



**BOLDLY TRANSFORMING HIGHER EDUCATION**

*Critical Issues for Title IX: Four-Part Webinar Series*  
*Session 2: Critical Issues for Title IX Investigators*  
*October 28, 2020*

Peter Lake & Julian R. Williams

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ACPA – College Student Educators International is the leading comprehensive student affairs association that advances higher education and engages students for a lifetime of learning and discovery. Although serving an international audience, our membership is primarily from the United States and our offices are headquartered in Washington, D.C. at the National Center for Higher Education.

Related to our mission of supporting and fostering learning through the generation and sharing of knowledge, ACPA acknowledges the painful history of genocide in the United States for native, aboriginal, and indigenous peoples. We honor and respect the many and diverse tribal nations and peoples who were forcefully removed from, as well as those still connected to, this land.

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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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**How to Use Go To Webinar**

- Conversation will be captioned and recorded
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We will take a short, 15-minute "stretch break" at approximately 2:15 pm.

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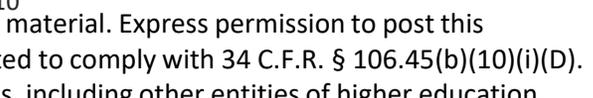
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This webinar is not intended to be a comprehensive Title IX investigator training under the new Title IX regulations.

We hope you will interact with us and ask questions!

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Brief Overview of the New Regulations

General Topic Areas

- Brief overview of the new regulations
- The role of the investigator
- Scope of policies and “tuning”
- Consent
- Relevance
- “Universe of Evidence”
- Final Investigative report
- Question and Answer





**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 Investigator



**Role 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
- Understand basics of Title IX evidence rules



**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

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**The Investigation Process Itself**

- Planning
- Interviewing
- Gathering Documentary Evidence
- Report Writing
- Tie to the Hearing Process



**The Role of the Investigator**

- Title IX coordinator can serve as the investigator – Is this a good idea?
- 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?
- “Initial inquiries” as part of gatekeeping?

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**The 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
- Make recommendations for supportive measures or accommodations?
- Drawing conclusions/findings of responsibility?????

***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.

*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).

Written Notification to Parties **BEFORE** Any Initial Interview with the Respondent

- Notice of the school's grievance process
- The opportunity, if any, to engage in an informal resolution process
- 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 or statements during the grievance process

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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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Investigators should be well-versed on the “scope” of the institution’s “education program or activities.”

**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.*



**Involvement in an Education Program or Activity**

... [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 as provided in the revised definition of "formal complaint" in § 106.30; this provision tethers a recipient's obligation to investigate a complainant's formal complaint to the complainant's involvement (or desire to be involved) in the recipient's education program or activity so that recipients are not required to investigate and adjudicate 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 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.



**§ 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.

Study abroad?

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**Scope/ Off-campus Jurisdiction**

While such situations may be fact specific, recipients must consider whether, for example, a sexual harassment incident between two students that occurs in an off-campus apartment (i.e., not a dorm room provided by the recipient) is a situation over which the recipient exercised substantial control; if so, the recipient must respond to notice of sexual harassment that occurred there.

Id. at 30093.



**Tuning**

- Recipients may continue to address harassing conduct that does not meet the § 106.30 definition of sexual harassment, as acknowledged by the Department's change to § 106.45(b)(3)(i) to clarify that dismissal of a formal complaint because the allegations do 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 own code of conduct. Id. at 40 (emphasis added).
- 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 occurring against a person who is not located in the United States. Id. at 44 n. 102 (emphasis added).

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**Conduct That Does Not Meet sexual Harassment Definition**

Recipients may continue to address harassing conduct that does not meet the § 106.30 definition of sexual harassment, as acknowledged by the Department's change to § 106.45(b)(3)(i) to clarify that dismissal of a formal complaint because the allegations do 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 own code of conduct.

Id. at 40 (emphasis added).



**Conduct That Does Not Meet sexual Harassment Definition**

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 occurring against a person who is not located in the United States.

Id. at 44 n. 102.

Tuning? Traps?



Nothing in the final regulations precludes a recipient from applying the § 106.45 grievance process to address sexual assaults that the recipient is not required to address under Title IX.

[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.

[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.

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§ 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.



Statute of Limitations?

The Department does not wish to impose a statute of limitations for filing a formal complaint of sexual harassment under Title IX. . . . [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 as provided in the revised definition of "formal complaint" in § 106.30; this provision tethers a recipient's obligation to investigate a complainant's formal complaint to the complainant's involvement (or desire to be involved) in the recipient's education program or activity so that recipients are not required to investigate and adjudicate 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 of many years and sometimes complainants choose not to pursue remedial action in the immediate aftermath of a sexual harassment incident. The Department believes that applying a statute of limitations may result in arbitrarily denying remedies to sexual harassment victims.

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Statute of Limitations and Dismissal of Complaint

[T]he § 106.45 grievance process contains procedures designed to take into account the effect of passage of time on a recipient's ability to resolve allegations of sexual harassment. For example, if a formal complaint of sexual harassment is made several years after the sexual harassment allegedly occurred, § 106.45(b)(3)(ii) provides that . . . if the respondent is no longer enrolled or employed by the 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 has the discretion to dismiss the formal complaint or any allegations therein.



No Reasonable Cause Threshold

The Department declines to add a reasonable cause threshold into § 106.45. The very purpose of the § 106.45 grievance process is to ensure that accurate determinations regarding responsibility are reached, impartially and based on objective evaluation of relevant evidence; the Department believes that goal could be impeded if a recipient's administrators were to pass judgment on the sufficiency of evidence to decide if reasonable or probable cause justifies completing an investigation.



RSOs/Greek Life

[T]here is no exemption from Title IX coverage for fraternities and sororities, and in fact these final regulations specify in § 106.44(a) that the education program or activity of a postsecondary institution includes any building owned or controlled by a student organization officially recognized by the postsecondary institution.

Relationship agreements?



**Organizations**

The § 106.45 grievance process . . . contemplates a proceeding against an individual respondent to determine responsibility for sexual harassment. **The Department declines to require recipients to apply § 106.45 to groups or organizations against whom a recipient wishes to impose sanctions arising from a group member being accused of sexual harassment because such potential sanctions by the recipient against the group do not involve determining responsibility for perpetrating Title IX sexual harassment but rather involve determination of whether the group violated the recipient's code of conduct.**

id. at 30096 (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.**

(emphasis added).

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**§ 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)(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).

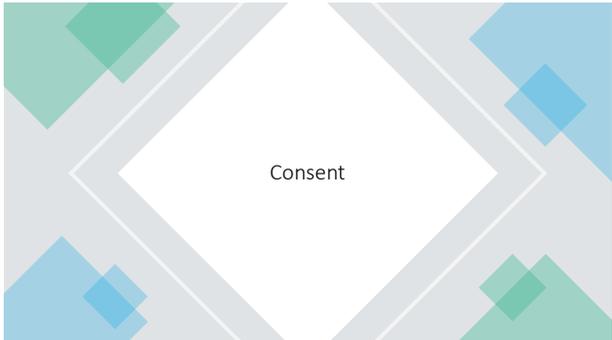
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**§ 106.45(b)(4)**

(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.

(emphasis added).



Consent



“Consent”

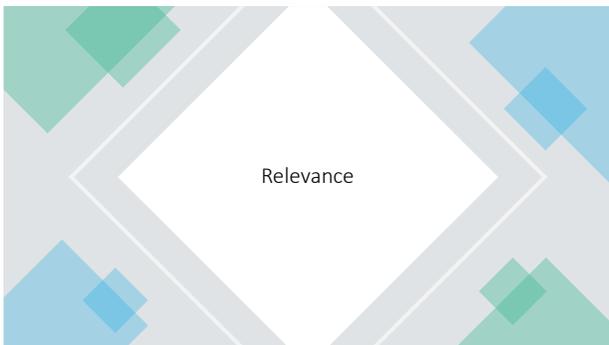
*The Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault, as referenced in this section.*

“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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**Relevance**

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

**Relevance in Relation to...**

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*[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 30237.



**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.



## 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."

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## "Relevance"

*The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied.* Id. at 30247 n.102B.



## "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.*

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*[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.



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).



### 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).



### "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.*



### "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 30352 (internal citation omitted, emphasis added).

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§ 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)

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Submission of Evidence and Sharing of Responses

*A recipient may require all parties to submit any evidence that they would like the investigator to consider prior to when the parties' time to inspect and review evidence begins. Alternatively, a recipient may choose to allow both parties to provide additional evidence in response to their inspection and review of the evidence under § 106.45(b)(5)(vi) and also an opportunity to respond to the other party's additional evidence. Similarly, a recipient has discretion to choose whether to provide a copy of each party's written response to the other party to ensure a fair and transparent process and to allow the parties to adequately prepare for any hearing that is required or provided under the grievance process.* (emphasis added)

Id. at 30307 (emphasis added).

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§ 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)

(emphasis added)

68 [T]he universe of evidence given to the parties for inspection and review under § 106.45(b)(5)(vi) must consist of all evidence directly related to the allegations; determinations as to whether evidence is "relevant" are made when finalizing the investigative report, pursuant to § 106.45(b)(5)(vii) (requiring creation of an investigative report that "fairly summarizes all relevant evidence").

Id. at 30248 n.1021 (emphasis added).

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"Universe of Evidence"

*If a recipient chooses not to allow the parties to respond to additional evidence provided by a party in these circumstances, the parties will still receive the investigative report that fairly summarizes relevant evidence under § 106.45(b)(5)(vii) and will receive an opportunity to inspect and review all relevant evidence at any hearing and to refer to such evidence during the hearing, including for purposes of cross-examination at live hearings under § 106.45(b)(5)(vi).*

Not Allowing Parties to Respond to Additional Evidence

Id. at 30307 (emphasis added).

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*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).***

Id. at 30307 (emphasis added).

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### Paring Down the “Universe” to “Relevant”

*“[D]irectly related” may sometimes encompass a broader universe of evidence than evidence that is “relevant.”*

Id. 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.

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### Evidence and Investigative Report Sent to Advisors

*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.

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**Should investigators incorporate any party’s responses to the “universe of evidence” (in whole or in part) into the final report?**

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### Relevance... again!

*[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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### 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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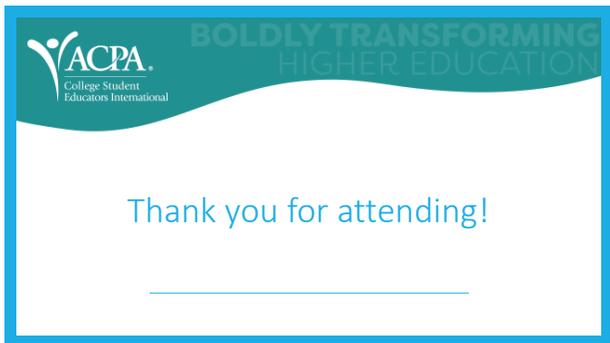
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Possible Format for the Final Investigative Report

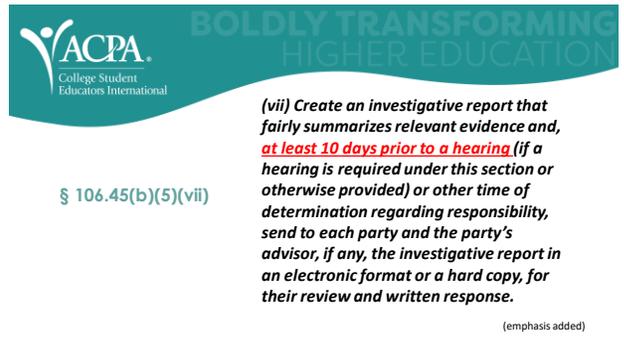
- I. BACKGROUND AND REPORTED CONDUCT
- II. JURISDICTION
- III. SCOPE OF THE INVESTIGATION
- IV. RELEVANT POLICY AND LAW PROHIBITING SEXUAL HARASSMENT (INCLUDING SEXUAL ASSAULT AND RETALIATION):
- V. INVESTIGATION AND SUMMARY OF RELEVANT EVIDENCE
  - A. Statements of Parties and Witnesses
  - B. Documentary Evidence
- VI. ANALYSIS?
- VII. CONCLUSION

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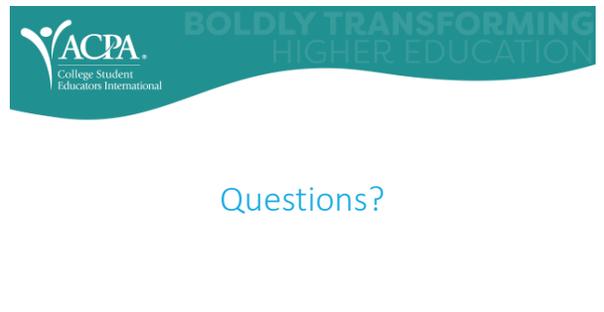
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