National Association of College and University Attorneys
Presents:

The U.S. Department of Education's Notice of Proposed Rulemaking on Title IX and Sexual Misconduct

Webinar

July 18, 2022

12:00 PM – 2:00 PM Eastern
11:00 AM – 1:00 PM Central
10:00 AM – 12:00 PM Mountain
9:00 AM – 11:00 AM Pacific

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Speaker Biographies

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The U.S. Department of Education's Notice of Proposed Rulemaking on Title IX and Sexual Misconduct

Patty Petrowski currently serves as Associate Vice President and Deputy General Counsel in the Office of the Vice President and General Counsel at the University of Michigan. In that role, Patricia helps to oversee 14 attorneys and five paralegals and provides legal support to the University on a broad range of issues including Title IX and the Clery Act. Prior to joining the Office of the Vice President and General Counsel, Patricia was a partner with a large Chicago law firm, where she worked from 2000-2014. As a partner in the firm's complex litigation group, she litigated, arbitrated, and tried cases involving a variety of subject matters, with significant experience representing major research universities and academic medical centers. Patricia received a J.D. degree from the University of Michigan Law School. She received a bachelor's degree with High Honors in Political Economy from Michigan State University and was elected Phi Beta Kappa.

Josh Richards is a partner at the Philadelphia office of Saul Ewing Arnstein & Lehr, where he is the Vice-Chair of the firm's Higher Education Practice, which has handled hundreds of matters involving Title IX and related issues for colleges, universities, and K-12 schools. Josh approaches his Title IX work and other matters involving litigation, compliance and/or government investigations from a mission-driven perspective and strives to provide practical advice that protects institutions without compromising their ability to fulfill their primary purposes. Josh brings this approach to matters involving employment disputes, student conduct, faculty relations, board governance, financial exigency, accreditation, minors on campus, and civil tort claims, including student death and abuse matters. In addition, he regularly conducts on-site training sessions for higher education clients regarding compliance with civil rights laws and the Clery Act. Josh is a graduate of Middlebury College and the University of Pennsylvania Law School. He is currently nearing the end of a three-year term (FY 2019-

2022) on the NACUA Board of Directors and is on NACUA's Committee on Program for Annual Conference.

Hope Murphy Tyehimba is an Associate General Counsel in the Office of the Vice President and General Counsel at The Johns Hopkins University, where she is a member of the Student Affairs and Employment Matters and the Healthcare and Research Practice Groups. At Hopkins, Hope advises on matters involving students and employees, including, discrimination, harassment and retaliation, affirmative action, privacy issues, discipline, sexual misconduct and violence, disability-related accommodations, workplace safety, policy review, and contract review and development. Prior to joining Hopkins, Hope served as general counsel at North Carolina Central University, a constituent institution in the University of North Carolina System, where she was chief legal advisor to the Board of Trustees, chancellor, vice chancellors and other senior campus administrators. Hope's other experiences in higher education include serving in assistant general counsel roles at NCCU, North Carolina State University and East Carolina University. Before transitioning to higher education, Hope worked as an assistant attorney general at the North Carolina Attorney General's Office and as a senior associate in private practice. Hope received her Bachelor of Arts degree in Psychology and Political Science from The University of North Carolina at Chapel Hill and her Juris Doctorate degree from The University of North Carolina School of Law, where she was a member of the Holderness Moot Court, a recipient of the Gressman & Pollitt Oral Advocacy Award and a member of The Order of Barristers.

Materials

1. NPRM on Title IX and Sexual Misconduct
   U.S. Dep't of Educ. Office for Civil Rights, June 23, 2022.

2. Fact Sheet on Title IX and Sexual Misconduct
   U.S. Dep't of Educ. Office for Civil Rights (June 23, 2022)

3. Summary of Major Provisions
   U.S. Dep't of Educ. Office for Civil Rights, (June 23, 2022)

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Webinar

The U.S. Department of Education's Notice of Proposed Rulemaking on Title IX and Sexual Misconduct (2022)

Hope Murphy Tyehimba, Associate General Counsel, Johns Hopkins University

Patty Petrowski, Deputy General Counsel, University of Michigan

Joshua Richards, Partner, Saul Ewing LLP

Presenters

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Context

November 29, 2018	May 19, 2020	August 14, 2020	July 12, 2022	**Sept. 12**, 2022	?
ED publishes NPRM on Title IX	Final Rule published in Federal Register	Final Rule takes effect	NPRM published in the Federal Register	Public Comments Due	

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Definitions & Jurisdiction

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Big Picture

Recipients have an obligation to **respond** appropriately to **notice** of **sex discrimination** in its **programs and activities**.

- The reach and scope of each of these terms has changed, and generally to broaden both what triggers an institutional response *and* what that response needs to be.

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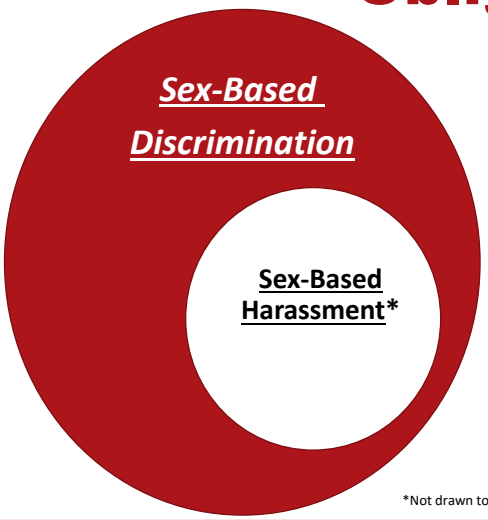
What Triggers A Response Obligation?



*Not drawn to scale...

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What Triggers A Response Obligation?

Sex Discrimination

- Sex stereotypes
- Sex characteristics
- Sexual orientation
- Gender identity
- Pregnancy/parental status

Sex-Based Harassment

- Quid pro quo
- Hostile environment
- Clery crimes

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What Triggers A Response Obligation?

- ***Conduct*** or ***impact*** in education program or activity, in the United States
  - "All operations"
  - Buildings owned or controlled by student orgs; and/or
  - ***Within institution's disciplinary authority***

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What Triggers A Response Obligation?

"The Department's current view is that these decisions are correct in . . . requir[ing] a recipient to address a hostile environment based on sex that exists within its education program or activity, whether or not the initial sex-based harassment or other contributing acts or sex-based harassment may have occurred elsewhere. . . . A recipient cannot, therefore, sever incidents that happened outside of its education program or activity from any subsequent harassment or resulting hostile environment within the recipient's control." (Preamble at 49-50*).

*All citations to the preamble cite the unofficial version.

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What Triggers A Response Obligation?

"A person who has gained admission"

Student

Visitor

Employee

Stranger

Any other person who was participating or attempting to participate in the P&A at the time of the conduct

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What Triggers A Response Obligation?

- Actual knowledge no longer trigger's recipient's response obligations.
- Instead, various categories of employees who receive notification of possible sex discrimination will trigger response obligations.
- Much broader than officials with authority to institute corrective measures under the current regulations.

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Notification Requirements

Notify Title IX Coordinator	Notify Title IX Coordinator or Provide Reporting Information
• Any employee with authority to institute corrective measures on behalf of recipient • Any employee with responsibility for administrative leadership, teaching, or advising when complainant is a student	• Any employee with responsibility for administrative leadership, teaching, or advising when complainant is an employee • All other employees

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Notification To Certain Categories Of Employees Triggers Response Obligations

- Employees with authority to institute corrective measures
- Administrative leadership, teaching, or advising
- All other employees

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Notification That Does Not Trigger A Response Obligation

- Confidential Employees
  - Employees subject to applicable Federal or State law privilege;
  - Employees recipient has designated as confidential; or
  - Employees who conduct IRB-approved research.
- Public Awareness Events
  - Held on campus or through and on-line platform sponsored by institution;
  - Notification requirements still apply to employees, but the Title IX Coordinator's obligations would not apply

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Title IX Coordinator Responsibilities

- Once a recipient is on notice, the Title IX Coordinator must:
  - Treat both parties equitably;
  - Notify complainant of grievance procedures;
  - If complaint is made, notify respondent of applicable grievance procedures and both parties of informal resolution;
  - Offer and coordinate supportive measures;
  - Initiate grievance procedures or informal resolution;
  - If no complaint, determine whether to initiate grievance procedures; and
  - Take other steps to ensure that sex discrimination does not continue or recur.

NPRM §106.44(f)

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Initiating The Grievance Process

2020 Regulations

- Formal Complaint -- Signed, written, formal request

2022 NPRM

- Complaint -- Oral or written request. NPRM § 106.2

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Initiating The Grievance Process

- Who is a complainant?
  - Anyone who has experienced sexual harassment can be a complainant, including students, employees, or third parties.
  - Third-parties must be **participating in or attempting to participate in, the institution's education program or activity** at the time of filing a formal complaint.

NPRM §106.2

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Initiating The Grievance Process (Unwilling Complainant)

- A complaint generally should be initiated when there is:
  - An immediate and serious threat to the health and safety of any community member; or
  - Corroborating evidence available.

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Initiating Grievance Process (Unwilling Complainant)

- Factors to consider:
  - Risk of additional sex discrimination;
  - Seriousness of alleged sex discrimination;
  - Age and relationship of parties;
  - Scope of alleged sex discrimination;
  - Availability of evidence; and
  - Disciplinary sanction

NPRM Preamble at 204-206

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Title IX Coordinator Responsibilities

- Upon receiving notice that a student is pregnant, a Title IX Coordinator must:
  - Inform student of the recipient's obligations re: pregnancy and related conditions;
  - Provide student with option of reasonable modification to policies/practices/procedures;
  - Allow voluntary access to a separate portion of program or activity;
  - Allow leave of absence;
  - Ensure availability of lactation space; and
  - Maintain grievance procedures under §106.45 and §106.46.

NPRM §106.40(b)(3)(i)-(iv)

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Supportive Measures

"Upon being notified of conduct that may constitute sex discrimination under Title IX, a Title IX Coordinator must offer supportive measures, as appropriate, to the complainant or respondent to the extent necessary to restore or preserve that party's access to the recipient's education program or activity." NPRM 106.44(g)

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Supportive Measures

- Factors to Consider When Offering Supportive Measures:
  - Need expressed by the complainant or respondent;
  - Ages of the parties involved, the nature of the allegations, and their continued effects on the complainant or respondent;
  - Whether the parties continue to interact directly in the recipient's education program or activity; and
  - Whether steps have already been taken to mitigate the harm from the parties' interactions, such as implementation of a civil protective order.

NPRM Preamble at 216

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Supportive Measures

- Supportive measures can now include temporary measures that burden a respondent:
  - May be imposed only during pendency of the grievance procedures; and
  - Must be no more restrictive than is necessary to restore or preserve the complainant's access to the recipient's education program or activity
- Recipient must provide the parties with the opportunity to appeal the supportive measures
  - Decisionmaker cannot be the same person who implemented the measures; and
  - Recipient must conduct fact-specific inquiry to determine what is a timely appeal

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Informal Resolution

"A recipient has **discretion** to determine whether it is appropriate to offer an informal resolution process when it receives information about conduct that may constitute sex discrimination under TIX or a complaint of sex discrimination is made, and may decline to offer informal resolution despite one or more of a parties' wishes."

-NPRM § 106.44(k)(1)(i) (emphasis added)

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Informal Resolution

- Most significant changes to informal resolution under NPRM:
  - No longer requires formal complaint;
  - Requires Title IX Coordinator, to the extent necessary, to take prompt and effective steps to ensure sex discrimination does not continue or recur;
  - Expands the notice requirements;
  - Includes an explicit statement that recipient must not require or pressure parties to participate; and
  - The facilitator of the informal resolution may not be the same person as the investigator or decisionmaker.

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Questions?
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The Grievance Process
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The Grievance Process: §106.45

Who does it apply to?	Everyone – all employees, students and third parties
When is 106.45 required?	Sex discrimination complaints
What is sex discrimination?	Preamble, p. 5, Footnote 1
What are the procedural requirements?	NPRM §106.45(b) (1)-(7)

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The Grievance Process: §106.45

1. Basic requirements §106.45(b)(1)-(7)
2. Single investigator model okay §106.45(b)(2)
3. Respondents presumed not responsible §106.45 (b)(3)
4. Reasonable timeframes for major stages of the grievance procedures §106.45 (b)(4)
5. Requirement to evaluate relevant evidence §106.45(b)(6)
6. Notice of allegations §106.45(c)
7. Dismissal of sex discrimination complaint §106.45(d)
8. Provision of evidence to parties §106.45(f)(4)
9. Credibility of Assessments §106.45(g)
10. Standard of evidence §106.45(h)(1)
11. Notice of outcome to parties §106.45(h)(2)
12. Sanctions and Remedies §106.45(h)(3)
13. False statements §106.45(h)(5)
14. Additional provisions §106.45 (i)

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The Grievance Process: §106.45

Single Investigator Model Okay: "The decisionmaker *may* be the same person as the Title IX Coordinator or investigator."

BUT, no conflict of interest or bias permitted.

NPRM §106.45(b)(2)

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The Grievance Process: §106.45

Respondents Presumed Not Responsible: "Include a presumption that the respondent is not responsible for the alleged conduct until a determination whether sex discrimination occurred is made at the conclusion of the recipient's grievance procedures for complaints of sex discrimination." NPRM §106.45(b)(3)

**Presumption no longer limited to complaints involving sexual harassment but applies to all complaints of sex discrimination.*

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The Grievance Process: §106.45

Reasonable Timeframes:

"Establish reasonably prompt timeframes for the **major stages** of the grievance procedures, including a process that allows for the reasonable extension of timeframes on a case-by-case basis for good cause with notice to the parties that includes the reason for the delay."

NPRM §106.45 (b)(4)

Major Stages:

1. Evaluation/dismissal determinations
2. Investigation
3. Determination
4. Appeal (if any)

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The Grievance Process: §106.45

- **Evaluating Evidence:** "Require an objective evaluation of all **relevant** evidence, consistent with the definition of relevant in NPRM §106.2—including both inculpatory and exculpatory evidence—and provide that credibility determinations must not be based on a person's status as a complainant, respondent, or witness." NPRM §106.45 (b)(6)
- Mandatory evidentiary exclusions – NPRM §106.45 (b)(7)

"Questions are ***relevant*** when they seek evidence that may aid in showing whether the alleged sex discrimination occurred, and evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred. NPRM §106.2.

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The Grievance Process: §106.45

Notice of allegations: "Upon initiation of the recipient's grievance procedures, a recipient must provide notice of the allegations to the parties whose identities are known." NPRM §106.45(c).

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Dismissals

2020 Regulations

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 2022 **must dismiss** the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part. 2020 Regulations § 106.45(b)(3)(i) (emphasis added).

NPRM

- Permissive dismissals allowed if:
  - Recipient cannot identify respondent;
  - Respondent not participating in the recipient's education program or activity
  - Respondent not employed by recipient;
  - Complaint withdrawn *and* the recipient determines that without the complainant's withdrawn allegations, the conduct that remains in the complaint, even if proven, would not constitute sex discrimination;
  - Alleged conduct, even if proven, would not constitute sex discrimination under TIX.
- Notification requirements – reason for dismissal, appeal rights

-NPRM §106.45 (d)

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The Grievance Process: §106.45

Investigation of the complaint

NPRM §106.45(f)

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The Grievance Process: §106.45

Credibility Assessments: "A recipient must provide a process that enables the decisionmaker to adequately assess the credibility of the parties and witnesses to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination." NPRM §106.45(g).

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The Grievance Process: §106.45

Standard of Proof

NPRM §106.45(h)(1)

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The Grievance Process: §106.45

Notice of Outcome: "Notify the parties of the outcome of the complaint, including the determination of whether sex discrimination occurred under Title IX, and the procedures and permissible bases for the complainant and respondent to appeal, if applicable."

NPRM §106.45 (h)(2).

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The Grievance Process: §106.45

- **Sanctions and Remedies**: "The recipient must . . . . [i]f there is a determination that sex discrimination occurred, as appropriate, require the Title IX Coordinator to provide and implement remedies to a complainant or other person the recipient identifies as having had equal access to the recipient's education program or activity limited or denied by sex discrimination, and require the Title IX Coordinator to take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity." NPRM §106.45 (h)(3).

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The Grievance Process: §106.45

False Statements: "The recipient must . . . [n]ot discipline a party, witness, or others participating in a recipient's grievance procedures for making a false statement or for engaging in consensual sexual conduct based solely on the recipient's determination of whether sex discrimination occurred." NPRM §106.45(h)(5).

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The Grievance Process: §106.45

- **Additional Provisions**: "If a recipient adopts additional provisions as part of its grievance procedures for handling complaints of sex discrimination, including sex-based harassment, such additional provisions must apply equally to the parties."

NPRM §106.45(i)

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The Grievance Process: §106.46

Who does it apply to?	Postsecondary students *only*
When is §106.46 required?	Sex-based harassment complaints *only*
What is sex-based harassment?	Defined in NPRM §106.2
What are the procedural requirements?	NPRM §106.45(b)(1)-(7) + §106.46(c)-(h)

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The Grievance Process: §106.46

- Additional Procedures Under NPRM §106.46:
  - Student employees
  - Written notice required, NPRM §106.46(c)
  - Oral AND written complaint can initiate grievance procedures
  - Complaint withdrawal in writing
  - 6 additional requirements, NPRM §106.46(e)

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The Grievance Process: §106.46

Credibility Assessments and Cross Examination: "A postsecondary institution must provide a process as specified in this subpart that enables the decisionmaker to adequately assess the credibility of the parties and witnesses to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex-based harassment." NPRM §106.46(f)(1)

Choice 1	Choice 2
Decisionmaker asks the parties and witnesses relevant and not otherwise impermissible questions during individual meetings or at a live hearing. NPRM §106.46(f)(1)(i)	If institution proceeds with a live hearing, then it *must* allow the party's advisor to ask any parties or witnesses all relevant and not otherwise impermissible questions. NPRM §106.46(f)(1)(ii)

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The Grievance Process: §106.46

Live Hearing Not Required

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The Grievance Process: §106.46

- Cross Examination at a Live Hearing
  - Advisors
  - Relevancy determinations
  - Uncooperative parties or witnesses
  - Rules of decorum

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The Grievance Process: §106.46

Determination of Responsibility: "The postsecondary institution must provide the determination whether sex-based harassment occurred in writing to the parties simultaneously." NPRM §106.46(h)

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The Grievance Process: §106.46

- Mandatory
- Grounds for Appeals
  - procedural irregularity,
  - new evidence,
  - conflict of interest or bias,
  - investigator or decisionmaker that would change the outcome;
  - additional grounds for appeal discretionary
- Comply with requirements of NPRM §106.45(d)(3)(i), (iv), (v)

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Retaliation (§106.71)

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Training

- **All employees** must be trained on:
  - the recipient's obligation to address sex discrimination in its education program or activity,
  - the scope of conduct that constitutes sex discrimination (including the proposed definition of "sex-based harassment"), and
  - all applicable notification and information requirements under proposed §§ 106.40(b)(2) and 106.44 (p. 143)
  - Issues related to pregnancy and parenting

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Training

- **Investigators, decisionmakers, and other persons who are responsible for implementing the recipient's grievance procedures or have the authority to modify or terminate supportive measures** must be trained on:
  - the topics on the prior slide;
  - institutional obligations and grievance procedures (conducting an investigation, hearings, appeals, and informal resolution process);
  - how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias; and
  - the meaning and application of the term "relevant," in relation to questions and evidence, and the types of evidence that are impermissible regardless of relevance

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Training

- **Facilitators of an informal resolution process** must be trained on:
  - the topics listed two slides ago;
  - the rules and practices associated with the recipient's informal resolution process; and
  - how to serve impartially, including by avoiding conflicts of interest and bias

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Training

- **Title IX Coordinator and any designees** must be trained on:
  - all of the topics listed three slides ago;
  - their specific responsibilities;
  - recordkeeping requirements, and
  - "[a]ny other training necessary to coordinate the recipient's compliance with Title IX"

Training materials continue to be required to be publicly posted on recipients' websites.

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