraph (a) of this section 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(d) Application outside the United States.

The requirements of paragraph (c) of this section apply only to sex discrimination occurring against a person in the United States.

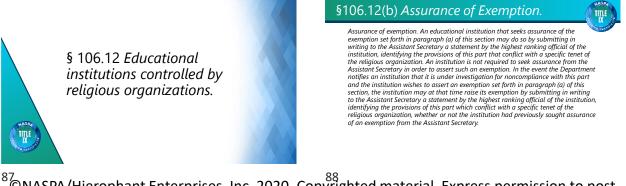


If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

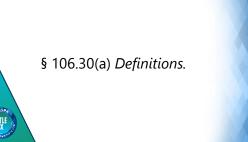
#### 85

86

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



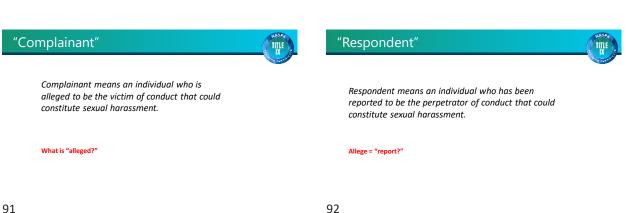
<sup>87</sup>©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



#### "Actual Knowledge"



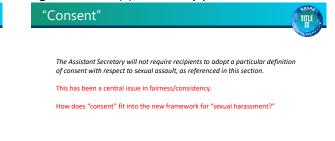
Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipients Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. 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(0).



©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

More on Complainants/Respondents

- A person may be a complainant, or a respondent, even where no formal complaint has been filed and no grievance process is pending.
- References ... to a complainant, respondent, or other individual with respect to exercise of rights under Title IX should be understood to include situations in which a parent or guardian has the legal right to act on behalf of the individual.
- [T]he definitions of "complainant" and "respondent" do not restrict either party to being a student or employee, and, therefore, the final regulations do apply to allegations that an employee was sexually harassed by a student.



<sup>93</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### "Formal Complaint"

Formal complaint means 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. 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. 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.

(emphasis added)

#### "Formal Complaint" Cont'd



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. 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).

#### "Sexual Harassment" [Three-Prong Test]

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

(1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct:

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

(3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

(emphasis added)

### First Amendment and the Second Prong

[P]rotection of free speech and academic freedom was weakened by the Department's use of wording that differed from the Davis definition of what constitutes actionable sexual harassment under Title IX . . . these final reaulations return to the Davis definition verbatim, while also protecting against even single instances of quid pro quo harassment and Clery/ VAWA offenses, which are not entitled to First Amendment protection.

Id. at 30155 n.680.

#### 98

97 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

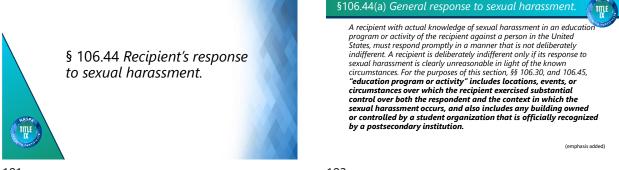
#### "Supportive Measures"

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.

"Supportive Measures" Cont'd

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

<sup>99</sup>©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.





#### §106.44(a) Cont'd

A recipient's response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. The 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 of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.

### 103

104

§106.44(a) Cont'd

and Fourteenth Amendment.

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

§106.44(b) Response to a formal complaint.

- (1) 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).
- (2) 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.
- §106.44(c) Emergency removal.

Nothing in this part precludes 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.

The Department may not deem a recipient to have satisfied the

recipient's duty to not be deliberately indifferent under this part

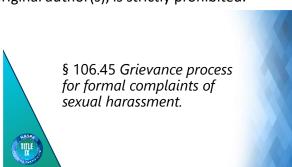
Constitution, including the First Amendment, Fifth Amendment,

based on the recipient's restriction of rights protected under the U.S.

<sup>105</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### §106.44(d) Administrative leave.

Nothing in this subpart precludes a recipient from placing a nonstudent employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45. This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.



# § 106.45(a) Discrimination on the basis of sem

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(b) Grievance process.

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

#### 109

110 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### § 106.45(b)(1)(i)

(1) Basic requirements for grievance process. A recipient's grievance process must-

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





(ii) Require an objective evaluation of all relevant evidenceincluding 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;

<sup>111</sup>©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### § 106.45(b)(1)(iii)

(iii) Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decisionmaker, 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) Cont'd

A recipient must ensure that Title IX Coordinators, investigators, decision-makers,

- and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment in § 106.30.
- the scope of the recipient's education program or activity.
- · how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and
- how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias....

(bullets added)

### § 106.45 (b)(1)(iii) Cont'd

A recipient must ensure that decision-makers receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposit or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section

A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paraaraph (b)(5)(vii) of this section.

Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sev stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment;

#### § 106.45(b)(1)(iv)

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

116

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### § 106.45(b)(1)(v)

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

#### § 106.45(b)(1)(vi)



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

115

<sup>117</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### § 106.45(b)(1)(vii)

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

#### § 106.45(b)(1)(viii)

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

#### § 106.45(b)(1)(ix)



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

#### § 106.45(b)(1)(x)

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

#### 121

122

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### § 106.45(b)(2)(i)

(2) Notice of allegations— (i) Upon receipt of a formal complaint, a recipient must provide the following written notice to the parties who are known:

| 106.45(b)(2)(i)(A) | NAS I |
|--------------------|-------|
|                    |       |

(A) Notice of the recipient's grievance process that complies with this section, including any informal resolution process.

<sup>123</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### § 106.45(b)(2)(i)(B)

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

#### § 106.45(b)(2)(ii)



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

#### § 106.45(b)(3)(i)



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

#### 127

§ 106.45(b)(3)(ii)

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

128

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### § 106.45(b)(3)(iii)

(iii) Upon a dismissal required or permitted pursuant to paragraph (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)(4)



(4) Consolidation of formal complaints. A recipient may consolidat 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 this section to the singular "party," "complainant," or "respondent" include the plural, as applicable.

<sup>129</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### § 106.45(b)(5)

(5) Investigation of a formal complaint. When investigating a formal complaint and throughout the grievance process, a recipient must—

#### § 106.45(b)(5)(i)

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

#### § 106.45(b)(5)(ii)

(ii) Provide an equal opportunity for the parties to present

witnesses, including fact and expert witnesses, and other

inculpatory and exculpatory evidence;



§ 106.45(b)(5)(iii)

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

#### 133

134

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### § 106.45(b)(5)(iv)

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

#### § 106.45(b)(5)(v)



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

<sup>135</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### § 106.45(b)(5)(vi)

(vi) Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject to the parties' inspection and review available at any hearing to give each party eaual opportunity to refer to such evidence during the hearing, including for purposes of cross-examination: and

#### § 106.45(b)(5)(vii)

(vii) Create an investigative report that fairly summarizes relevant

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

#### § 106.45(b)(6)(i)



(i) For postsecondary institutions, the recipient's grievance process must provide for a live hearing. At the live hearing, the decisionmaker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such crossexamination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings.

139

#### § 106.45(b)(6)(i) Cont'd

At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions. Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a crossexamination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant. If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.

140

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

TIŢĻE

#### § 106.45(b)(6)(i) Cont'd

Questions and evidence about the complainant's sexual predisposition of prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. If a party or witness does not submit to cross-examination at the live hearing, the decisionmaker(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 crossexamination or other questions.

#### § 106.45(b)(6)(i) Cont'd

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

<sup>141</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### § 106.45(b)(7)(i)

(7) Determination regarding responsibility.

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

#### § 106.45(b)(7)(ii)(A)





(ii) The written determination must include-(A) Identification of the allegations potentially constituting sexual harassment as defined in § 106.30;

#### § 106.45(b)(7)(ii)(B)



(B) 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;

#### 145

146

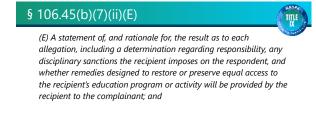
§ 106.45(b)(7)(ii)(C)

(C) Findings of fact supporting the determination;

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### § 106.45(b)(7)(ii)(D)

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



<sup>147</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### § 106.45(b)(7)(ii)(F)

(F) The recipient's procedures and permissible bases for the complainant and respondent to appeal.

#### § 106.45(b)(7)(iii)



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

### § 106.45(b)(7)(iv)

(iv) The Title IX Coordinator is responsible for effective implementation of any remedies.



#### § 106.45(b)(8)(i)

#### (8) Appeals.

(i) A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:

#### 151

152

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### § 106.45(b)(8)(i)(A-C)

(A) Procedural irregularity that affected the outcome of the matter; (B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and

(C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

## § 106.45(b)(8)(ii)



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

<sup>153</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### § 106.45(b)(8)(iii)(A-F)

(iii) As to all appeals, the recipient must: (A) Notify the other party in writing when an appeal is filed and implement

appeal procedures equally for both parties; (B) Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility

or dismissal, the investigator(s), or the Title IX Coordinator; (C) Ensure that the decision-maker(s) for the appeal complies with the

standards set forth in paragraph (b)(1)(iii) of this section; (D) Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;

(E) Issue a written decision describing the result of the appeal and the rationale for the result; and

(F) Provide the written decision simultaneously to both parties.

#### § 106.45(b)(9)

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

#### § 106.45(b)(9)(i)

(i) Provides to the parties a written notice disclosing: The allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the

records that will be maintained or could be shared;

### § 106.45(b)(9)(ii-iii)

(ii) Obtains the parties' voluntary, written consent to the informa resolution process; and

(iii) Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

158

157 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### § 106.45(b)(10)(i)(A)

(10) Recordkeeping.

(i) A recipient must maintain for a period of seven years records of—

(A) Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required under paragraph (b)(6)(i) of this section, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity;

- § 106.45(b)(10)(i)(B-D)
  - (B) Any appeal and the result therefrom;

(C) Any informal resolution and the result therefrom; and (D) All materials used to train Title IX Coordinators, investigators, decisionmakers, and any person who facilitates an informal resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.

<sup>159</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### § 106.45(b)(10)(ii)

(ii) For each response required under § 106.44, a recipient must create and maintain for a period of seven years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity. If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.



#### § 106.71(a)

(a) Retaliation prohibited. No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part. Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation.

163

#### § 106.71(a) Cont'd

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. Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).

164

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### § 106.71(b)(1)

(b) Specific circumstances.

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





(2) Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

<sup>165</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### **Final Thoughts**

- We will talk further about how to operationalize the regulations and about bias, impartiality, etc. in the Developing Policies, Procedures and Practices module and in the live session on Title IX Grievance Procedures/Sexual Misconduct Procedures.
- · We will discuss "tuning" in depth in subsequent modules.
- · You now have the legal foundations to take the next step in the program!





Legal Intersectionality of Title IX, Title VII, Clery, VAWA, ADA/504, etc..

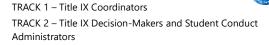
#### Peter Lake

Professor of Law Charles A Dana Chair, and Director of the Center for Excellence in Higher Education Law and Policy Stetson University College of Law

Jake Sapp Deputy Title IX Coordinator Austin College

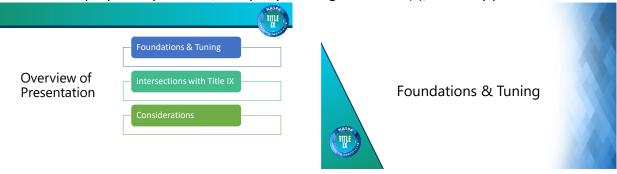


#### This Module is Designed for

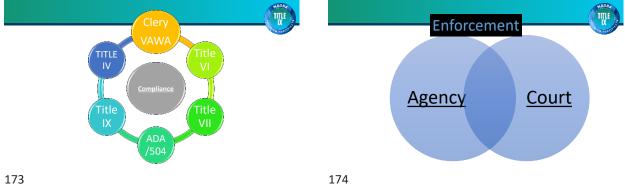


#### 170

169 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>171</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.





175

176

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

**Government Funding Requires Compliance** 

(b) By entering into a program participation agreement, an institution agrees that-

(1) It will comply with all statutory provisions of or applicable to Title IV of the HEA, all applicable regulatory provisions prescribed under that statutory authority, and all applicable special arrangements, agreements, and limitations entered into under the authority of statutes applicable to Title IV of the HEA, including the requirement that the institution will use funds it receives under any Title IV, HEA program and any interest or other earnings thereon, solely for the purposes specified in and in accordance with that program;

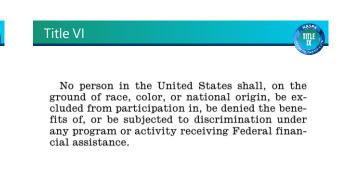
Title IX Discrimination on the basis of sex 20 U.S.C. 1681

20 U.S.C. § 1094 34 C.F.R. § 668.14

<sup>177</sup>©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

| Title IX   | Title IX Regulate   | ory Requirements  |
|--|---|---|
| No person in the United States shall, on the basis of sex, be excluded from<br>participation in, be denied the benefits of, or be subjected to discrimination<br>under any education program or activity receiving Federal financial assistance,<br>except that: | Old Regulations<br>• July 21, 1974<br>• Notice of Non-Discrimination<br>• Responsible Employee<br>• Grievance Procedure<br>• Admissions & Recruitment<br>• Education<br>• Employment<br>• Title VI Procedures | <ul> <li>New Regulations</li> <li>August 14, 2020</li> <li>Trained Coordinators, Decision-<br/>Makers, &amp; Investigators</li> <li>Defines Sexual Harassment</li> <li>Mandatory Dismissal of certain<br/>Claims</li> <li>Live Hearing – Cross Examination</li> <li>Retaliation Prohibited</li> </ul> |
| 179  | 180   |   |





#### 181

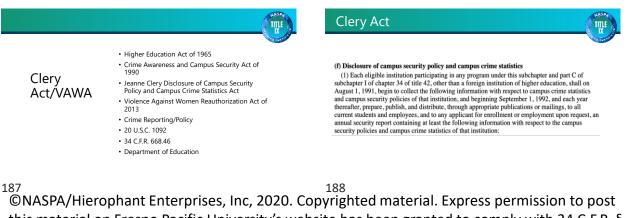
182

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>183</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

| Title VII  | Title VII Regulatory Req  | uirements                                      | TITLE |
|--|---|--|-------|
| (a) Employer practices<br>It shall be an unlawful employment practice for an employer -<br>(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his<br>compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;<br>or | Unlawful Employment<br>Practices:<br>• Hiring / Firing / Otherwise<br>• Segregate -> Deprive<br>Employment Opportunities<br>(training programs) | Race, color, religion, sex,<br>national origin |       |
| (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any<br>individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race,<br>color, religion, sex, or national origin.   | Disparate Impact  | Retaliation Prohibited                         |       |

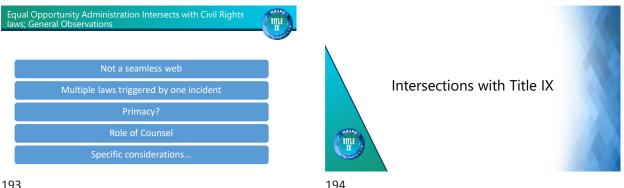


this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



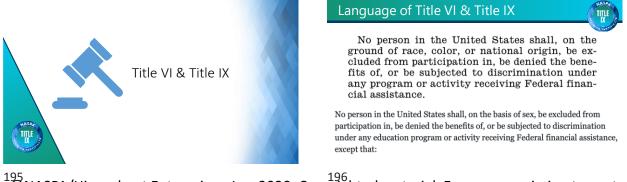
<sup>189</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.





#### 193

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>195</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

| Key Title VI & Title IX Case<br><u>Cannon v. Univ. of Chicago</u> , 441          | U.S. 677 (1979)   | P.   |  |
|--|---|--|--|
| Female student rejected admis<br>Excluded from participation b/c of<br>her sex & | sion to Private Medical Schools.<br>Schools received federal funding. | <u>Cannon</u> Analysis<br>Title IX -> Title VI | Title IX is connected to Title VI:<br>Legislative History<br>• Support for & Arguments against<br>• Article 1, Section 8, Clause 1 |
| Does Title IX contain an Implied   | d Private cause of action (COA)?                                      |  | Reliance on Title IV Case Law<br>• <u>Bossier Parish School Board v. Lemon,</u><br>370 F.2d 847, 852 (CA5 1967)                    |

#### Title VI Violations in Title IX Proceedings



Additionally, the Department will not tolerate discrimination on the basis of race, color, or national origin, which is prohibited under Title VI. If any recipient discriminates against any person involved in a Title IX proceeding on the basis of that person's race, color, or national origin, then the Department will address such discrimination under Title VI and its implementing regulations, in addition to such discrimination potentially constituting bias prohibited under § 106.45(b) (1)(iii) of these final regulations.

# Alexander v. Sandoval, 532 U.S. 275 (2001) → <u>Cannon</u> • Title VI IPCOA Fennell v. Marion Indep. Sch. Dist., 804 F.3d 398 (5 Cir. App. 10/13/2015) • Title VI Deliberate Indifference

#### 199

200

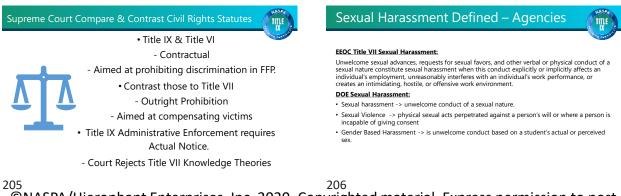
©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>201</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



204

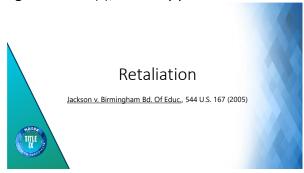


©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

New Title IX Regulations: Sexual Harassment Standard

(1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;

(2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or (3) "Sexual assault" as defined in <u>20 U.S.C. 1092</u>(f)(6)(A)(v), "dating violence" as defined in <u>34 U.S.C. 12291(a)(10)</u>, "domestic violence" as defined in <u>34 U.S.C. 12291(a)(30)</u>.



#### 207

<sup>207</sup>©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

<u>Jackson</u> <u>Holding</u>  Title IX's private right of action encompasses claims of retaliation against an individual because he has complained about sex discrimination.

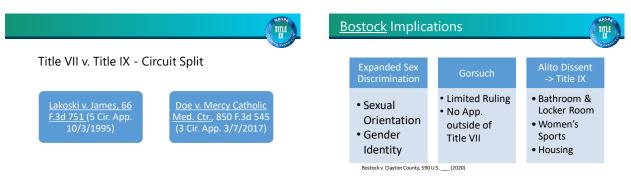
No Specific Title IX Retaliation Test

Title VII Used for Title IX Retaliation <u>McDonnell Douglas Corp. v. Green</u>, 411 U.S. 792 (1973

TITLE IX not

Establishes a 3 Step Burden Shifting Process: 1. Plaintiff establishes a Prima Facia case of discrimination

- "(1) Person engaged in protected conduct; (2) Person was subjected to an adverse employment action; and (3) the adverse employment action is causally linked to the protected conduct."
- 2. Defendant must articulate a legitimate, non-discriminatory reason for the adverse action
- Plaintiff must show by a preponderance of the evidence that the defendant's proffered reason is pretextual and that the actual reason for the adverse employment action is discriminatory."



#### 211

212 rightor

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>213</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

# Clery Act in Court

• 20 U. S. C. 1092(f)(14)(A)

Doe v. Vanderbilt Univ., 2019 WL 4748310 (USDCT MD Tenn. 9/30/2019) (No Clery COA)

Karasek v. Regents of the Univ. of Cal., 956 F.3d 1093 (9CA 4/20/20)

(14)

(A) Nothing in this subsection may be construed to—

(i) create a cause of action against any institution of higher education or any employee of such an institution for any civil liability; or

(ii) establish any standard of care.

(B) Netwithstanding any other provision of law, evidence regarding compliance or noncompliance with this subsection shall not be admissible as evidence in any proceeding of any court, agency, board, or other entity, except with respect to an action to enforce this subsection.



#### Michigan State University



- Finding #1: Failure to Properly Classify Reported Incidents and Disclose Crime Statistics · Finding #2: Failure to Issue Timely Warnings in Accordance with Federal Regulations
- · Finding #3: Failure to Identify and Notify Campus Security Authorities and to Establish an Adequate
- System for Collecting Crimes Statistics from all Required Sources
- · Finding #4: Lack of Administrative Capability
- Employ an independent Clery Compliance Officer, who will report to a high-level executive;
- · Establish a new Clery Compliance Committee that includes representation from more than 20 offices that play a role in campus safety, crime prevention, fire safety, emergency management, and substance abuse prevention; and
- · Create a system of protective measures and expanded reporting to better ensure the safety of its studentathletes in both intercollegiate and recreational athletic programs. Similar steps will be taken to better ensure the safety of minor children who participate in camps or other youth programs that are sponsored by the University or that are held on its properties.

#### Michigan State University – Clery & Title IX

- · Make substantial changes to the University's Title IX procedures and ensure that certain officials rec themselves from Title IX matters;
- · Take remedial actions to address the impact of the sexual misconduct by Nassar and Strampel on students, faculty and other staff within the College, the Sports Medicine Clinic, and related facilities, programs and services;
- Provide a process for those victims of Dr. Nassar, who have not otherwise had an opportunity to s remedy, to come forward and seek remedies to which they might be entitled;
- Review the actions of current and former employees of the University who had notice but who failed to take appropriate action in response to reports of sexual misconduct by Nassar or Strampel and consider appropriate sanctions against those employees;
- · Address the campus climate around issues of sexual harassment and sexual violence, strengthen staff training, and assess the need for additional student services; and
- · Exercise adequate Title IX oversight of the University's youth programs by notifying Youth Program participants of its Title IX grievance procedure and that the procedures apply to Youth Programs

218 217 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### Florida Tech – Under Investigation University of North Carolina UÎÎLE Finding #1: Lack of Administrative Capability Finding #2: Failure to Properly Define the Campus/Clery Geography Finding #3: Failure to Issue Timely Warnings. 17 Finding #4: Failure to Properly Compile and Disclose Crime Statistics . 22 Finding #5: Discrepancies between the Crime Statistics Included in the ASR and the Data Submitted to the Campus Safety and Security Data Analysis Cutting Tool ......... 32 Finding #6: Failure to Collect Campus Crime Information from All Required Sources. . 34 Finding #8: Failure to Disclose Accurate and Complete Disciplinary Referral Statistics -Finding #9: Failure to Include Required Information in the Annual Fire Safety Reports......54

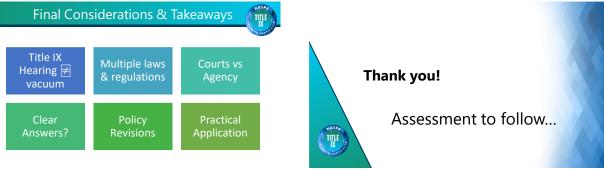
<sup>219</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

|     |                    |   |                                 | Digital Hearings   |
|-----|--------------------|---|---------------------------------|--|
|     | ADA/504 & Title IX | X | Accommodations<br>in Discipline | Summary of Investigators<br>Reports                                  |
|     |                    |   |                                 | Rossley v. Drake University, 342<br>F. Supp. 3d 904 (S.D. Iowa 2018) |
| 221 |                    |   | 222                             |  |

|                                   | Conduct Hearing Considerations                    |
|-----------------------------------|---|
|                                   | Involved Officers -> Bias?                        |
| Legal Intersection Considerations | Immediate Threat in Hearing  • Emergency Response |
|                                   | Granted Accommodations                            |
|                                   | In Person     Digital                             |

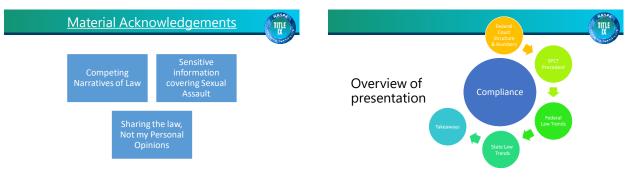
224

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>225</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.





©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>231</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

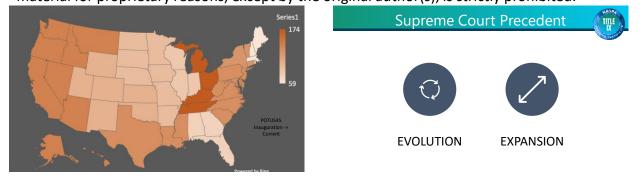




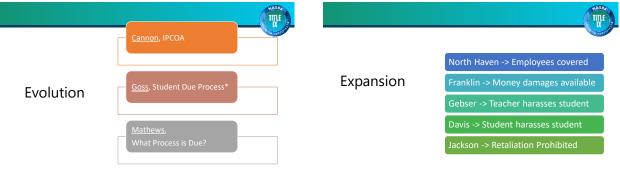


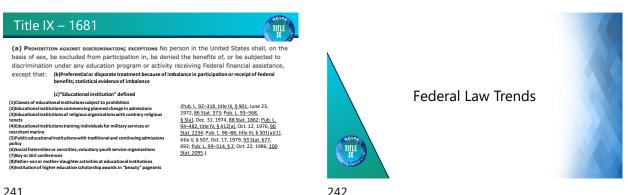


<sup>235</sup>©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>237</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.





©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

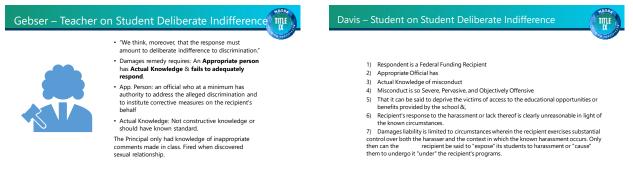
**Circuit Splits** 

TITLE

Recognized Sex Discrimination COA

|              |                         |                                   | 100 A             |                         |
|--------------|-------------------------|-----------------------------------|-------------------|-------------------------|
| Deliberate   | Detaliation             | 42 U.S.C. 1983 –                  | Erroneous         | Deliberate Indifference |
| Indifference | Retaliation             | Due Process &<br>Equal Protection | Outcome           | Plausible Inference     |
| Selective    | Inequity in Pre-Assault | Plausible                         | Pre-Assault claim |                         |
| Enforcement  | Athletics               | Claim                             | Inference         | Employees & Title IX    |

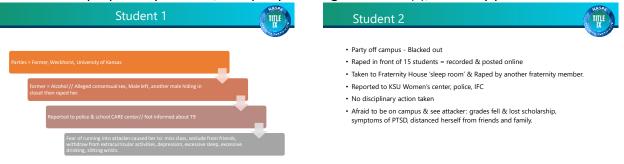
<sup>243</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



246

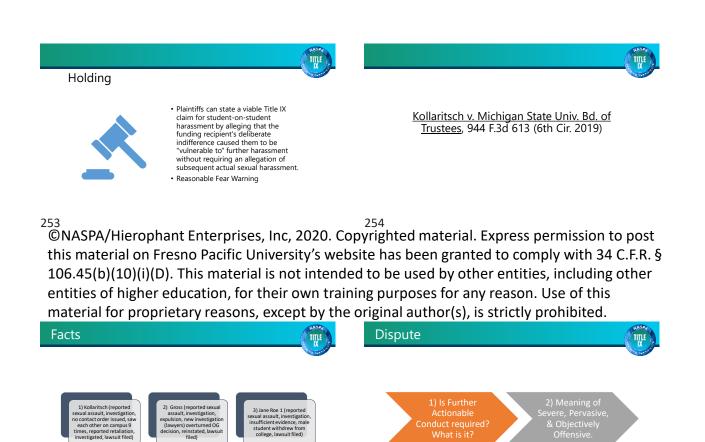


248 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



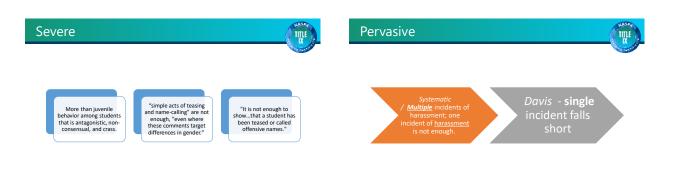
<sup>249</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

|  | Court's Analysis  |  |
|--|---|--|
| Dispute  | <ul> <li>Davis: Random House Dictionary definition of "subject" to include, "to<br/>make liable; lay open; expose."</li> </ul>  |  |
| What harm must<br>plaintiffs allege that KSU's argument =          | <ul> <li>KSU = further actual incidents of sexual harassment required. CT = this<br/>runs counter to purpose of Title IX</li> </ul>   |  |
| KSUS argument =<br>KSUS detilected<br>indifference caused<br>them? | <ul> <li>CT = cites to 4 USDCT cases &amp; 11<sup>th</sup> Cir <u>Williams v. Bd of Regents</u> = specific<br/>action taken by survivors that have deprived them educational<br/>opportunities. Further Harassment required, but what is the Further<br/>Harassment?</li> </ul> |  |
|  | Acknowledge that Courts look at Further Harassment  |  |



<sup>255</sup>©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

| Courts Analysis – Walkthrough of Each Davis Element   |
|---|
| • Davis = 2 parts   |
| <ol> <li>Actionable Harassment -&gt; Non-Consensual</li> <li>= 1) Severe, 2) Pervasive, and 3) Objectively Offensive</li> </ol> |
| 2) <u>Deliberate Indifference</u>   |
| = 1) Knowledge, 2) Act, 3) Injury, 4) Causation   |
| -   |
|   |



260

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>261</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



## Causation



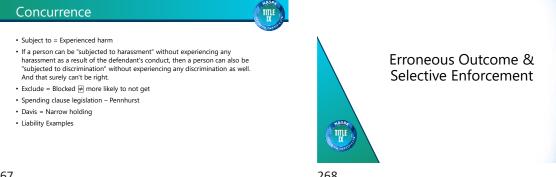
- "[T]he deliberate indifference must, at a minimum, cause students to undergo harassment or make them liable or vulnerable to it."
- "But for" Test
- Plaintiffs = Vulnerability alone misreading
- Correct Reading of Davis: Commission or Omission
- Post notice harassment presumption
- Cormier, 29 Yale J.L. & Feminism at 23-24



265

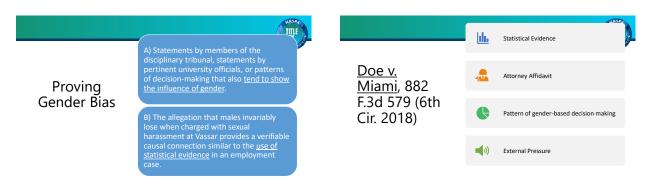
#### 266

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

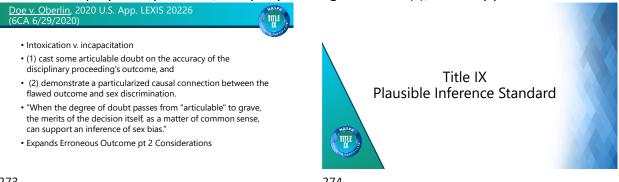


<sup>267</sup>©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

| Yusuf v. Vassar Coll., 35 F.3d 709 (2d Cir. 1994)         • Yusuf a Bengali male = student at Vassar   | <b>T</b> '(1, 1)/                  | Relation to Title VI & Title VII & Equal Protection<br><u>Albert V, Carovano</u> , 851 F2d 561 (2d Cr. 1988)<br><u>Burt V. City of New York</u> , 156 F.2d 791 (2d Cr. 1946)<br>Snowden V, Hughes, 321 U.S. 1 (1944)  |
|--|------------------------------------|---|
| <ul> <li>Attacked by student roommate = drunk white male.</li> <li>Roommate's girlfriend retaliated by bringing sexual harassment charges.</li> <li>Notice Deficiencies</li> <li>Hearing Deficiencies</li> </ul> | Title IX<br>Erroneous<br>Outcome & | "Title IX bars imposition of University discipline where gender is a<br>motivating factor in the decision to discipline."   |
| Yusuf Suspended for 1 semester.     Alleged Violations of 42 USC 1981 & Title IX   | Selective<br>Enforcement           | Erroneous Outcome = Innocent and wrongly<br>found to have committed the offense.<br>Selective Enforcement = Regardless of the<br>student's guilt or innocence, the severity of the<br>penalty and/or the decision to initiate the<br>proceeding was affected by gender. |



©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>273</sup>©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

|  | <b>THE</b>  | Doe v. Purdue                                   | Univ., | 928 F.3d 652 (7   | th Ci | r. 2019)   |
|--|---|---|--------|---|-------|--|
| <u>Doe v.</u><br><u>Purdue Univ.</u> ,<br>928 F.3d 652<br>(7th Cir.<br>2019) | Due Process & Title IX     Legally Protected Entitlement?     Contract      Fundamentally Unfair Procedures      ("[F]airness can rarely be obtained by     secret, one-sided determination of facts     decisive of rights.") Joint Anti-Fascist     Refugee Comm. v. McGrath, 341 U.S. 123     (1951) (Frankfurter Concurring)      Failure to examine Jane Roe -> No     Impeachment | Implied Private<br>Cause of Action -><br>Gebser | •      | Erroneous Outcome<br>& Selective<br>Enforcement -><br>Yusuf | •     | Deliberate<br>Indifference -> <u>Doe</u><br><u>v. Miami Univ.</u> , 882<br>F.3d 579 (6CA 2018) |



©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>279</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



#### McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)

Establishes a 3 Step Burden Shifting Process:

- 1. Plaintiff establishes a Prima Facia case of discrimination "(1) Person engaged in protected conduct; (2) Person was subjected to an adverse employment action; and (3) the adverse employment action is causally linked to the protected conduct."
- 2. Defendant must articulate a legitimate, non-discriminatory reason for the adverse action
- 3. Plaintiff must show by a preponderance of the evidence that the defendant's proffered reason is pretextual and that the actual reason for the adverse employment action is discriminatory."



283

284 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Outline of a 42 U.S.C. § 1983 Case

- · 1) Deprived of a constitutional right (Liberty / Property)
- · 2) by a state official acting under the color of law
- 11<sup>th</sup> Amend 1) Waived 2) Abrogated by statute 3) Ex Parte Young exception– Prospective Relief
- <u>3 Causes of Action</u>
- Substantive Due Process Violation (bars certain arbitrary gov. actions "regardless of the fairness of the procedures used to to implement them." Actions that Shock the Conscience
- 2) Procedural Due Process Violation (guarantee of a fair procedure)
- 3) Equal Protection Violation (Equal treatment under the laws)



Goldberg v. Kelly, 397 U.S. 254 (1970); Due Process Cases

<sup>285</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

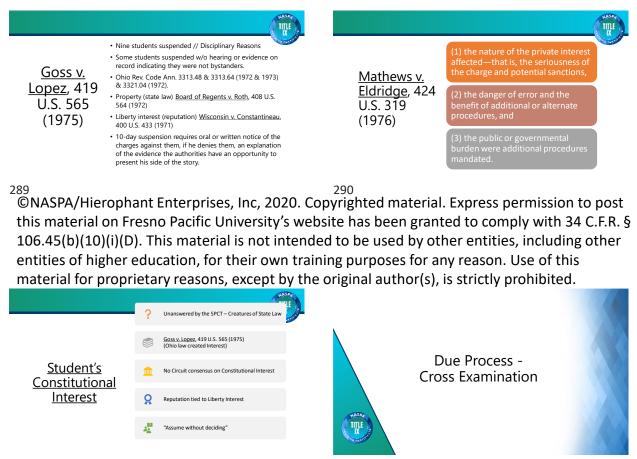
Expanding Recognized Interests

Liberty ... guaranteed (by the Fourteenth Amendment), the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the ucidid to contract, to engage in any of the common coupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized ... as essential to the orderly pursuit of happiness by free men." <u>Meyer v.</u> <u>Nebraska</u>, 262 U.S. 390 (1923)

- · The Court has also made clear that the Property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money. By the same token, the Court has required due process protection for deprivations of liberty beyond the sort of formal constraints imposed by the criminal process. Board of Regents v. Roth, 408 U.S. 573 (1972)
- For '(w)here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. <u>Wisconsin v. Constantineau</u>, 400 U.S. 433 (1971)

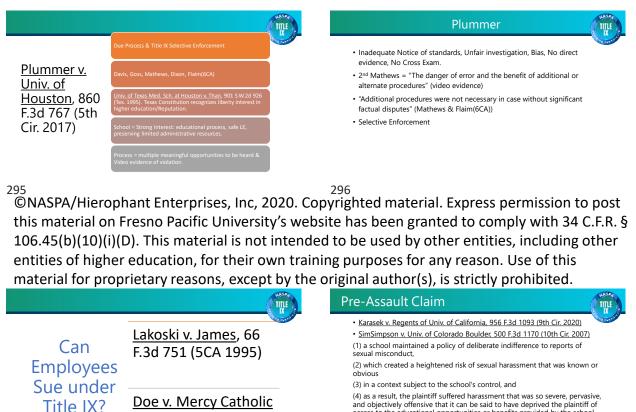
#### Student Interests in continuing education - Circuit split?

- Protected property interests: a property interest in continuing their education and a property. interest in a transcript "unmarred" by the finding of responsibility for sexual miscor
- 'As an initial matter, we note that the Supreme Court never has held that the interest in continued education at a public university constitutes a fundamental property or liberty interest that finds refuge in the substantive protections of the Due Process Clause." Martinson v. Regents of the Univ. of Mich., 563 F. Appx 365 (6th Ctr. 2014)
- "[O]ur own precedent suggests that the opposite is true," although this court has not definitively decided the issue
- A consensus on this issue does not appear to have emerged among our sister circuits either. <u>Williams v. Wendler</u>, 530 F.34 584 (7CA 2008) (holding that a suspension from a public university is not a deprivation of constitutional property). <u>Butler v. Rector & B.d. of Visitors of Coll.</u> <u>of William & Mary</u>, 121 F. Appx 515 (4th Cir. 2005) (assuming, without deciding, that a student had "a property interest in continued enormalitement" an amset's program that is protected by the Due Process Clause").



<sup>291</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

|  |   | Haidak v. Univ. of MassAmherst, 933 F.3d 56<br>(1CA 8/6/2019)  |
|--|---|--|
|  | Procedural Due Process & Title IX<br>(Goss, Mathews, Dixon, Univ. of Cinn, Flaim) Recognizes<br>Student Interest = Property & Reputation                            | Gorman v. Univ. of Rhode Island, 837 F.2d 7 (1st Cir. 1988)  |
| <u>Doe v. Baum,</u><br>903 F.3d 575<br>(6th Cir. 2018) | -> Jaksa v. Regents of Univ. of Michigan, 597 F. Supp.         1245 (E.D. Mich. 1984) = Con 문 Cross Exam         Disciplinary Decision -> Credibility Determination | (Goss, Mathews, Dixon, MagnaCarta) (Recognizes Paramount Student Interest, No cross exam<br>required.)<br>Schools interest: 1) protecting itself and other students from those whose behavior violates the<br>basic values of the school. 2) Allocation of resources toward "promoting & protecting the primary<br>function of institutions that exist to provide education. |
|  | Balance of Interests<br>Procedural Due Process violation & Title IX Erroneous   | Haidak = Challenging the Suspension & Expulsion hearings Title IX & 1983.<br>Not a common law trial // Rejects Baum  |



access to the educational opportunities or benefits provided by the school

<sup>297</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Med. Ctr. 850 F.3d 545 (3d Cir. 2017)





302

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>303</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



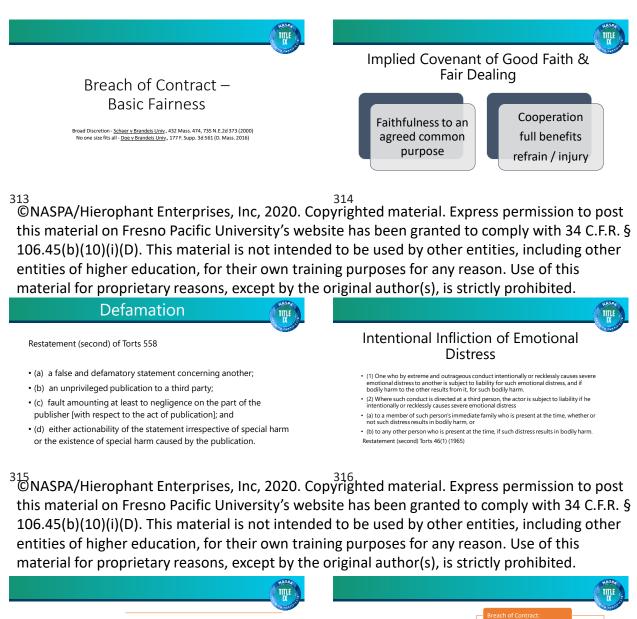


©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

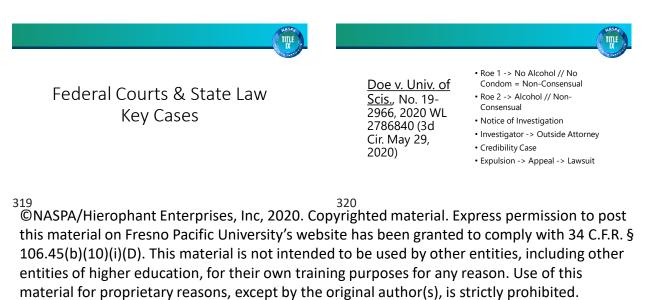


<sup>309</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.





|            | Duty      |   |   | Breach of Contract:<br>• Reasoanble Expectation<br>• Basic Fairness                 |
|------------|-----------|---|---|---|
| Negligence | Breach    |   | State Causes of<br>Action attached to<br>Title IX | Basic Fairness     Implied Covenant of Good Faith &     Fair Dealing     Defamation |
| Negligence | Causation | - |   |   |
|            | Damages   |   |   | Negligence -> Novel   |





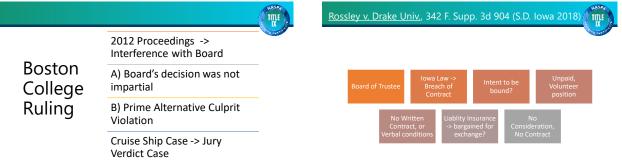
<sup>321</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

|              |  |        | <u>Doe v. Univ. (</u>           | <u>of Scis.</u> – Holding  |  |
|--------------|--|--------|---------------------------------|--|--|
| Doe v. Univ. | Academic (caution) v. Behavior                                       | 1      | Doe states a plausible claim fo | r Breach of Contract   |  |
| of the       | Assumes Contract is created Student substantial interest             |        | Promised: Fair & Equitable      | -> Suspension: some sort of hearing<br>-> Credibility Case: Cross-Exam |  |
| Sciences –   | DCL pressure   |        |                                 | -> creationity case. cross-coant                                       |  |
| Ct Analysis  | Pennsylvania Law   | ΔŢΔ    | Single model investigator viola | tes Fairness promised  |  |
|              | Fairness = Notice, Participate in live hearing, Cross Exam witnesses |        |                                 |  |  |
|              | Cites to Goss  | $\sim$ | Rehearing Requested -           |  |  |
|              |  |        |                                 |  |  |

|   | Cruise Ship Party Case  |                          | ~ | 1) 2012 Disciplinary<br>RE & BF | Proceedings -> BOK:  |
|---|---|--------------------------|---|---------------------------------|--|
| Doe v.<br>Trustees of                                 | <ul> <li>Neutrality - No Finding</li> <li>Chairperson -&gt; Associate Dean -&gt; Dean -&gt; Associate Dean -&gt; Board</li> </ul> | Doe v. Boston<br>Dispute | * | Board's decision wa             | is not impartial   |
| <u>Bos. Coll.</u> , 892<br>F.3d 67<br>(1st Cir. 2018) |   | Dispute                  | × | Prime Alternative C             |  |
| (150 CII. 2010)                                       | New Evidence -> No Reconsideration  |                          | - | 2) 2014 Review<br>Contract?     | Consideration? -> No<br>Lawsuit (exchange)<br>Independent Review |

326

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



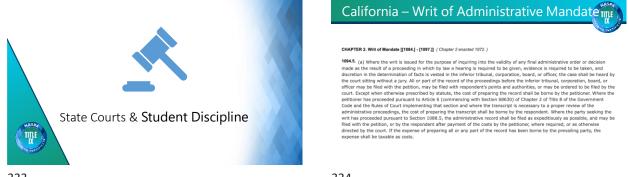
<sup>327</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

| Breach of Contract Ca | ises Takeaways | Title IX Defamation  | (W) |
|-----------------------|----------------|--|-----|
|                       | PROMISES? VS.  | Greenwelly. Univ. of Alabama Bd. of Trustees, No. 7:11-CV-2313-RDP, 2012 N<br>Ala, Aug. 22, 2012)<br>• Female Employee<br>• Complained -> Inequitable Pay & Disparate Treatment of students<br>• Title IX Retaliation claim<br>• College knowingly made false statements:<br>• District Attorney<br>• Police<br>• Dishonest Act & Thievery<br>• DoceIndiana Wesleyan Univ., No. 1:20-CV-00039-HAB, 2020 WL 247448<br>2020)-> Student HIV |     |



©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

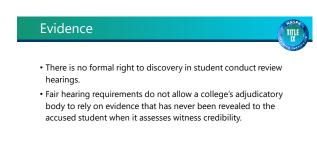
332



<sup>333</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

|                 |   | California State Court Discipline Requirements   |
|-----------------|---|--|
|                 | • <u>Doe v. Occidental College</u> , 40 Cal. App. 5th 208, 252<br>Cal. Rptr. 3d 646 (2019)  | No particular form of college student disciplinary hearing is required under<br>California law.  |
| California      | <ul> <li><u>Doe v. Westmont</u>, 34 Cal. App. 5th 622, 246 Cal. Rptr.<br/>3d 369 (2019)</li> </ul>  | <ul> <li>A fair college sexual misconduct hearing strives to balance three competing<br/>interests:</li> </ul>   |
| Title IX – Writ | • <u>Schrager v. Carry</u> , No. B282970, 2019 WL 1745858   | <ul> <li>1) the accused student seeks to avoid unfair or mistaken exclusion from the<br/>educational process,</li> </ul>   |
| of Mandamus     | (Cal. Ct. App. Apr. 18, 2019)   | <ul> <li>2) the college tries to provide a safe environment for all of its students,</li> </ul>  |
| Cases           | <ul> <li><u>Doe v Allee</u>, 30 Cal. App. 5th 1036, 242 Cal. Rptr. 3d<br/>109 (2019)</li> </ul>   | <ul> <li>3) the alleged victim, who often lives, works, and studies on a shared<br/>college campus with the accused, wants to safeguard their own well-being.</li> </ul> |
|                 | <ul> <li>"The common law requirements for a fair sexual misconduct<br/>hearing at a private college mirror the due process protections<br/>at public universities; these requirements are flexible and entail<br/>no rigid procedure."</li> </ul> |  |
| 335             |   | 336  |





338

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Credibility cases: Information given to accused

- The college must provide the accused student with the names of witnesses and the facts to which each testifies.
- College student conduct panel deprived student of a fair hearing on sexual misconduct charge when it failed to provide student with information regarding investigation; college's sexual assault policies and procedures required it to turn over interview notes and permitted student access to all evidence dean discovered or developed during his investigation, yet dean omitted some questions and answers from reports, dean, who was on panel, had full information available to him, and college staff member took detailed notes that recorded the panel's questions and witnesse' responses, but student was only provided less detailed oral summaries.
- At a minimum, to provide a fair hearing where a sexual misconduct case turns on witness credibility, a college must comply with its own policies and procedures.
   To provide a fair basing where a covula misconduct care turns on

**Credibility Cases** 

- To provide a fair hearing where a sexual misconduct case turns on witness credibility, a college's procedures must provide the accused student with a hearing before a neutral adjudicatory body.
- For a college to provide a fair hearing where a sexual misconduct case turns on witness credibility, the accused must be permitted to respond to the evidence against them.

<sup>339</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

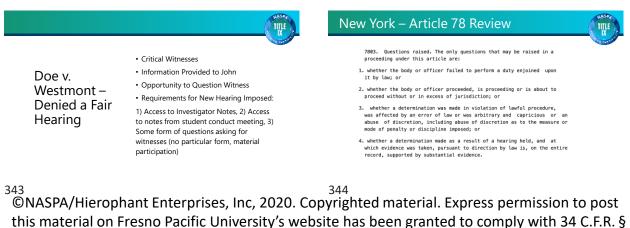
#### Credibility cases: Appearance of witnesses

Not necessary to place the alleged victim and the accused in the same room.
The alleged victim and other critical witnesses must appear before the

- adjudicatory body in some form—in person, by video conference, or by some other means—so the body can observe their demeanor.
- Some form of witness presence is required to enable a college's adjudicatory body, when considering a sexual misconduct claim, to determine whether the witness is worthy of belief especially where there is no corroborating physical evidence to assist the body in resolving conflicting accounts.

#### Credibility cases: Cross examination

- A college student accused of sexual misconduct is not entitled to directly cross-examine the alleged victim or other witnesses who testify at a sexual misconduct hearing.
- Where a college's sexual misconduct adjudication decision hinges on witness credibility, the accused must be permitted to pose questions to the alleged victim and other witnesses, even if indirectly.
- The accused must be able to pose questions to the witnesses in some manner, either directly or indirectly, such as through the adjudicatory body, but the body need not ask every question proposed by the accused.



this material on Fresho Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>345</sup>©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.





350

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>351</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



#### Fairness in Women's Sports Act



- Biological differences between Males & Females
- <u>Kleczek v. Rhode Island Interscholastic League, Inc.</u>, 612 A.2d 734 (R.I. 1992)
- Sex Specific Teams
- Broad Scope

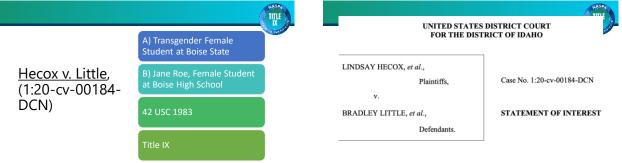
355

- All Teams: Male, Female, Coed -> Prove Sex
- Female Teams = No Males
- Creates COA (Student, School, Retaliation)

| Vital      | Birth Certificate Rules                 |
|------------|---|
| Statistics | <ul> <li>Definition of "sex"</li> </ul> |
| Act        | <ul> <li>Compelling Interest</li> </ul> |

356

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>357</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

| Nor does the Supreme Court's recent decision in Bostock v. Clayton Cty., Georgia, No.   | Connecticut   |
|---|---|
| Nor does the Supreme Court's recent decision in <i>Bostock v. Clayton Cty., Georgia</i> , No.<br>17-1618, 2020 WL 3146686 (U.S. June 15, 2020), alter the equal-protection analysis here. First,<br><i>Bostock</i> said nothing about and did not consider anything about the Constitution. <i>See id.</i> at *17 | Soule v. Connecticut Association of Schools, Inc.,(3:20-cv-00201-RNC)                 |
| (warning that "[t]he only question before us is whether an employer who fires someone simply  | CIAC Policy     3 Female High school females  |
| for being homosexual or transgender has discharged or otherwise discriminated against that<br>individual 'because of such individual's sex'' as that term is used in a particular provision of  | 2 Biological Males -> 15/85     Title IX Athletics Review     Effective Accommodation |
| Title VII). Second, nothing in the Fairness Act discriminates on the basis of transgender status,<br>so even assuming <i>arguendo</i> that <i>Bostock</i> had any relevance in a constitutional case, it would not  | Equal Treatment   |
| help Plaintiffs.  |   |

360

|                                      | (III)                                   |                        | Stat                | e Law              | Trends |                        |
|--------------------------------------|---|------------------------|---------------------|--------------------|--------|------------------------|
|                                      | Student and Administration Equality Act |                        |                     |                    |        |                        |
| Oklahoma -<br>SB 1466<br>(attempted) | 10-day Trigger -> Goss                  | Breach of<br>Contract, | Defama              | tion,              | IIED,  | Negligenc              |
|                                      | Procedural Requirements                 |                        |                     |                    | _      |                        |
|                                      | Advocate may Fully Participate          |                        | cedural<br>rements, | Proscril<br>Policy |        | Athletics<br>Mandates. |
|                                      | Credibility Case -> Cross Exam          |                        |                     |                    |        |                        |

365

## 362

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>363</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



# Why does this module combine these two tracks?



- Under the new Title IX regulations, Title IX coordinators are permitted to be investigators.
- It is important Title IX coordinators receive investigator training.
- Title IX coordinators, as a part of their overall oversight function, must understand the investigative process and how it has shifted under the new regulations, irrespective of whether they ever serve as the actual investigator.
- Title IX investigators should have working knowledge of the Title IX grievance system overall and understand their role within the system.

## What is Title IX? What is its mission?

- Enacted by Congress, Title IX seeks to reduce or eliminate barriers to educational opportunity caused by sex discrimination in institutions that receive federal funding. This is the mission of Title IX!
- Other federal laws also address sex discrimination. There are complex interactions with other federal laws, such as the Clery Act, the Family Educational Rights and Privacy Act (FERPA), and the Violence Against Women Act (VAWA).
- Title IX is concerned with *institutional response* to discrimination.

#### 367

368

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

# Title IX: FINAL RULE

**34 CFR Part 106** Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance The final regulations specify how recipients of Federal financial assistance covered by Title IX, including elementary and secondary schools as well as postsecondary institutions, (hereinafter collectively referred to as "recipients" or "schools"), must <u>respond</u> to allegations of sexual harassment consistent with Title IX's prohibition against sex discrimination. These regulations are intended to effectuate Title IX's prohibition against sex discrimination by requiring recipients to address sexual harassment as a form of sex discrimination in education programs or activities.

# Title IX: FINAL RULE The final regulations obligate recipients to **respond** promptly and supportively to persons alleged to be victimized by sexual harassment, **resolve** allegations of sexual harassment promptly and accurately under a predictable, fair grievance process that provides due process protections to alleged victims and alleged perpetrators of sexual harassment, and **effectively implement** remedies for victims.

<sup>369</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

idiscrimination on the Basis of Sex in Education Programs or ioncial Assistance, 85 Fed. Reg. 30026 (Mey 19, 2020) (final

#### Title IX: FINAL RULE

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

#### Special Issues in Investigation\*

- Definitions Under the New Regulations
- Familiarity with Specific Campus Policies
- The Investigation Process Itself
- Relevance and Rape Shield Rules
- The Minimum and Maximum Role of the Investigator
- The Tie to the Adjudication Process
- Who should serve as an investigator?

Note: These concepts will be covered in this module, subsequent modules, and in the live virtual session.



#### Is "sex" defined in the new regulations?

The word "sex" is undefined in the Title IX statute. The Department did not propose a definition of "sex" in the NPRM and declines to do so in these final regulations. The focus of these regulations remains prohibited conduct.

Important to look at campus policy and other relevant laws. Seek advice of counsel.

373

374 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



§ 106.30(a) Definitions.

#### "Actual Knowledge"

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. 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 aualify 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).

<sup>375</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

| "Co | mplainant"  | "Respondent"   |  |
|-----|---|--|--|
|     | Complainant means an individual who is<br>alleged to be the victim of conduct that could<br>constitute sexual harassment. | Respondent means an individual who has been<br>reported to be the perpetrator of conduct that could<br>constitute sexual harassment. |  |
|     | What is "alleged?"  | Allege = "report?"   |  |
| 377 |   | 378  |  |

#### More on Complainants/Respondents



- A person may be a complainant, or a respondent, even where no formal complaint has been filed and no grievance process is pending. (di at 20030)
- References ... to a complainant, respondent, or other individual with respect to exercise of rights under Title IX should be understood to include situations in which a parent or guardian has the legal right to act on behalf of the individual.
- [T]he definitions of "complainant" and "respondent" do not restrict either party to being a student or employee, and, therefore, the final regulations do apply to allegations that an employee was sexually harassed by a student. <sup>Id. at 30071-72</sup> (internal citations omitted, emphasis added)



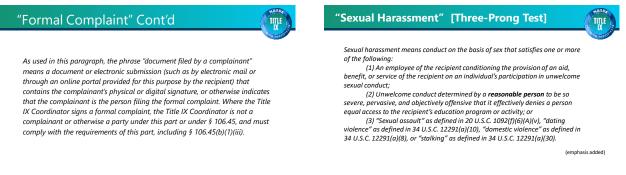
#### 379

380

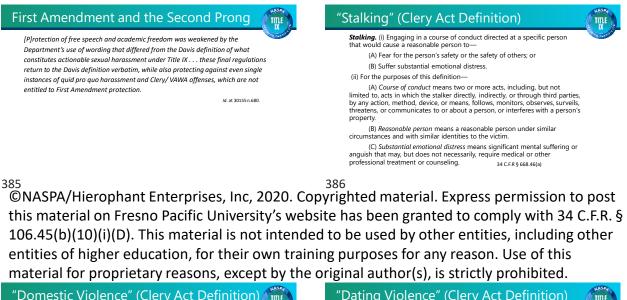
©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### "Consent"—Not Defined in New Regulations "Formal Complaint" TITLE • What will your campus definition be? Affirmative consent? Formal complaint means a document filed by a complainant or signed · Will distribute across multiple offenses by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation Elements of sexual harassment. At the time of filing a formal complaint, a consent is a voluntary agreement to engage in sexual activity; · someone who is incapacitated cannot consent; complainant must be participating in or attempting to participate in (such as due to the use of drugs or alcohol, when a person is asleep or unconscious, or because of an intellectual or other disability that prevents the student from having the capacity to give consent) the education program or activity of the recipient with which the formal complaint is filed. A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact past consent does not imply future consent; information required to be listed for the Title IX Coordinator under § 106.8(a), silence or an absence of resistance does not imply consent; and by any additional method designated by the recipient. · consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another; (emphasis added) · consent can be withdrawn at any time; and coercion, force, or threat of either invalidates consent

<sup>381</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



384



"Domestic Violence" (Clery Act Definition) "Dating Violence" (Clery Act Definition) Dating violence. Violence committed by a person who is or has been in a Domestic violence. (i) A felony or misdemeanor crime of violence social relationship of a romantic or intimate nature with the victim. committed-(i) The existence of such a relationship shall be determined based on the (A) By a current or former spouse or intimate partner of the reporting party's statement and with consideration of the length of the victim: relationship, the type of relationship, and the frequency of interaction (B) By a person with whom the victim shares a child in common; between the persons involved in the relationship. (C) By a person who is cohabitating with, or has cohabitated with, the (ii) For the purposes of this definition victim as a spouse or intimate partner; (A) Dating violence includes, but is not limited to, sexual or physical (D) By a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of abuse or the threat of such abuse. violence occurred, or (B) Dating violence does not include acts covered under the definition of domestic violence. (E) 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 jurisdiction in which the crime of violence occurred. 34 C.F.R § 668.46(a) 34 C.F.R § 668.46(a)

<sup>387</sup>©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



#### "Supportive Measures" Cont'd

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

§ 106.44 Recipient's response to sexual harassment.

#### 391

392

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

§106.44(a) General response to sexual harassment.

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

# §106.44(a) Cont'd

A recipient's response must treat complainants and respondents eauitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. The 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 of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.

<sup>393</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

(emphasis added)

#### §106.44(a) Cont'd

The Department may not deem a recipient to have satisfied the recipient's duty to not be deliberately indifferent under this part based on the recipient's restriction of rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment.

#### §106.44(b) Response to a formal complaint

(1) 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).

(2) 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.



#### <u>§106.44(c) Emergency removal</u>

Nothing in this part precludes a recipient from removing a responden 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.

#### 397

student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45. This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.

Nothing in this subpart precludes a recipient from placing a non-

§106.44(d) Administrative leave.

#### 398

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

§ 106.45 Grievance process for formal complaints of sexual harassment.

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.

<sup>399</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

§ 106.45(b) Grievance process.

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

#### § 106.45(b)(1)(i)

(1) Basic requirements for grievance process. A recipient's grievance process must-

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

#### § 106.45(b)(1)(ii)

403

(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;

#### § 106.45(b)(1)(iii)

TIŢĻE

(iii) Require that any individual designated by a recipient as Title IX Coordinator, investigator, decisionmaker, 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.

or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this

A recipient also must ensure that investigators receive training on issues of

marizes relevant

relevance to create an investigative report that fairly sun

evidence, as set forth in paragraph (b)(5)(vii) of this section.

| (emphasis added)   | (emphasis added)   |
|--|--|
| this material on Fresno Pacific University's web   |  |
| § 106.45(b)(1)(iii) Cont'd   | § 106.45 (b)(1)(iii) Cont'd  |
| A recipient must ensure that Title IX Coordinators, <u>investigators</u> , decision-<br>makers, and any person who facilitates an informal resolution process, receive | A recipient must ensure that decision-makers receive training on any technology to<br>be used at a live hearing and on issues of relevance of questions and evidence,<br>including when questions and evidence about the complainant's sexual predisposition |

section.

A recipient must ensure t makers, and any person w training on

the definition of sexual harassment in § 106.30,

- the scope of the recipient's education program or activity,
- how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and
- issue, conflicts of interest, and bias....

Any materials used to train Title IX Coordinators, investigators, decision makers, and any person who facilitates an informal resolution process, must · how to serve impartially, including by avoiding prejudgment of the facts at not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment; (emphasis added) (bullets added, emphasis added) <sup>405</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this

material for proprietary reasons, except by the original author(s), is strictly prohibited. § 106.45(b)(1)(iv)

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

(emphasis added)

### § 106.45(b)(1)(v)

(v) Include reasonably prompt time frames for conclusion of the

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

(emphasis added)

#### § 106.45(b)(1)(vi)

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

#### § 106.45(b)(1)(vii)

(vii) State whether the standard of evidence to be used to determin 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;

#### 409

410

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

TITLE

#### § 106.45(b)(1)(viii)

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

| § 106.45(b)(1)(ix)  | TITLE |
|---|-------|
| (ix) Describe the range of supportive measures available to |       |

complainants and respondents; and

<sup>411</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### § 106.45(b)(1)(x)

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

#### § 106.45(b)(2)(i)



(2) Notice of allegations-

(i) Upon receipt of a formal complaint, a recipient must provide the following written notice to the parties who are known:

(emphasis added

#### § 106.45(b)(2)(i)(A)



(A) Notice of the recipient's grievance process that complies with this section, including any informal resolution process.

#### § 106.45(b)(2)(i)(B)

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

τημ

#### 415

416

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### § 106.45(b)(2)(ii) § 106.45(b)(3)(i) (ii) If, in the course of an investigation, the recipient decides (3) Dismissal of a formal complaint-(i) The recipient must investigate the allegations in a formal to investigate allegations about the complainant or complaint. If the conduct alleged in the formal complaint would respondent that are not included in the notice provided not constitute sexual harassment as defined in § 106.30 even if pursuant to paragraph (b)(2)(i)(B) of this section, the proved, did not occur in the recipient's education program or recipient must provide notice of the additional allegations to activity, or did not occur against a person in the United States. the parties whose identities are known. then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; such a dismissal does not preclude action under another provision of the recipient's code of conduct. (emphasis added) (emphasis added)

<sup>417</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### § 106.45(b)(3)(ii)

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

#### § 106.45(b)(3)(iii)

(iii) Upon a dismissal required or permitted pursuant to paragraph (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.

(emphasis added)

#### § 106.45(b)(4)

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



TIŢĻE

(emphasis added)

#### § 106.45(b)(5)

(5) Investigation of a formal complaint. When investigating a formal complaint and throughout the grievance process, a recipient must-

(emphasis added)

421 422 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### § 106.45(b)(5)(i) § 106.45(b)(5)(ii) (i) Ensure that the burden of proof and the burden of gathering (ii) Provide an equal opportunity for the parties to present evidence sufficient to reach a determination regarding witnesses, including fact and expert witnesses, and other responsibility rest on the recipient and not on the parties provided inculpatory and exculpatory evidence; that the recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for a grievance process under this section (if a party is not an "eligible student," as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a (emphasis added) "parent," as defined in 34 CFR 99.3); (emphasis added)

<sup>423</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

§ 106.45(b)(5)(iii) § 106.45(b)(5)(iv) (iii) Not restrict the ability of either party to discuss the (iv) Provide the parties with the same opportunities to have allegations under investigation or to gather and present others present during any grievance proceeding, including the relevant evidence: opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties; (emphasis added) (emphasis added)

#### § 106.45(b)(5)(v)

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

#### § 106.45(b)(5)(vi)

(vi) Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.

(emphasis added)

#### 427

428

TIŢĻE

(emphasis added)

(emphasis added

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### § 106.45(b)(5)(vi) Cont'd

Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination; and

# § 106.45(b)(5)(vii)

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

(emphasis added)

<sup>429</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### § 106.45(b)(6)(i)

#### (6) Hearings.

(i) For postsecondary institutions, the recipient's grievance process must provide for a live hearing. At the live hearing, the decisionmaker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such crossexamination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings.

#### § 106.45(b)(6)(i) Cont'd

At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions. Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a crossexamination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant. If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.



# § 106.45(b)(6)(i) Cont'd

Questions and evidence about the complainant's sexual predisposition prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. If a party or witness does not submit to cross-examination at the live hearing, the decisionmaker(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 crossexamination or other questions.

# § 106.45(b)(6)(i) Cont'd

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

434

433 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

# § 106.45(b)(7)(i)

(7) Determination regarding responsibility. (i) The decision-maker(s), who cannot be the same person(s) as the

Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the recipient must apply the standard of evidence described in paragraph (b)(1)(vii) of this section.

§ 106.45(b)(7)(ii)(A)

harassment as defined in § 106.30;

(ii) The written determination must include-(A) Identification of the allegations potentially constituting sexual

<sup>435</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

## § 106.45(b)(7)(ii)(B)

(B) 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;

# § 106.45(b)(7)(ii)(C)

(C) Findings of fact supporting the determination;



# § 106.45(b)(7)(ii)(D)



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

§ 106.45(b)(7)(ii)(E)

(E) 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

# 439

440

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

# § 106.45(b)(7)(ii)(F)

(F) The recipient's procedures and permissible bases for the complainant and respondent to appeal.





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

<sup>441</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

# § 106.45(b)(7)(iv)

(iv) The Title IX Coordinator is responsible for effective implementation of any remedies.



(8) Appeals.

(i) A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:

# § 106.45(b)(8)(i)(A-C)



(A) Procedural irregularity that affected the outcome of the matter,
(B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and

(C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

# 445

446

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

# § 106.45(b)(8)(iii)(A-F)

(iii) As to all appeals, the recipient must:

 (A) Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
 (B) Ensure that the decision-maker(s) for the appeal is not the same person as

the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator; (C) Ensure that the decision-maker(s) for the appeal complies with the

standards set forth in paragraph (b)(1)(iii) of this section;

(D) Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;

(E) Issue a written decision describing the result of the appeal and the

rationale for the result; and (F) Provide the written decision simultaneously to both parties.

# § 106.45(b)(9)

§ 106.45(b)(8)(ii)

additional bases.

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

(ii) A recipient may offer an appeal equally to both parties on

<sup>447</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

# § 106.45(b)(9)(i)

(i) Provides to the parties a written notice disclosing: The allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;

# § 106.45(b)(9)(ii-iii)

(ii) Obtains the parties' voluntary, written consent to the informal resolution process; and

(iii) Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.





# § 106.45(b)(10)(i)(A)

(10) Recordkeeping.

(i) A recipient must maintain for a period of seven years records of—

(A) Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required under paragraph (b)(6)(i) of this section, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity; remotasis added!

# § 106.45(b)(10)(i)(B-D)

(B) Any appeal and the result therefrom;

(C) Any informal resolution and the result therefrom; and

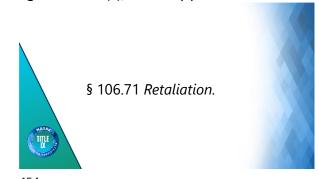
(D) All materials used to train Title IX Coordinators, investigators, decisionmakers, and any person who facilitates an informal resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.

(emphasis added)

<sup>451</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

# § 106.45(b)(10)(ii)

(ii) For each response required under § 106.44, a recipient must create, and maintain for a period of seven years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity. If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.



<sup>453</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

# § 106.71(a)

(a) Retaliation prohibited. No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part. Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation.

# § 106.71(a) Cont'd

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. Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).

(emphasis added)

# § 106.71(b)(1)



### (b) Specific circumstances.

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

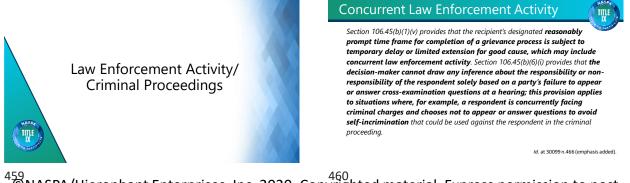
# § 106.71(b)(2)

(2) Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

# 457

458

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>460</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Concurrent Law Enforcement Activity Cont'd 🧴

Further, subject to the requirements in § 106.45 such as that evidence sent to the parties for inspection and review must be directly related to the allegations under investigation, and that a grievance process must provide for objective evaluation of all relevant evidence, inculpatory and exculpatory, nothing in the final regulations precludes a recipient from using evidence obtained from law enforcement in a § 106.45 grievance process. § 106.45(b)(5)(vi) (specifying that the evidence directly related to the allegations may have been gathered by the recipient "from a party or other source" which could include evidence obtained by the recipient from law enforcement) (emphasis added); § 106.45(b)(1)(i). Law Enforcement Cannot Be Used to Skirt Title IX Process [A] recipient cannot discharge its legal obligation to provide education

programs or activities free from sex discrimination by referring Title IX sexual harassment allegations to law enforcement (or requiring or advising complainants to do so), because the purpose of law enforcement differs from the purpose of a recipient offering education programs or activities free from sex discrimination. Whether or not particular allegations of Title IX sexual harassment also meet definitions of criminal offenses, the recipient's obligation is to respond supportively to the complainant and provide remedies where appropriate, to ensure that sex discrimination does not deny any person equal access to educational opportunities. Nothing in the final regulations prohibits or discourages a complainant from pursuing criminal charges in addition to a \$ 106.45 grievance process.

Id. at 30099 n.466 (emphasis added).

### Id. at 30099 (internal citation omitted, emphasis added)

# Police Investigations

463

The 2001 Guidance takes a similar position: "In some instances, a complainant may allege harassing conduct that constitutes both sex discrimination and possible criminal conduct. Police investigations or reports may be useful in terms of fact gathering. However, because legal standards for criminal investigations are different, police investigations or reports may not be determinative of whether harassment occurred under Title IX and do not relieve the school of its duty to respond promptly and effectively."



464

Id. at 30099 n. 467

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Confidentiality and FERPA Protections





<sup>465</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

| Who Should Serve as an Investigator?                                   | Job Description                               | TITLE |
|--|---|-------|
| Attorneys?     Outside Investigator?                                   | Required Competencies                         |       |
| Campus Safety/Security?  | Reporting Structure                           |       |
| Student Conduct Officers?  | Full Time vs. Part Time     Time Requirements |       |
| Title IX Coordinator/Deputy Title IX Coordinator?     Human Resources? | Potential Conflicts of Interest               |       |
| Co-investigators?  | • Soft skills                                 |       |
|  |   |       |

# Requirements



- No conflict of interest or bias; undue institutional interference.
- No sexual stereotypes
- Detail oriented
- · Ability to write a quality investigative report
- · Documentation is everything
- Organized
- Analytical skills
- · Time to devote to investigation
- Listening skills

469

· Understand basics of Title IX evidence rules

# Requirements (cont'd)

- · Comfortable with subject matter
- Able to apply policies and think critically
- Comfortable with conflict
- · Ability to build rapport
- Collaborative
- · Ability to remain objective and neutral

470

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>471</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

TIŢĻE

The Minimum and Maximum Role of the Title IX Investigator

· Campuses are no longer permitted to have a "single" or "pure" investigator model under Title IX.

· A separate decision-maker (or panel of decision-makers) must make a final determination of responsibility.

· This will be a shift in the function of the investigator on some campuses. · What, then, is the scope of the investigative report?

Purpose? Tone? Format?

· Will the investigator become a witness in the hearing or play other roles?

### The Minimum and Maximum Role of the Investigator Cont'd

· Gather all relevant information regarding an allegation of sexual harassment.

- · Interview all relevant parties
- Collect and organize relevant evidence
- · Credibility Assessments?
- Weighing Evidence?
- · Write a detailed investigative report
- · [Separate module on writing an investigative report.]
- · Make recommendations for interim measures or accommodations?
- Findings of Responsibility→ Remember: There must be a separate decisionmaker

### Sample Policy Elements Sample Policy Elements Continued · Confidentiality of information generally Introduction Requests for confidentiality • Scope · Opportunity to provide/access to information · Support services, supportive measures, and how to · Prohibition against retaliation access · Title IX Coordinator's contact information (and · Sanction and remedies, and how they will be determined Formal complaints deputy coordinators) and how to report · Mandated reporters Grievance process · Definitions of key terms, such as sexual · Evidentiary standard harassment and consent Notification of outcome · Timeframes, both for reporting and for resolution Appeal process 475 476 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this

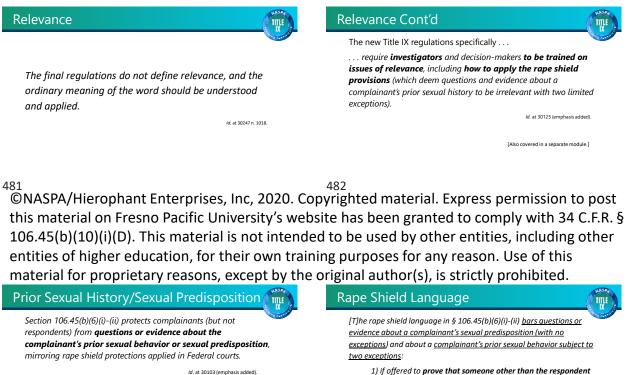
material for proprietary reasons, except by the original author(s), is strictly prohibited. Scope/Off-Campus Jurisdiction "Involvement in an education program or activity While such situations may be fact specific, recipients must consider whether, ... [A] complainant must be participating in or attempting to participate in the for example, a sexual harassment incident between two students that occurs in education program or activity of the recipient with which the formal complaint is filed as provided in the revised definition of "formal complaint" in § 106.30; this provis an off-campus apartment (i.e., not a dorm room provided by the recipient) is a tethers a recipient's obligation to investigate a complainant's formal complaint to the situation over which the recipient exercised substantial control; if so, the complainant's involvement (or desire to be involved) in the recipient's educated recipient must respond to notice of sexual harassment that occurred there. program or activity so that recipients are not required to investigate and adjudicat allegations where the complainant no longer has any involvement with the recipient while recognizing that complainants may be affiliated with a recipient over the course Id. at 30093. of many years and sometimes complainants choose not to pursue remedial action in the immediate aftermath of a sexual harassment incident.... Id. at 30086-87 (emphasis added)

<sup>477</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

# Educational Program or Activity §106.44(a) General response to sexual harassment. ... For the purposes of this section, §§ 106.30, and 106.45, "education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

(emphasis added)

480



committed the alleged sexual harassment, or

2) if the question or evidence concerns sexual behavior between the complainant and the respondent and is offered to prove **consent**.

Id. at 30336 n. 1308 (emphasis added)

<sup>483</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Consent and Rape Shield Language Rape Shield Language [A] recipient selecting its own definition of consent must apply such [T]he rape shield language in this provision: definition consistently both in terms of not varying a definition from one considers all auestions and evidence of a complainant's sexual grievance process to the next and as between a complainant and predisposition irrelevant, with no exceptions; respondent in the same arievance process. The scope of the auestions guestions and evidence about a complainant's prior sexual behavior or evidence permitted and excluded under the rape shield language in § are irrelevant unless they meet one of the two exceptions, 106.45(b)(6)(i)-(ii) will depend in part on the recipient's definition of and questions and evidence about a respondent's sexual consent, but, whatever that definition is, the recipient must apply it predisposition or prior sexual behavior are not subject to any special consistently and equally to both parties, thereby avoiding the ambiguity consideration but rather must be judged like any other question or evidence as relevant or irrelevant to the allegations at issue. feared by the commenter. Id. at 30125 Id. at 30352 (emphasis added).

[T]he investigative report must summarize "relevant" evidence, and thus at that point the rape shield protections would apply to preclude inclusion in the investigative report of irrelevant evidence.

Id. at 30353-54



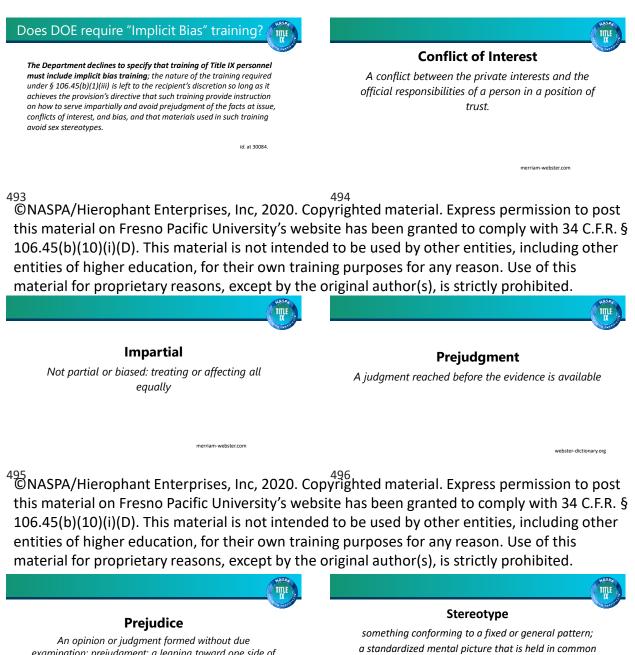
### 487

488 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

| as/Prejudice/Stereotypes/Prejudgment/Conflicts of  | Bias/Conflicts of Interest  |
|--|---|
| [S]ome complainants, including or especially girls of color, face school-level<br>responses to their reports of sexual harassment infected by bias, prejudice, or<br>stereotypes. Id. at 30084.<br>§ 106.45(b)(1)(iii) [prohibits] Title IX Coordinators, investigators, and decision-<br>makers, and persons who facilitate informal resolution processes from having<br>conflicts of interest or bias against complainants or respondents generally, or<br>against an individual complainant or respondent, [and requires] training that<br>also includes "how to serve impartially, including by avoiding prejudgment of<br>the facts at issue, conflicts of interest, and bias." Id. | Section 106.45(b)(1)(iii) requires Title IX Coordinators, investigators,<br>decision-makers, and individuals who facilitate any informal<br>resolution process to <b>be free of bias or conflicts of interest for or</b><br><b>against complainants or respondents</b> and to be <b>trained on how</b><br><b>to serve impartially</b> . |

<sup>489</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.





examination; prejudgment; a leaning toward one side of a question from other considerations than those belonging to it; and unreasonable predilection for, or objection against, anything; especially an opinion or leaning adverse to anything, without just grounds, or before sufficient knowledge.

merriam-webster.com

by members of a group and that represents an

oversimplified opinion, prejudiced attitude, or uncritical

judgment.

webster-dictionary.org

# "Sex Stereotypes"



- What is a sex stereotype? What does DOE mean by this term?
- What are some examples of sex stereotypes?
- An example of a scholarly paper on stereotypes:
  - S. Kanahara, A Review of the Definitions of Stereotype and a Proposal for a Progressive Model, Individual Differences Research. Vol. 4 Issue 5 (Dec. 2006).
- Sex stereotypes are to be avoided in training and in actual practice.
- · Be especially careful when doing case studies of any kind.
- · Anyone can be a complainant or respondent, and all are individuals!

All Title IX personnel should serve in their roles impartially. All Title IX personnel should avoid • prejudgment of facts prejudice conflicts of interest hias sex stereotypes

499

500

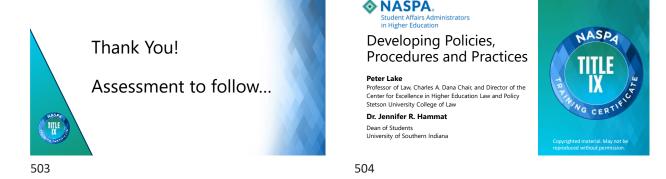
©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



You have no "side" other than the integrity of the process.

You now have the legal foundations to take the next step in the NASPA Title IX Training Certificate program!

<sup>501</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



# This Module is Designed for:



TRACK 1 – Title IX Coordinators TRACK 2 – Title IX Decision-Makers and Student Conduct Administrators

# A Word on Accountability...

Recipients cannot be guarantors that sexual harassment will never occur in education programs or activities, but recipients can and will, under these final regulations, be held accountable for responding to sexual harassment in ways designed to ensure complainants' equal access to education without depriving any party of educational access without due process or fundamental fairness.

> Department of Education, Nondrizviministion on the Bosis of Sox in Education Programs or Activitie Receiving Federal Financial Assistance, 85 Fed. Reg. 30026 (May 19, 2020) (final rule) or line at www.storinfo.acv/content/obs/1%-2020-05-19/odf/2020-10512.odf) at 30046 (internal citations

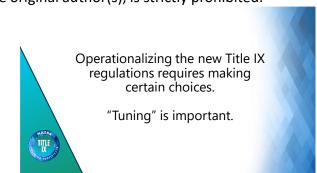
## 505

506

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Not Merely "Checking Off Boxes"

Recipients, including universities, will not be able to simply check off boxes without doing anything. Recipients will need to engage in the detailed and thoughtful work of informing a complainant of options, offering supportive measures to complainants through an interactive process described in revised § 106.44(a), and providing a formal complaint process with robust due process protections beneficial to both parties as described in § 106.45.



<sup>507</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

510

# Regulations Intend to Provide "Flexibility" 🞢

[T]hese final regulations leave recipients the flexibility to choose to follow best practices and recommendations contained in the Department's guidance or, similarly, best practices and recommendations made by non-Department sources, such as Title IX consultancy firms, legal and social science scholars, victim advocacy organizations, civil libertarias and due process advocates, and other experts.

[T]hese final regulations leave recipients legitimate and necessary flexibility to make decisions regarding the supportive measures, remedies, and discipline that best address each sexual harassment incident.

Id. at 30044.

Id. at 30091

# "Flexibility" Cont'd

Within the standardized § 106.45 grievance process, recipients retain significant flexibility and discretion, including decisions to: < designate the reasonable time frames that will apply to the grievance process;

- use a recipient's own employees as investigators and decisionmakers or outsource those
- functions to contractors; • determine whether a party's advisor of choice may actively participate in the grievance
- process;
- select the standard of evidence to apply in reaching determinations regarding responsibility;
- use an individual decision-maker or a panel of decision-makers;
  offer informal resolution options;
- impose disciplinary sanctions against a respondent following a determination of
- responsibility; and
- select procedures to use for appeals.



# **Policy Basics**

- · Single policy or multiple policies?
- Who creates policy? You? Your TIX Team? Conduct? Committee? Counsel?
- Title IX ←→ Student Conduct (reference each other)
- Title IX←→ HR
- Consensual relations policies (do you have these?)
- Terminology
  - "Complainant" vs. "Alleged to be the Victim of conduct that could constitute sexual harassment"/"Survivor\*
  - · "Respondent" vs. "Reported to be the Perpetrator of conduct that could constitute sexual harassment
  - · Formal complaint, document filed by a complainant, supportive measures
  - · What is a "day?" (Business day, calendar day, "school" day?)

511

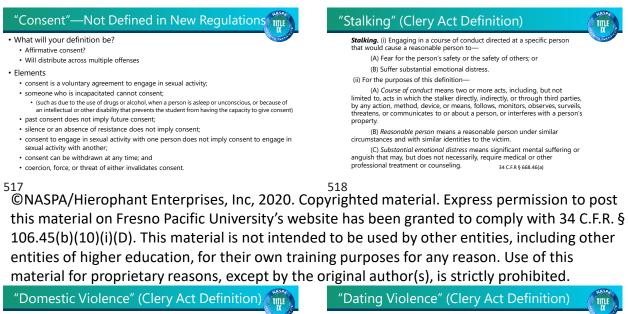
512 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post

this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

| troduction  | <ul> <li>Confidentiality of information generally</li> </ul>               |
|---|--|
| соре  | <ul> <li>Requests for confidentiality</li> </ul>                           |
| upport services, supportive measures, and how to    | <ul> <li>Opportunity to provide/access to information</li> </ul>           |
| access  | <ul> <li>Prohibition against retaliation</li> </ul>                        |
| ïtle IX Coordinator's contact information (and      | <ul> <li>Sanction and remedies, and how they will be determined</li> </ul> |
| deputy coordinators) and how to report              | <ul> <li>Formal complaints*</li> </ul>                                     |
| "Mandated reporters"                                | Grievance process  |
| Definitions of key terms, such as sexual harassment | Evidentiary standard   |
| and consent   | <ul> <li>Notification of outcome</li> </ul>                                |
| Timeframes, both for reporting and for resolution   | Appeal process   |

ONASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

| Definitions of Offenses to Be Included in Policies   | "Sexual Harassment" [Three-Prong Test]  |
|--|---|
| i. Sexual harassment<br>ii. Sexual assault<br>1. Non-consensual sexual contact, and<br>2. Non-consensual sexual intercourse<br>iii. Domestic violence<br>iv. Dating violence<br>v. Sexual exploitation*<br>vi. Stalking<br>vi. Stalking<br>vi. Retallation*<br>vii. Intrinidation*<br>ix. Actual Knowledge | Sexual harassment means conduct on the basis of sex that satisfies one or<br>more of the following:<br>(1) An employee of the recipient conditioning the provision of an aid,<br>benefit, or service of the recipient on an individual's participation in<br>unwelcome sexual conduct;<br>(2) Unwelcome conduct determined by a <b>reasonable person</b> to be so<br>severe, pervasive, and objectively offensive that it effectively denies a person<br>equal access to the recipient's education program or activity; or<br>(3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating<br>violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined<br>in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30). |



Domestic violence. (i) A felony or misdemeanor crime of violence committed-

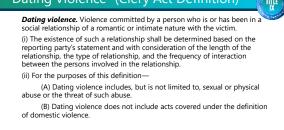
> (A) By a current or former spouse or intimate partner of the victim:

(B) By a person with whom the victim shares a child in common;

(C) By a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner;

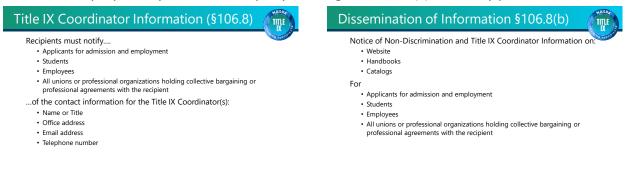
(D) By a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred, or

(E) 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 jurisdiction in which the crime of violence occurred. 34 C.F.R § 668.46(a)



34 C.F.R § 668.46(a)

<sup>519</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.





Title IX Personnel

523

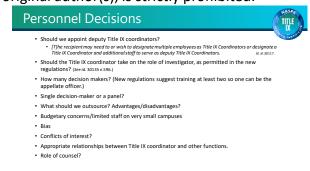
# Title IX Personnel

- Title IX coordinator—MUST be designated
- · Title IX investigator
- Title IX decision-maker(s)/Appellate officer(s)
- · Anyone implementing an informal process (if offered)
- The Title IX coordinator can be the investigator.
- The decision-maker cannot be the same person as the investigator or the Title IX coordinator.
- Case managers?

# 524 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Outsourcing/Requiring Legally Trained Title IX Operatives

The Department notes that nothing in the final regulations precludes a recipient from carrving out its responsibilities under § 106.45 by outsourcing such responsibilities to professionally trained investigators and adjudicators outside the recipient's own operations. The Department declines to impose a requirement that Title IX Coordinators, investigators, or decision-makers be licensed attorneys (or otherwise to specify the qualifications or experience needed for a recipient to fill such positions), because leaving recipients as much flexibility as possible to fulfill the obligations that must be performed by such individuals will make it more likely that all recipients reasonably can meet their Title IX responsibilities.



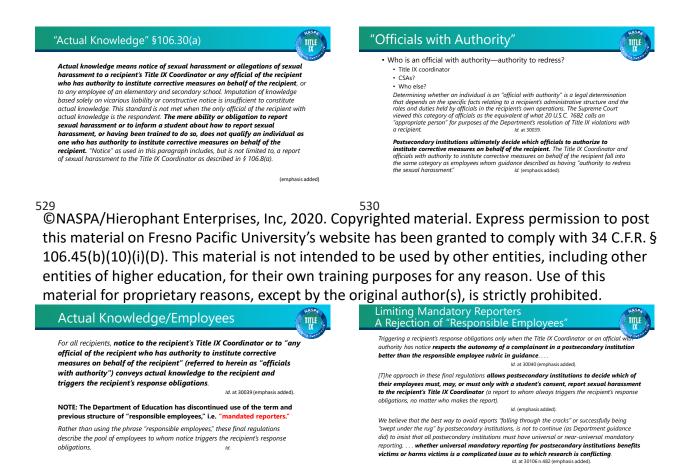
<sup>525</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Id. at 30105.

# Training

- "Best practices"/"Experts"/Certification Impartiality of Title IX operatives
- No bias
- No conflicts of interest
- No sexual stereotypes in training materials
- Training on the institution's specific policies, procedures and processes · Training on "relevance" of evidence for investigations and hearings
- Training on technology used in hearings
- · We assume that all recipients will need to train their Title IX Coordinators, an investigator, any person designated by a recipient to facilitate an informal resolution process (e.g., a mediator), and two decision-makers (assuming an additional decision-maker for appeals). We assume this training will take approximately eight hours for all staff at the . . . IHE level. Id. at 30567.

"Actual Knowledge," Notice, "Mandatory Reporters"



<sup>531</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

TIŢĻE

## "Universal mandatory reporting"

[N]othing in the proposed or final regulations prevents recipients (including postsecondary institutions) from instituting their own policies to require professors, instructors, or all employees to report to the Title IX Coordinator every incident and report of sexual harassment [i.e. a "universal mandatory reporting policy"].

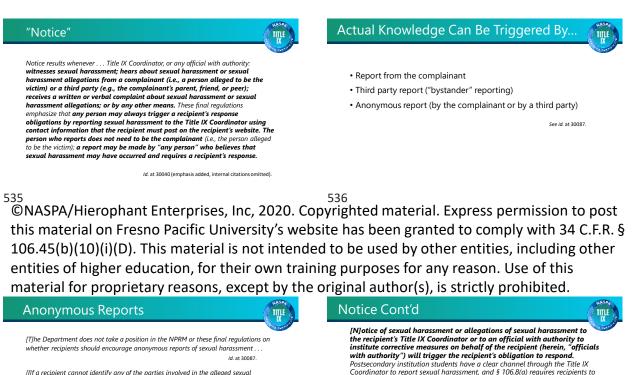
Id. at 30107 (emphasis added).

## "Mandatory Reporters"

• Should IHE's designate a large cadre of "mandatory reporters" even if they are permitted to?

TITLE

- Pros/cons?
- Conflicts in research?
- How much time to you have to notify folks of the change?
- Does it make sense to stay the course for this first year, and wait and see if a change is needed?



[I]f a recipient cannot identify any of the parties involved in the alleged sexual harassment based on the anonymous report, then a response that is not clearly unreasonable under light of these known circumstances will differ from a response under circumstances where the recipient knows the identity of the parties involved in the alleged harassment, and the recipient may not be able to meet its obligation to, for instance, offer supportive measures to the unknown complainant.

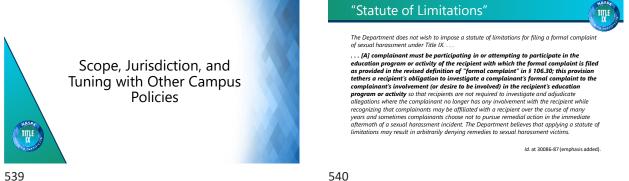
Id. at 30087

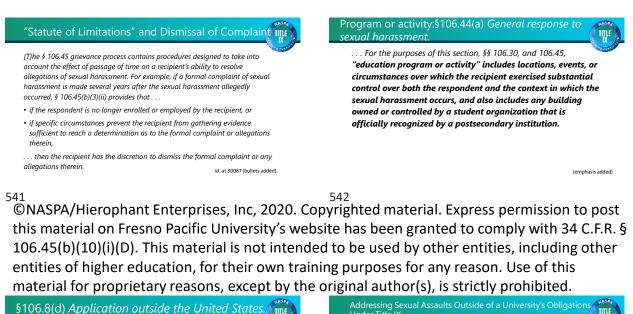
### contact information, so that "any person" may report sexual harassment in person, by mail, telephone, or e-mail (or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report), and specifies that a report may be made at any time (including during nonbusiness hours) by mail to the Title IX Coordinator's office address or by using the listed telephone number or e-mail address.

notify all students and employees (and others) of the Title IX Coordinator's

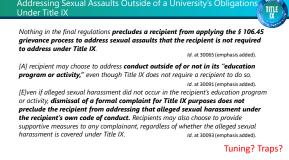
Id. at 30106 (emphasis added).

<sup>537</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



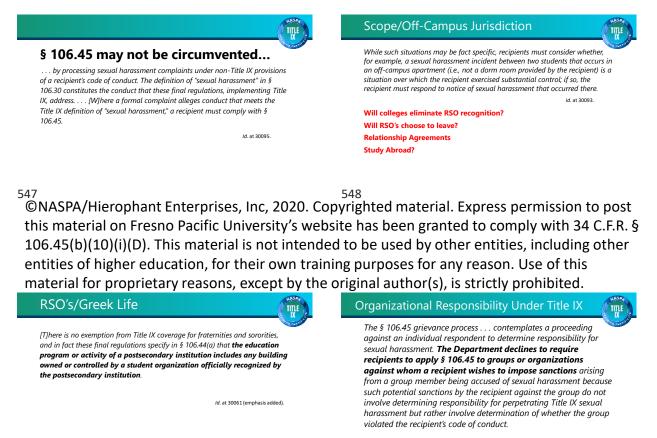


The requirements of paragraph (c) of this section apply only to sex discrimination occurring against a person in the United States.



<sup>543</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.





Id. at 30096 (emphasis added).

<sup>549</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

| No Reasonable Cause Threshold   | Title IX Coordinator/Gatekeeping  |
|---|---|
| The Department declines to add a reasonable cause threshold into<br>§ 106.45. The very purpose of the § 106.45 grievance process is to<br>ensure that accurate determinations regarding responsibility are<br>reached, impartially and based on objective evaluation of relevant<br>evidence; the Department believes that goal could be impeded if a<br>recipient's administrators were to pass judgment on the sufficiency<br>of evidence to decide if reasonable or probable cause justifies<br>completing an investigation. | Title IX Coordinators have always had to consider whether a report<br>satisfies the criteria in the recipient's policy, and these final regulations<br>are not creating new obstacles in that regard. The criteria that the Title<br>IX Coordinator must consider are statutory criteria under Title IX or<br>criteria under case law interpreting Title IX's non-discrimination<br>mandate with respect to discrimination on the basis of sex in the<br>recipient's education program or activity against a person in the United<br>States, tailored for administrative enforcement. Additionally, these final<br>regulations do not preclude action under another provision of the<br>recipient's code of conduct, as clearly stated in revised § 106.45(b)(3)(i),<br>if the conduct alleged does not meet the definition of Title IX sexual<br>harassment. |



entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

| gger Warnings?  | Tuning with Other Policies and Campus Functions  |
|---|--|
| These final regulations neither require nor prohibit a recipient from providing a<br>rigger warning prior to a classroom discussion about sexual harassment<br>including sexual assault; § 106.6(d)(1) does assure students, employees (including<br>eachers and professors), and recipients that ensuring non-discrimination on the<br>pasis of sex under Title IX does not require restricting rights of speech, expression,<br>and academic freedom guaranteed by the First Amendment. Whether the recipient<br>would like to provide such a trigger warning and offer alternate opportunities for<br>those students fearing renewed trauma from participating in such a classroom<br>discussion is within the recipient's discretion. | <ul> <li>Student and Organizational Conduct</li> <li>Employment Conduct</li> <li>Disability Services</li> <li>Equity</li> <li>Security</li> <li>Threat Assessment</li> <li>Bias Incident Reporting</li> <li>Care Team Reports</li> </ul> |

<sup>555</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



# **Prompt Timeframes**



- What is "prompt"?
- What timeframes should we set?
- Examples of possible delays?
  - 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 \$106.45(b)(1)(v)



[T]he recipient's response must treat complainants and respondents equitably, meaning that for a complainant, the recipient must offer supportive measures, and for a respondent, the recipient must follow a grievance process that complies with \$ 106.45 before imposing disciplinary sanctions.

Id. at 30044

### 559

560

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Reasonable/Clearly Unreasonable

In addition to the specific requirements imposed by these final regulations, all other aspects of a recipient's response to sexual harassment are evaluated by what was not clearly **unreasonable** in light of the known circumstances. Recipients must also document their reasons why each response to sexual harassment was not deliberately indifferent. (d at 30046 lintema citations omitted, embasis added)

Section 106.44(b)(2) (providing that recipient responses to sexual harassment must be non-deliberately indifferent, meaning not clearly **unreasonable** in light of the known circumstances... Id. at 30046 n.182 (emphasis added).

[I]f a recipient does not provide supportive measures as part of its response to sexual harassment, the recipient specifically must document why that response was not clearly unreasonable in light of the known circumstances (for example, perhaps the complainant did not want any supportive measures). Id: at 30046-n138 (emphasis added).



<sup>561</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

# Concurrent Law Enforcement Activity

Section 106.45(b)(1)(v) provides that the recipient's designated reasonably prompt time frame for completion of a grievance process is subject to temporary delay or limited extension for goad cause, which may include concurrent law enforcement activity. Section 106.45(b)(6)(0) provides that the decision-maker cannot draw any inference about the responsibility or newsponses and the decision of a hearing; this provision applies to situations where, for example, a respondent is concurrently facing criminal charges and chooses not to appear or answer questions to a value self-incrimination that could be used against the respondent in the criminal proceeding. Further, subject to the requirements in § 106.45 such as that evidence sent to the parties for inspection and review must be directly related to the allegations under investigation, and that a grievance process must provide for objective evaluation of all relevant evidence, inclupatory and exculpatory, nothing in the final regulations precludes a recipient from using evidence obtained from law enforcement in a § 106.45 grievance process. § 106.45(b)(5)(v), (specifying that the evidence directly related to the allegations my have been gathered by the recipient ("rom a party or other source" which could include evidence obtained by the recipient (may enforcement) (emphasis added); § 106.45(b)(1)(ii).

### Law Enforcement Cannot Be Used to Skirt Title IX Process

[A] recipient cannot discharge its legal obligation to provide education programs or activities free from sex discrimination by referring Title IX sexual harassment allegations to law enforcement (or requiring or advising complainants to do so), because the purpose of law enforcement differs from the purpose of a recipient offering education programs or activities free from sex discrimination. Whether or not particular allegations of Title IX sexual harassment also meet definitions of criminal offenses, the recipient's obligation is to respond supportively to the complainant and provide remedies where appropriate, to ensure that sex discrimination does not deny any person equal access to educational opportunities. Nothing in the final regulations prohibits or discourages a complainant from pursuing criminal charges in addition to a \$ 106.45 grievance process.

Id. at 30099 (internal citation omitted).

# Police Investigations

The 2001 Guidance takes a similar position: "In some instances, a complainant may allege harassing conduct that constitutes both sex discrimination and possible criminal conduct. Police investigations or reports may be useful in terms of fact gathering. However, because legal standards for criminal investigations are different, police investigations or reports may not be determinative of whether harassment occurred under Title IX and do not relieve the school of its duty to respond promptly and effectively."

Confidentiality

565 566 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Id. at 30099 n. 467

Confidentiality and FERPA Protections

Section 106.71(a) requires recipients to 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 (unless permitted by FERPA, or required under law, or as necessary to conduct proceedings under Title IX), and § 106.71(b) states that exercise of rights protected by the First Amendment is not retaliation. Section 106.30 defining "supportive measures" instructs recipients to keep confidential the provision of supportive measures except as necessary to provide the supportive measures. These provisions are intended to protect the confidentiality of complainants, respondents, and witnesses during a Title IX process, subject to the recipient's ability to meet its Title IX obligations consistent with constitutional protections.

Id. at 30071 (emphasis added). [Separate module addresses FERPA, recordkeeping and confidentiality.]



Id. at 30296.

[§106.45(b)(5)(iii)] applies only to discussion of "the allegations under investigation," which means that where a complainant reports sexual harassment but no formal complaint is filed, § 106.45(b)(5)(iii) does not apply, leaving recipients discretion to impose non-disclosure or confidentiality requirements on

complainants and respondents.

<sup>567</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

# Non-disclosure Agreements?

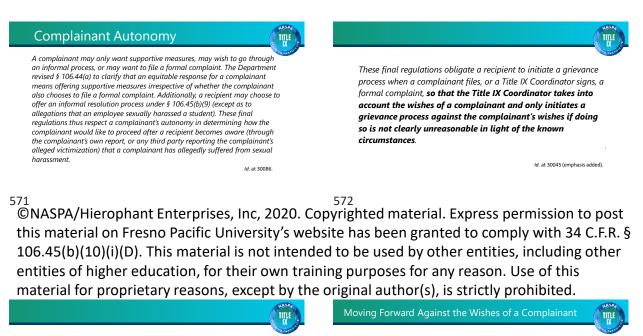
Recipients may require parties and advisors to refrain from disseminating the evidence (for instance, by requiring parties and advisors to sign a non-disclosure agreement that permits review and use of the evidence only for purposes of the Title IX grievance process), thus providing recipients with discretion as to how to provide evidence to the parties that directly relates to the allegations raised in the formal complaint.

Id. at 30304 (emphasis added)





570



(A) complainant's desire not to be involved in a grievance process or desire to keep the complainant's identity undisclosed to the respondent will be overridden only by a trained individual (i.e., the Title IX Coordinator) and only when specific circumstances justify that action. These final regulations clarify that the recipient's decision not to investigate when the complainant does not wish to file a formal complaint will be evaluated by the Department under the deliberate indifference standard; that is, whether that decision was clearly unreasonable in light of the known circumstances.

- Cross complaints
- Proceeding with a reluctant participant?
- Trauma?
- Triggers?
- In transit withdrawals

<sup>573</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Id. at 30045 (emphasis added)



§ 106.30(a) "Supportive Measures"



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)"Supportive Measures" Cont'd

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

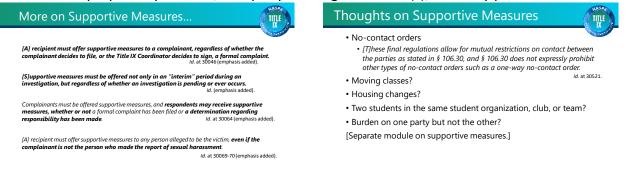
# §106.44(a) Cont'd

... 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 of supportive measures with or without the filing of a formal complaint...

(emphasis added)

τημ

<sup>577</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>579</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



582

# **Emergency Removal of Respondent**

[T]hese final regulations expressly authorize recipients to remove a respondent from the recipient's education programs or activities on an emergency basis, with or without a grievance process pending, as long as post-deprivation notice and opportunity to challenge the removal is given to the respondent. A recipient's decision to initiate an emergency removal will also be evaluated under the deliberate indifference standard.

Id. at 30046 (internal citation omitted)

# §106.44(d) Administrative leave.

Nothing in this subpart precludes a recipient from placing a nonstudent employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45. This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.

583

584

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Thoughts on Emergency Removal and Administrative Leave mu

· How should we make this clear in our policies?

- Will IHE's be at risk if they use this process?
- Litigation risk/TRO?
- Bias? De novo review by hearing?



<sup>585</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

# § 106.30(a) "Formal Complaint"

Formal complaint means 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. 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. 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.

(emphasis added)

### "Formal Complaint" Cont'd

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. Where the Title IX Coordinator sians 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).

# "Formal Complaint" Cont'd

A "formal complaint" is a document that initiates a recipient's arievance process, but a formal complaint is not required in order for a recipient to have actual knowledge of sexual harassment, or allegations of sexual harassment, that activates the recipient's legal obligation to respond promptly, including by offering supportive measures to a complainant. Id. at 30030 (emphasis added)

# § 106.45(b)(3)(i)

### (3) Dismissal of a formal complaint-

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

589

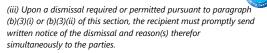
590

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

# § 106.45(b)(3)(ii)

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

# § 106.45(b)(3)(iii)



<sup>591</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

## **Dismissal of Complaint**

[I]f a respondent is no longer enrolled or employed by a recipient, or if specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein, then the recipient may dismiss the formal complaint or any allegations therein. Id. at 30087

[I]f a recipient dismisses a formal complaint or any allegations in the formal complaint, the complainant should know why any of the complainant's allegations were dismissed and should also be able to challenge such a dismissal by appealing on certain grounds. Id. at 30053.

# § 106.45(b)(4)

(4) Consolidation of formal complaints. A recipient may consolidat 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 this section to the singular "party," "complainant," or "respondent" include the plural, as applicable.

# Thoughts on Formal Complaints



### • Signed?

- Digital?
- Verified?
- Notary?
- Attestation or oath?
- Privileges?
- How to handle false reports?
  - Provision for false reports/providing false information in code/policy?



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

595

596

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

# § 106.71(b)(2) Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith. (emphasis added)

<sup>597</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

# § 106.45(b)(5)(iv)

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

### Must You Allow a Complainant to Bring a Support Persor to the Initial Meeting with the Title IX Coordinator?

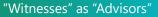
Although these final regulations do not expressly require recipients to allow complainants to bring a supportive friend to an initial meeting with the Title IX Coordinator, nothing in these final regulations prohibits complainants from doing so. Indeed, many people bring a friend or family member to doctors' visits for extra support, whether to assist a person with a disability or for emotional support, and the same would be true for a complainant reporting to a Title IX Coordinator. Once a grievance process has been initiated, these final regulations require recipients to provide the parties with written notice of each party's right to select an advisor of choice, and nothing precludes a party from choosing a friend to serve as that advisor of choice.

See id. at 30109 (emphasis added).

# "Advisors"



- Complainants and respondents can have any advisor of their choosing Some will choose a lawyer as an advisor. Some will want a lawyer but will not be able
- to afford one. Equitable treatment issues? Some may have a family member, a friend, or another trusted person serve as their
- advisor. If a party does not have an advisor, the school must provide one [W] hile the final regulations do not require the recipient to pay for parties' advisors, nothing the in the final regulations precludes a recipient from choosing to do so. Id. at 30297
- Effective representation? [P]roviding parties the right to select an advisor of choice does not align with the constitutional
- right of criminal defendants to be provided with effective representa Should not be viewed as practicing law, but rather "as providing advocacy services to a
- complainant or respondent Id. at 30299



The Department acknowledges commenters' concerns that advisors may also serve as witnesses in Title IX proceedings, or may not wish to conduct cross-examination for a party whom the advisor would otherwise be willing to advise, or may be unavailable to attend all hearings and meetings. Notwithstanding these potential complications that could arise in particular cases, the Department believes it would be inappropriate to restrict the parties' selection of advisors by requiring advisors to be chosen by the recipient, or by precluding a party from selecting an advisor who may also be a witness.

Id. at 30299 (emphasis added)

601 602 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

"Witnesses" as "Advisors" Cont'd

The Department notes that the § 106.45(b)(1)(iii) prohibition of Title IX personnel having conflicts of interest or bias does not apply to party advisors (including advisors provided to a party by a postsecondary institution as required under § 106.45(b)(6)(i)), and thus, the existence of a possible conflict of interest where an advisor is assisting one party and also expected to give a statement as a witness does not violate the final regulations. Rather, the perceived "conflict of interest" created under that situation would be taken into account by the decision-maker in weighing the credibility and persuasiveness of the advisor-witness's testimony.

Id at 30299

### "Advisors" Cont'd How can/should advisors participate in the process? Section 106.45(b)(5)(vi) (evidence subject to inspection and review must be sent electronically o in hard copy to each party and the party's advisor of choice). Id. at 30298 n. 1168 Section 106.45(b)(5)(vii) (a copy of the investigative report must be sent electronically or in hard copy to each party and the party's advisor of choice). Id. at 30298 n. 1169 [T]he final regulations make one exception to the provision in § 106.45(b)(5)(iv) that recipients have discretion to restrict the extent to which party advisors may actively participate in the grievance process: Where a postsecondary institution must hold a live hearing with crossexamination, such cross-examination must be conducted by party advisors. Id. at 30298 n. 1167

<sup>603</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

# § 106.45(b)(6)(i)

### (6) Hearinas.

(i) For postsecondary institutions, the recipient's grievance process must provide for a live hearing. At the live hearing, the decisionmaker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such crossexamination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings.

# § 106.45(b)(6)(i) Cont'd

At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions. Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a crossexamination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant. If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.

(emphasis added)

# Hearings



- What is a "hearing"?
- Single decision-maker vs. a panel of decision makers?
- Rules of evidence?
- Should all hearings be online (currently)
- What are the differences?
- Online hearings
- Platforms?
- Security?
- Do you record?
- Hearing rules?

607

# Adopting Rules Outside of § 106.45(b)

§ 106.45(b) expressly allows recipients to adopt rules that apply to the recipient's grievance process, other than those required under § 106.45, so long as such additional rules apply equally to both parties. For example, a postsecondary institution recipient may adopt reasonable rules of order and decorum to govern the conduct of live hearings.

Id. at 30293 n. 1148 (emphasis added).

### 608

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

# More on § 106.45

§ 106.45 would, for example, permit a recipient to require parties personally to answer questions posed by an investigator during an interview, or personally to make any opening or closing statements the recipient allows at a live hearing, so long as such rules apply equally to both parties. Id. at 30298 (emphasis added).

While nothing in the final regulations discourages parties from speaking for themselves during the proceedings, the Department believes it is important that each party have the right to receive advice and assistance navigating the grievance process.

# Recipients may not...

... adopt evidentiary rules of admissibility that contravene those evidentiary requirements prescribed under § 106.45... ... adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice... ... adopt rules excluding certain types of relevant evidence (e.g., lie detector test results, or rape kits) where the type of evidence is not either deemed "not relevant" (as is, for instance, evidence concerning a complainant's prior sexual history) or otherwise barred from use under § 106.45 (as is, for instance, information protected by a legally recognized privilege) ...

<sup>609</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

## Rules for Evaluating Evidence

... the § 106.45 grievance process does not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by a recipient's decisionmaker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with § 106.45 and apply equally to both parties.

Id. at 30294 (emphasis added)

## Rules Regarding Weight and Credibility

A recipient may, for example, adopt a rule regarding the weight or credibility (but not the admissibility) that a decisionmaker should assign to evidence of a party's prior bad acts, so long as such a rule applied equally to the prior bad acts of complainants and the prior bad acts of respondents. Because a recipient's investigators and decision-makers must be trained specifically with respect to "issues of relevance," any rules adopted by a recipient in this regard should be reflected in the recipient's training materials, which must be publicly available.

Id. at 30294 (emphasis added)

# **Prior Sexual History**



Section 106.45(b)(6)(i)-(ii) protects complainants (but not respondents) from questions or evidence about the complainant's prior sexual behavior or sexual predisposition, mirroring rape shield protections applied in Federal courts.

Id. at 30103 (emphasis added)

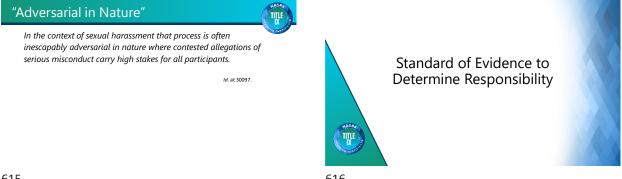
# **Cross-Examination**

- · Advisors may cross examine but not the witnesses/complainants/respondents themselves
- Objections and evidence issues
- Inculpatory/ Exculpatory evidence

## 613

614

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>615</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

# § 106.45(b)(1)(vii)

A recipient's grievance process must-

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

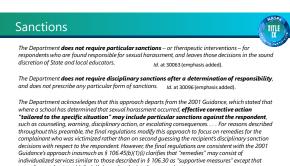
## "Standard of Evidence"

- · Which should we choose?
  - · Clear and convincing?
  - · Preponderance of the evidence?
  - · How do we choose?
  - · Pros and cons of each?
  - What do you have now (for students)?
  - What do you have now (for employees, including faculty)?
  - · Do changes to the employee/faculty component need to go through a governance group for approval?



Sanctions and Remedies

619



remedies need not avoid disciplining or burdening the respondent.

620 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

| Disciplinary Decisions/Sanctions Must Themselves  | Sanctions  |
|---|--|
| The Department notes that while Title IX does not give the<br>Department a basis to impose a Federal standard of fairness or<br>proportionality onto disciplinary decisions, Title IX does, of course,<br>require that actions taken by a recipient must not constitute sex | <ul> <li>If a respondent is found responsible in a grievance process for sexual harassment what is an appropriate sanction?</li> <li>Is anything less than expulsion okay?</li> </ul>  |
| discrimination; Title IX's non-discrimination mandate applies as<br>much to a recipient's disciplinary actions as to any other action<br>taken by a recipient with respect to its education programs or<br>activities.  | <ul> <li>Schools maintain discretion and flexibility in imposing sanctions<br/>AFTER a respondent has been found responsible.</li> <li>Make sure to outline the possible RANGE of sanctions clearly in your<br/>policy.</li> <li>Can include a continuation of supportive measures.</li> </ul> |

<sup>621</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

### § 106.45(b)(1)(i) Remedies (1) Basic requirements for grievance process. A recipient's grievance process Where a respondent is found responsible for sexual harassment as mustdefined in § 106.30. the recipient must provide remedies to the (i) Treat complainants and respondents equitably by providing remedies to a complainant designed to restore or preserve the complainant's complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a equal access to education. 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 Id. at 30083 (emphasis added). restore or preserve equal access to the recipient's education program or activity. Such remedies may include the same individualized services described in § 106.30 as "supportive measures"; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent: (emphasis added)

# Remedies

- Examples of remedies for an individual complainant
  - Can be a continuation of supportive measures (such as a nocontact order)
  - Academic accommodations/academic support services Counseling services
  - Residence accommodations
- What about remedies for the broader community?
- Again, issuing sanctions after a respondent is found responsible is not enough. The new regulations turn on "remedies for the complainant" not sanctions against the respondent.
- · Are there academic remedies based on the impact the event had?

Appeals

626

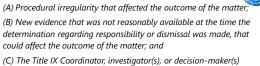
625 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

# § 106.45(b)(8)(i)

### (8) Appeals.

(i) A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:





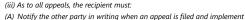
had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

<sup>627</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

# § 106.45(b)(8)(ii)

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

# § 106.45(b)(8)(iii)(A-F)



appeal procedures equally for both parties (B) Ensure that the decision-maker(s) for the appeal is not the same person as

the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;

(C) Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of this section; (D) Give both parties a reasonable, equal opportunity to submit a written

statement in support of, or challenging, the outcome;

(E) Issue a written decision describing the result of the appeal and the rationale for the result; and

(F) Provide the written decision simultaneously to both parties.

# Points on Appeals

- What choices do we need to make?
- Procedures?
- Who can hear appeals?
- What "additional basis" could exist?



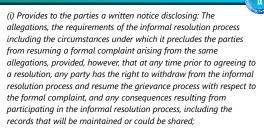
# 631

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

# § 106.45(b)(9)

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

# § 106.45(b)(9)(i)



<sup>633</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

# § 106.45(b)(9)(ii-iii)

(ii) Obtains the parties' voluntary, written consent to the informal resolution process; and

(iii) Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

# Ending an Informal Process

[A]n informal resolution process, in which the parties voluntarily participate, may end in an agreement under which the respondent agrees to a disciplinary sanction or other adverse consequence, without the recipient completing a grievance process, under § 106.45(b)(9).

Id. at 30059 n.286

# Points on Informal Resolution

- The new regulations don't require it, but informal resolution is allow
- Equitable/Trained
- · Should you offer it?
- Pros/Cons
- · Increased complainant autonomy
- Who should implement?
- What type of training is needed?
- Mediator training?
- · When can't we use informal resolution? · When the allegation is that an employee sexually harassed a student

A Closer Look at Retaliation

## 637

638 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post

this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

# § 106.71(a)

(a) Retaliation prohibited. No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part. Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation.

# § 106.71(a) Cont'd

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. Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).

# <sup>639</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this

material for proprietary reasons, except by the original author(s), is strictly prohibited.

# § 106.71(b)(1)

(b) Specific circumstances.

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

# § 106.71(b)(2)

Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

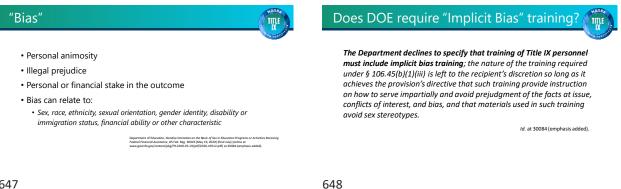




©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>645</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.





### **Conflict of Interest**

A conflict between the private interests and the official responsibilities of a person in a position of *trust*.

merriam-webster.co

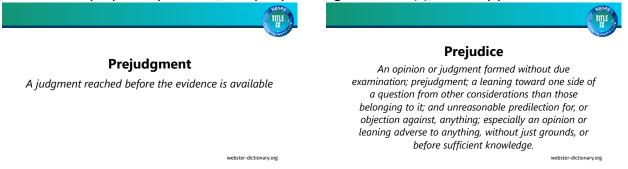
## **Impartial** Not partial or biased: treating or affecting all equally

merriam-webster.com

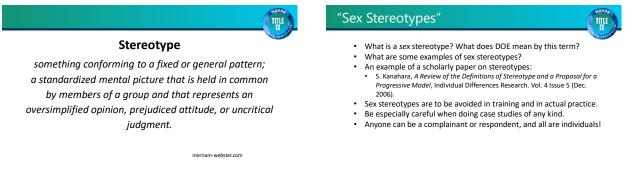
649

650

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>651</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.





Conclusion

655

Policy should reflect practice and practice should reflect policy.

### 656

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>657</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.





### Supportive Measures Within the New Title IX Regulations

Jill Dunlap, PhD Senior Director for Research, Policy, and Civic Engagement NASPA

661



### This Module is Designed for

TRACK 1 – Title IX Coordinators

#### 662

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Why the focus on supportive measures?

- The term supportive appears 1,112 times in the new regulations
  Why does the Department place such an emphasis on
- supportive measures?
- Unsupportive institutional responses increase the effects of trauma on complainants, and institutional betrayal may occur when an institution's mandatory reporting policies require a complainant's intended private conversation about sexual assault to result in a report to the Title IX Coordinator.
- Definitions
  9. 105 20 Definitions (a)(3)
  9. 105 20 Definitions (a)(3)
  9. 105 20 Definitions (a)(3)
  9. 200 2

<sup>663</sup> ONASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

| Breaking It Down  | Breaking It Down  |
|---|---|
| <ul> <li>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.</li> <li>"supportive measures, as defined in § 106.30, are 'offered without fee or charge to the complainant or the respondent."</li> </ul> | Purpose  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. |
| 30544, p. 521   | 3040, p. 435  |

### **Breaking It Down**

#### Examples

#### · Supportive measures may include:

- Counseling Extensions of deadlines or other course-related adjustments
- o Modifications of work or class schedules
- Campus escort services
- o Mutual restrictions on contact between the parties
- o Changes in work or housing locations
- Leaves of absence
- $_{\odot}$  Increased security and monitoring of certain areas of the campus, and other similar measures

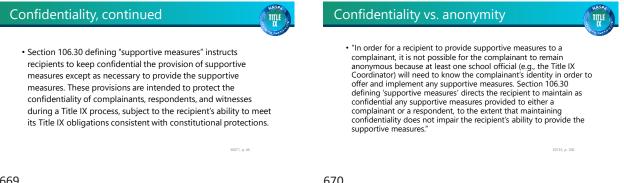
#### **Breaking It Down**

#### Confidentiality

- · The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.
- · "The Title IX Coordinator need not, and should not, disclose the complainant's identity to the respondent during the process of selecting and implementing supportive measures for the complainant."

30285. p. 260: 30286. p. 261

667 668 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>669</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

### Definitions continued

- Supportive measures as:
- o Differentiated from interim measures
- o Differentiated from remedies
- Referred to as "accommodations" or "protective measures" under Clery
  - "The definition of supportive measures emphasizes that supportive measures are "individualized services" reasonably available "before or after the filing of a formal complaint or where no formal complaint has been filed."

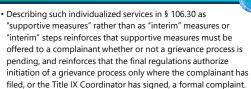


Remedies

 "In order to determine that a complainant has been victimized and is entitled to remedies (which, unlike supportive measures, need not avoid burdening a respondent), allegations of Title IX sexual harassment must be resolved through the § 106.45 grievance process, designed to reach reliable factual determinations."

· "With respect to remedies, the final regulations require a recipient to provide remedies to a complainant where a respondent has been found responsible, and notes that such remedies may include the same individualized services described in § 106.30 as 'supportive measures."

#### Justification for language change



§ 106.44(a); § 106.44(b)(1); § 106.30 (defining "formal complaint")

#### Policy requirements

#### § 106 45

Grievance process for formal complaints of sexual harassment (1)(ix)

· Recipients must: Describe the range of supportive measures available to complainants and respondents.

#### 673

#### 674

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

| lustification for "range of sanctions" language  | Importance of policy language  |
|--|--|
| <ul> <li>"These final regulations leave recipients legitimate and necessary flexibility to make decisions regarding the supportive measures, remedies, and discipline that best address each sexual harassment incident."</li> <li>"Like the Supreme Court, the Department believes that recipients have unique knowledge of their own educational environment and student body, and are best positioned to make decisions about which supportive measures and remedies meet each complainant's need to restore or preserve the right to equal access to education, and which disciplinary stanctions are appropriate against a respondent who is found responsible for sexual harassment."</li> </ul> | <ul> <li>Commenters told the Department about the importance of<br/>transparency regarding availability of supportive measures.</li> <li>"The Department agrees that requiring recipients to describe the range of supportive<br/>measures available to complainants and respondents is an important part of ensuring that<br/>the grievance process is transparent to all members of a recipient's educational<br/>community. Section 06.45(b)(1)(x), particularly, notifies both parties of the kind of<br/>individualized services that may be available while a party navigates a grievance process,<br/>which many commenters asserted is a stressful and difficult process for complainants and<br/>respondents."</li> </ul> |
| 3004, p. 19  | 30257, p. 251  |

<sup>675</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Complainant, defined Complainant autonomy · Throughout these final regulations, the Department aims to respect the autonomy of complainants and to recognize the • "We have revised the § 106.30 definition of "complainant" to importance of a complainant retaining as much control as mean any individual 'who is alleged to be the victim' of sexual possible over their own circumstances following a sexual harassment, to clarify that a recipient must offer supportive harassment experience, while also ensuring that complainants measures to any person alleged to be the victim, even if the have clear information about how to access the supportive complainant is not the person who made the report of sexual measures a recipient has available (and how to file a formal harassment." complaint initiating a grievance process against a respondent if the complainant chooses to do so) if and when the complainant desires for a recipient to respond to the complainant's situation. 30043, p. 18 678

### Additional considerations



30488. p. p. 463: 30197. p. 172: 30121. p. 96: 30165. p. 14

- "These final regulations require a recipient to respond to sexual harassment whenever the recipient has notice of sexual harassment that occurred in the recipient's own education program or activity, regardless of whether the complainant or respondent is an enrolled student or an employee of the recipient."
- "Further, under § 106.44(a) the recipient must offer supportive measures to a complainant alleged to be the victim of sexual harassment occurring at a building owned or controlled by an officially recognized student organization."
- "The benefits of third-party reporting do not, however, require the third party themselves to become the "complainant" because, for example, supportive measures must be offered to the alleged victim, not to the third party who reported the complainant's alleged victimization."

"The Department further reiterates that recipients retain discretion to provide supportive measures to any complainant even where the harassment is not pervasive."

## Recordkeeping

§ 106.45 (10)(D)(ii) Grievance process for formal complaints of sexual harassment.

#### Recordkeeping.

(D) A recipient must maintain for a period of seven years records of-

• (ii) For each response required under § 106.44, a recipient must create, and maintain for a period of seven years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment.

679 680 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

TIŢĻE

#### Recordkeeping

§ 106.45 (10)(D)(ii) Grievance process for formal complaints of sexual harassment. Recordkeeping.

#### (D) A recipient must maintain for a period of seven years records of-

 In each instance, the recipient must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity

· If a recipient does not provide a complainant with supportive measures, then the recipient In use document the reasons why such a response was not clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.

## Document non-provision of supportive measurement

- Institutions must also indicate if a complainant does not want to receive supportive measures, if offered.
- Section 106.45(b)(10).

 As revised, this provision states that if a recipient does not provide supportive measures as part of its response to sexual harassment, the recipient specifically must document why that response was not clearly unreasonable in light of the known circumstances(for example, perhaps the complainant did not want any supportive measures).

## <sup>681</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

TIŢĻE

#### Clery Act Alignment

 The good news is your institution is likely already doing most of this Under Clery,

Your (policy) statement should identify and provide specific information about appropriate and available services for victims at your institution. Provide information about how a student or employee can access these services or request information. Provide specific contact information. Be sure to include both on- and off-campus services, as applicable. We recommend that institutions reach out to organizations that assist victims of dating violence, domestic violence, sexual assault and stalking, such as local rape crisis centers and state and territorial coalitions against domestic and sexual violence, when developing this list of services. If there are no on- or off-campus services, you must state this fact in your policy statement.

**Clery Act Alignment** 

TITLE

TITLE

- Within your Annual Security Report, you already must provide:
  - A statement of available services [that] should be updated annually to reflect currently available services. A statement that the institution will provide written notification to victims about options for, available assistance in, and how to request changes to academic, living, transportation and working situations or protective measure
  - The institution must make such accommodations or provide such protective measures if the victim requests them and if they are reasonably available, regardless of whether the victim chooses to report the crime to campus police or local law enforcement

30046, p.21



entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

30064, p. 38

Equitable services for respondents

- The Department does not require recipients to provide respondents with supportive measures, but it also does not prevent them from doing so.
- o "Complainants must be offered supportive measures, and respondents may receive supportive measures, whether or not a formal complaint has been filed or a determination regarding responsibility has been made."

#### Equitable support services

· "The Department understands commenters' concerns that an adversarial process may take an emotional toll on participants, and the final regulations encourage provision of supportive measures to both parties and give both parties an equal right to select an advisor of choice to assist the parties during a grievance process."

<sup>687</sup>©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

| Su  | pportive services for respondents  | Equitable, not equal   |
|-----|--|--|
|     | <ul> <li>"The Department does not equate the trauma experienced by a sexual<br/>harassment victim with the experience of a perpetrator of sexual<br/>harassment or the experience of a person accused of sexual harassment.<br/>Nonetheless, the Department acknowledges that a grievance process may<br/>be difficult and stressful for both parties. Further, supportive measures may<br/>be offered to complainants and respondents (see § 106.30 defining<br/>"supportive measures"), and §106.45(b)(5)(iv) requires recipients to provide<br/>both parties the same opportunity to select an advisor of the party's<br/>choice. These provisions recognize that the stress of participating in a<br/>grievance process affects both complainants and respondents and may<br/>necessitate support and assistance for both parties."</li> </ul> | <ul> <li>"The Department does not intend, and the final regulations do not require, to impose a requirement of equality or parity with respect to supportive measures provided to complainants and respondents."</li> <li>"By defining supportive measures to mean individualized services that cannot unreasonably burden either party, these final regulations incentivize recipients to make supportive measures available to respondents, but these final regulations require recipients to offer supportive measures to complainants."</li> </ul> |
|     | 30103, p. 78   | 30277, p.252; 30276, p.251   |
| 689 |  | 690  |

#### **One-Way No-Contact Orders**

 A fact-specific inquiry is required into whether a carefully crafted no-contact order restricting the actions of only one party would meet the § 106.30 definition of supportive measures. For example, if a recipient issues a one-way no-contact order to help enforce a restraining order, preliminary injunction, or other order of protection issued by a court, or if a one-way no-contact order does not unreasonably burden the other party, then a one-way no-contact order may be appropriate.

#### Timing of supportive measures

- The Department reiterates that "no written statement is required in order to receive The Department retained in the investment statement is required in order to receive supportive measures, and that there is no time limit on a complainant's decision to file a formal complaint, so the decision to sign and file a formal complaint need not occur in the immediate aftermath of sexual violence when a survivor may have the greatest difficulty focusing, recalling details, or making decisions."
- · "A complainant may disclose or report immediately (if the complainant desires) to receive supportive measures and receive information about the option for filing a formal complaint, and that disclosure or report may be verbal, in writing, or by any other means of giving notice.
- "These final regulations do not expressly require a recipient to continue providing supportive measures upon a finding of non-responsibility, and the Department declines to require recipients to lift, remove, or cease supportive measures for complainants or respondents upon a finding of non-responsibility.

30130. p. 105: 30130. p. 105: 30183. p. 15

TITLE

#### 691

692

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

TIŢĻE

TIŢĻE

30184. p. 577

#### When not to provide supportive services

"The Department acknowledges that there may be specific instances in which it is impossible or impractical to provide supportive measures. For example, the recipient may have received an anonymous report or a report from a third party and cannot reasonably determine the identity of the complainant to promptly contact the complainant. Similarly, if a complainant refuses the supportive measures that a recipient offers (and the supportive measures offered are not clearly unreasonable in light of the known circumstances) and instead insists that the recipient take punitive action against the respondent without a formal complaint and grievance process under § 106.45, the Department will not deem the recipient's response to be clearly unreasonable in light of the known circumstances.

#### Supportive measures are not punitive TITLE "Under § 106.30, a supportive measure must not be punitive or disciplinary, but may burden a respondent as long as the burden is not unreasonable. · "Emergency removal may be undertaken in addition to implementing supportive measures designed to restore or preserve a complainant's equal access to education. Placing a complainant (not respondent) on paid leave, if employed by the institution · Changing respondent's class schedule, housing, or dining hall assignment may be acceptable

· Removing respondent from teams, clubs, or other extracurricular activities may not be acceptable 30231, p. 206; 30236, p. 211; 30231, p. 20

<sup>693</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

TIŢĻE

#### Deliberate indifference

· Rule protects against deliberate indifference by ensuring "that recipients respond to sexual harassment by offering supportive measures designed to restore or preserve a complainant's equal educational access without treating a respondent as responsible until after a fair grievance process."

#### Deliberate indifference

· "The school is responsible for responding promptly without deliberate indifference, including offering appropriate supportive measures to the complainant, which may include separating the complainant from the respondent, counseling the respondent about appropriate behavior, and taking other actions that meet the § 106.30 definition of "supportive measures."

### Informal resolutions and supportive measures

With respect to the relationship between supportive measures and informal resolution, the Department wishes to clarify that supportive measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party and without constituting punitive or disciplinary actions including by protecting the safety of all parties and the recipient's educational environment or determing sexual The safety of an parties and the recipient's educational environment to determing sectal harassment. Unlike informal resolutions, which may result in disciplinary measures designed to punish the respondent's supportive measures must be non-disciplinary and non-punitive. 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, beforeast excluding and monitoring of certain areas of the campus, and other similar measures. measures. Informal resolutions may reach agreements between the parties, facilitated by the recipient, that include similar measures but that also could include disciplinary measures, while recipient, that includes a similar includes out that each obtain includes in a formal complaint providing finality for both parties in terms of resolving allegations raised in a formal complaint of sexual harassment. Because an informal resolution may result in disciplinary or punitive measures agreed to by a respondent, we have revised § 10645(b)(9) to expressly state that a recipient may not offer informal resolution unless a formal complaint is filed.

### Retaliation

• "A recipient may warn a respondent that retaliation is prohibited and inform the respondent of the consequences of retaliating against the complainant, as part of a supportive measure provided for a complainant, because such a warning is not a punitive or disciplinary action against the respondent."

697

698 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this

material for proprietary reasons, except by the original author(s), is strictly prohibited.

Role of Title IX Coordinator

- "The Title IX Coordinator, a specially trained employee who must respond promptly to the alleged victim by offering supportive measures and confidentially discussing with the alleged victim the option of filing a formal complaint."
- The rule defines "supportive measures" and mandates that Title IX Coordinators are responsible for effective implementation of supportive measures).
- Role of Advocate/Support Person/Advisor "Although these final regulations do not expressly require recipients to allow complainants to bring a supportive friend to an initial meeting with the Title IX Coordinator, nothing in these final regulations prohibits complainants from doing so." · "Although commenters asserted that some complainants, even at postsecondary institutions, are too young, immature, or traumatized to
  - contact a Title IX Coordinator, the Department notes that nothing in the final regulations prevents a complainant from first discussing the harassment situation with a trusted mentor or having a supportive friend with them to meet with or otherwise report to the Title IX Coordinator."

<sup>699</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

TIŢĻE

### Role of Others on Campus

This does not preclude recipient employees or administrators other than the Title IX Coordinator from implementing supportive measures for the complainant (or for a respondent)."

"The final regulations, § 106.30 defining "supportive measures," require that the Title IX Coordinator is responsible for the effective implementation of supportive measures; however, this does not preclude other recipient employees or administrators from implementing supportive measures for a complainant (or a respondent) and in fact, effective implementation of most supportive measures requires the Title IX Coordinator to coordinate with administrators, employees, and offices outside the Title IX office (for example, notifying campus security of the terms of a no-contact order, or working with the school registrar to appropriately reflect a complainant's withdrawal from a class, or communicating with a professor that a complainant needs to re-take an exam)."

### Role of third party reporting

· "These final regulations preserve the benefits of allowing third party reporting while still giving the complainant as much control as reasonably possible over whether the school investigates, because under the final regulations a third party can report-and trigger the Title IX Coordinator's obligation to reach out to the complainant and offer supportive measuresbut the third party cannot trigger an investigation. Further, the final regulations allow a complainant to initially report for the purpose of receiving supportive measures, and to later decide to file a formal complaint."

TIŢĻE

#### Costs associated with interim measures

 The Department made a determination, based on comments that it received to the NPRM, about what it believes to be the cost of supportive measures provided by institutions.

• "The Department has included a cost of \$250 for supportive measures."



### 703

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

TIŢĻE

#### NASPA. Student Affairs Administrators in Higher Education

## Title IX Evidence Issues

#### Peter Lake

Professor of Law, Charles A. Dana Chair, and Director of the Center for Excellence in Higher Education Law and Policy Stetson University College of Law Senior Higher Education Consulting Attorney Steptoe & Johnson PLLC

#### Jake Sapp Deputy Title IX Coordinator Austin College



### This Module is Designed for



TRACK 1 – Title IX Coordinators TRACK 2 – Title IX Decision-Makers and Student Conduct Administrators TRACK 3 – Title IX Investigators

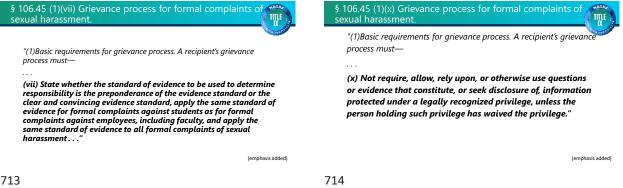
ission.

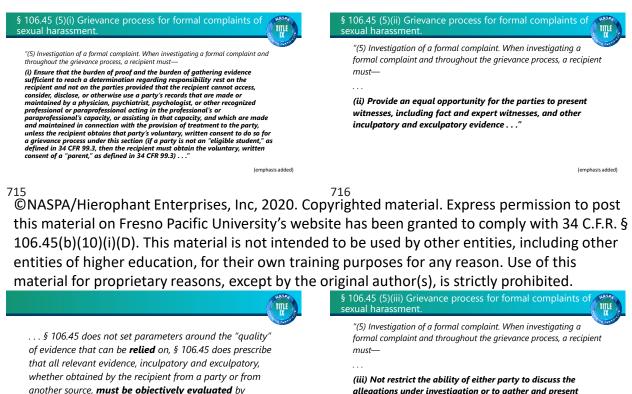
<sup>705</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.





<sup>711</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.





allegations under investigation or to gather and present relevant evidence . . ."

(emphasis added)

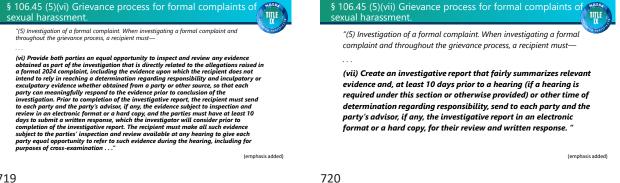
<sup>717</sup>©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

(emphasis added)

investigators and decision-makers free from conflicts of

interest or bias and who have been trained in (among

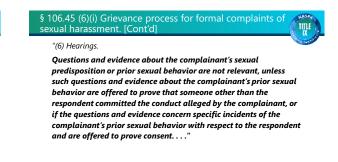
other matters) how to serve impartially.



# § 106.45 (6)(i) Grievance process for formal complaints of sexual harassment.

#### "(6) Hearings.

(i) For postsecondary institutions, the recipient's grievance process must provide for a live hearing. At the live hearing, the decisionmaker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.... Only relevant crossexamination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant."



(emphasis added)

## <sup>721</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

TITLE

(emphasis added)

| § 106.45 (6)(i) Grievance process for formal complaints of sexual harassment. [Cont'd]   |  |
|--|--|
| "(6) Hearings.<br>If a party or witness does not submit to cross-examination at<br>the live hearing, the decision-maker(s) must not rely on any<br>statement of that party or witness in reaching a<br>determination regarding responsibility; provided, however,<br>that the decision-maker(s) cannot draw an inference about<br>the determination regarding responsibility based solely on a<br>party's or witness's absence from the live hearing or refusal to<br>answer cross-examination or other questions" | "(6) Hearings.<br>(ii) With or without a hearing, questions and evidence about<br>the complainant's sexual predisposition or prior sexual behavior<br>are not relevant, unless such questions and evidence about the<br>complainant's prior sexual behavior are offered to prove that<br>someone other than the respondent committed the conduct alleged<br>by the complainant, or if the questions and evidence concern<br>specific incidents of the complainant's prior sexual behavior with<br>respect to the respondent and are offered to prove consent. The<br>decision-maker(s) must explain to the party proposing the<br>questions any decision to exclude a question as not relevant." |
| (emphasis add  | ided) (emphasis added)   |
| 723  | 77/  |

<sup>7</sup>©NASPA/Hierophant Enterprises, Inc, 2020. Copyríghted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.





In order to preserve the benefits of live, back-and-forth questioning and follow-up questioning unique to cross-examination, the Department declines to impose a requirement that questions be submitted for screening prior to the hearing (or during the hearing); the final regulations revise this provision to clarify that cross-examination must occur "directly, orally, and in real time" during the live hearing, balanced by the express provision that questions asked of parties and witnesses must be relevant, and before a party or witness answers a cross-examination question the decision-maker must determine relevance (and explain a determination of irrelevance). This provision does not require a decision-maker to give a lengthy or complicated explanation; it is sufficient, for example, for a decision-maker to explain that a question is irrelevance the question calls for prior sexual behavior information without meeting one of the two exceptions, or because the question asks about a detail that is not probative of any material fact concerning the allegations. The Department believes the protections of the rape shield language remain stronger if decisionmakers are not given discretion to decide that sexual behavior is admissible where its probative value substantially outweighs the danger of harm to a victim and unfair prejudice to any party. If 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 sto apply a single admissibility rule (relevance), including this provision's specification that sexual behavior is irrelevant with two concrete exceptions. This apprach leaves the decision-maker decision is arrelevant with two concrete exceptions. This apprach leaves the decision-maker of the strain and the decision decision and the decisionmaker equirements in 50.64s, including the provisions discussed above whereby the decisionmaker cannot rely on statements of a party or witness if the party or witness did not submit to crossexamination, a party is treatment records cannot be used without the party's voluntary consent, and information protected by a legally records privilege cannot be used).

Id. at 30351-52

<sup>727</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

[T]he Department declines to import a balancing test that would exclude sexual behavior questions and evidence (even meeting the two exceptions) unless probative value substantially outweighs potential harm or undue prejudice, because that open-ended, complicated standard of admissibility would render the adjudication more difficult for a layperson decision-maker competently to apply. Unlike the two exceptions in this provision, a balancing test of probative value, harm, and prejudice contains no concrete factors for a decision-maker to look to in making the relevance determination. In response to commenters' concerns that the proposed rules did not provide a recipient sufficient leeway to halt investigations that seemed futile, the final regulations revise § 106.45(b)(3)(ii) to provide that a recipient may (in the recipient's discretion) dismiss a formal complaint, or allegations therein, in certain circumstances including where a complainant requests the dismissal (in writing to the Title IX Coordinator), where the respondent is no longer enrolled or employed by the recipient, or where specific circumstances prevent the recipient from meeting the recipient's burden to collect sufficient evidence (for example, where a postsecondary institution complainant has cased participating in the investigation and the only inculpatory evidence available is the complainant's statement in the formal complaint or as recorded in an interview by the investigator).

<sup>729</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

§ 106.45(b)(5)(vi) [emphasizes] that the evidence gathered and sent to the parties for inspection and review is evidence "directly related to the allegations" which must specifically include "inculpatory or exculpatory evidence whether obtained from a party or other source." Such inculpatory or exculpatory evidence (related to the allegations) may, therefore, be gathered by the investigator from, for example, law enforcement where a criminal investigation is occurring concurrently with the recipient's Title IX grievance process.

Id. at 30303.



Id. at 30304.



The Department emphasizes that the decision-maker must not only be a separate person from any investigator, but the decision-maker is under an obligation to objectively evaluate all relevant evidence both inculpatory and exculpatory, and must therefore independently reach a determination regarding responsibility without giving deference to the investigative report.

Id. at 30314.

Regardless of whether certain demographic groups are more or less financially disadvantaged and thus more or less likely to hire an attorney as an advisor of choice, decision-makers in each case must reach determinations based on the evidence and not solely based on the skill of a party's advisor in conducting crossexamination. The Department also notes that the final regulations require a trained investigator to prepare an investigative report summarizing relevant evidence, and permit the decision-maker on the decision-maker's own initiative to ask questions and elicit testimony from parties and witnesses, as part of the recipient's burden to reach a determination regarding responsibility based on objective evaluation of all relevant evidence including inculpatory and exculpatory evidence. Thus, the skill of a party's advisor is not the only factor in bringing evidence to light for a decisionmaker's consideration. Mark 19932

733

734

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

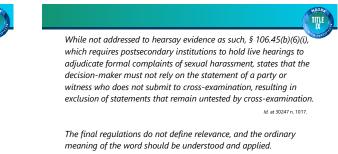
Unlike court trials where often the trier of fact consists of a jury of laypersons untrained in evidentiary matters, the final regulations require decision-makers to be trained in how to conduct a grievance process and how to serve impartially, and specifically including training in how to determine what auestions and evidence are relevant. The fact that decision-makers in a Title IX grievance process must be trained to perform that role means that the same well-trained decision maker will determine the weight or credibility to be given to each piece of evidence, and the training required under § 106.45(b)(1)(iii) allows recipients flexibility to include substantive training about how to assign weight or credibility to certain types or categories of evidence, so long as any such training promotes impartiality and treats complainants and respondents equally. Thus, for example where a cross-examination question or piece of evidence is relevant, but concerns a party's character or prior bad acts, under the final regulations the decision-maker cannot exclude or refuse to consider the relevant evidence, but may proceed to objectively evaluate that relevant evidence by analyzing whether that evidence warrants a high or low level of weight or credibility, so long as the decisionmaker's evaluation treats both parties equally by not, for instance automatically assigning higher weight to exculpatory character evidence than to inculpatory character evidence Id. at 30337 (emphasis added)

## [A] recipient must objectively evaluate all relevant evidence (inculpatory and exculpatory) but retains discretion, to which the Department will defer, with respect to how persuasive a decision-maker finds particular evidence to be.

<sup>735</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

While the proposed rules 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, the final regulations require recipients to gather and evaluate relevant evidence, with the understanding that this includes both inculpatory and exculpatory evidence, and the final regulations deem questions and evidence about a complainant's prior sexual behavior to be irrelevant with two exceptions and preclude use of any information protected by a legally recognized privilege (e.g., attorney-client).

Id. at 30247-48 (internal citations omitted)





The Department understands that courts of law operate under comprehensive, complex rules of evidence under the auspices of judges legally trained to apply those rules of evidence (which often intersect with other procedura) and substantive legal rules, such as rules of procedure, and constitutional rights). Such comprehensive rules of evidence admit hearsay (generally, out-of-court statements offered to prove the ruth of the matter asserted) under certain conditions, which differ in criminal and civil trials. Because Title IX grievance processes are not court proceedings, comprehensive rules of evidence do not, and need not, apply. Rather, the Department has prescribed procedures designed to achive of Jair, eliable outcome in the context of sexual harassment in an education program or activity where the conduct alleged constitutes see discrimination under Title IX. While judges in courts of law are competent to apply comprehensive, complicated rules of evidence, the Department does not believe that expectation is fair to impose on recipients, whose primary function is to provide education, not to resolve disputes between students and end polyees. Id. at 30347.

739

740

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

The Department understands commenters' concerns that a blanket rule against reliance on party and witness statements made by a person who does not submit to cross-examination is a broader exclusionary rule than found in the Federal Rules of Evidence, under which certain hearsay exceptions permit consideration of statements made by persons who do not testify in court and have not been cross-examined. [W]here a party or witness does not appear and is not cross-examined, the statements of that part or witness cannot be determined reliable, truthful, or credible in a non-courtroom setting like that of an educational institution's proceeding that lacks subpoena powers, comprehensive rules of evidence, and legal professionals.... (Riecipients are educational institutions that should not be converted into de facto courtrooms. The final regulations thus prescribe a process that simplifies evidentiary complexities while ensuring that determinations regarding responsibility result from consideration of relevant, reliable evidence. The Department declines to adopt commenters' suggestion that instead the decision-maker should be permitted to rely on statements that are no subject to cross-examination, if they are reliable; making such a determination without the benefit of extensive rules of evidence would likely result in inconsistent and potentially inaccurate assessments of reliability. Commenters correctly note that courts have not imposed a blanket rule excluding hearsay evidence from use in administrative proceedings. However, cases cited by commenters do not stand for the proposition that every administrative proceeding must be permitted to rely on hearsay evidence, even where the agency lacks subpoena power to compel Id. at 30348 witnesses to appear.

While commenters correctly observe that the Confrontation Clause is

concerned with use of testimonial statements against criminal

evidence in a criminal court. For reasons discussed above, the

on recipients, whether patterned after civil or criminal rules.

defendants, even if use of a non-testimonial statement poses no

constitutional problem under the Sixth Amendment, the statement

would still need to meet a hearsay exception under applicable rules of

Department does not wish to impose a complex set of evidentiary rules

Id. at 30347

<sup>741</sup> ONASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

[R]elevance is the sole gatekeeper evidentiary rule in the final regulations, but decision-makers retain discretion regarding the weight or credibility to assign to particular evidence. Further, for the reasons discussed above, while the final regulations do not address "hearsay evidence" as such, § 106.45(b)(6)(i) does preclude a decision-maker from relying on statements of a party or witness who has not submitted to cross-examination at the live hearing.

Id. at 30354.



#### Recipients may not...

... adopt evidentiary rules of admissibility that contravene those evidentiary requirements prescribed under § 106.45

... adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice . .

... adopt rules excluding certain types of relevant evidence (e.g., lie detector test results, or rape kits) where the type of evidence is not either deemed "not relevant" (as is, for instance, evidence concerning a complainant's prior sexual history) or otherwise barred from use under § 106.45 (as is, for instance, information protected by a legally recognized privilege) . . Id. at 30294 (internal citations omitted)

1) Credibility Determinations 2) Issues of Relevance 3) Setting the Evidentiary Standard 4) Inculpatory & Exculpatory Evidence 5) Expert Testimony 6) Hearsay & Character 7) Federal Court on Title IX Evidence

746

745 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

TIŢĻE

Credibility Determinations

- · Often these cases are "word against word," so what exists to corroborate claims?
- Reports to law enforcement, medical assistance, contemporaneous reports or conversations, journal entries, witness accounts, etc. can be viewed as corroborating (if medical or mental health reports exist you can ask the complainant for access to those records).
- · In cases where medical or mental health records exist and panel members gain access, it's a good idea to enlist the help of medical/mental health experts to interpret.
- · Avoid expectations or assumptions about behaviors or responses by either complainant or respondent. Avoid stereotypes; prevent bias, implicit or otherwise.

# Credibility Determinations

- Assess demeanor: Does the person appear credible? Look at body language, eye contact, level of nervousness, defensiveness, evasiveness, etc.
- · Is the person's account inherently believable? Plausible? What is his or her potential bias?
- · Does the person have a motive to be untruthful?
- Are there past acts that could be relevant (although past acts are not determinative of the issue before you, they can be relevant for some purposes).
- · Pay attention to inconsistencies, but remember that in cases of trauma, inconsistencies can occur. Inconsistencies alone may not determine credibility or lack thereof.
- Look out for attempts to derail the hearing, deflect away from questions, and/or bog down the hearing with irrelevant information.
- Check your own bias at the door. Do not pre-judge your findings until all relevant
  information is heard. Do not be lured towards confirmation bias.

<sup>747</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

TIŢĻE

#### Relevance

The new Title IX regulations "specifically . . . require investigators and decision-makers to be trained on issues of relevance, including how to apply the rape shield provisions."

The decision-maker is required to make relevance determinations regarding cross-examination in real time during the hearing.

#### Title IX Regulations – Relevance

- · Require an "objective evaluation of all relevant evidence" 106.45(b)(1)(ii)
- The Department declines to define certain terms in this provision such as "upon request," "relevant," or "evidence directly related to the allegations," as these terms should be interpreted using their plain and ordinary meaning.

ww.federalregister.gov/d/2020-10512/p-3515

#### FRE 401 – Court Room Test for **Relevant Evidence**



Evidence in federal court is relevant if:

- a) It has any tendency to make a fact more or less probable than it would be without the evidence; and
- b) The fact is of consequence in determining the action.
- Irrelevant Evidence Evidence not tending to prove or disprove a matter in issue. Bryan A. Gardner, Black's Law Dictionary 10, (2014). Pg. 676
- · Does the question call for an answer that makes an issue of material fact more or less likely?

#### Merriam Webster Definition of Relevant

- · Having significant and demonstrable bearing on the matter at hand.
- Tending logically to prove or disprove a fact of consequence or to make the fact more or less probable and thereby aiding the trier of fact in making a decision
  - "Relevant," Merriam-Webster.com Dictionary, Merriam Webster, https://www.me Accessed 12 Jul. 2020.

751

#### 752

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### What is Probative?

- Title IX Regulations do not define Probative
- · Evidence that tends to prove or disprove a point in Issue. Bryan A. Gardner, Black's Law Dictionary 10, (2014). Pg. 677
- "Each single piece of evidence must have a plus value." 1 JOHN H. WIGMORE, EVIDENCE 410 (1940)

• "The Court may exclude relevant evidence if its probative value substantially outweighed by a danger of one or more of the following: Unfair Prejudice, Confusing the Issues, Misleading the jury, Undue delay, Wasting time, Needlessly presenting cumulative evidence."

FRE 403 = Court Room Exclusions

Not Applied to Title IX Hearings

· Need to apply

• "A recipient may not adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice."

<sup>753</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### What Exclusions do Apply in Title IX Hearings

1) Legally Recognized Privileged Information -> (Attorney/Client & Dr./Client)

- 2) Complainant's Sexual Predisposition (always) & Prior Sexual History Unless... Two Exceptions
- 3) Treatment Records without the parties written voluntary consent
- A recipient may adopt rules of order or decorum to forbid badgering a witness. 5) OCR Blog Post: The decision-maker must not rely on the statement of a party or witness who does not submit to cross-examination, resulting in exclusion of statements that remain untested by cross-examination.

#### **Relevant but Hostile**

Where the substance of a question is relevant, but the manner in which an advisor attempts to ask the question is harassing, intimidating, or abusive (for example, the advisor yells, screams, or physically "leans in" to the witness's personal space), the recipient may appropriately, evenhandedly enforce rules of decorum that require relevant questions to be asked in a respectful, non-abusive manner. https://www.federalregister.gov/d/2020-10512/p-3779

<sup>6)</sup> A Recipient may fairly deem repetition of the same question to be irrelevant.

#### Rape Shield Language

[T]he rape shield language in § 106.45(b)(6)(i)-(ii) bars questions or evidence about a complainant's sexual predisposition (with no exceptions) and about a complainant's prior sexual behavior subject to two exceptions.

1) if offered to prove that someone other than the respondent committed the alleged sexual harassment, or

2) if the question or evidence concerns sexual behavior between the complainant and the respondent and is offered to prove consent.

Id. at 30336 n. 1308 (emphasis added)

TIŢĻE



#### 757

758 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Relevance Litany...Making the Determination

- 1) What is at Issue?
- 2) Admissibility Versus Probative
- 3) What does the offered evidence go to prove? Not does it prove this at point of admissibility

4) Apply the Regulatory standards as applicable...Title IX hearings not governed by FRE per se

Cross Examination & Relevance Determination · The decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant. • "[T]his provision does not require a decision-maker to give a lengthy or complicated explanation; it is sufficient, for a decision-maker to explain that a question is irrelevant because .... the question asks about a detail that is not probative of any material fact concerning the allegations." • "[D]irectly, orally, and in real time" precluding a requirement that cross examination questions be submitted or screened prior to the live hearing. h /2020-10512/p-

· "The recipient may adopt a rule that prevents parties and advisors from challenging the relevance determination (after receiving the decision-maker's explanation) during the hearing."

<sup>759</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### **Evidentiary Standards**

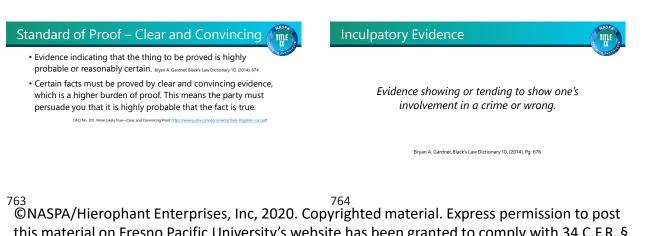
"State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment;" https://www.federalregister.gov/d/2020-10512/p-6468

- 1) Clear & Convincing
- 2) Preponderance of the Evidence

#### Standard of Proof - Preponderance of the Evidence

Using a preponderance of the evidence standard, and considering relevant definitions in the Policy, the hearing panel weighs the evidence to determine whether the Respondent violated the Policy. 50.01% likelihood or 50% and a feather Which side do you fall on?

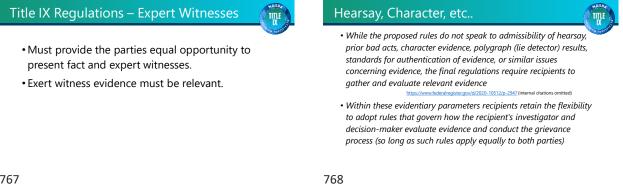
"The Greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force, superior evidentiary weight that, though not sufficient to free the mind wholly from all reasoanble doubt, is still sufficient to incline a mind to one side of the issue rather than the other." Bryan A. Gardner, Black's Law Dictionary 10, (2014). , 1373



this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

| Court Room Expert Testimony Requirements- FRE 70  |
|---|
| A witness who is qualified as an expert by knowledge,<br>skill, experience, training, or education may testify in the<br>form of an opinion or otherwise if:                              |
| <ul> <li>A) The expert's scientific, technical, or other specialized knowledge will help<br/>the trier of fact to understand the evidence or to determine a fact in<br/>issue;</li> </ul> |
| B) The Testimony is based on sufficient facts or data   |
| C) The Testimony is the product of reliable principles and methods  |
| D) The expert has reliably applied the principles and methods to the facts of the case.   |
|   |

<sup>765</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



#### FRE 801 – Hearsay



(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay. "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement

#### FRE 801 - Exclusions From Hearsay (d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay (1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement (A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition; • (B) is consistent with the declarant's testimony and is offered (i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent imprope influence or motive in so testifying; or · (ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or (C) identifies a person as someone the declarant perceived earlier. · (2) An Opposing Party's Statement. The statement is offered against an opposing party and (A) was made by the party in an individual or representative capacity; • (B) is one the party manifested that it adopted or believed to be true • (C) was made by a person whom the party authorized to make a statement on the subject; • (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed • (E) was made by the party's coconspirator during and in furtherance of the conspiracy.

769

770 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

FRE 803 – Exceptions to the Rule Against Hearsame

(1) **Present Sense Impression**. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

(2) Excited Utterance. A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused. (3) Then-Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of

memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will. (4) Statement Made for Medical Diagnosis or Treatment. A statement that:

(A) is made for — and is reasonably pertinent to — medical diagnosis or treatment; and (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause

(Not Entire Rule)

Statements Not Subject to Cross Exam

OCR Blog Post -> https://www2.ed.gov/about/offices/list/ocr/blog/20200522.html 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. Section 106.45(b)(6)(i)

<sup>771</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Potential Federal Court Rulings on Evidenceme

Haidak v. University of Massachusetts-Amherst, 933 F.3d 56 (1st Cir. App. 8/6/2019)

"The rules that govern a common law trial need not govern a university disciplinary proceeding. But the rules of trial may serve as a useful benchmark to guide our analysis." Id. at 67

For example, even in a full-blown federal trial, "extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness." Fed. R. Evid. 608(b). And extrinsic evidence aside, the court has ample discretion to exclude evidence "if its probative value is substantially outweighed by a danger of ... undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. Because a federal district court would have been well within its discretion in excluding the transcript, it follows <u>a fortiori</u> that an identical decision by the Hearing Board did not violate Haidak's right to due process.





Interview Techniques for Title IX Investigators Under the New Regulations

**Dr. Jennifer R. Hammat** Dean of Students University of Southern Indiana



#### This Module is Designed for

TRACK 1 – Title IX Coordinators TRACK 3 – Title IX Investigators

776

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### Reference

775

Unless otherwise noted, source: Department of Education, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026 (May 19, 2020)(final rule) (online at https://www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf). Decisions and Flexibility

The Department has given you some flexibility here. As you draft your policies and procedures, you have a decision to make about how you conduct your investigations. This is largely based on your staffing level and if you intend to have your investigator make any determinations of credibility of evidence and/or parties (Obama era investigations). It is one of the decisions you will need to make as a campus. If you stay the course, and continue to have investigators determine credibility and relevance, very little changes. If you decide they will not do this, investigations change significantly.

<sup>777</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### Outsourcing Is an Option

The Department notes that nothing in the final regulations precludes a recipient from carrying out its responsibilities under \$ 106.45 by outsourcing such responsibilities to professionally trained investigators and adjudicators outside the recipient's own operations. The Department declines to impose a requirement that Title IX Coordinators, investigators, or decision-makers be licensed attorneys (or otherwise to specify the qualifications or experience needed for a recipient to fill such positions), because leaving recipients as much flexibility as possible to fulfill the obligations that must be performed by such individuals will make it more likely that all recipients reasonably can meet their Title IX responsibilities.

Id. at 30105.

#### A note about §106.45(b)(7)

Section 106.45(b)(7) specifies that the decision-maker must be a different person from the Title IX Coordinator or investigator, but the final regulations do not preclude a Title IX Coordinator from also serving as the investigator.

ld. at 30135 n.596.

### § 106.45(b)(5)(i)-(vii)



Requires recipients to investigate formal complaints in a manner that:

- Keeps the burden of proof and burden of gathering evidence on the recipient while protecting every party's right to consent to the use of the party's own medical, psychological, and similar treatment records;
- Provides the parties equal opportunity to present fact and expert witnesses and other inculpatory and exculpatory evidence;
- Does not restrict the parties from discussing the allegations or gathering evidence; Id. at 30053

### 106.45(b)(5)(i)-(vii) continued

- · Gives the parties equal opportunity to select an advisor of the party choice (who may be, but does not need to be, an attorney);
- Requires written notice when a party's participation is invited or expected for an interview, meeting, or hearing;
- · Provide both parties equal opportunity to review and respond to the evidence gathered during the investigation; and
- Sends both parties the recipient's investigative report summarizing the relevant evidence, prior to reaching a determination regarding responsibility Id at 20052

#### 781

782 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>783</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

§ 106.45(b)(1)(i)-(x) continued

- Requires Title IX Coordinators, investigators, decisionmakers, and persons who facilitate informal resolutions to be free from conflicts of interest and bias and trained to serve impartially without prejudging the facts at issue;
- Presumes the non-responsibility of respondents until conclusions of the grievance process;

 Includes reasonably prompt time frames for the grievance process:

Id. at 30053 (emphasis added

### § 106.45(b)(1)(i)-(x) continued

- · Informs all parties of critical information about recipient's procedures including the range of remedies and disciplinary sanctions a recipient may impose, the standard of evidence applied by the recipient to all formal complaints of sexual harassment under Title IX (which must be either the preponderance of the evidence standard, or the clear and convincing evidence standard), the recipient's appeal procedures, and the range of supportive measures available to both parties; and
- · Protects any legally recognized privilege from being pierced during a grievance process. Id. at 30053.

#### Training

- "Best practices"/"Experts"/Certification
- Impartiality of Title IX operatives
- No bias
- No conflicts of interest
- No sexual stereotypes in training materials
- Training on the institution's specific policies, procedures and processes
  Training on "relevance" of evidence for investigations and hearings
- Training on technology used in hearings
- We assume that all recipients will need to train their Title IX Coordinators, an investigator, any person designated by a recipient to facilitate an informal resolution process (e.g., a mediator), and two decision-makers (assuming an additional decision-maker for appeals). We assume this training will take approximately eight hours for all staff at the ... IHE level.

Id. at 30567.



788

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

What has happened?

- A formal complaint has been received (and signed).
- An initial meeting with the Title IX Coordinator has happened to provide support measures.
- A notice of investigation has gone out to both parties.
- The case has been assigned to you (the investigator) or as the Title IX Coordinator, you are the investigator, or you have outsourced the investigation.
- The investigator has read the formal complaint.
- Which route for investigations has your school opted for?
   Investigations with or without credibility assessments?

Preparing your questions pre-interview

Investigations

- Read the Formal Complaint
- Write out the questions you have about the report on first read.
- Read the Formal Complaint again.
  - What additional questions do you have about the incident narrative.Who is identified in the Formal Complaint you feel you need to interview.
- What questions do you have for those individuals?
- Have all of these typed out ahead of the first interview.
- Revise and update with additional questions and witnesses as you go.

<sup>789</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

### § 106.45(b)(5)(iv)

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

#### Crossover interview techniques

- Title IX investigation framework is good practice for other kinds of investigations:
- Code of Conduct violations
- Threat assessment or BIT concerns investigations
- Educational conversations with student
- Academic Integrity case investigations
- Hazing investigations





Fact Finding and Data Collection (with credibility assessment)

793

### How to start an interview

- Introduce yourself
- Is small talk appropriate? Build rapport. Establish baseline responses\*
- · Explain your role
- Explain you will be note/taking/recording the interview for notes
- · Ask interviewee to share their recollections of the incident. Do not interrupt the narrative
  - · Let them talk until they are done
  - · Follow up questions later

794

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

| Remember your role | 9 |
|--------------------|---|
|--------------------|---|

You are NOT a party's lawyer, advisor, counselor, parent, or friend You ARE an investigator and a facilitator You ARE free from bias You ARE free from prejudgment You ARE interested in finding out fact about the incident You ARE interested in the truth

Being Impartial ≠ Being a Robot You can be a neutral fact-finder and still show empathy and kindness. Investigation spaces should be judgement free zones

#### Follow-up questions · When seeking clarification after the party's initial recollection of the event, try to ask questions that build confidence and put them at ease

- "You said you left the party around 1am, is that correct?"
- · "You said you recalled having three cups of 'red solo cup' punch, is that right?"
- · If they are describing a location, it might be helpful to ask them to sketch out the room for you (if it is a residence hall, you should have those schematics on your computer to pull up/print out).

<sup>795</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### Clarifications

- When asking harder questions about the order of events, or specific about the conversation or activities, you may run into a series of "I don't know" or "I can't remember" statements. That's ok.
- Reassure the party its ok that they cannot remember or don't know.
- · You can move to another question or kind of questioning.
- · If you hit a memory gap, ask them some sensory questions to see if it triggers any memories. Often there are memories they cannot access unless you ask the question from a different lens.

### Sense and Feel questions

- "Can you draw what you experienced?"
- · "What were you feeling when XYZ occurred?"
- · "What did you smell?"
- "Can you show me?"
- · "What were you feeling when you were kissing?"
- "Tell me more about that."
- "What did you hear?"
- "Tell me about his/her eyes."
- "What can you not forget?"
- Source: Russell Strand. Frontline Training Conference. 2018

### A word about trauma

- Anyone you speak with about alleged sexual harassment (complainant, respondent, or witnesses) could have experienced or still be experiencing trauma as a result of the alleged situation.
- · Be cognizant that talking to you may be very difficult for the parties.
- · Remember to document their experience with as little interruption as possible. Follow-up questions should be limited.
- · Ideally, you want the party being interviewed to do most of the speaking. Modified from: Russell Strand, Frontline Training Con

#### Meet the student where they are:

#### Baseline knowledge =

- How to evaluate risk
- · Factors to consider in decision-making
- · Medically accurate knowledge of sex, reproduction, sexual health
- Ability to navigate interpersonal relationships
- Communication skills
- Conflict resolution skills Emotional intelligence
- · Not all students know the same thing about the same things

#### 799

800 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

TITLE



<sup>801</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



### Credibility: EEOC Guidance

- If there are conflicting versions of relevant events, the employer will have to weigh each party's credit Credibility assessments can be critical in determining whether the alleged harassment in fact occurrer Factors to consider include:
- · Inherent plausibility: Is the testimony believable on its face? Does it make sense? · Demeanor: Did the person seem to be telling the truth or lying?
- · Motive to falsify: Did the person have a reason to lie?
- Corroboration: Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at aroun the time that they occurred) or **physical evidence** (such as written documentation) that corroborates th party's testimony?
- · Past record: Did the alleged harasser have a history of similar behavior in the past? None of the above factors are determinative as to credibility. For example, the fact that there are no eye
  witnesses to the alleged harassment by no means necessarily defeats the complainant's credibility, since
  harassment of one occurs behind closed doors. Furthermore, the fact that the alleged harassre engaged i
  similar behavior in the past does not necessarily mean that he or she did so again.

#### Investigative relevance

- "The investigator is obligated to gather evidence directly related to the allegations whether or not the recipient intends to rely on such evidence (for instance, where evidence is directly related to the allegations but the investigator does not believe the evidence to be credible and thus does not intend to rely on it).
- The parties may then inspect and review the evidence directly related to the allegations. The investigator must take into consideration the parties' responses and then determine what evidence is relevant and summarize the evidence in the investigative report." Id. at 30248

805

## 806

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Investigative relevance continued

"The parties then have equal opportunity to review the investigative report; if a party disagrees with an investigator's determination about relevance, the party can make that argument in the party's written response to the investigative report under § 106.45(b)(5)(vii) and to the decision-maker at any hearing held; either way the decision-maker is obligated to objectively evaluate all relevant evidence and the parties have the opportunity to araue about what is relevant (and about the persuasiveness of relevant evidence)."

# § 106.45(b)(7)

Section 106.45(b)(7) also helps prevent injection of bias into Title I sexual harassment grievance processes, by requiring transparent descriptions of the steps taken in an investigation and explanation of the reasons why objective evaluation of the evidence supports findings of facts and conclusions based on those facts.

<sup>807</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

### An Investigative Note about Rape Shield Laws (

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.

Id. at 30352

Id at 20249

### **Rape Shield Continued**

To further reinforce the importance of correct application of the rape shield protections, we have revised § 106.45(b)(6)(i) to explicitly stat that only relevant questions may be asked, and the decision-maker must determine the relevance of each crossexamination questions before a party or witness must answer.

ld. at 30352

Id. at 30389 (emphasis added)

#### Obligations

"The investigator is obligated to gather evidence directly related to the allegations whether or not the recipient intends to rely on such evidence (for instance, where evidence is directly related to the allegations but the recipient's investigator does not believe the evidence to be credible and thus does not intend to rely on it). The parties may then inspect and review the evidence directly related to the allegations. The investigator must take into consideration the parties' responses and then determine what evidence is relevant and summarize the relevant evidence in the investigative report."

Id. at 30352 (internal citations omitted).

### **Obligations Continued**

"The parties then have equal opportunity to review the investigative report; if a party disagrees with an investigator's determination about relevance, the party can make that argument in the party's written response to the investigative report under § 106.45(b)(5)(vii) and to the decision-maker at any hearing held; either way the decision-maker is obligated to objectively evaluate all relevant evidence and the parties have the opportunity to argue about what is relevant (and about the persuasiveness of relevant evidence)."

Id. at 30248-49.

#### 811

812

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

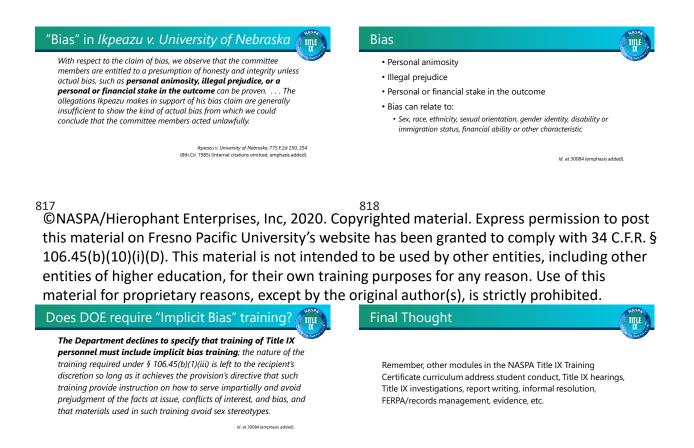


Bias, Impartiality, Conflicts of Interest, Sex Stereotypes

#### **Bias/Conflict of Interest**

Section 106.45(b)(1)(iii) requires Title IX Coordinators, investigators, decision-makers, and individuals who facilitate any informal resolution process to be free of bias or conflicts of interest for or against complainants or respondents and to be trained on how to serve impartially.

Id. at 30103 (emphasis added)



<sup>819</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.





### This Module is Designed for



TRACK 1 - Title IX Coordinators TRACK 3 - Title IX Investigators

#### Reference

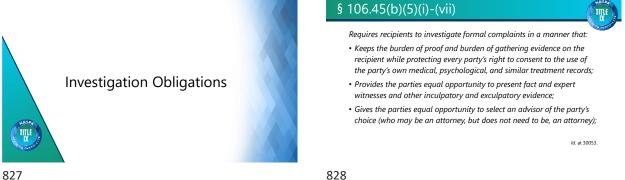
Unless otherwise noted, source: Department of Education, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026 (May 19, 2020)(final rule) (online at https://www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf).

#### 824

823 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### Outsourcing Is an Option **Bias/Conflict of Interest** The Department notes that nothing in the final regulations precludes a recipient from carrying out its responsibilities under § 106.45 by outsourcing Section 106.45(b)(1)(iii) requires Title IX Coordinators, investigators, such responsibilities to professionally trained investigators and adjudicators decision-makers, and individuals who facilitate any informal outside the recipient's own operations. The Department declines to impose a requirement that Title IX Coordinators, investigators, or decision-makers be resolution process to be free of bias or conflicts of interest for or licensed attorneys (or otherwise to specify the qualifications or experience against complainants or respondents and to be trained on how needed for a recipient to fill such positions), because leaving recipients as to serve impartially. much flexibility as possible to fulfill the obligations that must be performed by such individuals will make it more likely that all recipients reasonably can Id. at 30103 (emphasis added) meet their Title IX responsibilities. Id. at 30105.

<sup>825</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



### § 106.45(b)(5)(i)-(vii) continued

• Requires written notices when a party's participation is invited of expected for an interview, meeting, or hearing;

- · Provides both parties equal opportunity to review and respond to the evidence gathered during the investigation;
- · Sends both parties the recipient's investigative report summarizing the relevant evidence, prior to reaching a determination regarding responsibility.

#### **Report Purpose**

We agree that the final regulations seek to provide strong, clear procedural protections to complainants and respondents, including apprising both parties of the evidence the investigator has determined to be relevant, in order to adequately prepare for a hearing (if one is required or otherwise provided) and to submit responses about the investigative report for the decision-maker to consider even when I hearing is not required or otherwise provided.

M at 20200

#### 829

830

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Id. at 30053

Id. at 30309

Report purpose and combining continued

 A valuable part of this process is giving parties (and advisors who are providing assistance to the parties) adequate time to review, assess, and respond to the investigative report in order to fairly prepare for the live hearing or submit arguments to a decisionmaker where a hearing is not required or otherwise provided.

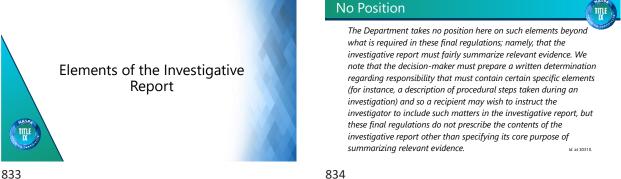
• In the context of a grievance process that involves multiple complainants, multiple respondents, or both, a recipient may issue a single investigative report.

#### Findings or Conclusions in Report?

The Department does not wish to prohibit the investigator from including recommended findings or conclusions in the investigative report. However, the decision-maker is under an independent obligation to objectively evaluate relevant evidence, and thus cannot simply defer to recommendations made by the investigator in the investigative report.

Id. at 30308.

<sup>831</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



#### Why review the report?

- Allowing the parties to review and respond to the investigative report is important to providing the parties with notice of the evidence the recipient intends to rely on in deciding whether the evidence supports the allegations under investigation.
- These final regulations do not prescribe a process for the inclusion of additional support information or for amending or supplementing the investigative report in light of the parties' responses after reviewing the report.

### Discretion

- Recipients enjoy discretion with respect to whether and how to amend and supplement the investigative report as long as any such rules and practices apply equally to both parties, under the revised introductory sentences of § 106.45(b). Md. at 30310.
- A recipient may require all parties to submit any evidence that they would like the investigator to consider prior to the finalization of the investigative report thereby allowing each party to respond to the evidence in the investigative report sent to the parties under § 106.45(b)(5)(vii). Id. at 30310-11.

#### 835

836

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

TIŢĻE

Id. at 30310

| Discretion continued  | Reminders  |
|---|--|
| A recipient also may provide both parties with an opportunity to respond to any additional evidence the other party proposes after reviewing the investigative report. If a recipient allows parties to provide additional evidence in response to the investigative report, any such additional evidence will not qualify as new evidence that was reasonably available at the time the determination regarding responsibility was made for purposes of appeal under § 106.45(b)(8)(i)(B). | <ul> <li>"The investigator is obligated to gather evidence directly related to the allegations whether or not the recipient intends to rely on such evidence (for instance, where evidence is directly related to the allegations but the investigator does not believe the evidence to be credible and thus does not intend to rely on it).</li> <li>The parties may then inspect and review the evidence directly related to the allegations. The investigator must take into consideration the parties' responses and then determine what evidence is relevant and summarize the evidence in the investigator report."</li> </ul> |

<sup>837</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### **Reminders continued**

"The parties then have equal opportunity to review the investigative report; if a party disagrees with an investigator's determination about relevance, the party can make that argument in the party's written response to the investigative report under § 106.45(b)(5)(vii) and to the decision-maker at any hearing held; either way the decision-maker is obligated to objectively evaluate all relevant evidence and the parties have the opportunity to argue about what is relevant (and about the persuasiveness of relevant evidence)."

ld. at 30248-49.

#### § 106.45(b)(7)



Section 106.45(b)(7) also helps prevent injection of bias into Title IX sexual harassment grievance processes, by requiring transparent descriptions of the steps taken in an investigation and explanation of the reasons why objective evaluation of the evidence supports findings of facts and conclusions based on those facts.

Id. at 30389 (emphasis added).



## Background

#### I. BACKGROUND AND REPORTED CONDUCT

• Summary of allegation goes here. Identify the names of the CP and RP here and the Investigator. [One paragraph summary].

#### 841

842

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

| Jurisdiction  | Scope   |
|---|---|
| <b>II. JURISDICTION</b><br>• This office houses the Title IX Office which has campus-wide<br>responsibility for investigating alleged violations of the Sexual<br>Harassment Policy. This office responds to claims of harassment<br>(including sexual assault), stalking, dating violence, domestic<br>violence, and retaliation brought forward by students,<br>employees or third parties. | <ul> <li>III. SCOPE OF THE INVESTIGATION</li> <li>This is the timeline and details pertinent to the case. It is the record of when it was reported. If a No Contact Order was issued. When parties were notified, interviewed, submitted evidence, asked for additional parties to be interviewed, and if they rescheduled or didn't respond.</li> <li>This is the accounting for the time it took for the investigation. It will match what is in the file, (in emails and in phone logs). (1-2 paragraphs).]</li> </ul> |

<sup>843</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### Scope continued

• Parties interviewed:

- Complainant Name, in-person interviews on February 7, 2019
- Respondent Name, in-person interview on February 8, 2019
- Witness 1 Name, in-person interview on February 9, 2019
- Witness 2 Name, in-person interview on February 10, 2019
- Witness 3 Name, in-person interview on February 11, 2019
- Witness 4 Name, in-person interview on February 12, 2019

#### Scope continued

# HASPA

- Documentary evidence acquired:
- Written statement of Complainant Name, dated February 5, 2019
- Text message correspondence between CP Name and Witness 1 Name (received February 21, 2019)
- Text message correspondence between CP Name and Witness 2 Name (received February 21, 2019)
- Text message correspondence between Witness 2 Name and Witness 3 Name (received February 18, 2019)
- Video shared by Witness 4, February 20, 2019
- Photographs shared by Witness 3 and Witness 4, February 21, 2019

#### Relevant policies\*\*



#### IV. RELEVANT POLICY AND LAW PROHIBITING SEXUAL HARASSMENT (INCLUDING SEXUAL ASSAULT) AND RETALIATION

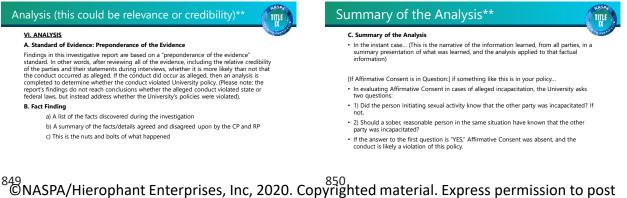
- · This is straight from your policy. What are the relevant policy prohibitions you have published with regard to sexual harassment (the definitions and why it is being investigated).
- · In this new format, this section could be optional, we included it to make the investigative report complete.

#### Investigation SUMMARY V. INVESTIGATION SUMMARY A. Statement Summary of the Parties Complainant: Respondent: B. Documentary Evidence Below is the list of the documentary evidence reviewed for this report: · Documentation and investigative files obtained by the Title IX Investigator; · The written statement provided by the COMPLAINANT and evidence; · The written statement provided by the RESPONDENT and evidence; and · University policies.

847

#### 848

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### Credibility Assessment\*\*

TITLE

- D. Credibility Asses
- According to the Equal Employment Opportunity Commi Unlawful Harassment by Supervisors dated June 18, 1999:
- If there are conflicting versions of relevant events, the employer will have to weigh each party's credibility. Cr assessments can be critical in determining whether the alleged harassment in fact occurred. Factors to consi

on's Enfo

- Inherent plausibility: Is the testimony believable on its face? Does it make sense? · Demeanor: Did the person seem to be telling the truth or lying?
- Motive to falsify: Did the person have a reason to lie?
- Corrobustion: Is there where stetsmony (such as testimony by eye-where see, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or physical evidence (such as written documentation) that corrobustes the party stestimony?
- Past record: Did the alleged harasser have a history of similar behavior in the past?
- None of the above factors are determinative as to credibility. For example, the fact that there are no eye-witnesses to the alleged harassment by no means necessarily defeats the complainant's credibility, since harassment often occurs behind cosed doors. Furthermore, the fact that the alleged harasser engaged in similar behavior in the past does not necessarily mean that he or she did so again.

#### Credibility Assessment\*\*

· These factors will now be assessed for the purposes of this investigation.

TITLE

- The Complainant...
- The Respondent...
- The Witnesses...

#### **Relevant Evidence**



- List of the evidence provided
- · Summary of whether determined to be relevant or not
- Can break this out by inculpatory and exculpatory
- One party may provide more than the other
- Make sure you assign who provided the evidence in the summary of evidence (and the dates received in the timeline of events – evidence is often sent after interviews with the investigator).

### Conclusions and/or Recommendations\*\*

#### VII. CONCLUSION

- The investigator finds that the credible evidence evidence supports a possible violation(s) of the University's Sexual Harassment policy. This report will be forwarded to the decision-maker. OR
- The investigator finds the credible evidence does not support a possible violation(s) of the University's Sexual Harassment policy. This report will be forwarded to the decision-maker.

#### VII. RECOMMENDATIONS

As a Title IX matter, the University has the authority to evaluate the allegations and make findings as applied to students and employees for disciplinary purposes. The investigator **recommends** that the Respondent should go through the live hearing process for possible violations of the University Sexual Harassment Policy. In similarly situated cases of this nature, a common outcome has been Suspension from the University. **OR** 

 As a Title IX matter, the University has the authority to evaluate the allegations and make findings as applied to students and employees for disciplinary purposes. The investigator does not recommend the Respondent should go through the live hearing process for possible violations of the University Sexual Harassment Policy.

#### 853

854

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### Involve your colleagues

- Draft up a template that works for your school
- Draft it together
- Have counsel review it
- Have students review it
- Have academics review it
- You want this template to be the blueprint all investigator use
- Modify as you need. Keep it simple.



<sup>855</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### Bias/Conflict of Interest

Section 106.45(b)(1)(iii) requires Title IX Coordinators, investigators, decision-makers, and individuals who facilitate any informal resolution process to be free of bias or conflicts of interest for or against complainants or respondents and to be trained on how to serve impartially.

Id. at 30103 (emphasis added)

#### "Bias" in Ikpeazu v. University of Nebraska

 With respect to the claim of bias, we observe that the committee members are entitled to a presumption of honesty and integrity unless actual bias, such as personal animosity, illegal prejudice, or a personal or financial stake in the outcome can be proven. ... The allegations (kpeazu makes in support of his bias claim are generally insufficient to show the kind of actual bias from which we could conclude that the committee members acted unlawfully.

> Ikpeazu v. University of Nebraska, 775 F.2d 250, 254 (8th Cir. 1985) (internal citations omitted, emphasis added).

#### Bias



#### · Personal animosity

- Illegal prejudice
- · Personal or financial stake in the outcome
- · Bias can relate to:

· Sex, race, ethnicity, sexual orientation, gender identity, disability or immigration status, financial ability or other characteristic

Id. at 30084 (emphasis added)

#### Does DOE require "Implicit Bias" training

The Department declines to specify that training of Title IX personnel must include implicit bias training; the nature of the training required under § 106.45(b)(1)(iii) is left to the recipient's discretion so long as it achieves the provision's directive that such training provide instruction on how to serve impartially and avoid prejudgment of the facts at issue, conflicts of interest, and bias, and that materials used in such training avoid sex stereotypes.

Id. at 30084 (emphasis added)

#### 859

860

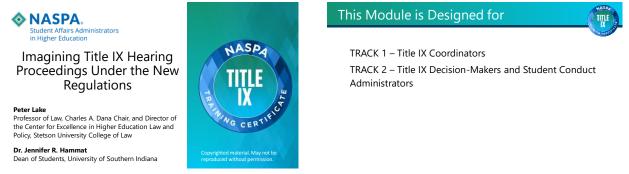
©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### **Final Thought**

Remember, other modules in the NASPA Title IX Training Certificate curriculum address student conduct, Title IX hearings, Title IX investigations, report writing, informal resolution, FERPA/records management, evidence, etc.



<sup>861</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



#### Reference

Unless otherwise noted, source: Department of Education, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026 (May 19, 2020)(final rule) (online at https://www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf).

#### This Module is an Overview

We will discuss topics more in depth in the live virtual session, including:

- · Supportive Measures, Sanctions and Remedies
- Consent
- Advisors
- · Special Issues in Cross-Examination
- · No-Shows and Failure to Submit to Cross-Examination
- Appeals

[Some of these topics are also covered in other pre-recorded modules.]

865

#### 866

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>867</sup>©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### Decision-Maker Training Mandates

[T]he decision-maker will be trained in how to conduct a grievance process, including

· How to determine relevance

- How to apply the rape shield protections
- How . . . to determine the relevance of a cross-examination question before a party or witness must answer. Id. at 30353 (bullets added).

Eliciting Testimony

The Department also notes that the final regulations require a trained investigator to prepare an investigative report summarizing relevant evidence, and permit the decision-maker on the decision-maker's own initiative to ask questions and elicit testimony from parties and witnesses, as part of the recipient's burden to reach a determination regarding responsibility based on objective evaluation of all relevant evidence including inculpatory and exculpatory evidence.

Id. at 30332

#### §106.45(b)(6)(i) Live Hearings & Cross-Examination

#### (6) Hearings.

(i) For postsecondary institutions, the recipient's grievance process must provide for a live hearing. At the live hearing, the decisionmaker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings.

#### 871

872

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

§106.45(b)(6)(i) Rape Shield & Cross-Examination

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

#### §106.45(b)(6)(i) "Hearsay"

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.

<sup>873</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

§106.45(b)(6)(i) Staging a Live Hearing

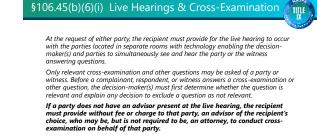
Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other.

Recipients must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

#### § 106.45(b)(3)(i)—Mandatory Dismissal

#### (3) Dismissal of a formal complaint—

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





(emphasis added)

#### §106.45(b)(3)(ii)—Permissive Dismissal

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

- A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any alleaations therein:
- The respondent is no longer enrolled or employed by the recipient; or
- specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein. (emphasis and bullets added)

#### Hearings

- · What is a "hearing"?
- · Single decision-maker vs. a panel of decision makers?
- Rules of evidence?
- · Hearing rules/rules of decorum
- · Pauses, "time-outs"
- · Objections?
- · Calling the investigator as the first witness?
- · Opening and closing statements?
- · Should all hearings be online (currently)?
- · What are the differences?
- Online hearings
- Platforms?
- Security?

#### 877

878 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### Prior Sexual History/Sexual Predisposition Relevance Cont'd The new Title IX regulations specifically . . . Section 106.45(b)(6)(i)-(ii) protects complainants (but not ... require investigators and decision-makers to be trained respondents) from questions or evidence about the on issues of relevance, including how to apply the rape complainant's prior sexual behavior or sexual shield provisions (which deem questions and evidence about a predisposition, mirroring rape shield protections applied in complainant's prior sexual history to be irrelevant with two Federal courts. limited exceptions). Id. at 30125 (emphasis added) Id. at 30103 (emphasis added)

## Rape Shield Language

[T]he rape shield language in § 106.45(b)(6)(i)-(ii) bars questions or evidence about a complainant's sexual predisposition (with no exceptions) and about a complainant's prior sexual behavior subject to two exceptions:

1) if offered to prove that someone other than the respondent committed the alleged sexual harassment, or

2) if the question or evidence concerns sexual behavior between the complainant and the respondent and is offered to prove consent.

Id. at 30336 n.1308 (emphasis added)

#### Consent and Rape Shield Language

[A] recipient selecting its own definition of consent must apply such definition consistently both in terms of not varying a definition from one grievance process to the next and as between a complainant and respondent in the same grievance process. The scope of the questions or evidence permitted and excluded under the rape shield language in § 106.45(b)(6)(i)-(ii) will depend in part on the recipient's definition of consent, but, whatever that definition is, the recipient must apply it consistently and equally to both parties, thereby avoiding the ambiguity feared by the commenter.

Id. at 30125.

#### 883

884

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### Counterclaims Decision-Maker to Determine Relevance We have also revised § 106.45(b)(6)(i) in a manner that builds in a The Department cautions recipients that some situations will involve counterclaims made between two parties, such that a "pause" to the cross-examination process; before a party or witness respondent is also a complainant, and in such situations the answers a cross-examination question, the decisionmaker must recipient must take care to apply the rape shield protections to any determine if the question is relevant. party where the party is designated as a "complainant" even if the same party is also a "respondent" in a consolidated grievance Id at 30323 process. Id. at 30352 (internal citation omitted)

<sup>885</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### Decision-Maker to Determine Relevance Cont'd mu

Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination question, the decision-maker must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.

Id. at 30331.

#### Decision-Maker to Determine Relevance Cont'd

Thus, for example, where a cross-examination question or piece of evidence is relevant, but concerns a party's character or prior bad acts, under the final regulations the decision-maker cannot exclude or refuse to consider the relevant evidence, but may proceed to objectively evaluate that relevant evidence by analyzing whether that evidence warrants a high or low level of weight or credibility, so long as the decision-maker's evaluation treats both parties equally by not, for instance, automatically assigning higher weight to exculpatory character evidence than to inculpatory character evidence.

Id. at 30337 (internal citation omitted)

#### Decision-Maker to Determine Relevance Cont'd

While the Department will enforce these final regulations to ensure that recipients comply with the § 106.45 grievance process, including accurately determining whether evidence is relevant, the Department notes that § 106.44(b)(2) assures recipients that, when enforcing these final regulations, the Department will refrain from second guessing a recipient's determination regarding responsibility based solely on whether the Department would have weighed the evidence differently.

Id. at 30337 (internal citation omitted)

889

prior sexual behavior information) provides transparency for the parties to understand a decisionmaker's relevance determinations.

question's relevance.

890 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Decision-Maker to Determine Relevance Cont'd

The final regulations do not preclude a recipient from adopting a rule (applied equally to both parties) that does, or does not, give parties or advisors the right to discuss the relevance determination with the decision-maker during the hearing. If a recipient believes that arguments about a relevance determination during a hearing would unnecessarily protract the hearing or become uncomfortable for parties, the recipient may adopt a rule that prevents parties and advisors from challenging the relevance determination (after receiving the decision-maker's explanation) during the hearing. Id. at 30343.

Decision-Maker to Determine Relevance Cont'd

Decision-Maker to Determine Relevance Cont'd

The new regulations require "on the spot" determinations about a

[A]n explanation of how or why the question was irrelevant to the

regulations (for example, in the case of sexual predisposition or

allegations at issue, or is deemed irrelevant by these final

Id. at 30343

Requiring the decision-maker to explain relevance decisions during the hearing only reinforces the decision-maker's responsibility to accurately determine relevance, including the irrelevance of information barred under the rape shield language.

<sup>891</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Decision-Maker to Determine Relevance Cont'd me

This provision does not require a decision-maker to give a lengthy or complicated explanation; 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 asks about a detail that is not probative of any material fact concerning the allegations. No lengthy or complicated exposition is required to satisfy this provision.

Id. at 30343.

#### Decision-Maker to Determine Relevance Cont'd

If a party or witness disagrees with a decision-maker's determination that a question is relevant, during the hearing, the party or witness's choice is to abide by the decision-maker's determination and answer, or refuse to answer the question, but unless the decision-maker reconsiders the relevance determination prior to reaching the determination regarding responsibility, the decisionmaker would not rely on the witness's statements.

Id. at 30349 (internal citations omitted)

Id. at 30343.

#### Decision-Maker to Determine Relevance Cont'd

The party or witness's reason for refusing to answer a relevant question does not matter. This provision does apply to the situation where evidence involves intertwined statements of both parties (e.g., a text message exchange or email thread) and one party refuses to submit to cross-examination and the other does submit, so that the statements of one party cannot be relied on but statements of the other party may be relied on Id. at 30349 (internal citations omitted)

Consent

#### 895

896 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### Elements to consider

#### Elements

- · consent is a voluntary agreement to engage in sexual activity,
- someone who is incapacitated cannot consent; (such as due to the use of drugs or alcohol, when a person is asleep or unconscious, or because of an intellectual or other disability that prevents the student from having the capacity to give consent)
- · past consent does not imply future consent;
- · silence or an absence of resistance does not imply consent;
- · consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another;
- · consent can be withdrawn at any time; and
- · coercion, force, or threat of either invalidates consent



<sup>897</sup>©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### Credibility and Reliability

A decision-maker must exclude irrelevant questions, and nothing in the final regulations precludes a recipient from adopting and enforcing (so long as it is applied clearly, consistently, and equally to the parties) a rule that deems duplicative questions to be irrelevant or to impose rules of decorum that require questions to be asked in a respectful manner; however any such rules adopted by a recipient must ensure that all relevant questions and evidence are admitted and considered (though varying weight or credibility may of course be given to particular evidence by the decision-maker).

ld. at 30331 n.1285 (emphasis added)

#### Credibility and Reliability

Probing the credibility and reliability of statements asserted by witness contained in such evidence (police reports, SANE reports, medical reports, and other documents or records) requires the parties to have the opportunity to cross-examine the witness making the statements.

Cross-examination (which differs from questions posed by a neutral factfinder) constitutes a unique opportunity for parties to present a decisionmaker with the party's own perspective about evidence. This adversarial testing of credibility renders the person's statement sufficiently reliable for consideration and fair for consideration by the decision-maker. Id. at 303

#### Credibility and Reliability

Although observing demeanor is not possible without live crossexamination, a decision-maker may still judge credibility based on, for example, factors of plausibility and consistence in party and witness statements.

Specialized legal training is not a prerequisite for evaluating credibility, as evidenced by the fact that many criminal and civil court trials rely on jurors (for whom no legal training is required) to determine the facts of the case including credibility of witnesses.

901

902

these factors.

Credibility and Trauma

The Department notes that decisionmakers are obligated to serve

impartially and thus should not endeavor to "develop a personal relationship" with one party over another regardless of whether one

judging credibility solely on demeanor presents risks of inaccuracy generally, the Department cautions that judging credibility based on a

complainant's demeanor through the lens of whether observed

judging credibility, other factors are consistency, plausibility, and reliability. Real-time cross-examination presents an opportunity for parties and decision-makers to test and evaluate credibility based on all

party is located in a separate room or not. For the same reasons that

demeanor is "evidence of trauma" presents similar risks of inaccuracy.

The Department reiterates that while assessing demeanor is one part of

Id. at 30356 (internal citation omitted)

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Other Factors Besides Demeanor

[C]redibility determinations are not based solely on observing demeanor, but also are based on other factors (e.g., specific details, inherent plausibility, internal consistency, corroborative evidence). Cross-examination brings those important factors to a decisionmaker's attention in a way that no other procedural device does; furthermore, while social science research demonstrates the limitations of demeanor as a criterion for judging deception, studies demonstrate that inconsistency is correlated with deception. Id. at 30321

Other Factors Besides Demeanor Cont'd

[A]ssessing demeanor is just one of the ways in which crossexamination tests credibility, which includes assessing plausibility, consistency, and reliability; judging truthfulness based solely on demeanor has been shown to be less accurate than, for instance, evaluating credibility based on consistency.

Id. at 30355

<sup>903</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

# Reliability [W]hether a witness's statement is reliable must be determined in light of the credibility-testing function of cross-examination, even where non-appearance is due to death or post-investigation disability. Role of Lawyers and Advisors Id. at 30348. 906

#### § 106.45(b)(5)(iv) Advisor of Choice

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

#### "Advisors'

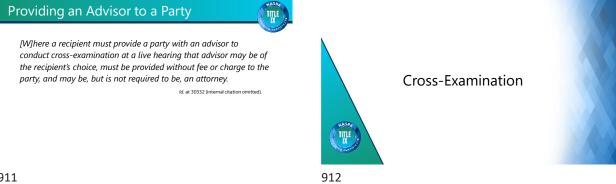
- · Complainants and respondents can have any advisor of their choosing.
- · How will an advisor be designated?
- · Some will choose a lawyer as an advisor. Some will want a lawyer but will not be able to afford one. Equitable treatment issues.
- · Some may have a family member, a friend, or another trusted person serve as their advisor.
- · If a party does not have an advisor, the school must provide one free of charge.
- · The school is not obligated to train advisors.
- · How can/should advisors participate in the process?

#### 907

908 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### Advisors in a Hearing 'Representation?" The Department notes that the final regulations, § 106.45(b)(5)(iv) and § 106.45(b)(6)(i), make clear that the choice or presence of a party's Whether a party views an advisor of choice as "representing" the advisor cannot be limited by the recipient. To meet this obligation a party during a live hearing or not, this provision only requires recipient also cannot forbid a party from conferring with the recipients to permit advisor participation on the party's behalf to party's advisor, although a recipient has discretion to adopt rules governing the conduct of hearings that could, for example, include conduct cross-examination; not to "represent" the party at the live rules about the timing and length of breaks requested by parties or hearing. A recipient may, but is not required to, allow advisors to advisors and rules forbidding participants from disturbing the "represent" parties during the entire live hearing (or, for that matter, hearing by loudly conferring with each other. throughout the entire grievance process). Id. at 30342 Id. at 30339 (emphasis added)

<sup>909</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



#### Cross-examination

[T]he Department does not believe that the **benefits of** adversarial cross-examination can be achieved when conducted by a person ostensible designated as a "neutral" official. This is because the function of cross-examination is precisely not to be neutral but rather to point out in front of the neutral decisionmaker each party's unique perspective about relevant evidence and desire regarding the outcome of the case.

ld at 30335 (internal citations omitted emphasis added)

# Cross-examination and Credibility Cross-examination is essential in cases like Doe's because it does more than uncover inconsistencies – it takes aim at credibility like no other procedural device. Med at 30328.n1248. Due process requires cross-examination in circumstances like these because it is the greatest legal engine ever invested for uncovering the truth. Med at 30328.n1247.

913

917

914

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

| ne "Pause"  | Recipient to Remain Neutral  |  |  |
|---|--|--|--|
| Before a complainant, respondent, or witness answers<br>a cross-examination question, the decision-maker<br>must first determine whether the question is relevant<br>and explain to the party's advisor asking cross-<br>examination questions any decision to exclude a<br>question as not relevant. | [T]he reason cross-examination must be conducted by a party's advisor,<br>and not by the decision-maker or other neutral official, is so that the<br><b>recipient remains truly neutral throughout the grievance process</b> .<br>To the extent that a party wants the other party questioned in an<br>adversarial manner in order to further the asking party's views and<br>interests, that questioning is conducted by the party's own advisor, and<br>not by the recipient. Thus, no complainant (or respondent) need feel as<br>though the recipient is 'taking sides' or otherwise engaging in cross-<br>examination to make a complainant feel as though the recipient is<br>blaming or disbelieving the complainant. |  |  |
| Id. at 30331 (emphasis added).  | <i>ld.</i> at 30316 (emphasis added).  |  |  |

<sup>915</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

"Cross-examination" = Asking Questions The Department disagrees that cross-examination places a victim (or any party or witness) "on trial" or constitutes an interrogation; rather, cross-examination properly conducted simply constitutes a procedure by which each party and witness answers questions posed from a party's unique perspective in an effort to advance the asking party's own interests. Mat at 30315 (emphasis added.)

#### **DARVO** techniques

[C]ross-examination does not inherently rely on or necessitate DARVO techniques, and recipients retain discretion to apply rules designed to ensure that cross-examination remains focused on relevant topics conducted in a respectful manner. Recipients are in a better position than the Department to craft rules of decorum best suited to their educational environment. Id. at 30319

DARVO="Deny, Attack, and Reverse Victim and Offender"

#### Equal Rights to Cross-examination

§ 106.45(b)(6)(i) grants the right of cross-examination equally to complainants and respondents, and cross-examination is as useful and powerful a truth-seeking tool for a complainant's benefit as for a respondent, so that a complainant may direct the decisionmaker's attention to implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility in the respondent's statements.

Id. at 30330.

#### 919

#### 920

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



Non Appearance of Parties and Witnesses/ Unwillingness to Submit to Cross-Examination

The Department understands that complainants (and respondents) often will not have control over whether witnesses appear and are cross-examined, because neither the recipient nor the parties have subpoena power to compel appearance of witnesses. . . . Where a witness cannot or will not appear and be cross-examined, that person's statements will not be relied on by the decision-maker . . . Id. at 30348

<sup>921</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Non Submission to Cross-examination

The prohibition on reliance on "statements" applies not only to statements made during the hearing, but also to any statement of the party or witness who does not submit to cross-examination. "Statements" 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 to the extent that they contain the statements of a party or witness who has not submitted to cross-examination.

#### Non Submission to Cross-examination Cont'd

While documentary evidence such as police reports or hospital records may have been gathered during investigation and, if directly related to the allegations inspected and reviewed by the parties, and to the extent they are relevant, summarized in the investigative report, the hearing is the parties' first opportunity to argue 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. Id. at 30349 (internal citations omitted).

#### Non Submission to Cross-examination Cont'd

If parties do not testify about their own statement and submit to crossexamination, the decision-maker will not have the appropriate context for the statement, which is why the decision-maker cannot consider that party's statements. This provision requires a party or witness to "submit to cross-examination" to avoid exclusion of their statements; the same exclusion of statements does not apply to a party or witness's refusal to answer questions posed by the decision-maker. If a party or witness refuses to respond to a decision-maker's questions, the decision-maker is not precluded from relying on that party or witness's statements. Non Submission to Cross-examination Cont'd

This is because cross-examination (which differs from questions posed by a neutral fact-finder) constitutes a unique opportunity for parties to present a decision-maker with the party's own perspectives about evidence. This adversarial testing of credibility renders the person's statements sufficiently reliable for consideration and fair for consideration by the decision-maker, in the context of a Title IX adjudication often overseen by laypersons rather than judges and lacking comprehensive rules of evidence that otherwise might determine reliability without crossexamination.

Id. at 30349 (internal citations omitted)

<sup>925</sup> <sup>926</sup>
 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Id. at 30349 (internal citations omitted)

Non Submission to Cross-examination Cont'd

[W]here a party or witness does not appear at a live hearing or refuses to answer cross-examination questions, the decision-maker must disregard statements of that party or witness but must reach a determination without drawing any inferences about the determination regarding responsibility based on the party or witness's failure or refusal to appear or answer questions. Thus, for example, where a complainant refuses to answer crossexamination questions but video evidence exists showing the underlying incident, a decision-maker may still consider the available evidence and make a determination.

#### "Remaining Evidence"

§ 106.45(b)(6)(i) includes language that directs a decision-maker to reach the determination regarding responsibility based on the evidence remaining even if a party or witness refuses to undergo crossexamination, so that even though the refusing party's statement cannot be considered, the decision-maker may reach a determination based on the remaining evidence so long as no inference is drawn based on the party or witness's absence from the hearing or refusal to answer crossexamination (or other) questions. Thus, even if a party chooses not to appear at the hearing or answer cross-examination questions (whether out of concern about the party's position in a concurrent or potential civil lawsuit or criminal proceeding, or for any other reason), the party's mere absence from the hearing or refusal to answer questions does not affect the determination regarding responsibility in the Title IX grievance process.

<sup>927</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### "Remaining Evidence" Cont'd

[1]f the case does not depend on party's or witness's statements but rather on other evidence (e.g., video evidence that does not consist of 'statements'' or to the extent that the video contains nonstatement evidence) the decision-maker can still consider that other evidence and reach a determination, and must do so without drawing any inference about the determination based on lack of party or witness testimony. This result thus comports with the Sixth Circuit's rationale in Baum that cross-examination is most needed in cases that involve the need to evaluate credibility of parties as opposed to evaluation of non-statement evidence.

Id at 30328





[T]he final regulations expressly authorize a recipient, in the recipient's discretion, to allow any or all participants to participate in the live hearing virtually.

Id. at 30332.

[T]echnology must enable all participants to see and hear other participants, so a telephonic appearance would not be sufficient .... Id at 30348

#### 931

932

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### Technology

Decision-makers must be trained on how to use technology at their institution to run a live hearing.

- Software, hardware, programs, apps, etc. · Practice and run throughs
- · Internet connectivity checks in advance?
- · Contingency plan or statement that hearings may have to be rescheduled if the campus or a party has connectivity issues.
- · Be prepared for the live event
  - · Everyone is prepared (mentally and otherwise) for a live hearing and something impedes the process that could have been prevented.

The final regulations permit a recipient to apply temporary delays or limited extensions of time frames to all phases of a grievance process where good cause exists. For example, the need for parties, witnesses, and other hearing participants to secure transportation, or for the recipient to troubleshoot technology to facilitate a virtual hearing, may constitute good cause to postpone a hearing.

Id. at 30361-62 (emphasis added).

<sup>933</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Remember: Schools must create an audio or audiovisual recording, or transcript, of any live hearing.



## "Adversarial in Nature"



In the context of sexual harassment that process is often inescapably adversarial in nature where contested allegations of serious misconduct carry high stakes for all participants.

#### **Emergency Removal**

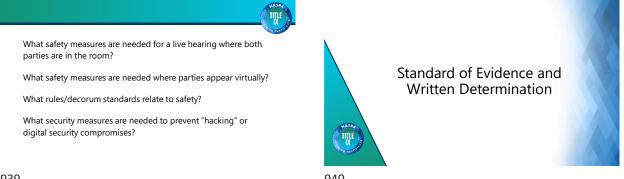
With respect for a process to remove a respondent rom a recipient's education program or activity, these final regulations provide an emergency removal process in § 106.44(c) if there is an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment. A recipient must provide a respondent with notice and an opportunity to challenge the emergency removal decision immediately following the removal.

Id. at 30183

#### 937

938

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>939</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### § 106.45(b)(7)

Requires a decision-maker who is not the same person as the Title IX Coordinator or the investigator to reach a determination regarding responsibility by applying the standard of evidence the recipient has designated in the recipient's grievance procedures for use in all formal complaints of sexual harassment (which must be either the preponderance of the evidence standard or the clear and convincing evidence standard), and the recipient must simultaneously send the parties a written determination explaining the reasons for the outcome.

Id. at 30054 (emphasis added).

#### Written Determination Regarding Responsibility me

The written determination must include-

- (A) Identification of the allegations potentially constituting sexual harassment as defined in § 106.30;
- (B) A description of the procedural steps taken from the 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;
- (C) Findings of fact supporting the determination;
- (D) Conclusions regarding the application of the recipient's code of conduct to the facts;
- (E) A statement of, and rationale 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
- (F) The recipient's procedures and permissible bases for the complainant and respondent to appeal. § 106.45(b)(7)(ii)(A-F)

## § 106.45(b)(7)(iii)

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

#### 943

§ 106.45(b)(7)(iv)

(iv) The Title IX Coordinator is responsible for effective

[The connection of supportive measures, sanctions and remedies to

implementation of any remedies.

the hearing/decision-maker.]

944 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>945</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

§ 106.45(b)(8)(i)(A-C) Bases for Appeals

(A) Procedural irregularity that affected the outcome of the matter (B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and

(C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.



# **Bias/Conflicts of Interest**

Section 106.45(b)(1)(iii) requires Title IX Coordinators, investigators decision-makers, and individuals who facilitate any informal resolution process to be free of bias or conflicts of interest for or against complainants or respondents and to be trained on how to serve impartially. Id. at 30103 (emphasis added).

**Bias/Conflict of Interest** Section 106.45(b)(1)(iii) requires Title IX Coordinators, investigators,

decision-makers, and individuals who facilitate any informal resolution process to be free of bias or conflicts of interest for or against complainants or respondents and to be trained on how to serve impartially.

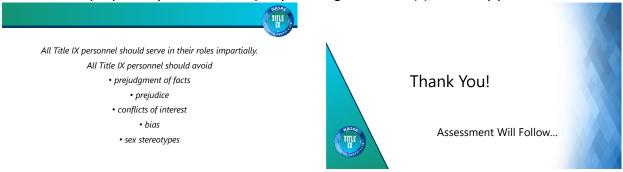
- · Personal animosity
- Illegal prejudice
- · Personal or financial stake in the outcome
- · Bias can relate to:

 Sex, race, ethnicity, sexual orientation, gender identity, disability or immigration status, financial ability or other characteristic

949

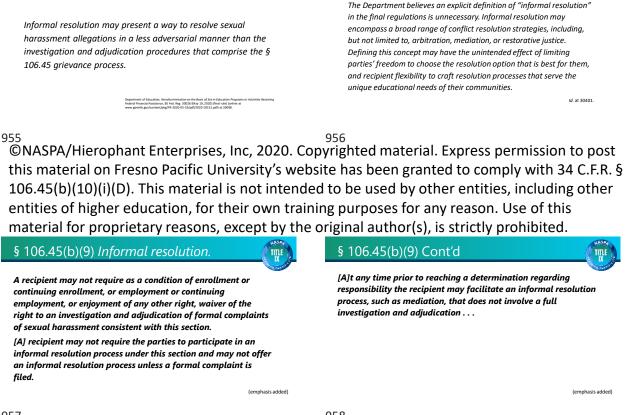
#### 950

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>951</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.





<sup>957</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### § 106.45(b)(9)(i) (Written Notice)

Parties must be provided written notice that outlines • *The allegations* 

 The requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint

 any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared

(emphasis and bullets added)

# § 106.45(b)(9)(ii-iii)

TILLE

(ii) Obtains the parties' voluntary, written consent to the informal resolution process; and

(iii) Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

(emphasis added)



Because informal resolution is only an option, and is never required, under the final regulations, the Department does not believe that § 106.45(b)(9) presents conflict with other Federal or State laws or practices concerning resolution of sexual harassment allegations through mediation or other alternative dispute resolution processes.

Id. at 30404.

#### Points on Informal Resolution

 The new regulations don't require it, but informal resolution is allowed.

TIŢĻE

- · A formal complaint must be filed before any informal resolution process can begin.
- · Both parties must voluntarily agree to informal resolution (written consent required). [No coercion or undue influence.]
- No "informed" consent standard as such, other than information required by regulations.
- Parties do not have to be in the same room...often, they are not.
- · Equitable implementation by trained personnel

961

962

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### Points on Informal Resolution What is arbitration? Should you offer it? The submission of a dispute to an unbiased third person designated by the Pros/Cons parties to the controversy, who agree in advance to comply with the award-· Increased complainant autonomy a decision to be issues after a hearing at which both parties have an opportunity to be heard. · Training of personnel is required under the new regulations Arbitration is a well-established and widely used means to end disputes · Who should implement? It is one of several kinds of Alternative Dispute Resolution which provide parties to a controversy with a choice other than litigation. Unlike litigation, arbitration takes place out of court: the two sides select an • What type of training is needed? · Mediation? Arbitration? Restorative justice? impartial third party, known as an arbitrator; agree in advance to comply with the arbitrator's award; and then participate in a hearing at which both sides When can't we use informal resolution? →When the allegation is that an employee sexually harassed a student. can present evidence and testimony. The arbitrator's decision is usually final and courts rarely reexamine it. · Does this option provide for more opportunities for "educational" Arbitration can be voluntary or required. [Except on a college campus, for interventions? Title IX purposes, informal resolution cannot be required.] · What does this look like in practice? https://legal-dictionary.thefreedictionary.com/arbitration

<sup>963</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

|     | What is mediation?   |     | What is mediation? Cont'd  |
|-----|--|-----|--|
|     | Mediation, as used in law, is a form of alternative dispute<br>resolution resolving disputes between two or more parties with<br>concrete effects. Typically, a third party, the mediator, assists the<br>parties to negotiate a settlement. Disputants may mediate disputes<br>in a variety of domains, such as commercial, legal, diplomatic,<br>workplace, community, and family matters.<br>"Neutrals"<br>Campus "Ombudsperson"? |     | Mediation is a dynamic, structured, interactive process where an<br>impartial third party assists disputing parties in resolving<br>conflict through the use of specialized communication and<br>negotiation techniques. All participants in mediation are<br>encouraged to actively participate in the process. Mediation is a<br>"party-centered" process in that it is focused primarily upon the<br>needs, rights, and interests of the parties. |
|     | https://en.wikipedia.org/wiki/Mediation  |     | https://en.wikipedia.org/wiki/Mediation  |
| 965 |  | 966 |  |

#### What is mediation? Cont'd

The mediator uses a wide variety of techniques to guide the process in a constructive direction and to help the parties find their optimal solution. A mediator is facilitative in that she/he manages the interaction between parties and facilitates open communication. Mediation is also evaluative in that the mediator analyzes issues and relevant norms ("reality-testing"), while refraining from providing prescriptive advice to the parties (e.g., "You should do ... .").

#### https://en.wikipedia.org/wiki/Mediation

https://en.wikipedia.org/wiki/Mediation

#### What is mediation? Cont'd

The term "mediation" broadly refers to any instance in which a third party helps others reach an agreement. More specifically, mediation has a structure, timetable, and dynamics that "ordinary" negotiation lacks. The process is private and confidential, possibly enforced by law. Participation is typically voluntary. The mediator acts as a neutral third party and facilitates rather than directs the process. Mediation is becoming a more peaceful and internationally accepted solution to end the conflict. Mediation can be used to resolve disputes of any magnitude.

https://en.wikipedia.org/wiki/Mediation

TITLE

967 968 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### What is mediation? Cont'd

Mediators use various techniques to open, or improve, dialogue and empathy between disputants, aiming to help the parties reach an agreement. Much depends on the mediator's skill and training. As the practice gained popularity, training programs, certifications, and licensing followed, which produced trained and professional mediators committed to the discipline.

- JAMS
- American Arbitration Association (AAA)
- American Bar Association, ADR Section
- Association for Conflict Resolution (ACR)
- · CPR Institute for Dispute Resolution
- · National Association for Community Mediation

TITLE

Mediation does not bar imposition of penalties. E.g., Rajib Chanda, Mediating University Sexual Assault Cases, 6 Harv. Negotiation L. Rev. 265, 301 (2001) (defining mediation as "a process through which two or more disputing parties negotiate a voluntary settlement with the help of a 'third party' (the mediator) who typically has no stake in the outcome" and stressing that this "does not impose a 'win-win' requirement, nor does it bar penalties. A party can 'lose' or be penalized; mediation only requires that the loss or penalty is agreed to by both parties—in a sexual assault case, 'agreements . . . may include reconciliation, restitution for the victim, rehabilitation for whoever needs it, and the acceptance of responsibility by the offender.")

Id. at 30406 n.1519 (emphasis added).

<sup>969</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

What is restorative justice? TIŢĻE τιχιε A restorative justice program aims to get offenders to take responsibility for their actions, to A 'mediation option for sexual assault victims addresses' each of the A resolution of public program annow oger unerines to take responsioning for men accords, to understand the harm they have caused, to give them an opportunity to defeem themselves and to discourage them from causing further harm. For victims, its goal is to give them an active role in the process and to reduce featings of anxiety and powerlassness. Restorative software active role in the process and to reduce featings of anxiety and powerlassness. three main reasons why sexual assault is underreported-1) 'that victims anticipate social stigmatization iustice is founded on an alternative theory to the traditional methods of iustice, which often focus on retribution. However, restorative justice programs can complement traditional 2) perceive a difficulty in prosecution, and methods. 3) consider the effect on the offender Academic assessment of restorative justice is positive. Most studies suggest it makes Academic basesainten toi feasionalery losade is bydaoline: mosa oblass suggest in inanes offenders less likely to reolfend. A 2007 study also fuer yn method of justice. Its use has seen victim satisfaction and offender accountability of any method of justice. Its use has seen worldwide growth since the 1990s. Restorative justice inspired and is part of the wider study [B]ecause mediation is not adversarial, avoids the need to "prove" charges, and gives the victim control over the range of penalties on the of restorative practices. offender, all of which likely 'encourage [victims] to report the incident.' How can it be used in Title IX/sexual misconduct? Id. at 30404 n.1517 (quoting Rajib Chanda, Mediating University Sexual Assault Cases, 6 Harv. Negotiation L. Rev. 265, 305 (2001) (numeration added). Koss MP, Wilgus JK, Williamsen KM. Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance With Title IX Guidance. Trauma Violence Abuse. 2014;15(3):242-257. doi:10.1177/1524838014521500

#### **Restorative Justice**

- Theories about its effectiveness include:
- The offender has to learn about the harm they have caused to their victim, making it hard for them to justify their behavior.
- It offers a chance to discuss moral development to offenders who may have had little of it in their life.
- Offenders are more likely to view their punishment as legitimate.
- The programs tend to avoid shaming and stigmatizing the offender.
   Many restorative justice systems, especially victim-offender mediation and family group conferencing, require participants to sign a confidentiality agreement. These agreements usually state that conference discussions will not be disclosed to nonparticipants. The rationale for confidentiality is that it promotes open and honest communication.
  - https://en.wikipedia.org/wiki/Restorative\_justice (internal citation omitted)

With respect to the implications of restorative justice and the recipient reaching a determination regarding responsibility, the Department acknowledges that generally a critical feature of restorative justice is that the respondent admits responsibility at the start of the process. However, this admission of responsibility does not necessarily mean the recipient has also reached that determination, and participation in restorative justice as a type of informal resolution must be a voluntary decision on the part of the respondent.

ld. at 30406 (emphasis added)

TITLE

<sup>973</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### Therefore, the language limiting the availability of an informal Similarly, a recipient could use a restorative justice model after resolution process only to a time period before there is a a determination of responsibility finds a respondent determination of responsibility does not prevent a recipient from responsible; nothing in the final regulations dictates the form of using the process of restorative justice under § 106.45(b)(9), and a disciplinary sanction a recipient may or must impose on a recipient has discretion under this provision to specify the respondent. circumstances under which a respondent's admission of responsibility while participating in a restorative justice Id. at 30406 (emphasis added) model would, or would not, be used in an adjudication if either party withdraws from the informal process and resumes the formal grievance process. Id at 30406 (emphasis added)

<sup>975</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



#### Confidentiality and Informal Processes

The Department appreciates the concerns raised by some commenters that the confidential nature of informal resolutions may mean that the broader educational community is unaware of the risks posed by a perpetrator; however, the final regulations impose robust disclosure requirements on recipients to ensure that parties are fully aware of the consequences of choosing informal resolution, including the records that will be maintained or that could or could not be shared, and the possibility of confidentiality requirements as a condition of entering a final agreement.

Id. at 30404 (emphasis added)

#### Confidentiality Cont'd

We believe as a fundamental principle that parties and individua recipients are in the best position to determine the conflict resolution process that works for them; for example, a recipient may determine that confidentiality restrictions promote mutually beneficial resolutions between parties and encourage complainants to report, or may determine that the benefits of keeping informal resolution outcomes confidential are outweighed by the need for the educational community to have information about the number or type of sexual harassment incidents being resolved.

Id. at 30404 (internal citation omitted)

979

980

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### Confidentiality Cont'd

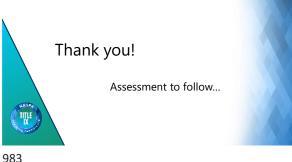
The recipient's determination about the confidentiality of informa resolutions may be influenced by the model(s) of informal resolution a recipient chooses to offer; for example, a mediation model may result in a mutually agreed upon resolution to the situation without the respondent admitting responsibility, while a restorative justice model may reach a mutual resolution that involves the respondent admitting responsibility. The final regulations permit recipients to consider such aspects of informal resolution processes and decide to offer, or not offer, such processes, but require the recipient to inform the parties of the nature and consequences of any such informal resolution processes. Id. at 30404

#### Ending an Informal Process

[A]n informal resolution process, in which the parties voluntarily participate, may end in an agreement under which the respondent agrees to a disciplinary sanction or other adverse consequence, without the recipient completing a grievance process, under § 106.45(b)(9).

Id. at 30059 n.286

<sup>981</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



# 📀 NASPA. Student Affairs Administrators in Higher Education

#### The Critical Role of the Title IX Coordinator

Peter Lake

Professor of Law Charles A Dana Chair and Director of the Center for Excellence in Higher Education Law and Policy Stetson University College of Law



This Module is Designed for:

TRACK 1 – Title IX Coordinators



§106.8(a) Designation of coordinator.

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."

Cannot be "in name only."

(emphasis added)

985

986

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

§106.8(a) Designation of Coordinator Cont'd

The recipient must notify applicants for admission and employment, students, parents or legal quardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator pursuant to this paragraph. 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 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

Restricting Access Could Not Fully Authorize If the Title IX Coordinator is located in an administrative office or building that restricts, or impliedly restricts, access only to certain students (e.g., a women's center), such a location could violate § 106.8(a) by not "authorizing" a Title IX Coordinator to comply with all the duties required of a Title IX Coordinator under these final regulations (for example, a Title IX Coordinator must intake reports and formal complaints of sexual harassment from any complainant regardless of the complainant's sex).

idance, 85 Fed. Reg. 30026 (May 19, 2020) (final rule) (online at thent/sks/FR-2020-05-19/odf/2020-10512.odf) at 30464 (empha

<sup>987</sup>©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### The Title IX Coordinator · Each institution must designate a Title IX coordinator Deputy Coordinators? We acknowledge commenters' concerns that these final regulations place many responsibilities on a Title IX Coach? Champion? Coordinator, and a recipient has discretion to designate r than one employee as a Title IX Coordinator if needed in order to fulfill the recipient's Title IX obligations. Prior Guidance on Works for ...? **Title IX Coordinators** Unlike any other job in higher ed? Evolvina? [T]he decision-maker must be a different person from the Job description? Title IX Coordinator or investig or, but the final regulations do not preclude a Title IX Coordinator from Conflicts of interest? also serving as the investigator 990

989

## Guidance from April 2015



Three items released by OCR on April 24, 2015:

- 1. Dear Colleague Letter regarding Title IX Coordinators
- 2. Letter directly to Title IX Coordinators
- 3. Title IX Resource Guide

These have not been rescinded or withdrawn as of July 20, 2020. https://www.ed.gov/news/press-releases/new-guidance-us-department-educationreminds-schools-obligation-designate-title-ix-coordinator

# April 2015 Cont'd

- · These publications were "not new guidance," however, reflected OCR enforcement experience at the time.
- · The evolution of the Title IX Coordinator position and OCR learning through voluntary compliance efforts.

991

992

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### Highlights of April 2015 Guidance

- · Institutions must designate a Title IX Coordinator! "... OCR has found that some of the most egregious and harmful Title IX violations occur when a recipient fails to designate a Title IX coordinator or when a Title IX coordinator has not been sufficiently trained or given the appropriate level of authority to oversee the recipient's compliance with Title IX." (4/24/15 DCL pg. 1.)
- · "Full Support"/"Support" mentioned several times
- "Expertise"
- · Auditor-like position, with direct contact with federal government
- · Direct communication with parents

# Highlights Cont'd · Visible position, including on webpage: · Create a webpage with complete Title IX operative info, Title IX policies and procedures, and other related resources

- "A link to this page should be prominently displayed on the recipient's homepage." (4/24/15 DCL, pg. 6.)
- "Two-click rule"
- Keep it updated → No dead links
- · Discuss reporting options, including confidential options
- · Don't forget about social media!
- Focus-group testing
- Remember, your Title IX web presence is integral to compliance

<sup>993</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### Highlights Cont'd Highlights Cont'd "No vacancy" in position · Coordinators should seek mentorship from and collaborate with other coordinators One designee "Actually serving" · No conflicts of interest "... designating a disciplinary board member, general counsel, dean of students, "Independence" superintendent, principal, or athletics director as the Title IX coordinator may pose Reporting structure a conflict of interest." (4/24/15 DCL, pg. 3.) [NOTE: Expansion of this in 2017 "... the Title IX coordinator should report directly to the recipient's guidance and new Title IX regulations.] senior leadership, such as the . . . college or university president." · Full-time is ideal, but not required (4/24/15 DCL pg. 2.) "Designating a full-time Title IX coordinator will minimize the risk of a conflict of interest and in many cases ensure sufficient time is available to perform all the role's responsibilities." (4/24/15 DCL, pg. 3.)

# Highlights Cont'd



#### Authority → "Formal and informal

- · Multiple coordinators are okay, but one "lead" with "ultimate oversight"
- "Training"/"Time"
- · Only rare person doesn't need training
- "In most cases, the recipient will need to provide an employee with training to act as its Title IX coordinator. The training should explain the different facets of Title IX, including regulatory provisions, applicable OCR quidance, and the recipient's Title IX policies and grievance procedures." (4/24/15 DCL, pg. 6.)

# Highlights Cont'd

- Title IX does not specify who should determine the outcome of Title IX complaints . . . The Title IX coordinator could play this role, provided there are no conflicts of interest, but does not have to. (4/24/15 DCL pg. 4.)
  - This is not allowed under the new regulations!
- · Assist in the development of an annual climate survey and coordinate data collection and analysis (survey is not mandated)
- · Should be involved in drafting/revising policy and procedures related to Title IX
  - · Readable and age-appropriate language
  - Understandable by students with disabilities and English language learners

#### 997

998 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### Highlights Cont'd **Highlights Cont'd** · Involved in prevention efforts · Assist in the development of an annual climate survey and coordinate data Title IX team is broader than the Title IX Coordinator collection and analysis (survey is not mandated, but suggested) "Access" to departmental records → Enrollment, athletics, discipline [T]he Title IX coordinator should work closely with many different members of the school community, such as administrators, counselors, athletic directors, non harassment professional counselors or advocates, and legal counsel. Although these employees · A comprehensive job: Recruitment/ admissions, counseling, financial may not be formally designated as Title IX coordinators, the Title IX coordinator assistance, athletics and athletic financial assistance, programmatic equity, pregnant and parenting student services, discipline, single-sex ed, may need to work with them because their job responsibilities relate to the employment, retaliation and harassment issues recipient's obligations under Title IX. (April 2015 Title IX Resource Guide, pg. 3.) Employment Fostering communication on the team . . . employment actions such as recruitment, hiring, promotion, compensation, grants of leave, and benefits." (April 2015 Title IX Resource Guide, pg. 23.)

<sup>999</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.





#### 1003

1004

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Supportive Measures Cont'd Supportive Measures Cont'd Complainants will know about the possible supportive measures available to them and will have the opportunity to express what they The Title IX Coordinator must promptly contact the would like in the form of supportive measures, and the Title IX complainant to discuss the availability of supportive Coordinator will take into account the complainant's wishes in measures . . . determining which supportive measures to offer. The final regulations do prescribe that a recipient's Title IX Coordinator Id. at 30087 (emphasis added) must remain responsible for coordinating the effective implementation of supportive measures, so that the burden of arranging and enforcing the supportive measures in a given circumstance remains on the recipient, not on any party. ld. at 30183 (emphasis added

<sup>1005</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### Supportive Measures Cont'd Supportive Measures Cont'd [T]he Title IX Coordinator must serve as the point of contact for the affected [I]f a recipient does not provide a complainant with supportive students to ensure that the supportive measures are effectively implemented so measures, then the recipient must document why such a response was that the burden of navigating paperwork or other administrative requirements not clearly unreasonable in light of the known circumstances. within the recipient's own system does not fall on the student receiving the Id. at 30219 supportive measures. The Department recognizes that beyond coordinating and serving as the student's point of contact, the Title IX Coordinator will often rely on other campus offices to actually provide the supportive measures sought, and the Department encourages recipients to consider the variety of ways in which the recipient can best serve the affected student(s) through coordination with other offices while ensuring that the burden of effectively implementing supportive measures remains on the Title IX Coordinator and not on students. Id. at 30183 (emphasis added).

#### Supportive Measures Cont'd

These final regulations do not expressly require a recipient to continue providing supportive measures upon a finding of non-responsibility, and the Department declines to require recipients to lift, remove, or cease supportive measures for complainants or respondents upon a finding of non-responsibility. Recipients retain discretion as to whether to continue supportive measures after a determination of non-responsibility.

Id. at 30183 (emphasis added)

#### 1009

#### Title IX Coordinator/Gatekeeping

Title IX Coordinators have always had to consider whether a report satisfies the criteria in the recipient's policy, and these final regulations are not creating new obstacles in that regard. The criteria that the Title IX Coordinator must consider are statutory criteria under Title IX or criteria under case law interpreting Title IX's non-discrimination mandate with respect to discrimination on the basis of sex in the recipient's education program or activity against a person in the United States, tailored for administrative enforcement. Additionally, these final regulations do not preclude action under another provision of the recipient's code of conduct, as clearly stated in revised § 106.45(b)(3)(i), if the conduct alleged does not meet the definition of Title IX sexual harassment. Id. at 30090 (internal citation omitted, emphasis added).

1010 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

TIŢĻE

Assisting in Filing a Formal Complaint

Nothing in these final regulations precludes a Title IX Coordinator from assisting a complainant (or parent) from filling out a document intended to serve as a formal complaint; however, a Title IX Coordinator must take care not to offer such assistance to pressure the complainant (or parent) to file a formal complaint as opposed to simply assisting the complainant (or parent) administratively to carry out the complainant's (or parent's) desired intent to file a formal complaint. No person may intimidate, threaten, or coerce any person for the purpose of interfering with a person's rights under Title IX, which includes the right not to participate in a grievance process.

#### Decision-Maker with Regards to Moving Forward Against the Wishes of the Complainant [T]he decision to initiate a grievance process in situations where the complete does not want an investigation or where the complainant intends not to participate should be made thoughtfully and intentionally, taking into account the circumstances of the situation including the reasons why the complainant wants or does not want the recipient to investigate. The Title IX Coordinator is trained with special responsibilities that involve interacting with complainants, making the Title IX Coordinator the appropriate person to decide to initiate a grievance process on behalf of the recipient. Other school administrators may report sexual harassment incidents to the Title IX Coordinator, and may express to the Title IX Coordinator reasons why the administrator believes that an investigation is warranted, but the decision to initiate a grievance process is one that the Title IX Coordinator must

Id. at 30134 (emphasis added)

<sup>1011</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

TIŢĻE

make.

#### Signatory of a Formal Complaint

The Department does not view a Title IX's Coordinator decision to sign a formal complaint as being adverse to the respondent. A Title IX Coordinator's decision to sign a formal complaint is made on behalf of the recipient (for instance, as part of the recipient's obligation not to be deliberately indifferent to known allegations of sexual harassment), not in support of the complainant or in opposition to the respondent or as an indication of whether the allegations are credible, have merit, or whether there is evidence sufficient to determine responsibility.

Id. at 30134 (emphasis added)

#### Signatory of a Formal Complaint Cont'd

[W]hen the Title IX Coordinator signs a formal complaint, the Title IX Coordinator does not become a complainant, or otherwise a party, to a grievance process, and must still serve free from bias or conflict of interest for or against any party.

In order to ensure that a recipient has discretion to investigate and adjudicate allegations of sexual harassment even without the participation of a complainant, in situations where a grievance process is warranted, the final reaulations leave that decision in the discretion of the recipient's Title IX Coordinator.

Id. at 30134 (emphasis added)

# Signatory of a Formal Complaint Cont'd

However, deciding that allegations warrant an investigation does not necessarily show bias or prejudgment of the facts for or against the complainant or respondent. The definition of conduct that could constitute sexual harassment, and the conditions necessitating a recipient's response to sexual harassment allegations, are sufficiently clear that a Title IX Coordinator may determine that a fair, impartial investigation is objectively warranted as part of a recipient's non-deliberately indifferent response, without prejudging whether alleged facts are true or not. . . . the Title IX Coordinator does not lose impartiality solely due to signing a formal complaint on the recipient's behalf.

Id. at 30134-35 (internal citations omitted, emphasis added)

#### 1015

# Signatory of a Formal Complaint Cont'd

The final regulations give the Title IX Coordinator discretion to sign a formal complaint, and the Title IX Coordinator may take circumstances into account such as whether a complainant's allegations involved violence, use of weapons, or similar factors. . . . in some situations, the Title IX Coordinator may believe that signing a formal complaint is not in the best interest of the complainant and is not otherwise necessary for the recipient to respond in a non-deliberately indifferent manner.

Id. at 30217-18 (emphasis added).

#### 1016

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

TIŢĻE

Dismissal/Consolidation of Complaints

- How and when are Title IX coordinators required or able to dismiss complaints?
- Mandatory Dismissal
- Discretionary Dismissal
- How and when are Title IX coordinators able to consolidate complaints?
- · Is this a point of flexibility/choice?

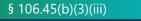
| § 106.45(b)(3)(i)  |  |
|--|--|
| (3) Dismissal of a formal complaint—   |  |
| (i) The recipient must investigate the allegations in a formal complaint.<br>If the conduct alleged in the formal complaint would not          |  |
| constitute sexual harassment as defined in § 106.30 even if proved,<br>did not occur in the recipient's education program or activity, or      |  |
| did not occur against a person in the United States, then <u>the</u><br><u>recipient must dismiss the formal complaint with regard to that</u> |  |
| conduct for purposes of sexual harassment under title IX or this   |  |

part; such a dismissal does not preclude action under another provision of the recipient's code of conduct.

<sup>1017</sup>©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### § 106.45(b)(3)(ii)

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





(iii) Upon a dismissal required or permitted pursuant to paragraph (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)(4)

(4) Consolidation of formal complaints. A recipient may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances. Where a grievance process involves more than one complainant or more than one respondent, references in this

section to the singular "party," "complainant," or "respondent" include the plural, as applicable.

#### Witness

Even where the Title IX Coordinator testifies as a witness, the Title IX Coordinator is still expected to serve impartially without prejudgment of the facts at issue.

Id. at 30336 (emphasis added)

#### 1022

1021 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Recommendations to a Decision-Maker?

Nothing in the final regulations prevents Title IX Coordinators from offering recommendations regarding responsibility to the decisionmaker for consideration, but the final regulations require the ultimate determination regarding responsibility to be reached by an individual (i.e., the decision-maker) who did not participate in the case as an investigator or Title IX Coordinator.

Id. at 30372.

#### Remedies The final regulations revise § 106.45(b)(7)(iv) to state that the Title IX Coordinator is responsible for effective implementation of remedies, thereby indicating that where a written determination states that the recipient will provide remedies to a complainant, the complainant can then communicate separately with the Title IX Coordinator to

<sup>1023</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### **Coordination Function/Point Person**

- · Assigns investigator(s) (if multiple options are available)
- · Assigns decision-maker(s) (if multiple options are available)
- · Implements and manages supportive measures
- · Implements and manages remedies
- · Delegation of tasks

#### Delegation of Tasks

discuss the nature of such remedies.

Nothing in the final regulations restricts the tasks that a Title IX Coordinator may delegate to other personnel, but the recipient itself is responsible for ensuring that the recipient's obligations are met, including the responsibilities specifically imposed on the recipient's Title IX Coordinator under these final regulations, and the Department will hold the recipient responsible for meeting all obligations under these final regulations.

Id. at 30463 (emphasis add

Id. at 30520 (emphasis added)

# Bias/Conflicts of Interest/Prejudice

Every Title IX Coordinator must be free from conflicts of interest and bias and, under revised § 106.45(b)(1)(iii), trained in how to serve impartially and avoid prejudgment of the facts at issue. No recipient is permitted to ignore a sexual harassment report, regardless of the identity of the person alleged to have been victimized, and whether or not a school administrator might be inclined to apply harmful stereotypes against believing complainants generally or based on the complainant's personal characteristics or identity.

Id. at 30083 (emphasis added)

TIŢĻE

#### 1027

#### outside, unaffiliated Title IX personnel because the Department does not conclude that such prescription is necessary to effectuate the purposes of the

Bias/Conflicts of Interest/Prejudice Cont'd

The Department understands commenters' concerns that the final

regulations work within a framework where a recipient's own employees

are permitted to serve as Title IX personnel, and the potential conflicts of

final regulations; although recipients may face challenges with respect to

ensuring that personnel serve free from conflicts of interest and bias,

recipients can comply with the final regulations by using the recipient's

interest this creates.... The Department declines to require recipients to use

Id. at 30251-52 (emphasis added, internal citation omitted).

1028

own employees.

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Bias/Conflicts of Interest/Prejudice Cont'd TITLE

[T]he Department's authority under Title IX extends to regulation of recipients themselves, and not to the individual personnel serving as Title IX Coordinators, investigators, decision-makers, or persons who facilitate an informal resolution process. Thus, the Department will hold a recipient accountable for the end result of using Title IX personnel free from conflicts of interest and bias, regardless of the employment or supervisory relationships among various Title IX personnel. To the extent that recipients wish to adopt best practices to better ensure that conflicts of interest do not cause violations of the final regulations, recipients have discretion to adopt practices suggested by commenters, such as ensuring that investigators have institutional independence or decidina that Title IX Coordinators should have no role in the hiring or firing of investigators. Id. at 30252.

Bias/Conflicts of Interest/Prejudice Cont'd

[T]he Department declines to state whether particular professional experiences or affiliations do or do not constitute per se violations of § 106.45(b)(1)(iii). The Department acknowledges the concerns expressed both by commenters concerned that certain professional qualifications (e.g., a history of working in the field of sexual violence) may indicate bias, and by commenters concerned that excluding certain professionals out of fear of bias would improperly exclude experienced, knowledgeable individuals who are capable of serving impartially.

Id. at 30252 (emphasis added)

<sup>1029</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

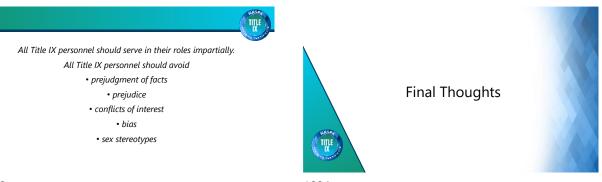
#### Bias/Conflicts of Interest/Prejudice Cont'd

Whether bias exists requires examination of the particular facts of a situation and the Department encourages recipients to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particula person serving in a Title IX role is biased, exercising caution not to apply 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), bearing in mind that the very 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 Id. at 30252 (emphasis added)

#### Bias/Conflicts of Interest/Prejudice Cont'd

The Department cautions parties and recipients from concluding bias, or possible bias, based solely on the outcomes of grievance processes decided under the final regulations; for example, the mere fact that a certain number of outcomes result in determinations of responsibility, or nonresponsibility, does not necessarily indicate or imply bias on the part of Title IX personnel.

Id. at 30252 (emphasis added).



1033

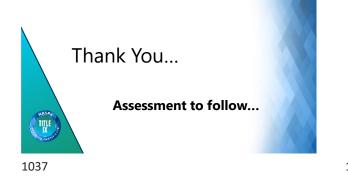
1034 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Final Thoughts for Title IX Coordinators...

- · Know when to ask for legal assistance.
- · Reach out to colleagues at other institutions.
- Orchestrating and planning are big parts of the job.
- · Ensure supportive measures and remedies are effectively administered.
- · Seek continuing training and educational opportunities.

- Final Thoughts for Title IX Coordinators
  - · You are the lynchpin for Title IX compliance for your institution.
  - You are the expert on your campus for Title IX compliance.
  - · You can help to ensure Title IX procedures are free from bias and conflicts of interest.
  - · You are essential in fulfilling the mission of Title IX-to reduce or eliminate barriers to educational opportunities created by sex discrimination!

<sup>1035</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.





📀 NASPA.

and FERPA Melissa M. Carleton

Bricker & Eckler LLP

#### This Module is Designed for:



TRACK 1 – Title IX Coordinators TRACK 2 – Title IX Decision-Makers and Student **Conduct Administrators** TRACK 3 - Title IX Investigators

#### Agenda · What laws protect confidentiality in Title IX cases? FERPA Clery Act • HIPAA? Title IX itself State laws • What information must the Title IX office maintain? · What information is available to the public?

#### 1039

1040

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>1041</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### **Educational Records?** Personally Identifiable Information Yes: • No: Includes: · "Records that are directly Personal notes, 34 C.F.R. 99.3 Student's name related to a student and • Employee records, 34 C.F.R. 99.3 · Name of the student's parents and other family members maintained by an educational · Law enforcement records, 34 · Address of the student or the student's family agency or a party acting for C.F.R. 99.3 · Social security numbers that agency" 34 C.F.R. 99.3 · Grades on peer-graded papers, Student ID numbers Disciplinary records before they are collected and Biometric records (fingerprints, retina scans) · Handwriting, print, computer recorded by a teacher (Sup. Ct., · Student's date of birth, place of birth, and mother's maiden name media, video tape, audio tape, 2002) film, microfilm, microfiche • Treatment records, 34 C.F.R. 99.3 EMAILS Alumni records, 34 C.F.R. 99.3

1044

#### Personally Identifiable Information



#### • ALSO Includes:

 Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; and

 Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

#### 1045

#### 1046

Access:

without copies

Who May Access Records?

 Students who are 18 years of age or are attending an institution of postsecondary education ("eligible students")

must be permitted to access their education records.

· Does not mean that they get copies, unless circumstances would

effectively prevent the eligible student from exercising their rights

· Means the opportunity inspect/review records

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### But Wait – What About Parents?

- Parents of Eligible Students may access information:
   With consent of the eligible student
  - If your institution permits the release of information to parents of tax dependent students, and it notifies those students of this in its annual FERPA notice
  - If the student is under the age of 21 and the student has violated a law, rule, or policy governing the use or possession of alcohol or a controlled substance and the institution has determined that the student has committed a disciplinary violation with respect to that use or possession, 34 C.F.R. 99.31(a)(15)
  - If another exception is met to disclose without consent of the student
- Access for School Officials • "School officials" may access student records if the school determines that they have a legitimate educational interest in such records. 34 C.F.R. 99.31(a)(1)(i)(A). • "School officials" should be defined in your policy and annual FERPA notice. • Contractors, consultants, and even volunteers may be "school officials" in some situations.
  - Use "reasonable methods" to ensure that educational records are not accessed by school officials that do not have a legitimate educational interest in them.
  - Be cautious in your sharing of information only with those who "need to know" and telling them what they need to know.

# <sup>1047</sup>©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### Access by Consent

- Other individuals may access educational records with a signed and dated written consent from the eligible student.
- The written consent must:
  - Specify the records that may be disclosed;
  - State the purpose of the disclosure; and
  - Identify the party or class of parties to whom the disclosure may be made. 34 C.F.R. 99.30.

#### Exceptions – Disclosure without Consent

- Directory Information
- Health or Safety Emergency
- Post-Secondary Disclosure to Victim of Certain Violent/Sexual Crimes
- Post-Secondary Disclosure of Final Disciplinary Result, Certain Violent/Sexual Crimes
- Disclosure of Sanctions Relating to Harassed Student
- Student's New School
- Completely De-Identified/Redacted Records
- Judicial Order/Subpoena
- Government Audit/Investigation



this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Health or Safety Emergency

- Schools may disclose information to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or others. 34 C.F.R. 99.36(a).
- · Look to the "totality of the circumstances" to determine whether there is an "articulable and significant threat" before disclosing information without consent. 34 C.F.R. 99.36(c). · Such threat must be recorded in the access log. 34 C.F.R. 99.36(c).

#### Health or Safety Emergency

· Comments to the FERPA regulations state there must be an "actual, impending, or imminent emergency" or a situation where warning signs lead school officials to believe that the student "may harm himself or others at any moment." However, an emergency does not mean a threat of a possible emergency for which the likelihood of occurrence is unknown. 73 FR 74838 (Dec. 9, 2008)

# <sup>1053</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this

material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### Disclosure to Crime Victims

- · Disclosures may be made to the victim of an alleged perpetrator of a crime of violence or a non-forcible sex offense
  - · Crime of violence includes forcible sex offenses (rape, sodomy, sexual assault with an object, fondling). See 34 C.F.R. 99.39.
- · The disclosure may only include the final results of the disciplinary proceeding with respect to that alleged crime or offense. Final results include:
  - Name of the student
  - · Violation committed (code section and essential findings to support violation)
  - · Sanction imposed, date of imposition, and duration
- · Disclosure may occur regardless of whether violation was found to have been committed.

#### Disciplinary Results to Public

- · Institutions of postsecondary education may disclose final disciplinary results if:
  - · A student is an alleged perpetrator of a crime of violence or nonforcible sex offence (see 34 C.F.R. 99.39) and
  - · With respect to the allegation, the student has committed a violation of the institution's rules or policies.
- . The student may not disclose the name of any other student, including a victim or witness, without prior written consent of the other student.
- See 34 C.F.R. 99.31(a)(14); 34 C.F.R. 99.39

#### Sanctions to Harassed Student

- "The Department has long viewed FERPA as permitting a school to ... the harassed student ... information about the sanction imposed upon a student who was found to have engaged in harassment when that sanction directly relates to the harassed student."
  - · February 9, 2015 Letter to Loren W. Soukup (relies on January 2001
  - OCR Guidance re: Sexual Harassment in Schools)
  - Available online at http://ow.ly/QLOX303yUre

#### **Records to New School**

· Records can be disclosed to officials of another school where the student seeks to enroll, intends to enroll, or has enrolled, so long as the disclosure is for purposes related to the student's enrollment or transfer. 34 C.F.R. 99.31(A)(2).

TIŢĻE

- · Prior to disclosure, the previous school must attempt to notify the eligible student of the disclosure, unless the annual notice states that such disclosures may be made without notice. 34 C.F.R. 99.34(a)
- · If such a disclosure is made, the eligible student may request a receive a copy of the record that was disclosed, and also a hearing. 34 C.F.R. 99.34(a)(2) and (3).

#### 1057

1058

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

TIŢĻE

#### De-Identified/Redacted Records

- Records may be released if all personally-identifiable information has been redacted, as long as the school/college has made a reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information. See October 19, 2004 Letter to Robin Parker, available online at:
- http://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/unofmiami.html -- "If, because of other records that have been released, the redaction of names, identification numbers, and dates and times of incidents is not sufficient to prevent the identification of a student involved in a disciplinary proceeding including, but not limited to, student victims and student witnesses, then FERPA prohibits the University from having a policy or practice of releasing the information as such. The University either must remove or redact all of the information in the education record that would make a student's identity easily traceable or refuse to release the requested education record at all

# Judicial Order/Subpoena

- Institution must disclose to comply with a judicial order or lawfully issued subpoena
  - · Must make a reasonable effort to notify the eligible student before disclosure so that they can seek protective action against the order or subpoena (i.e. a "motion to quash")
  - · The rules about notifying the student are different if the court order or subpoena requires secrecy (e.g. due to terroristic threats)
  - See 34 C.E.R. 99.31(a)(9)

<sup>1059</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### Government Audit/Investigation

· FERPA does not prohibit disclosure in the following cases:

- Government officials for audit purposes See 34 C.F.R. § 99.35
- Educational research studies See 34 C.F.R. § 99.31(a)(6)
- Accrediting agencies for purposes of carrying out accrediting functions - 34 C.F.R. § 99.31

#### What does Title IX say about FERPA?

· "The obligation to comply with [the Title IX regulations] is not obviated or alleviated by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99." • 34 C.F.R. 106.6(f)

#### **Clery Act**

- · In cases involving sexual assault, dating violence, domestic violence, and stalking, you must provide victims with information about how you will protect their confidentiality and how you will complete publicly available recordkeeping (like your Clery crime log) without inclusion of personally identifying information about the victim.
- · Be careful of names, locations, contact information, identifying information
- · Like FERPA, you can release information if the release is compelled by statute or court order and you take reasonable steps to notify the victim of the disclosure.
- See 34 C.F.R. 668.46(b)(11)(iii) for more details.

# Clery Act

- · In cases involving sexual assault, dating violence, domestic violence, and stalking, the institution must share with both parties:
  - · The result of any institutional disciplinary proceeding, including any initial, interim, and final decision by the institution, as well as the rationale for the result and the sanctions
  - · The institution's procedures for appeal, if such procedures are available
  - Any change to the result and
  - · When such results become fina
- · Any information that will be used during informal and formal disciplinary meetings and hearings
- · Compliance with the above does not constitute a violation of FERPA per 34 C.F.R. 668.46(I).

#### 1063

1064 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

TIŢĻE

| PAA?   | Title IX and Confidentiality  |  |
|--|---|--|
| HIPAA protects certain treatment records that may be held by your institution's health/counseling center or hospital.  | Section 106.71(a) requires recipients to keep confidential the identity of any individual who has made a report or complaint of se  |  |
| Generally, when a party provides written consent for<br>treatment records to be used in Title IX proceedings, they<br>become education records subject to FERPA, not HIPAA                                       | discrimination, including any individual who has made a report of<br>filed a formal complaint of sexual harassment, any complainant, a<br>individual who has been reported to be the perpetrator of sex   |  |
| <ul> <li>See Joint Guidance on the Application of FERPA and HIPAA<br/>to Student Health Records, U.S. Department of Education<br/>and U.S. Department of Health and Human Services,<br/>December 2019</li> </ul> | discrimination, any respondent, and any witness (unless permitted<br>by FERPA, or required under law, or as necessary to conduct<br>proceedings under Title IX), and § 106.71(b) states that exercise of<br>rights protected by the First Amendment is not retaliation. |  |
|  | Final regulations at 30071.   |  |

<sup>1065</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### Title IX and Confidentiality

Section 106.30 defining "supportive measures" instructs recipients to keep confidential the provision of supportive measures except as necessary to provide the supportive measures. These provisions are intended to protect the confidentiality of complainants, respondents, and witnesses during a Title IX process, subject to the recipient's ability to meet its Title IX obligations consistent with constitutional protections.

Final regulations at 30071

#### "Gag Orders" Not Permitted, But...

... abuses of a party's ability to discuss the allegations can be addressed through tort law and retaliation prohibitions. [§106.45(b)(5)(iii)] applies only to discussion of "the allegations

under investigation," which means that where a complainant reports sexual harassment but no formal complaint is filed, § 106.45(b)(5)(iii) does not apply, leaving recipients discretion to impose non-disclosure or confidentiality requirements on complainants and respondents.

Final regulations at 30296

#### Non-Disclosure Agreements?

Recipients may require parties and advisors to refrain from disseminating the evidence (for instance, by requiring parties and advisors to sign a non-disclosure agreement that permits review and use of the evidence only for purposes of the Title IX grievance process), thus providing recipients with discretion as to how to provide evidence to the parties that directly relates to the allegations raised in the formal complaint.

Final Regulations at 30304.

TIŢĻE

#### State Laws

· Privacy laws vary from state to state but may include causes of action such as:

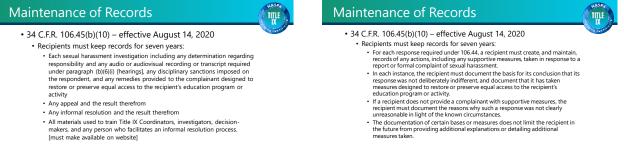
TITLE

- "Right of privacy"
- "False light invasion of privacy"
- Defamation
- · Protections for employee personnel files
- · Consult with legal counsel for additional restrictions that may apply regarding release of records and information in vour state

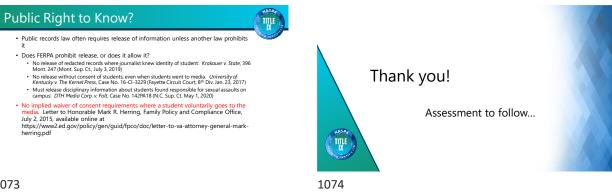
#### 1069

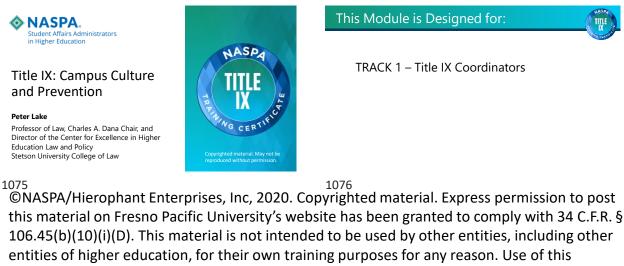
1070

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>1071</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.





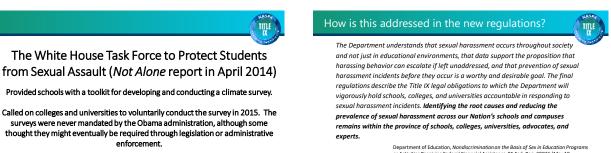
material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>1077</sup>©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Yale Resolution Agreement Yale Assessed... 1. The community's current understanding of Yale's policies, Yale ... will conduct periodic assessments (at least annually) of campus climate procedures, and resources relating to sexual misconduct; with regard to gender discrimination, sexual misconduct and Title IX, seeking 2. Community members' impressions of the sexual climate in their own input from students and student groups, including women's groups, as well as a wide variety of other sources. schools/departments and the University more generally; 3. Whether and how individuals feel they can influence the day-to-day The University will consider such assessments in identifying future actions to climate in which they study, work, and live; ensure that it maintains an environment that is safe and supportive to all 4. What additional actions the University should take to address and students and in compliance with Title IX. prevent sexual misconduct. Yale University, Report of the 2012-13 Campus Sexual Climate Assessment, May 15, 2013, pc. 5. US Dept. of Ed., Office for Civil Rights, Yale University Voluntary Resolution Agreement, June 11, 2012, pg. 5

1080



Department of Education, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026 (May 19, 2020(final rule) (online at https://www.govinfo.agv/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf) at 30070 (emphasis added).

#### 1081

1082 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

**Guiding Principles** For Addressing Campus Culture and **Climate for Title IX Purposes** 

enforcement.

Guiding Principle #1: Education

<sup>1083</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### Education Education Education is the great hope in overcoming What we need in the United States is not violence or lawlessness; but love and wisdom, and compassion violence. toward one another, and a feeling of justice toward RFK discussed the challenges of the "mindless menace of violence." those who still suffer within our country ... Robert F. Kennedy, Cleveland, Ohio, 1968 Robert F. Kennedy, Indianapolis, Indiana, 1968

## Education

gender studies, etc.)

classroom: "the classroom exception"



Department of Education, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026 (May 19, 2020)(final rule) (online at <u>https://www.govind.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf</u>) at 30125-26 (emphasis added).

information to students.

· New regulations may help to identify "capital" offenses and stress the importance of fairness in all equal opportunity work-and the damaging impacts of bias

· Use informal resolution as an opportunity for education if appropriate; conflict resolution skill development

Utilize academic departments focused on related issues: (Health studies)

· New regulations allow us to address "trigger" and other issues in the

other forms of sexual harassment in light of the three-part definition

Identify core educational challenges and opportunities.

### 1087

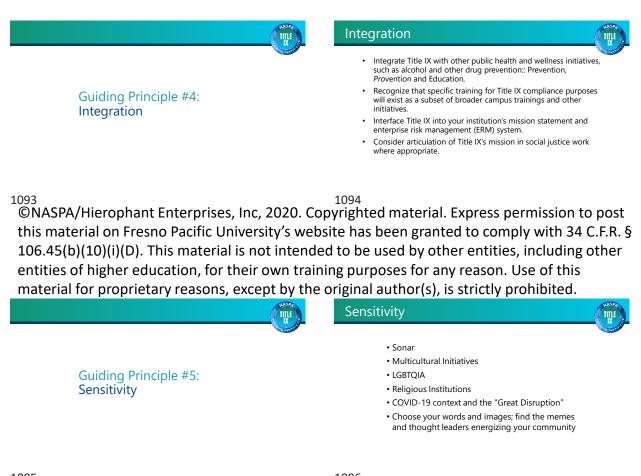
1088

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>1089</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

|   | The Title IX System Itself  |
|---|---|
|   | <ul> <li>Make your Title IX efforts known to the community</li> <li>Promote the positive work you are doing to keep your community free from<br/>discrimination. What are the most positive features of the new regulations? How will<br/>you articulate that?</li> </ul> |
| Guiding Principle #3:<br>The Title IX System Itself | <ul> <li>Look to schools that have been through an investigation, for clues<br/>(especially investigations occurring after the new regulations are effective)</li> <li>Utilize the wisdom and experience of campus constituencies to help</li> </ul>                      |
|   | assess systems<br>• Title IX promotes fairness and has other objectives.  |
|   | Effective response to Title IX incidents helps to foster a healthy culture!   |
|   | <ul> <li>Title IX personnel must serve impartially, free from bias, sex stereotyping,<br/>prejudgment, prejudice, etc. This is essential for trust in the Title IX grievance<br/>process!</li> </ul>  |
| 1091  | 1092  |

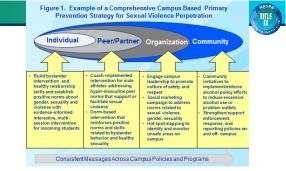


<sup>1095</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

|                                     | Prevention   |
|-------------------------------------|--|
| Guiding Principle #6:<br>Prevention | <ul> <li>AODV preventionand provention</li> <li>Social norming on violence</li> <li>Bystander prevention programs</li> <li>Enlist <u>everyone</u> in prevention efforts</li> </ul> |

#### Prevention

- Use <u>evidence-based</u> strategies –Centers for Disease Control and Prevention, Division of Violence Prevention, *Preventing Sexual Violence on College Campuses: Lessons from Research and Practice* (April 2014)
- Use a <u>comprehensive</u> strategy —Consider the following model from the CDC, Preventing Sexual Violence on College Campuses: Lessons from Research and Practice (April 2014)



#### 1099

1100

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

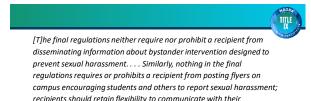
TIŢĻE



©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

The Department shares commenters' beliefs that measures preventing sexual harassment from occurring in the first place are beneficial and desirable.

> Department of Education, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026 (May 19, 2020) (final nuel) (online at https://www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf) at 30126.



campus encouraging students and others to report sexual harassment recipients should retain flexibility to communicate with their educational community regarding the importance of reporting sexual harassment.

Id. at 30471.



Id. at 30190.

The Department declines to . . . add a requirement of educational outreach and prevention programming elsewhere within the final regulations. The Department notes that nothing in the final regulations prevents recipients from undertaking such efforts. . . . With respect to a general requirement that recipients provide prevention and community education programming, the final regulations are focused on governing a recipient's response to sexual harassment incidents, leaving additional education and prevention efforts within a recipient's discretion.

## **Final Thoughts**

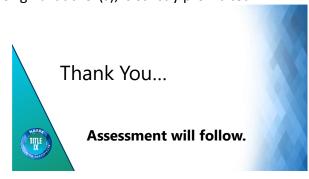
- · Flexibility to do prevention work does not mean do nothing!
- · Remember to combat bias, sex stereotypes, prejudice and prejudgement in campus Title IX efforts: the values of a well-run Title IX system are important for a community.
- Encourage constructive dialogue about Title IX compliance efforts.
- · Celebrate efficacy where it exists.
- · Remember the mission of Title IX.

## 1105

1106 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Enacted by Congress, Title IX seeks to reduce or eliminate barriers to educational opportunity caused by sex discrimination in institutions that receive federal funding.

This is the mission of Title IX!



<sup>1107</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



## What we hope to accomplish..



- Updates and Highlight of Select Issues (~30 minutes)
- Tabletop Exercises in Breakout Groups (40 minutes)
- Discuss Tabletop Exercises in the Larger Group (~20 minutes)
- Open time for Questions (~30 minutes)
  - Please send questions in a message directly to Jake Sapp.
  - We will not read your name.

1111

- This session is being recorded.
  - · However, discussion in your breakout session will not be recorded.

Definitive Answers vs. Choice Points

## 1112

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>1113</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

## Watch YouTube for Videos from OCR

Conducting and Adjudicating Title IX Hearings: An OCR Training Webinar (July 23, 2020)

OCR Webinar on Due Process Protections under the New Title IX Regulations (July 21, 2020)

OCR Webinar on New Title IX Protections Against Sexual Assault (July 7, 2020)

OCR Webinar: Title IX Regulations Addressing Sexual Harassment (May 8, 2020)



## 106.44(a)



The Title IX Coordinator must:

- 1) Promptly contact the complainant to discuss the availability of supportive measures
- 2) Consider the complainant's wishes with respect to supportive measures.
- 3) Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint,
- 4) Explain to the complainant the process for filing a formal complaint.

Responses in Regards to a Respondent Where There Is No Formal Complaint

§ 106.44(a) specifies that the recipient's response must treat complainants and respondents equitably, meaning that for a complainant, the recipient must offer supportive measures, and for a respondent, the recipient must follow a grievance process that complies with § 106.45 before imposing disciplinary sanctions.

#### https://www.federalregister.gov/d/2020-10512/p-573

1117 1118 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>1119</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

## 106.44(b) + 106.45

1) Fulfill the 106.44(a) mandatory response 2) Issue Notice of Allegations 3) Gatekeeping

| Written Notification to Parties <b><u>BEFORE</u></b> Any Initial Interview with the Respondent | HASPA<br>TITLE<br>IX |
|--|----------------------|
| Notice of the school's grievance process   |                      |
| <ul> <li>The opportunity, if any, to engage in an informal resolution process</li> </ul>       |                      |

#### · Key details of the alleged sexual harassment

- · Who was involved in the incident
- · Date and time of the incident, if known Location, if known
- · The alleged misconduct that constitutes sexual harassment
- · A statement that the respondent is presumed not responsible at the outset of the
- process and can only be found responsible after the grievance concludes
- · A statement that the parties are entitled to an advisor of their choice
- · A statement that the parties can request to inspect and review certain evidence
- · Any conduct rules, if they exist, that prohibit providing knowingly false information r statements during the grievance process Notice should be provided to allow the respondent

enough time to prepare before the initial interview.



Special Issues Highlight #3 Gatekeeping and Dismissal and Consolidation of Formal Complaints

1123

## Title IX Coordinator/Gatekeeping

Title IX Coordinators have always had to consider whether a report satisfies the criteria in the recipient's policy, and these final regulations are not creating new obstacles in that regard. The criteria that the Title IX Coordinator must consider are statutory criteria under Title IX or criteria under case law interpreting Title IX's non-discrimination mandate with respect to discrimination on the basis of sex in the recipient's education program or activity against a person in the United States, tailored for administrative enforcement. Additionally, these final regulations do not preclude action under another provision of the recipient's code of conduct, as clearly stated in revised § 106.45(b)(3)(i), if the conduct alleged does not meet the definition of Title IX sexual harassment. Id. at 30090 (internal citation omitted, emphasis added).

1124

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Assisting in Filing a Formal Complaint

Nothing in these final regulations precludes a Title IX Coordinator from assisting a complainant (or parent) from filling out a document intended to serve as a formal complaint; however, a Title IX Coordinator must take care not to offer such assistance to pressure the complainant (or parent) to file a formal complaint as opposed to simply assisting the complainant (or parent) administratively to carry out the complainant's (or parent's) desired intent to file a formal complaint. No person may intimidate, threaten, or coerce any person for the purpose of interfering with a person's rights under Title IX, which includes the right not to participate in a grievance process. Id. at 30136 (emphasis added)

## Dismissal/Consolidation of Complaints

- · How and when are Title IX coordinators required or able to dismiss complaints?
  - Mandatory Dismissal
  - Discretionary Dismissal
- How and when are Title IX coordinators able to consolidate complaints?
- · Is this a point of flexibility/choice?

<sup>1125</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

## § 106.45(b)(3)(i)

(3) Dismissal of a formal complaint-

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

(emphasis added)

## § 106.45(b)(3)(ii)



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

(emphasis added)

## § 106.45(b)(3)(iii)

(iii) Upon a dismissal required or permitted pursuant to paragraph (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)(4)

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

#### 1129

1130

(emphasis added)

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>1131</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

## Recipients Discretion (non-exhaustive)

Training https://www.federalregister.gov/d/2020-10512/p-1594

· Required objective standards for prohibition on conflicts of interest & bias https:/ ww.federalregister.gov/d/2020-10512/p-2975

Addressing conduct that falls outside of Title IX

Introduction of New Evidence <a href="https://www.federalregister.gov/d/2020-10512/p-3412">https://www.federalregister.gov/d/2020-10512/p-3412</a>

## "Flexibility"

Within the standardized § 106.45 grievance process, recipients retain significant flexibility and discretion, including decisions to • designate the reasonable time frames that will apply to the grievance process;

- · use a recipient's own employees as investigators and decisionmakers or outsource those functions to contractors
- · determine whether a party's advisor of choice may actively participate in the grievance
- process;
- · select the standard of evidence to apply in reaching determinations regarding responsibility, • use an individual decision-maker or a panel of decision-makers;
- offer informal resolution options;
- impose disciplinary sanctions against a respondent following a determination of responsibility; and
- · select procedures to use for appeals

(emphasis added)



Special Issues Highlight #5 Expert Witnesses

## 1135

Expert Witness

· Federal rules of evidence do not apply · Is it relevant? That is the ultimate question. • What could they opine on? Medical information Polygraph tests?

• § 106.45 grievance process does not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by a recipient's decision-maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with § 106.45 and apply equally to both

· How should they be vetted? · Can not be excluded if relevant

1136 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>1137</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

The Department thus believes that § 106.45(b)(5)(iii)-permitting the parties to discuss the allegations under investigation, and to gather and present evidence-furthers the Department's interest in promoting a fair investigation that gives both parties meaningful opportunity to participate in advancing the party's own interests in case, while abuses of a party's ability to discuss the allegations can be addressed through tort law and retaliation prohibitions.





The Department recognizes commenters' concerns that some discussion about the allegations under investigation may fall short of retaliation or tortious conduct, yet still cause harmful effects. For example, discussion and gossip about the allegations may negatively impact a party's social relationships. For the above reasons, the Department believes that the benefits of § 106.45(b)(5)(iii), for both parties, outweigh the harm that could result from this provision. This provision, by its terms, applies only to discussion of "the allegations under investigation," which means that where a complainant reports sexual harassment but no formal complaint is filed, § 106.45(b)(5)(iii) does not apply, leaving recipients discretion to impose non-disclosure or confidentiality requirements on complainants and respondents.

As to the requirement in § 106.45(b)(5)(iii) that recipients must not restrict parties' ability "to gather and present evidence," the purpose of this provision is to ensure that parties have equal opportunity to participate in serving their own respective interests in affecting the outcome of the case.

## 1142

1141 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

"Gag orders" are not permitted, but

[§106.45(b)(5)(iii)] applies only to discussion of "the allegations under investigation," which means that where a complainant reports sexual harassment but no formal complaint is filed, § 106.45(b)(5)(iii) does not apply, leaving recipients discretion to impose non-disclosure or confidentiality requirements on complainants and respondents. Id. (emphasis added).

## Non-disclosure Agreements?

Recipients may require parties and advisors to refrain from disseminating the evidence (for instance, by requiring parties and advisors to sign a non-disclosure agreement that permits review and use of the evidence only for purposes of the Title IX grievance process), thus providing recipients with discretion as to how to provide evidence to the parties that directly relates to the allegations raised in the formal complaint.

Id. at 30304 (emphasis added)

<sup>1143</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.





Tabletop Exercises and Breakout Groups

## 1147

## Breakout Groups

- You will be placed into a random breakout group with about 4-6 other people.
  - Please send a chat message to Jill Dunlap if you need to be placed in the group with closed-captioning.
- Discuss the scenarios that were previously emailed
   You can start with either scenario.
- Please spend about 20 minutes discussing each scenario as a group.
- Please share how you plan to address these issues on your campus. This is
   a time to learn from each other!
- We will come back together as a group and Peter & Jake will go over the scenarios.
- Breakout rooms are not recorded.
- Please make sure you are unmuted and video is on.

1148

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### Scenario #1 Scenario #1 Continued The next day, and before you receive any response from Complainant A, you receive You are the Title IX Coordinator at ABC University, which has an online another formal complaint form via the online reporting portal from another complainant Title IX formal complaint form. You receive a completed and signed Complainant B. Complainant B. also a student at ABC. alleges the same respondent. form from an ABC student, Complainant A, via the online reporting Respondent X, sent Complainant B several unsolicited and inappropriate text messages and portal. Complainant A alleges that Respondent X, a fellow ABC student, inappropriately touched Complainant B on the buttocks on a few occasions while out "mouth kissed and fondled the genitals" of Complainant A while socially with the same group in France. Respondent X exhibited similar behavior once back Complainant A was heavily intoxicated and could not give consent. The on campus, seeking out Complainant B in their residence hall common room and grabbing alleged misconduct occurred on a campus-sponsored week-long trip to Complainant B's buttocks without consent. In addition, once back in the U.S. Respondent X accelerates the inappropriate texting. Respondent X is now sending Complainant B nude France as part of an annual trip sponsored by the French Club. You, as "selfies." Respondent X ignores Complainant B's repeated asks for Respondent X to stop the Title IX coordinator, reach out to Complainant A via email to discuss touching, texting and "sexting" Complainant B. This increased "sexting," coupled with supportive measures and ask that Complainant A speak with you. hearing about Complainant A's formal complaint, prompted Complainant B to file a formal complaint, Complainant B mentions "extreme discomfort" participating in any future activities with the French Club since Respondent X serves as the club's president <sup>1149</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post

ONASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

## Scenario #1 Continued

Neither Complainant A nor Complainant B notified the faculty member who accompanied the group on the trip of the alleged misconduct while out of the country.

## Scenario #1—Questions

- Should either of these formal complaints, or specific allegations contained therein, be dismissed under Title IX? Why or why not? Would the dismissal, if any, be mandatory or discretionary under Title IX?
- If either of the formal complaints, or specific allegations contained therein, should be dismissed under Title IX, who makes that determination, how, and when?
- If either of the complaints, or any allegations contained therein, are dismissed under Title IX what, if anything, can the campus do to address these incidents?

## Scenario #2



Respondent and Complainant have notified you, the Title IX coordinator, of the following information regarding their advisors:

Respondent has designated Law Yer as Respondent's advisor of choice.

Complainant has designated Par Ent as Complainant's advisor of choice. Per the requirements in § 106.45(b)(5)(vi), after interviewing parties and witnesses and gathering physical evidence, the Title IX investigator sends the initial collection of evidence to Complainant, Respondent and their advisors. Respondent and Complainant submit their responses to the evidence to the investigator within the allotted 10-day timeframe. The Title IX investigator then takes into account the responses of both parties to the evidence and begins to draft the final investigative report.

Five days later, the final investigative report is provided to both parties and their advisors, with notice that the live hearing will take place 14 days later.

1153

Scenario #2

Two days before the hearing. Complainant contacts you via email and states that Complainant thas heard that Respondent's advisor, Law Yer, is an attorney. Complainant would like to change their advisor to someone who is an attorney, but their preference, Att Orney, cannot make the hearing date with this little notice. Complainant asks for the hearing to be pushed back four to five weeks to accommodate the schedule of Att Orney. Complainant indicates that Complainant, Complainant's original advisor (Par Ent), and potential new advisor (Att Orney), all agree that heading into a live hearing "against" a party with an attorney while Complainant does not have an attorney is fundamentally unfair and inequitable. Att Orney called your campus general counsel to discuss this matter. Att Orney states that not allowing the extension prevents Complainant from "having an advisor of choice" represent Complainant at the hearing and this violates Title IX. Your campus general counsel is concerned there will be a lawsuit and/or Complainant will contact the Department of Education if the request for an extension is not granted. As the Title IX coordinator, you are concerned with this request for an extension is not granted. As the Title IX coordinator, you are concerned with this request for an extension is not granted. As the file IA conclusion of the fall semseter.

1154

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Scenario #2—Questions

- Should Complainant's request for an extension be granted? Why or why not? How would you arrive at a conclusion?
- What in the new Title IX regulations, if anything, speaks to this issue?
   How should advisors be officially designated as such, when and to whom? How will you handle changes in advisors mid-way through a grievance? Is this permitted?
- How should the role of advisors be discussed in your campus policies or in materials relating to preparing parties for a grievance process?



<sup>1155</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

## Advisors

• How should your policies address advisors?

 In a Title IX grievance process recipients must allow parties to select advisors of the parties' choice, who may be, but need not be, attorneys, while continuing to insist that any restrictions on the active participation of advisors during the grievance process must apply equally to both parties. https://www.fedeaurguitagevid/2020-30512p-3465

• What resources advisors be given?

- Copy of policies that address their participation in investigation interviews and hearings?
- Copy of rules of decorum for a hearing?
- FERPA waiver?
- Non-disclosure agreement?

Closing Thoughts and Questions

## **Closing Thoughts**

• Multiple Legal Authorities

· "Looking around corners."

• "Policy should reflect practice and practice should reflect policy."

Tuning



## A Reminder...

ANSPA TITLE

All Title IX personnel should serve in their roles impartially. All Title IX personnel should avoid • prejudgment of facts • prejudice • conflicts of interest • bias • sex stereotypes

## 1159

1160

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>1161</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

 Mathematical Control
 Mathematical Control

 TRACK 1 – Title IX Coordinators
 TRACK 3 – Title IX Investigators

 TRACK 3 – Title IX Investigators
 Highlight of Select Issues (~60 minutes)

 Discuss Tabletop Exercises in Breakout Groups (60 minutes)
 Discuss Tabletop Exercises in the Larger Group (~60 minutes)

 Depen time for Questions (~30 minutes)
 Please send questions in a message directly to Jennifer Hammat.

 We will stay slightly past the end time if needed to answer questions but if you need to leave at the exact ending time, that's ok.

 This session is being recorded.

 However, discussion in your breakout session will not be recorded.



Definitive Answers vs. Choice Points

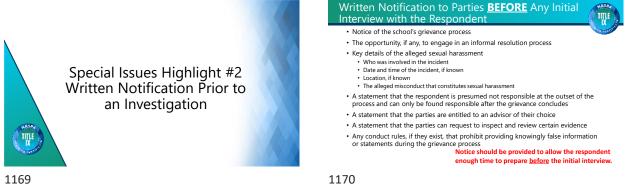
Special Issues Highlight #1 Relationships of Investigator to Other Title IX Operatives

## 1165

1166 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Title IX Investigator  $\leftarrow \rightarrow$  Title IX Coordinator Title IX Investigator  $\leftarrow \rightarrow$  Title IX Decision-Maker The final regulations do not preclude a Title IX Coordinator The Department emphasizes that the decision-maker must not only from also serving as the investigator. be a separate person from any investigator, but the decision-maker is under an obligation to objectively evaluate all relevant evidence Does the Title IX coordinator "supervise" investigators? both inculpatory and exculpatory, and must therefore Make hiring/firing decisions regarding investigators? independently reach a determination regarding responsibility Should the Title IX coordinator offer input on the investigation in any way without giving deference to the investigative report. if not serving as the investigator? Id. at 30314 (emphasis added) Input on gathering evidence? Input on the final report? Should the investigator be called as a first witness routinely in a hearing? What conflicts of interest could arise?

<sup>1167</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



### Remember the Presumption of Non-Responsibility

A recipient's grievance process must-

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.

§ 106.45(b)(1)(iv)(emphasis added)



## 1171

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Concurrent Law Enforcement Activity

Further, subject to the requirements in § 106.45 such as that evidence se to the parties for inspection and review must be directly related to the allegations under investigation, and that a grievance process must provide for objective evaluation of all relevant evidence, inculpatory and exculpatory, nothing in the final regulations precludes a recipient from using evidence obtained from law enforcement in a § 106.45 grievance process. § 106.45(b)(5)(vi) (specifying that the evidence directly related to the allegations may have been gathered by the recipient "from a party or other source" which could include evidence obtained by the recipient from law enforcement) (emphasis added); § 106.45(b)(1)(ii).

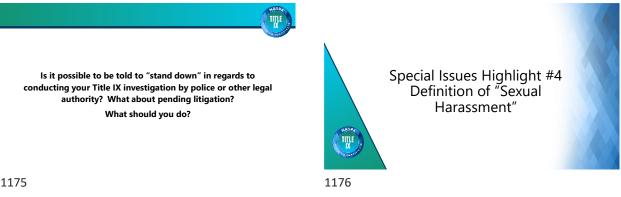
## Police Investigations

The 2001 Guidance takes a similar position: "In some instances, a complainant may allege harassing conduct that constitutes both sex discrimination and possible criminal conduct. Police investigations or reports may be useful in terms of fact gathering. However, because legal standards for criminal investigations are different, police investigations or reports may not be determinative of whether harassment occurred under Title IX and do not relieve the school of its duty to respond promptly and effectively."

Id. at 30099 n. 467 (emphasis added).

<sup>1173</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Id at 30099 n 466



#### "Sexual Harassment" [Three-Prong Test]

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

(1) An employee of the recipient conditioning the provision of an aid. benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct:

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

(3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

(emphasis added)



1178

1177 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

| Consent  | Consent  |
|--|--|
| [T]he Assistant Secretary will not require<br>recipients to adopt a particular definition of<br>consent with respect to sexual assault. Md at 30125.   | The Department believes that the definition of what constitutes<br>consent for purposes of sexual assault within a recipient's<br>educational community is a matter best left to the discretion of<br>recipients, many of whom are under State law requirements to<br>apply particular definitions of consent for purposes of campus |
| You should be well-versed on the definition of consent<br>contained <u>within your specific campus policies</u> . Address<br>specific issues of consent related to the new definition of<br>sexual harassment. | sexual misconduct policies.<br>1d. at 30124.   |

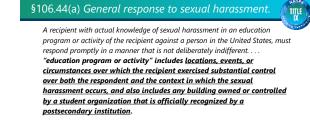
<sup>1179</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

| Consent   | Elements to Consider   |
|---|--|
| The third prong of the § 106.30 definition of sexual harassment<br>includes "sexual assault" as used in the Clery Act, 20 U.S.C.<br>1092(f)(6)(A)(v), which, in turn, refers to the FBI's Uniform Crime<br>Reporting Program (FBI UCR) and includes forcible and nonforcible<br>sex offenses such as rape, fondling, and statutory rape which<br>contain elements of "without the consent of the victim." | <ul> <li>Elements</li> <li>consent is a voluntary agreement to engage in sexual activity;</li> <li>someone who is incapacitated cannot consent;</li> <li>(such as due to the use of drugs or alcohol, when a person is asleep or unconscious, or because of an intellectual or other disability that prevents the student from having the capacity to give consent)</li> <li>past consent does not imply future consent;</li> <li>silence or an absence of resistance does not imply consent;</li> <li>consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another;</li> <li>consent can be withdrawn at any time; and</li> <li>coercion, force, or threat of either invalidates consent.</li> </ul> |
|   | Role, if any, of affirmative consent? REMEMBER: State laws.  |
| 1181  | 1182   |



Special Issues Highlight #6 Scope

## 1183



What does your campus policy state specifically regarding the scope of "education programs or activities?"

(emphasis added)

1184

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Example of "Scope" in a Policy

This policy applies to ABC University students, employees, and third-parties located within the United States both on and off campus, as well as in the digital realm. Off-campus coverage of this policy is limited to incidents that occur on employee-led trips, at internship or service learning sites, and college-owned properties (including buildings operated by Registered Student Organizations), or in any context where the University exercised substantial control over both alleged harassers and the context in which the alleged harassment occurred.



<sup>1185</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

## § 106.45(b)(3)(i)

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

## § 106.45(b)(3)(ii)

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

(emphasis added)

(emphasis added)

## § 106.45(b)(3)(iii)



(iii) Upon a dismissal required or permitted pursuant to paragraph (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.

Whether sexual harassment occurs in a recipient's education program or activity **is a fact-specific inquiry**. The key questions are whether the recipient exercised substantial control over the respondent and the context in which the incident occurred.

Id. at 30204 (emphasis added)

## 1189

1190

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

## More on Dismissals

Example: the Title IX Coordinator receives a formal complaint for alleged sexual misconduct that occurred between two students in an off-campus apartment complex where the university had no substantial control over the context or the alleged harasser. Is this within the scope of the policy example described above? If not, who

dismisses? Regulations say the "recipient." Who specifically?

Remember, <u>a formal complaint must be investigated</u>.

- Will there be a "pre-investigation" inquiry/"fact-specific" inquiry by an investigator to determine?
- What "level" of investigation is required here?
- Will a decision-maker have to make a determination?



<sup>1191</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

## § 106.45(b)(2)(ii)

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

(emphasis added)



## What has happened?



- · A formal complaint has been received (and signed).
- An initial meeting with the Title IX Coordinator has happened to provide support measures.
- A notice of investigation has gone out to both parties.
- The case has been assigned to you (the investigator) or as the Title IX Coordinator, you are the investigator, or you have outsourced the investigation.
- · The investigator has read the formal complaint.
- Which route for investigations has your school opted for? • Investigations with or without credibility assessments?

## Preparing your questions pre-interview

- Read the Formal Complaint
  - Write out the questions you have about the report on first read.
- Read the Formal Complaint again.
  - What additional questions do you have about the incident narrative.
  - Who is identified in the Formal Complaint you feel you need to interview.
    What questions do you have for those individuals?
- Have all of these typed out ahead of the first interview.
- Revise and update with additional questions and witnesses as you go.

#### 1195

### 1196

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Crossover interview techniques

- Title IX investigation framework is good practice for other kinds of investigations:
- Code of Conduct violations
- Threat assessment or BIT concerns investigations
- Educational conversations with student
- Academic Integrity case investigations
- Hazing investigations



<sup>1197</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### How to start an interview

- Introduce yourself
- Is small talk appropriate? Build rapport. Establish baseline responses\*
- Explain your role

1199

- · Explain you will be note/taking/recording the interview for notes
- Ask interviewee to share their recollections of the incident.
  - Do not interrupt the narrative
  - Let them talk until they are done
  - Follow up questions later

#### Remember your role

You are NOT a party's lawyer, advisor, counselor, parent, or friend You ARE an investigator and a facilitator You ARE free from bias You ARE free from prejudgment You ARE interested in finding out fact about the incident You ARE interested in the truth

Being Impartial ≠ Being a Robot You can be a neutral fact-finder and still show empathy and kindness. Investigation spaces should be judgement free zones

## Follow-up questions

- · When seeking clarification after the party's initial recollection of the event, try to ask questions that build confidence and put them at ease.
- "You said you left the party around 1am, is that correct?"
- · "You said you recalled having three cups of 'red solo cup' punch, is that right?"
- · If they are describing a location, it might be helpful to ask them to sketch out the room for you (if it is a residence hall, you should have those schematics on your computer to pull up/print out).

#### 1201

1202 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

TIŢĻE

| se and Feel questic  | ons 👘   | A word about trauma  |
|--|---|--|
| "Can you draw what you<br>experienced?"<br>"What were you feeling when<br>XYZ occurred?"<br>"What did you smell?"<br>"Can you show me?"<br>"What were you feeling when<br>you were kissing?" | <ul> <li>"Tell me more about that."</li> <li>"What did you hear?"</li> <li>"Tell me about his/her eyes."</li> <li>"What can you not forget?"</li> </ul> | <ul> <li>Anyone you speak with about alleged sexual harassment<br/>(complainant, respondent, or witnesses) could have experienced o<br/>still be experiencing trauma as a result of the alleged situation.</li> <li>Be cognizant that talking to you may be very difficult for the partie<br/>Remember to document their experience with as little interruption<br/>possible. Follow-up questions should be limited.</li> <li>Ideally, you want the party being interviewed to do most of the<br/>speaking.</li> </ul> |

<sup>1203</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

| Neet the student where they are:   | Ask them for evidence they want reviewed                            |
|--|---|
| Baseline knowledge =   | Inculpatory evidence  |
| How to evaluate risk   | Exculpatory evidence  |
| <ul> <li>Factors to consider in decision-making</li> <li>Medically accurate knowledge of sex, reproduction, sexual health</li> </ul> | Relevant to the allegations   |
| Ability to navigate interpersonal relationships  | Rape shield law protections   |
| Communication skills     Conflict resolution skills  | Witnesses to interview  |
| Emotional intelligence   | <ul> <li>If they know of others with similar experiences</li> </ul> |
| <ul> <li>Not all students know the same thing about the same things</li> </ul>   | <ul> <li>Character testimony is permitted</li> </ul>                |

1206

Clarifications

- · Reassure the party its ok that they cannot remember or don't know.
- You can move to another question or kind of questioning.
- · If you hit a memory gap, ask them some sensory questions to see if it triggers any memories. Often there are memories they cannot access unless you ask the question from a different lens.

Why would you consider conducting an investigation without assessing credibility?

- Cross purpose. The purpose of the hearing is to determine credibility of all the parties and all the evidence. If the investigator does this, one could later assert bias against the investigator for making their assessment of the parties and/or the evidence.
- Time. Investigations that accept information, gather documents, and statements, and provide a relevance review of said documents would make for an effective summary of the investigative materials presented for the hearing to sort through.
- Repetition. Anything anyone says to you, they will have to say again at the hearing and be subject to cross-examination, or it won't be considered.



### 1207

1208

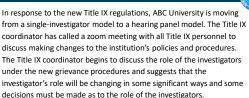
©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

### **Breakout Groups**

- You will be placed into a random breakout group with about 4-6 other people.
   Please send a chat message to Jill Dunlap if you need to be placed in the group with
- Prease send a char message to sim building in you need to be placed in the group windowed captioning.
   Discuss the scenarios that were previously emailed.
- You can start with either scenario.
- Please spend about 60 minutes discussing the scenarios as a group.
- Please share how you plan to address these issues on your campus. This is a time to learn from each other!
- a time to learn from each other!
  We will come back together as a group and Peter & Jennifer will go over the scenarios.
- Breakout rooms are not recorded.
- Please make sure you are unmuted and video is on.

#### 1200

# Scenario #1



<sup>1209</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

## Scenario #1—Questions

- What significant changes to the investigative function, if any, should be considered?
- Should the investigator address credibility of parties and witnesses in the final investigative report? Why or why not?
- Should the investigator make recommendations on findings of responsibility in the final investigative report? Why or why not?
   Should the investigator make recommendations as to the sanctions/remedies
- Should the investigator make recommendations as to the sanctions/remedies that should be imposed? Why or why not?
   Should the Title IX coordinator have any input in the investigation process.
- Should the Title IX coordinator have any input in the investigation process and/or report writing? Why or why not?
   Charld the investigation the cellular as a first without in Title IX.
- Should the investigator be called as a routine, or first, witness in Title IX hearings? Why or why not?



#### The Minimum and Maximum Role of the Title IX Investigator



- · Campuses are no longer permitted to have a "single" or "pure" investigator model under Title IX.
- · A separate decision-maker (or panel of decision-makers) must make a final determination of responsibility.
- · This will be a shift in the function of the investigator on some campuses · What, then, is the scope of the investigative report?
- Purpose? Tone? Format?
- · Will the investigator become a witness in the hearing or play other roles?

- · Gather all relevant information regarding an allegation of sexual harassment.
- · Interview all relevant parties
- · Collect and organize relevant evidence
- Credibility Assessments?
- Weighing Evidence?
- Write a detailed investigative report
- · Make recommendations for interim measures or accommodations?
- · Findings of Responsibility?

1213 1214 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

| counsening and community service. | recipient's grievance process must—<br>lot require, allow, rely upon, or otherwise use questions or<br>vidence that constitute, or seek disclosure of, information<br>rotected under a legally recognized privilege, unless the<br>erson holding such privilege has waived the privilege. | You are an investigator for ABC University investigating an allegation of non-<br>consensual sexual contact between Complainant and Respondent, two Freshmen<br>students at ABC. Complainant alleges Complainant was intoxicated and unable to<br>give consent at the time the sexual contact occurred. Complainant submits as<br>evidence a letter from a high school that Respondent and Complainant both<br>attended. The letter from the high school shows a finding of responsibility against<br>Respondent for sending nude photos of Complainant while Complainant was<br>passed out at a party via text message to a friend. Complainant also submits a<br>letter from a juvenile court showing a judgement against Respondent for the<br>"sexting" act and penalties imposed on Respondent including a fine, mandatory<br>counseling and community service. |
|-----------------------------------|---|--|
|-----------------------------------|---|--|

<sup>1215</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

## Scenario #2—Questions

- · Should this evidence be included in the "universe of evidence" given to both parties and their advisors for their response prior to the finalization of the final investigative report?
- Is this relevant evidence that should be included in the final report? Why or why not? How would you determine this?



## § 106.45(b)(5)(vi)

(vi) Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.

### 1219

## § 106.45(b)(5)(vi) Cont'd

Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination; and

(emphasis added)

1220 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

(emphasis added)

| § 106.45(b)(5)(vii)   | "Universe of Evidence"   |
|---|--|
| (vii) Create an investigative report that fairly summarizes<br>relevant evidence and, at least 10 days prior to a hearing (if a<br>hearing is required under this section or otherwise provided)<br>or other time of determination regarding responsibility, send<br>to each party and the party's advisor, if any, the investigative<br>report in an electronic format or a hard copy, for their review<br>and written response. | [T]he <b>universe of evidence</b> given to the parties for inspection<br>and review under § 106.45(b)(5)(vi) must consist of all<br>evidence directly related to the allegations; determinations as<br>to whether evidence is "relevant" are made when finalizing<br>the investigative report, pursuant to § 106.45(b)(5)(vii)<br>(requiring creation of an investigative report that "fairly<br>summarizes all relevant evidence"). |
|   | ld. at 30248 n.1021 (emphasis added).  |
| (emphasis added)  | Is this essentially a "mini notice-and-comment" process?   |

<sup>1221</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

| Submission of Evidence  | and Sharing of Responses   | Not Allowing Parties to Respond to Additional Evidence  |
|---|--|---|
| would like the investigator to<br>to inspect and review eviden<br>choose to allow both parties<br>response to their inspection o<br>106.45(b)(5)(vi) and also <u>an o</u><br><u>party's additional evidence</u> . S | rties to submit any evidence that they<br>consider prior to when the parties' time<br>ce begins. Alternatively, a recipient may<br>to provide additional evidence in<br>und review of the evidence under §<br>ppportunity to respond to the other<br>Similarly, <u>a recipient has discretion to</u><br>copy of each party's written response to | If a recipient chooses not to allow the parties to respond to<br>additional evidence provided by a party in these<br>circumstances, the parties will still receive the investigative report<br>that fairly summarizes relevant evidence under § 106.45(b)(5)(vii)<br>and will receive an opportunity to inspect and review all relevant<br>evidence at any hearing and to refer to such evidence during the<br>hearing, including for purposes of cross-examination at live<br>hearings under § 106.45(b)(5)(vi). |
| the other party to ensure a fo  | ir and transparent process and to allow  | ld. at 30307 (emphasis added).  |
| the parties to adequately pre   | pare for any hearing that is required or   |   |
| provided under the grievance  | Id. at 30307 (emphasis added).   |   |
| 1222  |  | 1004  |



Id. at 30307 (emphasis added)

If a recipient allows parties to provide additional evidence after reviewing the evidence under § 106.45(b)(5)(vi), any such additional evidence that is summarized in the investigative report will not qualify as new evidence that was reasonably available at the time the determination regarding responsibility was made for purposes of an appeal under § 106.45(b)(8).

Should investigators incorporate any party's responses to the <u>"universe of evidence"</u> (in whole or in part) into the final

Relevance

1225

1226

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Paring Down the "Universe" to "Relevant"

"[D]irectly related" may sometimes encompass a broader universe of evidence than evidence that is "relevant." (d. at 30304.

Non-treatment records and information, such as a party's financial or sexual history, must be directly related to the allegations at issue in order to be reviewed by the other party under § 106.45(b)(5)(vi), and all evidence summarized in the investigative report under § 106.45(b)(5)(vii) must be "relevant" such that evidence about a complainant's sexual predisposition would never be included in the investigative report and evidence about a complainant's prior sexual behavior would only be included if it meets one of the two narrow exceptions stated in § 106.45(b)(6)(i)-(ii) ... (id at 30304.

[R]elevance is the sole gatekeeper evidentiary rule in the final regulations, but decision-makers retain discretion regarding the weight or credibility to assign to particular evidence. Further, for the reasons discussed above, while the final regulations do not address "hearsay evidence" as such, § 106.45(b)(6)(i) does preclude a decision-maker from relying on statements of a party or witness who has not submitted to cross-examination at the live hearing.

report?

Id. at 30354.

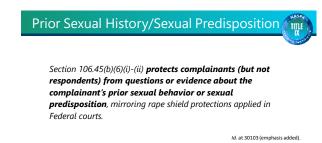
<sup>1227</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.





[T]he investigative report must summarize "relevant" evidence, and thus at that point the rape shield protections would apply to preclude inclusion in the investigative report of irrelevant evidence.

Id. at 30353-54 (emphasis added).



### 1231

1232

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

| Rape Shield Language  | Possible Format for the Final Investigative Report   |
|---|--|
| <ul> <li>[T]he rape shield language in § 106.45(b)(6)(i)-(ii) <u>bars questions or</u><br/><u>evidence about a complainant's sexual predisposition (with no exceptions)</u><br/>and about a <u>complainant's prior sexual behavior subject to two</u><br/><u>exceptions</u>:         <ol> <li>if offered to prove that someone other than the respondent<br/>committed the alleged sexual harassment, or</li> </ol> </li> </ul> | I. BACKGROUND AND REPORTED CONDUCT II. JURISDICTION III. SCOPE OF THE INVESTIGATION IV. RELEVANT POLICY AND LAW PROHIBITING SEXUAL HARASSMENT (INCLUDING SEXUAL ASSAULT AND RETALIATION): V. INVESTIGATION AND SUMMARY OF RELEVANT EVIDENCE A. Statements of Parties and Witnesses B. Documentary Evidence |
| 2) if the question or evidence concerns sexual behavior between the complainant and the respondent and is offered to prove <b>consent</b> .<br>Id. at 30336 n.1308 (emphasis added).  | VI. ANALYSIS?<br>VII. CONCLUSION<br>Covered in-depth in the module on report-writing.  |

<sup>1233</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### Scenario #3

You, a Title IX investigator, are conducting an interview with a party in a Title IX grievance process. This party is a faculty member who is accompanied to the interview by a union representative and a personal attorney. You find it very difficult to interview the party because of the back and forth talk between the party and the party's advisors, who at times audibly offer conflicting advice to the party. The campus allows both parties to have two advisors present at the interviews and subsequent hearing (the other party in this matter will have a disability advocate and a personal attorney). Eventually the interview process becomes untenable because of interchanges among the advisors and party; you stop the interview mid-way through.

## Scenario #3—Questions

- What should be done at this point in the investigation?
- Who can you reach out to for assistance?
- What rules for advisors can be put in place with regards to interviews? What will you do if advisors refuse to cooperate with such rules?



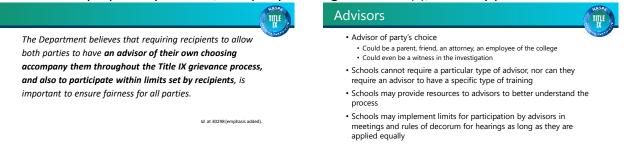
## 1237

## § 106.45(b)(5)(iv)

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

1238

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>1239</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

## Scenario #4

Complainant has filed and signed a formal complaint alleging sexual misconduct by Respondent. In an interview with you, the Title IX Investigator, the Respondent claims that someone other than Respondent committed the alleged sexual assault against Complainant on the night in question, and that Complainant has deliberately filed a complaint against Respondent to "get even with Respondent." The alleged assault occurred at an off-campus building owned by a recognized student organization during a party where everyone was engaged in heavy alcohol use. Respondent, who is unable to afford an attorney, asks you, the Investigator, to help Respondent determine what evidence would help demonstrate that Respondent is not the actual perpetrator.

## Scenario #4—Questions

- Who bears the burden of evidence in this situation?
- What type of exculpatory evidence could support Respondent's claims? What type of inculpatory evidence might undermine Respondent's claims?
- In light of "rape shield" protections, how might Complainant be questioned regarding this information in a follow-up interview?
- May you "help" the Respondent? How will you respond to Respondent's request?
- Might you now have actual notice that the Respondent is a Complainant?



Special Issues Highlight #14 Burden of Gathering Evidence and Burden of Proof...Thinking Ahead to the Hearing

## 1243

## § 106.45(b)(7)

Requires a decision-maker who is not the same person as the Title IX Coordinator or the investigator to reach a determination regarding responsibility by applying the standard of evidence the recipient has designated in the recipient's grievance procedures for use in all formal complaints of sexual harassment (which must be either the preponderance of the evidence standard or the clear and convincing evidence standard)...

Id. at 30054 (emphasis added)

## 1244

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

## § 106.45(b)(1)(ii)

 (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; Recipient Bears the Burden of Gathering Evidence 🧹

[I]t is the recipient's burden to impartially gather evidence and present it so that the decision-maker can determine whether the recipient (not either party) has shown that the weight of the evidence reaches or falls short of the standard of evidence selected by the recipient for making determinations.

(emphasis added)

Id. at 30319 (emphasis added)

<sup>1245</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### Burden to Gather Inculpatory and Exculpatory Evidence

The Department agrees with commenters that even so-called "he said/she said" cases often involve evidence in addition to the parties' respective narratives, and the § 106.45 grievance process obligates recipients to bear the burden of gathering evidence and to objectively evaluate all relevant evidence, both inculpatory and exculpatory, including the parties' own statements as well as other evidence.

#### Objective Evaluation of Evidence

§ 106.45 does not set parameters around the "quality" of evidence that can be relied on, § 106.45 does prescribe that **all relevant evidence**, inculpatory and exculpatory, whether obtained by the recipient from a party or from another source, must be objectively evaluated by investigators...

Id. at 30105 (emphasis added).

Id. at 30292 (emphasis added)

### Data Gaps

[E]vidence subject to inspection and review must include inculpatory and exculpatory evidence whether obtained from a party or from another source. The Department does not believe it is necessary to require investigators to identify data gaps in the investigative report, because the parties' right to inspect and review evidence, and review and respond to the investigative report, adequately provide opportunity to identify any perceived data gaps and challenge such deficiencies.

Id. at 30248 (emphasis added).

TIŢĻE

### **Burden of Proof**

Whether the evidence gathered and presented by the recipient (i.e., gathered by the investigator and with respect to relevant evidence, summarized in an investigative report) does or does not meet the burden of proof, the recipient's obligation is the same: To respond to the determination regarding responsibility by complying with § 106.45 (including effectively implementing remedies for the complainant if the respondent is determined to be responsible).

Id. at 30291 (emphasis added)

#### 1249

1250

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Standard of Evidence - Preponderance of the Evidence

Using a **preponderance of the evidence standard**, and considering relevant definitions in the policy, the hearing panel weighs the evidence to determine whether the respondent violated the policy. 50.01% likelihood or 50% and a feather Which side do you fall on?

The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force, superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a mind to one side of the issue rather than the other.

# Standard of Evidence – Clear and Convincing Evidence indicating that the thing to be proved is highly probable or reasonably certain. Bryan A. Gardner: Black's Law Dictionary 10, (2014), 674 Certain facts must be proved by clear and convincing evidence, which is a higher burden of proof. This means the party must persuade you that it is highly probable that the fact is true. CACI No. 201. More Likely True—Clear and Convincing Proof http://www.jacunet.com/action/particular.

<sup>1251</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Special Issues Highlight #15 Counterclaims Special Issues Highlight #15 Counterclaims 1253 1254



Closing

1255

**Closing Thought** 

"You have no "side" other than the integrity of the process."

## 1256

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Watch YouTube for Videos from OCR

A Reminder... The First Amendment and Title IX: An OCR Short Webinar (July 29, 2020) All Title IX personnel should serve in their roles impartially. OCR Short Webinar on How to Report Sexual Harassment under Title IX All Title IX personnel should avoid (July 27, 2020) • prejudgment of facts Conducting and Adjudicating Title IX Hearings: An OCR Training Webinar (July 23, 2020) prejudice OCR Webinar on Due Process Protections under the New Title IX conflicts of interest Regulations (July 21, 2020) OCR Webinar on New Title IX Protections Against Sexual Assault (July 7, bias 2020) sex stereotypes OCR Webinar: Title IX Regulations Addressing Sexual Harassment (May 8, 2020)

<sup>1257</sup>©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.





LIVE SESSION on Title IX Grievance Procedures/Sexual **Misconduct Procedures** July 30, 2020 and August 2, 2020

Peter Lake, Professor of Law, Charles A, Dana Chair, and Director of the Center for Excellence in Higher Education Law and Policy, Stetson University College of Law Dr. Jennifer R. Hammat, Dean of Students, University of Southern Indiana



## This Live Session is Designed for...

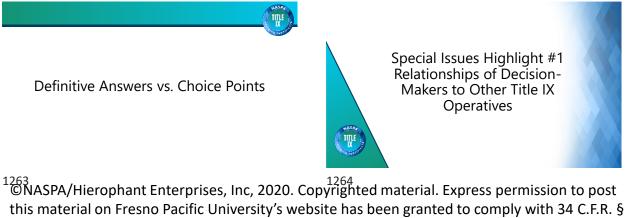


TRACK 1 – Title IX Coordinators TRACK 2 – Title IX Decision-Makers and Student Conduct Administrators

## What we hope to accomplish... · Highlight of Select Issues (~60 minutes) Tabletop Exercises in Breakout Groups (45 minutes) Discuss Tabletop Exercises in the Larger Group (~45 minutes) · Open time for Questions (~30 minutes) · Please send questions in a message directly to Jennifer Hammat. · We will not read your name. · We will stay slightly past the end time if needed to answer questions but if you need to leave at the exact ending time, that's ok. · This session is being recorded. However, discussion in your breakout session will not be recorded.

1261

1262 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Title IX Coordinator  $\leftarrow \rightarrow$  Decision-Maker

Nothing in the final regulations prevents Title IX Coordinators from offering recommendations regarding responsibility to the decision-maker for consideration, but the final regulations require the ultimate determination regarding responsibility to be reached by an individual (i.e., the decisionmaker) who did not participate in the case as an investigator or Title IX Coordinator.

Should the Title IX coordinator offer recommendations on responsibility?

## Title IX Investigator $\leftarrow \rightarrow$ Decision-Maker

The Department emphasizes that the decision-maker must not only be a separate person from any investigator, but the decision-maker is under an obligation to objectively evaluate all relevant evidence both inculpatory and exculpatory, and must therefore independently reach a determination regarding responsibility without giving deference to the investigative report.

Id. at 30314 (emphasis added)

Should the investigator be called as a first witness routinely?



Special Issues Highlight #2 **Revisiting Consent** 

1267

## Consent

[T]he Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault. Id. at 30125.

You should be well-versed on the definition of consent contained within your specific campus policies. Address specific issues of consent related to the new definition of sexual harassment.

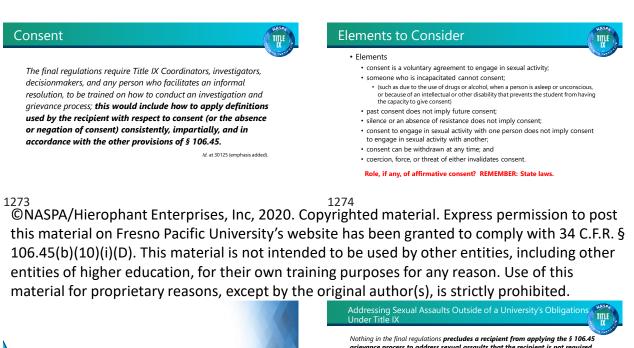
## 1268

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

| Consent   | Consent   |
|---|---|
| The Department believes that the definition of what constitutes<br>consent for purposes of sexual assault within a recipient's<br>educational community is a matter best left to the discretion of<br>recipients, many of whom are under State law requirements to<br>apply particular definitions of consent for purposes of campus<br>sexual misconduct policies. | The third prong of the § 106.30 definition of sexual harassment<br>includes "sexual assault" as used in the Clery Act, 20 U.S.C.<br>1092(f)(6)(A)(v), which, in turn, refers to the FBI's Uniform Crime<br>Reporting Program (FBI UCR) and includes forcible and nonforcible<br>sex offenses such as rape, fondling, and statutory rape which<br>contain elements of "without the consent of the victim." |
| <i>ld.</i> at 30124.  | id. at 30124.   |

<sup>1269</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

| Consent  | Consent   |
|--|---|
| The Department agrees that recipients <b>must clearly define consent and</b><br><b>must apply that definition consistently, including as between men</b><br><b>and women and as between the complainant and respondent in a</b><br><b>particular Title IX grievance process because to do otherwise would</b><br><b>indicate bias for or against complainants or respondents generally,</b><br><b>or for or against an individual complainant or respondent, in</b><br><b>contravention</b> of § 106.45(b)(1)(iii), and could potentially be 'treatment of<br>a complainant' or 'treatment of a respondent' that § 106.45(a) recognizes<br>may constitute sex discrimination in violation of Title IX. | Regardless of how a recipient's policy defines consent for sexual assault purposes, the burden of proof and the burden of collecting evidence sufficient to reach a determination regarding responsibility, rest on the recipient under § $106.45(b)(5)(i)$ . The final regulations do not permit the recipient to shift that burden to a respondent to prove consent, and do not permit the recipient to prove absence of consent. |
| ld. at 30125 (emphasis added).   | <i>ld.</i> at 30125 (emphasis added).   |
| 1271   | 1272  |



Special Issues Highlight #3 Revisiting "Tuning" grievance process to address sexual assaults that the recipient is not required to address under Title IX. Id. at 30065 (emphasis added). (A) recipient may choose to address conduct outside of or not in its "education program or activity," even though Title IX does not require a recipient to do so. (a ta 30031 (emphasis added). (E)ven if alleged sexual harassment did not occur in the recipient's education program or activity, dismissal of a formal complaint for Title IX purposes does not preclude the recipient from addressing that alleged sexual harassment under the recipient's own code of conduct. Recipients may also choose to provide supportive measures to any complainant, regardless of whether the alleged sexual harassment is covered under Title IX. M. at 30033 (emphasis added).

Tuning? Traps?

<sup>1275</sup>©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Conduct That Does Not Meet Sexual Harassment "Non-sexual Harassment Sex Discrimination" Definition ... § 106.45 applies to formal complaints alleging sexual Alleaations of conduct that do not meet the definition of "sexual harassment" in § 10 may be addressed by the recipient under other provisions of the recipient's code of harassment under Title IX, but not to complaints alleging sex conduct . . . Id. at 3009 discrimination that does not constitute sexual harassment ("non-Recipients may continue to address harassing conduct that does not meet the § 106.30 sexual harassment sex discrimination"). Complaints of non-sexual definition of sexual harassment, as acknowledged by the Department's change to § harassment sex discrimination may be filed with a recipient's Title 106.45(b)(3)(i) to clarify that dismissal of a formal complaint because the allegations do IX Coordinator for handling under the "prompt and equitable" not meet the Title IX definition of sexual harassment, does not preclude a recipient from addressing the alleged misconduct under other provisions of the recipient's grievance procedures that recipients must adopt and publish own code of conduct. Id. at 30037-38 (emphasis added) pursuant to § 106.8(c). Similarly, nothing in these final regulations prevents a recipient from addressing conduct that is outside the Department's jurisdiction due to the conduct constituting sexual harassment occurring outside the recipient's education program or activity, or Id. at 30095 occurring against a person who is not located in the United States. Tuning? Traps? Id. at 30038 n.108 (emphasis added).



### § 106.45 may not be circumvented...

... by processing sexual harassment complaints under non-Title IX provisions of a recipient's code of conduct. The definition of "sexual harassment" in § 106.30 constitutes the conduct that these final regulations, implementing Title IX, address. . . . [W]here a formal complaint alleges conduct that meets the Title IX definition of "sexual harassment," a recipient must comply with § 106.45.

Id. at 30095.



#### 1279

1280

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

"Mitigation of Trauma"

The Department agrees with commenters that the truth-seeking function of cross-examination can be achieved while mitigating any re-traumatization of complainants because under the final regulations:

- Cross-examination is only conducted by party advisors and not directly or personally by the parties themselves;
- upon any party's request the entire live hearing, including cross-examination, must occur with the parties in separate rooms; questions about a complainant's prior sexual behavior are barred subject to two limited
- exceptions: a party's medical or psychological records can only be used with the party's voluntary
- consent; · recipients are instructed that only relevant questions must be answered and the
- decision-maker must determine relevance prior to a party or witness answering a cross examination question; and recipients can oversee cross-examination in a manner that avoids aggressive, abusive questioning of any party or witness.
- ld. at 30313 (internal citations omitted, b

## Purpose is not to Humiliate or Berate

[T]he essential function of cross-examination is not to embarrass, blame, humiliate, or emotionally berate a party, but rather to ask questions that probe a party's narrative in order to give the decisionmaker the fullest view possible of the evidence relevant to the allegations at issue.

<sup>1281</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

"Cross-examination" = Asking Questions

The Department disagrees that cross-examination places a victim (or any party or witness) "on trial" or constitutes an interrogation; rather, crossexamination properly conducted simply constitutes a procedure by which each party and witness answers questions posed from a party's unique perspective in an effort to advance the asking party's own interests. Id. at 30315 (emphasis added)

[C]onducting cross-examination consists simply of posing questions intended to advance the asking party's perspective with respect to the specific allegations at issue; no legal or other training or expertise can or should be required to ask factual questions in the context of a Title IX grievance process. Id. at 30319 (emphasis added).

## The "Pause"

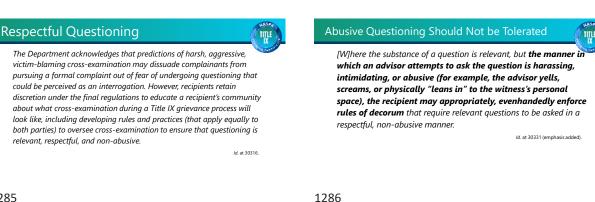


Id. at 30319

Id. at 30331 (emphasis added).

Before a complainant, respondent, or witness answers a cross-examination question, the decision-maker must first determine whether the question is relevant and explain to the party's advisor asking crossexamination questions any decision to exclude a question as not relevant.

1284



<sup>1285</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Advisors a cross-Examines If a party's advisor of choice refuses to comply with a recipients rules of decorum (for example, by insisting on yelling at the other party), the recipient may require the party to use a different advisor. Similarly, if an advisor that the recipient provides refuses to comply with a recipients rules of decorum, the recipient may provide that party with a different advisor to conduct crossexamination on behalf of that party. Marsusa

<sup>1287</sup>©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Advisors May Conduct "Direct" Examination Firing an Advisor A party cannot "fire" an assigned advisor during the hearing, but i the party correctly asserts that the assigned advisor is refusing to Whether advisors also may conduct direct examination is left to "conduct cross-examination on the party's behalf" then the recipient is a recipient's discretion (though any rule in this regard must apply obligated to provide the party an advisor to perform that function. equally to both parties). whether that means counseling the assigned advisor to perform that role, or stopping the hearing to assign a different advisor. If a party to Id. at 30342 (emphasis added) whom the recipient assigns an advisor refuses to work with the advisor when the advisor is willing to conduct cross-examination on the party's behalf, then for reasons described above that party has no right of self-representation with respect to conducting cross-examination, and that party would not be able to pose any cross-examination auestions. Id. at 30342 (emphasis added)

1290

## Cannot Impose Training on Advisors

[R]ecipients may not impose training or competency assessments on advisors of choice selected by parties, but nothing in the final regulations prevents a recipient from training and assessing the competency of **its own employees** whom the recipient may desire to appoint as party advisors.



#### 1291

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>1293</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Under this provision a recipient may, for instance, adopt rules that instruct party advisors to conduct questioning in a respectful, nonabusive manner, decide whether the parties may offer opening or closing statements, specify a process for making objections to the relevance of questions and evidence, place reasonable time limitations on a hearing, and so forth.

Id. at 30361.



# No Subpoena Power Over Witnesses



The Department understands that complainants (and respondents) often will not have control over whether witnesses appear and are cross-examined, because neither the recipient nor the parties have subpoena power to compel appearance of witnesses. . . . Where a witness cannot or will not appear and be cross-examined, that person's statements will not be relied on by the decision-maker ... Id. at 30348

#### 1297

1298

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Non Submission to Cross-examination Cont'd

While documentary evidence such as police reports or hospital records may have been gathered during investigation and, if directly related to the allegations inspected and reviewed by the parties, and to the extent they are relevant, summarized in the investigative report, the hearing is the parties' first opportunity to argue 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. Id. at 30349 (internal citations omitted)

#### Non Submission to Cross-examination Cont'd

Non Submission to Cross-examination The prohibition on reliance on "statements" applies not only to statements made during the hearing, but also to any statement of

the party or witness who does not submit to cross-examination.

evidence (such as videos) that do not constitute a person's intent to

reports, medical reports, and other documents and records may not

make factual assertions, or to the extent that such evidence does

"Statements" has its ordinary meaning, but would not include

not contain a person's statements. Thus, police reports, SANE

be relied on to the extent that they contain the statements of a party or witness who has not submitted to cross-examination.

If parties do not testify about their own statement and submit to cross examination, the decision-maker will not have the appropriate context for the statement, which is why the decision-maker cannot consider that party's statements. This provision requires a party or witness to "submit to cross-examination" to avoid exclusion of their statements; the same exclusion of statements does not apply to a party or witness's refusal to answer questions posed by the decision-maker. If a party or witness refuses to respond to a decision-maker's questions, the decision-maker is not precluded from relying on that party or witness's statements.

Id. at 30349 (internal citations omitted)

Id. at 30349

<sup>1299</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

# Non Submission to Cross-examination Cont'd

This is because cross-examination (which differs from questions posed by a neutral fact-finder) constitutes a unique opportunity for parties to present a decision-maker with the party's own perspectives about evidence. This adversarial testing of credibility renders the person's statements sufficiently reliable for consideration and fair for consideration by the decision-maker, in the context of a Title IX adjudication often overseen by laypersons rather than judges and lacking comprehensive rules of evidence that otherwise might determine reliability without crossexamination

Id. at 30349 (internal citations omitted)

#### Non Submission to Cross-examination Cont'd

[W]here a party or witness does not appear at a live hearing or refuses to answer cross-examination questions, the decision-maker must disregard statements of that party or witness but must reach a determination without drawing any inferences about the determination reaarding responsibility based on the party or witness's failure or refusal to appear or answer questions. Thus, for example, where a complainant refuses to answer crossexamination questions but video evidence exists showing the underlying incident, a decision-maker may still consider the available evidence and make a determination.

Id. at 30328

# Non-Appearance of Party/Advisor

[A] party's advisor may appear and conduct cross-examination even when the party whom they are advising does not appear. Similarly, where one party does not appear and that party's advisor of choice does not appear, a recipient-provided advisor must still cross-examine the other, appearing party "on behalf of" the non-appearing party, resulting in consideration of the appearing party's statements but not the non-

appearing party's statements (without any inference being drawn based on the non-appearance). Id at 30346

#### 1303

1304

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

TIŢĻE

Where a Respondent Does Not Appear

[E]ven where a respondent fails to appear for a hearing, the decision-maker may still consider the relevant evidence (excluding statements of the nonappearing party) and reach a determination regarding responsibility, though the final regulations do not refer to this as a "default judgment." If a decision-maker does proceed to reach a determination, no inferences about the determination regarding responsibility may be drawn based on the nonappearance of a party.

#### Where No Party Appears

allegations in a formal complaint.

[E]ven if no party appears for the live hearing such that no party's statements can be relied on by the decision-maker, it is still possible to reach a determination regarding responsibility where nonstatement evidence has been gathered and presented to the decisionmaker.

Where a Complainant Does Not Appear

In cases where a complainant files a formal complaint, and then

does not appear or refuses to be cross-examined at the hearing,

this provision excludes the complainant's statements, including

Id. at 30347.

Id at 30349

<sup>1305</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### "Remaining Evidence"

§ 106.45(b)(6)(i) includes language that directs a decision-maker to reach the determination regarding responsibility based on the evidence remaining even if a party or witness refuses to undergo crossexamination, so that even though the refusing party's statement cannot be considered, the decision-maker may reach a determination based on the remaining evidence so long as no inference is drawn based on the party or witness's absence from the hearing or refusal to answer cross-examination (or other) questions. Thus, even if a party chooses not to appear at the hearing or answer cross-examination questions (whether out of concern about the party's position in a concurrent or potential civil lawsuit or criminal proceeding, or for any other reason), the party's mere absence from the hearing or refusal to answer questions does not affect the determination regarding responsibility in the Title IX grievance process. Id. at 30322

# "Remaining Evidence" Cont'd

[I]f the case does not depend on party's or witness's statements but rather on other evidence (e.g., video evidence that does not consist of "statements" or to the extent that the video contains nonstatement evidence) the decision-maker can still consider that other evidence and reach a determination, and must do so without drawing any inference about the determination based on lack of party or witness testimony. This result thus comports with the Sixth Circuit's rationale in Baum that cross-examination is most needed in cases that involve the need to evaluate credibility of parties as opposed to evaluation of non-statement evidence.

Id. at 30328

Id at 30361



Special Issues Highlight #7 Using Evidence to Make a Determination of Responsible/Not Responsible and Burden of Proof

1309

# § 106.45(b)(7)

Requires a decision-maker who is not the same person as the Title IX Coordinator or the investigator to reach a determination regarding responsibility by applying the standard of evidence the recipient has designated in the recipient's grievance procedures for use in all formal complaints of sexual harassment (which must be either the preponderance of the evidence standard or the clear and convincing evidence standard) . . .

Id. at 30054 (emphasis added)

Id. at 30292 (emphasis added)

# 1310

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

# § 106.45(b)(1)(ii)

(ii) Require an objective evaluation of all relevant evidenceincluding 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;

Recipient Bears the Burden of Gathering Evidence

[I]t is the recipient's burden to impartially gather evidence and present it so that the decision-maker can determine whether the recipient (not either party) has shown that the weight of the evidence reaches or falls short of the standard of evidence selected by the recipient for making determinations.

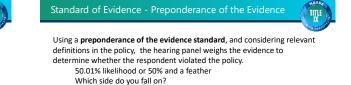
<sup>1311</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

(emphasis added)

**Burden of Proof** 

Whether the evidence gathered and presented by the recipient (i.e., gathered by the investigator and with respect to relevant evidence, summarized in an investigative report) does or does not meet the burden of proof, the recipient's obligation is the same: To respond to the determination regarding responsibility by complying with § 106.45 (including effectively implementing remedies for the complainant if the respondent is determined to be responsible).

Id. 30291 (emphasis added).



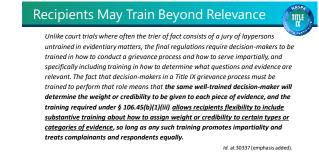
The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force, superior evidentiary weight that, though not sufficient to free the mind whollv from all reasoanble doubt, is still sufficient to incline a mind to one side of the issue rather than the other.

Bryan A. Gardner, Black's Law Dictionary 10, (2014), 1373

#### Standard of Evidence - Clear and Convincing



- Evidence indicating that the thing to be proved is highly probable
   or reasonably certain. Bryan A. Gardner, Black's Law Dictionary 10, (2014), 674
- Certain facts must be proved by clear and convincing evidence, which is a higher burden of proof. This means the party must persuade you that it is highly probable that the fact is true.
   CACI No. 201. More Likely True—Clear and Convincing Proof may must an another any structure and the party of the part



#### 1315

1316

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Training Beyond Relevance Is Not Required

[T]he § 106.45 grievance process does not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by a recipient's decision-maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with § 106.45 and apply equally to both parties. Mat30294. [I]f a recipient trains Title IX personnel to evaluate, credit, or assign weight to types of relevant, admissible evidence, that topic will be reflected in the recipient's training materials.

#### Rules on Weight of Evidence

A recipient may, for example, adopt a rule regarding the weight or credibility (but not the admissibility) that a decision-maker should assign to evidence of a party's prior bad acts, so long as such a rule applied equally to the prior bad acts of complainants and the prior bad acts of respondents.

Id. at 30294.

131

# 1318

<sup>1317</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### Weighing Evidence

Thus, for example, where a cross-examination question or piece of evidence is relevant, but concerns a party's character or prior bad acts, under the final regulations the decision-maker cannot exclude or refuse to consider the relevant evidence, but <u>may proceed to</u> objectively evaluate that relevant evidence by analyzing whether that evidence warrants a high or low level of weight or credibility, so long as the decisionmaker's evaluation treats both parties equally by not, for instance, automatically assigning higher weight to exculpatory character evidence than to inculpatory character evidence.

Id. at 30337 (emphasis added).

#### Second-Guessing from OCR on Weight?

While the Department will enforce these final regulations to ensure that recipients comply with the § 106.45 grievance process, including accurately determining whether evidence is relevant, the Department notes that § 106.44(b)(2) assures recipients that, when enforcing these final regulations, the Department will refrain from second guessing a recipient's determination regarding responsibility based solely on whether the Department would have weighed the evidence differently.

Id. at 30337 (internal citation omitted, emphasis added).

#### Credibility/Demeanor and Trauma

For the same reasons that judging credibility solely on demeanor presents risks of inaccuracy generally, the Department cautions that judging credibility based on a complainant's demeanor through the lens of whether observed demeanor is "evidence of trauma" presents similar risks of inaccuracy. The Department reiterates that while assessing demeanor is one part of judging credibility, other factors are consistency, plausibility, and reliability. Real-time cross-examination presents an opportunity for parties and decision-makers to test and evaluate credibility based on all these factors.

Id. at 30356 (internal citation omitted)

# Evidence-From Relevance to Probativeness

- · Weigh the impact of physical evidence. Consider role of photographic and videograp evidence.
- Walk throughs?
- · Weigh the testimony of each party and witness
- Believability/Credibility
  - [C]redibility determinations are not based solely on observing demeanor, but also are based on other factors (e.g., specific details, inherent plausibility, internal consistency, corroborative evidence). Mar Nat.
- Reliability Bias/Interest in the outcome/ "Prejudicial"
- Persuasiveness
- Consistency
- Opinion/Fact/Expert testimony
- "Judicial Notice"
- · Weigh all the evidence: coherence//no prejudgment before judgement—avoid confirmation bias Combat sex stereotypes
- · No improper inferences: ex. Refusal to testify.

1321

1322 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

TIŢĻE

§ 106.45(b)(7) Requires a decision-maker who is not the same person as the Title IX Coordinator or the investigator to reach a determination regarding responsibility by applying the standard of evidence the recipient has designated in the recipient's arievance procedures for use in all Special Issues Highlight #8 formal complaints of sexual harassment (which must be either the preponderance of the evidence standard or the clear and Written Determination convincing evidence standard), and the recipient must simultaneously send the parties a written determination explaining the reasons for the outcome. ld. at 30054 (emphasis added

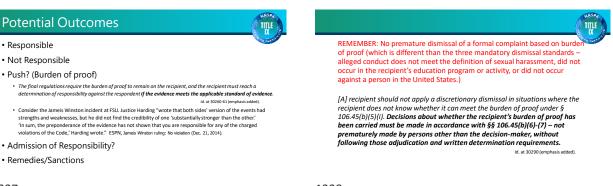
<sup>1323</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### Written Determination Regarding Responsibility me

- The written determination must include-
- (A) Identification of the allegations potentially constituting sexual harassment as defined in § 106.30; (B) A description of the procedural steps taken from the 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;
- (C) Findinas of fact supporting the determination:
- (D) Conclusions reaarding the application of the recipient's code of conduct to the facts:
- (E) A statement of, and rationale for, the result as to each allegation, including a A successful of <u>other tworted por</u> the result as to each allegation, including a determination regarding responsibility, any disciplinary stanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant: and
- (F) The recipient's procedures and permissible bases for the complainant and respondent to § 106.45(b)(7)(ii)(A-F)

# IRAC: Basic content of a report

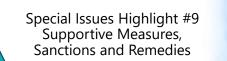
- Issue(s)/Procedural Posture
- Rule (Policies/Allegations)
- · Analysis (Rationales)
- Conclusion(s)



#### 1327

1328

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



### § 106.45(b)(7)(iv)



- Remedies
- Sanctions
- · Continuation of Supportive Measures

<sup>1329</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



#### § 106.45(b)(8)(i)

(8) Appeals.



(i) A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:

# § 106.45(b)(8)(i)(A-C)



(A) Procedural irregularity that affected the outcome of the matter; (B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and

(C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

Three required standards for appeal. You may have other standards, but they must apply equitably and equally.

1333

1334

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

# § 106.45(b)(8)(iii)(A-F)

(iii) As to all appeals, the recipient must:

(A) Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties (B) Ensure that the decision-maker(s) for the appeal is not the same person as

the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;

(C) Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of this section,

(D) Give both parties a reasonable, equal opportunity to submit a written

statement in support of, or challenging, the outcome;

(E) Issue a written decision describing the result of the appeal and the

rationale for the result; and (F) Provide the written decision simultaneously to both parties.

# Points on Appeals

§ 106.45(b)(8)(ii)

additional bases

- · What choices do we need to make?
  - · Who should decide appeals and what training do they need?

(ii) A recipient may offer an appeal equally to both parties on

τητιε

- · How many appellate officers do we need?
- What are the procedures for appeals?
- · How do appellate officers arrive at a determination?
- What "additional bases" could exist?

<sup>1335</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



#### Scenario #1

ABC University's policies state that the Title IX Coordinator will serve as the "hearing officer" to "manage the logistics of the hearing process and to assist the hearing panel. The hearing officer is empowered to enforce rules of decorum as well." ABC University policies also specify that the Title IX Coordinator "is not a decision-maker." Per ABC University policies, the decision-making function is entrusted to a panel consisting of three individuals trained as Title IX decision-makers—two faculty members, and one student who is selected from a pool of available and appropriately trained student Title IX decision-makers.

## Scenario #1—Questions

- Can a Title IX coordinator be a "hearing officer" separate from the decision-maker(s)? Is there anything in the new Title IX regulations that prevents this? Is this a desirable or problematic approach?
- Who else might be a "hearing officer" (not a decision-maker)? The school's attorney? What, if anything, could be problematic with that approach?
- Is there anything in the new regulations that prevents students from serving on a hearing panel? Will your campus allow students to serve on hearing panels as decision-makers? Why or why not?

#### 1339

#### 1340

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>1341</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### **Decision-Makers**

- Who are appropriate decision-makers?
   Faculty, staff, students?
  - [T]he final regulations do not preclude a recipient from allowing student leaders to serve in Title IX roles so long as the recipient can meet all requirements in \$106.45 and these final regulations, and leaves it to a recipient's judgment to decide under what circumstances, if any, a recipient wants to involve student leaders in Title IX roles. Id. at 30253.
  - Outside decision-makers or "adjudicators"? What about law firms?
     § 106.8(a) specifies that the Title IX Coordinator must be an 'employee' designated and authorized by the recipient to coordinate the recipient's efforts to comply with Title IX obligations. No such requirement of employee status applies to, for instance, serving as a decision-maker on a hearing panel. Id. at 30253 n.1037.
  - No bias or conflicts of interest
  - <u>Training</u>

#### Decision-Maker Training Mandates

[T]he decision-maker will be trained in how to conduct a grievance process, including

- How to determine relevance
- · How to apply the rape shield protections
- How . . . to determine the relevance of a cross-examination question before a party or witness must answer.

Id. at 30353 (bullets added).

#### Scenario #2

In a Title IX hearing, Complainant's advisor, Ad Visor, is cross-examining Respondent in a live in-person hearing where both parties are present. Upon hearing Respondent's answer to Ad Visor's question, Complainant yells out "That's a lie!"

### Scenario #2—Ouestions

- · How should a decision-maker address this situation? Is the spontaneous utterance "evidence"?
- Should a campus adopt hearing rules addressing spontaneous utterances/ decorum in the course of a hearing? If so, what might these rules look like?
- What are ways in which rules of decorum might differ for an inperson hearing versus a virtual hearing?
- · Who enforces the rules of decorum at the live hearing?

#### 1345

1346 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Special Issues Highlight #12 Rules of Decorum

### What are some possible rules of decorum

- Promptness
- Respectful behavior at all times
- Turn off cell phone
- No gum chewing
- No outbursts, talking out of turn, spontaneous utterances
- If virtual, be in a private space free from disruption

<sup>1347</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Advisor/Party Interactions During A Hearing

The Department notes that the final regulations, § 106.45(b)(5)(iv) and § 106.45(b)(6)(i), make clear that the choice or presence of a party's advisor cannot be limited by the recipient. To meet this obligation a recipient also cannot forbid a party from conferring with the party's advisor, although a recipient has discretion to adopt rules governing the conduct of hearings that could, for example, include rules about the timing and length of breaks requested by parties or advisors and rules forbidding participants from disturbing the hearing by loudly conferring with each other.

Id. at 30339 (emphasis added

#### Scenario #3



At a Title IX hearing in which you are a decision-maker, Complainant's advisor, Lav Yer, is posing questions through cross-examination to Respondent. Law Yer asks. Law Yer: "On the night in question, before you engaged in sexual misconduct with my client, you were seen "feeding shots" to Witness 1 according to several witnesses. Witness 1 stated to the investigator that you made Witness 1 feel extremely uncomfortable with repeated sexual advances that night. Witness 1 has attested to this here today [Note: This is true.] and has submitted to crossexamination. In fact, although Witness 1 has not submitted any formal complaints against you, Witness 1 believes you may have "taken advantage" of Witness 1 at a party in on-campus housing last semester by touching Witness 1 inappropriately when Witness 1 was too intoxicated to give consent. Complainant believes you have engaged in a pattern of doing this to other individuals. Did you inappropriately touch Witness 1 last semester or at any time while Witness 1 was too intoxicated to give consent?

# Scenario #3 Continued



Before Respondent can answer and before the decision-maker can take a pause to determine if the question is relevant, Att Orney, the advisor for Respondent states:

Att Orney: "Objection. Compound and Argumentative. This question also calls for irrelevant information and I direct my advisee not to answer."

The decision-maker then asks Law Yer to offer a response to the objection. Law Yer: "This question is relevant because it sets up the facts on what

happened on the night in question and it shows a pattern of bad behavior by Respondent involving other victims."

# Scenario #3—Questions

- Is this utterance by Law Yer a "question?"
- Will you allow rhetorical, compound or argumentative questions? Why or why not?
- Is this a question seeking relevant information? Why or why not?
- Should you, the decision-maker, ever take evidence of any "prior bad acts" of the parties into account?
- How will you address speaking objections, if at all?
- If you are unsure if a question is or is not relevant, what should you do?
- Do you have actual notice of a potential Title IX violation involving Witness 1?
- How will you manage issues relating to lawyers as advisors that may arise in a hearing?

#### 1351

1352

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Challenging the Relevance Determination

The final regulations do not preclude a recipient from adopting a rule (applied equally to both parties) that does, or does not, give parties or advisors the right to discuss the relevance determination with the decision-maker during the hearing. If a recipient believes that arguments about a relevance determination during a hearing would unnecessarily protract the hearing or become uncomfortable for parties, the recipient may adopt a rule that prevents parties and advisors from challenging the relevance determination (after receiving the decision-maker's explanation) during the hearing.

Id. at 30343 (emphasis added)

#### Scenario #4

#### HASPA TITLE

In a Title IX hearing, Complainant is asked the following question by Respondent's advisor on cross-examination: "Isn't it true that you had sexual relations with Respondent's roommate and Witness 3 in the month before the alleged incident with

Respondent occurred?"

#### Scenario #4—Ouestions

- Is this a relevant question? Why or why not?
- When are guestions about a complainant's prior sexual history allowed?
- How will you communicate "rape shield" provisions to advisors prior to a hearing?



#### 1357

1358 ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

| Relevance  | Prior Sexual History/Sexual Predisposition   |
|--|--|
| [R]elevance is the sole gatekeeper evidentiary rule in the final<br>regulations, but decision-makers retain discretion regarding the<br>weight or credibility to assign to particular evidence. Further, for the<br>reasons discussed above, while the final regulations do not address<br>"hearsay evidence" as such, § 106.45(b)(6)(i) does preclude a<br>decision-maker from relying on statements of a party or witness<br>who has not submitted to cross-examination at the live hearing. | Section 106.45(b)(6)(i)-(ii) protects complainants (but not<br>respondents) from questions or evidence about the<br>complainant's prior sexual behavior or sexual<br>predisposition, mirroring rape shield protections applied in<br>Federal courts. |
| <i>Id.</i> at 30354.   | <i>ld.</i> at 30103 (emphasis added).  |

<sup>1359</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### Rape Shield Language Decision-Maker to Determine Relevance We have also revised § 106.45(b)(6)(i) in a manner that builds in a [T]he rape shield language in § 106.45(b)(6)(i)-(ii) bars questions or "pause" to the cross-examination process; before a party or witness evidence about a complainant's sexual predisposition (with no exceptions) answers a cross-examination question, the decisionmaker must and about a complainant's prior sexual behavior subject to two determine if the question is relevant. exceptions: 1) if offered to prove that someone other than the respondent Id. at 30323. committed the alleged sexual harassment, or 2) if the question or evidence concerns sexual behavior between the complainant and the respondent and is offered to prove consent. Id. at 30336 n.1308 (emphasis added) 1362

#### Decision-Maker to Determine Relevance Cont'd

Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination question, the decision-maker must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.

Id. at 30331.

#### Decision-Maker to Determine Relevance Cont'd

Thus, for example, where a cross-examination question or piece of evidence is relevant, but concerns a party's character or prior bad acts, under the final regulations the decision-maker cannot exclude or refuse to consider the relevant evidence, but may proceed to objectively evaluate that relevant evidence by analyzing whether that evidence warrants a high or low level of weight or credibility, so long as the decision-maker's evaluation treats both parties equally by not, for instance, automatically assigning higher weight to exculpatory character evidence than to inculpatory character evidence.

1363

#### 1364

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Decision-Maker to Determine Relevance Cont'd m

The new regulations require "on the spot" determinations about a question's relevance.

[A]n explanation of how or why the question was irrelevant to the allegations at issue, or is deemed irrelevant by these final regulations (for example, in the case of sexual predisposition or prior sexual behavior information) provides transparency for the parties to understand a decisionmaker's relevance determinations.

Decision-Maker to Determine Relevance Cont'd me

This provision does not require a decision-maker to give a lengthy or complicated explanation; 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 asks about a detail that is not probative of any material fact concerning the allegations. No lengthy or complicated exposition is required to satisfy this provision.

Id. at 30343 (emphasis added).

Id. at 30337 (internal citation omitted)

<sup>1365</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

#### Decision-Maker to Determine Relevance Cont'd me

If a party or witness disagrees with a decision-maker's determination that a question is relevant, during the hearing, the party or witness's choice is to abide by the decision-maker's determination and answer, or refuse to answer the question, but unless the decision-maker reconsiders the relevance determination prior to reaching the determination regarding responsibility, the decisionmaker would not rely on the witness's statements.

#### Decision-Maker to Determine Relevance Cont'd mu

The party or witness's reason for refusing to answer a relevant question does not matter. This provision does apply to the situation where evidence involves intertwined statements of both parties (e.g., a text message exchange or email thread) and one party refuses to submit to cross-examination and the other does submit, so that the statements of one party cannot be relied on but statements of the other party may be relied on.

Id. at 30349 (internal citations omitted).

#### Scenario #5



In a Title IX hearing, Respondent is asked the following question by Complainant's advisor on cross-examination:

"Isn't it true that you got into trouble your senior year of high school for sending nude photos of Complainant to your friends after you hooked up with Complainant in high school?"

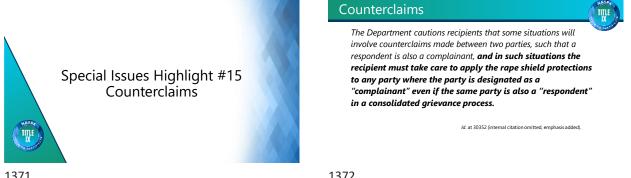
# Scenario #5—Questions Is this a relevant question? When are questions about a respondent's prior sexual history allowed? The Department reiterates that the rape shield language ... does not pertain to the sexual predisposition or sexual behavior of respondents, so evidence of a pattern of inappropriate behavior of a alleged harasser must be judged for relevance as any other evidence must be.

#### 1369

1373

1370

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>1371</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



1374

# Watch YouTube for Videos from OCR

NASSA TITLE R San

The First Amendment and Title IX: An OCR Short Webinar (July 29, 2020) OCR Short Webinar on How to Report Sexual Harassment under Title IX (July 27, 2020)

Conducting and Adjudicating Title IX Hearings: An OCR Training Webinar (July 23, 2020)

OCR Webinar on Due Process Protections under the New Title IX Regulations (July 21, 2020)

OCR Webinar on New Title IX Protections Against Sexual Assault (July 7, 2020)

OCR Webinar: Title IX Regulations Addressing Sexual Harassment (May 8, 2020)

### 1375



A Reminder...

All Title IX personnel should serve in their roles impartially.

All Title IX personnel should avoid

• prejudgment of facts

prejudice

conflicts of interest

bias
sex stereotypes

©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.



<sup>1377</sup> ©NASPA/Hierophant Enterprises, Inc, 2020. Copyrighted material. Express permission to post this material on Fresno Pacific University's website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.