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Episode 7:  
 Revised Title IX Regulations

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PRESENTED BY  
  
**KROGER GARDIS & REGAS, LLP**  
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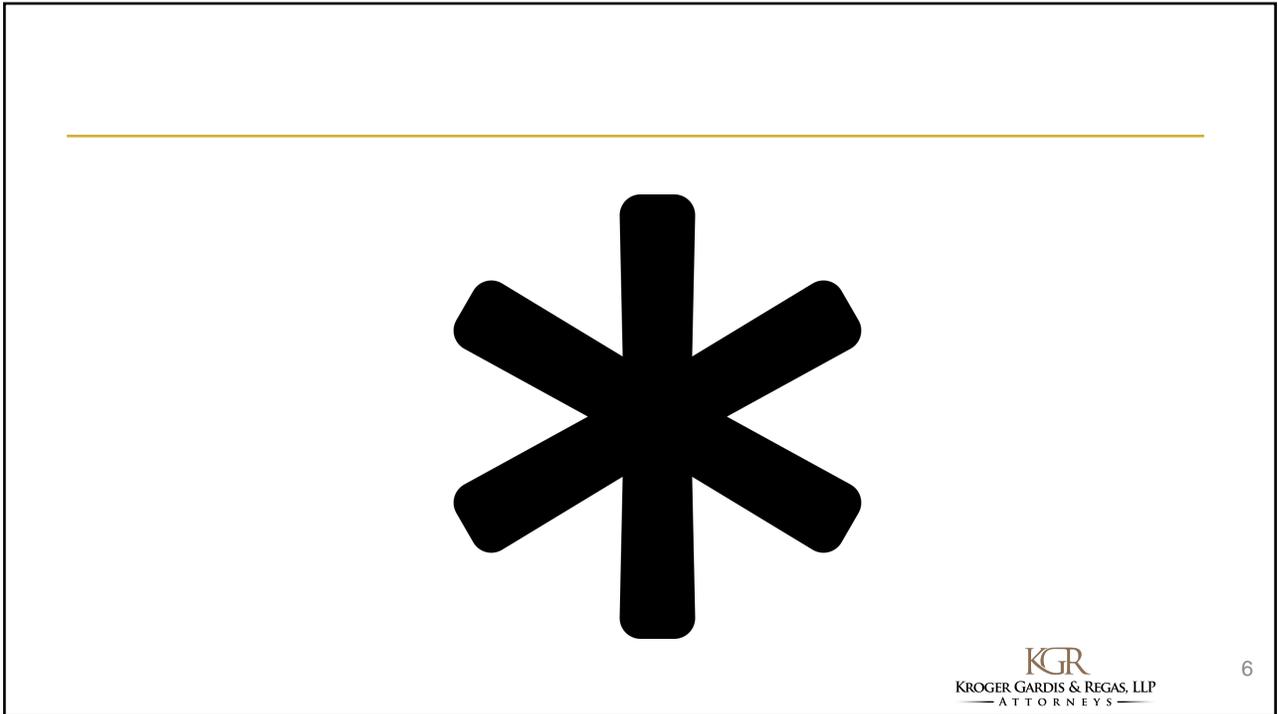
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## Disclaimer

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- The audience for this is broad, including both education leaders and attorneys.
- Focuses on practical guidance pursuant to current standards.
- Does NOT provide comprehensive review.
- Does NOT cover local regulation.
- Does NOT cover your internal policy, procedure, guidelines.
- You should ensure compliance with ALL standards.



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## Background

- U.S. Department of Education, Office for Civil Rights (OCR), has amended Title IX regulations at 34 C.F.R. Part 106.
- Existing regulations on topics such as athletic participation, employment, and single-sex education not addressed by the final rule.
- Prior to this amendment, Title IX regulations did not refer to sexual harassment.
- Historically *Gebser v. Lago Vista Independent School District* and *Davis v. Monroe County Board of Education* (Gebser/Davis), established the definitions and standards that are commonly used in the context of adjudicating allegations of sexual harassment in educational institutions, while OCR's nonbinding "Dear Colleague Letters" set out standards for administrative liability.
- Now, however, the Title IX regulations define sexual harassment and establish detailed procedures for how educational institutions subject to Title IX (referred to as "recipients") must respond to allegations of sexual harassment.

## Effective Date

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- On March 13, 2020, the President of the United States declared that a national emergency concerning the novel coronavirus disease (COVID-19) outbreak began on March 1, 2020, as stated in "Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak," Proclamation 9994 of March 13, 2020, *Federal Register* Vol. 85, No. 53 at 15337-38.
- The Department appreciates that exigent circumstances exist as a result of the COVID-19 national emergency, and that these exigent circumstances require great attention and care on the part of States, local governments, and recipients of Federal financial assistance.
- The Department recognizes the practical necessity of allowing recipients of Federal financial assistance time to plan for implementing these final regulations, including to the extent necessary, time to amend their policies and procedures necessary to comply.
- Taking into account this national emergency, as well as consideration of public comments about an effective date as discussed in the "Effective Date" subsection of the "Miscellaneous" section of this preamble, the Department has determined that these final regulations are effective August 14, 2020.



## Definition of sexual harassment – 34 C.F.R. § 106.30(a)

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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 (i.e., *quid pro quo* sexual harassment);
2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
3. "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

## Title IX coordinator - 34 C.F.R. § 106.8(a)

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- Title IX regulations have always required recipients to designate an employee to coordinate the recipient's efforts to implement the law. The final rule requires that recipients not only designate but also "authorize" this individual to coordinate the recipient's compliance efforts. In addition, the rule requires the employee to be known as the "Title IX Coordinator."

## Policy and notice requirements – 34 C.F.R. § 106.8

- Removes portions of existing 34 C.F.R. § 106.9 regarding dissemination of a recipient's policy. While most of the prior regulation's substance has been moved to new 34 C.F.R. § 106.8, recipients should carefully review their existing notices and publications to ensure compliance.
- Requires a recipient to provide notice of its nondiscrimination policy and grievance procedures, including how to file or report sexual harassment and how the recipient will respond, to the following groups: applicants for admission and employment; students; parents or legal guardians; unions or professional organizations holding agreements with the recipient. 34 C.F.R. § 106.8(b).
- In addition, the rule requires notice to the same groups of the Title IX coordinator's name or title, email address, office address, and telephone number. 34 C.F.R. § 106.8(a).
- Section 106.8(b)(1) requires a recipient's notice of nondiscrimination to state that the recipient does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by Title IX and its regulations not to discriminate in such a manner. Such notification must state that the requirement not to discriminate in the education program or activity applies to employment. The notice must also indicate that inquiries about the application of Title IX and its regulations to the recipient may be referred to the designated Title IX Coordinator, to the Assistant Secretary, or both.
- Recipients to which Subpart C of 34 C.F.R. Part 106 applies must also provide notice of the requirement not to discriminate in admissions. Part C does not apply to elementary and secondary schools. See 34 C.F.R. § 106.15 (defining scope of applicability for educational institutions).
- Recipients must publish the notice of nondiscrimination described above and the Title IX coordinator's contact information on their websites and in any handbook provided to the groups listed above. 34 C.F.R. § 106.8(b)(2).

## Reporting allegations of sexual harassment – 34 C.F.R. § 106.8(a)

- Any person may report sex discrimination, including sexual harassment, regardless of whether the person is the alleged victim of the reported conduct, 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 report. Such a report may be made at any time, including during non-business hours, by using the telephone number or email address, or by mail to the office address, listed for the Title IX Coordinator.
- For K-12 educational institutions, defines *actual knowledge* of sexual harassment as notice of sexual harassment or allegations of sexual harassment to any employee. 34 C.F.R. § 106.30(a).
  - OCR chose to expand the employees who would trigger an official response by the Title IX coordinator in a K-12 school for several reasons, including consistency with mandatory child abuse reporting laws and the risk that an adult who targets young children may pressure them to stay silent. OCR opined that it is "unreasonable to expect young children to seek out specific employees for the purpose of disclosing Title IX sexual harassment."



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## Complainant and respondent – 34 C.F.R. § 106.30(a)

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- Defines a *complainant* as a person who is alleged to be the victim of conduct that could constitute sexual harassment.
- A complainant may file a *formal complaint* with the Title IX coordinator by mail, email, or other method made available by the recipient. 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. The Title IX coordinator may also sign a complaint, which does not make the Title IX coordinator a party in the grievance process.
- The final rules define *respondent* as an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.
- Does not authorize a third party reporter to file a formal complaint. OCR's commentary makes clear, however, that a Title IX coordinator may sign a complaint, thus triggering an investigation, in order to ensure that the recipient does not respond to sexual harassment with deliberate indifference. In some cases, this may entail implementing a formal grievance procedure over the complainant's objections. By defining the complainant as the person who is alleged to be the victim of sexual harassment in any event, the final rule ensures that the alleged victim has access to supportive measures and receives written notice of steps in the grievance procedure even if he or she is not a willing participant.

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## K-12 Location Limitations

- For K-12 purposes, the rules define an *education program or activity* as including any location, event, or circumstance over which the recipient exhibits substantial control over both the alleged harasser and the context in which the harassment occurred. 34 C.F.R. § 106.44(a).
- Commentary: “§ 106.30 sexual harassment definition does not make sexual harassment dependent on the method by which the harassment is carried out; use of e-mail, the internet, or other technologies may constitute sexual harassment as much as use of in-person, postal mail, handwritten, or other communications.”

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## The educational institution's response – 34 C.F.R. § 106.44

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The final rules discuss the general requirements for responding to notice of sexual harassment separately from the required procedure for responding to a *formal complaint* of sexual harassment, defined as 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. 34 C.F.R. § 106.30(a).

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## General response

- A recipient must respond promptly to actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States in a manner that is not deliberately indifferent. This provision adopts the *Gebser/Davis* standard stating that a recipient is *deliberately indifferent* if its response is clearly unreasonable in light of known circumstances. 34 C.F.R. § 106.44(a).
- A recipient's response must treat complainants and respondents equitably by offering supportive measures to a complainant and by following a grievance process before imposing any disciplinary consequences or sanctions on a respondent. 34 C.F.R. § 106.44(a).
  - The rule defines *supportive measures* as non-disciplinary, non-punitive, individualized services, offered as appropriate and without charge to a complainant or a respondent before or after the filing of a formal complaint, or where no complaint has been filed. 34 C.F.R. § 106.30(a). Examples of supportive measures include actions similar to the "interim measures" discussed in OCR's prior guidance: e.g., counseling, course modifications, schedule changes, and increased monitoring or supervision.
  - OCR emphasizes that supportive measures should be designed to restore or preserve equal access to the education program or activity without "unreasonably" burdening the other party.
- Requires the Title IX Coordinator to promptly contact the complainant (alleged victim) to discuss the availability of supportive measures, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain the process for filing a formal complaint. 34 C.F.R. §§ 106.30(a), .44(a).

## Emergency removal/administrative leave

- Section 106.44 clarifies that the regulations do not prohibit immediate removal of a respondent from the education program or activity on an emergency basis, provided that the recipient conducts an individualized safety and risk analysis and determines that emergency removal is necessary in order to protect a student or other individual from an immediate threat to physical health or safety.
  - A recipient must provide the respondent with notice and an opportunity to challenge the decision immediately after the removal. 34 C.F.R. § 106.44(c).
  - Emergency removal would not be an appropriate action to address emotional or mental health needs, which should instead be addressed by supportive measures.
- Emergency removal does not modify any rights under the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.
- Does not prohibit placing an employee-respondent on administrative leave during the pendency of a grievance process. 34 C.F.R. § 106.44(d).

## Formal complaint process basic elements – 34 C.F.R. § 106.45(b)(1)

In response to a formal complaint of sexual harassment, recipients must follow a grievance procedure that complies with the following basic elements:

- **Treat parties equitably** by providing remedies to a complainant after a determination of responsibility against a respondent has been made and following a grievance process before imposing any disciplinary sanctions, or other actions that are not supportive measures, against a respondent.
  - *Remedies* may include the same actions described as supportive measures, but remedies need not avoid punishing or burdening the respondent.
- **Require an objective evaluation of all available evidence**, both inculpatory and exculpatory, and prohibit credibility determinations based on a party's status as complainant, respondent, or witness.

## Formal complaint process basic elements – 34 C.F.R. § 106.45(b)(1)

- **Require that any person designated as a Title IX coordinator, investigator, decision-maker, or any person designated to facilitate an informal process not have a conflict of interest against complainants and respondents generally or against the particular complainant and respondent.**
  - These individuals must also receive training on the definition of sexual harassment; the scope of the recipient's education program or activity; how to conduct an investigation and grievance process, including, as applicable, hearings, appeals, and informal processes; and how to serve impartially.
  - Investigators must receive training on how to prepare an investigation report, and decision-makers must receive training on any technology to be used at a live hearing and issues of evidence and questioning, including when questions about a complainant's prior sexual history or disposition are not relevant.
  - Training must promote impartial investigations and adjudication of formal complaints and must not be based on sex stereotypes.

## Formal complaint process basic elements – 34 C.F.R. § 106.45(b)(1)

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- **Include a presumption that the respondent is not responsible for the alleged conduct until a determination has been made at the conclusion of the grievance process.**
- **Include reasonably prompt time frames for conclusion of the grievance process**, including a process for temporary delays based on good cause (e.g., law enforcement involvement, absence of a party, witness, or advisor, translation or accommodation needs) with written notice to both parties explaining the reason for the delay.
- **Describe or list the possible disciplinary outcomes and remedies that may be implemented following a determination of responsibility.**

## Formal complaint process basic elements – 34 C.F.R. § 106.45(b)(1)

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- **Include the procedures and permissible reasons for appeal by a respondent or a complainant.**
- **Describe the range of supportive measures available to complainants and respondents.**
- **Not require, allow, or use evidence or questions that constitute or seek legally privileged information, unless the privilege is waived.**
- **State whether the recipient uses a preponderance of evidence or clear and convincing evidence standard to determine responsibility.**
  - Recipients must use the same standard of evidence for all formal complaints, including complaints against employees.



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## Written notice – 34 C.F.R. § 106.45(b)(2)

Upon receipt of a formal complaint, a recipient must provide written notice to all known parties in sufficient time to give the respondent time to prepare a response before an initial interview. Written notice must include:

- Notice of the grievance process, including any informal resolution process;
- Notice of the allegations, including sufficient detail (i.e., names of known parties, the conduct alleged to be sexual harassment, and the date and location of the conduct, if known) to allow the respondent to prepare a response;
- A statement that the respondent is presumed not responsible for the conduct and that responsibility will be determined at the conclusion of the grievance process;
- Notice of the parties' right to have an advisor (who may be, but is not required to be, an attorney) and to inspect and review evidence; and
- Notice of any provision in the code of conduct that prohibits knowingly making false statements or providing false information in the grievance process.

If in the course of an investigation, the recipient decides to investigate allegations about the respondent or complainant that were not included in the original written notice, notice of the additional allegations must also be provided in writing to the known parties.

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## Dismissal – 34 C.F.R. § 106.45(b)(3)

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- The complaint must be dismissed if the allegations would not constitute sexual harassment as defined in section 106.30 even if proved, did not occur in the recipient's program or activity, or did not occur against a person in the United States.
- The complaint may be dismissed if the complainant notifies the Title IX coordinator at any time that he or she wishes to withdraw the complaint or an allegation, if the respondent's enrollment or employment ends, or if specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination.
  - OCR's commentary alludes to the passage of several years between a formal complaint and the alleged conduct, or a complainant ceasing to cooperate with the grievance process, as examples of "specific circumstances."
- If a recipient dismisses a complaint, written notice must be promptly provided to both parties simultaneously, including the reasons for mandatory or discretionary dismissal.

## Consolidation – 34 C.F.R. § 106.45(b)(4)

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Provides wide latitude to consolidate formal complaints against more than one respondent, by more than one complainant against one or more respondents, or by one party against another party, where the allegations arise out of the same facts or circumstances.

## Investigation – 34 C.F.R. § 106.45(b)(5)

When investigating a complaint and throughout the grievance process, a recipient must:

- Ensure that the burden of proof and of gathering evidence rests on the recipient rather than the parties, except that certain treatment records cannot be obtained without voluntary, written consent from the party or parent;
- Provide an equal opportunity for the party to present witnesses and evidence;
- Not restrict either party's ability to discuss the allegations or gather and present evidence;
- Provide the parties with the same opportunities to have others present during interviews or other related proceedings, including an advisor who may but is not required to be an attorney;
- Provide, to a party who is invited or expected to attend, written notice of the date, time, participants, purpose, and location of any investigative interview, hearing, or other meeting with enough time to allow the party to prepare to participate;
- Provide both parties and their advisors, if any, an equal opportunity to review all evidence that is directly related to the allegations in the formal complaint, including evidence on which the recipient does not intend to rely and any exculpatory or inculpatory evidence from any source; such evidence must be provided prior to the completion of the final investigation report and in time to give the parties at least 10 days to prepare a written response, which the investigator must consider prior to completing the investigation report; and
- Prepare a written investigation report that fairly summarizes the relevant evidence and provide the report to the parties and their advisors, if any, for their review and written response, at least 10 days before a hearing or other determination of responsibility.

## Hearings - 34 C.F.R. § 106.45(b)(6)

- Does not require K-12 schools to provide live hearings.
  - According to OCR's commentary, school officials "could determine that their educational community is best served by holding live hearings for high school students, for students above a certain age, or not at all."
  - The commentary states that a Title IX coordinator could determine whether a live hearing is necessary on a case-by-case basis, provided that the K-12 recipient's grievance process clearly indicates the equitable circumstances under which a hearing will or will not be provided.
- With or without a hearing, the recipient must provide each party the opportunity after the completion of the investigative report to submit written, relevant questions that the party wants asked of another party or witness, provide each party with the answers, and provide for limited follow-up questions.
  - Section 106.45(b)(6)(ii) establishes when questions regarding a complainant's prior sexual behavior or sexual predisposition are considered relevant in a hearing provided by a K-12 recipient.

## Determination of responsibility – 34 C.F.R. § 106.45(b)(7)

- The decision maker, who cannot be the investigator or the Title IX coordinator, must apply the recipient's standard of evidence and issue a written determination of responsibility that:
- Identifies the allegations that potentially constitute sexual harassment;
  - Describes the recipient's procedural steps taken from the receipt of the complaint to the determination;
  - Includes findings of fact supporting the determination;
  - Includes conclusions regarding application of the code of conduct to the facts;
  - Includes a statement of, and a rationale for, the result as to each allegation, including a determination of responsibility, any disciplinary sanctions, and whether remedies to restore or preserve equal access to the recipient's education program or activity will be provided to the complainant; and
  - Includes procedures and permissible basis for appeals.

## Appeals – 34 C.F.R. § 106.45(b)(8)

- Recipients must offer both parties the right to appeal a determination of responsibility, and the recipient's dismissal of a complaint or any allegations therein, for the following reasons: (1) a procedural irregularity that affected the outcome; (2) new evidence that was not reasonably available at the time of the determination and could affect the outcome; (3) conflict of interest on the part of the Title IX coordinator, investigator, or decision maker that affected the outcome.
  - A recipient's grievance procedure may also offer both parties an equal right to appeal for additional reasons.
- For all appeals, the recipient must ensure that written notice is provided to both parties of the appeal and provide both parties an equal opportunity to submit a written statement in support of, or challenging, the determination.
- The appeal process must result in a written decision that must be provided to both parties simultaneously.
- In addition, recipients must ensure that the decision maker for an appeal is not the Title IX coordinator, investigator, or initial decision maker, does not have a conflict of interest or bias against complainants and respondents generally or the particular complainant and respondent, and receives training as outlined in section 106.45(b)(1)(iii).

## Informal resolution – 34 C.F.R. § 106.45(b)(9)

- Prohibits offering to facilitate an informal resolution process unless a formal complaint of sexual harassment is filed.
  - Intention is to ensure that the “default” procedure when a formal complaint is filed includes an investigation.
- At any point during the formal complaint process, a recipient may offer to facilitate an informal process that does not require a full investigation as long as the recipient provides both parties written notice of rights under section 106.45(b)(9)(i), obtains the parties’ written, voluntary consent, and does not offer informal resolution in the context of a complaint alleging that an employee harassed a student.
- Commentary: Informal resolution “may encompass a broad range of conflict resolution strategies, including, but not limited to, arbitration, mediation, or restorative justice.”

## Recordkeeping – 34 C.F.R. § 106.45(b)(10)

- Recipients must keep records related to reports of alleged sexual harassment for a minimum of seven years, including investigation records, disciplinary sanctions, remedies, appeals, and records of any action taken, including supportive measures.
- Records should document in each instance that the recipient’s response was not deliberately indifferent and that measures were taken to restore or preserve equal access to the education program or activity.
- If a recipient does not offer supportive measures in response to a report, the recipient’s records should document why the response was not clearly unreasonable under the known circumstances.
- In addition to retaining for the required seven-year period any materials used to train Title IX coordinators, investigators, decision makers, and any employee designated to facilitate an informal process, recipients must also post the training material on their websites, or, if a recipient does not maintain a website, otherwise make the materials available to the public.



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## Retaliation – 34 C.F.R. § 106.71

- Broadly prohibits retaliation by a recipient or any other person against any person for the purpose of interfering with Title IX rights or because the person has participated or refused to participate in any manner in a proceeding under Title IX regulations. Complaints of retaliation may be addressed under the recipient's Title IX grievance process.
  - Charges against an individual for code of conduct violations not involving sex discrimination or sexual harassment, but arising out of the same facts or circumstances as a report or complaint of sex discrimination or sexual harassment, constitute retaliation if the purpose of the charges is to interfere with any right or privilege secured by Title IX or its regulations.
    - Example: If a recipient takes disciplinary action against a reporter based on underage drinking with the purpose of interfering with any Title IX right or privilege, this would constitute retaliation. On the other hand, if the recipient's code of conduct consistently prohibits underage drinking, then the disciplinary action would not be considered retaliation.
  - Charging a person with a code of conduct violation based on the person's knowingly making a materially false statement in bad faith in an investigation is not retaliation, provided, however, that a determination of responsibility alone is not sufficient to determine that a person made a materially false statement in bad faith.
- A recipient must keep confidential the identity of a person who complains or reports sexual harassment, including parties and witnesses, except as permitted by law or to carry out the purpose of these regulations.

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## “New Title IX Regulations” Checklist

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<ul style="list-style-type: none"> <li><input type="checkbox"/> Complete feedback survey</li> <li><input type="checkbox"/> Plan for e-office hours into calendar (Mondays 10:30 eastern) and participate with your questions for me and guest(s)</li> <li><input type="checkbox"/> Be ready by 8/14/20</li> <li><input type="checkbox"/> Discuss and decide on discretionary portions of approach</li> <li><input type="checkbox"/> Update policies, statements, procedures, notices, guidelines, etc</li> <li><input type="checkbox"/> Reorganize and train staff</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Provide guidance to students and all educational community members</li> <li><input type="checkbox"/> Run through some hypothetical allegations and test run your process</li> <li><input type="checkbox"/> Learn and evolve</li> <li><input type="checkbox"/> Realize that these regulations can be changed by law and/or new administration</li> </ul>
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# Have a great rest of your...!



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