



BOLDLY TRANSFORMING HIGHER EDUCATION

Critical Issues for Title IX: Four-Part Webinar Series
Session 3: Critical Issues for Title IX Decision-Makers
 November 2, 2020

Peter Lake & Julian R. Williams

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We particularly acknowledge and recognize that the land upon which our international headquarters is located today has long served as a site of meeting and exchange amongst a number of Indigenous people, including the Accohannock, Pacomake, Piscataway, Anacostank, Mattapanient, Nangemeick, Pamunkey, Tauxehent, Nanticoke, Chickahominy, Monacan, Mattiponi, Nansemond, Rappahannock, Ani-Stohini/Unami, and Assateague tribal nations as the original occupants of the Washington, D.C. region.

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ACPA strongly advocates for higher education and student affairs professionals to honor the land, the original tribal occupants, and the history of the place where you are located. Further, we have a responsibility to continually self-educate, reflect, and listen to the histories and people in our areas. Including tribal land acknowledgements in practice, and understanding and acknowledging history, is not only respectful and educational, it is the justice-oriented advocacy necessary for continuing the work of dismantling the devastating effects of settler colonialism in our society.

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- Question box
- Questions will be answered throughout or at the end of the presentation
- Raise your hand feature

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We will take a short, 15-minute "stretch break" at approximately 2:15 pm.

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Please be advised: This webinar is not intended to be legal advice. Know when to consult legal counsel.

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This webinar is not intended to be a comprehensive Title IX decision-maker training under the new Title IX regulations.



We hope you will interact with us and ask questions!

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General Topic Areas

- Brief overview of the new regulations
- The role of the decision-maker
- Dismissal standards
- Relevance and evidentiary issues
- Advisors
- Rules of Decorum
- Cross-Examination
- Consent
- Written Determinations
- Question and Answer




Brief Overview of the New Regulations



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.

Department of Education, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30226 (May 19, 2020) (Final rule) (online at www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf#at=1).



Some of the Major Changes to Title IX—FEDERAL COLLEGE SEX COURT Arrives on Campus

- Reporting requirements (fewer “mandated” reporters)
- Focus on formal complaints and actual knowledge
- New definition of “sexual harassment”
- Informal resolution—the rise of mediation?
- Jurisdiction
 - Title IX or conduct?
- Live hearing requirement (no single investigator models)
- Cross-examination by advisors
- The role(s) of advocates in college court
- Staffing
 - Title IX Coordinator
 - Title IX Investigator
 - Title IX Decision-Maker(s) (including one for appeals)—cannot be the Title IX coordinator or investigator

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Some of the Major Changes to Title IX Continued

- Can use “clear and convincing” or “preponderance of the evidence”
- Can use videoconferencing for hearings (especially important in light of COVID-19)
- Retaliation is expressly prohibited.
- Training materials for Title IX coordinators, Title IX investigators, Title IX decision-makers and those involved in informal resolution must be posted to an institution’s website.
- Conflicts of interest and bias
- “Deliberate indifference” standard and *Gebser/Davis*



§ 106.45 Grievance process for formal complaints of sexual harassment.

Summary of the 10 points under § 106.45

- Equitable treatment of parties/remedies
- Evaluation of evidence
- No bias and conflicts of interest/proper training of personnel
- **Presumption of non-responsibility of respondent until process is complete**
- Prompt timeframes
- Describe the range of possible sanctions
- State and evenly apply the evidence standard
- Provide procedures for appeal
- Describe supportive measures
- Legally-privileged information

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§ 106.30 Definitions (a): “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).”

U.S. Dept of Education, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (FINAL RULE) at 2014–2020 (emphasis added).



The Role of the Decision-Maker



Role Requirements

- No conflict of interest or bias; undue institutional interference
- No sexual stereotypes
- Detail oriented
- Ability to write a final determination report
 - Documentation is everything
- Organized
- Analytical skills
 - Credibility assessments
 - Weighing evidence
 - Listening skills



Role 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
- Ability to manage lawyers/advisors
- Understand basics of Title IX evidence rules

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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**
 - **Training**

Hearing Officers

- Should you designate a separate hearing officer who is not a decision-maker?
 - *With respect to the roles of a hearing officer and decisionmaker, the final regulations leave recipients discretion to decide whether to have a hearing officer (presumably to oversee or conduct a hearing) separate and apart from a decision-maker, and the final regulations do not prevent the same individual serving in both roles.* Id. at 30372.
- What is their role?
- Who should take this position?
 - Title IX Coordinator? General Counsel? Someone else?

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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 (bulletin added).

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.
- Training on technology usage for live hearings on your campus.
- Additional and continued training on bias.

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 (emphasis added).

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).

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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.

Id. at 30372 (emphasis added).

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).

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Dismissal Standards



§ 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.**

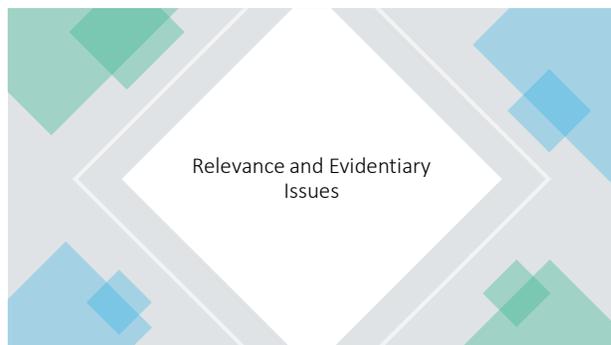
(emphasis added)

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What role could a decision-maker have in complaint dismissals?

What about a decision after an “initial” inquiry?



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Relevance in Relation to...

- Relevance
- Credibility
- Evidentiary Standard
- Probative Evidence
- Prejudice
- Inculpatory Evidence
- Exculpatory Evidence
- Hearsay
- Expert Testimony



[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.

id. at 100337.



Inculpatory Evidence

Evidence showing or tending to show one's involvement in a crime or wrong.

Bryan A. Gardner, Black's Law Dictionary 10, (2014), Pg. 676.



Exculpatory Evidence

Evidence tending to establish a defendant's innocence.

Bryan A. Gardner, Black's Law Dictionary 10, (2014), Pg. 675.

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Evidentiary Standard

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?

Contrast this with "**clear and convincing**" and "beyond a reasonable doubt."



"Relevance"

The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied. Id. at 30247 n. 3018.

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"Relevance"

*Having significant and demonstrable bearing on the matter at hand.
Affording evidence tending to prove or disprove the matter at issue or under discussion.*

merriam-webster.com



[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.



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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 (which deem questions and evidence about a complainant's prior sexual history to be irrelevant with two limited exceptions).** Id. at 30125 (emphasis added).



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Prior Sexual History/Sexual Predisposition

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).

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"Rape Shield"

[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).



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Consent and "Rape Shield"

[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.

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"Rape Shield"

[T]he rape shield language in this provision:

- **considers all questions and evidence of a complainant's sexual predisposition irrelevant, with no exceptions;**
- **questions and evidence about a complainant's prior sexual behavior are irrelevant unless they meet one of the two exceptions;**
- **and questions and evidence about a respondent's sexual predisposition or prior sexual behavior are not subject to any special consideration but rather must be judged like any other question or evidence as relevant or irrelevant to the allegations at issue.**

Id. at 30352 (emphasis added).



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"Rape Shield" Protections and the Investigative Report

[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.



Rape Shield and Counterclaims

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

Id. at 30292 (internal citation omitted, emphasis added).

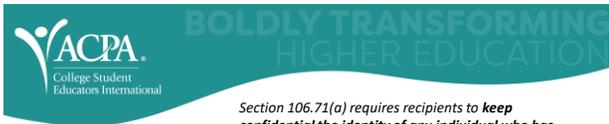


Rules Regarding Weight and Credibility

A recipient may, for example, adopt a rule regarding the weight or credibility (but not the admissibility) that a 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. 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).

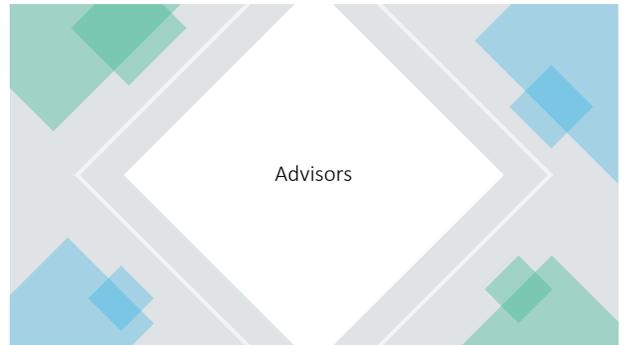
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Confidentiality

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.

Id. at 30071 (emphasis added).



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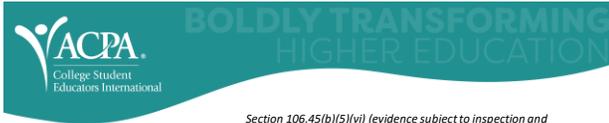
“Advisors”

- 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.
- How are advisors designated? Changes in advisor midway through a process?



“Advisors” Cont’d

- 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 in the final regulations precludes a recipient from choosing to do so.* Id. at 30291.
- Advisors conduct cross-examination. 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 representation.* Id. at 30297.
 - Should not be viewed as practicing law, but rather “as providing advocacy services to a complainant or respondent.” Id. at 30299.



How Can/Should “Advisors” Participate in the Process?

Section 106.45(b)(5)(vi) (evidence subject to inspection and review must be sent electronically or 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)(vi) 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 cross-examination, such cross-examination must be conducted by party advisors. Id. at 30298 n. 1167.



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Advisors May Conduct “Direct” Examination

Whether advisors also may conduct direct examination is left to a recipient’s discretion (though any rule in this regard must apply equally to both parties).

Id. at 30342 (emphasis added).

“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.

Id. at 30325 (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).

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The “Pause”

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 cross-examination questions any decision to exclude a question as not relevant.

Id. at 30311 (emphasis added).

Respectful Questioning

The Department acknowledges that predictions of harsh, aggressive, victim-blaming cross-examination may dissuade complainants from pursuing a formal complaint out of fear of undergoing questioning that could be perceived as an interrogation. However, recipients retain discretion under the final regulations to educate a recipient’s community about what cross-examination during a Title IX grievance process will look like, including developing rules and practices (that apply equally to both parties) to oversee cross-examination to ensure that questioning is relevant, respectful, and non-abusive.

Id. at 30316.

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Abusive Questioning Should Not be Tolerated

[W]here 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.

Id. at 30333 (emphasis added).

Advisors as Cross-Examiners

If a party's advisor of choice refuses to comply with a recipient's 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 recipient's rules of decorum, the recipient may provide that party with a different advisor to conduct cross-examination on behalf of that party.

Id. at 30320.

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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

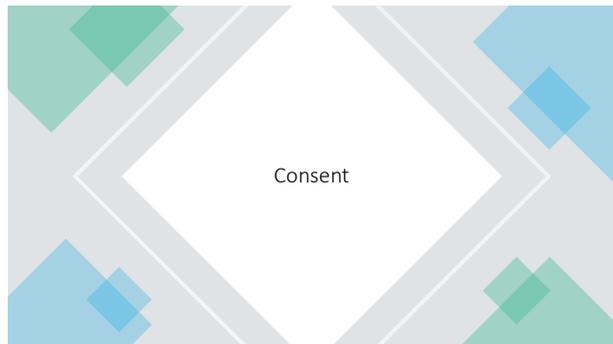
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Advisor/Party Interactions During A Hearing

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 30239 (emphasis added).



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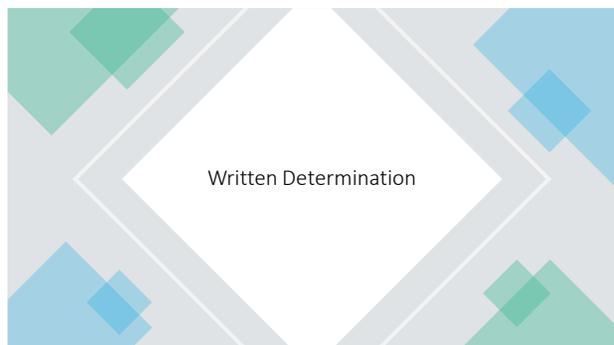
“Consent”

The Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault, as referenced in this section.

“Consent”—Not Defined in New Regulations

- What will your definition be?
 - Affirmative consent?
 - Will distribute across multiple offenses
- 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.

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§ 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.*

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§ 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;*

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§ 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;



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§ 106.45(b)(7)(ii)(C)

(C) Findings of fact supporting the determination;



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§ 106.45(b)(7)(ii)(D)

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

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§ 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



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§ 106.45(b)(7)(ii)(F)

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

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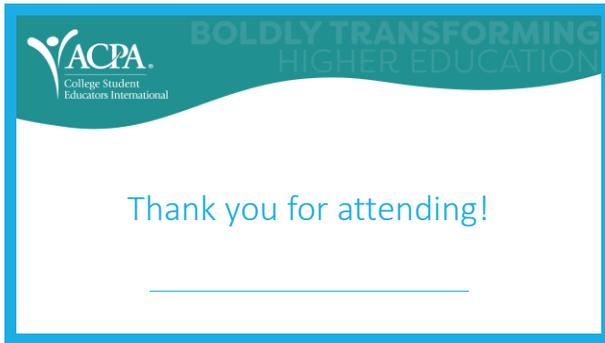
§ 106.45(b)(7)(iii)

(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.



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Questions?



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