Victim Rights Law Center's Tool for Incorporating Trauma-Informed Practices into the Final Title IX Rule Legal Framework

Introduction

This Final Title IX Rule Tool (hereinafter "the Tool") is intended to support administrators at institutions of higher education as they are drafting institutional policy and procedures to be consistent with the new Title IX legal framework. The considerations and recommendations contained in this Tool were developed from a trauma-informed perspective and guided by a commitment to equity. At times, there is tension between the commitment to equity and the Final Title IX Rule (hereinafter "the Final Rule") since the Final Rule does not share the same trauma-informed values. These recommendations are also evolving, as institutions and practitioners incorporate the Final Rule into policy and practice and may be updated as the Department of Education provides additional clarity.

This is not an exhaustive list of all changes under the Final Rule; rather, this is meant to highlight and delve into the major changes as well as connect pieces of the Final Rule that are central to understanding the new framework. In some places, the Final Rule is more prescriptive and straightforward and does not require additional analysis.

Please note that this is not legal advice. Questions about compliance with the Final Rule should be directed to your institution's legal counsel. References contained in this Tool are to the unofficial version of the Final Rule that can be found here.

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TOOL FOR INCORPORATING TRAUMA-INFORMED PRACTICES INTO THE NEW TITLE IX FRAMEWORK

Application: The Department of Education has specifically indicated that the regulations will not be retroactive when they go into effect on August 14, 2020. In other words, institutions will not have to reopen previously decided cases in order to adjudicate them under the institution's updated grievance process. The Department of Education has also directed institutions to apply the new regulations to incidents that occur *on or after* August 14, 2020.

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THRESHOLD ISSUES: **If these baseline requirements are not met, no complaint may proceed under Title IX.**		
Issue/Change History from Prior Guidance	**Final Rule Language**	**Considerations/Recommendations**
Jurisdiction		
Prior guidance did not take a rigid jurisdictional approach. See 2011 Dear Colleague Letter (DCL) at 4 ("Schools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, outside a school's education program or activity. If a student files a complaint with the school, regardless of where the conduct occurred, the school must process the complaint in accordance with its established procedures. Because students often experience the continuing effects of off-campus sexual harassment in the educational setting, schools should consider the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus. For example, if a student alleges that he or she was sexually assaulted by another student off school grounds, and that upon returning to school he or she was taunted and harassed by other students who are the alleged perpetrator's friends, the school should take the earlier sexual assault into account in	**§ 106.44(a):** *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.* Education program or activity = • Locations, events, circumstances over which the recipient exercised substantial control over the respondent and the context in which sexual harassment occurs (106.44(a)); • Any building owned or controlled by student organization that is officially recognized (106.44(a)). **§ 106.30**: *At time of filing a formal complaint, complainant must be participating in or attempting to participate in the education*	As a threshold matter, we recommend addressing conduct that falls outside the scope of Title IX. While institutions are given the flexibility to do this, how to go about it in institutional policy is not straightforward. With some variation, there are two general approaches for developing policies and procedures that cover broader conduct that are outlined below: **A) One policy and one set of procedures that covers Title IX and other sexual misconduct.** Under this approach, one policy would include conduct prohibited by Title IX and the institution more broadly, such as sexual exploitation, off-campus conduct, and sexual misconduct that occurs outside of the U.S. Under this approach, complaints that did not meet the requirements of a formal complaint under Title IX would be "dismissed" by notifying the students simply that the case is not covered by Title IX, but the conduct is

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determining whether there is a sexually hostile environment. The school also should take steps to protect a student who was assaulted off campus from further sexual harassment or retaliation from the perpetrator and his or her associates."); 2014 FAQ (FAQ) at 29 ("Under Title IX, a school must process all complaints of sexual violence, regardless of where the conduct occurred, to determine whether the conduct occurred in the context of an education program or activity or had continuing effects on campus or in an off-campus education program or activity.").	*program/activity of recipient where formal complaint is filed.* ✓ Education Program or Activity ✓ In the U.S. ✓ Complainant must be participating in or attempting to participate in education program/activity of the institution where complaint is filed As to misconduct that falls outside the ambit of Title IX, nothing in the final regulations precludes recipients from vigorously addressing misconduct (sexual or otherwise) that occurs outside the scope of Title IX or from offering supportive measures to students and individuals impacted by misconduct or trauma even when Title IX and its implementing regulations do not require such actions. Preamble, 633. A complainant may be "attempting to participate" in the recipient's education program or activity in a broad variety of circumstances that do not depend on a complainant being, for instance, enrolled as a student or employed as an employee. A complainant may be "attempting to participate," for example,	still covered by the same institutional policy. The "dismissal" would have very little impact on the institution's procedure otherwise. <u>Advantages to one policy approach:</u> • Streamlined process for adjudicating all sexual misconduct allegations; • Clearer policy for the campus community to understand and utilize; • Prevents confusion around which policy applies to allegations; • If after investigating it is clear that the allegations do not fall within the scope of Title IX, the process can continue instead of starting all over again under another applicable policy. <u>Disadvantages to the one policy approach:</u> • Requires a live hearing and cross-examination for all allegations, even those complaints that fall outside of Title IX; • Attaches additional Title IX requirements such as the restrictions on supportive measures and the presumption of not responsible to all conduct, regardless of whether it falls under Title IX; • Every grievance process will require the involvement of a significant number of administrators/officials;

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	where the complainant has withdrawn from the school due to alleged sexual harassment and expresses a desire to re-enroll if the recipient responds appropriately to the sexual harassment allegations, or if the complainant has graduated but would like to participate in alumni events at the school, or if the complainant is on a leave of absence to seek counseling to recover from trauma. Preamble, 709.	• Substantial institutional resources required to comply with Title IX grievance process for all allegations. **B) Two policies and procedures: Title IX and a Code of Conduct that incorporates sexual misconduct.** Under this approach, conduct that falls under Title IX would be housed in a Title IX-specific policy. All other gender-based misconduct the institution considers a violation of its community standards, such as sexual exploitation or conduct that occurs between students in a study abroad program, would be housed in a different policy. This separate gender-based misconduct policy could stand alone or be incorporated into the Code of Conduct. <u>Advantages of a bifurcated approach:</u> • More latitude and discretion on the part of the institution to develop processes to adjudicate non-Title IX allegations that are fair and trauma-informed; • The ability to implement a process that uses only experienced investigators to question parties and witnesses rather than relying on a hearing panel of faculty and staff;

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		• More control over the role and participation of advisors; • More freedom to institute supportive/safety measures during the pendency of an investigation; • Ability to reduce the number of administrators required to conduct an adjudication process, which can help a complainant feel more comfortable coming forward and protect the privacy of all parties; • Less demand of institutional resources. <u>Disadvantages of a bifurcated approach:</u> • Can be confusing for campus community to figure out what policy applies and how to accurately report sexual misconduct; • If a formal complaint is filed under the Title IX policy and mandatory dismissal is subsequently triggered, the process must start again under a different policy, which can be difficult for victims experiencing trauma. Similarly, if a complaint is adjudicated under a Code of Conduct that may not include a live hearing, but is later determined to fall under Title IX, the process will have to be restarted under the Title IX policy. From a

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		trauma-informed perspective, this is problematic.
Actual Knowledge & Reporting Authorities		
Notice: Previously, constructive knowledge was sufficient to put an institution on notice of sexual harassment. 1997 Guidance (a school is liable where it "knows or should have known"); 2001 Guidance at 13 ("A school has notice if a responsible employee knew, or in the exercise of reasonable care should have known, about the harassment.") (internal quotation marks omitted); DCL at 4; 2014 Q&A at 2 ("[Office for Civil Rights (OCR)] deems a school to have notice of student-on-student sexual violence if a responsible employee knew, or in the exercise of reasonable care should have known, about the sexual violence."); 2017 Q&A at 1. Reporting Authorities: Under prior guidance, employees on campus had reporting obligations if they were considered "responsible employees." This was defined as "any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility." 2001 Guidance at 13.	**§ 106.30(a):** *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... 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.* The Title IX Coordinator and officials with authority to institute corrective measures on behalf of the recipient fall into the same category as employees whom guidance described as having "authority to redress the sexual harassment." Preamble, 54. There is "wide discretion to craft and implement the recipient's own employee reporting policy to decide (as	While the group of individuals who are deemed Officials with Authority may be significantly smaller than the previous category of Responsible Employees, we recommend that institutions continue to maintain a policy that requires faculty/staff to report sexual misconduct to a centralized place. These employees will not fall under the umbrella of "officials with authority to institute corrective measures" but will be asked to share disclosures/reports they receive with a designated official as a matter of institutional policy. This official, likely the Title IX Coordinator, will be able to share information about resources and rights and options so the victim/reporter has the opportunity to make an informed decision about future reports. From a trauma-informed perspective, the value of having this information, especially in writing, is critical. Maintaining a policy that requires faculty and staff to report to a centralized official also allows the institution to track systemic patterns and trends and identify potential safety risks. There may be instances where the victim/reporter does not want the

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	to employees who are not the Title IX Coordinator and not officials with authority) which employees are mandatory reporters (i.e., employees who must report sexual harassment to the Title IX Coordinator), which employees may listen to a student's or employee's disclosure of sexual harassment without being required to report it to the Title IX Coordinator, and/or which employees must report sexual harassment to the Title IX Coordinator but only with the complainant's consent." Preamble, 64.	faculty/staff to reveal their names to the Title IX Coordinator. In that case, the employee can still relay limited information to the Title IX Coordinator and receive information to pass along to the victim/reporter. This would respect the victim/reporter's request for anonymity while allowing the Title IX Coordinator to offer a comprehensive list of resources, rights, and reporting options. This reporting structure would also support an institution's obligations under the Clery Act.
Definition of Sexual Harassment		
The 1997 Guidance defined sexual harassment as "conduct of a sexual nature is sufficiently severe, persistent, **or** pervasive to limit a student's ability to participate in or benefit from the education program, or to create a hostile or abusive educational environment." (Emphasis added). Prior guidance defined sexual harassment as "unwelcome conduct of a sexual nature" and instructed the institution to assess whether "the harassment rises to a level that it denies or limits a student's ability to participate in or benefit from the school's program based on sex." 2001 Guidance at 2, 5.	**§ 106.30(a):** *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),*	The Final Rule's definition of sexual harassment raised the threshold on what is considered sexual harassment, making it difficult to meet. It will have to be incorporated into the institutional Title IX policy. To make it possible for your institution to adjudicate conduct that may not fit into this new definition, but still occurs with some frequency on your campus, we recommend ensuring that sexual exploitation is incorporated as prohibited conduct in policy and defining it broadly. Where this is housed in policy will ultimately depend on whether your institution takes a one policy or two policy approach to Title IX and other sexual misconduct.

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The DCL articulated the analysis of hostile environment sexual harassment: "when a student sexually harasses another student, the harassing conduct creates a hostile environment if the conduct is sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the school's program." DCL at 3.	*"domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).* **§ 106.45(b)(3):** *If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved … then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under Title IX or this part…*	For example, you may consider the following commonly used definition of sexual exploitation: Sexual Exploitation is taking sexual advantage of another person without consent. It may involve use of one's own or another individual's nudity or sexuality. Examples of Sexual Exploitation include, but are not limited to: • Voyeurism (e.g. watching, showing or taking pictures, videos, or audio recordings of another person in a state of undress or of another person engaging in a sexual act without the consent of all parties); • Disseminating, showing, streaming, or posting pictures or video of another in a state of undress or of a sexual nature without the person's consent; • Distributing sexually intimate or sexual information about another person; • Exposing one's genitals to another person without consent or inducing another to expose their own genitals in non-consensual circumstances; • Knowingly exposing another individual to a sexually transmitted disease without their knowledge;

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		• Knowingly assisting another person with committing an act of sexual misconduct; • Inducing incapacitation for the purpose of making another person vulnerable to sexual assault.
Formal Complaint		
Under previous guidance, a formal complaint initiated the grievance process, but institutions had latitude in determining what constituted a formal complaint. For instance, it was not required to be written or contain specific information. Another crucial difference between prior guidance and the Final Rule is when the institution is required to initiate a grievance process. Previously, a report that put the institution on notice of sexual harassment was enough to trigger an institution's grievance process, even without a formal complaint. Under the Final Rule, only a formal complaint as defined therein initiates a grievance process.	**§ 106.30:** *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. 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*	Title IX Coordinators and others who work with students who have reported sexual harassment should take extra care to explain to survivors the steps needed to initiate a grievance process under Title IX and the difference between Title IX and the institution's code of conduct. If the allegations fall under Title IX, it is critical to walk the survivor through the elements of a formal complaint and offer options to ensure they feel comfortable. We also recommend emphasizing that there is no statute of limitations on filing a formal complaint, but that there may be additional considerations to take into account in waiting to file. We also recommend that you consider your campus community and preempt some of the concerns survivors may have at the outset of this process. For instance, some students may fear that moving forward with the grievance process requires them to report to law enforcement. Others may be concerned about being cross-examined and

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	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). Title IX obligates recipients to operate education programs or activities free from sex discrimination, and we do not believe Title IX's non-discrimination mandate would be furthered by imposing a time limit on a complainant's decision to file a formal complaint. Preamble, 373. The formal complaint definition in § 106.30 ensures that schools must investigate when the complainant desires that action (see also § 106.44(b)(1)), and ensures that a school only overrides a complainant's desire for the school not to investigate if the Title IX Coordinator has determined on behalf of the recipient that an investigation is needed, and in	wonder if there is a way around that. To the extent that you can, we recommend anticipating these concerns and addressing them to make the process as accessible and clear as possible. Additionally, we recommend making an internal decision about what circumstances would warrant the Title IX Coordinator signing a formal complaint and initiating a grievance process in the absence of the complainant doing so. For instance, if a respondent has a past conduct history or the report alleges serial perpetration, these may be instances where the Title IX Coordinator steps in and initiates a grievance process despite a survivor's wishes not to participate as the complainant. To guard against arbitrariness, we recommend coming up with a list of circumstances that would warrant the Title IX Coordinator taking such action, kept internal. This would give the Title IX Coordinator a rubric for making the assessment and being consistent about when that assessment is triggered.

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	such circumstances the final regulations protect the complainant's right to refuse to participate in the grievance process. § 106.71. Preamble, fn. 580. Even where the Title IX Coordinator is also the investigator, the Title IX Coordinator must be trained to serve impartially, and the Title IX Coordinator does not lose impartiality solely due to signing a formal complaint on the recipient's behalf. Preamble, 400.	
GRIEVANCE PROCESS: Reporting and Investigation		
Issue/Change History from Prior Guidance	**Final Rule Language**	**Considerations/Recommendations**
Presumption of Non-Responsibility		
Prior guidance did not require a presumption. In general, a presumption is inconsistent with a preponderance of the evidence standard, since it typically requires the opposing party to overcome the presumption and thus bear the burden of proof. A presumption requires that the institution take an affirmative position before any evidence is weighed, contrary to a preponderance standard that relies on equity between the parties at the outset. For this	**§ 106.45(b)(1)(iv):** *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)(2)(B):** *Notice of Allegations – The written notice must*	While the Final Rule requires a grievance process to specifically state the presumption, it is important to remember what this means for this particular context in practicality. This language is a reminder to institutions that no bias should exist against a respondent just because the respondent was accused of sexual misconduct/sexual harassment. The presumption serves as a way to ensure that no punitive measures are

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reason, prior guidance did not require or allow for a presumption. Importantly, lack of a presumption was not inconsistent with impartiality and furthered the equity commitments of Title IX.	*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.*	taken against a respondent until a grievance process has found them responsible. Additionally, while a presumption typically indicates that the party without the presumption bears the burden of overcoming it, it is critical to remember that the complainant <u>does not</u> bear the burden of proof in a campus grievance process and is not responsible for overcoming this presumption. The institution itself is required to bear the burden of proof and to impartially administer the process and adjudicate the allegations. The Final Rule's emphasis on impartiality and due process extends to both parties, not just the respondent.
Role of Title IX Coordinator		
"The Title IX coordinators should not have other job responsibilities that may create a conflict of interest. For example, serving as the Title IX coordinator and a disciplinary hearing board member or general counsel may create a conflict of interest." DCL at 7.	**§ 106.30**: *Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.* **§ 106.45(b)(7)(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.* **§ 106.45(b)(1)(iii)**. *A recipient's grievance process must … Require that … a Title IX Coordinator… not have a conflict of interest or bias for or*	Title IX Coordinators should have a robust group of administrators, faculty, and staff who can support the coordination of supportive measures. While the Title IX Coordinator can serve as the investigator, we recommend not conflating these roles if possible for your institution. This is primarily due to the concern that decision-makers at the hearing can call the investigator as a witness, who will also be cross-examined by the parties' advisors. Given the strict conflict of interest requirements of the Final Rule, this scenario risks putting the Title IX Coordinator in a

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	against complainants or respondents generally or an individual complainant or respondent. The Title IX Coordinator can also serve as the investigator. Preamble, 1259. 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	position of making credibility assessments and accused of bias in their Title IX Coordinator role. While the Title IX Coordinator cannot be a decision-maker regarding responsibility, they should be prepared to make threshold decisions about mandatory dismissal. Finally, the Title IX Coordinator should be prepared to explain in painstaking detail to complainants the applicable policy/policies related to allegations and any considerations the complainant should take into account when deciding what avenue to pursue ultimately. For instance, if the institution does not adjudicate conduct outside the scope of Title IX, it would be beneficial to ensure the complainant understands the elements required for a formal complaint and advised accordingly. If a complainant is considering leaving school for a period of time due to the sexual harassment, the Title IX Coordinator should inquire about the complainant's intentions for returning if the sexual harassment is addressed. These steps will ensure that reports do not fall through the cracks unnecessarily.

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	re-take an exam). Preamble, fn. 595, 398-399.	
Supportive Measures		
Prior Guidance referred to interim measures and, until the 2017 Interim Guidance, instructed institutions to minimize the burden on the complainant. 2001 Guidance at 16; 2011 DCL at 16 (“Title IX requires a school to take steps to protect the complainant as necessary"); FAQ at 33 (schools should minimize the burden on the complainant). *See also* DCL at 15-16 ("When taking steps to separate the complainant and alleged perpetrator, a school should minimize the burden on the complainant, and thus should not, as a matter of course, remove complainants from classes or housing while allowing alleged perpetrators to remain.").	**§ 106.30**: *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.* ✓ Non-Disciplinary ✓ Non-Punitive ✓ Individualized ✓ Reasonably Available ✓ Designed to Restore or Preserve Equal Access to Education Program/Activity ✓ Cannot Unreasonably Burden Other Party	During the pendency of a formal disciplinary process, schools should generally implement mutual supportive measures. Common supportive measures address housing, academic, transportation, and employment needs, as well as contact between the parties. <u>General Supportive Measures</u> It is common for allegations to involve parties that overlap in classes, residence halls, or extracurricular activities. In these circumstances, it is important to balance the needs and safety of the complainant with the specific rubric for supportive measures in the Final Rule. For instance, if a complainant is in the same lab section with the respondent, you may look into whether the lab section is offered at a different time. If so, we recommend shifting the respondent into that lab if it works with their schedule and is not unreasonably burdensome. Similarly, if parties live in the same residence hall, consider making it possible for the complainant to change their housing at no additional cost. It is important to remember that under the framework of the Final Rule, removal of a respondent from

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	✓ Confidential (unless that impairs the ability to provide the supportive measure) 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. Preamble, 577. Changing a respondent's class schedule or changing a respondent's housing or dining hall assignment may be a permissible supportive measure depending on the circumstances. By contrast, removing a respondent from the entirety of the recipient's education programs and activities, or removing a respondent from one or more of the recipient's education programs or activities (such as removal from a team, club, or extracurricular activity), likely would constitute an unreasonable	housing would be considered an emergency removal and not a supportive measure. Please see the section on Emergency Removal for more information on considerations and recommendations for taking this action. In general, we recommend incorporating a safety planning framework when discussing supportive measures. Complainants may not be able to articulate what they need or know what is available, so engaging in a safety planning discussion may illuminate areas where supportive measures may be appropriate, regardless of whether a formal complaint is filed. For instance, if the parties typically cross paths in the dining hall, it may be helpful to assign the respondent a different dining hall if another is available on campus. *It is important to note here that there is a fine line between supportive measures and emergency removal (discussed in the following section). This line seems to be related to a respondent being asked to change their schedules, but not removed in entirety from the education program or activity. When a respondent is removed entirely from an extracurricular activity or campus writ large, that would be considered

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	burden on the respondent or be deemed disciplinary or punitive, and therefore would not likely qualify as a supportive measure. Preamble, 750.	an emergency removal requiring certain elements to be met. <u>No-Contact Orders</u> No-contact Orders (NCO) at this stage should be mutual (restrict both parties from contact) unless there are particular circumstances that would warrant a unilateral (restrict one party from contacting the other). For instance, a unilateral NCO may be appropriate as a supportive measure if a complainant has a Civil Protection Order, a Preliminary Injunction, other relevant court order, or there are other circumstances that would warrant its issuance. If mutual NCOs are issued as a supportive measure and there is ultimately a finding of responsibility, the mutual should be changed to a unilateral NCO. NCOs in general, and unilateral NCOs in specific, should be listed as a remedy and a supportive measure in institutional policy. They should <u>not</u> be listed as a sanction.
Emergency Removal		
"If a school has a sexual assault response coordinator, that person should be consulted in identifying safety risks and interim measures that are necessary to protect the student." FAQ at 21.	**§ 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,*	Emergency removal can be undertaken in conjunction with supportive measures but is not in and of itself a supportive measure. It requires that an official at an institution conduct a safety and risk analysis tailored to

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"Title IX requires the school to protect the complainant and ensure his or her safety as necessary." FAQ at 23.	*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.* The Department also reiterates that sexual harassment allegations presenting a risk to the physical health or safety of a person may justify emergency removal of a respondent in accordance with the § 106.44(c) emergency removal provision, which could include a no-trespass or other no-contact order issued against a respondent. Preamble, 577. Similarly, we decline to require recipients to follow more prescriptive requirements to undertake an emergency removal (such as requiring that the assessment be based on objective evidence, current medical knowledge, or performed by a licensed evaluator). While such detailed requirements might apply to a	the specific allegations prior to taking action under this provision. There is no indication in the Final Rule about when this analysis must take place – i.e. every case versus only certain cases. The Preamble makes it pretty clear, however, that this analysis is not confined to sexual assault allegations and acknowledges that immediate threat to physical health or safety can arise from the spectrum of sexual harassment claims. In light of this, we recommend developing a small team of administrators who are equipped to make initial assessments about each allegation and whether a larger safety risk assessment team should be convened. The larger safety risk assessment team would be comprised of administrators from various facets of the institution that have different expertise. It is important to think about a diverse makeup of this team and to ensure that it there are individuals equipped to assess the unique risks of various types of violence and circumstances, such as intimate partner/domestic violence. Under this framework, the Title IX Coordinator would not be the one making the safety risk determination ultimately, preventing any conflict of interest later in the process. This would also allow administrators with access to information

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	recipient's risk assessments under other laws, for the purposes of these final regulations under Title IX, the Department desires to leave as much flexibility as possible for recipients to address any immediate threat to the physical health or safety of any student or other individual. Preamble, 728-29. § 106.44(c) does not impose a requirement to hold a "full hearing" and in fact, does not impose any predeprivation due process requirements; the opportunity for a respondent to challenge an emergency removal decision need only occur post-deprivation. Preamble, 731. The Department declines to put any temporal limitation on the length of a valid emergency removal, although nothing in the final regulations precludes a recipient from periodically assessing whether an immediate threat to physical health or safety is ongoing or has dissipated. Preamble, 747. We appreciate the opportunity to clarify that, where the standards for emergency removal are met under § 106.44(c), the recipient has discretion whether to remove the respondent	about other forms of misconduct to weigh in on the risk to the physical health or safety of the complainant or other students. The safety risk assessment team should be guided by a consistent rubric for assessing the elements required under the emergency removal provision. This rubric may include questions related to the following: • Whether the alleged acts included force or violence; • Whether any object, device, or weapon was used; • Whether there were injuries to the reporting party; • Whether the student has a history of violations or records indicating past use of force or violence or danger to the safety of other students; • Whether the information available reveals a pattern of conduct in particular settings or targeting particular groups. The Final Rule does not require an opportunity to be heard *prior* to removal but does require an opportunity to challenge the decision *immediately afterwards.* When creating a structure to hear challenges to emergency removal decisions, we recommend designating a single high-level decision maker who has no involvement with the Title IX process to hear the challenge

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	from all the recipient's education programs and activities, or to narrow the removal to certain classes, teams, clubs, organizations, or activities. Preamble, 755. Section 106.44(c) does not preclude a recipient from using Title IX personnel trained under § 106.45(b)(1)(iii) to make the emergency removal decision or conduct a postremoval challenge proceeding, but if involvement with the emergency removal process results in bias or conflict of interest for or against the complainant or respondent, § 106.45(b)(1)(iii) would preclude such personnel from serving in those roles during a grievance process. Preamble, 764.	and make the determination. This is to ensure there is no conflict of interest and that this individual has the requisite authority to make this kind of decision. For such a role, a position like a Dean of Students may be appropriate since they will likely be conflicted out of serving in any sort of official role in the Title IX process.
Mandatory Dismissal		
Prior guidance did not mandate dismissal on the basis of a narrow definition of sexual harassment. It was widely known and acknowledged that federal guidance on Title IX constituted a broad floor and institutions could expand definitions as they deemed necessary. Furthermore, mandatory dismissal did not comport with hostile environment sexual harassment. Institutions had wide latitude in adjudicating conduct.	**§ 106.45(b)(3)(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*	The Title IX Coordinator should dismiss a complaint under Title IX only after a preliminary assessment clearly indicates that the allegations fall outside the scope of Title IX as defined in the Final Rule. If an institution's policy covers more than Title IX, the dismissal should be *pro forma,* and the process should continue (unless the allegations do not fall under the scope of the policy at all). At this juncture, we

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	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)(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:* *(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.*	recommend issuing the complainant notice that the case is being dismissed under Title IX but will continue being investigated as a violation of the institution's policy. This notice should inform the complainant that they will no longer have the ability to seek redress from the Department of Education upon case closure, but other tangible impact at the institutional level will be negligible. If an institution has two policies – one that covers Title IX and another that covers additional sexual misconduct prohibited by the institution – then dismissal at this juncture would not prevent the case from being adjudicated by the other policy, assuming it covered the prohibited conduct. In that scenario, we recommend developing a "pass off" system that does not require the complainant to repeat any part of the process that was already done to the extent possible. If a different investigator is taking over, we recommend including a short and substantive pass off so that the investigation can pick up where it left off and the transition can be as seamless as possible. Ideally, both processes would utilize the same investigator(s) and this would be unnecessary. We also recommend issuing a written notice to the parties that lays out the differences

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		between the processes but reiterates the things that remain the same – i.e. ability to have an advisor present – as well as the right to appeal the dismissal. In general, it may be helpful to anticipate a large degree of confusion at this juncture and preemptively provide resources and information to alleviate it.
Parties' Review of All Information Prior to Written Investigative Report		
The DCL included that "the complainant and the alleged perpetrator must be afforded similar and timely access to any information that will be used at the hearing." DCL, 11. It further specified that access should be limited by FERPA and "should not be given to privileged or confidential information. For example, the alleged perpetrator should not be given access to communications between the complainant and a counselor or information regarding the complainant's sexual history." Footnote 29, DCL, 11.	**§ 106.45(b)(5)(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.* **§ 106.45(b)(5)(i):** *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*	We recommend explaining this aspect of the process in painstaking detail to the complainant at the outset of a process. We also recommend suggesting to the complainant that they seek out an advisor as soon as practicable and reiterate the obligation of any advisor to cross-examine the respondent and witnesses. Bear in mind that there is a lot of information to sort through at the beginning of a process and complainants are often less inclined to think they need an advisor/attorney for a grievance process. The request for complainants to waive confidentiality and disclose otherwise confidential records as part of the investigation is not an uncommon practice. Often, such requests are made prior to the complainant consulting an advisor and without understanding the ramifications of

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	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 ….	the waiver. Historically, the investigators had more discretion about the information shared with the parties and were able to exert some control over private information submitted by the complainant. Since this provision strips the investigator of that control by requiring them to share all information with the other party, extra care should be taken to advise parties of this disclosure before information is submitted.
Restriction on Party Confidentiality Through Grievance Process		
The Final Rule's Preamble connects this shift to previous guidance around the equitable opportunity to present witnesses and evidence. *See* 1997 Guidance (to be "equitable" grievance procedures should provide for "the opportunity to present witnesses and other evidence"); 2001 Guidance at 20; 2011 DCL at 9; 2017 Q&A at 3.	**§ 106.45(b)(5)(iii):** *When investigating a formal complaint and throughout the grievance process, a recipient must not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.* **§ 106.71(a):** *No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part[.]*	In practice, this provision will raise concerns around the line between "discussing the allegations" and retaliation (§ 106.71), particularly when there is an NCO in place. We recommend clearly articulating the difference between discussing the allegations and prohibited contact, whether it be third party contact or passive contact through social media, when an NCO is in effect as a supportive measure during the pendency of a formal adjudication process. It is important to note that this provision is inapplicable when there is no formal complaint or investigation, but the prohibition on retaliation is still triggered and applicable. We also recommend clearly communicating the prohibition on retaliation and how claims of such will be adjudicated under the Title IX policy as well.

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GRIEVANCE PROCESS: Adjudication – Live Hearing		
Issue/ Change History from Prior Guidance	**Final Rule Language**	**Considerations/Recommendations**
Live Hearing Required – Single Investigator Models Prohibited		
Prior guidance did not mandate an investigative approach. The DCL and FAQ explicitly provided discretion to institutions around the model they implemented. See DCL at 9; FAQ at 25. Overarching principles were adequate, reliable, impartial.	**§ 106.45(b)(6)(i):** *Hearings. For postsecondary institutions, the recipient's grievance process must provide for 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.* The Department believes that fundamental fairness to both parties requires that the intake of a report and formal complaint, the investigation (including party and witness interviews	There is some latitude in how an institution structures and conducts a live hearing that may facilitate a more trauma-informed proceeding. For instance, you may provide the complainant with the option to turn their screen off so they do not have to see the respondent, even though the decision-makers, respondent, and respondent's advisor will be able to see the complainant in real time. You may consider discussing with the complainant how they would prefer to structure the hearing in light of any trauma or trepidation they are experiencing. For instance, a complainant may prefer to be questioned first as opposed to after the witnesses, etc. It may also be helpful to train any advisors that will be appointed by your institution on how to advocate for and support their advisee in anticipation of the hearing. Finally, we recommend that the decision-maker asks questions prior to a cross-examination. Anything repeated by the advisor on cross-examination could be

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	and collection of documentary and other evidence), drafting of an investigative report, and ultimate decision about responsibility should not be left in the hands of a single person (or team of persons each of whom performed all those roles). Rather, after the recipient has conducted its impartial investigation, a separate decision-maker must reach the determination regarding responsibility; that determination can be made by one or more decision-makers (such as a panel), but no decision-maker can be the same person who served as the Title IX Coordinator or investigator. Preamble, 1247. A recipient may, for instance, adopt rules that instruct party advisors to conduct questioning in a respectful, non-abusive 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. Preamble, 1226.	excluded as duplicative and therefore irrelevant. In addition, we recommend instituting a specific set of rules to govern how questioning can be conducted and training decision-makers on these rules. For instance, if a question was answered by the complainant, the advisor for the respondent should be prevented from repeating the question, even if they did not think the answer was sufficient. You should also consider training your decision-makers to request that a question be rephrased if it is badgering or hostile. A request to rephrase does not equal a determination that the question was irrelevant but falls within the institution's purview to establish rules of decorum. We also recommend clearly instructing the advisors at the outset of the hearing that questions that have been clearly deemed irrelevant by the investigator due to rape shield will not be tolerated. Additional steps to structuring a more trauma-informed hearing are discussed in the following sections.

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Decision-Makers		
"The inquiry must be prompt, thorough, and impartial." 2001 Guidance at 15. The DCL required the investigation, which may or may not include a hearing, to be adequate, reliable, and impartial. DCL at 9. It also explicitly allowed discretion around adjudicating under a single-investigator or hybrid model. The FAQ indicated that "a school's Title IX investigation must be adequate, reliable, impartial, and prompt and include the opportunity for both parties to present witnesses and other evidence … Furthermore, neither Title IX nor the DCL specifies who should conduct the investigation. It could be the Title IX coordinator, provided there are no conflicts of interest, but it does not have to be. All persons involved in conducting a school's Title IX investigations must have training or experience in handling complaints of sexual violence and in the school's grievance procedures." FAQ at 25.	**§ 106.45(b)(7)(i):** *Determination regarding responsibility. 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)(1)(iii):** *A recipient's grievance process must – Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. 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,*	Unless your institution has the resources to outsource the role of decision-maker to a former judge or another individual who has had legal training and experience, we generally recommend instituting a decision-making ***panel*** comprised of **three** people and identify one as a chair. Since decision-makers must make decisions about the relevance of every single question posed by advisors in addition to providing on-the-spot explanations for any question excluded, more than one decision-maker is ideal in this setting and will allow for more reliable hearings. Recruiting and Identifying Decision-Makers: When selecting a decision-making panel, the Final Rule is explicit that decision-makers cannot have any conflicts of interest. We recommend selecting and training a pool of decision-makers from which the decision-making panel can be drawn for each case. It is important to consider the weighty and considerable tasks of the decision-makers when considering who may be appropriate in this role. Students, for instance, are not appropriate decision-makers. Faculty and staff selected for the pool should provide information about their various commitments and involvement in school activities and programs for the Title IX Coordinator to keep

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	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. 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 predisposition 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 paragraph (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 sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment; "[T]he final regulations do not preclude the recipient from using a hearing	on file. Maintaining a record of this information will help the Title IX Coordinator anticipate any potential conflicts as cases progress to a hearing. <u>Role of the Chair:</u> When structuring a decision-making panel, we recommend designating one panelist to serve as a Chair who is consistent amidst an otherwise rotating team of panelists. This individual would ideally have more experience and training specific to addressing relevance and applying evidentiary standards. The Chair's role would be to oversee the hearing and make the final decisions with respect to relevance, evidence, and other matters that arise in the hearing. Input from other panelists is critical, and a consistent Chair allows there to be a continuity and consistency in how rules and procedures are applied. <u>Training Decision-Makers:</u> The Final Rule requires decision-makers to be trained on the following topics: • Final Rule's definition of sexual harassment; • 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;

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	board to function as a decision-maker, such that more than one individual serves as a decision-maker, each of whom must fulfill the obligations under § 106.45(b)(1)(iii).” Preamble, 813-14.	• How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias; • Technology to be used at a live hearing; • Relevance of questions and evidence, including when questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant. In addition to these topics, we recommend incorporating the following: • How to identify and address questions that are duplicative and therefore able to be excluded as irrelevant, specifically how to analyze questions that are asked in a different form but designed to elicit information already provided; • Evaluating appeals, specifically around allegations of bias and new evidence. <u>For more on relevance and cross-examination, see below.</u>

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Cross-Examination		
Previous guidance has strongly admonished institutions from allowing for direct cross-examination. DCL at 12 ("OCR strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing. Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment."); FAQ at 31 ("A school may choose, instead, to allow the parties to submit questions to a trained third party (e.g., the hearing panel) to ask the questions on their behalf. OCR recommends that the third party screen the questions submitted by the parties and only ask those it deems appropriate and relevant to the case.").	**§ 106.45(b)(6)(i):** *At the live hearing, the decision-maker(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 …* *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.*	We recommend revamping the restrictions around advisor participation during the hearing writ large and not just around cross-examination. We recommend allowing advisors to directly examine their advisees prior to a cross-examination. From a trauma-informed perspective, this will give the complainant an opportunity to share their narrative in a more comprehensive fashion before being crossed. For some complainants, disclosing their experience to members of the institution is in and of itself validating or empowering. It is worth noting here that if a party participates in a direct-examination, but declines to be cross-examined, statements made during the direct would not be relied on by decision-makers in reaching a determination regarding responsibility. We recommend that the procedures require any party who participates in a direct-examination also participates in a cross-examination. We also recommend allowing the advisors to object to questions during a cross-examination and provide an explanation for why the question is not relevant. This both provides a helpful buffer between the complainant and respondent's advisor and allows the decision-maker(s) to hear

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	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. Preamble, 1159. ***But see:*** A recipient's additional evidentiary rules may not, for example, exclude relevant cross-examination questions even if the recipient believes the questions assume facts not in evidence or are misleading. Preamble, 1227. The Department purposefully designed these final regulations to allow recipients to retain flexibility to adopt rules of decorum that prohibit any party advisor or decision-maker from questioning witnesses in an abusive,	arguments that may better inform their decisions.

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	intimidating, or disrespectful manner. Preamble, 1072.	
Relevance		
Relevance was referenced in prior guidance documents, but no definition was provided, and they did not specifically prescribe rules for determining what evidence was relevant. In general, relevance was left up to the investigator as the fact-gatherer.	The ordinary meaning of the word relevance should be understood and applied. Preamble, Footnote 1018, 811. **§ 106.45(b)(6)(i):** *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 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 … 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.*	The Department of Education does not specifically define relevance and says the ordinary meaning should be applied. Generally speaking, relevance is the tendency of a statement, document, or other source of information to prove or disprove an element of the prohibited conduct definition. Whether something is relevant depends on whether it "tends to prove" one of the parties' accounts. There are some parameters that should be applied through the entire grievance process, including the investigation. The Final Rule explicitly deems irrelevant information related to the complainant's prior sexual history and sexual predisposition (subject to two narrow exceptions). While contained in the provision specifically geared towards hearings, we recommend ensuring that these clear restrictions are consistently applied throughout the process, beginning with the investigation. Explicitly empowering the investigator to apply the relevance parameters described in 106.45(b)(6)(i) will help ensure that such information is excluded altogether.

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	The Department notes that where evidence is duplicative of other evidence, a recipient may deem the evidence not relevant. Preamble, 1136.	
Advisors		
Previously, advisors were optional, not compulsory. The Clery Act specifically requires the institution to provide both parties with the opportunity to have an advisor of their choice through a disciplinary process. In practice, this has been interpreted to mean there should be no limitations on who parties choose for this role, but institutions could limit the participation of advisors.	**§ 106.45(b)(5)(iv):** *When investigating a formal complaint and throughout a grievance process, a recipient must … 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)(6)(i):** *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*	<u>Selecting Advisors:</u> In light of the increasing role institutions will play in designating potential advisors, we recommend being judicious in who is selected and trained to step into the role of an advisor. It is important to remember that advisors are not subject to the Final Rule's strict conflict of interest rules; that is, an advisor *can* have a conflict of interest with their advisee or the other party. This does not mean, however, that the appointment of an advisor should not be carefully considered. For instance, many campuses have confidential advocates or counselors that have stepped into the role of an advisor at times. However, since the role of an advisor is not confidential, the privilege that attaches to their role as a counselor or advocate would not extend to their function as an advisor. In the event of litigation, either arising from the campus grievance process or a related criminal case, it will be very difficult to tease out the confidential communications from the non-confidential ones, potentially opening up access to records that the complainant may wish to keep private. In light of this privacy concern,

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	attorney, to conduct cross-examination on behalf of that party. 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). Preamble, 1171. [T]he Department clarifies here that conducting 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. Preamble, 1074. Advisors of choice (including assigned advisors) are not subject to the requirements of § 106.45(b)(1)(iii) which obligates Title IX personnel (Title IX Coordinators, investigators, decision-makers) to serve impartially	we recommend keeping the roles of advisor and counselor/advocate separate and distinct to preserve the integrity of the counselor/advocate relationship as well as to ensure confidentiality of records. In short, we recommend not including confidential advocates or counselors in your pool of advisors. <u>Training Advisors:</u> While the Final Rule does not require advisors to be trained like other officials involved in the grievance process, we recommend training those on your campus who will make up the pool of available advisors for parties to choose or to be appointed in the event a party does not have an advisor at the hearing or does not appear. Specifically, advisors will need training on the meaning of relevance, rape shield protections, and the procedural rules around decorum. It is also critical that advisors understand the goals of cross-examination and how to conduct it in a thorough, zealous, and respectful way. We also recommend incorporating training on evaluating evidence related to relevance and privacy in light of the increased access to information during the investigative stage. We also encourage you to consider training advisors on the grievance process writ large,

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	without conflicts of interest or bias for or against complainants or respondents generally, or for or against an individual complainant or respondent. Preamble, 1148.	including supportive measures, retaliation, and appeals.
Standard of Evidence		
While the 2001 guidance was silent on the appropriate standard of evidence, the DCL was explicit that institutions should use preponderance: "Thus, in order for a school's grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard." DCL at 11. The FAQ mirrored this requirement: "the evidentiary standard that must be used (preponderance of the evidence) (i.e., more likely than not that sexual violence occurred) in resolving a complaint."	**§ 106.45(b)(1)(vii):** *A recipient's grievance process must 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.*	As an initial matter, we believe that the preponderance of the evidence standard is the most appropriate in facilitating a resolution with the distinct interests at stake in campus disciplinary processes and the only standard of review that is truly compatible with a trauma-informed approach. In addition, the preponderance standard is consistent with the standard used in most civil litigation. Finally, the clear and convincing standard is difficult to develop a training around. This is primarily because a clear and convincing standard requires the decision-maker to determine whether a violation is "substantially" more likely than not to have occurred, which is an inherently subjective analysis without specific parameters. Applying this standard will lead to inconsistent decision-making processes. If your institution has discretion over this – i.e. if any collective bargaining agreements do not specify or require the use of clear and convincing evidence – we recommend

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		continuing to use a preponderance standard.
Informal Resolution Process		
In some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis. 2001 Guidance at 21. Moreover, in cases involving allegations of sexual assault, mediation is not appropriate even on a voluntary basis. DCL at 8.	**§ 106.45(b)(9):** *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-* *(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*	With the new requirements around a live hearing and cross-examination, survivors may be more inclined to pursue informal resolutions, even if they are experiencing trauma. We recommend ensuring that informal resolution processes are meticulously organized and structured so that they can facilitate a resolution without unduly causing additional harm. We also recommend being specific in your policy about what these informal processes are on your campus. In light of the requirement that a formal complaint be filed prior to the informal resolution process, we recommend encouraging the parties to have advisors throughout this process as well.

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	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; *(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.* Informal resolution may only be offered <u>after</u> a formal complaint has been filed, so that the parties understand what the grievance process entails and can decide whether to voluntarily attempt informal resolution as an alternative. Preamble, Footnote 463, at 267.	

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GRIEVANCE PROCESS: Appeals		
Issue/Change History from Prior Guidance	**Final Rule Language**	**Considerations/Recommendations**
OCR also recommends that schools provide an appeals process. If a school provides for appeal of the findings or remedy, it must do so for both parties. DCL at 12. If a school chooses to provide for an appeal of the findings or remedy or both, it must do so equally for both parties. The specific design of the appeals process is up to the school, as long as the entire grievance process, including any appeals, provides prompt and equitable resolutions of sexual violence complaints, and the school takes steps to protect the complainant in the educational setting during the process. FAQ at 37.	**§ 106.45(b)(8):** *(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:* *(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.* *(ii) A recipient may offer an appeal equally to both parties on additional bases.*	The Preamble specifically notes that institutions can implement rules and timelines around the gathering of evidence. Given this flexibility, we recommend developing clear expectations for evidence submission and guidelines for what will occur if evidence is submitted after that timeframe. This will give the institution clear guideposts when evaluating "new" evidence as an appeal ground. In this vein, we recommend training appellate decision-makers to critically evaluate and apply the restriction on evidence submitted at this stage. For instance, a witness who was known to a party but not put forward during the investigation would not constitute "new" evidence. We also recommend developing a narrow list of instances when a case will be remanded for a new hearing with a different decision-maker/panel and strictly sticking to it. If this option is wielded on a regular or semi-regular basis, it may contribute to a deterrent effect on complainants being

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	The final regulations also provide the parties equal appeal rights including on the ground of procedural irregularity, which could include a recipient's failure to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence. Preamble, 815 Under § 106.45(b)(8) of the final regulations, recipients have the discretion to permit parties to appeal sanctions. Preamble, 1360. **§ 106.45(b)(6)(i):** *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.*	willing to report and go through the grievance process.

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