

2020  
Regs  
Rapid  
Response

**R<sup>3</sup>**

# Ten Things to Know About the New Title IX Regulations

May 11, 2020



# Introduction of Presenters

Brett A. Sokolow, J.D.

W. Scott Lewis, J.D.

Kim Pacelli, M.Ed., J.D.

Saundra Schuster, J.D.

Daniel C. Swinton, J.D., Ed.D

# Topics to be Discussed

1. New Terminology
2. Training Materials Publication
3. What Constitutes Notice
4. Mandatory Dismissal and Jurisdiction
5. Advisors
6. Interim Measures
7. Timing of Review and Comment Period
8. Live Hearings and Decision Makers
9. Cross-Examination
10. Standard of Evidence

# New Terminology

- Complainant
- Respondent
- Grievance
- Recipient
- Sexual Assault

*106.30(a)(3) “Sexual assault” as defined in 20 U.S.C. 1092(f)(6)(A)(v), “dating violence” as defined in 34 U.S.C. 12291(a)(10), “domestic violence” as defined in 34 U.S.C. 12291(a)(8), or “stalking” as defined in 34 U.S.C. 12291(a)(30).*

# Training Materials Publication

*106.45 (b)(10)(D) All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.*

- Institutional Materials
- Proprietary Materials
- How to Publish Them



# What Constitutes Notice

*106.44 (a) General 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.*

- Actual Notice
- Actual Authority
- What about Responsible Employees/Mandatory Reporters?

## Mandatory Dismissal and Jurisdiction

- 106.45(b)(3)(i) *The recipient must investigate the allegations in a formal complaint. If the conduct alleged in the formal complaint would:*
  - *not constitute sexual harassment as defined in § 106.30 even if proved,*
  - *did not occur in the recipient's education program or activity, or*
  - *did not occur against a person in the United States,*

*then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under Title IX or this part; such a dismissal does not preclude action under another provision of the recipient's code of conduct.*



# Mandatory Dismissal and Jurisdiction

- What about study abroad?
- Out-of-country campuses?
- Off-campus houses/apartments?
- Off-campus events?



*A party cannot “fire” an assigned advisor during the hearing, but if the party correctly asserts that the assigned advisor is refusing to “conduct cross-examination on the party’s behalf,” then the recipient is obligated to provide the party an advisor to perform that function, whether that means counseling the assigned advisor to perform that role, or stopping the hearing to assign a different advisor.*

- When should we provide one?
- How?
- Who?



2020  
Regs  
Rapid  
Response

# R<sup>3</sup> Interim Measures

- 106.44 (c) *Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal.*

## Timing of Review and Comment Period

*106.45(b)(5)(vi) “...Prior to completion of the investigative report, the recipient must send to each party and the party’s advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report.”*

- What about the other ten days before the hearing?

# Live Hearings and Decision Makers

*106.45(b)(6)(i) For postsecondary institutions, the recipient's grievance process must provide for a live hearing.*

- What does “live” mean?
- Who are the Decision Makers?
- Panels or Administrators?

# Cross-Examination

- 106.45(b)(6)(i) *At the live hearing, the decision-maker(s) must permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.*
  - Any limitations?
  - What does “relevant” mean?



## Standard of Evidence

*106.45(b)(1)(vii) State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment.*

- What does this mean?
- What about Collective Bargaining Agreements?

## Presenter Contact Information

**Brett A. Sokolow, J.D.**

Founder and Chair, TNG Consulting  
President, ATIXA  
E: [Brett.Sokolow@tngconsulting.com](mailto:Brett.Sokolow@tngconsulting.com)

**W. Scott Lewis, J.D.**

Partner, TNG Consulting  
Advisory Board, ATIXA  
E: [Scott.Lewis@tngconsulting.com](mailto:Scott.Lewis@tngconsulting.com)

**Sandra Schuster, J.D.**

Partner, TNG Consulting  
Advisory Board, ATIXA  
E: [Sandra.Schuster@tngconsulting.com](mailto:Sandra.Schuster@tngconsulting.com)

**Kim Pacelli, M.Ed., J.D.**

Partner, TNG Consulting  
Advisory Board, ATIXA  
E: [Kim.Pacelli@tngconsulting.com](mailto:Kim.Pacelli@tngconsulting.com)

**Daniel C. Swinton, J.D., Ed.D.**

President, TNG Consulting  
Vice President, ATIXA  
Advisory Board, ATIXA  
E: [Daniel.Swinton@tngconsulting.com](mailto:Daniel.Swinton@tngconsulting.com)



Thank You!

ATIXA MEMBERS

Log back in via the members only link for the Q&A in 15 minutes!