



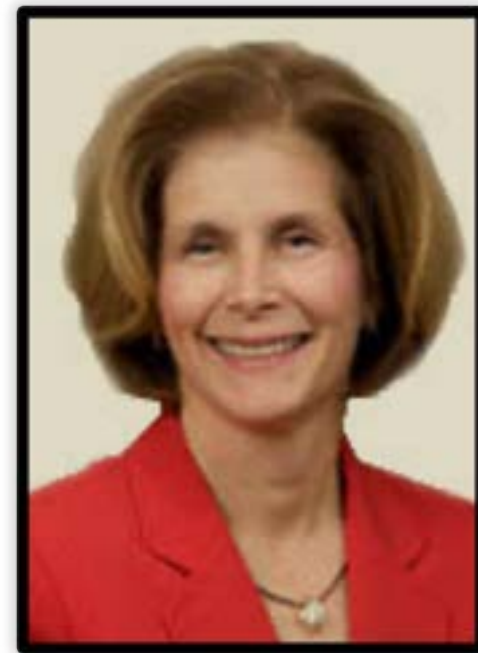
Title IX Investigator Training – Part I



Welcome.

Judith W. Spain
J.D., CCEP

Compliance Collaborative Program Consultant,
Georgia Independent College Association



“

—

“The measure of intelligence is the ability to
change”

—

Albert Einstein

Agenda

Training Objectives:

- Definitions
- Jurisdiction
- Dismissal of Complaints
- Standard of Evidence
- Emergency Removal
- Supportive Measures
- Training Materials Publication Requirement



DEFINITIONS



Definition – Sexual Harassment

“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; (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 2015 (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). “

- Sec. 106.30



Definition – Sex

No Regulatory Definition: The Department did not propose a definition of “sex” in the NPRM and declines to do so in these final regulations.

- Page 553 See also pps. 556, 557, 560

Anyone May Experience Discrimination: Anyone may experience sexual harassment, irrespective of gender identity or sexual orientation.

- Page 556 See also pps. 554, 558, 561

Sex Stereotyping: Nothing in these final regulations, or the way that sexual harassment is defined in § 106.30, precludes a theory of sex stereotyping from underlying unwelcome conduct on the basis of sex.

- Page 557



Definition – Sex

“Quid Pro Quo and Per Se Harassment: [The] other categories (quid pro quo; sexual assault and three other Clery Act/VAWA offenses) . . . do not require elements of severity, pervasiveness, or objective offensiveness.”

- Pages 425, 432, 461, 469

“Verbal Harassment: The three-pronged definition of sexual harassment in § 106.30 captures physical and verbal conduct serious enough to warrant the label “abuse[.]”

- Page 476



Definition – Sex

“Evaluating Severity, Pervasiveness, and Objective Offensiveness: Elements of severity, pervasiveness, and objective offensiveness must be evaluated in light of the known circumstances and depend on the facts of each situation, but, must be determined from the perspective of a reasonable person standing in the shoes of the complainant.”

- Page 477



Definition – Sex

“No Showing of Intent Required: The Davis standard does not require an “intent” element; unwelcome conduct so severe, pervasive, and objectively offensive that it denies a person equal educational opportunity is actionable sexual harassment regardless of the respondent’s intent to cause harm.”

- Page 515-516



Definition – Education Program or Activity

“[E]ducation program or activity” includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.”

- Sec. 106.44(a)



Definition – Recognized, Off-Campus Student Organizations

“Recognized, Off-Campus Student Organizations: [W]here a postsecondary institution has officially recognized a student organization, the recipient’s Title IX obligations apply to sexual harassment that occurs in buildings owned or controlled by such a student organization, irrespective of whether the building is on campus or off campus, and irrespective of whether the recipient exercised substantial control over the respondent and the context of the harassment outside the fact of officially recognizing the fraternity or sorority that owns or controls the building.”

- Pages 625-626



Definition – Misconduct Outside Education Program or Activity

“Discretion to Levy Separate Conduct Charges for Misconduct Outside Education Program or Activity: [N]othing in the final regulations precludes the recipient from choosing to also address allegations of conduct outside the recipient’s education program or activity.”

- Pages 631 and 634



Definition – Formal Complaint

“[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.”

- Sec. 106.30



Definition – Complainant

“[A]n individual who is alleged to be the victim of conduct that could constitute sexual harassment”

- Sec. 106.30

“Complainant Connection to Education Program or Activity:
[A] complainant must be participating in, or attempting to participate in, the recipient’s education program or activity at the time of filing a formal complaint.”

- Page 411 and 708



Definition – Respondent

“[A]n individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.”

- Sec. 106.30

Student, Employee, and Faculty Respondents: [A]ny “individual” can be a respondent, whether such individual is a student, faculty member, another employee of the recipient, or other person with or without any affiliation with the recipient.

- Page 146



JURISDICTION



Jurisdiction – Triggering Event



“A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.”

- Sec. 106.44(a)

Jurisdiction – Actual Knowledge

“Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient....”

“This [actual knowledge] standard is not met when the only official of the recipient with actual knowledge is the respondent.”

“The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient.”

- Sec. 106.30



Jurisdiction – Officials with Authority



“Designate Officials with Authority to Implement Corrective Measures: A recipient also may empower as many officials as it wishes with the requisite authority to institute corrective measures on the recipient’s behalf, and notice to these officials with authority constitutes the recipient’s actual knowledge and triggers the recipient’s response obligations. Recipients may also publicize lists of officials with authority.”

- Pages 300 and 320

Jurisdiction - Mandatory Reporters



“Designating Mandatory Reporters: [N]othing in the proposed or final regulations prevents recipients (including postsecondary institutions) from instituting their own policies to require professors, instructors, or all employees to report to the Title IX Coordinator every incident and report of sexual harassment.”

- Pages 300, 316, 320, and 604

Jurisdiction – Mandatory Reporter/Employee with Authority



“Mandatory Reporter ≠ Employee with Authority to Implement Corrective Measures: [T]he mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient.”

- Page 321

Jurisdiction – No Formal Complaint Required



- “No Formal Complaint Required: [A] recipient may have actual knowledge of sexual harassment even where no person has reported or filed a formal complaint about the sexual harassment.”
 - Page 673

Jurisdiction – Filing by Title IX Coordinator



- “Filing by Title IX Coordinator (Limitations): The Title IX Coordinator’s decision to sign a formal complaint may occur only after the Title IX Coordinator has promptly contacted the complainant (i.e., the person alleged to have been victimized by sexual harassment) to discuss availability of supportive measures, consider the complainant’s wishes with respect to supportive measures, and explain to the complainant the process for filing a formal complaint. Thus, the Title IX Coordinator’s decision to sign a formal complaint includes taking into account the complainant’s wishes regarding how the recipient should respond to the complainant’s allegations.”

Jurisdiction – Unwilling Complainant



“Unwilling Complainant: If the Title IX Coordinator signs a formal complaint against the wishes of the complainant, then the recipient likely will have difficulty obtaining evidence from the complainant that is directly related to the allegations in a formal complaint.”

- Page 1477

Jurisdiction – Unknown Respondent



- “Unknown Respondent: A recipient must investigate a complainant’s formal complaint even if the complainant does not know the respondent’s identity, because an investigation might reveal the respondent’s identity, at which time the recipient would be obligated to send both parties written notice.”
 - Page 413

DISMISSAL OF COMPLAINTS





Mandatory Dismissal

- “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 must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; such a dismissal does not preclude action under another provision of the recipient’s code of conduct.”
 - Sec. 106.45(b)(3)(i)



Discretionary Dismissal

“The recipient may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.”

- Sec. 106.45(b)(3)(ii)



Non-Title IX Proceedings

“Flexibility in Structuring Non-Title IX Proceedings: [I]f a recipient wishes to use a grievance process that complies with § 106.45 to resolve allegations of misconduct that do not constitute sexual harassment under § 106.30, nothing in the final regulations precludes a recipient from doing so. Alternatively, a recipient may respond to non-Title IX misconduct under disciplinary procedures that do not comply with § 106.45. The final regulations leave recipients flexibility in this regard, and prescribe a particular grievance process only where allegations concern sexual harassment covered by Title IX. “

- Pages 482, 645, 687, 962, 963

STANDARD OF EVIDENCE

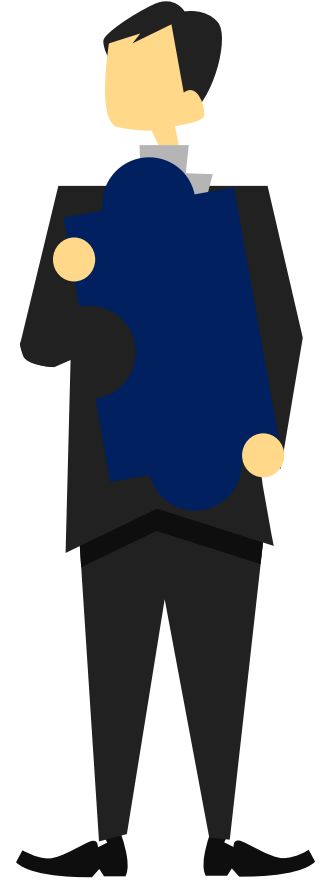


Preponderance of Evidence



“No Regulatory Definition: The Department declines to provide definitions of the “preponderance of the evidence” standard and the “clear and convincing evidence” standard. The Department believes that each standard of evidence referenced in the final regulations has a commonly understood meaning in other legal contexts and intends the “preponderance of the evidence” standard to have its traditional meaning in the civil litigation context and the “clear and convincing evidence” standard to have its traditional meaning in the subset of civil litigation and administrative.”

- Page 1319

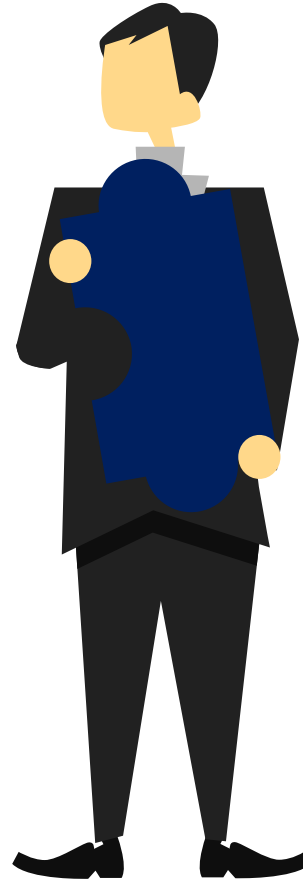


Preponderance of Evidence



Preamble Definition: A preponderance of the evidence standard of evidence is understood to mean concluding that a fact is more likely than not to be true. E.g., *Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622 (1993) (a preponderance of the evidence standard “requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence”) (internal quotation marks and citation omitted).

- Page 1314, n. 1472



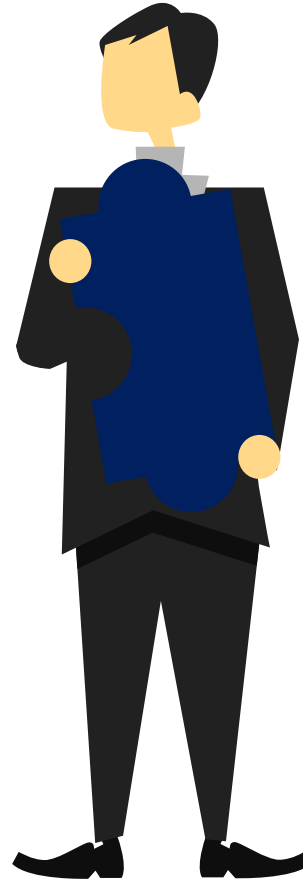
Same Standard



“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;”

- Sec. 106.45(b)(1) (vii)



EMERGENCY REMOVAL



Emergency Removal



“Nothing in this part precludes a recipient from removing a respondent from the recipient’s education program or activity on an emergency basis, provided that the recipient 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. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.”

- Sec. 106.44 (c)

Purpose



“Purpose: [E]mergency removal is for the purpose of addressing imminent threats posed to any person’s physical health or safety, which might arise out of the sexual harassment allegations.”

- Page 727

When Appropriate?



“When Appropriate: [E]mergency removal is not appropriate in every situation where sexual harassment has been alleged, but only in situations where an individualized safety and risk analysis determines that an immediate threat to the physical health or safety of any student or other individual justifies the removal, where the threat arises out of allegations of sexual harassment as defined in § 106.30.”

- Page 728 and pages 734, 755, 759

“When Appropriate: [T]he recipient should not remove a respondent from the recipient’s education program or activity pursuant to § 106.44(c) unless there is more than a generalized, hypothetical, or speculative belief that the respondent may pose a risk to someone’s physical health or safety.”

- Page 758

Deference



“Deference: OCR will not second guess a recipient’s removal decision based on whether OCR would have weighed the evidence of risk differently from how the recipient weighed such evidence.”

- Page 766

Administrative Leave - General



“Nothing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45. This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.”

- Sec. 106.44 (d)

Administration Leave - Student Employees



“Student Employees: Administrative leave may jeopardize a student-employee’s access to educational benefits and opportunities in a way that a non-student employee’s access to education is not jeopardized. Accordingly, administrative leave is not always appropriate for student-employees.”

- Page 773

“Student Employees: If a recipient removes a respondent pursuant to § 106.44(c) after conducting an individualized safety and risk analysis and determining that an immediate threat to the physical health or safety of any students or other individuals justifies removal, then a recipient also may remove a student-employee respondent from any employment opportunity that is part of the recipient’s education program or activity.”

- Page 774

SUPPORTIVE MEASURES





Definition

“Remedies must be designed to restore or preserve equal access to the recipient’s education program or activity. Such remedies may include the same individualized services described in § 106.30 as “supportive measures”; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent.”

- Sec. 106.45(b)(1)(i)



When Offered?

[N]on-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.

- Sec. 106.30



Restore/Preserve Equal Access

“[Supportive] measures are designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment, or deter sexual harassment.”

- Sec. 106.33



Possible Supportive Measures

[S]upportive 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.

- Sec. 106.33

TRAINING MATERIALS PUBLICATION REQUIREMENT



Publicly Available

“A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.”

- Sec. 106.45(b)(10)



Up-To-Date Training

“A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.”

- Sec. 106.45(b)(10)



RESOURCES

- OCR and Title IX
 - https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html
- Joint Guidance on Title IX -
 - <https://system.suny.edu/sci/tix2020/>



Judith W. Spain J.D., CCEP

jspain@georgiacolleges.org

Cell (859)582-9451



Contact.

