



STETSON LAW

45th National Conference on Higher
Education Law & Policy

SETTING UP FOR SUCCESS

Jody Shipper

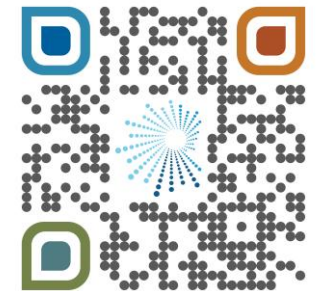
GRAND RIVER | SOLUTIONS

MEET YOUR FACILITATOR



Jody Shipper

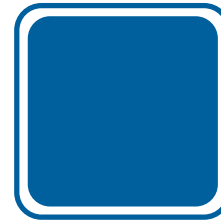
Co-Founder & Managing Director of Grand River Solutions, Jody Shipper is a nationally-recognized subject-matter expert with more than 20 years of experience in Title IX and related fields. She is known for her insight into best-in-class programming, policies, and community outreach aimed at addressing sexual misconduct on campus. She lectures extensively throughout the U.S.



OVERVIEW OF TOPICS



#ReadyForTheRegs



What if . . . There are no new regs?



Take the Best,
Leave the Rest



Setting up for Success



ReadyForTheRegs

Part 1

An Overview of Expected Changes

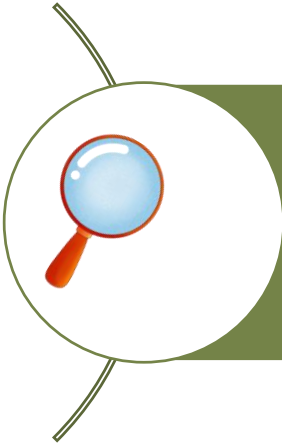
PATH FROM DRAFT TO RELEASE

Released unofficially
June 23, 2022 –
Happy Anniversary!

Sept 12 over 240,000
comments

Published in the
Federal Register July
12th.

Feb. 2, 2024: OIRA
gets Regs, and gets
120 days



After OIRA gets the regulations, they hold hearings, currently scheduled through end of March. Then, their comments go back to OCR for consideration and review.



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Pending EO 12866 Regulatory Review

RIN: [1870-AA16](#)

Title: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

Agency/Subagency: ED / OCR

Legal Deadline: None

International Impacts: No

Pandemic Response: No

Received Date: 02/02/2024

Stage: Final Rule

Section 3(f)(1) Significant: No

Affordable Care Act [Pub. L. 111-148 & 111-152]: No

Dodd-Frank Wall Street Reform and Consumer Protection Act, [Pub. L. 111-203]:
No

[View EO 12866 Meetings](#)

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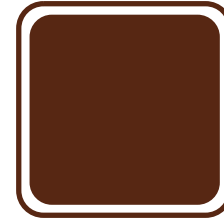
REMINDER OF WHERE WE ARE NOW

2020 Title IX Final Rule (effective now)

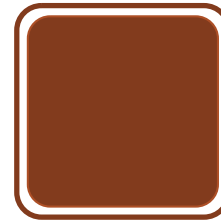
- Narrow geographic scope
- Narrow set of violations
- Narrow concentration (sexual harassment/violence)
- Narrow required reporting and formal process
- More significant process

30026		Federal Register / Vol. 85, No. 97 / Tuesday, May 19, 2020 / Rules and Regulations	
DEPARTMENT OF EDUCATION	Room 4E308, Washington, DC 20202. Telephone: (202) 453-6639. Email: <i>Alejandro.Reyes@ed.gov.</i>	Elementary and Secondary Schools Formal Complaint Support for Formal Complaint Definition No Formal Complaint Required To Report Sexual Harassment Burden on Complainants To File a Formal Complaint Anonymous Reporting and Anonymous Filing of Formal Complaints Officials Other than the Title IX Coordinator Filing a Formal Complaint Complexity of a Document Labeled "Formal Complaint" Parents' and Guardians' Rights To File a Formal Complaint Methods of Reporting and Methods of Filing a Formal Complaint Miscellaneous Concerns About the Formal Complaint Definition Postsecondary Institution Respondent Sexual Harassment Overall Support and Opposition for the § 106.30 Sexual Harassment Definition Prong (1) <i>Quid pro quo</i> Prong (2) <i>Davis</i> standard <i>Davis</i> Standard Generally So Severe And Pervasive Objectively Offensive Effectively Denies Equal Access Prong (3) Sexual Assault, Dating Violence, Domestic Violence, Stalking Gender-Based Harassment Supportive Measures Overall Support and Opposition No-Contact Orders	
34 CFR Part 106	If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free at 1-800-877- 8339.		
[Docket ID ED-2018-OCR-0064]			
RIN 1870-AA14			
Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance			
AGENCY: Office for Civil Rights, Department of Education.			
ACTION: Final rule.			
SUMMARY: The Secretary of Education amends the regulations implementing Title IX of the Education Amendments of 1972 (Title IX). The final regulations specify how recipients of Federal financial assistance covered by Title IX, including elementary and secondary schools as well as postsecondary institutions, (hereinafter collectively referred to as "recipients" or "schools"), must respond to allegations of sexual harassment consistent with Title IX's prohibition against sex discrimination. These regulations are intended to effectuate Title IX's prohibition against sex discrimination by requiring recipients to address sexual harassment as a form of sex discrimination in	SUPPLEMENTARY INFORMATION: Table of Contents Effective Date Executive Summary Purpose of This Regulatory Action Summary of the Major Provisions of This Regulatory Action Timing, Comments, and Changes Adoption and Adaptation of the Supreme Court's Framework To Address Sexual Harassment Differences Between Standards in Department Guidance and These Final Regulations Definition of Sexual Harassment Actual Knowledge Deliberate Indifference Role of Due Process in the Grievance Process Due Process Principles Summary of § 106.45 Similarities and Differences Between the § 106.45 Grievance Process and Department Guidance Public Comment Analysis of Comments and Changes Personal Stories		

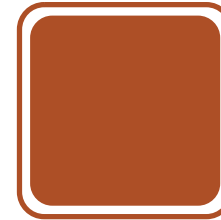
WHAT TO EXPECT (THEMES)



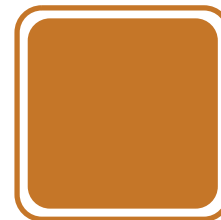
Broader application
Off campus



Broader definitions
On the basis of sex



Broader obligations
Responsible for climate even
without reports



Hearings optional
But the circuit in which you are
located will matter

(PROPOSED) EXPANDED SCOPE

Sex-Based Harassment (Proposed § 106.2) includes
Discrimination on the Basis of Sex (Proposed § 106.10)

SEX-BASED HARASSMENT

- Quid pro quo (new definition)
- Hostile environment: “Severe *or* pervasive”
- Specific Offenses, including sexual assault, dating violence, domestic violence, and stalking

DISCRIMINATION ON THE BASIS OF SEX

- Discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.

EXPANDED RESPONSIBILITY

1

Constructive
notice is notice

2

Don't need to
wait for Formal
Complaint to
respond

3

Obligated to
provide prompt
and equitable
resolution of sex
discrimination
complaints

(PROPOSED) EXPANDED RESPONSIBILITY



Retaliation and peer retaliation

- 2020 Regs: Only defined what was NOT retaliation
- Definition includes intimidation, threats, coercion

(PROPOSED) EXPANDED RESPONSIBILITY



Pregnancy and related conditions

- Childbirth, termination
- Lactation, lactation space
- Medical conditions
- Reasonable modifications
- Reach out to inform a student who is pregnant

LGBTQI+

- “sex stereotypes, sex characteristics... sexual orientation, and gender identity.”
- separate rule making for athletic eligibility standards

DUTY TO RESPOND



- No more “actual knowledge”
- “[R]equire a recipient to take a prompt and effective action to end any prohibited sex discrimination that has occurred in its education program or activity, to prevent its recurrence, and remedy its effects.”

RESPONSIBLE EMPLOYEES

Proposed regs do not use term in same way

Expands those who must inform Title IX or provide information

Somewhat narrower than 2001

School is obligated to know, so how will you get the information?

GEOGRAPHY AND JURISDICTION

- Expanded scope
(Proposed § 106.11)
- ~~“in the United States”~~
(Current § 106.44(a))

“It also requires a recipient to respond to a hostile environment based on sex within its education program or activity in the United States, **even if sex-based conduct contributing to the hostile environment occurred outside the recipient’s education program or activity or outside the United States.**”
(Proposed § 106.11)

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DEFINITIONS

Student

Complainant (includes 3rd Party Complainants)

Retaliation and Peer Retaliation

Pregnancy or related conditions

Confidential employee

DETERMINATIONS OF RESPONSIBILITY: SEX-BASED HARASSMENT

Investigator as decision-maker? Mandated credibility analysis

Institution must have some opportunity for the decision maker to ask credibility questions of the parties where credibility is disputed and the questions are relevant to one or more of the allegations of sex-based harassment. This could mean under Section 106.46 (f) (1) (i):

- Allowing **the decisionmaker** to ask the parties and witnesses, **during individual meetings with the parties or at a live hearing**, relevant and not otherwise impermissible questions and follow-up questions, including questions challenging credibility, before determining whether sex-based harassment occurred, and
- Allowing **each party** to propose to the decisionmaker or investigator relevant and not otherwise impermissible questions and follow-up questions, including questions challenging credibility, that the party wants asked of any party or witness **and have those questions asked** during individual meetings with the parties or at a live hearing.

WAIT AND SEE . . .

- Will ED mandate one standard of proof
- What room will there be for a single investigator model
- Whether and how grievance procedures should be different for different subgroups and grade levels (student/employee; elementary/high school/postsecondary)
- Intersection with FERPA



ReadyForTheRegs

Part 2 What if there are No New Regs?

CHOICES YOU CAN MAKE NOW

- Clarity of Policy
- Responsible Employee
- Confidential Reporting
- Sex Discrimination
- Retaliation

**IS YOUR
POLICY EASILY
UNDERSTOOD?**



CONFIDENTIAL RESOURCES

01

Privileged under Federal or State law associated with their role or duties for the institution.

02

Let's discuss why this is a problem: Employees who are not privileged but designated as a confidential resource for the purpose of providing services, and only while providing those services

03

Human-studies research approved by the campus's Institutional Review Board (IRB) and designed to gather information about sex discrimination, but only while conducting the study



CLARIFYING YOUR LANGUAGE

Responsible employees
Mandated reporters
Clery CSA's
Support measures
Accommodations
Remedies

TO CONSIDER

What
process for
non-Title IX
cases?

What process for non-
Title IX cases?

Intersectional
cases

Avoidance of retaliation
claims: charging Title IX
and Non-Title IX sexual
misconduct

Take the Best, Leave the Rest

What will you borrow from Title IX?

- Support measures
- Formal complaint
- Notice letters
- Advisor of choice
- Evidence review
- Response to draft report
- Hearing



RETALIATION

- 2020 Regs definition
- What is goal of your policy language?
- Options

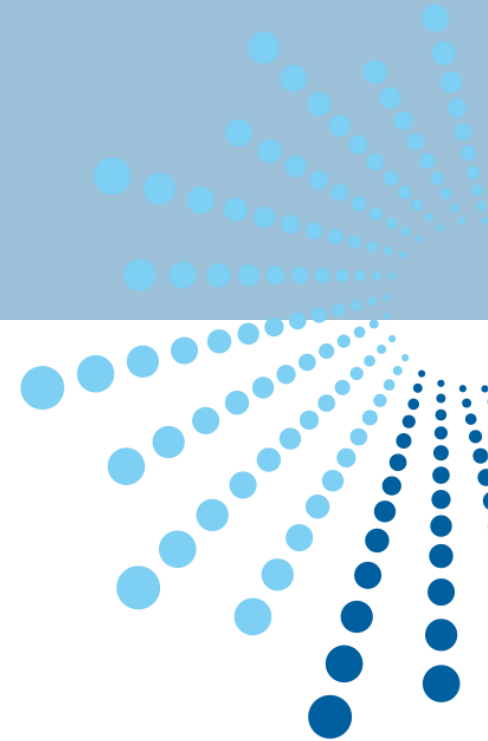
INVESTIGATION BEST PRACTICES

An investigation conducted in accordance with best practice utilizes trauma informed tools and allows the participants

1. Notice so parties and investigator understand the allegations and scope of investigation
2. Equal opportunity to present relevant evidence
3. Advisor
4. Opportunity to review and respond to evidence

THE FUTURE OF HEARINGS

Do you need one?
Want one?



CURRENT PROCEDURAL REQUIREMENTS

Must be live, but can be conducted remotely

No Compelling participation

Standard of proof used may be preponderance of the evidence or clear and convincing; standard must be the same for student and employee matters

Cross examination must be permitted and must be conducted by advisor of choice or provided by the institution

Decision maker determines relevancy of questions and evidence offered

Written decision must be issued that includes finding and sanction

THINK ABOUT

- Who will assess credibility?
- How many sets of hands should touch each case?
- What is the goal of your process?



THE GENERAL "RULE" FOR PUBLIC INSTITUTIONS

- Some Circuit Courts have concluded “some” form of questioning among the parties is a due process minimum, such as by questions posed to parties and witnesses through a hearing panel.
- Ninth Circuit: No hearing needed
- Many say indirect questioning is satisfactory, adversarial questioning is not necessary

3RD CIRCUIT

“fair process” at private university would require “the modest procedural protections of a live, meaningful, and adversarial hearing and the chance to test witnesses’ credibility through some method of cross-examination”



OF COURSE, THERE ARE “THOSE” CIRCUITS

Doe v. Baum, 903 F.3d 575, 581 (6th Cir. 2018): due process at public institutions would require some form of live cross-examination in “credibility” cases

University of the Sciences (3rd Circuit): “fair process” at private university would require “the modest procedural protections of a live, meaningful, and adversarial hearing and the chance to test witnesses’ credibility through some method of cross-examination”

9th Circuit: requiring private universities to conduct the hearing envisioned by the court of appeals was contrary to fair procedure caselaw.

SO MANY OPTIONS!

- Single investigator model
- 2020 Hearing
- Hearing that requires questioning through the decision maker(s)
- Hearing focused only on disputed facts
- Review Panel with both parties
- Review Panel with each party

CONSIDERATIONS

- Geographical Location
- Community Expectations
- Impact of Hearings on Participation
- Resources





OTHERS?

SETTING OFFICES UP FOR SUCCESS



03

THE HISTORY OF THE TITLE IX COORDINATOR/OFFICE

- What? Nah, we don't have one
- Maybe we have one, not sure where that might be
- Surely, it's in the athletics department
- No one is going to want to deal with this stuff, where could we put it
- Wait, *my* office needs to be the office that demonstrates we're on top of these issues, although I don't want the blame if something goes wrong
- Wait, we gave all this power to one person? Quick, take it away
- This is so important. It should have its own office and report to the top

IMPEDIMENTS TO SUCCESS

Staffing, funding

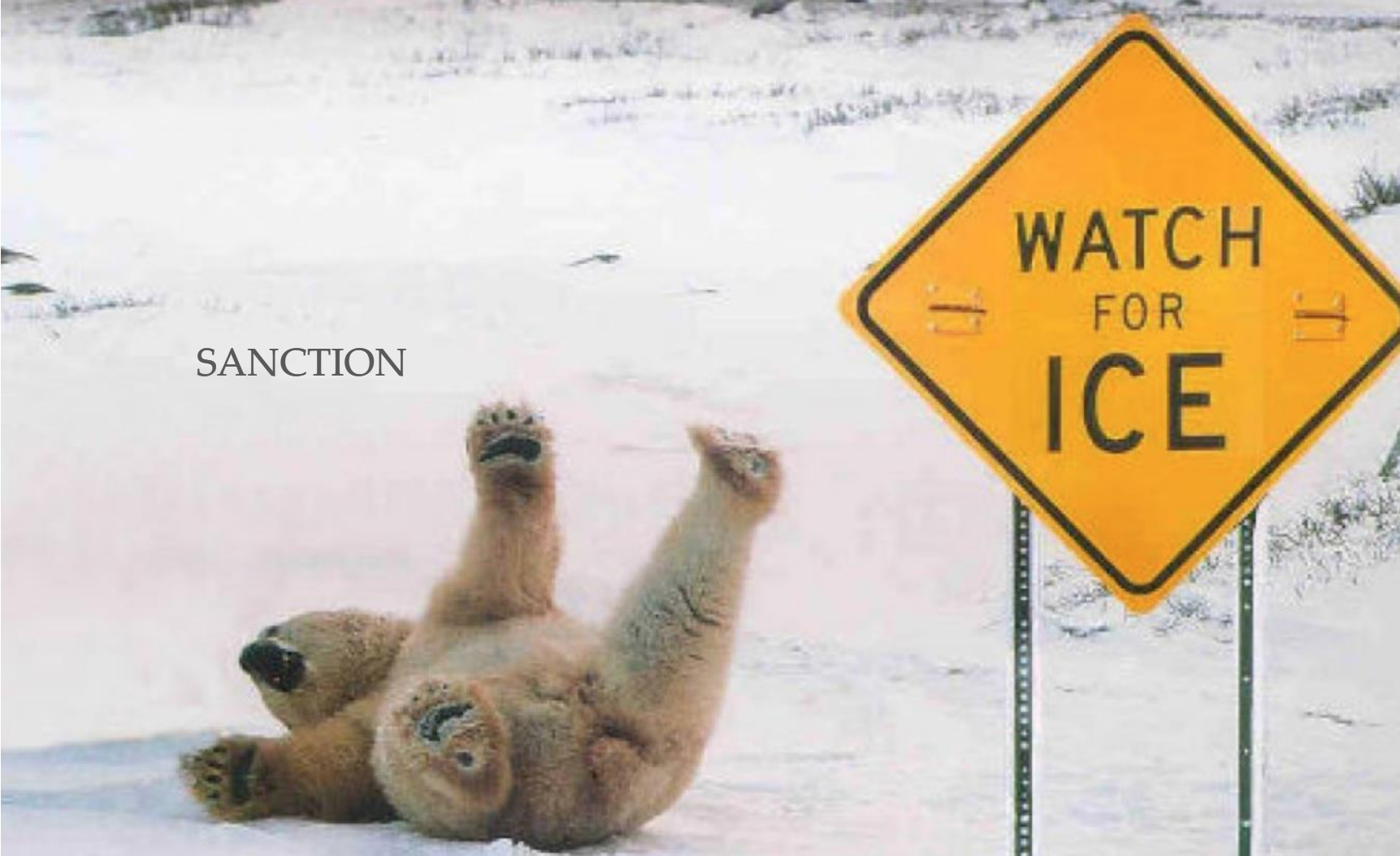
Other offices that don't "play nice"

Not part of sanctioning decisions

Not having final say in support measures, trainings,
prevention

Those who want to "handle quietly on their own"

ERRORS MADE AND LESSONS LEARNED



SANCTION

COMMON INSTITUTIONAL ERRORS

- Undoing the finding with the sanction
- Using the wrong language in reports: "drunk," "respondent did not prove there was consent," "evidence proves complainant consented"
- Misunderstanding affirmative consent
- Using legal processes: motions in limine, stipulations
- Helping parties draft their appeal



OTHER COMMON ERRORS



Credibility when a party does not attend hearing



Demeanor credibility



New evidence at hearings



Lesser-included charges

DON'T FREEZE

Why appeals are a good thing



COMMON ERRORS ON APPEAL

Appeals panels that exceed their authority

Lack of clarity on the difference between determining an appeal was not filed, versus a determination the appeal was not successful



INVESTIGATION

- Investigate
- Determine What Happened
 - Findings of Fact
 - Findings of Policy



SANCTION

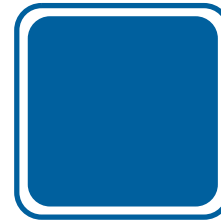
APPEAL

- Review the Appeal
- Determine Whether Grounds for Appeal Have Been Met
- Make Decision Regarding Merits of Appeal

RECORD-KEEPING



How much data to store
Different methods



Who needs it
Who should, or should not, see it

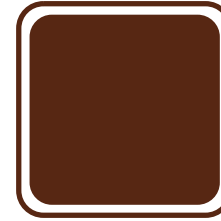


How to use the data
And how it gets used, or not



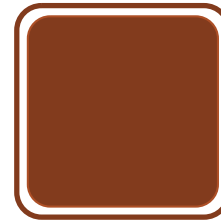
Storing and transferring

OTHER BARRIERS TO SUCCESS



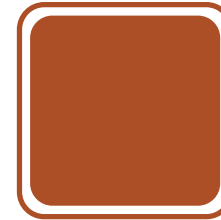
Too many hats

For example, ADA, 504,
Affirmative Action?



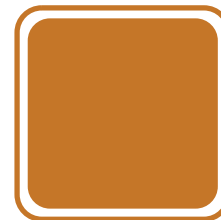
Inconsistent materials, website

When campus marketing steps
in to help



One-time trainings

If it's important, it needs
reminders



Loooong Trainings

Length \neq Retention of knowledge

TREATING SOME HARASSMENT DIFFERENTLY FROM OTHER HARASSMENT?

- Elevated leadership of the office
- Budget differences
- Skill differences
- Differences in process, rights, options, and support

WHAT DO YOU HAVE NOW, AND IS IT WORKING

- Do you know where you will send *any* type of sex or gender-based case that may arise?
- Do you have a protocol for handling intersectional cases?
- Do you know which office has the jurisdiction?
- Do you know which office has the authority?

IS THERE CONSISTENT CAMPUS-WIDE AGREEMENT?

- Handling of intersectional cases
- Pay equity
- Grade disputes?
- What acts, really, violate the policy
- Sanctioning

THANKS FOR JOINING US!

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