

# 2024 Title IX Education Series: Translating the New Regulations into Your Title IX Policies and Procedures

Session 2: The New Grievance Process – Part II

June 4, 2024

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## Meet Your Speaker Panel



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**learning  
OUTCOME**


Continue to learn about the amendments to the new regulations that will directly impact your Title IX grievance process.

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**Disclaimer**

The information provided in this training does not, and is not intended to, constitute legal advice. Instead, all information, content, and materials available during this training are for training and general informational purposes only.

 **ACADEMIC  
IMPRESSIONS**

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# AGENDA


- 1) Stage 3: Investigation
- 2) Stage 4: Determination
- 3) Stage 5: Appeal

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## Grievance procedure, generally (106.45(f) & 106.46(e))

- Adequate
- Reliable
- Impartial



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#1

Investigate

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## ■ The Investigation: Equal right to...

1. Be treated equitably
2. Notice of the allegations and grievance procedures
3. An advisor (for 106.46 only)
4. A presumption of non-responsibility unless proven otherwise
5. Protection against retaliation
6. Resolution within a reasonable timeframe
7. A trained and impartial investigator and decisionmaker
8. Written notice for meetings and proceedings
9. The institution bearing the burden of gathering evidence
10. Exclusion of certain evidence as impermissible

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## ■ Equal right to (con't)...

11. An objective evaluation of all relevant evidence
12. Access to evidence
13. Reasonable opportunity to respond to evidence

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## ■ Fundamental Rights #1-3

1. Right to be treated fairly and equitably. 106.45(b)(1)
2. Right to notice of the allegations and grievance procedures for resolution. 106.45(c) (must be in writing under 106.46(c))
3. Right to an advisor, who may be, but is not required to be, an attorney. 106.46(c)(1)(i).

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## ■ Fundamental Rights #4-5

4. Right to a presumption of not responsible until the grievance procedure concludes. 106.45(b)(3)
5. Right to protection against retaliation. 106.45(c)(iii)

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## ■ Fundamental Rights #6-7

6. Right to a complaint's resolution within a reasonable timeframe. 106.45(b)(4)
7. Right to a trained and impartial investigator and decisionmaker. 106.8(d)(2) and 106.45(b)(1)
  - No conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. 106.45(b)(2)
  - Objectively seeks, gathers, examines, records, and evaluates the information they obtain.

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## Fundamental Right #8

8. Right to written notice of the date, time, location, participants, and purpose of all meetings or proceedings with sufficient time to prepare to participate. 106.46(e)(1)

### Sample template:

*I would like to schedule an interview with you on [insert date/time]. The interview allows me to explore the alleged conduct with you, ask you questions about it, and invite you to identify any witnesses who may have helpful information. You may also share other information with me before, during or after the interview, including electronic communications, photographs, and other physical evidence relating to the allegations. You may have an advisor or support person of your choosing attend the interview.*

*Following the interview, which will be audio-recorded, I will create a transcript from the recording and provide it to you for your review and approval.*

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**POLL**



**Will your investigators record their interviews with the parties and witnesses?**

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## ■ Fundamental Right #9

9. Right to have the institution bear the burden to gather sufficient evidence to determine whether sex discrimination occurred. 106.45(f)(1)
- The investigator must allow the parties to:
    - Present fact witnesses. 106.45(f)(2)
      - Discretionary to allow expert witnesses
    - Provide relevant evidence (inculpatory and exculpatory) not otherwise impermissible. 106.45(f)(2)
  - The investigator independently identifies and obtains relevant evidence not otherwise impermissible.

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## ■ Definition of “Relevant evidence”

- “*Relevant*” means related to the allegations of sex discrimination under investigation. 106.2
- “*Relevant evidence*” means material items and assertions of fact gathered to ascertain the truth of the allegations under investigation.
  - Testimony, documents, objects, photographs, electronic messages, video, etc.
  - Aids a decisionmaker in determining whether the alleged sex discrimination occurred.

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## ■ Inculpatory v. exculpatory evidence

- Inculpatory evidence tends to show an allegation is true.

*After the parties' sexual encounter, the respondent sent a text message to the complainant stating, "I'm sorry, I should have listened when you said stop."*

- Exculpatory evidence tends to show an allegation is not true.

*The respondent has mid-length blonde hair, while the video from the scene of the alleged misconduct shows the perpetrator with short dark hair.*

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## ■ Fundamental Right #10

10. Right to the exclusion of the following types of evidence as impermissible:

- Confidential employee communication (unless waived)
- Statutory or legal privilege (unless waived).
- Complainant's sexual interests or prior sexual conduct, unless meets one of the permissible exceptions.

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## ■ Fundamental Right #11

11. Right to an objective evaluation of all the relevant evidence not otherwise impermissible under 106.45(b)(7).

- Investigator must objectively evaluate all evidence, and then...
- Identify “relevant evidence.”
  - Decisionmaker is not constrained by the investigator’s relevance determinations.


## ■ Fundamental Right #12

12. Right to access the relevant evidence related to the allegations of sex discrimination. 106.45(f)(4)(i)


- Access to all the relevant evidence. 106.45(f)(4) and 106.46(e)(6), or
- Summary of relevant evidence
  - 106.45: Can be oral or written summary 106.45(4)(i).
  - 106.46(e)(6)(i): Summary is written in an “investigative report”
  - If summarized, must allow access to the relevant evidence upon party request. 106.45(4)(i) and 106.46(e)(6)(i)

# EVIDENCE

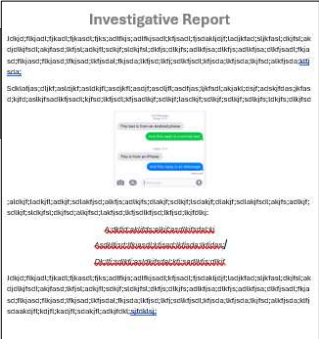
**All evidence gathered**



**Relevant evidence**



**Summary of relevant evidence**




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## ■ Fundamental Right #13

13. Right to a reasonable opportunity to respond to the relevant evidence. 106.45(f)(4)(ii) and 106.46 (e)(6)(ii)

- Discretionary regarding how much time to provide for review and response.
- Discretionary as to the format of the “response.”
  - Written response
  - Oral response


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# #2

## Determination

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### ■ The Determination: Equal right to...

14. Be questioned and have witnesses questioned by the decisionmaker
15. Propose questions to the other party and witnesses (for 106.46 only)
16. Have the decisionmaker evaluate all relevant and permissible evidence for its persuasiveness under the relevant standard of proof.
17. Receive a written determination, including disciplinary sanctions and remedies, if applicable.

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## ■ Fundamental Right #14

14. Right to be questioned and have the witnesses questioned by the decisionmaker to adequately assess credibility. 106.45(g) and 106.46(f)(1)(i)-(ii)

- When credibility is in dispute and relevant to evaluating an allegation of sex discrimination or sex-based harassment.

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## ■ Fundamental Right #15 (106.46 only)

15. Right to propose questions for the other party and witnesses to be asked by the investigator or decisionmaker during individual meetings. 106.46(g)(1)(i), OR

Propose questions for the other party and witnesses to be asked by the decisionmaker or a party's advisor at the hearing. 106.46(g)(1)(ii)

- Decisionmakers must prescreen party questions for relevance and permissibility. 106.46(g)(3)

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## ■ Fundamental Rights #16-17

16. Right to have the decisionmaker evaluate all relevant and permissible evidence for its persuasiveness under the preponderance of evidence standard of proof (or clear and convincing standard, if applicable).
17. Right to a simultaneous written determination with rationale.
  - Includes disciplinary sanctions and remedies, if applicable.

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## ■ Written determination 106.45(h)(1)

- Determination of whether sex discrimination occurred
- Rationale for such determination
- Procedures and permissible bases for appeal, if applicable

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## ■ Written determination 106.46(h)(1)

- A description of the alleged sex-based harassment;
- Policies and procedures used to evaluate the allegations;
- Discussion of the evaluation of the relevant and permissible evidence and its persuasiveness or lack thereof (rationale);
- Determination of whether sex-based harassment occurred
- Disciplinary sanctions for respondent (if applicable)
- Remedies for the complainant or other identified students (if applicable)

## ■ Fundamental Right #18

18. Right not to be disciplined for making a false statement or engaging in consensual sexual conduct based solely on the determination.

- Right #18 part 1: A non-responsibility determination does not mean the complainant lied about the allegations. The same applies to respondents if they denied the allegation and were still found responsible.
- Right #18 part 2: Refers to immunity for other impermissible conduct (i.e., underage alcohol use, drug use, consensual pre-marital sex, etc.)

# #3

## Appeal

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### ■ The Appeal: Equal right to...

19. Appeal the outcome, if applicable under 106.45, or on the bases set out in § 106.46(i)(1), if the adjudication involved sex-based harassment.
20. Make a statement in support of, or challenging, the outcome.
21. Right to the outcome of the appeal and rationale

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## ■ Fundamental Right #19

19. Right to appeal the decisionmaker's determination of responsibility (only if applicable under 106.45).

Bases for appeal must include:

- i. Procedural irregularity that would change the outcome;
- ii. New evidence that would change the outcome and that was not reasonably available when the determination whether sex-based harassment occurred, or dismissal was made; and
- iii. The Title IX Coordinator, investigator, or decisionmaker had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that would change the outcome.

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## ■ Fundamental Rights #20-21

20. Right to make a statement in support of, or challenging, the outcome.

➤ Cross appeals?

21. Right to the appeal officer's determination and rationale.

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# *Thank you!*

Please remember to complete the *event evaluation*.  
Your comments will help us continually improve the  
quality of our programs.

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# QUESTIONS?

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