

INVESTIGATION  
REPORT

CareerLearning

# Title IX Investigation Reports in Higher Ed

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# Agenda

I

## Introduction

- Title IX
- 2020 Amendments

II

## Investigations

- Reports of Title IX Sexual Harassment
- Formal Complaints
- Investigation and Report
- Hearing and Written Determination

III

## Conclusion



# Introduction

## Introduction

I

# The Law

- **Title IX**
  - No person in the U.S. shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.
- **Title IX Regulations**
  - 34 C.F.R. 106
- **Enforced by Office for Civil Rights**





## Introduction

- **Title IX**
- **Trump Administration**
  - Regulations
  - Due Process
  - Court vs. OCR
  - August 2020 Amendments
- **Biden Administration**

# Definitions – Recognizing Sexual Harassment

## Sexual harassment

- An employee of the institution conditioning the provision of an aid, benefit, or service of the institution on an individual's participation in unwelcome sexual conduct (quid pro quo).
- 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 institution's education program or activity, **or**
- Sexual assault, dating violence, domestic violence, or stalking (as defined by law).





## Responding to Sexual Harassment

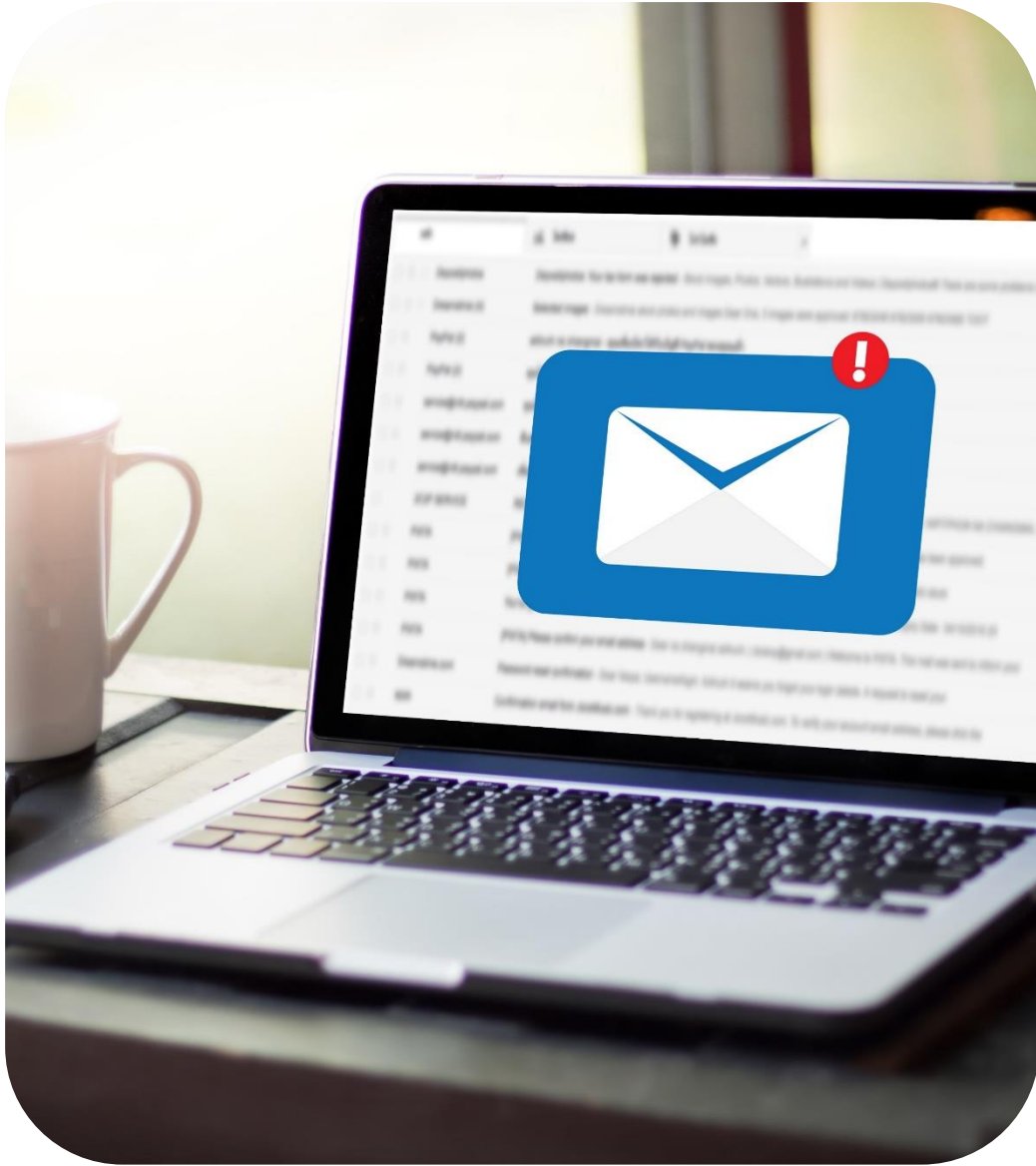
- An **institution** with **actual knowledge** of **sexual harassment** in an **education program or activity** of the institution against a **person in the U.S.** must **respond** promptly in a manner that is not deliberately indifferent.
- A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

## Obligation to Respond – Actual Knowledge

- **Notice of sexual harassment or allegations of sexual harassment to:**
  - Title IX Coordinator
  - Any official of the institution who has the authority to institute corrective measures on behalf of the institution
- **Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge.**







# Title IX Reporting

## Reports of discrimination/harassment

- Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment).
- Any person may report in person, by mail, by telephone, or by email, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report.

## Within the 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
- Includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution





## Complainant

- An individual who is alleged to be the victim of conduct that could constitute sexual harassment
- The 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.

## Respondent

- An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment

# Responding to Sexual Harassment Allegations

Title IX Coordinator must promptly:

- Contact the complainant to discuss the availability of supportive measures,
- Consider the complainant's wishes with respect to supportive measures,
- Inform the complainant of the availability of support measures, **and**
- Explain to the complainant the process for filing a formal complaint.



# Responding to Sexual Harassment Allegations

## Supportive measures

- Means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonable, 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
- Are designed to restore or preserve equal access to the institution's education program or activity without unreasonably burdening the other party





# Responding to Sexual Harassment Allegations

## Supportive measures

- Includes measures designed to protect the safety of all parties or the institution's environment or deter sexual harassment
- May include counseling, extensions of deadlines or course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures

## Addressing Complaints – Retaliation

- No institution or person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right secured by Title IX, or because the individual has made a report or complaint, testified, assisted, or participated, or refused to participate in any manner in an investigation, proceeding or hearing.
- Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under Title IX.

## Addressing Complaints – Confidentiality

- An institution must keep confidential the identity of any individual who 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.
- This confidentiality applies except as may be permitted by FERPA, or as required by law, or to carry out the purposes of Title IX (including the conduct of any investigation, hearing, or judicial proceeding arising thereunder).





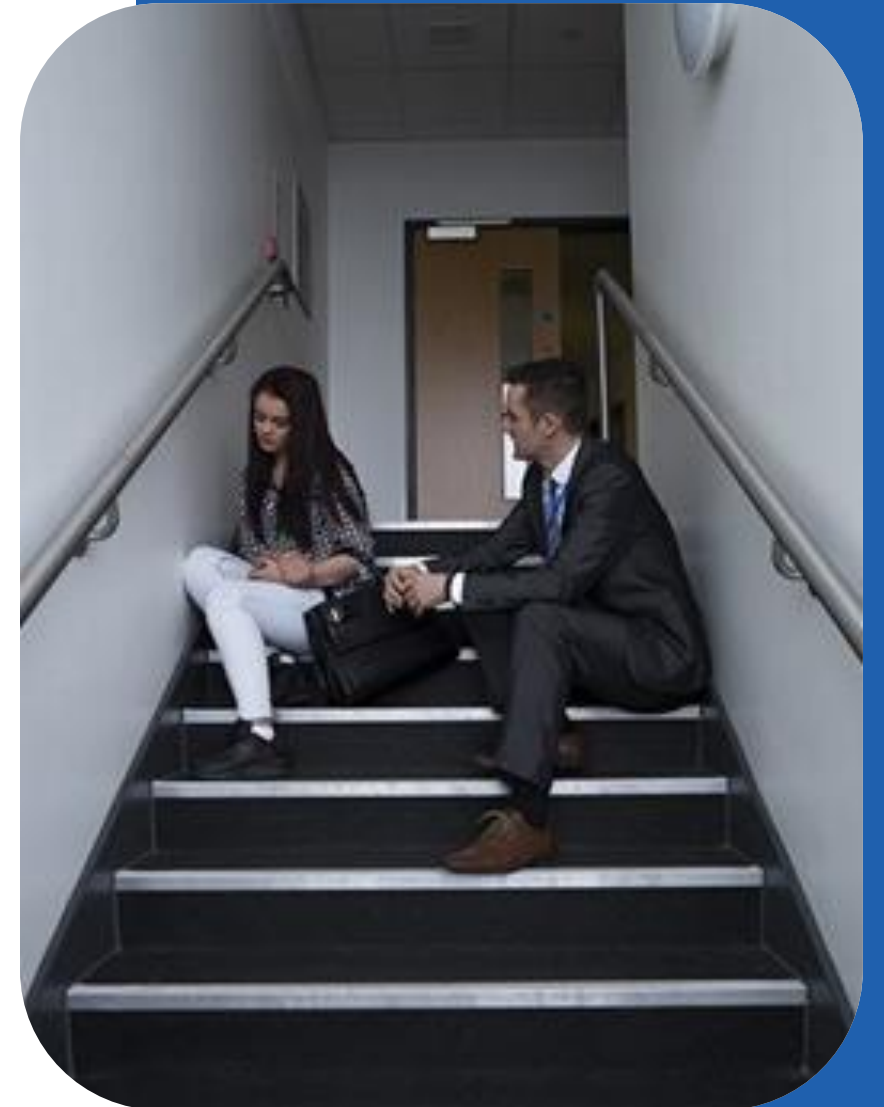
**Complaints**

# Formal Complaints

# Case Study

## Harassment

- A female student meets with an academic advisor. She tells the advisor that she broke up with her ex-boyfriend about a month ago, and he has been following her.
- He cornered her that morning in an isolated stairwell of one of the building on campus and said that he's been watching her all the time. He grabbed her by the arm and told her that he can't stand the thought of her dating someone else, and that if she doesn't stop hanging out with this new guy, someone is going to end up hurt. She escaped, but she is afraid now to walk on campus.
- The advisor reports this information to the Title IX Coordinator.





# Formal Complaints

## Formal complaint

- A document filed by the complainant or signed by the Title IX Coordinator (1) alleging sexual harassment against a respondent and (2) requesting the institution investigate the allegation of sexual harassment
- A document filed by the complainant means a document or electronic submission that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.

## Formal Complaints

- Complainant must be participating or attempting to participate in the education program or activity of the institution with which the formal complaint is filed.
- Complaints may be filed with Title IX Coordinator in person, by mail, or by email, by using contact information, or by another method designated by the institution.
- Institution must follow the grievance process.
- Supportive measures must be offered as appropriate.



## Grievance Process – Basic Requirements

- **Must treat complainants and respondents equitably**
  - Provide remedies to a complainant where a determination of responsibility has been made against the respondent.
  - Follow a grievance process that complies with this part before the imposition of any disciplinary sanctions or other actions against a respondent.
- **Require an objective evaluation of all relevant evidence and provide that credibility determinations may not be based on a person's status.**
- **Require that any individual designated by an institution as a Title IX Coordinator, investigator, decision-maker, or any person designated to facilitate an informal resolution process not have a conflict of interest or bias.**

## Grievance Process – Basic Requirements

- **Includes a presumption that the respondent is not responsible for the alleged conduct until a determination of responsibility is made at the conclusion of the grievance process.**
- **Includes reasonably prompt time frames for conclusion of the grievance process**
  - Must include process that allows for temporary delay for good cause with written notice to complainant and respondent of the delay and the reasons for action
  - Good cause may include considerations such as absence of a party, a party's advisor, or witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities.

## Grievance Process – Basic Requirements

- Describe the range of (or list) possible disciplinary sanctions and remedies that the institution may implement following the determination of responsibility.
- State whether the standard of evidence to be used to determine responsibility is preponderance of the evidence, or clear and convincing evidence.
  - Must apply the same standard for formal complaints against students as for formal complaints against employees
  - Must apply the same standard to all formal complaints of sexual harassment





## Grievance Process – Basic Requirements

- Include the procedures and permissible bases for the complainant and the respondent to appeal.
- Describe the range of supportive measures available to complainants and respondents.
- Must not require, allow, rely upon, or otherwise use questions or evidence that constitute information protected under a legally recognized privilege, unless the person has waived the privilege





# Investigations



## Grievance Process – Investigations

- Upon receipt of a formal complaint, an institution must provide written notice to parties who are known.
- Written notice must include:
  - Notice of recipient's grievance process
  - Notice of allegations of sexual harassment, including sufficient details known at that time (i.e., identities of the parties involved in the incident if known, the conduct allegedly constituting sexual harassment and the date and location of the alleged incident)



# Grievance Process – Investigations

## Written notice must also:

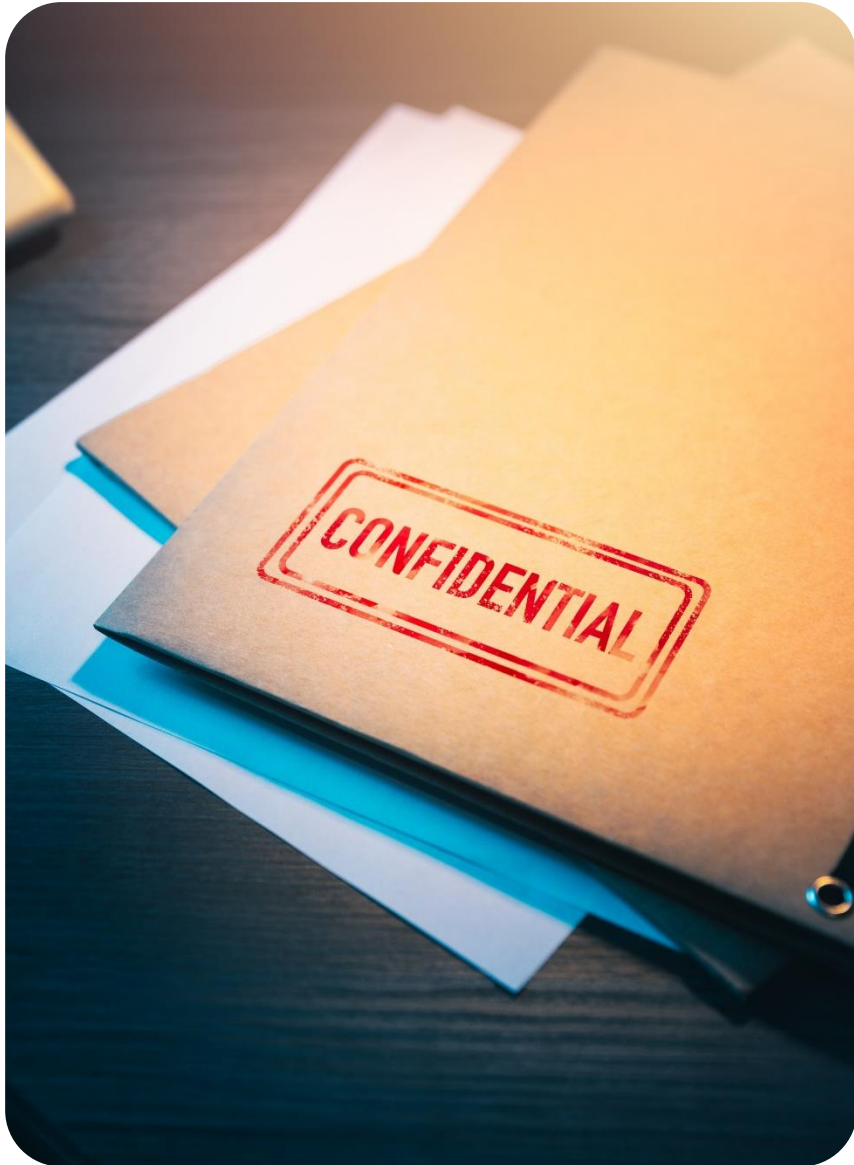
- Include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.
- Inform the parties that they may have an advisor of their choice who may be an attorney and that they may inspect and review evidence.
- Inform the parties of any provision in the institution's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.



## Grievance Process – Investigations

- Written notice must be provided with sufficient time to prepare a response before any initial interview.
- If other allegations are investigated later, notice must be provided of the additional allegations to the parties whose identities are known.





## Grievance Process – Investigations

An institution must:

- Ensure that the burden of proof and burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the institution and not on the parties.
- The institution cannot access, consider, disclose, or otherwise use a party's records that are made and maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for the grievance process.

## Grievance Process – Investigations

### An institution must:

- Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.
- Not restrict the ability of either party to discuss the allegations under investigation or gather and present relevant evidence.
- 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.

## Grievance Process – Investigations

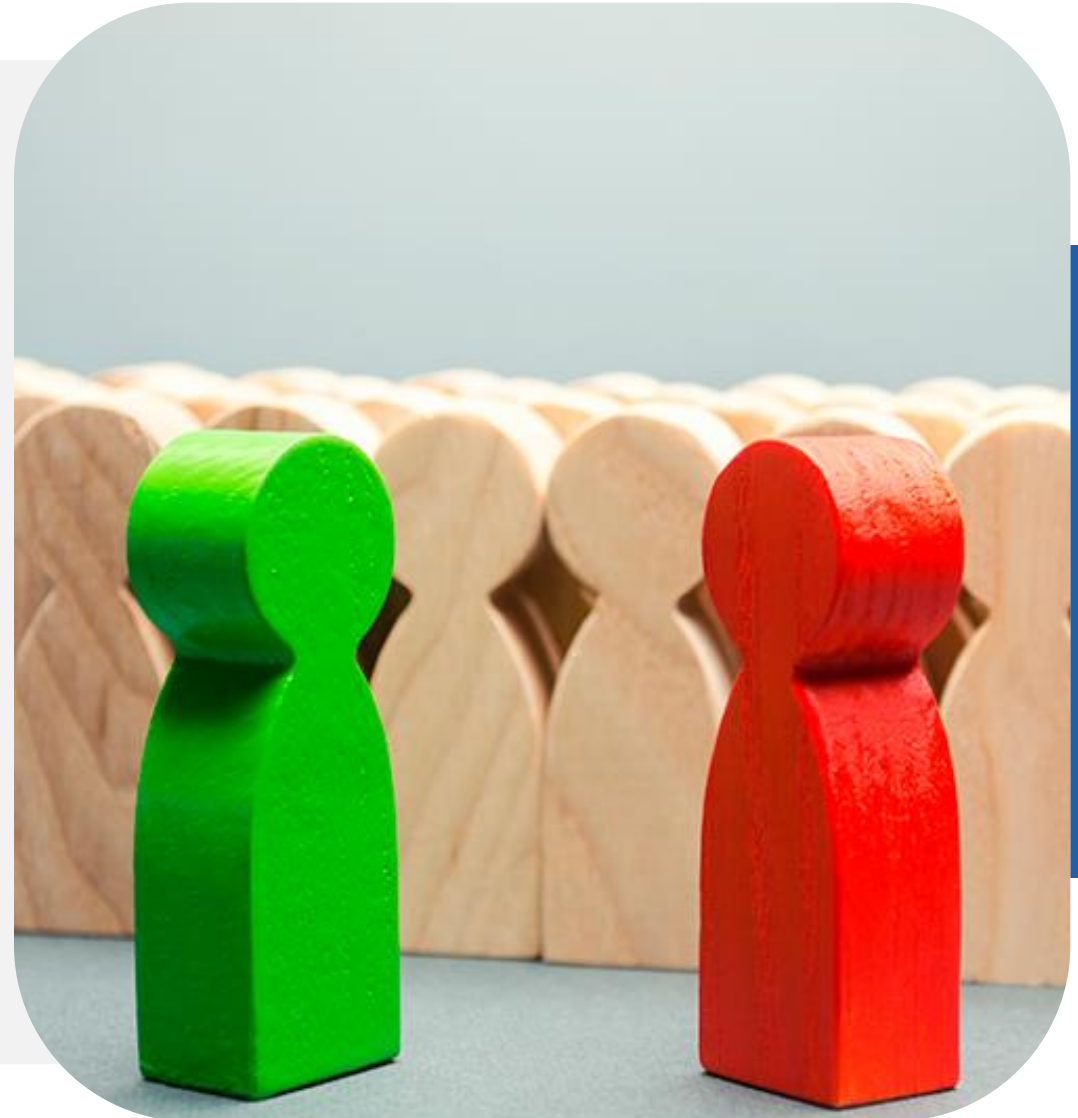
### An institution must:

- Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate.
- Provide parties with the same opportunities to have others present during any grievance proceeding, including an advisor of their choice, but may establish reasonable restrictions regarding participation.

## Title IX Investigator Role

Dispel misconceptions.

- If it is one person's word against another person's word, it is futile to investigate.
- If the matter is investigated by third parties, and it is found to be unsubstantiated, there is no duty to investigate.





# Investigation – Initial Steps

## Initial questions

- What is the allegation?
- When did it occur?
- Where did it occur?
- What steps have you taken since that time?
- Was there a delay in reporting, and if so, why?
- What evidence do you have to provide?
- Who else should we talk to?
- What relief are you seeking?



## Title IX Investigator Role

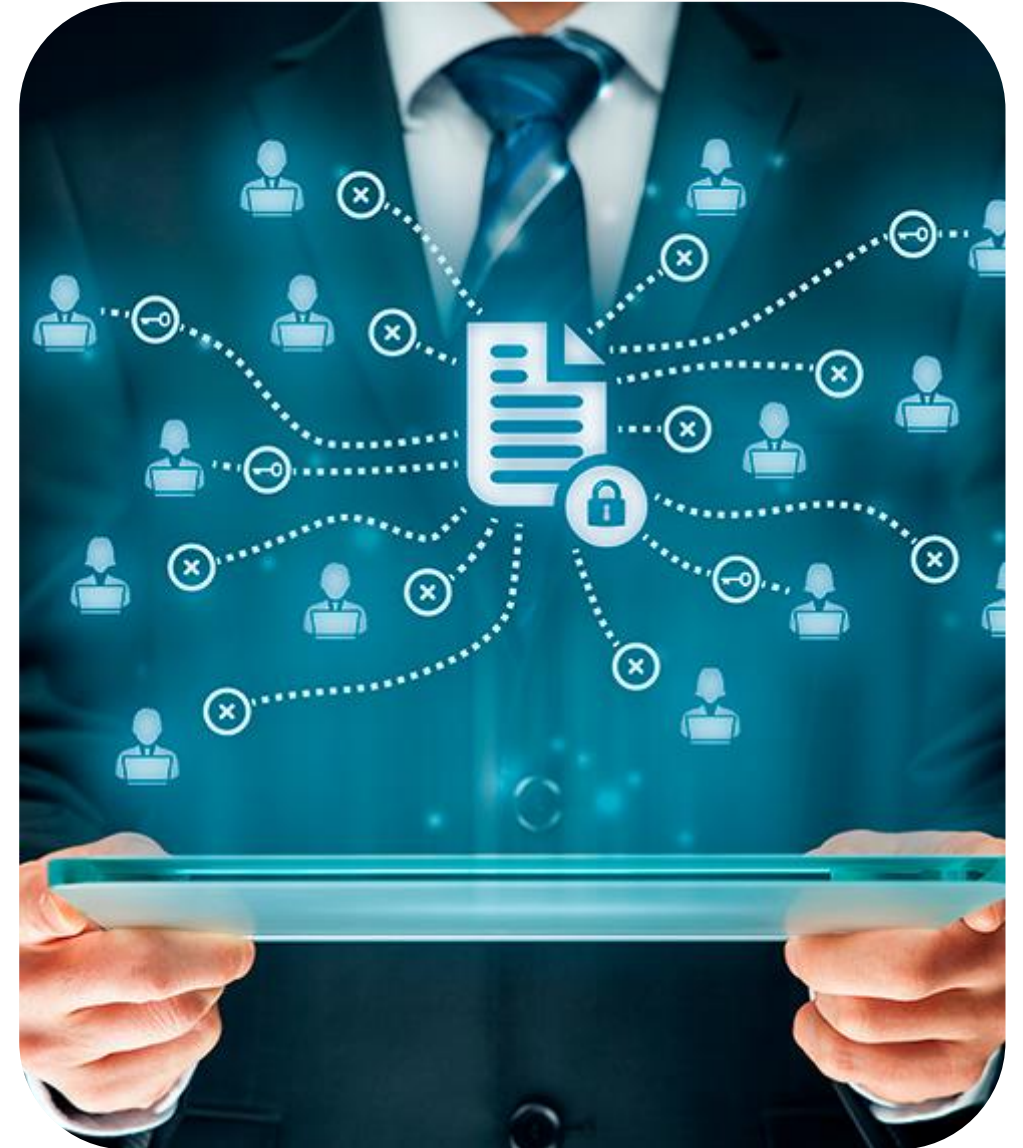
### Conducting investigations

- Maintain impartiality.
- Follow all procedural requirements.
- Review and summarize relevant evidence.
- Make appropriate credibility determinations.
- Prepare a thorough investigation report.

# Title IX Investigations

## Key documents

- Emails or other electronic communications
- Video recordings
- Observations by other staff members
- Medical records
- Student disciplinary records
- Evidence of the effect of bullying on the victim (grades/absences)



## Title IX Investigations

### Notetaking by the investigator

- Careful notes should be taken, but the investigator should be cautious about making any subjective assessments.
- All steps in the investigation should be carefully documented.
- The investigator may describe the process but should not make any promises.

## Grievance Process – No Participation

- Neither parties nor witnesses are required to participate in the Title IX grievance process.
- The 2020 amendments do require schools to offer complainants supportive measures regardless of whether they participate in a grievance process and to prohibit retaliation against individuals based on their decision to participate, or not participate, in a grievance process.

Questions and Answers on the Title IX Regulations (July 20, 2021) (updated June 28, 2022), Question 42.  
<https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>

# Grievance Process – Investigations

An institution must:

- Create an investigation report that fairly summarizes relevant evidence.
- Investigator must be able to assess credibility and identify relevant evidence.
- Relevant evidence is evidence and testimony that directly relates to the issues disputed or discussed.



# Grievance Process – Investigations

## An institution must:

- Prior to the completion of the investigative report, the recipient must send to each party and the party's advisor, the evidence subject to review and inspection in an electronic format or a hard copy.
- The parties must have 10 days to submit a written response, which the investigator must consider prior to completing the investigation report.





## Grievance Process – Investigations

An institution must:

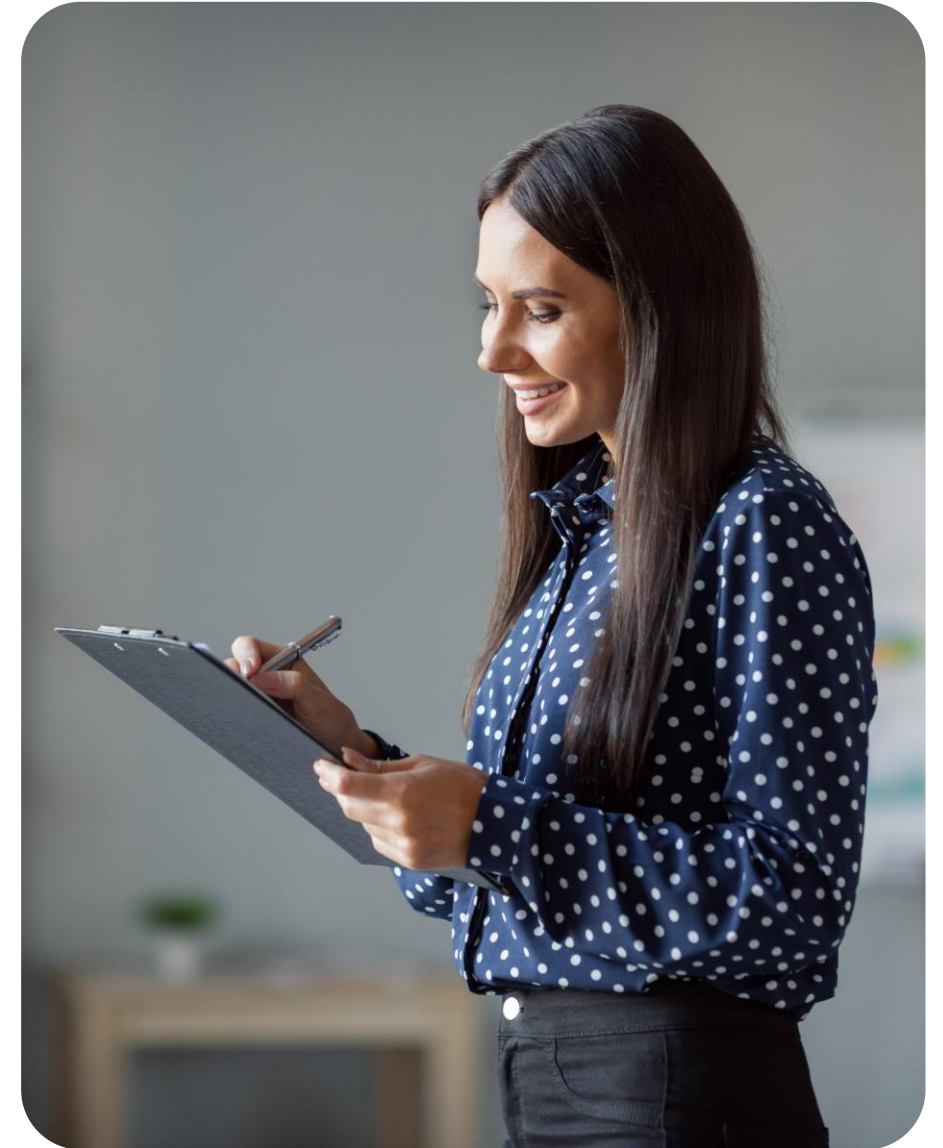
- At least 10 days prior to a hearing (if a hearing is required) or other time of determination regarding responsibility, send to each party and the party’s advisor the investigation report in an electronic format or hard copy, for their review and written response.



# Grievance Process – Investigations

## Possible investigation report contents:

- Summary of the complainant's allegations and the response of the accused
- Summary of the persons interviewed and a statement about their credibility
- Presentation of the findings of fact.
- Summary of relevant standards and other statements concerning the process
- Careful consideration should be given concerning whether the report should include conclusions about the allegations and recommendations for disciplinary or other corrective action.



## Investigation Report

- The Title IX regulations do not require or prohibit an investigator from making a recommendation with respect to a determination regarding responsibility.
- The preamble to the regulations states: “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.”

Questions and Answers Regarding the Department’s Title IX Regulations, (January 15, 2021 - Part 2), Question 7  
<https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-part2-20210115.pdf>

## Grievance Process – No Live Hearing

- The Title IX regulations do ***not*** deem the investigative report itself, or a party's written response to it, as relevant evidence that a decision-maker *must* consider.
- ***The decision-maker has an independent obligation to evaluate the relevance of available evidence, including evidence summarized in the investigative report, and to consider all other relevant evidence.*** The decisionmaker may not, however, consider any evidence/information that the regulations preclude the decision-maker from considering.

Questions and Answers Regarding the Department's Title IX Regulations, (January 15, 2021 - Part 2), Question 15  
<https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-part2-20210115.pdf>



# Decision Making

## Responsibility Decision-Maker

- Not Title IX Coordinator or Investigator
- Must issue a written determination regarding responsibility
- Determination must apply evidence standards.



# Grievance Process – Live Hearings

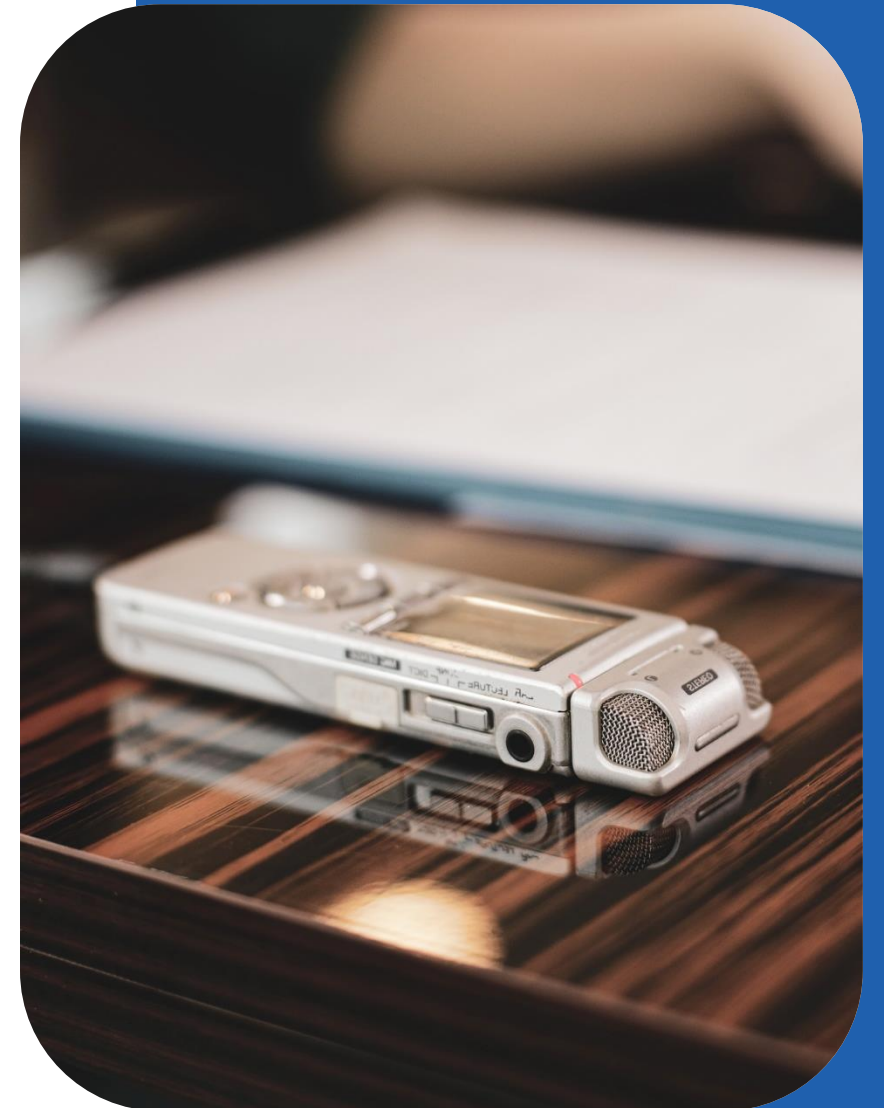
Post-secondary institutions must provide a live hearing.

- The decision-maker 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 institution to otherwise restrict the extent to which advisors may participate in the proceedings).
- At the request of either party, the institution must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party or the witness answer questions.

## Grievance Process – Live Hearings

Post-secondary institutions must provide 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 institution'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.



## Grievance Process – Live Hearings

Post-secondary institutions must provide a live hearing.

- 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 must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.
- If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.



## Grievance Process – Live Hearings

Post-secondary institutions must provide a live hearing.

- 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 provide consent.



## Determination

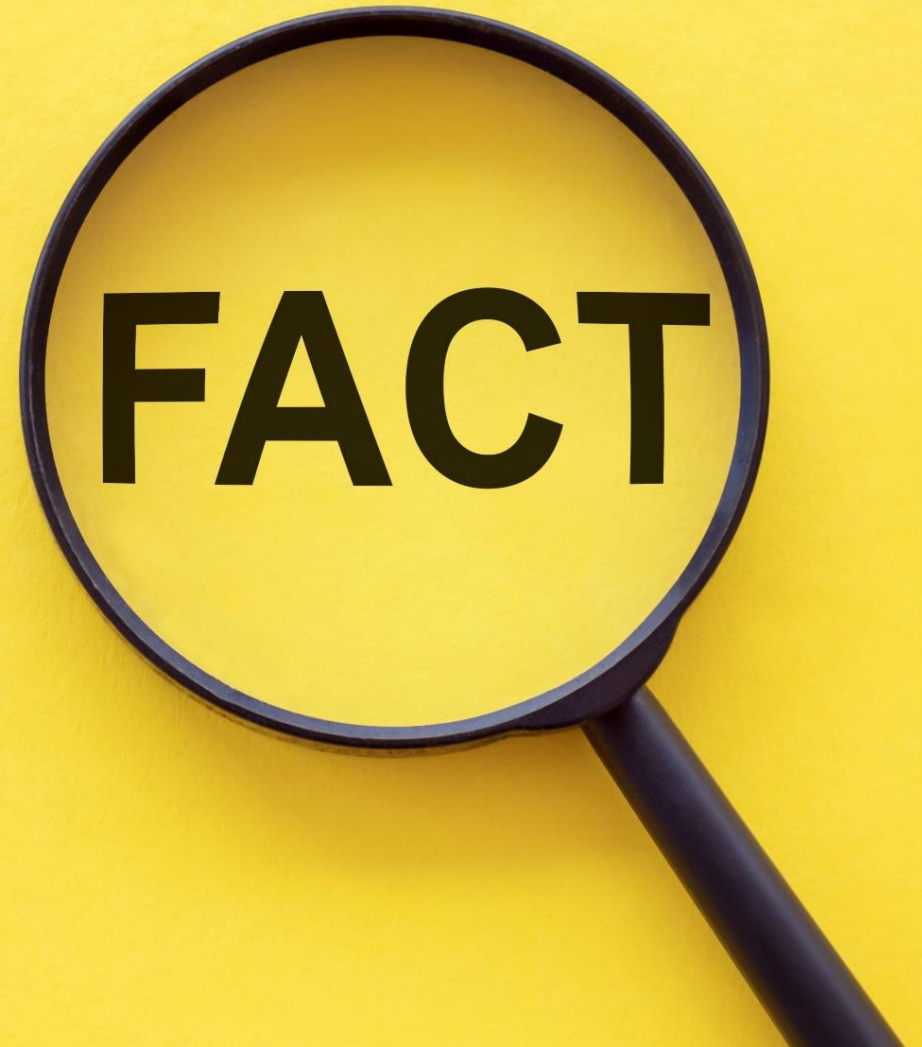
Written determination must include:

- Identification of the allegations potentially constituting sexual harassment;
- A description of the procedural steps taken from the receipt of the formal complaint to the determination, including any notifications to the parties, interviews, site visits, methods used to gather other evidence, and hearings held;

## Determination

Written determination must include:

- Findings of fact supporting the determination;
- Conclusions regarding the application of the recipient's code of conduct to the facts;



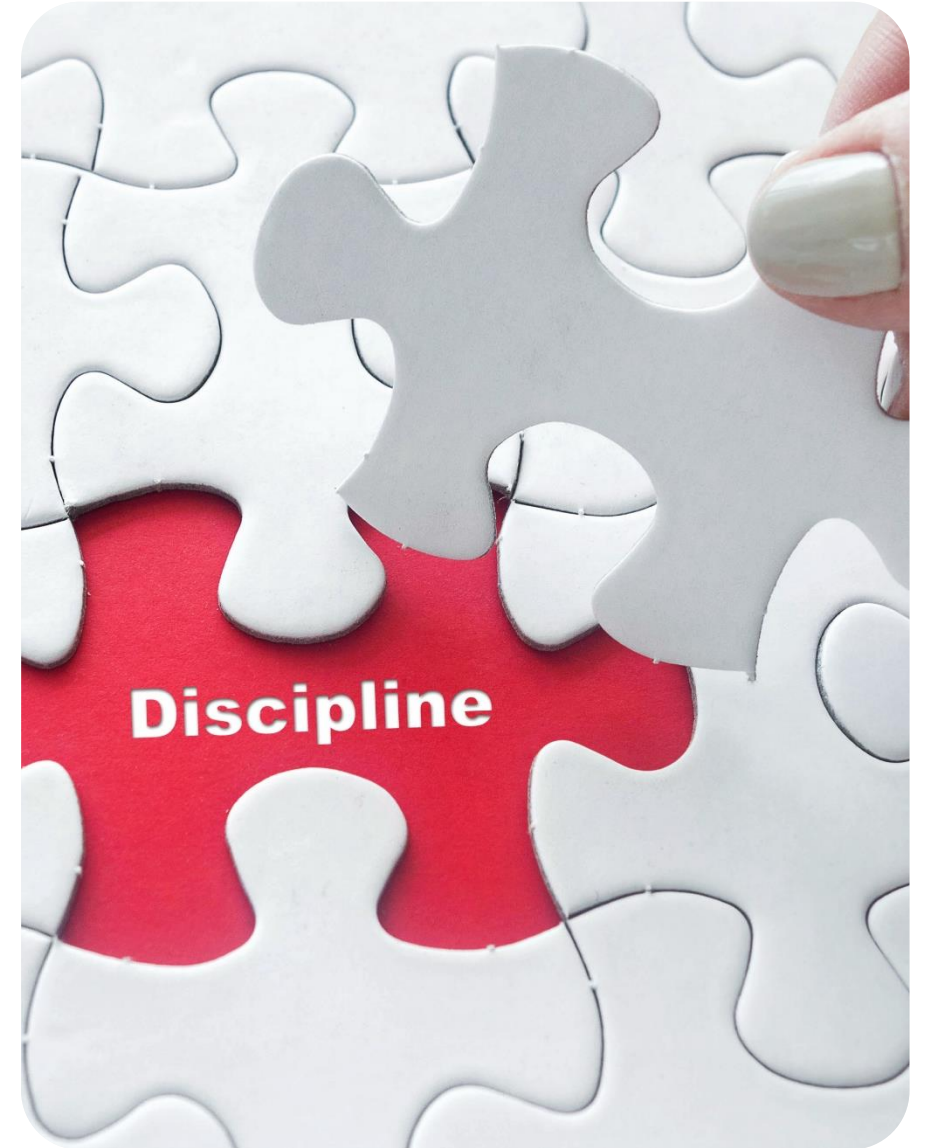
## Determination

- We decline to expressly require the written determination to address evaluation of contradictory facts, exculpatory evidence, “all evidence” presented at a hearing, or how credibility assessments were reached, because the decision-maker is obligated to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence (and to avoid credibility inferences based on a person’s status as a complainant, respondent, or witness), under § 106.45(b)(1)(ii). See 85 Fed. Reg. 30389 (May 19, 2020).
- It is precisely this objective evaluation that provides the basis for the decision-maker’s “rationale” for “the result” of each allegation, which must be described in the written determination under § 106.45(b)(7)(ii)(E).

# Determination

## Written determination must include:

- A statement of, and rationale for, the result as to each allegation, **including**
- A determination regarding responsibility,
- Any disciplinary sanctions the institution imposes on the respondent, **and**
- Whether remedies designed to restore or preserve equal access to the education program or activity will be provided by the institution to the complainant; **and**





## Determination

Written determination must include:

- The institution's procedures and permissible bases for the complainant and respondent to appeal
- The institution must provide the written determination to the parties simultaneously.
- The Title IX Coordinator is responsible for effective implementation of any remedies.



## Appeal

- An institution must offer both parties an appeal from a determination of responsibility, and from an institution's dismissal of a formal complaint or any allegations contained therein.
- If appeal, decision is final after appeal.
- If not appeal, then decision is final on the date on which an appeal would no longer be considered timely.

## Appeal

- **The appeal must be on the following bases:**
  - Procedural irregularity that affected the outcome of the matter;
  - New evidence that was not reasonably available at the time of the determination regarding responsibility or dismissal that could affect the outcome of the matter;
  - The Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias for or against the complainants or respondents that affected the outcome of the matter;
- **The institution may offer an appeal equally to both parties on additional bases.**



# Appeal

For any appeal, the institution must:

- Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome.
- Issue a written decision describing the result of the appeal and the rationale for the result.
- Provide the written decision simultaneously to both parties.

## Proposed Regulations

- On June 23, 2022, the Department of Education (Department) released proposed regulations, which seek to amend existing regulations related to Title IX.
- The proposed regulations are not final, and therefore, educational institutions will not need to update or revise any policies at this time.



# Title IX Proposed Regulations

## June 23, 2022, Proposed Regulations

- Sex discrimination applies to sexual orientation, gender identity, and sex characteristics.
- New definition of sex-based harassment, including hostile environment that looks at “sufficiently severe or pervasive” conduct
- New definition of confidential employees
- New response requirements, including eliminating the definition of actual knowledge and deliberately indifferent

# Title IX Proposed Regulations

June 23, 2022, Proposed Regulations

- Requires institutions to address off-campus conduct
- Expands the definition of complainant
- Requires institutions to provide supportive measures to students and employees in instances involving any sex discrimination
- Sets forth additional training requirements
- Combining grievance procedures for sex discrimination and sexual harassment complaints in certain instances

# Title IX Proposed Regulations

## June 23, 2022, Proposed Regulations

- Sets forth additional requirements for sex-based harassment complaints involving a post-secondary student
- Revised informal resolution procedures
- New regulations related to protecting students from discrimination based on pregnancy, including providing reasonable modifications for students, reasonable break time for employees for lactation, and lactation space for students and employees
- Revised retaliation provisions

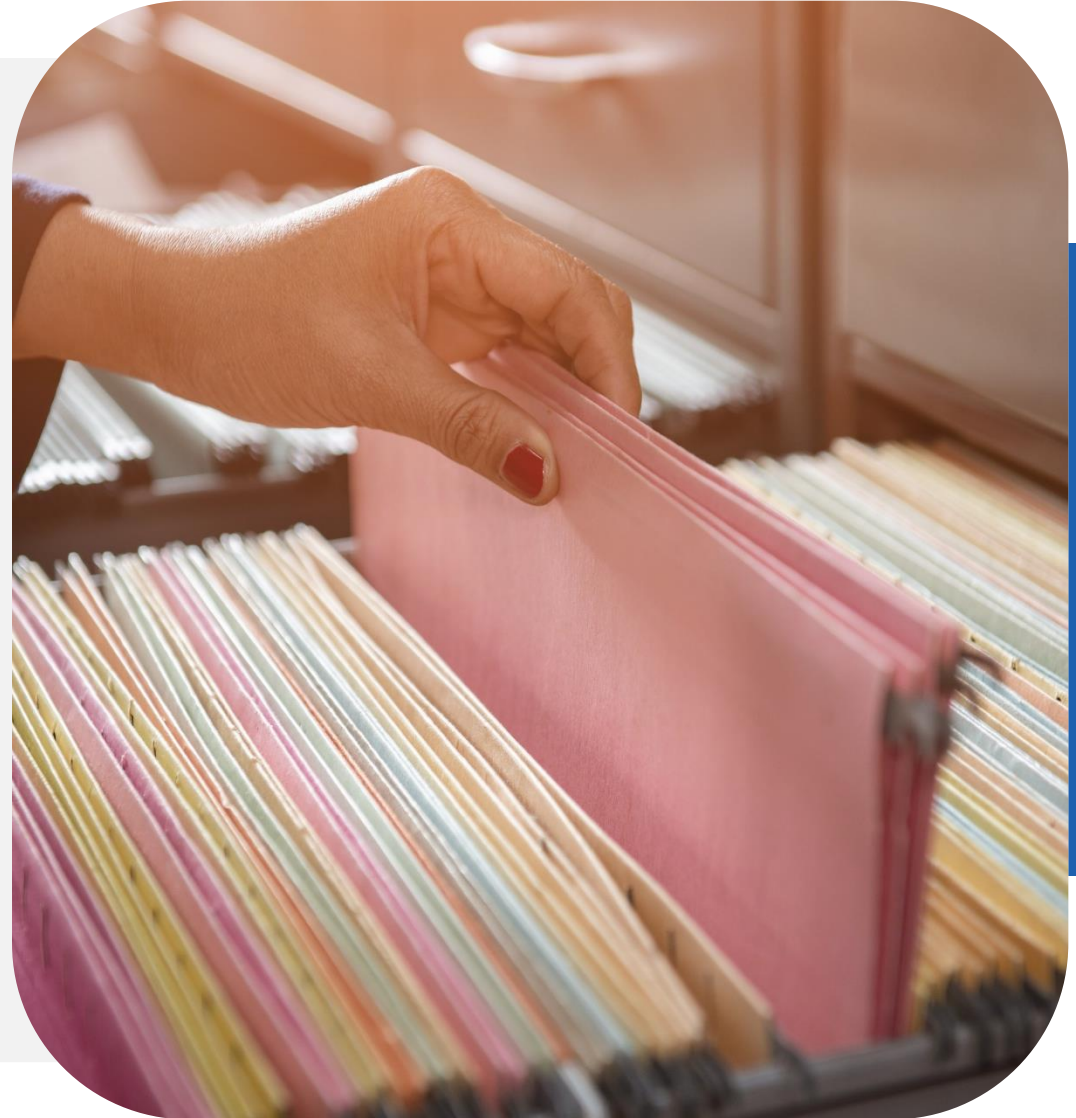


# Conclusion



## Conclusion

- Need to consider how to draft for students and employees
- Need to maintain and create records as necessary
- Need to consider other requirements, including retaliation and First Amendment



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# What was your key takeaway?

Please let us know in the Q&A.

We will use your response with your first name and last initial on our website so others can benefit!





**Richard Verstegen**  
**Attorney**

## Questions?



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