

Title IX Investigation Training

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Title IX

- Title IX was enacted to ensure: “No person in the United States 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.”

Several Guidance Documents Rescinded

- 1997 Sexual Harassment Guidance
- 2001 Revised Sexual Harassment Guidance and 2006 Dear Colleague Letter distributing it
- 2011 Dear Colleague Letter
- 2014 Q&A
- 2015 Title IX Resource Guide and Dear Colleague Letter on Title IX Coordinators
- September 22, 2017 Q&A on Campus Sexual Misconduct

Updated Regulations

- Set out in 34 C.F.R. § 106.45
- Effective August 2020 (not applied retroactively)
- New Q&A dated September 4, 2020
- New Q&A: Part 1 and Part 2 dated January 15, 2021

2020 Final Rule Guiding Principles

- **(1) Historic Recognition of Sexual Harassment as Sex Discrimination**
 - Previously, Department of Education only addressed sexual harassment and sexual assault as unlawful sex discrimination through guidance documents.
 - For the first time, the Final Rule imposes legal obligations on schools and required response.
- **(2) Supporting Complainants and Respecting Complainant's Autonomy**
 - Schools must offer free supportive measures to every alleged victim of sexual harassment, even if complainant doesn't want to initiate or participate in grievance process.
 - Respects complainants' wishes and autonomy by giving them choice to file a formal complaint or not.

2020 Final Rule Guiding Principles

- **(3) Non-Discrimination, Free Speech and Due Process**
 - Reflects core American values of equal treatment on the basis of sex, free speech and academic freedom, due process of law, and fundamental fairness.

Notice of Complaint

Initial Assessment/Jurisdiction/Supportive Measures

Formal Complaint

Analyze Potential Dismissal

Informal Resolution vs. Full Investigation

Investigation

Live Hearing

Appeal



When Must Institution Respond?

(1) The school has actual knowledge of sexual harassment;

(2) That occurred within the school's education program or activity; and

(3) Against a person in the United States.

Jurisdiction / Off-Campus Locations

- **Must respond to actual knowledge of sexual harassment in University’s education program or activity, which includes:**
 - (1) On campus
 - (2) “locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs”, and
 - (3) “any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.”
- **No distinction between sexual harassment occurring in person versus online.**

Jurisdiction/In the U.S.

- **International students or foreign students studying in U.S. are entitled to the same protections under Title IX as any other individuals.**
- **Study abroad:**
 - Title IX's jurisdiction only applies to persons and conduct within the U.S. (20 U.S.C. § 1681(a)).
 - However, even if a formal Title IX complaint is dismissed on jurisdictional grounds, nothing precludes University from addressing those allegations under its own code of conduct.

Notice of Complaint

- Institutions may choose whether to have mandatory reporting for all employees, or to designate some employees to be confidential resources for college students to discuss sexual harassment without automatically triggering a report to the Title IX office.
- Notice to a Title IX Coordinator, or to an official with authority to institute collective measures on the recipient's behalf, charges a school with actual knowledge and triggers the school's response obligations.

“Sexual Harassment” for Title IX Purposes

- **Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:**
 - (1) An employee of Asbury conditioning the provision of an aid, benefit, or service of Asbury on an individual's participation in unwelcome sexual conduct;
 - (2) Unwelcome conduct **determined by a reasonable person** to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to Asbury’s education program or activity; or
 - (3) “Sexual assault”, “dating violence”, “domestic violence”, or “stalking”

Deliberate Indifference Standard

- **Asbury must promptly respond to actual knowledge of sexual harassment in the recipient's education program or activity against a person in the United States in a manner that is not deliberately indifferent. (34 C.F.R. § 106.44(a))**
 - In other words, the response cannot be clearly unreasonable in light of the known circumstances.
- **Must treat the parties equitably, which for a respondent means refraining from imposing disciplinary sanctions or other actions that are not supportive measures (as defined in 34 C.F.R. § 106.30) against a respondent, without following the 34 C.F.R. § 106.45 grievance process.**

Deliberate Indifference – Mandatory Response Obligations

- Offer supportive measures to the person alleged to be the victim (i.e. the “complainant”)
- Title IX Coordinator must promptly contact the complainant confidentially 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 to the complainant the process for filing a formal complaint.
- Must follow a grievance process that complies with the Final Rule before the imposition of any disciplinary sanctions or other actions that are not supportive measures, against a respondent.

Deliberate Indifference – Mandatory Response Obligations

- **Must not restrict rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment, when complying with Title IX.**
- **Must investigate sexual harassment allegations in any formal complaint, which can be filed by a complainant, or signed by a Title IX Coordinator.**
- **Respect complainant's wishes with respect to whether the school investigates unless the Title IX Coordinator determines that signing a formal complaint to initiate an investigation over the wishes of the complainant is not clearly unreasonable in light of the known circumstances.**

Definitions – Complainant and Respondent

- **Complainant is as an individual who is alleged to be the victim of conduct that could constitute sexual harassment.**
 - Report may come from complainant or any third party.
 - While parents and guardians do not become complainants (or respondents), the Final Rule expressly recognizes the legal rights of parents and guardians to act on behalf of parties (including by filing formal complaints) in Title IX matters.
- **Respondent is as an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.**

Response to Notice of Complaint

- **When a school has notice of complaint, the Title IX Coordinator must:**
 - (1) Treat complainants and respondents equitably
 - (2) Promptly contact the complainant to discuss the availability of supportive measures;
 - (3) Consider the complainant's wishes with respect to supportive measures;
 - (4) Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint; and
 - (5) Explain to the complainant the process for filing a formal complaint.

Definitions – Supportive Measures

- **“Supportive measures” are individualized services reasonably available that are non-punitive, non-disciplinary, and not unreasonably burdensome to the other party while designed to ensure equal educational access, protect safety, or deter sexual harassment.**
- **Selection of supportive measures and remedies must be based on what is not clearly unreasonable in light of the known circumstances.**
- **Regulations do not second-guess a school’s disciplinary decisions, but requires the school to offer supportive measures, and provide remedies to a complainant whenever a respondent is found responsible.**

Definitions – Supportive Measures

- May include counseling, extensions of deadlines or other 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.
- Must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures.
- The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

Documentation of Supportive Measures

- **Must maintain records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment.**
- **Must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity.**
- **If institution does not provide a complainant with supportive measures, it must document the reasons why such a response was not clearly unreasonable in light of the known circumstances.**

Definitions – Formal Complaint

- **“Formal complaint” is 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 school investigate the allegation of sexual harassment.**
 - May be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under the Final Rule, and by any additional method designated by the school.
 - The phrase “document filed by a complainant” means a document or electronic submission (such as by e-mail or through an online portal provided for this purpose by the school) that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.

No Anonymous Formal Complaints

- A formal complaint initiates the grievance process (i.e., an investigation and adjudication of allegations of sexual harassment).
- A complainant cannot file a formal complaint anonymously because § 106.30 requires the document or electronic submission (such as an e-mail or using an online portal provided for this purpose by the recipient) to contain the complainant's physical or digital signature or otherwise indicates that the complainant is the person filing the formal complaint.
- The final regulations require a recipient to send written notice of the allegations to both parties upon receiving a formal complaint. The written notice of allegations under § 106.45(b)(2) must include certain details about the allegations, including the identity of the parties, if known.

Formal Complaint filed by Title IX Coordinator

- When a formal complaint is signed by a Title IX Coordinator rather than filed by a complainant, the written notice of allegations in § 106.45(b)(2) requires the recipient to send both parties details about the allegations, including the identity of the parties if known, and thus, if the complainant's identity is known it must be disclosed in the written notice of allegations. However, if the complainant's identity is unknown (for example, where a third party has reported that a complainant was victimized by sexual harassment but does not reveal the complainant's identity, or a complainant has reported anonymously), then the grievance process may proceed if the Title IX Coordinator determines it is necessary to sign a formal complaint, even though the written notice of allegations does not include the complainant's identity.

Emergency Removal

- **34 CFR 106.44(c) allows University to remove a respondent from education program or activity on an emergency basis, provided that it:**
 - undertakes an individualized safety and risk analysis, determines that an **immediate threat to the physical health or safety** of any student or other individual arising from the allegations of sexual harassment justifies removal, and
 - provides the respondent with notice and an opportunity to challenge the decision immediately following the removal.
- **Also authorizes placement of a non-student employee respondent on administrative leave during the pendency of the grievance process**

What if complainant doesn't want to disclose his/her identity?

- **A complainant (or third party) who desires to report sexual harassment without disclosing the complainant's identity to anyone may do so, but an institution will be unable to provide supportive measures in response to that report without knowing the complainant's identity.**
- **If a complainant desires supportive measures, Asbury can, and should, keep the complainant's identity confidential (including from the respondent), unless disclosing the complainant's identity is necessary to provide supportive measures for the complainant (e.g., where a no-contact order is appropriate and the respondent would need to know the identity of the complainant in order to comply with the no-contact order, or campus security is informed about the no-contact order in order to help enforce its terms). . . .**

Employees of Asbury University

- Regulations apply Asbury students, employees and anyone otherwise affiliated with the University (34 C.F.R. § 106.30(a)).
- Also covers sexual harassment allegations in cases where the complainant and respondent are both employees.

Formal Complaint – Dismissal Analysis

- Proceed with Grievance Process or Dismiss
- **Must dismiss if:**
 - Conduct would not constitute sexual harassment even if proved,
 - Conduct did not occur in the recipient’s education program or activity, or
 - Conduct did not occur against a person in the United States.
- **Recall that dismissal does not preclude action under another provision of applicable code of conduct.**

Formal Complaint – Dismissal Analysis

- **May dismiss the formal complaint or any allegations therein if:**
 - A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations;
 - The respondent is no longer enrolled or employed by the institution, or
 - Specific circumstances prevent the institution from gathering evidence sufficient to reach a determination.
- **Upon dismissal:**
 - Institution must send written notice of the dismissal and reason(s) therefor simultaneously to the parties
 - Must offer both parties an appeal from a recipient's dismissal of a formal complaint or any allegations therein.

Formal Complaint – Consider Informal Resolution

- **Consider informal resolution.**
- **At any time prior to reaching a determination regarding responsibility, Asbury may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that it comply with certain requirements.**
- **Asbury cannot compel a complainant or respondent to engage in informal resolution or require waiver of investigation/formal hearing.**

Informal Resolution Requirements

- **Provides to the parties a written notice disclosing:**
 - The allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;
- **Obtains the parties' voluntary, written consent to the informal resolution process; and**
- **Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.**

Mandatory Grievance Procedures for Formal Complaints

- **Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with the regulation before the imposition of any disciplinary sanctions or other actions that are not supportive measures against a respondent.**
 - Remedies must be designed to restore or preserve equal access to Asbury's education program or activity. Such remedies may include the same individualized "supportive measures"; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent.

Mandatory Grievance Procedures

- Require an objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence—and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness;
- Require that Title IX Coordinator, investigator, decision-maker not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent, and are fully trained on Title IX;

Mandatory Grievance Procedures

- **Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process;**
- **Include reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if Asbury offers informal resolution processes, and a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action.**

Mandatory Grievance Procedures

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

Mandatory Grievance Procedures

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

Written Notice to the Parties – Notice of Allegations

- Upon receipt of formal complaint, Asbury must provide the following written notice to the known parties:
 - Notice of Asbury’s grievance process that complies with 34 C.F.R. § 106.45, including any informal resolution process; and
 - **Notice of the allegations** of sexual harassment potentially constituting sexual harassment, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview by Title IX officer.
 - Sufficient details include the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment under § 106.30, and the date and location of the alleged incident, if known.

Written Notice to the Parties – Notice of Allegations

- **The written notice must:**
 - 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, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section.
 - inform the parties of any provision in Asbury’s code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

Written Notice to the Parties

- If, in the course of an investigation, Asbury decides to investigate allegations about the complainant or respondent that are not included in the notice described above, Asbury must provide notice of the additional allegations to the parties whose identities are known.

Investigation Requirements

- **Asbury must investigate the allegations in a formal complaint regardless of the merits of the allegations.**
 - (Unless limited exceptions for dismissal apply.)
- **During the investigation and entire grievance process, Asbury must:**
 - Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding **responsibility rest on Asbury and not on the parties.**
 - Asbury cannot access, consider, disclose, or otherwise use a party's records that are made or 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 Asbury obtains that party's voluntary, written consent to do so for a grievance process.

Investigation Requirements

- 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 to gather and present relevant evidence;

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Investigation Requirements

- Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice.
 - Advisor may be, but is not required to be, an attorney.
 - May not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding
 - However, Asbury may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.

Investigation Requirements

- 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.

Investigation Requirements

- Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which Asbury does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.
 - Intended to allow the parties to “effectively provide context to the evidence included in the report” and to “advance their own interests for consideration by the decision-maker.”

Investigation Requirements

- Investigator must take into consideration the parties' responses and then determine what evidence is relevant and summarize the relevant evidence in the investigative report.
- The parties then have equal opportunity to review the investigative report; if a party disagrees with an investigator's determination about relevance, the party can make that argument in the party's written response to the investigation report (and to the decision-maker at any hearing held).
- Regardless, the decision-making is obligated to objectively evaluate all relevant evidence, and the parties have the opportunity to argue about what is relevant (and about the persuasiveness of relevant evidence).

Investigation Requirements

- **Prior to completion of the investigative report, Asbury must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report.**
 - Regulations do not specify how or when the investigative report should be given to the decision-maker.
 - However, decision-maker will need to have the investigative report and the parties' responses to same, prior to reaching a determination regarding responsibility.
 - Exact timing of transmittal is within Asbury's discretion (Preamble at 30309)

Investigation Requirements

- **Investigation (and adjudication) of the allegations must be based on an objective evaluation of the evidence available in a particular case**
 - Rule recognizes that the type and extent of evidence available will differ based on the facts of each incident.
 - In some situations, there may be little or no evidence other than the statements of the parties themselves
- **Does not require “objective” evidence (as in, corroborating evidence); this provision requires that the recipient objectively evaluate the relevant evidence that is available in a particular case.**
- **“All” the evidence required is tempered by what a thorough investigation effort can gather within a reasonably prompt time frame.**

Investigation Requirements

- “While the gathering and evaluation of available evidence will take time and effort on the part of the recipient, the Department views any difficulties associated with the provision’s evidence requirement to be outweighed by the due process benefits the provision will bring to both parties during the grievance process.”

Overview of Investigation Steps:

- Formal complaint (signed by complainant or Title IX Coordinator)
- Written Notice of Allegations
- Investigation
- Evidence Review of evidence “directly related” to the allegations
- Parties may submit written response to evidence
- Investigative Report is issued and shared with parties at least 10 days before hearing
- Parties may submit written response to Investigative Report
- Live Hearing

Gathering Evidence

- **It is the institution's burden to gather evidence sufficient to reach a determination regarding responsibility. This burden should never fall on the parties.**
- **Investigation must undertake a thorough search for relevant facts and evidence pertaining to a particular case, while operating under the constraints of conducting and concluding the investigation under designated, reasonably prompt time frames and without powers of subpoena.**
 - These conditions limit the extensiveness or comprehensiveness of an institution's efforts to gather evidence while reasonably expecting the institution to gather evidence that is available. (Preamble at 30292)

Gathering Evidence

- **The investigator is obligated to gather evidence directly related to the allegations whether or not the recipient intends to rely on such evidence.**
 - For instance, where evidence is directly related to the allegations but the investigator does not believe the evidence to be credible and thus does not intend to rely on it. (Preamble at 30248-49)

Relevance

- All evidence summarized in the investigative report under § 106.45(b)(5)(vii) must be relevant.
- The regulations do not contain a definition for relevance.
- “While the proposed rules do not speak to admissibility of hearsay, prior bad acts, character evidence, polygraph (i.e. lie detector) results, standards for authentication of evidence, or similar issues concerning evidence, the final regulations:
 - (1) require recipients to gather and evaluate relevant evidence, with the understanding that this includes both inculpatory and exculpatory evidence, and
 - (2) the final regulations deem questions and evidence about a complainant’s prior sexual behavior to be irrelevant with two exceptions, and preclude use of any information protected by a legally recognized privilege (e.g., attorney-client).” (Preamble at 30247)

Two Rape Shield Exceptions

- “... rape shield protections, providing that 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:
 - (1) someone other than the respondent committed the conduct alleged by the complainant, or
 - (2) if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.”

What is NOT relevant?

- **Certain evidence and information that is not relevant or otherwise not subject to use in a grievance process:**
 - Information protected by a legally recognized privilege;
 - Evidence about a complainant's sexual predisposition must never be included in the investigative report;
 - Evidence about a complainant's prior sexual behavior would only be included if it meets one of the two narrow exceptions stated in § 106.45(b)(6)(i)-(ii)
 - Any party's medical, psychological, and similar records unless the party has given voluntary, written consent; and
 - Party or witness statements that have not been subjected to cross-examination at a live hearing.

Parties' review

- Parties may make corrections, provide appropriate context, and prepare their responses and defenses before a decision-maker reaches a determination regarding responsibility.
- If relevant evidence seems to be missing, a party can point that out to the investigator, and if it turns out that relevant evidence was destroyed by a party, the decision-maker can take that into account in assessing the credibility of parties, and the weight of evidence in the case
- May restrict parties' (and their party advisors) ability to disseminate or use any of the evidence for non-Title IX grievance process use or require a non-disclosure as long as doing so does not violate the regulations or law.

What evidence to consider and include in investigation report?

- Privileged information/materials – do not include in evidence review or investigation report
- Not directly related – do not include in evidence review or investigation report
- Directly related but may not relevant – include in evidence review
- Directly related and relevant – include in evidence review and investigation report

What type of evidence must be provided to parties?

- The universe of evidence given to the parties for inspection and review under § 106.45(b)(5)(vi) must consist of all evidence directly related to the allegations.
- Determinations as to whether evidence is “relevant” are made when finalizing the investigative report, pursuant to § 106.45(b)(5)(vii).

“Directly related”

- Not defined in the Final Rule, but notes that the phrase “directly related” in § 106.45(b)(5)(vi) aligns with requirements in FERPA.
- Department notes that “directly related” may sometimes encompass a broader universe of evidence than evidence that is “relevant.”
 - Grievance process is geared toward reaching reliable, accurate outcomes in a manner that keeps the burden of collecting and evaluating relevant evidence on the recipient while giving both parties equally strong, meaningful opportunities to present, point out, and contribute relevant evidence, so that ultimately the decision-maker objectively evaluates relevant evidence and understands the parties’ respective views and arguments about how and why evidence is persuasive or should lead to the outcome desired by the party.

“Directly related”

- During part of investigation process where the parties have the opportunity to review and respond to evidence, the universe of that exchanged evidence should include all evidence (inculpatory and exculpatory) that relates to the allegations under investigation, without the investigator having screened out evidence related to the allegations that the investigator does not believe is relevant.
- Parties should have opportunity to argue that evidence directly related to the allegations is in fact relevant as opposed to being withheld by investigator.
- Investigator must then consider the parties’ viewpoints about whether such evidence (directly related to the allegations) is also relevant, and on that basis, decide whether to summarize that evidence in the investigative report.

“Directly related”

- **Prior to sending directly related evidence to the parties, investigator may be required to redact information such as information protected by a legally recognized privilege contained within documents**

Investigative Report

- The regulations do not address the specific contents of the investigative report other than specifying its core purpose of summarizing the relevant evidence.
- The Department takes no position here on such elements beyond what is required in these final regulations; namely, that the investigative report must fairly summarize relevant evidence.
- Should include procedural steps taken during investigation that can be included later by decision-maker in written determination.
- Investigator may include recommended findings or conclusions in the investigative report, but § 106.45(b)(7) (i) prevents an investigator from actually making a determination regarding responsibility.

Parties' Review of Investigative Report

- Allow parties to review investigative report at least 10 days prior to hearing and provide a written response.
- Provide parties with meaningful opportunity to understand what evidence the University collects and believes is relevant, so the parties can advance their own interests for consideration by the decision-maker.
- If a party disagrees with an investigator's determination about relevance, the party can make that argument in the party's written response to the investigative report and to the decision-maker at any hearing held.

Use of Investigation Report by Decision-Maker(s)

- 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, and 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.

Role of Investigator in Hearing

- Investigator may testify either voluntarily or in response to a question from a party or decision-maker in hearing about his/her investigation report and/or recommendations.
 - But investigator may **not** testify as to statements made by others, including the complainant or respondent, if the individual who made a statement does not submit to cross-examination. (34 C.F.R. § 106.45(b)(6)(i)).
- Regulations neither require not prohibit investigator from making a recommendation or conclusion in investigative report with respect to determination of responsibility.
 - However, the decision-maker is under independent obligation to objectively evaluate relevant evident, and cannot simply defer to investigator's recommendation.

Consolidation of Formal Complaints

- Institution may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances.
- The requirement for the same facts and circumstances means that the multiple complainants' allegations are so intertwined that their allegations directly relate to all the parties.

Consolidation of Formal Complaints

- The Department believes that institutions and parties will benefit from knowing that recipients have discretion to consolidate formal complaints... • Intended to give “discretion” to consolidate formal complaints that arise “out of the same facts or circumstances and involve more than one complainant, more than one respondent, or what amount to countercomplaints by one party against the other.”

Consolidation of Formal Complaints

- If the respondent is facing an additional allegation, the respondent has a right to know what allegations have become part of the investigation for the same reasons the initial written notice of allegations is part of a fair process, and the complainant deserves to know whether additional allegations have (or have not) become part of the scope of the investigation.
- This information allows both parties to meaningfully participate during the investigation, for example by gathering and presenting inculpatory or exculpatory evidence (including fact and expert witnesses) relevant to each allegation under investigation.

Time Frames

- Time frames may be measured by calendar days, business days, school days, or any other reasonable method that works best with the school's administrative operations.
- Should whatever definition of days that the University already uses in other aspects of its operations.

What if Complainant or Respondent Withdraws?

- **Asbury must promptly respond to a report that an individual has been allegedly victimized by sexual harassment, whether the alleged victim is presently a student or not, in a manner that is not “deliberately indifferent,” or clearly unreasonable in light of known circumstances.**
- **A complainant who has graduated may still be ‘attempting to participate’ in the recipient’s education program or activity**
 - For example, where the complainant has graduated from one program but intends to apply to a different program, or where the graduated complainant intends to remain involved with a recipient’s alumni programs and activities.

What if Complainant or Respondent Withdraws?

- **Similarly, a complainant who is on a leave of absence may be ‘participating or attempting to participate’ in the recipient’s education program or activity;**
 - For example, a complainant may still be enrolled as a student even while on leave of absence, or may intend to re-apply after a leave of absence and thus is still ‘attempting to participate’ even while on a leave of absence.
 - A complainant who has left school because of sexual harassment, but expresses a desire to re-enroll if the recipient appropriately responds to the sexual harassment, is ‘attempting to participate’ in the recipient’s education program or activity.

Withdrawal of Complainant or Respondent

- **Title IX Coordinators may sign a formal complaint, regardless of whether a complainant is “participating or attempting to participate” in the school’s education program or activity.**
 - The decision to sign a formal complaint (or not) is evaluated under the deliberate indifference standard: whether the decision was clearly unreasonable in light of the known circumstances.

COVID-Related Issues

- **University may not adopt a blanket policy putting all investigations or proceedings on hold until campuses resume normal operations, or a policy of refusing to accept and respond to new complaints.**
- **Must make a good-faith effort (and document the steps the institution took) to:**
 - Respond promptly and effectively to reports of discriminatory harassment (for instance, on the basis of race, sex, or disability)
 - Conduct fair, impartial investigations of student and employee complaints of such harassment in a reasonably timely manner
 - Take into consideration the health, safety, and well-being of all their students and staff.

May Investigations Take Longer During COVID?

- Depends on the facts of each case.
- Remember that there is no fixed time-frame by which an investigation must conclude so long as it is within “reasonably prompt.”
- Universities may not delay investigations or hearings based solely on basis that in-person interviews or hearings are more difficult.
- However, OCR will evaluate good-faith effort to conduct a fair, impartial investigation and adjudication in a timely manner in the event that time frame is impacted by COVID-related delays.
- Must use technology, as appropriate, to conduct activities remotely in a timely fashion.
- Ensure confidentiality of electronic communications

Record-Keeping

- **Records described in 34 C.F.R. § 106.45(b)(10) must be maintained for a period of seven years.**
 - The regulations do not specify what must or may happen to such records after the seven-year period has elapsed.
 - In the Preamble to the regulations at 30411, the Department notes that “while the final regulations require records to be kept for seven years, nothing in the final regulations prevents recipients from keeping their records for a longer period of time if the recipient wishes or due to other legal obligations.

FERPA and Confidentiality

- **The Title IX regulations state the general rule that a recipient must keep confidential the identity of any person who has reported sexual harassment, or who has been reported to be a perpetrator of sexual harassment.**
 - Purpose of this provision is to prevent the school from retaliating against anyone.
 - Three exceptions to this duty of confidentiality:
 - (1) If disclosure is permitted under FERPA;
 - (2) if disclosure is required by law; or
 - (3) if disclosure is necessary to carry out the purposes of Title IX and its regulations, including to conduct a grievance process.
- **A recipient's disclosure of the identity of a respondent cannot be made with a retaliatory purpose and must also fall within one of the categories above.**

More on Confidentiality

- Regulations balance a complainant's desire for confidentiality (for instance, the complainant's identity not being disclosed to the respondent) with a school's discretion to pursue an investigation where factual circumstances warrant an investigation even though the complainant does not desire to file a formal complaint or participate in a grievance process.
- A complainant (or third party) who desires to report sexual harassment without disclosing the complainant's identity to anyone may do so, but the recipient will be unable to provide supportive measures in response to that report without knowing the complainant's identity.

May Investigations Take Longer During COVID-19?

- **If COVID-19 related delay is expected, notify all parties, including the reason for the delay and estimated length.**
- **Endeavor to notify complainants and respondents of:**
 - status of pending investigation, and
 - Scheduled investigative interviews, meetings and hearings
- **Notify students if methods for receiving complaints has changed as a result of COVID-19.**

Retaliation Prohibited

- **May not intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege 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 a Title IX investigation, proceeding, or hearing.**
 - Also includes charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment.
- **Must keep confidential the identity of complainants, respondents, and witnesses, except as may be permitted by FERPA, or as required by law, or as necessary to carry out a Title IX proceeding.**
- **Complaints alleging retaliation may be filed according to same grievance procedures .**

What does not rise to level of prohibited retaliation?

- The exercise of rights protected under the First Amendment does not constitute retaliation.
- Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding does not constitute retaliation so long as the determination regarding responsibility, alone, is not sufficient to conclude that any party made a bad faith materially false statement.

Questions?

