Title IX Hearing and Appellate Officer Training: An Integrated and Coordinated Approach

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Baylor University
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Framing the Conversation

We Don’t Know What We Don’t Know

Flip the Lens

Embrace the Tension

Together We are Better than the Sum of our Parts
Awareness of the Impact of Language

Identifying the Parties
- Complainant/victim/survivor/reporting party/accuser
- Respondent/offender/accused/responding party/perpetrator

Inclusivity & Avoiding Reinforcement of Negative Perceptions/Myths
- “He said/she said” vs. “word-against-word credibility assessment”

Neutral, Non-judgmental
- “Believe” or “feel” vs. “experience”
- “story” vs. “account”

Individuality
Inclusivity
Respect

Process Words
- Investigation
- Review
- Assessment
THE CONTEXT
The Context

- Regulatory Framework

- Dynamics of Sexual and Gender-Based Harassment and Interpersonal Violence

- Individual Culture, Climate, History, Resources, Policies, Procedures, Personnel and Values of the Institution
The Hierarchy

- Title IX
- Title IX Implementing Regulations (2020)
- 2011 Dear Colleague Letter (Rescinded)
- 2014 Q&A (Rescinded)
- 2017 Q&A
- Preamble to Title IX Implementing Regulations
- 1997 Sexual Harassment Guidance
- 2001 Revised Sexual Harassment Guidance
- Dear Colleague Letters
  - Bullying
  - Hazing
  - Title IX Coordinator
  - Retaliation
- Resolution Agreements
- OCR aids and tools
- OCR webinars
- OCR blog
Federal Regulatory Framework

1. **Title IX**
   - Title IX of the Education Amendments of 1972
   - Prohibits sex discrimination in educational institutions that receive federal funds

2. **Clery**
   - The Jeanne Clery Act (1990)
   - Requires reporting of crimes, timely warnings, education/prevention programs, and policies and procedures for sexual assault

3. **VAWA**
   - The Violence Against Women Reauthorization Act of 2013
   - Amends Clery to expand sexual assault requirements and include dating violence, domestic violence, and stalking; applies to all students and employees
The Legal Context

Central process to uniformly vet all complaints of sexual and gender-based harassment and violence

University's Response
Policies/Procedures Informed by:

University Counsel

Note: Lists of report recipients and relevant laws not exhaustive
Options for Title IX Cases at Baylor

Supportive Measures Only

- Parties may receive supportive measures with or without the filing of a formal complaint
- Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to a party.
- Designed to restore or preserve equal access to the education program or activity without unreasonably burdening the other party.

Informal Resolution

- Initiated with the filing of a formal complaint
- Must give written notice to the parties as described in § 106.45(b)(9)
- Both parties must give voluntary written consent
- Administered by trained facilitators
- Not available to address allegations that an employee sexually harassed a student

Formal Resolution

- Initiated with the filing of a formal complaint
- Must give written notice to the parties as described in § 106.45(b)(2)(i)
- Follows prescribed grievance process described in § 106.45
- Administered by trained investigators and decision-makers who are free from conflicts of interest or bias
Key Provisions: New Title IX Regulations

Notice

Intake

Formal Complaint

Written Notice of Rights and Resources (VAWA)

Option to File a Formal Complaint

Written Notice

May Not Require Engagement

Not SH by Employee on Student

Must Provide Advisor

See § 106.45(b)(5)

Live Hearing (Can be Virtual)

Separate Decision Maker

Preponderance or Clear and Convincing

Must Allow Cross-Examination by Advisor

All Questions on Cross Subject to Relevancy Determination

Cannot Consider Statements not Subject to Cross

Must Provide Advisor

Procedural Irregularity

New Evidence

Conflict of Interest

Document Signed by TIX Coordinator

Actual Knowledge: TIX Coordinator

Actual Knowledge: Official with Authority

Responsible Employee Considerations

Jurisdiction & Scope

Supportive Measures & Documentation

Document Signed by Complainant

Informal Resolution

Informal Resolution

Document Signed by TIX Coordinator

Additional Key Provisions:

- Student Procedures
- Faculty Procedures
- Staff Procedures

- Complainant Withdraws
- Respondent No Longer Affiliated
- Evidence Unavailable
- Not Education Program or Activity
- Conduct Not Sexual Harassment
- Conduct Occurred Outside the U.S.
TITLE IX AND
THE CLERY ACT
The Clery Act (As Amended by VAWA)

- Governs a school’s response to sexual assault, dating violence, domestic violence and stalking (and other crimes)
- Applies to Clery-defined crimes reported to campus security authorities that occur on Clery geography
- Requires procedural and educational components that do not fully align with Title IX requirements
- Requires reporting of crime statistics through
  - Daily crime log
  - Annual security report
- Includes a duty to warn/timely warnings

Core Tenets:
VAWA: Prompt, Fair, and Impartial Investigation & Resolution

• **Prompt, fair, and impartial process** from the initial investigation to the final result
• Conducted in a manner consistent with the institution’s policies and transparent to the accuser and accused
• The accuser and the accused have **equal opportunities** to have others present, including an **advisor of their choice**
• The accuser and accused are given **timely notice of meetings** at which one or the other or both may be present
• The accuser, the accused, and appropriate officials are given **timely and equal access to information** that will be used during informal and formal disciplinary meetings and hearings
VAWA: Prompt, Fair, and Impartial Investigation & Resolution

• Officials are appropriately trained and do not have a conflict of interest or bias for or against the accuser or the accused
• The proceeding is completed in a reasonably prompt timeframe
• Explicit provision noting that institutions may extend their reasonably prompt deadlines for good cause with written notice to the accused and accuser of the delay and the reason for the delay
• The accuser and the accused receive simultaneous notification, in writing, of the result of the proceeding, the rationale, sanctions, any available appeal procedures, any change to the results that occurs prior to final resolution and when results become final
“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.”

20 USC § 1681
Definition of Sexual Harassment

*Sexual harassment* means 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


Title IX Regulations May 19, 2020; § 106.30(a)
Response to Sexual Harassment

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. … A recipient’s response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.

Title IX Regulations May 19, 2020; § 106.44(a)
Title IX

Education Program or Activity

For the purposes of this section, §§ 106.30, and 106.45, “education 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.

Core Tenets:

Title IX Regulations May 19, 2020; § 106.44(a)
RESPONDING TO A REPORT OF PROHIBITED CONDUCT
Title IX

Two Key Provisions

• 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 this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.

Title IX Regulations May 19, 2020; §§ 106.44(a) and 106.45(b)(1)(i)
Understanding Two Key Provisions

Offer Supportive Measure upon Actual Knowledge

Pursue Investigation and Adjudication in Response to a Formal Complaint
Complainant Agency & Autonomy

• “The final regulations promote clarity as to recipient’s legal obligations, and **promote respect for each complainant’s autonomy**, by distinguishing between a complainant’s report of sexual harassment, on the one hand, and the filing of a formal complaint that has initiated a grievance process against a respondent, on the other hand.”

• “The Department acknowledges that a **recipient should respect the complainant’s autonomy and wishes** with respect to a formal complaint and grievance process to the extent possible.”

Title IX Regulations May 19, 2020, Preamble, 85 F.R. 30282; 30219
Reports vs. Formal Complaints

- The new regulations distinguish and separate a recipient’s obligation to **respond to a report** of sexual harassment from a recipient’s **obligation to investigate formal complaints** of sexual harassment.
  - If students would like supportive measures but do not wish to initiate an investigation…they may make a report of sexual harassment.
  - If students would like supportive measures and also would like the recipient to initiate an investigation…they may file a formal complaint.

Title IX Regulations May 19, 2020; Preamble, 85 F.R. 30189
The Obligation to Investigate

• **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

• **Once a formal complaint is filed, a recipient must investigate the allegations in that complaint**
  – The Department believes that where a complainant has chosen to file a formal complaint, or the Title IX Coordinator has decided to sign a formal complaint, the recipient must investigate those allegations regardless of the merits of the allegations. (emphasis in original)

Title IX Regulations May 19, 2020 §106.30 Definitions and §106.45(b)(3) Dismissal of a formal complaint; 85 F.R. 30574
Baylor’s Response to a Report

• Report to University
• Initial Assessment
  – Promptly contact Complainant
  – Provision of supportive measures
  – Consider Complainant’s wishes
  – Explain process for filing a formal complaint
• Filing of formal complaint
  – By Complainant
  – By Title IX Coordinator
RESOLUTION PROCESS
Resolution Process

- Formal Complaint
  - Informal Resolution
  - Formal Resolution

Flowchart:
- Notice
  - Intake
    - Formal Complaint
      - Decision
        - Investigation
          - Hearing
            - Appeal
Basic Requirements

• 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 this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.

Relevant Regulations Sections:
Equitable Treatment: §§ 106.44(a) and 106.45(b)(1)(i)
Basic Requirements

• Require an objective evaluation of all relevant evidence
  – Including both inculpatory and exculpatory evidence
  – Credibility determinations may not be based on a person’s status

• Implementers must be trained and free from conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent

Relevant Regulations Sections:
Equitable Treatment: §§ 106.44(a) and 106.45(b)(1)(i)
Objective evaluation of all relevant evidence: § 106.45(b)(1)(ii)
Training and avoidance of conflicts or bias: § 106.45(b)(1)(iii)
Basic Requirements

• 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

• Follow reasonably prompt time frames for conclusion of the grievance process with permissible delay for good cause

Relevant Regulations Sections:
Equitable Treatment: §§ 106.44(a) and 106.45(b)(1)(i)
Objective evaluation of all relevant evidence: § 106.45(b)(1)(ii)
Training and avoidance of conflicts or bias: § 106.45(b)(1)(iii)
Basic Requirements

- Provide a **standard of evidence** to be used to determine responsibility, applying either 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
  - Apply the same standard of evidence to all formal complaints of sexual harassment

Title IX Regulations May 19 2020; §§ 106.45(b)(1)(vii) and 106.45(b)(7)(i), 85 F.R. 30275
Basic Requirements

• Provide procedures and permissible bases for the complainant and respondent to appeal

• Provide a range of supportive measures available

• 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

Relevant Regulations Sections:
Appeal: §§ 106.45(b)(1)(viii) and 106.45(b)(7)(ii)(F)
Range of Supportive Measures: § 106.45(b)(1)(ix)
Waiver of Privilege: § 106.45(b)(1)(x)
Overview of Investigation Requirements

1. **Formal Complaint**
   - Filed by Complainant or
   - Signed by Title IX Coordinator

2. **Notice of Allegations**
   - With sufficient detail and time for a party to prepare for an initial interview

3. **Investigation**
   - Thorough search for relevant facts and evidence
   - Conducted by a trained investigator who is free from conflicts of interest or bias

4. **Evidence Review**
   - Of any evidence that is directly related to the allegations

5. **Written Responses to Evidence**
   - 10-day review period
   - Parties may submit written response

6. **Investigative Report**
   - Fairly summarizes relevant evidence
   - Includes inculpatory and exculpatory evidence

7. **Written Responses to Report**
   - 10-day review period
   - Parties may submit written response
Advisor of Choice

• 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, who may be, but is not required to be, an attorney.

• A recipient may establish restrictions on advisors’ participation, as long as the restrictions apply equally to both parties.

Title IX Regulations May 19, 2020; §106.45(b)(5)(iv), 85 F.R. 30576
• We do not believe that specifying what restrictions on advisor participation may be appropriate is necessary, and we decline to remove the discretion of a recipient to restrict an advisor’s participation so as not to unnecessarily limit a recipient’s flexibility to conduct a grievance process that both complies with § 106.45 and, in the recipient’s judgment, best serves the needs and interests of the recipient and its educational community.
Restrictions on Advisor Participation

• “Section 106.45(b)(5)(iv) (allowing recipients to place restrictions on active participation by party advisors) and the revised introductory sentence to § 106.45(b) (requiring any rules a recipient adopts for its grievance process other than rules required under § 106.45 to apply equally to both parties) would, for example, permit a recipient to require parties personally to answer questions posed by an investigator during an interview, or personally to make any opening or closing statements the recipient allows at a live hearing, so long as such rules apply equally to both parties.”

Title IX Regulations May 19 2020; Preamble at 30298
Training of Advisors Not Required

- The final regulations do not require training for advisors of choice. This is because the recipient is responsible for reaching an accurate determination regarding responsibility while remaining impartial, yet a party’s ability to rely on assistance from an advisor should not be limited by imposing training requirements on advisors, who by definition need not be impartial because their function is to assist one particular party.

Title IX Regulations May 19 2020; Preamble at 30333
Training of Advisors Not Required

- To allow recipients to meet their obligations with as much flexibility as possible, the Department declines to require recipients to pre-screen a panel of assigned advisors from which a party could make a selection at a hearing, or to require provided advisors to receive training from the recipient.
Sexual and Interpersonal Misconduct Policy

Baylor University
TITLE IX OFFICE

Sexual and Interpersonal Misconduct Policy

Effective: August 14, 2020
What is Prohibited Conduct?

Prohibited Conduct

<table>
<thead>
<tr>
<th>Title IX</th>
<th>Non-Title IX</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sexual Harassment, Sexual Assault, Dating Violence, Domestic Violence, Stalking</td>
<td>Sexual Harassment, Sexual Assault, Dating Violence, Domestic Violence, Stalking, Sexual Exploitation, Retaliation, Complicity</td>
</tr>
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- **On Campus**: Substantial Control over R and the Conduct
- **Off Campus**: Buildings Owned or Controlled by a Recognized Student Organization
- **Outside the U.S. but still in an Education Program or Activity**
- **Outside the EPA but the conduct has a nexus to the University**

[COZEN O'CONNOR]
Definitions of Prohibited Conduct

• **Sexual Harassment:**
  – *Quid pro quo* sexual harassment is conduct on the basis of sex by which an employee of the University conditions the provision of an aid, benefit, or service of the University on a student’s or employee’s participation in unwelcome sexual conduct.
Definitions of Prohibited Conduct

• Sexual Harassment:
  – Severe, pervasive and objectively offensive sexual harassment is conduct on the basis of sex that constitutes unwelcome conduct determined by a reasonable person to be so severe, pervasive and objectively offensive that it effectively denies a student or employee equal access to the University’s education program or activity.
Definitions of Prohibited Conduct

- **Sexual Assault**
  Sexual assault includes rape, fondling without consent, incest or statutory rape, defined as follows:
  a. Rape is the penetration, no matter how slight, of the vagina or anus with any body part or object, or oral genital contact of another person without consent (as defined below).
  b. Fondling is the touching of the private body parts of another person for the purpose of sexual gratification, without consent.
  c. Incest is sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
  d. Statutory rape is sexual intercourse with a person who is under the statutory age of consent. Under Texas law, individuals younger than 17 years of age are legally incapable of giving consent to sexual penetration or contact by an adult (someone 18 years of age or older) who is three or more years older than the individual.
Definitions of Prohibited Conduct

• **Domestic Violence**

Domestic violence is conduct that constitutes a felony or misdemeanor crime of violence committed:

• By a current or former spouse or intimate partner of the complainant;
• By a person with whom the complainant shares a child in common;
• By a person who is cohabitating with, or has cohabitated with, the complainant as a spouse or intimate partner;
• By a person similarly situated to a spouse of the complainant under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred; or
• By any other person against an adult or youth complainant who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.
Definitions of Prohibited Conduct

• Dating Violence
Dating violence is conduct that constitutes violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the complainant. The existence of such a relationship shall be determined based on the parties’ statements and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. For the purposes of this definition, dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse. Dating violence does not include acts covered under the definition of domestic violence.
Definitions of Prohibited Conduct

• Title IX Stalking

Stalking for purposes of the Title IX Sexual Harassment definition is conduct on the basis of sex that constitutes a course of conduct directed at a specific person that would cause a reasonable person to fear for the person’s safety or the safety of others or suffer substantial emotional distress.

For the purposes of this definition:

• Course of conduct means two or more acts, including, but not limited to, acts in which the respondent directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person’s property.

• Reasonable person means a reasonable person under similar circumstances and with similar identities to the complainant.

• Substantial emotional distress means significant mental suffering or anguish that may, but does not necessarily require medical or other professional treatment or counseling.
Definitions of Prohibited Conduct

• Non-Title IX Stalking
Stalking as defined in the Title IX Stalking definition above that did not reportedly occur in a program or activity of the University in the United States, or that otherwise fits within the definition of stalking but does not fall within the Title IX Stalking definition because the reported conduct is not directed at the alleged victim on the basis of sex.
Definitions of Prohibited Conduct

• **Sexual Harassment**: Sexual harassment is any unwelcome sexual advance, request for sexual favors, and/or other unwelcome, verbal or physical conduct of a sexual nature when one of the conditions outlined in (a), (b), or (c), below, is present.

• **Gender-Based Harassment**: Gender-based harassment includes harassment based on gender, sexual orientation, gender identity, or gender expression, which may include acts of aggression, intimidation, or hostility, whether verbal or non-verbal, graphic, physical, or otherwise, even if the acts do not involve contact of a sexual nature, when one of the conditions outlined in (a), (b), or (c), below, is present.
Definitions of Prohibited Conduct

• (a) Submission to, or rejection of, such conduct is made implicitly or explicitly a term or condition of a person’s instruction, academic standing, employment, or participation in any University program, activity, or benefit, but which does not fit within the definition of Title IX *Quid Pro Quo*.

• (b) Submission to, or rejection of, such conduct by an individual is used as a basis for evaluation in making academic or personnel decisions, in circumstances that do not fit within the definition of Title IX *Quid Pro Quo*. 
Definitions of Prohibited Conduct

• (c) Such conduct creates a hostile environment. Under Texas Education Code §51.281(4) a hostile environment exists:
  – i. in the employment context, when it unreasonably interferes with a person's work performance or creates an intimidating, hostile, or offensive work environment; or
  – ii. in the education context, when it is sufficiently severe, persistent, or pervasive that the conduct interferes with a student's ability to participate in or benefit from the University’s educational programs or activities.
Definitions of Prohibited Conduct

• Sexual Exploitation
  Sexual Exploitation: Any act where one person violates the sexual privacy of another or takes unjust or abusive sexual advantage of another, but that does not fall within the definition of Title IX Sexual Harassment. Sexual exploitation may include:
  • surreptitiously observing another individual's nudity or sexual activity or allowing another to observe consensual sexual activity without the knowledge and consent of all parties involved;
  • recording, photographing, transmitting, showing, viewing, streaming, or distributing intimate or sexual images, audio recordings, or sexual information without the knowledge and consent of all parties involved;
  • providing alcohol or drugs to a complainant with the intent to facilitate Prohibited Conduct;
  • exposing one's genitals or inducing another to expose their own genitals in non-consensual circumstances; or
  • knowingly exposing someone to or transmitting an STI or HIV.
Definitions of Prohibited Conduct

• Retaliation
  Retaliation means intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by Title IX or its implementing regulations or this policy, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing regarding Prohibited Conduct (including both Title IX Sexual Harassment and Non-Title IX Misconduct). Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX or its implementing regulations, constitutes retaliation, as does any adverse action taken against a person for making a good faith report of Prohibited Conduct or participating in any proceeding under this Policy.
Definitions of Prohibited Conduct

- Retaliation
  - Retaliation may include intimidation, threats, coercion, harassment, or adverse employment or educational actions that would discourage a Reasonable Person from engaging in activity protected under this Policy. Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance process under this Policy does not constitute prohibited retaliation, provided, however, that a determination regarding responsibility is not alone sufficient to establish that any party made a materially false statement in bad faith.
Definitions of Prohibited Conduct

- **Related Definitions:**
  - Consent: Consent is the voluntary, informed, and freely given agreement, through words and/or actions, to participate in mutually agreed-upon acts. Consensual activity happens when each partner willingly and affirmatively chooses to participate.
    - Force
    - Coercion
  - Incapacitation: Incapacitation is the inability, temporarily or permanently, to give consent because the individual is mentally and/or physically helpless, either voluntarily or involuntarily, or the individual is unconscious, asleep, or otherwise unaware that the activity is occurring. In addition, an individual is incapacitated if they demonstrate that they are unaware at the time of the incident of where they are, how they got there, or why or how they became engaged in an act.
Sexual and Interpersonal Misconduct Policy

- Notice of Investigation
- Assignment of investigator
- Fact gathering process
- Evidence review
- Final investigative report
EVIDENTIARY CONSIDERATIONS
Evidentiary Considerations

- Privileged Information & Records
- Relevance
- Prior Sexual History
- Prior or Subsequent Misconduct
- Setting Evidentiary Rules
Privileged Information

- 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.

Title IX Regulations May 19, 2020; § 106.45(b)(1)(x) 85 F.R.30361
Baylor Policy

• “In general, a person’s medical and counseling records are confidential and are not accessible to the investigator unless the person voluntarily chooses to share those records with the investigator. The investigator will not access, consider, disclose or otherwise use a party’s privileged records without the party’s voluntary, written consent to do so, and such information will not be deemed relevant to an investigation or adjudication absent the voluntary, written consent of the party. In those instances, the relevant information from the records must be shared with the other party; it should be noted, however, that irrelevant information may be redacted by the investigator from such records, as appropriate.”

Baylor Policy at 39.
Relevance

- The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied.

Title IX Regulations May 19, 2020; Preamble at 30247, FN 1018
“While the proposed rules do not speak to
– admissibility of hearsay,
– prior bad acts,
– character evidence,
– polygraph (lie detector) results,
– standards for authentication of evidence,
– or similar issues concerning evidence,
the final regulations require recipients to **gather and evaluate relevant evidence**, with the understanding that . . .

Title IX Regulations May 19, 2020; Preamble at 30247, footnotes omitted
Relevance

• this includes both inculpatory and exculpatory evidence, and
• 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).”

Title IX Regulations May 19, 2020; Preamble at 30247, footnotes omitted
Prior Sexual History

• 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 someone other than the respondent committed the conduct alleged by the complainant, or
  – To prove consent, if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent.

Title IX Regulations May 19, 2020; §§ 106.45(b)(1)(iii) and 106.45(b)(6) 85 F.R.30461
Prior Sexual History

• Only applies to complainants
  – The Department reiterates that the rape shield language in this provision does not pertain to the sexual predisposition or sexual behavior of respondents, so evidence of a pattern of inappropriate behavior by an alleged harasser must be judged for relevance as any other evidence must be.

Title IX Regulations May 19, 2020; §§ 106.45(b)(1)(iii) and 106.45(b)(6); Preamble 85 F.R.30353
Prior Sexual History: Motive

• The Department disagrees that the rape shield language is too broad. Scenarios described by commenters, where a respondent might wish to prove the complainant had a motive to fabricate or conceal a sexual interaction, do not require admission or consideration of the complainant’s sexual behavior.

• Respondents in that scenario could probe a complainant’s motive by, for example, inquiring whether a complainant had a dating or romantic relationship with a person other than the respondent, without delving into a complainant’s sexual behavior; sexual behavior evidence would remain irrelevant in such circumstances.

Title IX Regulations May 19, 2020; §§ 106.45(b)(1)(iii) and 106.45(b)(6); Preamble at 30351
Prior or Subsequent Misconduct

- The regulations do not prohibit the use of prior or subsequent misconduct
  - “Evidence of a pattern of inappropriate behavior by an alleged harasser” permitted if relevant
Practical Considerations

• Prior or subsequent misconduct may be relevant to demonstrate:
  – Intent/knowledge/state of mind
  – Motive
  – Opportunity
  – Lack of mistake
  – Pattern
  – Identity
  – Information that is inextricably interwoven with the facts
Flexibility to Adopt Rules

• “Within these evidentiary parameters recipients retain the flexibility to adopt rules that govern how the recipient’s investigator and decision-maker evaluate evidence and conduct the grievance process (so long as such rules apply equally to both parties).

• Relevance is the standard that these final regulations require, and any evidentiary rules that a recipient chooses must respect this standard of relevance.
Flexibility to Adopt Rules – Except

- For example, a recipient may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence.

- A recipient’s additional evidentiary rules may not, for example, exclude relevant cross-examination questions even if the recipient believes the questions assume facts not in evidence or are misleading.
Baylor Policy

• “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 someone other than the respondent committed the conduct alleged by the complainant, or 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.”

Baylor Policy at 39.
Evidentiary Rules Must Consider

1. Relevant Evidence
2. Inculpatory and Exculpatory
3. Applies Equally to Both Parties
4. Applied Impartially and Without Bias
5. Prior Sexual History
6. Legally Recognized Privilege
Evidentiary Levels for Inclusion

- Privileged Materials: Don’t include in Evidence Review or Investigative Report
- Not Directly Related: Include in Evidence Review
- Directly Related: Include in Evidence Review and Investigative Report
- Directly Related & Relevant: Include in Evidence Review and Investigative Report
Investigative Report

• Allow parties to provide a written response to the investigative report
  – Recipients must also give the parties meaningful opportunity to understand what evidence the recipient collects and believes is relevant, so the parties can advance their own interests for consideration by the decision-maker.
  – The decision-maker 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).

Title IX Regulations May 19, 2020; §§ 106.45(b)(5)(vii); Preamble 85 F.R. 30309, 30249
Training

• A recipient must ensure that **Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process**, receive training on:
  – The definition of sexual harassment in § 106.30
  – The scope of the recipient’s education program or activity
  – How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable
  – How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias

• A recipient must ensure that **decision-makers** receive training on:
  – Any technology to be used at a live hearing
  – Issues of relevance of questions and evidence, including when questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section.

Title IX Regulations May 19, 2020; § 106.45(b)(1)(iii), 85 F.R. 30575
Training

• A recipient also must ensure that investigators receive training on:
  – Issues of relevance to create an investigative report that fairly summarizes relevant evidence

• Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment

Title IX Regulations issued May 6, 2020; § 106.45(b)(1)(iii)
DYNAMICS OF SEXUAL AND GENDER-BASED HARASSMENT AND VIOLENCE
Identifying Our Own Biases

• What does sexual assault look like?
• Over-identifying with complainant or respondent
  – I would have…
  – If it was me…
  – That could have been me…
  – What were they thinking when…
  – What did they think was going to happen?
• Culture/diversity/world view
Diversity and Culture

• Sensitivity to language and bias in a variety of communities
  – LGBTQ+
  – Cultural differences
  – Race
  – Insular groups
  – 504/disability
  – Neurodiversity

• Reporting barriers
• Communication differences/impediments
Case Evaluation

• Nature of sexual and gender-based harassment and violence
  – Delay in reporting
  – Barriers to reporting and proceeding with formal action
  – Reluctance to report to law enforcement
  – Word-against-word credibility
  – Often involve the use of alcohol or other drugs
  – Often involve people who are known to one another

• Evaluate in the context of all available information
Disclosure

• A process where an individual reveals abuse or assault
• On-going, not a one time event
• Stages of Disclosure:
  – Denial
  – Tentative
  – Active
  – Recantation
  – Reaffirmation
• Triggers for Disclosure
  – Accidental – person’s secret is found out
  – Purposeful – person makes decision to tell
Framing Difficult Questions

• Why frame?
• Difficult topics:
  – Alcohol or other drug use
  – Clothing
  – Body positions
  – How and whether consent was communicated
Key Provisions of Title IX Regulations May 19, 2020

- Notice
- Intake
- Formal Complaint
- Discretionary Dismissal
- Mandatory Dismissal
- Appeal
- Hearing
- Appeal

- Jurisdiction & Scope
- Supportive Measures & Documentation
- Option to File a Formal Complaint
- Written Notice of Rights and Resources (VAWA)
- Document Signed by Complainant
- Document Signed by TIX Coordinator
- May Not Require Engagement
- Written Notice
- Not SH by Employee on Student
- See § 106.45(b)(5)

- Live Hearing (Can be Virtual)
- Separate Decision Maker
- Preponderance or Clear and Convincing
- Must Allow Cross-Examination by Advisor
- All Questions on Cross Subject to Relevancy Determination
- Cannot Consider Statements not Subject to Cross
- Must Provide Advisor

- Procedural Irregularity
- New Evidence
- Conflict of Interest

- Student Procedures
- Faculty Procedures
- Staff Procedures

- Complainant Withdraws
- Respondent No Longer Affiliated
- Evidence Unavailable
- Not Education Program or Activity
- Conduct Not Sexual Harassment
- Conduct Occurred Outside the U.S.
HEARINGS
THE FINAL TITLE IX REGULATIONS
Hearings

• At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions.

Title IX Regulations May 19, 2020; § 106.45(b)(6)(i)
Hearings

• Only relevant cross-examination and other questions may be asked of a party or witness.

• If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient’s choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.

Title IX Regulations May 19, 2020; § 106.45(b)(6)(i)
Cross-Examination by Advisor

• [A] party’s advisor may appear and conduct cross-examination even when the party whom they are advising does not appear.

• Similarly, where one party does not appear and that party’s advisor of choice does not appear, a recipient-provided advisor must still cross-examine the other, appearing party “on behalf of” the non-appearing party, resulting in consideration of the appearing party’s statements but not the non-appearing party’s statements (without any inference being drawn based on the non-appearance).
Hearings

• If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions.

Title IX Regulations May 19, 2020; § 106.45(b)(6)(i)
Tested for Credibility

• Probing the credibility and reliability of statements asserted by witnesses contained in such evidence requires the parties to have the opportunity to cross-examine the witnesses making the statements.

• Where a Title IX sexual harassment allegation does not turn on the credibility of the parties or witnesses, this provision allows the other evidence to be considered even though a party’s statements are not relied on due to the party’s or witness’s non-appearance or refusal to submit to cross-examination.

Title IX Regulations May 19, 2020; Preamble at 85 F.R. 30349, 30345
Statements

• [I]n the postsecondary context, only statements that have been tested for credibility will be considered by the decision-maker in reaching a determination regarding responsibility.

• The prohibition on reliance on “statements” applies not only to statements made during the hearing, but also to any statement of the party or witness who does not submit to cross-examination.

Title IX Regulations May 19, 2020; Preamble at 85 F.R. 30345, 30349
Bright-Line Rule

• Absent importing comprehensive rules of evidence, the alternative is to apply a bright-line rule that instructs a decision-maker to either consider, or not consider, statements made by a person who does not submit to cross-examination.

• The Department believes that in the context of sexual harassment allegations under Title IX, a rule of non-reliance on untested statements is more likely to lead to reliable outcomes than a rule of reliance on untested statements.

• If statements untested by cross-examination may still be considered and relied on, the benefits of cross-examination as a truth-seeking device will largely be lost in the Title IX grievance process.
Fairness and Accuracy

• Reliance on party and witness statements that have not been tested for credibility via cross-examination undermines party and public confidence in the fairness and accuracy of the determinations reached by postsecondary institutions.

• This provision need not result in failure to consider relevant evidence because parties and witnesses retain the opportunity to have their own statements considered, by submitting to cross-examination.

Title IX Regulations May 19, 2020; Preamble at 85 F.R. 30347
Submit to Cross-Examination

• The Department appreciates the opportunity to clarify here that to “submit to cross-examination” means answering those cross-examination questions that are relevant.

• This provision requires a party or witness to “submit to cross-examination” to avoid exclusion of their statements; the same exclusion of statements does not apply to a party or witness’s refusal to answer questions posed by the decision-maker.

• If a party or witness refuses to respond to a decision-maker’s questions, the decision-maker is not precluded from relying on that party or witness’s statements.

Title IX Regulations May 19, 2020; Preamble at 85 F.R. 30349
Limitation on Use of Statements

• Where a grievance process is initiated because the Title IX Coordinator, and not the complainant, signed the formal complaint, the complainant who did not wish to initiate a grievance process remains under no obligation to then participate in the grievance process, and the Department does not believe that exclusion of the complainant’s statements in such a scenario is unfair to the complainant, who did not wish to file a formal complaint in the first place yet remains eligible to receive supportive measures protecting the complainant’s equal access to education.
Determination of Responsibility

- Decision-maker(s), cannot be the same person(s) as the Title IX Coordinator or the investigator(s)
- Must issue a simultaneous written determination regarding responsibility, including
  - Identification of the allegations
  - Description of the procedural steps taken from the receipt of the formal complaint through the determination
  - Findings of fact supporting the determination
  - Conclusions regarding the application of the recipient’s code of conduct to the facts
  - Rationale
  - Appeal procedures

Title IX Regulations May 19, 2020; § 106.45(b)(7)
Policy Language on Hearings

“Hearings will be presided over by a hearing officer, who will make the decision by a *preponderance of the evidence* as to whether or not the respondent violated the policy provisions at issue. The hearing officer has *broad authority to determine the process, timing and conduct of a hearing*. For example, the hearing officer will determine the order of presentation, timing and overall duration of the hearing, what information and evidence will be heard, what information and questions are relevant to the determination of the matter, and what cross-examination questions will or will not be permitted.”

Baylor Policy at 41.
Policy Language on Hearings

“Hearing officers will be appointed by the Title IX Coordinator. In selecting a hearing officer for a particular matter, the Title IX Coordinator will take care to select an individual who does not have a conflict of interest or bias against complainants or respondents generally or an individual complainant or respondent. The University will notify the parties of the identity of the hearing officer in advance of the hearing, and parties may, within 3 business days of such notice, object to the service of the hearing officer by providing a written statement (which may be transmitted electronically) as to why the party believes that the hearing officer has a conflict of interest or bias. The Title IX Coordinator or designee will make decisions regarding such objections and the appointment of an alternate hearing officer, as necessary. Parties and their advisors are prohibited from contacting the hearing officer for any reason prior to the full conclusion of the resolution process. In addition, parties and their advisors are prohibited from contacting the hearing officer about the resolution process after its completion.”

Baylor Policy at 41.
“Each party may have an advisor of their choice present at a hearing for the limited purpose of conducting cross-examination on behalf of that party. Advisors may be, but are not required to be, attorneys. If a party does not have an advisor of their choice present at a hearing, the University will without fee or charge to the party provide an advisor of the University’s choice, again for the limited purpose of conducting cross-examination on behalf of that party. No later than ten calendar days before the hearing, parties should inform the Title IX Coordinator of the identity of any advisor whom they have chosen to accompany them to the hearing or that they will not be bringing an advisor, so that the University will know whether or not it needs to arrange for the presence of a University-provided advisor.”
Policy Language on Advisors

“At a time and manner deemed appropriate by the hearing officer, the **advisor for each party will be permitted to ask the other party and any witnesses all relevant questions and follow-up questions**, including those challenging credibility. Except for that limited role, **advisors may not participate actively in the hearing and may not speak or otherwise communicate on the part of the party that the advisor is advising**. However, the advisor may consult privately in a non-disruptive manner with their advisee during and/or at a recess in the hearing.”
Policy Language on Advisors

“Scheduling accommodations generally will not be made for advisors if they unduly delay the process. The University reserves the right to take appropriate action regarding any advisor who disrupts the process, or who does not abide by the restrictions on their participation as determined in the sole discretion of the hearing officer, which may include exclusion of the advisor from the hearing and the appointment of an alternate University-provided advisor.”
Policy Language on Witnesses

“If a party wishes to have an individual appear at the hearing as a witness, they must provide notice of the identity of the proposed witness to the Title IX Coordinator or designee at least ten calendar days before the date of the hearing. The hearing officer may also provide names to the Title IX Coordinator or designee of witnesses they would like to have at the hearing. Witnesses present at the hearing are restricted to individuals already interviewed in the fact-gathering process. The Title IX Coordinator or designee, in consultation with the hearing officer as necessary, will determine whether the witness is likely to have information that is relevant to the hearing, and if it is determined that the witness is likely to have relevant information, the Title IX Coordinator or designee will inform the witness that their presence at the hearing is required (to the extent that the University has jurisdiction to require the presence of the witness) or requested.”

Baylor Policy at 42
Policy Language on Hearings

“At or before the hearing, the hearing officer will receive a copy of the investigative report, any attachments thereto, and copies of the parties’ written responses to the investigative report, if any, which will be part of the information of record to be considered by the hearing officer.”

Baylor Policy at 42
Policy Language on Hearings

“Subject to the discretion of the hearing officer, hearings will ordinarily begin with introductory remarks by the hearing officer, followed by opening statements from any party who wishes to provide one, followed by the hearing officer’s asking relevant initial questions of the parties as deemed appropriate by the hearing officer. During this portion of the hearing, advisors may confer privately and in a non-disruptive manner with their advisee, but they are not allowed to make opening statements or otherwise address the hearing officer or anyone else present at the hearing.”

Baylor Policy at 42
Policy Language on Hearings

“After the hearing officer has asked their initial questions of the parties, the hearing officer will permit each party’s advisor to ask the other party all relevant questions and follow-up questions, including those challenging credibility. **Subject to the discretion of the hearing officer, questioning of witnesses will generally follow a similar process, whereby the hearing officer will pose relevant initial questions to each witness, then the parties’ advisors will be permitted to ask relevant questions of witnesses. Cross-examination by advisors will be conducted directly, orally, and in real time by the party’s advisor of choice and never by a party personally.”

Baylor Policy at 42
Policy Language on Hearings

“Only relevant cross-examination questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination question, the hearing officer will first determine whether the question is relevant and explain any decision to exclude a question as not relevant. Neither advisors nor parties are permitted to object to hearing officer decisions regarding relevance during a hearing.”

Baylor Policy at 42
Policy Language on Hearings

• “Regarding the evidence subject to inspection and review that was provided to the parties and their advisors as described above, a copy of such evidence will be made available at the hearing, and each party and/or their advisor (as applicable) will have an equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.”

Baylor Policy at 43
Policy Language on Hearings

• “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 someone other than the respondent committed the conduct alleged by the complainant, or 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.”

Baylor Policy at 43
Policy Language on Hearings

• “Information protected under a legally recognized privilege (such as, for example, privileged communications between a party and their physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in a treatment capacity, or privileged communications between a party and their attorney), will not be admitted unless the person holding the privilege has waived the privilege.”

Baylor Policy at 43
Policy Language on Hearings

“At the request of either party, the University will provide for the hearing to occur with the parties located in separate rooms with technology enabling the hearing officer and parties to simultaneously see and hear the party or the witness answering questions. Live hearings may be conducted with all parties physically present in the same geographic location or, at the University’s discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other.”
Policy Language on Hearings

• “If a party or witness does not submit to cross-examination at the live hearing, the hearing officer will not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the hearing officer will not draw an inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions.”

Baylor Policy at 43
Policy Language on Hearings

• “At the discretion of the hearing officer, parties (but not their advisors) will usually be given an opportunity to make a closing statement at the conclusion of the hearing.”
Policy Language on Recordings

• “The University will create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for review.”
Policy Language on Written Determination

• “Within ten business days after the hearing, the hearing officer will prepare and issue a written determination regarding responsibility and any sanctions. In determining responsibility, the hearing officer will apply the preponderance of the evidence standard.”
Policy Language on Written Determination

• “The written determination will include:
  – Identification of the Prohibited Conduct section(s) of this policy, and of any other University policy sections considered in the investigation, alleged to have been violated;
  – A description of the procedural steps taken from the receipt of the complaint through the determination, including but not limited to, as applicable, any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
  – Findings of fact supporting the determination;
  – Conclusions regarding the application of the University’s definitions of Prohibited Conduct to the facts;
  – A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility; and
  – Identification of the University’s procedures and permissible bases for the complainant and respondent to appeal.”

Baylor Policy at 43
Personal Preparation: Be Objective

- Identify and set aside personal biases and prejudices
- Be careful to avoid making assumptions as to how a person “should” react
- Avoid putting oneself in the shoes of the complainant or the respondent
- Recognize emotional impact, if any, but do not allow emotion to impact fair and impartial fact-finding
Personal Preparation: Be Professional

• Maintain an appropriate demeanor at all times
• Be polite and respectful to all parties
• Maintain appropriate sensitivity to presentation of difficult information
• Prepare for the hearing by reading and annotating all materials
  – Outline areas of inquiry
  – Consider wording of questions ahead of time
Standard of Proof

Beyond a Reasonable Doubt
Clear and Convincing Evidence
Preponderance of the Evidence
Some Evidence
Standard of Proof

• More likely to be true than not
• More probable than not
• The greater weight of the evidence
• Tipping the scale ever so slightly
• 51 %
• Based on the more convincing evidence and it’s probable truth or accuracy, not on the amount
• Quality of the evidence, not quantity
• NOT beyond a reasonable doubt
Responding to Inadmissible Evidence

• Advance determinations of challenged evidence are critical to the proper functioning of the process
  – Use Investigative Report as a guide

• In the event of a deliberate or inadvertent utterance of inadmissible information, how do you unring the bell?
  – Instruction on the record
Advisors

• Advisors have a speaking role
• Establish rules of decorum and conduct in the hearing via opening instructions
• Establish tone of professionalism and respectful treatment of parties and advisors
• Promptly and firmly redirect advisors who do not abide by the guidelines you set forth
Participation Techniques

• Be alert to your non-verbal communication
• Pay attention to tone of voice and volume level
• Avoid asking questions that imply a value judgment
• Maintain attentive posture and good eye contact
• Exercise reflective listening in framing next question
What to Ask

• Do I need to know the information?
• When questions arise, it can be helpful to walk yourself through the following set of questions:
  – Will an answer to my question help me decide the appropriate outcome or sanction?
  – Will getting an answer to this question influence my decision?
The Continuum Approach

- **Open-ended**
  
  “What are you able to tell me about your experience?”

- **Focused**
  
  “When you say the touching continued, can you share more about that?”

- **Multiple Choice**
  
  Range of options or “some other way”

- **Yes/No**

- **Leading**
Technology Options

• Zoom
  – Ability to see and hear in real time
  – Breakout rooms
  – Recording

• Training webinars
  – Basics of meeting controls: https://support.zoom.us/hc/en-us/articles/201362603-What-Are-the-Host-Controls-
DELIBERATIONS
Deliberation Techniques

• Gather all documents and exhibits in advance
• Use cross-referencing grids/matrices
• Identify specific elements of alleged misconduct from policy definitions
• Begin by identifying areas of agreement as to evidence
• Identify conflicts and prioritize
• Discuss each conflict individually
• Articulate your position and support it from the evidence
SANCTIONS
Discretion in Sanctioning

• Upon reaching a determination that a respondent is responsible for sexual harassment, the final regulations **do not restrict a recipient’s discretion** to impose a disciplinary sanction against the respondent, including suspension, expulsion, or other removal from the recipient’s education program or activity.

Title IX Regulations May 19, 2020, Preamble at 85 F.R. 30224
Discretion in Sanctioning

• For reasons described elsewhere in this preamble, the Department does not require any particular disciplinary sanctions against respondents, because these Title IX regulations are focused on requiring remedies for victims, leaving disciplinary decisions to recipients’ discretion.

Title IX Regulations May 19, 2020, Preamble at 85 F.R. 30262
Discretion in Sanctioning

• The § 106.45 grievance process is designed for implementation by non-lawyer recipient officials, and the final regulations do not intrude on a recipient’s discretion to use disciplinary sanctions as educational tools of behavior modification rather than, or in addition to, punitive measures.

• Similarly, these final regulations do not impose a standard of proportionality on disciplinary sanctions.
Sexual and Interpersonal Misconduct Policy

Effective: August 14, 2020
Policy on Sanctioning

- This policy prohibits a broad range of conduct, all of which is serious in nature. In keeping with the University’s commitment to foster an environment that is safe, inclusive, and free from discrimination and harassment, the hearing officer has great latitude in the imposition of sanctions tailored to the facts and circumstances of each report, the impact of the conduct on the complainant and surrounding community, and accountability for the respondent. The imposition of sanctions is designed to eliminate Prohibited Conduct, prevent its recurrence, remedy its effects and restore or preserve the complainant’s equal access to University education programs or activities, while supporting the University’s educational mission. Sanctions may include educational, restorative, rehabilitative, and punitive components. Some conduct, however, is so egregious in nature, harmful to the individuals involved, and/or so deleterious to the educational process that it requires severe sanctions, including suspension or expulsion.”

Baylor Policy at 44-45
Policy on Sanctioning

“In determining the appropriate sanction, the hearing officer may consider factors including but not limited to the following:

- the nature and violence of the conduct at issue;
- the impact of the conduct on the complainant;
- the impact or implications of the conduct on the community or the University;
- prior misconduct by the respondent, including the respondent’s relevant prior discipline or criminal history (if available);
- maintenance of a safe and respectful environment conducive to learning;
- protection of the University community; and
- any other mitigating, aggravating, or compelling circumstances in order to reach a just and appropriate resolution in each case.”

Baylor Policy at 45
Policy on Sanctioning

“In determining the appropriate sanction, the hearing officer may consider factors including but not limited to the following:

• the nature and violence of the conduct at issue;
• the impact of the conduct on the complainant;
• the impact or implications of the conduct on the community or the University;
• prior misconduct by the respondent, including the respondent’s relevant prior discipline or criminal history (if available);
• maintenance of a safe and respectful environment conducive to learning;
• protection of the University community; and
• any other mitigating, aggravating, or compelling circumstances in order to reach a just and appropriate resolution in each case.”
Policy on Sanctioning

- **Warning**: A formal admonition, which appears in an individual's disciplinary record at the University.

- **Disciplinary Probation**: A more serious admonition may be assigned for a definite period of time. Findings of misconduct that resulted in disciplinary probation may be considered in determining subsequent sanctions, even if the probation period has ended. Any future violation may be grounds for more severe sanctions, including suspension, suspension with conditions, or, in especially serious cases, expulsion from the University.
Policy on Sanctioning

• **Restitution:** Requirement to reimburse or otherwise compensate another and/or the University for damage or loss of property resulting from a student's misconduct. Common assessment or group billing may be made to students in a residence hall for damages occurring in common areas shared by groups of residents (determinations about whether and to what extent that will occur are made by the University’s residence life administrators, not through the procedures provided in the Student Conduct Code).
Policy on Sanctioning

- Residential or Other Facilities Restrictions or Removal: Restriction or removal from residence halls or other campus facilities as designated in the written notification. The Campus Living & Learning contract fee will not be refunded to a student who is evicted from the residence halls.
Policy on Sanctioning

• Withholding of Degree: In cases involving seniors or graduate students in their final semester, the University may withhold a student's Baylor degree for a specified period of time. This penalty is imposed instead of suspension at the end of senior year or final year of graduate study when all other degree requirements have been met. Degrees may also be withheld indefinitely when all other degree requirements have been met. The sanction of withholding a degree may also occur if an expulsion-level offense occurs after all other degree requirements have been met but before the degree is conferred.
Policy on Sanctioning

• **Suspension**: Student status at the University may be terminated for a specified period of time.

• **Suspension with Conditions**: Student status at the University may be terminated for at least the period of time specified by the suspension, with the suspension to continue until certain conditions, stipulated by the officer or panel applying this penalty, have been fulfilled. These conditions may include, but are not limited to, restitution of damages and formal apology.
Policy on Sanctioning

- **Expulsion**: This is permanent termination of student status at the University, without any opportunity for readmission. Relevant information remains in the student's disciplinary record at the University and may be disclosed by the University when the student consents in writing or as otherwise required or permitted by law.

Baylor Policy at 46
Policy on Sanctioning

• **Community Service:** Community service up to 10 hours per week may be added to disciplinary probation for a portion or duration of the probationary period or following a warning.

• **Restriction of Access to Space, Resources, and Activities:** When appropriate, restrictions may be placed on access to space and/or resources or on participation in activities so as to limit opportunities for contact between the parties.
Policy on Sanctioning

• Educational Programs: In addition to any of the sanctions listed above, a student may be required to participate in educational programs.

• Provost’s Office or Human Resources Office Disciplinary Processes: In cases where the respondent is a University employee, in accordance with the University policies and procedures, the sanctions will be determined by the Provost’s Office or Human Resources.
Sanctioning Resources

- **STARRSA: Science-based Treatment, Accountability, and Risk Reduction for Sexual Assault**
  - STARRSA is a psychoeducational behavior intervention program designed to address sexual misconduct issues in 18 to 22-year-olds. It is a customizable multi-session program curriculum that provides the opportunity to intervene and disrupt the perpetration of harm in the present and decrease the likelihood of the perpetration of harm in the future.

- **Sanctioning Resources Folder in Box**
  - Contains information about books, articles, and other multi-media options for educational sanctions

- **Box Folder also contains sample sanction language to use in determination letters**
Policy on Remedies

• Regardless of the outcome, the hearing officer may recommend additional remedies for the complainant to address the effects of the conduct on the complainant, restore or preserve the complainant’s equal access to University programs and activities, and restore to the complainant, to the extent possible, benefits and opportunities lost as a result of the alleged Prohibited Conduct. The hearing officer may also identify remedies to address the effects of the conduct on the University community.

• The Title IX Coordinator will review the remedies recommended by the hearing officer and will consider the appropriateness of continuing supportive measures on an ongoing basis. Extended supportive or other measures may be included in the sanctions.
THE NOTIFICATION OF DECISION LETTER
Policy Language on Written Determination

• “The written determination will include:
  – Identification of the Prohibited Conduct section(s) of this policy, and of any other University policy sections considered in the investigation, alleged to have been violated;
  – A description of the procedural steps taken from the receipt of the complaint through the determination, including but not limited to, as applicable, any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
  – Findings of fact supporting the determination;
  – Conclusions regarding the application of the University’s definitions of Prohibited Conduct to the facts;
  – A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility; and
  – Identification of the University’s procedures and permissible bases for the complainant and respondent to appeal.”
The Notification of Decision Letter

• When making the determination as to responsibility
  – Make finding as to sufficiency, by a preponderance, to support finding of responsibility
    • Sufficient or insufficient
    • Not a finding by a preponderance that event did not occur
  – Must provide rationale
    • Can be concise, but must communicate salient elements of finding
    • Comment on evidence, not the people
    • Avoid extraneous and tangential comments
    • Remain closely tied to the facts and reasonable inferences
EVALUATING CREDIBILITY
Credibility Factors

• Assessing credibility factors:
  – Demeanor
  – Interest
  – Detail
  – Corroboration
  – Common sense

• Testing inherent plausibility in light of the known information, relationships, and circumstances of the disclosure
Demeanor

• Demeanor may be informative, not determinative
• Assessing demeanor requires individual assessment as to how demeanor supports or detracts from overall reliability of information
• Fact-finders should not place undue reliance on demeanor as an indicator of candor or evasion.
• Demeanor is one factor to observe in the context of the totality of the information
**Demeanor**

- Complainant/respondent may be affected by emotional component of sexual assault allegations
- Range of behaviors and emotional reactions vary
- Elicit and consider information from witnesses as to demeanor after the reported incident, during the disclosure, and in response to the report
- Note changes in demeanor and explanations for significant changes
- Consider demeanor during proceedings
Interest

• If Respondent and Complainant know each other:
  – Understand the context and history of any prior relationships
  – Understand significant events or markers in relationship
• Explore effects of incident:
  – Emotional: fear, intimidation, worry, anxiety
  – Actual: financial, time, participation in the process
• Is there any particular animus/motive/ill will for/or against any party or witness?
Interest

• How will the party/witness be impacted by their participation in the process?
  – Was information provided “against” interests?
• How will the party/witness be impacted by any particular outcome?
  – Will information shared impact current or future relationships?
Detail

• Explore all details of event – before, during, and after
• Surrounding details – seemingly insignificant facts that may have greater import
• Sensory details – using the five senses to describe the physical reality of the crime
• Behavioral changes and responses
• Emotional cues and indicators
• Listen for “ring of truth” language on the periphery
• Evaluate panoramic view of events from all parties/witnesses
Corroboration

• Freeze frame and explore critical junctures
• Cross-reference Complainant and Respondent accounts with all other evidence and witnesses’ statements
• Look to attendant details and behavior pre- and post-incident by both parties
• Focus on resolution of conflicts through believable evidence and common sense
• Outline case by issue and cross reference with all available evidence including timelines
Corroboration

• Consider other attendant details such as:
  – Size, age, power, authority and/or social status differential for Complainant and Respondent
  – Location of incident
    • Isolation of Claimant
    • Potential witnesses or reasons for lack of witnesses
  – Any change in either party’s demeanor, personality, or routine after the incident
    • E.g., roommate noticed that Complainant began wearing baggy clothes, stopped attending class regularly, ceased eating
    • E.g., friends noticed Respondent became withdrawn and went home every weekend
Evaluating Changes in Account

• Explore all circumstances of each account
• Understand the who, what, and where of the interview
• Ask the “why” (without asking why); questions to explore:
  – State of mind
  – Life circumstances at the time
  – Perception of interviewer/process
  – Changes in interest or motivation
• Inquire directly about inconsistencies
• Attempt to reconcile where possible
Disclosure

• A process where an individual reveals abuse or assault
• On-going, not a one time event
• Stages of Disclosure:
  – Denial
  – Tentative
  – Active
  – Recantation
  – Reaffirmation
• Triggers for Disclosure
  – Accidental – person’s secret is found out
  – Purposeful – person makes decision to tell
Synthesis

• Testing inherent plausibility of the conflicting accounts in light of the known information
• How does it all fit together?
• Does it make sense in the context of:
  – These individuals?
  – The setting?
  – The community?
  – The activity?
  – The relationships?
## Integrated Analysis

<table>
<thead>
<tr>
<th>Dynamics of Sexual Assault</th>
<th>Informed understanding of dynamics of sexual and gender-based harassment and interpersonal violence.</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Demeanor</strong></td>
<td>Did the witness speak in a convincing manner? Was he/she uncertain, confused, self-contradictory or evasive?</td>
</tr>
<tr>
<td></td>
<td>How did he/she look, act and speak while testifying / reporting?</td>
</tr>
<tr>
<td><strong>Interest / Motive / Bias</strong></td>
<td>Did the witness have any interest in the outcome of the case, bias, prejudice, or other motive that might affect his/her testimony?</td>
</tr>
<tr>
<td><strong>Detail</strong></td>
<td>Use direct quotes from testimony or statements.</td>
</tr>
<tr>
<td></td>
<td>How well could the witness remember and describe the things about which he/she testified?</td>
</tr>
<tr>
<td></td>
<td>Was the ability of the witness to see, hear, know, remember, or describe those things affected by youth or old age or by any physical, mental or intellectual deficiency?</td>
</tr>
<tr>
<td><strong>Corroboration</strong></td>
<td>How well did the testimony of the witness square with the other evidence in the case, including the testimony of other witnesses?</td>
</tr>
<tr>
<td></td>
<td>Was it contradicted or supported by the other testimony and evidence?</td>
</tr>
<tr>
<td><strong>Common Sense</strong></td>
<td>Does it all add up? (Gut check)</td>
</tr>
<tr>
<td></td>
<td>Is there something missing?</td>
</tr>
</tbody>
</table>
Questions to Consider: Credibility Generally

• As judges of the facts, you are sole judges of the credibility of the witnesses and their testimony

• This means you must judge the truthfulness and accuracy of each witness’s testimony and decide whether to believe all, or part, or none of that testimony

• The following are some factors that you may and should consider when judging credibility and deciding whether to believe or not to believe testimony
Questions to Consider: Detail

• Was the witness able to see, hear, or know the things about which they testified?
• How well could the witness remember and describe the things about which they testified?
• Was the ability of the witness to see, hear, know, remember, or describe those things affected by youth or old age or by any physical, mental, or intellectual deficiency?
• Were there inconsistencies or discrepancies in the witness’s testimony?
Questions to Consider: Interest

• Did the witness have any interest in the outcome of the case, bias, prejudice, or other motive that might affect their testimony?
• Did the witness stand to receive any benefit from a particular outcome?
Questions to Consider: Demeanor

• Did the witness testify in a convincing manner?
• How did the witness look, act, and speak while testifying?
• How did the witness’s nonverbal communications (posture, gestures, facial expressions, eye contact) match their verbal communications (voice, expression)?
• Was the testimony uncertain, confused, self-contradictory, or evasive?
Questions to Consider: Corroboration

• How well did the testimony of the witness square with the other evidence in the case, including the testimony of other witnesses?

• Was it contradicted or supported by the other testimony and evidence?
Questions to Consider: Common Sense

• Does it make sense?
If there is a dispute about whether harassment occurred or whether it was welcome -- in a case in which it is appropriate to consider whether the conduct could be welcome -- determinations should be made based on the totality of the circumstances. The following types of information may be helpful in resolving the dispute:

- **Statements by any witnesses** to the alleged incident.

  ...  
  (continued on next slide)
Evidence about the relative credibility of the allegedly harassed student and the alleged harasser. For example, the level of detail and consistency of each person's account should be compared in an attempt to determine who is telling the truth. Another way to assess credibility is to see if corroborative evidence is lacking where it should logically exist. However, the absence of witnesses may indicate only the unwillingness of others to step forward, perhaps due to fear of the harasser or a desire not to get involved.
Credibility Considerations from OCR

(1997 Sexual Harassment Guidance continued)

• Evidence that the alleged harasser has been found to have harassed others may support the credibility of the student claiming the harassment; conversely, the student's claim will be weakened if he or she has been found to have made false allegations against other individuals.
Credibility Considerations from OCR
(1997 Sexual Harassment Guidance continued)

- Evidence of the allegedly harassed student's reaction or behavior after the alleged harassment.
  - For example, were there witnesses who saw the student immediately after the alleged incident who say that the student appeared to be upset?
  - However, it is important to note that some students may respond to harassment in ways that do not manifest themselves right away, but may surface several days or weeks after the harassment.
  - For example, a student may initially show no signs of having been harassed, but several weeks after the harassment, there may be significant changes in the student's behavior, including difficulty concentrating on academic work, symptoms of depression, and a desire to avoid certain individuals and places at school.
Credibility Considerations from OCR

(1997 Sexual Harassment Guidance continued)

• Evidence about whether the student claiming harassment filed a complaint or took other action to protest the conduct soon after the alleged incident occurred. However, failure to immediately complain may merely reflect a fear of retaliation or a fear that the Claimant may not be believed rather than that the alleged harassment did not occur.

...
Credibility Considerations from OCR
(1997 Sexual Harassment Guidance continued)

• Other contemporaneous evidence. For example, did the student claiming harassment write about the conduct, and his or her reaction to it, soon after it occurred (e.g., in a diary or letter)? Did the student tell others (friends, parents) about the conduct (and his or her reaction to it) soon after it occurred?

See 1997 Sexual Harassment Guidance
APPEALS
Appeals

• A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient’s dismissal of a formal complaint or any allegations therein, on the following bases:
  – Procedural irregularity that affected the outcome of the matter
  – New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
  – The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individuals complainant or respondent that affected the outcome of the matter.

• A recipient may offer an appeal equally to both parties on additional bases.
Appeals

• As to all appeals, the recipient must:
  – Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
  – Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;
  – Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of this section [regarding no conflict of interest or bias, and properly trained];
  – Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging the outcome;
  – Issue a written decision describing the result of the appeal and the rationale for the result; and
  – Provide written decision simultaneously.
Sexual and Interpersonal Misconduct Policy

Effective: August 14, 2020
Baylor Policy on Appeals

- Either party to a matter covered by this SIM policy may file an appeal from: 1) a determination regarding responsibility; and/or 2) the Title IX Coordinator’s dismissal of a formal complaint or any allegations therein from the Title IX Sexual Harassment process, on the following grounds:
  a. Procedural irregularity that affected the outcome of the matter;
  b. New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter;
  c. The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter; and/or
  d. The decision of the decision-maker was arbitrary or capricious.
Baylor Policy on Appeals

• An appeal must be submitted in writing to the Title IX Coordinator.

• Appeals must be filed no later than seven calendar days after the date on which the University transmitted the hearing officer’s written determination to the parties or the Title IX Coordinator’s decision to dismiss the matter for purposes of Title IX. The Title IX Coordinator may extend this deadline if warranted by the circumstances.

Baylor Policy at 51
Baylor Policy on Appeals

• The University will notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties. The other party may then have a period of five business days to submit a statement in support of the written determination and/or in opposition to the appeal. Any such statement will be shared with the party who filed the appeal and their advisor.

Baylor Policy at 51
Baylor Policy on Appeals

• The appellate officer will issue a written decision describing the result of the appeal and the rationale for the result, and the University will provide the written decision simultaneously to both parties. The appellate officer’s decision on any appeal is the final step in the adjudication process, except as provided in such decision.

• The appellate officer may deny the appeal, or if one or more of the appeal grounds have been met, may:
  – return the case to the original hearing officer for reconsideration; or
  – appoint an Alternate hearing officer to review the case.

• It is the responsibility of the appellate officer to determine which if any aspects of the case merit a new review, and to direct the Title IX Coordinator accordingly.
Baylor Policy on Appeals

- Absent extenuating circumstances, the appellate officer will notify the complainant and respondent of the appeal decision simultaneously in writing within **20 business days** of the appeal receipt deadline, and will notify the Title IX Coordinator in writing of any instructions for further action. This deadline may be extended if warranted by the circumstances. If this deadline is extended, the parties will be notified in writing at the time the extension is determined.
- The decision made by the appellate officer to grant or deny the appeal is final. If an appeal is granted, the subsequent determination and/or sanction is/are final.
Use of Slides

• This PowerPoint presentation is not intended to be used as a stand-alone teaching tool.
• These materials are meant to provide a framework for informed discussion, not to provide legal advice regarding specific institutions or contexts.
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