

# ODR Basics Training

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# Basics Training : Major Subject Areas

- Basics Training Overview
- Prompt and Equitable Investigations and Hearings
- Retaliation, Not in Good Faith, False or Misleading
- Confidentiality in Investigations and Hearings
- Intoxication and Incapacitation



# Basics Training

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# Basics Training Overview: Goals

- Understanding Title IX's requirements as reflected in Harvard's *Interim Title IX Sexual Harassment Policy* ("ITIXSHP") applicable to certain alleged conduct occurring on or after August 14, 2020
- Identifying other sexual misconduct prohibited by Harvard's *Interim Other Sexual Misconduct Policy* ("IOSMP") applicable to certain alleged conduct occurring on or after August 14, 2020
- Identifying sexual and gender-based harassment prohibited by Harvard's *Sexual and Gender-Based Harassment Policy* ("S&GBHP"), applicable to alleged conduct between September 1, 2014 and August 13, 2020



# Basics Training Overview:

## Key Topics

- Assessing Potential Violations of the 3 Policies: S&GBHP, ITIXSHP, IOSMP
- Jurisdiction: University Program or Activity
- What is Sexual Harassment? Other Sexual Misconduct?
- Hostile Environment Analysis: S&GBHP and IOSMP
- Consent: ITIXSHP and IOSMP
- Sexual Harassment Analysis: ITIXSHP
- Evidence that is Relevant or Directly Related; Weighing: ITIXSHP
- Academic Freedom and Freedom of Expression



# Current Title IX Regulations (2020)

From the Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021) (the “July 2021 OCR Q&As”\*), p. 1 [[Questions and Answers on the Title IX Regulations on Sexual Harassment \(July 2021\) \(PDF\) \(ed.gov\)](#)]:

This question-and-answer resource describes OCR’s interpretation of schools’ responsibilities under Title IX, and the Department’s current implementing regulations related to sexual harassment, as enforced by OCR. The focus here is on questions related to the most recent amendments to the regulations in 2020 (the 2020 amendments). The Department is undertaking a comprehensive review of its current Title IX regulations as amended in 2020, following President Biden’s *Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*. While this review is ongoing and until any new regulations go into effect, the 2020 amendments remain in effect. [. . .] Preamble\* references: Please note that where appropriate, this Q&A refers to the preamble to the 2020 amendments, which clarifies OCR’s interpretation of Title IX and the regulations. You can find citations to specific preamble sections in the endnotes of this Q&A. The preamble itself does not have the force and effect of law. [\* The official version of the regulations was published in the *Federal Register* on May 19, 2020 at 85 Fed. Reg. 30026 (codified in 34 C.F.R. Part 106).

[Federal Register :: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance](#)]



# Current Title IX Regulations (2020): Training Requirement

§ 106.45(b)(1)(iii): “A recipient must ensure that Title IX Coordinators, investigators [i.e., the Investigative Team], decision-makers [i.e., the Hearing Panel], 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, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.”



# Current Title IX Regulations (2020): Training Requirement, cont.

§ 106.45(b)(1)(iii), cont.: “A recipient must ensure that [Hearing Panelists] receive training on any technology to be used at a live hearing and on 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 . . . . A recipient also must ensure that [Investigative Teams] receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence . . . . Any materials used to train Title IX Coordinators, [Investigative Teams], [Hearing Panelists], 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[.]”





# Violence Against Women Act (VAWA) Regulations

Section 668.46(k)(2)(ii) of the VAWA regulations provides that “the procedures for institutional disciplinary action in cases of alleged dating violence, domestic violence, sexual assault, or stalking” will “be conducted by officials who, at a minimum, receive **annual training**” on issues related to these four areas of concern and “on how to conduct [a] process that protects the safety of victims and promotes accountability[.]”



# Title IX Statute

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“No person . . . 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.”



# Title IX Statute, cont.

## OCR Policy Guidance Portal: OCR's Enforcement in Light of *Bostock v. Clayton County, Georgia* (Letter from the Acting Assistant Secretary for Civil Rights, August 31, 2020):

Title IX does not mention discrimination on the basis of a student's sexual orientation. However, the U.S. Supreme Court recently held that discrimination on the basis of an individual's status as a homosexual constitutes sex discrimination within the meaning of Title VII . . . . *See Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1741 (2020) (“[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”) . . . . [While] *Bostock* does not control [OCR's] interpretation of Title IX . . . . the *Bostock* opinion guides OCR's understanding that discriminating against a person based on their homosexuality or identification as transgender generally involves discrimination on the basis of their biological sex” [footnote omitted].



# Title IX Statute, cont.

## Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation

On January 20, 2021, President Biden signed the above-referenced executive order, indicating: “Under *Bostock*’s reasoning, laws that prohibit sex discrimination – including Title IX [. . .] prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary.”



# Assessing Potential Violations of the S&GBHP

## Sexual Harassment?

- Unwelcome Conduct
- Sexual Nature
- Quid Pro Quo *OR*
- Hostile Environment
  - Sufficiently Severe, Persistent, *or* Pervasive

## Gender-Based Harassment?

- Unwelcome Conduct
- Includes Conduct Non-Sexual in Nature
- Hostile Environment
  - Sufficiently Severe, Persistent, *or* Pervasive

## Jurisdiction

- Harvard Property
- Off Harvard Property
  - University Program or Activity
  - Hostile environment for member of Harvard community



# Assessing Potential Violations of the ITIXSHP

## Sexual Harassment?

- Unwelcome Conduct
- On Basis of Sex, including Sexual Orientation and Gender Identity
- Quid Pro Quo *OR/*
- So Severe, Pervasive, *and* Objectively Offensive, it Effectively Denies Equal Access *OR/*
- Sexual Assault, Dating Violence, Domestic Violence, and Stalking

## Jurisdiction

- Against a person in the United States
- Harvard Property
- Off Harvard Property
  - University Program or Activity
  - Substantial Control Over Person Accused and Context
  - Building Owned or Controlled by Recognized Student Organization
- Procedures: Complainant at time of filing must be participating in University Program or Activity, or attempting to



# Assessing Potential Violations of the ITIXSHP, cont.

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See Appendix A to the Interim Title IX Sexual Harassment Policy: Current Definitions in Federal Law of Sexual Assault, Dating Violence, Domestic Violence, and Stalking.



# Assessing Potential Violations of the IOSMP

## Other Sexual Misconduct?

- Unwelcome Conduct
- On Basis of Sex, including Sexual Orientation and Gender Identity
- Quid Pro Quo *OR/*
- So Severe, Persistent, *or* Pervasive, it Effectively Denies Equal Access (Hostile Environment)

## Jurisdiction

- Harvard Property
- Off Harvard Property
  - University Program or Activity
  - Hostile environment for member of Harvard community





# Jurisdiction: Program or Activity: S&GBHP and IOSMP

- Two policies apply to sexual or gender-based harassment (S&GBHP), or other sexual misconduct (IOSMP), respectively, that is committed by students, faculty, staff, Harvard appointees, or third parties, whenever the conduct occurs on Harvard property; or off Harvard property if in connection with a University or University-recognized program or activity; or the conduct may have the effect of creating a hostile environment for a member of the University community.
- The IOSMP applies to sexual misconduct that falls outside the ITIXSHP (discussed further below). Thus, for conduct occurring on or after August 14, 2020, the conduct covered by the ITIXSHP + the IOSMP = all conduct covered by the S&GBHP prior to August 14, 2020.



# Jurisdiction: Program or Activity: ITIXSHP

- The ITIXSHP, consistent with the current Title IX regulations (2020), applies to sexual harassment that is committed by students, faculty, staff, Harvard appointees, or third parties against a person in the United States, whenever the misconduct occurs: on Harvard property; or off Harvard property if in connection with a University or University-recognized program or activity which includes locations, events, or circumstances over which the University exercised substantial control over both the person accused of the conduct and the context in which the sexual harassment occurred, and also includes any building owned or controlled by a student organization that is officially recognized by the University.
- The procedures for the ITIXSHP provide that at the time of filing a formal complaint, a Complainant must be participating in or attempting to participate in the education or work program or activity of the University.



# Program or Activity: ITIXSHP, Complainant, cont.

July 2021 OCR Q&As, item 23, indicates in relevant part: **Is a school required to accept a formal complaint of sexual harassment from a complainant who is not currently enrolled in or attending the school?** Yes, but only if the complainant is attempting to participate in the school’s education program or activity at the time they file the formal complaint. Individuals who are currently participating in the school’s education program or activity may also file formal complaints. The preamble gives several examples of situations of a complainant “attempting to participate” in a school’s education program, including when a complainant:

- (1) has withdrawn from the school due to alleged sexual harassment and expresses a desire to re-enroll if the school responds appropriately to the allegations,
- (2) has graduated but intends to apply to a new program or intends to participate in alumni programs and activities,
- (3) is on a leave of absence and is still enrolled as a student or intends to re-apply after the leave of absence, or
- (4) has applied for admission. [Footnotes omitted. Sources: 34 C.F.R. § 106.30(a) (definition of formal complaint) and Preamble, 85 Fed. Reg. at 30,138, 30,198 fn. 869, and 30,219.]]



# Program or Activity: ITIXSHP, cont.

Preamble, p. 30093: The Department will interpret a recipient's education "program or activity" in accordance with the Title IX statute and its implementing regulations, which generally provide that an educational institution's program or activity includes "all of the operations of" a postsecondary institution [. . . .] For instance, incidents that occur in housing that is part of a recipient's operations such as dormitories that a recipient provides for students or employees whether on or off campus are part of the recipient's education program or activity."



# Program or Activity: ITIXSHP, cont.

Preamble, p. 30197: “Federal court opinions [. . .] have considered whether sexual harassment occurred in a recipient’s education program or activity by examining factors such as whether the recipient funded, promoted, or sponsored the event or circumstance where the alleged harassment occurred. While it may be helpful or useful for recipients to consider factors applied by Federal courts to determine the scope of a recipient’s program or activity, no single factor is determinative to conclude whether a recipient exercised substantial control over the respondent and the context in which the harassment occurred, or whether an incident occurred as part of ‘all of the operations of’ a school, college, or university.”

- ODR consults with OGC about “program or activity” questions, as appropriate.



# Program or Activity: ITIXSHP, cont.

Preamble, p. 30197: “Where a postsecondary institution has officially recognized a student organization, and sexual harassment occurs in an off campus location *not* owned or controlled by the student organization yet involving members of the officially recognized student organization, the recipient’s Title IX obligations will depend on whether the recipient exercised substantial control over the respondent and the context of the harassment, or whether the circumstances may otherwise be determined to have been part of the ‘operations of’ the recipient.”



# Program or Activity: ITIXSHP, cont.

Preamble, p. 30202: “[T]he statutory and regulatory definitions of ‘program or activity’ encompass ‘all of the operations of’ [postsecondary institutions], and such ‘operations’ may certainly include computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of, the recipient. [. . . A]n education program or activity includes circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurred, such that the factual circumstances of online harassment must be analyzed to determine if it occurred in an education program or activity. For example, a student using a personal device to perpetrate online sexual harassment during class time may constitute a circumstance over which the recipient exercises substantial control.”



# Program or Activity: ITIXSHP, cont.

Preamble, p. 30206: “[E]ven if a recipient must dismiss a formal complaint for Title IX purposes because the alleged sexual harassment did not occur against a person in the U.S., such a dismissal is only for purposes of Title IX, and nothing precludes the recipient from addressing the alleged misconduct through the recipient’s own code of conduct.”

- At Harvard, the IOSMP may be applied to such a scenario, if otherwise appropriate.





# S&GBHP: What is Sexual Harassment?

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Two types of sexual harassment:

- Quid Pro Quo
- Hostile Environment
- Both are based on unwelcome conduct of a sexual nature



# ITIXSHP: What is Sexual Harassment?

Three categories of sexual harassment:

- Quid Pro Quo
- 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 University's education or work programs or activities
- Sexual assault, dating violence, domestic violence, and stalking (see Appendix A of the ITIXSHP for definitions)
- All three categories are based on unwelcome conduct on the basis of sex, including sexual orientation and gender identity



# IOSMP: What is Other Sexual Misconduct?

Two types of other sexual misconduct (i.e., sexual misconduct that falls outside the jurisdiction of the ITIXSHP):

- Quid Pro Quo (i.e., when the conduct does not meet the jurisdictional requirements of the ITIXSHP)
- Hostile Environment
- Both are based on unwelcome conduct on the basis of sex, including sexual orientation and gender identity



# A Variety of Factors to Consider

Whether the alleged conduct violates the relevant policy (S&GBHP, ITIXSHP, or IOSMP) may depend on a variety of factors, including: the degree to which the conduct affected one or more person's education or employment; the type, frequency, and duration of the conduct; the relationship between the parties; the number of people involved; and the context in which the conduct occurred.



# S&GBHP: Gender-Based Harassment

Gender-based harassment is verbal, nonverbal, graphic, or physical aggression, intimidation, or hostile conduct based on sex or sex-stereotyping (under Title IX) or sexual orientation or gender identity (which Harvard added to this policy at the time, pre-*Bostock*, based on state law), but not involving conduct of a sexual nature, sufficient to create a hostile environment. For example, persistent disparagement of a person based on a perceived lack of stereotypical masculinity or femininity or exclusion from an activity based on sexual orientation or gender identity may also violate this Policy.



# What Constitutes Quid Pro Quo Harassment?

- Unwelcome conduct of a sexual nature (S&GBHP) or on the basis of sex, including sexual orientation and gender identity (ITIXSHP and IOSMP).
- Submission to or rejection of such conduct is condition to employment or academic standing or used as basis for employment decisions or academic evaluation
- Implicit or explicit condition
- Resists and suffers harm OR submits and avoids harm



# What Constitutes Quid Pro Quo Harassment? (cont.)

Preamble, pp. 30147-30148: “Making [. . .] benefits or opportunities contingent on a person’s participation in unwelcome conduct on the basis of sex strikes at the heart of Title IX’s mandate that education programs and activities remain free from sex discrimination; thus, the Department interprets the *quid pro quo* harassment description broadly to encompass situations where the *quid pro quo* nature of the incident is implied from the circumstances. [. . .] The Department notes that when a complainant acquiesces to unwelcome conduct in a *quid pro quo* context to avoid potential negative consequences, such ‘consent’ does not necessarily mean that the sexual conduct was not ‘unwelcome’ or that prohibited *quid pro quo* harassment did not occur.”



# Standards for Reference: S&GBHP

## OCR 2001 Revised Sexual Harassment Guidance (2001 Guidance)\*

- Factors used to evaluate hostile environment sexual harassment, p. 5
- Assess Welcomeness, p. 7
- Quid pro quo harassment factors, p. 10
- Due Process Rights of the Accused, p. 22
- First Amendment, p. 22

\*Per p. 30552 of the Preamble, the 2001 Guidance was one of the “baseline[s] against which the Department promulgate[d] the [new Title IX] regulations.”





# Hostile Environment Analysis: S&GBHP and IOSMP

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# S&GBHP & IOSMP What Constitutes a Hostile Environment?

- Unwelcome conduct of a sexual nature (S&GBHP) or on the basis of sex, including sexual orientation and gender identity (IOSMP)
- Sufficiently severe, persistent OR pervasive
- Interferes with or limits ability to participate in or benefit from the University's education or work programs or activities



# S&GBHP\*: Hostile Environment, Policy and Procedures, FAQs #2 and #47

FAQ #2: *“What is a ‘hostile environment’ in the context of a sexual harassment claim?”*

“A hostile environment interferes with or limits a person’s ability to participate in or benefit from the University’s education or work programs or activities. The University will consider the effects of off-campus conduct when evaluating whether there is a hostile environment in connection with a person’s educational or work experience at Harvard.”

FAQ #47: *“When might conduct that occurs in non-University housing or on non- University property be covered by the Procedures?”*

“If harassing conduct that takes place outside of Harvard’s property is in connection with a Harvard program or activity or has the effect of creating a hostile environment for a member of the University community, then it is covered by the [S&GBHP or IOSMP, as applicable]. This includes conduct that occurs in non-University housing.”

\* The content of these and many other FAQs is relevant for cases under the IOSMP also.



# S&GBHP: Hostile Environment: Objective and Subjective Perspective, FAQ #3

FAQ #3: *“Does the University employ a subjective or objective analysis in determining whether there has been a ‘hostile environment’ in the context of a sexual harassment claim?”*

“Both. In order to find a hostile environment sufficient to make out a violation of University Policy, the University must find, from both an objective and a subjective perspective, that the conduct was unwelcome and that the unwelcome conduct was sufficiently severe, persistent, or pervasive that it created a hostile environment. The University must determine both that a reasonable person considering all the circumstances would find the conduct unwelcome and the environment hostile and that the complainant viewed them as such.”



# Hostile Environment Considerations from the 2001 Guidance

Consider, on the totality of the circumstances, various objective and subjective factors, e.g.:

- Extent to which conduct affected education or employment
- Type, frequency and duration of the conduct
- Relationship between the parties
- Number of people involved
- Context in which conduct occurred



# Type, Frequency, and Duration

- Severe, persistent or pervasive standard
- More severe the conduct, less need to show repetitive series of incidents
  - Single, severe incident may be sufficient, on the totality of the circumstances (e.g., penetration, exposure of genitalia, recording of sexual activity or nudity)
  - The less severe the conduct, the more the need to show a repetitive series of incidents; this is particularly true if the conduct is verbal
- Pattern or practice of harassment
- Sustained and nontrivial
- Generally more than isolated/casual incident



# Context

From OCR's 2001 Sexual Harassment Guidance:

- Consider power dynamics if applicable, e.g., employee vs. a student
- Harassing conduct in a personal or secluded area, such as a dormitory room or residence hall, can have a greater effect (e.g., be seen as more threatening) than would similar conduct in a more public area
- On the other hand, harassing conduct in public may be more humiliating
- Each incident must be judged individually



# Context, cont.: Considering a Series of Incidents

From OCR’s 2001 Sexual Harassment Guidance (p. 7, footnotes omitted): “Other incidents at the school. A series of incidents at the school, not involving the same students, could — taken together — create a hostile environment, even if each by itself would not be sufficient.”

While the ITIXSHP, based on the current Title IX regulations (2020), does not use the hostile environment concept, the same approach to “tak[ing] together” a “series of incidents” can be applied as appropriate, under that policy’s standard for sexual harassment; see, e.g., Preamble p. 30353: “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.”

“Incidents of gender-based, but nonsexual harassment. Acts of verbal, nonverbal or physical aggression, intimidation or hostility based on sex, but not involving sexual activity or language, can be combined with incidents of sexual harassment to determine if the incidents of sexual harassment are sufficiently serious to create a sexually hostile environment.” [Not necessary, post-*Bostock*, under the ITIXSHP and IOSMP, in which sexual harassment explicitly includes that based on sexual orientation and gender identity.]





# S&GBHP: What is Unwelcome Conduct?

- Did not request or invite conduct AND
- Regarded conduct as undesirable or offensive
  - Participating in sexual conduct at one time doesn't mean it's welcome at another time
  - Welcoming some sexual conduct doesn't mean other sexual conduct is welcome
  - Absence of "no" does not mean "yes."



# S&GBHP: Determining if Conduct is Unwelcome

Whether conduct is unwelcome is determined based on the **totality of circumstances**, including various objective and subjective factors (see also FAQ #4). The following types of information may be helpful in making that determination (see also 2001 Guidance, p. 9):

- statements by any witnesses to the alleged incident;
- information about the relative credibility of the parties and witnesses;
- the detail and consistency of each person's account;
- the absence of corroborating information where it should logically exist;



## S&GBHP: Determining if Conduct is Unwelcome, cont.

- Information that the Respondent has been **found** to have harassed others;
- Information that the Complainant has been **found** to have made false allegations against others;
- Information about each party's reaction or behavior after the alleged incident; and
- Information about any actions the parties took immediately following the incident, including reporting the matter to others.



# S&GBHP: Determining if Conduct is Unwelcome, cont., FAQ #5

FAQ #5: *“Does a person have to indicate that sexual conduct is unwelcome?”*

“Not necessarily. Whether conduct is deemed unwelcome depends on the context in which it occurred and must be determined based on the totality of the circumstances. Acquiescence in the conduct or the absence of an objection does not always mean that the conduct was welcome. On the other hand, if a party responds positively to sexual conduct, without indicating by statement or conduct that he or she objects, then the evidence will often not support a conclusion that the sexual conduct was unwelcome.”



# S&GBHP: Types of Unwelcome Conduct of a Sexual Nature

- Sexual violence, including sexual assault
- Observing, photographing, videotaping, or making other visual or auditory records of sexual activity or nudity, where there is a reasonable expectation of privacy, without the knowledge and consent of all parties
- Sharing visual or auditory records of sexual activity or nudity without the knowledge and consent of all recorded parties and recipient(s)
- Sexual advances, whether or not they involve physical touching
- Commenting about or inappropriately touching an individual's body
- Requests for sexual favors in exchange for actual or promised job benefits, such as favorable reviews, salary increases, promotions, increased benefits, or continued employment
- Lewd or sexually suggestive comments, jokes, innuendoes, or gestures
- Stalking
- Other verbal, nonverbal, graphic, or physical conduct



# ITIXSHP and IOSMP: Consent

Conduct is unwelcome if a person did not consent to it. Consent is agreement, assent, approval or permission given voluntarily and may be communicated verbally or by actions. That a person welcomes some sexual contact does not necessarily mean that person welcomes other sexual contact. Similarly, that a person willingly participates in conduct on one occasion does not necessarily mean that the same conduct is welcome on a subsequent occasion.

In addition, when a person is incapacitated, meaning so impaired as to be incapable of giving consent, conduct of a sexual nature is deemed unwelcome, provided that the Respondent knew or reasonably should have known of the person's incapacity. The person may be incapacitated as a result of drugs or alcohol or for some other reason, such as sleep or unconsciousness. A Respondent's impairment at the time of the incident as a result of drugs or alcohol does not, however, diminish the Respondent's responsibility for [sexual harassment/other sexual misconduct, as applicable] under this Policy.



# Procedures for the IOSMP: Evidence for Determining if Conduct is Unwelcome, Etc.

In gathering and weighing evidence, the Investigative Team will consider both whether a reasonable person considering all the circumstances would find the conduct unwelcome and, when applicable, the environment hostile and whether the complainant viewed them as such. The following types of information may be helpful in making that determination, while avoiding prejudgment of the facts at issue: an objective evaluation of all relevant evidence – including both inculpatory (tending to support that the alleged conduct occurred) and exculpatory (not tending to support that the alleged conduct occurred) evidence; statements by any witnesses to the alleged incident; information about the relative credibility of the parties and witnesses, so long as credibility determinations are not based on a person’s status as a complainant, respondent, or witness; the detail, consistency, and plausibility of each person’s account; the absence of corroborating information where it should logically exist; information that the Respondent has been found to have committed sexual misconduct or harassment; information that the Complainant has been found to have made false allegations against others; information about the parties’ reaction or behavior after the alleged incident; and information about any actions the parties took immediately following the incident, including reporting the matter to others.



# Sexual Harassment Analysis: ITIXSHP

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# The ITIXSHP Does Not Use the “Hostile Environment” Concept

- Unwelcome conduct on the basis of sex, including sexual orientation and gender identity
- Determined by a reasonable person to be so severe, persistent AND objectively offensive that it
- Effectively denies a person equal access to the University’s education or work programs or activities



# The Current Title IX Regulations (2020) and the *Davis* Standard

Preamble, p. 30032: The U.S. Supreme Court in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999) (“*Davis*”) “crafted a definition of when sex-based conduct becomes actionable sexual harassment, defining the conduct as ‘so severe, pervasive, and objectively offensive’ that it denies its victims equal access to education.”

Preamble, p. 30033: “Including the *Davis* definition of sexual harassment for Title IX purposes as ‘severe, pervasive, and objectively offensive’ conduct that effectively denies a person equal educational access helps ensure that Title IX is enforced consistent with the First Amendment. At the same time, the Department adapts the *Davis* definition of sexual harassment in these final regulations by also expressly including *quid pro quo* harassment and [the four] Clery Act/VAWA sex offenses [sexual assault, dating violence, domestic violence, and stalking].”



# The Current Title IX Regulations (2020) and the *Davis* Standard, cont.

Preamble, pp. 30033: “This expanded definition of sexual harassment ensures that *quid pro quo* harassment and Clery Act/VAWA sex offenses [sexual assault, dating violence, domestic violence, and stalking] trigger a recipient’s response obligations, without needing to be evaluated for severity, pervasiveness, offensiveness, or denial of equal access, because prohibiting such conduct presents no First Amendment concerns and such serious misconduct causes denial of equal educational access[.]”



# The Current Title IX Regulations (2020) and the *Davis* Standard, cont.

Preamble, p. 30142: “The Department assumes that a victim of *quid pro quo* sexual harassment or the [four] sex offenses included in the Clery Act, as amended by VAWA, has been effectively denied equal access to education. The § 106.30 definition captures categories of misconduct likely to impede educational access while avoiding a chill on free speech and academic freedom. [. . . *Q*]uid pro quo harassment and the four Clery Act/VAWA offenses constitute *per se* actionable sexual harassment, while the ‘catch-all’ *Davis* formulation that covers [for example] purely verbal harassment also requires a level of severity, pervasiveness, and objective offensiveness. The ‘catch-all’ *Davis* formulation is a narrowly tailored standard to ensure that speech and expression are prohibited only when their seriousness and impact avoid First Amendment concerns” (footnote omitted).



# ITIXSHP: Objective/Reasonable Person Perspective, Subjective Perspective

7-2021 OCR Q&As, item 8, indicates in relevant part: “The preamble [(pp. 30169-30170)] explains that to determine whether a person has been effectively denied equal access to a school’s education program or activity, a school must evaluate ‘whether a reasonable person in the complainant’s position would be effectively denied *equal* access to education compared to a similarly situated person who is not suffering the alleged sexual harassment’ [(emphasis in the original). . . . Some examples may include] skipping class to avoid a harasser, a decline in a student’s grade point average, or having difficulty concentrating in class[. . . . However,] ‘[n]o concrete injury is required’ to prove an effective denial of equal access.”



# ITIXSHP: Objective/Reasonable Person Perspective, Subjective Perspective, Intent

Preamble, p. 30091, fn. 437: “[The current Title IX regulations (2020) do] not impose an independent intent [. . .] requirement on conduct that constitutes sexual harassment; however, the Department notes that the sexual offense of ‘fondling,’ which is an offense under ‘sexual assault’ as defined under the Clery Act [see Appendix A of the ITIXSHP], includes as an element of fondling touching ‘for the purpose of sexual gratification.’ Courts have interpreted similar ‘purpose of’ elements in sex offense legislation as an intent requirement, and recipients should take care to apply that intent requirement to incidents of alleged fondling so that, for example, unwanted touching [. . .] – with no sexualized intent or purpose – is distinguished from Title IX sexual harassment and can be addressed by a recipient outside these final regulations.”



# ITIXSHP: Objective/Reasonable Person Perspective, Subjective Perspective, Intent, cont.

Preamble, p. 30167: “The Department believes that a benefit of the *Davis* standard as formulated in the [current Title IX regulations (2020)] is that whether harassment is actionable turns on both subjectivity (i.e., whether the conduct is unwelcome, according to the complainant) and objectivity (i.e., ‘objectively offensive’) with the *Davis* elements determined under a reasonable person standard, thereby retaining a similar ‘both subjective and objective’ analytic approach that commenters point out is used in the 2001 Guidance. [. . .] The *Davis* standard does not require an ‘intent’ element; unwelcome conduct so severe, pervasive, and objectively offensive that it denies a person equal educational opportunity is actionable sexual harassment regardless of the respondent’s intent to cause harm.”



# Procedures for the ITIXSHP: Evidence for Determining if Conduct is Unwelcome, etc.

In gathering and weighing evidence, the Investigative Team and the Hearing Panel will note that whether conduct is unwelcome is subjective, that is, based on whether the person subject to the conduct viewed it as unwelcome. However, in making determinations as to whether consent was communicated by the person subject to the conduct, and as to the elements of severity, pervasiveness, objective offensiveness, and denial of equal access, consideration should be given not only to the subjective perspective of the person subject to the conduct, but also to the objective view of a reasonable person, based on the totality of the circumstances.





# Procedures for the ITIXSHP: Evidence for Determining if Conduct is Unwelcome, etc., cont.

The following types of information may be helpful in making that determination, while avoiding prejudgment of the facts at issue: an objective evaluation of all relevant evidence – including both inculpatory (tending to support that the alleged conduct occurred) and exculpatory (not tending to support that the alleged conduct occurred) evidence; statements by any witnesses to the alleged incident; information about the relative credibility of the parties and witnesses, so long as credibility determinations are not based on a person’s status as a complainant, respondent, or witness; the detail, consistency, and plausibility of each person’s account; the absence of corroborating information where it should logically exist; information that the Respondent has been found to have committed sexual misconduct or harassment; information that the Complainant has been found to have made false allegations against others; information about the parties’ reaction or behavior after the alleged incident; and information about any actions the parties took immediately following the incident, including reporting the matter to others.



# Procedures for the ITIXSHP: Relevance

- When identifying potential witnesses, the parties should understand that the purpose of interviews is to gather and assess **relevant**\* information about the incident(s) at issue in the formal complaint.
- The Investigative Team will provide the Complainant and the Respondent, and their advisors, if any, with the investigative report, in an electronic format or hard copy, which will include recommended findings of fact on a preponderance of the evidence[.] [(Per § 106.45(b)(5)(vii) of the current Title IX regulations (2020), the Investigative Team will “[c]reate an investigative report that fairly summarizes **relevant** evidence[.]”)]

\***Emphasis** added.



# Procedures for the ITIXSHP: Relevance, cont.

- At the live hearing, the Hearing Panel will permit each party’s personal advisor, to ask the other party and any witnesses **relevant** questions and follow-up questions, including those challenging credibility. [Per § 106.45(b)(6)(i), “Only **relevant** cross- examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the [Hearing Panel] must first determine whether the question is **relevant** and explain any decision to exclude a question as **not relevant.**”]
- 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. [See also § 106.45(b)(6)(i) of the current Title IX regulations (2020).]



# Procedures for the ITIXSHP: Relevance, cont.

OCR on August 24, 2021, issued a [Letter to Students, Educators, and Other Stakeholders Victims Rights Law Center et al. v. Cardona \(PDF\)](#) in response to the decision of the federal district court in *Victim Rights Law Center et al. v. Cardona*, No. 1:20-cv-11104, 2021 WL 3185743 (D. Mass. July 28, 2021), in which OCR noted in relevant part:

The court upheld most of the provisions of the 2020 [Title IX regulations] that the plaintiffs challenged, but it found one part of 34 C.F.R. § 106.45(b)(6)(i) (live hearing requirement for the Title IX grievance process at postsecondary institutions only) to be arbitrary and capricious, vacated that part of the provision, and remanded it to the Department for further consideration. In a subsequent order issued on August 10, 2021, the court clarified that its decision applied nationwide. The court vacated the part of 34 C.F.R. § 106.45(b)(6)(i) that prohibits a decision-maker from relying on statements that are not subject to cross-examination during the hearing: “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...” Please note that all other provisions in the 2020 [Title IX regulations], including all other parts of 34 C.F.R. § 106.45(b)(6)(i), remain in effect.

OCR further indicated:

In accordance with the court’s order, the Department will immediately cease enforcement of the part of § 106.45(b)(6)(i) regarding the prohibition against statements not subject to cross-examination. Postsecondary institutions are no longer subject to this portion of the provision. [(Continued on next slide.)]



# Procedures for the ITIXSHP: Relevance, cont.

[(Continued from previous slide:)] In practical terms, a decision-maker at a postsecondary institution may now consider statements made by parties or witnesses that are otherwise permitted under the regulations, even if those parties or witnesses do not participate in cross-examination at the live hearing, in reaching a determination regarding responsibility in a Title IX grievance process.

For example, a decision-maker at a postsecondary institution may now consider statements made by the parties and witnesses during the investigation, emails or text exchanges between the parties leading up to the alleged sexual harassment, and statements about the alleged sexual harassment that satisfy the regulation's relevance rules, regardless of whether the parties or witnesses submit to cross-examination at the live hearing. A decision-maker at a postsecondary institution may also consider police reports, Sexual Assault Nurse Examiner documents, medical reports, and other documents even if those documents contain statements of a party or witness who is not cross-examined at the live hearing.

The Office for Civil Rights is in the process of identifying all documents on our website that discuss this vacated provision and will make updates to those documents as appropriate in the coming weeks. Any statements in an OCR document about the vacated part of § 106.45(b)(6)(i) should not be relied upon. [(“OCR’s 08-24-21 Letter”)]

Accordingly, the procedures for the ITIXSHP were updated to remove the following language: “If a party or witness does not submit to cross-examination at the live hearing, the Hearing Panel must not rely on any statement of that party or witness, in reaching a determination regarding responsibility.”



# Procedures for the ITIXSHP: Relevance, cont.

Preamble, p. 30343: “Requiring the [Hearing Panel] to explain **relevance** decisions during the hearing only reinforces the [Hearing Panel’s] responsibility to accurately determine relevance, including the irrelevance of information barred under the rape shield language.”

Preamble, p. 30349: “[E]ven where a respondent fails to appear for a hearing, the [Hearing Panel] may still consider the **relevant** evidence [. . .] and reach a determination regarding responsibility[.]” See procedures for the ITIXSHP: “The Hearing Panel 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.”



# Procedures for the ITIXSHP: Relevance, cont.

Preamble, p. 30321: “The Department does not believe that determinations about whether certain questions or evidence are **relevant** or directly related to the allegations at issue requires legal training and that such factual determinations reasonably can be made by layperson recipient officials impartially applying logic and common sense. The Department believes that recipients are capable of, and committed to, controlling a hearing environment to keep the proceeding focused on relevant evidence and ensuring that participants are treated respectfully[.]”



# Procedures for the ITIXSHP: Relevance, cont.

- The Hearing Panel will issue a determination regarding responsibility, applying a preponderance of the evidence standard and making a decision by majority vote.

Preamble, p. 30308: “The Department does not wish to prohibit the [Investigative Team] from including recommended findings or conclusions in the investigative report. However, the [Hearing Panel] is under an independent obligation to objectively evaluate **relevant** evidence, and thus cannot simply defer to recommendations made by the [Investigative Team] in the investigative report.”





# ITIXSHP: Evidence: Relevance

Preamble, p. 30247, fn. 1018: “The final regulations do not define **relevance**, and the ordinary meaning of the word should be understood and applied.”

As for “ordinary meaning,” the *Merriam-Webster* online dictionary, for example, defines “relevant” as “having significant and demonstrable bearing on the matter at hand” and “affording evidence tending to prove or disprove the matter at issue or under discussion” (<https://www.merriam-webster.com/dictionary/relevant>, accessed April 13, 2022).



# ITIXSHP: Evidence: Relevance, cont.

Preamble, p. 30248: “**Relevance** is the standard that these final regulations require, and any evidentiary rules that a recipient chooses must respect this standard of **relevance**. 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 may adopt rules of order or decorum [for hearings] to forbid [a party’s personal advisor] badgering a witness, and may fairly deem repetition of the same question to be **irrelevant**.”



# ITIXSHP: Evidence: Relevance, cont.

Preamble, p. 30294: “[The current Title IX regulations (2020) do] not prescribe rules governing how admissible, **relevant** evidence must be evaluated for weight or credibility by a recipient’s [Hearing Panel], and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with § 106.45 and apply equally to both parties. [. . .] A recipient may, for example, adopt a rule regarding the weight or credibility (but not the admissibility) that a [Hearing Panel] should assign to evidence of a party’s prior bad acts, so long as such a rule applied equally to the prior bad acts of complainants and the prior bad acts of respondents. Because a recipient’s [Investigative Team] and [Hearing Panel] must be trained specifically with respect to ‘issues of **relevance**,’ any rules adopted by a recipient in this regard should be reflected in the recipient’s training materials, which must be publicly available” (emphasis added) (internal footnotes omitted).



# ITIXSHP: Evidence: Relevance, cont.

Preamble, p. 30294: “For example, a recipient may not adopt a rule excluding **relevant** evidence whose probative value is substantially outweighed by the danger of unfair prejudice[. . .] Similarly, a recipient may not adopt rules excluding certain types of **relevant** evidence (e.g., lie detector test results, or rape kits) where the type of evidence is not either deemed ‘not **relevant**’ (as is, for instance, evidence concerning a complainant’s prior sexual history) or otherwise barred from use under § 106.45 (as is, for instance, information protected by a legally recognized privilege). However [. . .] **relevant** evidence must be evaluated for weight or credibility by a recipient’s [Hearing Panel], and recipients [. . .] have discretion [. . .] in that regard[.]”



# Regarding the ITIXSHP: Evidence: Relevance: Assigning Minimal Weight to Certain Evidence

- Information regarding prior misconduct by either party, or a witness, that is otherwise **relevant**, but that was not supported by a finding resulting from a formal, impartial investigative process, will be given minimal (i.e., the least possible) weight by the Investigative Team (in its recommended findings of fact) and the Hearing Panel
- Information regarding the character of either party, or a witness, that is otherwise **relevant**, will be given minimal weight by the Investigative Team (in its recommended findings of fact) and the Hearing Panel; sexual history evidence that is being offered to show an individual's character is not relevant and will not be considered as evidence
- Information from lie detector tests or similar taken by either party, or any witness, that is otherwise **relevant**, will be given minimal weight by the Investigative Team (in its recommended findings of fact) and the Hearing Panel



# ITIXSHP: Evidence: Relevance, cont.

Preamble, p. 30247: “[§ 106.45(b)(ii), which ‘[r]equire[s] an objective evaluation of all relevant evidence] does not require ‘objective’ evidence (as in, corroborating evidence); this provision requires that the recipient objectively evaluate the relevant evidence that is available in a particular case.”

Preamble, p. 30371: “[T]he [Investigative Team] must impartially gather all **relevant** evidence including party and witness statements, and the [Hearing Panel] must assess the **relevant** evidence, including party and witness credibility, to decide if the recipient has met a burden of proof showing the respondent to be responsible for the alleged sexual harassment.”

Preamble, p. 30384: “[T]he outcome [(i.e., the ‘determination regarding responsibility’ by the Hearing Panel)] reflects the weight and persuasiveness of the available, **relevant** evidence in the case.”



# ITIXSHP: Evidence: Not Relevant: Privilege

Consistent with § 106.45(b)(1)(x) of the current Title IX regulations (2020), the Investigative Team and the Hearing Panel must “[n]ot 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.”



# ITIXSHP: Evidence: Not Relevant: Privilege, cont.

Consistent with § 106.45(b)(5)(i) of the current Title IX regulations (2020), the Investigative Team and the Hearing Panel “cannot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party’s voluntary, written consent to do so[.]”





# Procedures for the ITIXSHP: Directly Related

Prior to the conclusion of the investigation, the Investigative Team will provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is **directly related\*** to the allegations raised in a formal complaint, including evidence upon which the Investigative Team does not intend to rely in reaching a determination regarding responsibility, and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party has the opportunity to respond to the evidence prior to conclusion of the investigation. Prior to completion of the investigative report, the Investigative Team will send to each party and the party's advisor (i.e., personal advisor), if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties will have up to 10 business days to submit a written response, which the Investigative Team will consider prior to completion of the investigative report. [. . .] The Hearing Panel must make all evidence gathered by the Investigative Team [. . .] available at the hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.

\***Emphasis** added.



# Procedures for the ITIXSHP: Directly Related, cont.

Preamble, p. 30248, fn. 1021: “The Department notes that the universe of evidence given to the parties for inspection and review under § 106.45(b)(5)(vi) must consist of all evidence **directly related** to the allegations; determinations as to whether evidence is ‘relevant’ are made when finalizing the investigative report, pursuant to § 106.45(b)(5)(vii) (requiring creation of an investigative report that ‘fairly summarizes all relevant evidence’). Only ‘relevant’ evidence can be subject to the [Hearing Panel’s] objective evaluation in reaching a determination[.]”

Preamble, p. 30248: “The [Investigative Team] is obligated to gather evidence **directly related** to the allegations whether or not the recipient intends to rely on such evidence (for instance, where evidence is **directly related** to the allegations but the [Investigative Team] does not believe the evidence to be credible and thus does not intend to rely on it)”; p. 30432: “[The Investigative Team] will need to review all the evidence obtained as part of the investigation and determine what evidence is **directly related** to the allegations raised in a formal complaint.”



# Procedures for the ITIXSHP: Directly Related, cont.

Preamble, p. 30304: “With regard to the sharing of confidential information, a recipient may permit or require the [Investigative Team] to redact information that is not **directly related** to the allegations (or that is otherwise barred from use under § 106.45, such as information protected by a legally recognized privilege, or a party’s treatment records if the party has not given written consent) contained within documents or other evidence that are **directly related** to the allegations, before sending the evidence to the parties for inspection and review”; p. 30428: “If some of the information in [provided] medical records is not **directly related** to the allegations raised in a formal complaint, then these final regulations do not require a recipient to share the information that is not **directly related** to the allegations raised in the formal complaint.”

Preamble, p. 30432: “The *only* evidence that a recipient should be providing [for inspection and review by the parties] is evidence that is **directly related** to the allegations raised in a formal complaint” (emphasis added).



# ITIXSHP: Evidence: Directly Related: Weighing

The parties must have an equal opportunity to inspect, review, and respond to evidence **directly related** to the allegations (see § 106.45(b)(5)(vi)), and an equal opportunity to review and respond to the recipient's investigative report (see § 106.45(b)(5)(vii)), allows each party the opportunity to provide input and make arguments about the relevance of evidence and how a [Hearing Panel] should weigh the evidence.



# ITIXSHP: Evidence: Directly Related: Weighing, cont.

In the Preamble at p. 30303, the Department states that the [current Title IX regulations (2020)]:

... balance[] the recipient’s obligation to impartially gather and objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence, with the parties’ equal right to participate in furthering each party’s own interests by identifying evidence overlooked by the [Investigative Team] and evidence the [Investigative Team] erroneously deemed relevant or irrelevant and making arguments to the [Hearing Panel] regarding the relevance of evidence and the weight or credibility of relevant evidence.

Note that Sections 106.45(b)(5)(vi) and (vii) require the recipient to “send to each party and the party’s advisor, if any” the evidence and the investigative report, so that a party’s advisor can advise the party in exercising the party’s right to review and respond to the evidence and to the investigative report.



# ITIXSHP: Evidence: Directly Related

Preamble, p. 30304: “The Department declines to define certain terms in this provision such as [. . .] ‘evidence **directly related** to the allegations,’ as these terms should be interpreted using their plain and ordinary meaning.”

As for “ordinary meaning,” the *Merriam-Webster* online dictionary, for example, defines “direct” as “characterized by [a] close logical, causal, or consequential relationship” and “related” as “connected by reason of an established or discoverable relation,” with “relation” defined as “an aspect or quality (such as resemblance) that connects two or more things or parts as being or belonging or working together or as being of the same kind” (<https://www.merriam-webster.com/dictionary>, accessed April 15, 2022).



# ITIXSHP: Evidence: Directly Related, cont.

Preamble, p. 30311: “[W]e acknowledge that ‘**directly related** to the allegations’ *may* encompass a broader universe of evidence than evidence that is ‘relevant,’ and believe that it is most beneficial for the parties’ access to evidence to be limited by what is **directly related** to the allegations, but for the [Investigative Team] to determine what is relevant after the parties have reviewed that evidence” (emphasis added).

Preamble, p. 30434: “The Department [. . .] acknowledges that recipients have discretion to determine what constitutes evidence **directly related** to the allegations in a formal complaint”; p. 30437: “[T]hese final regulations do not require a recipient to share any information in records obtained as part of an investigation that is not **directly related** to the allegations in a formal complaint[.]”



# ITIXSHP: Evidence: Directly Related, cont.: Rape Shield Protections

Preamble, p. 30353 – 30354: “The final regulations clarify the rape shield language to state that questions and evidence subject to the rape shield protections are ‘not relevant,’ and therefore the rape shield protections apply wherever the issue is whether evidence is relevant or not. As noted above, this means that where § 106.45(b)(5)(vi) requires review and inspection of evidence ‘**directly related** to the allegations’ that universe of evidence is not screened for relevance, but rather is measured by whether it is ‘**directly related** to the allegations.’ However, the investigative report must summarize “relevant” evidence, and thus at that point the rape shield protections would apply to preclude inclusion in the investigative report of irrelevant evidence”; p. 30428: “If a recipient obtains evidence about a party’s sexual predisposition or prior sexual behavior that is **directly related** to the allegations raised in a formal complaint, the recipient should allow both parties an equal opportunity to inspect and review such evidence to be able to prepare to respond to it or object to its introduction in the investigative report or at the hearing.”





# Academic Freedom and Principles of Free Speech

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# S&GBHP, ITIXSHP, and IOSMP: Academic Freedom and Free Speech

From the S&GBHP, ITIXSHP, and IOSMP: “Nothing in this Policy shall be construed to abridge academic freedom and inquiry, principles of free speech, or the University’s educational mission.”



# S&GBHP\*: FAQs Concerning Academic Freedom and Freedom of Expression

## FAQ #14: *Does Harvard prohibit all offensive speech regarding sex and gender?*

No. For harassing speech to create a hostile environment, it must be so severe, pervasive, or persistent that it will deny or limit a student's ability to participate in or benefit from the University's educational or employment programs or opportunities. While Harvard is committed to non-discrimination and condemns derogatory speech, it is also committed to academic freedom and freedom of expression and encourages members of the University community to engage in open and spirited debate, to contribute to intellectual exchanges, and to participate fully in the life of the University. The University expects its students, faculty, and other community members to recognize the importance to others of expressing their views in an uninhibited manner. The University also recognizes the interest in free speech in private settings, such as private conversations and residential spaces, and the Policy would apply in such settings only if the harassing effect of the speech were so severe, persistent, or pervasive as to create a hostile environment.

\* The content of these FAQs is relevant for cases under the IOSMP, as well as, aside from reference to the "hostile environment" standard, the ITIXSHP.



# S&GBHP: FAQs Concerning Academic Freedom and Freedom of Expression, cont.

FAQ #15: *Does the University Policy apply to comments made in the classroom or other statements made in coursework, such as in papers or exams?*

The Policy specifically states it shall not be construed to apply “to abridge academic freedom and inquiry, principles of free speech, or the University’s educational mission.” The University encourages freedom of inquiry and construes the Policy to give ample room for the exchange of ideas in the educational setting, even if those ideas might be controversial or even offensive to some. Speech that is germane to coursework is not prohibited by the Policy. In the classroom or coursework setting, speech that does not have a legitimate educational purpose could fall within the Policy.



# S&GBHP: FAQs Concerning Academic Freedom and Freedom of Expression, cont.

*FAQ #16: How does Harvard determine whether offensive speech creates a hostile environment?*

The University assesses the effect of the speech on the environment from the perspective of an objective, reasonable person, bearing in mind that the University encourages free and uninhibited speech and inquiry. The appropriateness of the speech may vary depending on the circumstances. For example, where academically relevant, a professor or a student may discuss sexually provocative or offensive material in class. By contrast, discussion of such material might not be appropriate where it has no relevance to the particular setting or is inappropriately directed at a particular individual.



# S&GBHP: FAQs Concerning Academic Freedom and Freedom of Expression, cont.

*FAQ #17: Does Harvard's commitment to free speech extend to all of its activities?*

Yes. Free speech interests are particularly heightened in the classroom, and in other education programs and activities, including public meetings and talks, cultural and artistic events, and newspapers and publications that are integral to the University's educational mission.



# OCR Dear Colleague Letter: First Amendment

OCR, in a Dear Colleague Letter dated July 28, 2003, provided in relevant part: Some colleges and universities have interpreted OCR's prohibition of “harassment” as encompassing all offensive speech regarding sex, disability, race or other classifications. Harassment, however, to be prohibited by the statutes within OCR's jurisdiction, must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive. Under OCR's standard, the conduct must also be considered sufficiently serious to deny or limit a student's ability to participate in or benefit from the educational program. Thus, OCR's standards require that the conduct be evaluated from the perspective of a reasonable person in the alleged victim’s position, considering all the circumstances, including the alleged victim’s age.



# OCR Dear Colleague Letter: First Amendment, cont.

OCR, in a Dear Colleague Letter dated July 28, 2003, provided in relevant part, cont.:

There has been some confusion arising from the fact that OCR's regulations are enforced against private institutions that receive federal-funds. Because the First Amendment normally does not bind private institutions, some have erroneously assumed that OCR's regulations apply to private federal-funds recipients without the constitutional limitations imposed on public institutions. OCR's regulations should not be interpreted in ways that would lead to the suppression of protected speech on public or private campuses. Any private post-secondary institution that chooses to limit free speech in ways that are more restrictive than at public educational institutions does so on its own accord and not based on requirements imposed by OCR.





# Current Title IX Regulations (2020): First Amendment

§ 106.6(d)(1): “*Constitutional protections*. Nothing in this [regulation] requires a recipient to [. . . r]estrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution[.]”

§ 106.44(a): “*General response to sexual harassment*. [. . .] The Department may not deem a recipient to have satisfied the recipient’s duty to not be deliberately indifferent under this part based on the recipient’s restriction of rights protected under the U.S. Constitution, including the First Amendment[.]”

§ 106.71(b)(1) [Retaliation]: *Specific circumstances*. [. . .] The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under paragraph (a) of this section.”



# Current Title IX Regulations (2020): Freedom of Expression and Actionable Harassment

- Refer to discussion of the “*Davis* formulation” earlier in this training.

Preamble, p. 30144: “[W]e have revised §106.30 defining ‘sexual harassment’ to expressly state that the *Davis* elements of severity, pervasiveness, objective offensiveness, and effective denial of equal access, are evaluated from the perspective of a ‘reasonable person,’ so that the complainant’s individualized reaction to sexual harassment is not the focus when a recipient is identifying and responding to Title IX sexual harassment incidents or allegations.”

Preamble, p. 30150: “In the higher education context [. . .] students and faculty must be able to discuss sexual issues even if that offends some people who hear the discussion.”



# Current Title IX Regulations (2020): Freedom of Expression and Actionable Harassment, cont.

Preamble, p. 30152: “The other elements in § 106.30 (severe, pervasive, and objectively offensive) provide a standard of evaluation [. . .] ensuring that conduct addressed as a Title IX civil rights issue represents serious conduct unprotected by the First Amendment or principles of free speech and academic freedom.”

Preamble, p. 30154: “The Department believes, however, that severity and pervasiveness are needed elements to ensure that Title IX’s non-discrimination mandate does not punish verbal conduct in a manner that chills and restricts speech and academic freedom, and that recipients are not held responsible for controlling every stray, offensive remark that passes between members of the recipient’s community.”



# Current Title IX Regulations (2020): Freedom of Expression and Actionable Harassment, cont.

Preamble, p. 30154: “A course of unwelcome conduct directed at a victim to keep the victim fearful or silenced likely crosses over into ‘severe, pervasive, and objectively offensive’ conduct actionable under Title IX.”

Preamble, p. 30155, fn. 680: “[T]he principles of free speech, and of academic freedom, are crucial in the context of both public and private institutions.”

Preamble, pp. 30159-30161: “The Department further believes that § 106.30 appropriately recognizes certain forms of harassment as *per se* sex discrimination (i.e., *quid pro quo* and [sexual assault, dating violence, domestic violence, and stalking]), while adopting the *Davis* definition for other types of harassment such that free speech and academic freedom are not chilled or curtailed by an overly broad definition of sexual harassment” (footnotes omitted); p. 30160: “[T]he Supreme Court has cautioned that while [. . .] Title IX [. . .] prohibit[s] sex discrimination, [. . .] it is [not] designed to become a general civility code” (footnote omitted).



# Considering Complaints Involving Academic Freedom and Freedom of Expression

## Complaints on teaching methods

- Is there a relationship between the teaching method and a valid educational objective?
- Is the speech relevant to the course content?
- Does the speech have an educational purpose?
- Consider context of speech and manner of presentation—appropriate as part of a university lecture?

The Investigative Team and the Hearing Panel, as applicable, would rely on, e.g., expert input from relevant (i.e., similarly situated) faculty member witnesses with no involvement in the matter at issue.



# A Brief Look Back at Today's Key Topics: The Basics: Policies

- Assessing Potential Violations of the 3 Policies: S&GBHP, ITIXSHP, IOSMP
- Jurisdiction: University Program or Activity
- What is Sexual Harassment? Other Sexual Misconduct?
- Hostile Environment Analysis: S&GBHP and IOSMP
- Consent: ITIXSHP and IOSMP
- Sexual Harassment Analysis: ITIXSHP
- Evidence that is Relevant or Directly Related; Weighing: ITIXSHP
- Academic Freedom and Freedom of Expression



# Prompt and Equitable Investigations and, as Applicable, Hearings

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# Prompt and Equitable Investigations and, as Applicable, Hearings: Goals

- Working knowledge of the procedures for the Sexual and Gender-Based Harassment Policy (S&GBHP), the Interim Title IX Sexual Harassment Policy (ITIXSHP), and the Interim Other Sexual Misconduct Policy (IOSMP).
- How the relevant procedures ensure prompt investigations and, as applicable, hearings
- How the relevant procedures ensure equitable investigations and, as applicable, hearings





# Prompt and Equitable Investigations and, as Applicable, Hearings: Key Topics

- Avoiding conflict of interest or bias
- Informal resolution
- Initial review, administrative closure/dismissal, investigation
- Party requests for extension of investigative and hearing timeframes
- Relevant OCR guidance, regulations, and commentary regarding prompt and equitable investigations and hearings
- The hearing process



# The Policies: Prompt and Equitable

**S&GBHP:** “It is the policy of the University to provide . . . prompt and equitable methods of investigation[.]”

**ITIXSHP:** “It is the policy of the University to provide . . . prompt and equitable methods of resolution.”

**IOSMP:** “It is the policy of the University to respond promptly and equitably to allegations of other sexual misconduct.”



# Prompt and Equitable: Avoiding Conflict of Interest or Bias

The *Merriam-Webster* online dictionary defines “equitable” as “having or exhibiting equity: dealing fairly and equally with all concerned[.]” In ensuring an equitable process, the procedures for the ITIXSHP, consistent with the current Title IX regulations (2020), include two provisions regarding “conflict of interest or bias,” with these terms having the ordinary meaning, respectively, of “a conflict between the private interests and the official responsibilities of a person in a position of trust” and “a personal and sometimes unreasoned judgment” (<https://www.merriam-webster.com/dictionary>, accessed February 11, 2022).

The two provisions are as follows:

- “Any individual designated as a University Title IX Coordinator or a School or unit Title IX Resource Coordinator, investigator, School designee, hearing panelist, appellate panelist, or any person designated to facilitate an informal resolution process will not have a conflict of interest or bias for or against complainants or respondents generally or an individual Complainant or Respondent in a case to which they are assigned.”
- Failing to adhere to the provision above is one of four grounds for appeal.



# Prompt and Equitable: Avoiding Conflict of Interest or Bias, cont.

Preamble, p. 30050: “In the words of the [late] Honorable Ruth Bader Ginsburg, Associate Justice, discussing [. . .] the search for balance between sex equality and due process, ‘It’s not one or the other. It’s both. We have a system of justice where people who are accused get due process, so it’s just applying to this field what we have applied generally’” (footnote omitted).

Preamble, p. 30103: “Section 106.45 [Grievance process for formal complaints of sexual harassment] is premised on the principle that an accurate resolution of each allegation of sexual harassment requires objective evaluation of all relevant evidence without bias and without prejudgment of the facts. Under § 106.45, neither complainants nor respondents are automatically or prematurely believed or disbelieved, until and unless credibility determinations are made as part of the grievance process.”



# Prompt and Equitable: Avoiding Conflict of Interest or Bias, cont.

Preamble, p. 30121, fn. 540: “*Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 573 (D. Mass. 2016) (“Whether someone is a “victim” is a conclusion to be reached at the end of a fair process, not an assumption to be made at the beginning.’).”

Preamble, p. 30247: “A process that permitted credibility inferences or conclusions to be based on party status would inevitably prejudice the facts at issue rather than determine facts based on the objective evaluation of evidence, and this would decrease the likelihood that the outcome reached would be accurate.”



# Prompt and Equitable: Avoiding Conflict of Interest or Bias, cont.

Preamble, p. 30252: “Whether bias exists requires examination of the particular facts of a situation and the Department encourages recipients to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased, exercising caution not to apply generalizations that might unreasonably conclude that bias exists (for example, assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents), bearing in mind that the very training required by § 106.45(b)(1)(iii) is intended to provide Title IX personnel with the tools needed to serve impartially and without bias such that the prior professional experience of a person whom a recipient would like to have in a Title IX role need not disqualify the person from obtaining the requisite training to serve impartially in a Title IX role.”



# Prompt and Equitable: Avoiding Conflict of Interest or Bias, cont.

Preamble, p. 30254: “[T]he Department declines to require recipients to adopt the ‘Start by Believing’ approach [. . .] and cautions that a training approach that encourages Title IX personnel to ‘believe’ one party or the other would fail to comply with the requirement that Title IX personnel be trained to serve impartially [. . .] violat[ing] § 106.45(b)(1)(ii) precluding credibility determinations based on a party’s status as a complainant or respondent. The Department takes no position on whether ‘start by believing’ should be an approach adopted by non-Title IX personnel affiliated with a recipient, such as counselors[. . .]. The Department wishes to emphasize that parties should be treated with equal dignity and respect by Title IX personnel, but doing so does not mean that either party is automatically ‘believed.’ The credibility of any party, as well as ultimate conclusions about responsibility for sexual harassment, must not be prejudged and must be based on objective evaluation of the relevant evidence in a particular case; for this reason, the Department cautions against training materials that promote the application of ‘profiles’ or ‘predictive behaviors’ to particular cases.”



# Prompt and Equitable: Avoiding Conflict of Interest or Bias, cont.

Preamble, p. 30276: “[W]e believe that both respondents and complainants face potentially life-altering consequences from the outcomes of Title IX proceedings. Both parties have a strong interest in accurate determinations regarding responsibility[.]”

Preamble, p. 30292: “Title IX proceedings [. . .] are inherently adversarial, often involving competing plausible narratives and high stakes for both parties, and recipients are obligated to identify and address sexual harassment that occurs in the recipient’s education program or activity. The final regulations do not require a recipient to take an adversarial posture with respect to either party, and in fact require impartiality.”

Preamble, p. 30432: “A Title IX Coordinator should not encourage or discourage a party from submitting evidence[.]”





# Requests for Informal Resolution

Under the procedures for each of the S&GBHP and the IOSMP, an “Initiating Party” may make a request for informal resolution either without filing a formal complaint or after a formal complaint has been opened for investigation and before the final report has been provided to the parties; under the procedures for the ITIXSHP, informal resolution, consistent with § 106.45(b)(9) of the current Title IX regulations (2020), can be requested *only* after a formal complaint has been opened for investigation and before the determination regarding responsibility has been provided to the parties.

Preamble, p. 30098, fn. 463: “Informal resolution may only be offered after a formal complaint has been filed, so that the parties understand what the grievance process entails and can decide whether to voluntarily attempt informal resolution as an alternative” (emphasis in the original).



# Requests for Informal Resolution, cont.

Under the procedures for the ITIXSHP, consistent with § 106.45(b)(9)(iii) of the current Title IX regulations (2020), an informal resolution process cannot be used to resolve allegations that an employee (e.g., staff or faculty) sexually harassed a student.

Preamble, p. 30401: “[T]he Department is persuaded [. . .] that it may be too difficult to ensure that mediation or other informal resolution is truly voluntary on the part of students who report being sexually harassed by a recipient’s employee, due to the power differential and potential for undue influence or pressure exerted by an employee over a student.”



# Requests for Informal Resolution, cont.

The approval process for requests for informal resolution, as well as for draft agreements by the parties if applicable, and the way the process will be facilitated and by whom, are set forth in plain language in the applicable procedures for each of the three policies. Timelines are also specified.

A request for informal resolution will not, in any event, be considered for approval unless the alleged conduct, if true, would violate the applicable policy.



# Requests for Informal Resolution: Notice

- Consistent with the current Title IX regulations (2020), the procedures for the ITIXSHP are prescriptive as to notice to the parties:

“The Investigator [the ‘Facilitating Investigator’], or other University officer facilitating the informal resolution process, will: (1) provide the parties with a written notice disclosing the allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the investigative or hearing process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared; and (2) obtain the parties’ voluntary, written consent to the informal resolution process.”



# Requests for Informal Resolution: Practices and Expectations

ODR's routine practices and expectations regarding Informal Resolution include, but are not limited to, the following:

- The Facilitating Investigator serves as an impartial facilitator between the parties.
- The Facilitating Investigator describes the informal resolution process to the parties.
- The Facilitating Investigator establishes a constructive tone and encourages the parties to work expeditiously and in good faith toward a mutually acceptable resolution, within procedural timeframes.
- The parties are never expected to communicate directly with each other during informal resolution, unless both choose to do so (to date, this has been quite rare).



# Requests for Informal Resolution: Practices and Expectations, cont.

ODR's routine practices and expectations regarding Informal Resolution include, but are not limited to, the following, cont.:

- As needed, the Facilitating Investigator can answer questions from the parties about the pertinent Policy standards and related procedures.
- The Facilitating Investigator can provide information to the parties regarding possible actions they may consider in working toward a resolution, including, e.g., describing approaches used in previous successful informal resolution processes addressing similar facts.
- The parties are expected to participate in the informal resolution process in good faith, consider offers or suggestions with an open mind, work constructively toward a mutually acceptable resolution, and, if the process is successful, implement any agreement in good faith.



# Requests for Informal Resolution: Agreement Terms

ODR's routine practices and expectations regarding Informal Resolution include, but are not limited to, the following, cont.:

- Final agreement terms must be of a nature readily monitored (i.e., should a dispute as to compliance arise) by the relevant School or unit Title IX Resource Coordinator(s) without investigation.
- Final agreement terms must have a reasonable time limit, because the University's ability to monitor terms may be limited when a party has either graduated from or is no longer employed by the University.



# Requests for Informal Resolution: Agreement Terms, cont.

ODR's routine practices and expectations regarding Informal Resolution include, but are not limited to, the following, cont.:

- Final agreement terms cannot refer to legal, policy, or similar concepts and procedures outside of the scope of the relevant policy and procedures.
- Final agreement terms cannot include an actual or de facto “admission” of a policy violation; that is not the purpose of the *informal* resolution process.
- The Facilitating Investigator will assist, as appropriate, in reducing any resolution to writing.
- A successful agreement resolves the matter at issue and the parties agree that neither party can file or refile (as applicable) a complaint based on the same circumstances.





# Requests for Informal Resolution: Practices and Expectations, cont.

ODR's routine practices and expectations regarding Informal Resolution include, but are not limited to, the following, cont.:

- A failure by one party to honor the terms of the agreement as determined by, e.g., the relevant Title IX Resource Coordinator in consultation with the Director of ODR, would allow for filing of a complaint by the other party, if otherwise consistent with the relevant policy and procedures; there is no other remedy for such a breach.
- In order to maintain the integrity of the informal resolution process apart from ODR's investigation or the Hearing Panel's hearing, as applicable, any information from the informal resolution process, other than regarding its commencement and outcome, will not be shared by the Facilitating Investigator with the Investigative Team or the Hearing Panel.



# Requests for Informal Resolution: Practices and Expectations, cont.

ODR's routine practices and expectations regarding Informal Resolution include, but are not limited to, the following, cont.:

- The parties will be informed by the Facilitating Investigator that if informal resolution is unsuccessful and (as applicable) a matter returns to the Investigative Team for further investigation or the Hearing Panel for hearing, the parties may not offer, nor will the Investigative Team or Hearing Panel rely on, any information regarding the informal resolution process.
- The parties are subject to the confidentiality and retaliation provisions of the applicable policy. ODR notes, moreover, that it is common for successful agreements to include language prohibiting the parties from, e.g., further discussing the matter that was at issue, which would logically include any reference to the informal resolution process.



# Initial Review

- Reference the appropriate procedures for the three policies, based on the University affiliation of the Respondent, including for information on personal advisors
- Outreach to Complainant or to Reporter and potential Complainant (S&GBHP, IOSMP)
- Outreach to Complainant after the parties are notified in writing of the allegation(s) (ITIXSHP)
- Efforts to gather a more complete understanding of the allegation(s), as well as any related conduct that may implicate the relevant policy
- Determine whether the information, if true, would constitute a violation of the relevant policy such that an investigation is warranted or whether the information warrants an administrative closure (S&GBHP)



# ITIXSHP and IOSMP: Initial Review: Grounds for Mandatory or Discretionary Dismissal

- Consideration of grounds for dismissal, both mandatory (even if true, not a policy violation) or discretionary (Complainant request to withdraw, Respondent no longer a student/employee of University, circumstances preventing gathering sufficient evidence) in consultation with School or unit (ITIXSHP, IOSMP); Preamble, p. 30472: “These final regulations do not recognize a response specifically for an ‘informal complaint’ of sexual harassment.”
- ODR will not investigate a new formal complaint already adjudicated or informally resolved based on the same circumstances (IOSMP, S&GBHP), or may dismiss on this basis (ITIXSHP); Preamble, p. 30214, fn. 939: “When a formal complaint contains allegations that are precisely the same as allegations the recipient has already investigated and adjudicated, that circumstance could justify the recipient exercising discretion to dismiss those allegations, under § 106.45(b)(3)(ii).”



# Initial Review: Consolidation, Anonymity, Timing

- May generally consolidate allegations under the IOSMP with those under the ITIXSHP as appropriate
- “***Request for Anonymity***[:] Complainants who want to file a formal complaint cannot remain anonymous or prevent their identity from being disclosed to the Respondent (via the written notice of allegations).” (ITIXSHP, IOSMP; see procedures for S&GBHP for assessment of such requests under that policy.)
- Ordinarily, initial review concluded within one week of the date the complaint was received



# Respondent Notification and Response

“Following the decision to begin an investigation, the Investigative Team will notify the Respondent in writing of the allegations and will provide a copy of the Policy and these procedures. The Respondent will have one week in which to submit a written statement in response to the allegations.” Reference the relevant procedures for details. The Investigative Team coordinates with the relevant School or unit on how to best provide notice to the Respondent (or in the case of the ITIXSHP, notice to the prospective Respondent when the Complaint comes in and then notice to the Respondent if proceeding to investigation).



# Interviews and Collection of Information

- “The Investigative Team will request individual interviews with the Complainant and the Respondent, and, as appropriate, with other witnesses . . .” (under the procedures implementing the IOSMP, as appropriate, the “Reporter serving as a party to the complaint” may be interviewed).
- “When identifying potential witnesses, the parties should understand that the purpose of interviews is to gather and assess information about the incident(s) at issue in the [‘formal’] complaint, not to solicit general information about a party’s character” (S&GBHP, IOSMP; minimal weight is given to character evidence provided under the ITXSHP).
- “If, in the course of an investigation, the Investigative Team decides to investigate allegations not included in the written notice to the parties described herein, the Investigative Team will provide notice of the additional allegations to the parties whose identities are known” (ITIXSHP, IOSMP; also a routine practice under the procedures implementing the S&GBHP).



# Interviews and Collection of Information: No Reliance without Notice

Preamble, p. 30287, fn. 1142: The Department notes that a recipient's questioning of a respondent (whether a student or employee) about a reported sexual harassment incident, in the absence of a formal complaint, may not be used as part of an investigation or adjudication if a formal complaint is later filed by the complainant or signed by the Title IX Coordinator, because § 106.45(b)(5)(v) requires that a party be given written notice of any interview or meeting relating to the allegations under investigation, and a recipient is precluded from imposing disciplinary sanctions on a respondent without following the § 106.45 grievance process.





# Prompt and Equitable Investigations: Party Requests for Extensions

Extensions of time: ODR will consider requests for extensions of time for good cause, but only where the extension request is made by a party (not, e.g., a personal advisor and/or an attorney), a specific timeframe is requested that is as short as possible based on the circumstances, and a specific reason is given that ODR can verify. ODR notifies each party of extensions granted for the other, and ensures parity, i.e., where applicable, granting the extension as to both.



# Prompt and Equitable Investigations: Party Requests for Extensions, cont.

Preamble, p. 30269: “[E]ven where good cause exists, the final regulations make clear that recipients may only delay the grievance process on a temporary basis for a limited time.”

Preamble, p. 30271: “Prescribing that any delay or extension must be for good cause, and must be temporary and limited in duration, ensures that no grievance process is open-ended and that parties receive a reasonably prompt resolution of each formal complaint.”

Preamble, p. 30280: “The Department notes that § 106.45(b)(1)(v) addressing the recipient’s designated, reasonably prompt time frames contemplates good cause temporary delays and limited extensions of time frames only *after* the parties have received the initial written notice of allegations under § 106.45(b)(2), such that[, for example,] concurrent law enforcement activity is not good cause to delay sending the written notice itself” (emphasis in the original).



# S&GBHP & IOSMP: Prompt and Equitable Investigations: Review of Evidence

“After the collection of additional information is complete but prior to the conclusion of the investigation, the Investigative Team will request individual follow-up interviews with the Complainant (or the Reporter, if applicable [under the IOSMP]) and the Respondent [commonly referred to as the ‘review of evidence’ interviews] to give each the opportunity to respond to the additional information” (IOSMP, S&GBHP).



# ITIXSHP: Prompt and Equitable Investigations: Review of Evidence

“Prior to the conclusion of the investigation, the Investigative Team will provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related [see discussion above] to the allegations raised in a formal complaint, including evidence upon which the Investigative Team does not intend to rely in reaching a determination regarding responsibility, and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party has the opportunity to respond to the evidence prior to conclusion of the investigation. Prior to completion of the investigative report, the Investigative Team will send to each party and the party’s advisor (i.e., personal advisor), if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties will have up to 10 business days to submit a written response, which the Investigative Team will consider prior to completion of the investigative report” (ITIXSHP; instead of “review of evidence” interviews as under the other two policies, the Investigative Team may interview or otherwise reach out to each party to ask questions that may have arisen based on information gathered during the investigation).



# S&GBHP\*: Party Involvement and Information Sharing, FAQs # 24 and #25

FAQ #24: *“Will both parties be involved in each stage of the ODR process once an investigation has been opened?”*

“Yes. Under the University Policy and University Procedures, both parties are afforded an equal opportunity to participate in the investigation and appeal. Both parties are likewise afforded an equal opportunity to participate in the disciplinary processes of the individual Schools or Units.”

FAQ #25: *“Will both parties have access to the materials that ODR uses in reaching its conclusions?”*

“Yes. During the course of the investigation, both the complainant and the respondent will have the opportunity to respond to all information used by the Investigative Team in reaching its conclusions. They will also have the opportunity to provide the Investigative Team with any additional information that they have. This information, like other information received from the complainant and respondent during the investigatory process, will be shared with the other. In addition, each party will have the opportunity to review and comment on the draft investigative report, and the Investigative Team will evaluate the comments before issuing a final report.”

\* The content of these FAQs is also relevant for cases under the IOSMP, and in relevant part under the ITIXSHP.



# S&GBHP: Prompt and Equitable Investigations: Draft and Final Report

“At the conclusion of the investigation, the Investigative Team will make findings of fact, applying a preponderance of the evidence standard, and determine based on those findings of fact whether there was a violation of the Policy. The Investigative Team will provide the Complainant and the Respondent with a written draft of the findings of fact and analysis and will give both parties one week to submit a written response to the draft. The Investigative Team will consider any written responses before finalizing these sections of the report and the final section of the report, which [in the case of a violation finding] will outline any recommended measures to be taken by the School [or unit] to eliminate any harassment, prevent its recurrence, and address its effects.” (See procedures for additional details.)



# S&GBHP: Prompt and Equitable Investigations: Draft and Final Report, cont.

“The investigation will be completed and the final report provided to the Complainant, the Respondent, the School Title IX Resource Coordinator, and the appropriate officer in the School or unit, ordinarily within six weeks of receipt of the complaint. The administration of discipline in cases involving students is subject to the authority of the faculty; thus, as appropriate, having received the report, the School separately will consider the imposition of discipline through its own processes and notify the parties as appropriate. For cases involving faculty, staff, other Harvard appointees, or third parties that have been investigated by the ODR [. . .], the imposition of sanctions will be considered separately by the appropriate officials at the School or unit through their relevant policies.”



# S&GBHP: OCR September 2017 Q&A on Campus Sexual Misconduct\*

- The burden is on the school—not on the parties—to gather sufficient evidence to reach a fair, impartial determination
- An equitable investigation of a Title IX **complaint requires a trained investigator** to analyze and document the available evidence to support reliable decisions, objectively evaluate the credibility of parties and witnesses, synthesize all available evidence—including both **inculpatory** [e.g., tending to support that the Respondent engaged in the alleged conduct] and **exculpatory** [e.g., not tending to support that the Respondent engaged in the alleged conduct] **evidence**—and take into account the unique and complex circumstances of each case
- \*Per p. 30552 of the Preamble, the “2017 Q&A” was one of the “baseline[s] against which the Department promulgate[d] the [new Title IX] regulations.”





# S&GBHP: OCR September 2017 Q&A on Campus Sexual Misconduct: Investigative Timeframes

## Question 5:

What time frame constitutes a “prompt” investigation?

## Answer:

There is no fixed time frame under which a school must complete a Title IX investigation. OCR will evaluate a school’s good faith effort to conduct a fair, impartial investigation in a timely manner designed to provide all parties with resolution.



# IOSMP: Prompt and Equitable Investigations: Draft and Final Report

“At the conclusion of the investigation, the Investigative Team will make findings of fact, applying a preponderance of the evidence standard, and determine based on those findings of fact whether there was a violation of the Policy. The Investigative Team will provide the Complainant (or the Reporter, if applicable) and the Respondent with a written draft of the findings of fact and analysis and will give both parties five business days to submit a written response to the draft. The appropriate School or unit Title IX Resource Coordinator and the University Title IX Coordinator will be provided with the draft investigative report for informational purposes. The Investigative Team will consider any written responses from the parties before finalizing the report.”



# IOSMP: Prompt and Equitable Investigations: Draft and Final Report, cont.

“The investigation will be completed and the final report provided to the Complainant (or the Reporter, if applicable), the Respondent, the School Title IX Coordinator, and the appropriate officer in the School or unit, ordinarily within 75 business days of receipt of the formal complaint. The administration of discipline in cases involving students is subject to the authority of the faculty; thus, as appropriate, having received the report, the School separately will consider the imposition of discipline through its own processes and notify the parties as appropriate. Schools may impose a range of sanctions on students found to have violated the Policy, ranging from an admonition or warning up to and including dismissal or expulsion.” (See relevant procedures for information on discipline of non-students.)



# IOSMP: Prompt and Equitable Investigations: Draft and Final Report, cont.

“The Investigative Team may impose reasonable timeframes to enable the timely completion of a proceeding. Timeframes for all phases of a proceeding apply to all parties equally. There may be circumstances requiring longer timeframes. Timeframes may be extended, for example, in the interest of the integrity and completeness of the initial review and investigation, to accommodate witness availability, or to comply with requests by or not to prejudice investigations or processes of external law enforcement, or for other legitimate reasons, including the complexity of the investigation and the severity or extent of alleged misconduct. The Investigative Team will notify the parties of any extensions of timeframes.”



# ITIXSHP: Prompt and Equitable Investigations: Final Investigative Report

“At least 10 business days prior to a hearing [. . .]:

“\* the Investigative Team will provide the Complainant and the Respondent, and their advisors, if any, with the investigative report, in an electronic format or hard copy, which will include recommended findings of fact on a preponderance of the evidence, and will give both parties five business days to submit a written response; and

“\* the appropriate School or unit Title IX Resource Coordinator and the University Title IX Coordinator will be provided with the investigative report for informational purposes.”



# ITIXSHP: Prompt and Equitable Hearings: Written Determination

“The Hearing Panel will issue a determination regarding responsibility, applying a preponderance of the evidence standard and making a decision by majority vote. The determination regarding responsibility will include a description of the procedural steps taken; findings of fact supporting the determination regarding responsibility; conclusions regarding the application of the Policy to the facts, as well as application of the Interim Other Sexual Misconduct Policy to the facts, as appropriate, such as for allegations consolidated as described in Section II.D above; a statement of, and rationale for, the result as to each allegation, including any disciplinary sanctions the School may impose on the Respondent if applicable, and whether remedies designed to restore or preserve equal access to the University’s education program or activity will be provided to the Complainant; and the procedures and permissible bases for the parties to appeal. The School Title IX Resource Coordinator is responsible for effective implementation of any remedies.”



# ITIXSHP: Prompt and Equitable Investigations and Hearings: Timeframes

- “The initial review, investigation, hearing, and determination regarding responsibility, including the outcome of any remedies process, will be completed and the final determination regarding responsibility provided to the Complainant, the Respondent, the University Title IX Coordinator, the School Title IX Resource Coordinator, and the appropriate officer in the School or unit, ordinarily within 90 business days of receipt of the formal complaint. The Investigative Team or the Hearing Panel, as applicable, may impose reasonable timeframes to enable the timely completion of a proceeding. Timeframes for all phases of a proceeding apply to all parties equally. There may be circumstances requiring longer timeframes. Timeframes may be extended, for example, in the interest of the integrity and completeness of the initial review, investigation, hearing, and any remedies process, to accommodate witness availability, or to comply with requests by or not to prejudice investigations or processes of external law enforcement, or for other legitimate reasons, including the complexity of the investigation and the severity or extent of alleged misconduct.”
- “The Investigative Team or the Hearing Panel, as applicable, will notify the parties of any extensions of timeframes.”



# ITIXSHP: Investigative Timeframes: The Current Title IX Regulations (2020)

§ 106.45(b)(1)(v), Basic requirements for grievance process: “Include reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes, and a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party’s advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities[.]”





# ITIXSHP: Investigative Timeframes: The Current Title IX Regulations (2020), cont.

Preamble, p. 30247: “The Department disagrees that [the regulations] could permit endlessly delayed proceedings while parties or the recipient search for ‘all’ relevant evidence; § 106.45(b)(1)(v) requires recipients to conclude the grievance process within designated reasonable time frames and thus ‘all’ the evidence is tempered by what a thorough investigation effort can gather within a reasonably prompt time frame.”

Preamble, p. 30292: “The Department believes that the [regulations] appropriately obligate[] a recipient to undertake a thorough search for relevant facts and evidence pertaining to a particular case, while operating under the constraints of conducting and concluding the investigation under designated, reasonably prompt time frames and without powers of subpoena. Such conditions limit the extensiveness or comprehensiveness of a recipient’s efforts to gather evidence while reasonably expecting the recipient to gather evidence that is available.”



# The Hearing Process for the ITIXSHP

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# The Hearing Process for the ITIXSHP

Review the procedures for the ITIXSHP, which set forth the hearing process in detail. Some highlights:

- Hearing Panel (or the “Panel”) composition: two persons from a list of trained administrators and faculty, one from a list of external attorneys
- Panel determines the conduct of the live hearing, e.g., rules of decorum, reasonable time limitations; formal rules of evidence will not apply
- Each party’s advisor permitted to ask other party and witnesses relevant questions (“cross-examination” or “cross”); if no party advisor present, Panel must provide (but chosen by relevant School or the Office for Gender Equity)
- Rely only on documents submitted during the investigation (and again made available at the hearing to the parties), except at Panel discretion if new information not reasonably available at time of investigation and deemed highly relevant to determination



# The Hearing Process for the ITIXSHP, cont.

Review the procedures for the ITIXSHP, which set forth the hearing process in detail. Some highlights, cont.:

- Certain questions and evidence are not relevant except in specific circumstances
- Panel cannot draw negative inference based solely on party or witness exercising agency not to submit to cross-examination (see also discussion of OCR's 08-24-21 Letter in slides 60-61 above)
- Flexibility as to whether hearings, and attendees, all in same geographic location, virtual, or a combination thereof; if in person, parties by request entitled to be located in separate rooms with technology allowing full participation; hearing will be recorded or transcribed and made available for party inspection and review



# The Hearing Process for the ITIXSHP, cont.

Review the “Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021)” (the “July 2021 OCR Q&As”); items 38-55 are of particular relevance to the hearing process (except as modified by OCR’s 08-24-21 Letter; see slides 60-61 above). Some highlights:

Item 39: At a live hearing, “each party’s advisor [must be permitted to] to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.”

Item 46: During cross-examination [. . .], “only relevant cross-examination questions and other questions may be asked of a party or witness” and the [Panel] must determine the relevance of a question before a party or a witness answers.



# The Hearing Process for the ITIXSHP, cont.

Review the July 2021 OCR Q & As; items 38-55 are of particular relevance to the hearing process (except as modified by OCR's 08-24-21 Letter; see slides 60-61 above). Some highlights, cont.:

Item 50: The [current Title IX regulations (2020)] do not require that answers to cross-examination questions “be in linear or sequential formats” or that any party “must recall details with certain levels of specificity.”

Item 51: The [Panel] also may not draw any inference from a decision of a party or witness not to participate at the hearing, including not to submit to cross-examination [(citing to 34 C.F.R. § 106.45(b)(6)(i) of the regulations)]. This means, for example, that the [Panel] may not make any decisions about a party's credibility based on their decision not to participate in a hearing or submit to cross-examination.



# The Hearing Process for the ITIXSHP, cont.

OCR’s “Questions and Answers Regarding the Department’s Final Title IX Rule” (September 4, 2020) indicated the following regarding sanctioning, and this information was not contradicted by any information in the July 2021 OCR Q & A:

Item 15: “The [regulation] does not preclude a recipient from using [the Panel] to reach the determination regarding responsibility, and having another decision-maker determine appropriate remedies [f]or a complainant or appropriate disciplinary sanctions for the respondent. However, the end result must be that the written determination regarding responsibility includes the remedies and disciplinary sanctions decided upon in the written determination [. . .] The issuance of a written determination cannot be a piecemeal process that is broken down into chronologically occurring sub-parts. [. . .] Recipients should also remain aware of their obligation to conclude the grievance process within the reasonably prompt time frames designated in the recipient’s grievance process [. . .].”



# The Hearing Process for the ITIXSHP, cont.

Preamble, p. 30316: “[R]ecipients retain discretion under the final regulations to educate a recipient’s community about what cross- examination during a Title IX grievance process will look like, including developing rules and practices (that apply equally to both parties) to oversee cross-examination to ensure that questioning is relevant, respectful, and non-abusive” (footnote omitted).

Preamble, p. 30319: “The Department purposefully designed these final regulations to allow recipients to retain flexibility to adopt rules of decorum that prohibit any party advisor or [Hearing Panel] from questioning witnesses in an abusive, intimidating, or disrespectful manner.”





# The Hearing Process for the ITIXSHP, cont.

Preamble, p. 30332: “The Department disagrees that cross-examination at a live hearing means that a complainant’s case will be contingent on the effectiveness of the complainant’s advisor. Because cross-examination questions and answers, as well all relevant evidence, is evaluated by a [Hearing Panel] trained to be impartial, the professional qualifications of a party’s advisor do not determine the outcome.”

Preamble, p. 30341: “Claims by a party, for instance, that a recipient failed to provide ‘effective assistance of counsel’ would not be entertained by the Department because this provision does not require that advisors be lawyers providing legal counsel nor does this provision impose an expectation of skill, qualifications, or competence. An advisor’s cross-examination ‘on behalf of that party’ is satisfied where the advisor poses questions on a party’s behalf, which means that an assigned advisor could relay a party’s own questions to the other party or witness, and no particular skill or qualification is needed to perform that role.”



# The Hearing Process for the ITIXSHP, cont.

Preamble, p. 30342: “The Department declines to require training for assigned advisors because the goal of this provision is not to make parties ‘feel adequately represented’ but rather to ensure that the parties have the opportunity for their own view of the case to be probed in front of the [Panel]. Whether a party views an advisor of choice as ‘representing’ the party during a live hearing or not, this provision only requires recipients to permit advisor participation on the party’s behalf *to conduct cross-examination*; not to ‘represent’ the party at the live hearing” (emphasis in the original).

Preamble, p. 30343: “[A]n explanation [from the Hearing Panel, in real time] of how or why the question was irrelevant to the allegations at issue, or is deemed irrelevant by these final regulations (for example, in the case of sexual predisposition or prior sexual behavior information) provides transparency for the parties to understand a [Panel’s] relevance determinations.”



# The Hearing Process for the ITIXSHP, cont.

Preamble, p. 30343: “The final regulations do not preclude a recipient from adopting a rule (applied equally to both parties) that does, or does not, give parties or advisors the right to discuss the relevance determination with the [Panel] during the hearing. If a recipient believes that arguments about a relevance determination during a hearing would unnecessarily protract the hearing or become uncomfortable for parties, the recipient may adopt a rule that prevents parties and advisors from challenging the relevance determination (after receiving the [Panel’s] explanation) during the hearing.”

Preamble, p. 30343: “Th[e regulations] do[] not require [the Panel] to give a lengthy or complicated explanation; it is sufficient, for example, for [the Panel] to explain that a question is irrelevant because the question calls for prior sexual behavior information without meeting one of the two exceptions, or because the question asks about a detail that is not probative of any material fact concerning the allegations. No lengthy or complicated exposition is required to satisfy this provision. Accordingly, the Department does not believe this requirement will ‘bog down’ the hearing.”



# The Hearing Process for the ITIXSHP, cont.

Preamble, p. 30346: “[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[.]”

Preamble, p. 30349: “If a party or witness disagrees with a [Panel’s] determination that a question is relevant, during the hearing, the party or witness’s choice is to abide by the [Panel’s] determination and answer, or refuse to answer the question[.]”

(see also discussion of OCR’s 08-24-21 Letter in slides 60-61 above)



# The Hearing Process for the ITIXSHP, cont.

Preamble, p. 30354: “The Department notes that the rape shield language does not limit the ‘if offered to prove consent’ exception to when the question or evidence is offered *by the respondent*. Rather, such questions or evidence could be offered by either party, or by the investigator, or solicited on the [Panel’s] own initiative” (emphasis in the original).



# The Hearing Process for the ITIXSHP, cont.

Preamble, p. 30393: “[The regulations] state[] that the [Panel] ‘must issue a written determination regarding responsibility’ but does not require that written determination to be issued *at the hearing*. The Department notes that the time frame for when the [Panel] should issue the written determination will be governed by the recipient’s designated, reasonably prompt time frames [. . .]” (emphasis in the original).



# A Brief Look Back at Today's Key Topics: Prompt and Equitable Investigations and, as Applicable, Hearings

- Avoiding conflict of interest or bias
- Informal resolution
- Initial review, administrative closure/dismissal, investigation
- Party requests for extension of investigative and hearing timeframes
- Relevant OCR guidance, regulations, and commentary regarding prompt and equitable investigations and hearings
- The hearing process



# Retaliation, Not in Good Faith, False or Misleading

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# Retaliation, Not in Good Faith, False or Misleading: Agenda

- Review the University Policies regarding these areas of concern
- Review the current Title IX regulations (2020) regarding these areas of concern
- Review the five-prong retaliation analysis
- Review the analysis for claims re not in good faith/false or misleading



# Sexual and Gender-Based Harassment Policy (S&GBHP): Retaliation

“Retaliation against an individual for raising an allegation of sexual or gender-based harassment, for cooperating in an investigation of such complaint, or for opposing discriminatory practices is prohibited.” (See also the OCR 2001 Revised Sexual Harassment Guidance.)

Retaliation is a separate violation of the S&GBHP. ODR calls this provision to the attention of every party and witness at the beginning of each interview.



# Interim Other Sexual Misconduct Policy (IOSMP) and the Interim Title IX Sexual Harassment Policy (ITIXSHP): Retaliation

The IOSMP Provides: “Retaliation against an individual for making a report or complaint of sexual harassment, or for participating or refusing to participate in any proceeding regarding such a complaint, or for opposing discriminatory practices is prohibited.”

The ITIXSHP Provides: “Retaliation against an individual for making a report or complaint of sexual harassment, or for participating or refusing to participate in any proceeding regarding such a complaint, or for opposing discriminatory practices is prohibited by the Interim Other Sexual Misconduct Policy.”



# S&GBHP, IOSMP, and ITIXSHP: Not in Good Faith, False or Misleading

- S&GBHP: “Submitting a complaint that is not in good faith or providing false or misleading information in any investigation of complaints is also prohibited.”
- IOSMP: “Submitting a complaint that is not in good faith or providing materially false or misleading information in any such proceeding is also prohibited, provided that a determination regarding responsibility or lack of responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.”
- ITIXSHP: “Submitting a complaint that is not in good faith or providing false or misleading information in any investigation of complaints is also prohibited by the Interim Other Sexual Misconduct Policy.”



# Jurisdiction for Retaliation, Not in Good Faith, False or Misleading

Jurisdiction [i.e., it is the same as jurisdiction for the relevant policy; the language below applies to the S&GBHP:]

This Policy applies to sexual or gender-based harassment that is committed by students, faculty, staff, Harvard appointees, or third parties, whenever the misconduct occurs:

- On Harvard property; or
- Off Harvard property, if:
  - the conduct was in connection with a University or University-recognized program or activity; or
  - the conduct may have the effect of creating a hostile environment for a member of the University community.



# S&GBHP: Retaliation, Policy and Procedures FAQ #9

*“The University Policy prohibits retaliation not only against an individual raising an allegation but also against anyone cooperating in the investigation. What does that mean?”*

“The University Policy prohibits retaliation against persons who are cooperating with the investigatory process in any way, including the complainant, the respondent, and any witnesses [. . . .] Retaliation can take many forms, including dissemination of information in a manner intended to pressure or shame participants and witnesses in connection with the ODR process (such as, through social media) or to discourage participants or witnesses from assisting with that process.”



# Current Title IX Regulations (2020): Retaliation

## § 106.71 Retaliation.

(a) *Retaliation prohibited.* No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, 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 under this part. 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 this part, constitutes retaliation. [. . .]



# Current Title IX Regulations (2020): Retaliation, cont., and False Statement in Bad Faith

## § 106.71 Retaliation, cont.

(b) *Specific circumstances.* (1) The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under paragraph (a) of this section.

(2) Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.





# Preamble\* to the Current Title IX Regulations (2020): Materially False Statement in Bad Faith

- p. 30262, regarding § 106.71(b)(2) in the previous slide: “This provision acknowledges the reality that a complainant’s allegations may not have been false even where the ultimate determination is that the respondent is not responsible and/or that the complainant may not have acted subjectively in bad faith (and conversely, that a respondent may not have made false, or subjectively bad faith, denials even where the respondent is found responsible).”
- p. 30279: “[T]his ‘warning’ about making false statements applies equally to respondents, as to complainants.”
- p. 30279: “This emphasizes that the mere fact that the outcome was not favorable (which could turn on a decision-maker deciding that the party or a witness was not credible, or did not provide accurate information, or that there was insufficient evidence to meet the recipient’s burden of proof) is not sufficient to conclude that the party who ‘lost’ the case made a bad faith, materially false statement warranting punishment.”

\*See slide 6 above re the Preamble.



# Preamble to the Current Title IX Regulations (2020): Materially False Statement in Bad Faith, cont.

- p. 30537: “This regulatory provision is intended to permit [. . .] recipients to encourage truthfulness throughout the grievance process by reserving the right to charge and discipline a party for false statements made in bad faith, while cautioning recipients not to draw conclusions that any party made false statements in bad faith solely based on the outcome of the proceeding.”



# Current Title IX Regulations (2020): Written Notice, Not in Good Faith, False or Misleading

## § 106.45(b)(2) Notice of Allegations

(i) Upon receipt of a formal complaint, a recipient must provide the following written notice to the parties who are known: [. . .]

(B) [. . .] The written notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.



# What is Retaliation?

In determining whether retaliation has occurred, considering both objective and subjective factors on the totality of the circumstances, ODR examines five factors:

1. the complainant engaged in a protected activity – that is, exercised a right or took some action that is protected under the Policy;
2. the alleged retaliator had notice of the individual’s protected activity;
3. the alleged retaliator took a materially adverse action against the complainant;



# What is Retaliation, cont.

4. there is a causal connection between the protected activity and the adverse action.

*If any one of these elements is NOT established, then ODR will find insufficient evidence of a violation. If all the elements ARE established, then ODR will determine:*

5. the alleged retaliator has identified a legitimate, non-discriminatory reason for taking the adverse action. If so, ODR will determine whether this explanation (or any other reason it uncovers) is merely a pretext for retaliation.



# Elements of Retaliation: Protected Activity

Was Complainant engaged in a **protected activity**, prior to or contemporaneous with the time the allegedly retaliatory action occurred?

- Opposing discriminatory practices
  - If express opposition in a manner that, e.g., disrupts a program or activity, then not necessarily protected – determine case-by-case
  - Practice protested does not actually have to be in violation of the relevant Policy (reasonable good faith belief is enough)
- Making a report or complaint, participating or refusing to participate in an investigative process

Examples: party to an investigation, assisting another in filing a complaint, assisting in an investigation, or not (e.g., serve or refuse to serve as witness), refusal to participate in a discriminatory practice



# Elements of Retaliation: Notice and Adverse Action

- Notice: The party alleged to have retaliated must have **notice** of the protected activity.
- Was there a material **adverse action** against complainant?
  - An **adverse action** is one that is materially adverse, that is, one that would dissuade a reasonable person from, e.g., raising a concern under the relevant policy, making a report or complaint, or participating in/cooperating with an investigative process, or refusing to do so; this standard can be satisfied even if the individual was not in fact dissuaded – a context-specific analysis is needed
  - An **adverse action** must be significant rather than trivial. To constitute retaliation, the **adverse action** must go beyond the ordinary tribulations of education or work settings



# Elements of Retaliation: Causal Connection

**Causal connection** between protected activity and adverse action? Timing:

- When did adverse action occur? Must be after the protected activity. More time between protected activity and adverse action results in weaker presumption of a causal connection

Other ways to establish **causal connection**, e.g.:

- Complainant treated differently than others in similar situations who did not participate in the protected activity?
- Deviation from established practice?
- Peer-to-peer: subjective and objective evidence of what prompted the adverse action?
- And of course, direct evidence (i.e., sometimes the causal connection is readily evident)





# Elements of Retaliation: Legitimate, Nondiscriminatory Reason; Pretext

Any **legitimate, nondiscriminatory reason** for adverse action?

- Show objectively justifiable reason for the action
- Individual treated no differently than others; consistent with rules/policies/procedures/routine practices
- Individual retaliator did not have notice of complainant's protected activity

Was the nondiscriminatory reason a **pretext**?

- Show retaliatory motive more likely or nondiscriminatory reasons not credible



# Some Examples of Retaliation from the Preamble to the Current Title IX Regulations (2020)

- p. 30296, fn. 1161: “[A]buse of speech unprotected by the First Amendment [or similar provisions], when such speech amounts to intimidation, threats, or coercion for the purpose of chilling exercise of a person’s Title IX rights, is prohibited retaliation.”
- p. 30437: “Threatening to publicize or make a written determination public for the purpose of retaliation [. . .] is strictly prohibited under § 106.71 of these final regulations.”
- p. 30438: “[I]f confidential documents are used for retaliation as defined in § 106.71, then these final regulations would prohibit such retaliation.”
- p. 30536: “The Department acknowledges that persons other than complainants, such as witnesses may face retaliation, and seeks to prohibit retaliation in any form and against any person who participates (or refuses to participate) in a report or proceeding under Title IX and these final regulations.”



# Analysis of Not in Good Faith, False or Misleading

- Do the totality of the circumstances, both subjective and objective, indicate an intention to knowingly mislead, e.g., that the complaint allegation, and/or information provided in support of it, was willfully false, or do they indicate a reasonable, good faith belief in the allegation and/or the information provided to support it?
- In investigating such an allegation, ODR bears in mind that there may be reasonable explanations for, e.g., an unsubstantiated allegation other than a lack of good faith, including the complainant's sincerely held but incorrect belief that harassing conduct or other sexual misconduct occurred, and lack of sufficient evidence to prove an allegation that is nonetheless true.



# A Brief Look Back at Today's Agenda: Retaliation, Not in Good Faith, False or Misleading

- Review the University Policies regarding these areas of concern: Retaliation, Not in Good Faith, False or Misleading
- Review the current Title IX regulations (2020) regarding these areas of concern
- Review the five-prong retaliation analysis
- Review the analysis for claims re not in good faith/false or misleading



# Confidentiality in Investigations and Hearings

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# Confidentiality in Investigations and Hearings: Goals

- Regulations
- The Policies and the Procedures: Sexual & Gender-Based Harassment Policy (S&GBHP), Interim Title IX Sexual Harassment Policy (ITIXSHP), and Interim Other Sexual Misconduct Policy (IOSMP)
- The need for caution and vigilance in ODR investigations
- Reasonable steps to protect privacy



# Current Title IX Regulations (2020): Retaliation and Confidentiality

## § 106.71 Retaliation (in relevant part)

The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute [Family Educational Rights and Privacy Act . . .] or as required by law, or to carry out the purposes of [the Title IX regulations], including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.



# Procedures: S&GBHP, ITIXSHP, IOSMP

The “Confidentiality” language in the procedures for each policy is substantially similar. Example from the staff procedures for the ITIXSHP:

The ODR, the Hearing Panel, the Appellate Panel, personal advisors, and others at the University involved in or aware of the complaint will take reasonable steps to protect the privacy of all involved. Once a complaint is filed, the Complainant or Reporter, the Respondent, and any witnesses will be notified of the potential for compromising the integrity of the investigation by disclosing information about the case and the expectation that they therefore keep such information – including any documents they may receive or review – confidential. They also will be notified that sharing such information might compromise the investigation or may be construed as retaliatory. Retaliation of any kind is a separate violation of the Policy and may lead to an additional complaint and consequences. The parties remain free to share their own experiences, though to avoid the possibility of compromising the investigation, it is generally advisable to limit the number of people in whom they confide.





# Current Title IX Regulations (2020): Confidentiality and the Nature of Limits on the Parties

§ 106.45(b)(5)(iii): “*Investigation of a formal complaint*. When investigating a formal complaint and throughout the grievance process, a recipient must [. . . n]ot restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence[.]”

The Preamble to the current Title IX regulations (2020)

pp. 30295-30296:\* “The Department further notes that § 106.45(b)(5)(iii) is not unlimited in scope [. . . . It] does not [. . .] apply to discussion of information that does not consist of ‘the allegations under investigation’ (for example, evidence related to the allegations that has been collected and exchanged between the parties and their advisors during the investigation under § 106.45(b)(5)(vi), or the investigative report summarizing relevant evidence sent to the parties and their advisors under § 106.45(b)(5)(vii)).”

\*See slide 6 above re the Preamble.



# Current Title IX Regulations (2020): Confidentiality and the Nature of Limits on the Parties, cont.

Preamble, p. 30296: “The Department appreciates the opportunity to clarify that [§ 106.45(b)(5)(iii)] in no way immunizes a party from abusing the right to ‘discuss the allegations under investigation’ by, for example, discussing those allegations in a manner that exposes the party to liability for defamation or related privacy torts, or in a manner that constitutes [. . .] retaliation [under § 106.71].”



# Reasonable Steps to Protect Privacy: Caution and Vigilance

- Share information with others only on a “need to know” basis.
  - S&GBHP FAQ No. 38: Once a formal complaint is filed, ODR takes care to protect the privacy of those involved and share information only on a **“need-to-know” basis.**
- Tell interviewees that we will try to ensure that all aspects of the process will be kept as private as possible.
- Discuss with the Complainant and Respondent the kind of information likely to be disclosed for investigative purposes, to whom, and why.
  - S&GBHP FAQ No. 41: Information about the complaint, including the names of the people involved, is shared with witnesses **only to the extent necessary to gather information.**



# Party Access to Case Materials

S&GBHP FAQ No. 25: *“Will both parties have access to the materials that ODR uses in reaching its conclusions? Yes. During the course of the investigation, both the complainant and the respondent will have the opportunity to respond to all information used by the Investigative Team in reaching its conclusions. They will also have the opportunity to provide the Investigative Team with any additional information that they have. This information, like other information received from the complainant and respondent during the investigatory process, will be shared with the other. In addition, each party will have the opportunity to review and comment on the draft investigative report, and the Investigative Team will evaluate the comments before issuing a final report.”*

S&GBHP FAQ No. 43: *“Can ODR’s records be subpoenaed or obtained in lawsuits? Yes. If a lawsuit is brought, ODR’s records may have to be given to courts, lawyers, expert witnesses or others involved with the legal proceedings. ODR also may be required to release records to government agencies that are investigating the University’s compliance with state and/or federal law.”*



# Party Access to Case Materials, cont.

Preamble, p. 30304: “With regard to the sharing of confidential information, a recipient may permit or require the investigator to redact information that is not directly related to the allegations (or that is otherwise barred from use under § 106.45, such as information protected by a legally recognized privilege, or a party’s treatment records if the party has not given written consent) contained within documents or other evidence that are directly related to the allegations, before sending the evidence to the parties for inspection and review.”



# Current Title IX Regulations (2020): Recordkeeping

## § 106.45(b)(10)

(i) A recipient must maintain for a period of seven years records of – (A) Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required under paragraph (b)(6)(i) of this section, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient’s education program or activity; (B) Any appeal and the result therefrom; (C) Any informal resolution and the result therefrom; and (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.



# Privacy for Interviews and Hearings

## Some privacy-related goals:

- Interview in a location that ensures privacy, both visual and auditory.
- Schedule interviews so that interviewees do not cross paths.
- Only have in plain view documents that may be necessary to show the interviewee for investigative purposes.

Preamble, p. 30316: “[T]he Department notes that the live hearing is not a ‘public’ hearing, and the final regulations add §106.71 that requires recipients to keep party and witness identities confidential except as permitted by law and as needed to conduct an investigation or hearing.”



# Intoxication and Incapacitation

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# Language from the ITIXSHP\*

When a person is incapacitated, meaning so impaired as to be incapable of giving consent, conduct of a sexual nature is deemed unwelcome,

- provided that Respondent knew or reasonably should have known of the person's incapacity.
- The person may be incapacitated as a result of drugs or alcohol or for some other reason, such as sleep or unconsciousness.
- Respondent's impairment at the time of the incident as a result of drugs or alcohol does not, however, diminish their responsibility for sexual harassment under this Policy.

\* See also the relevant language in the IOSMP and the S&GBHP



# FAQs Regarding Incapacitation and Use of Drugs or Alcohol

- Is intoxication the same as incapacitation? No.
- Can a person request or invite sexual activity even after use of drugs or alcohol? Yes, unless they are incapacitated.
- How does someone know if a person is incapacitated? It varies widely.
  - Non-exhaustive list of signs that may indicate incapacity:
    - stumbling or difficulty maintaining balance, vomiting, inability to focus eyes, disorientation, unresponsiveness, inability to communicate coherently, and unconsciousness (See also S&GBHP, FAQs 6-8.)
    - Blackout does not necessarily = incapacitated.



# “Blackout Drunk”

- Does being “blackout drunk” mean one appears incapacitated to an objective observer? Not necessarily.
- “A blackout from intoxication is due to a brain malfunction. Your brain stops saving the things you do as memories. *You may act normal and do things like socialize, eat, drive, and drink.* But, your brain is impaired and does not record your memories during this time” (emphasis added). ([Blackouts and Fainting: Differences and Similarities \(webmd.com\)](#), accessed March 3, 2022.)



# Definition of One Drink

**12 oz Beer**  
at 5% alcohol



**5 oz Glass of Wine**  
at 12% alcohol



**1.5 oz Shot of Hard Liquor**  
at 40% alcohol or 80 proof

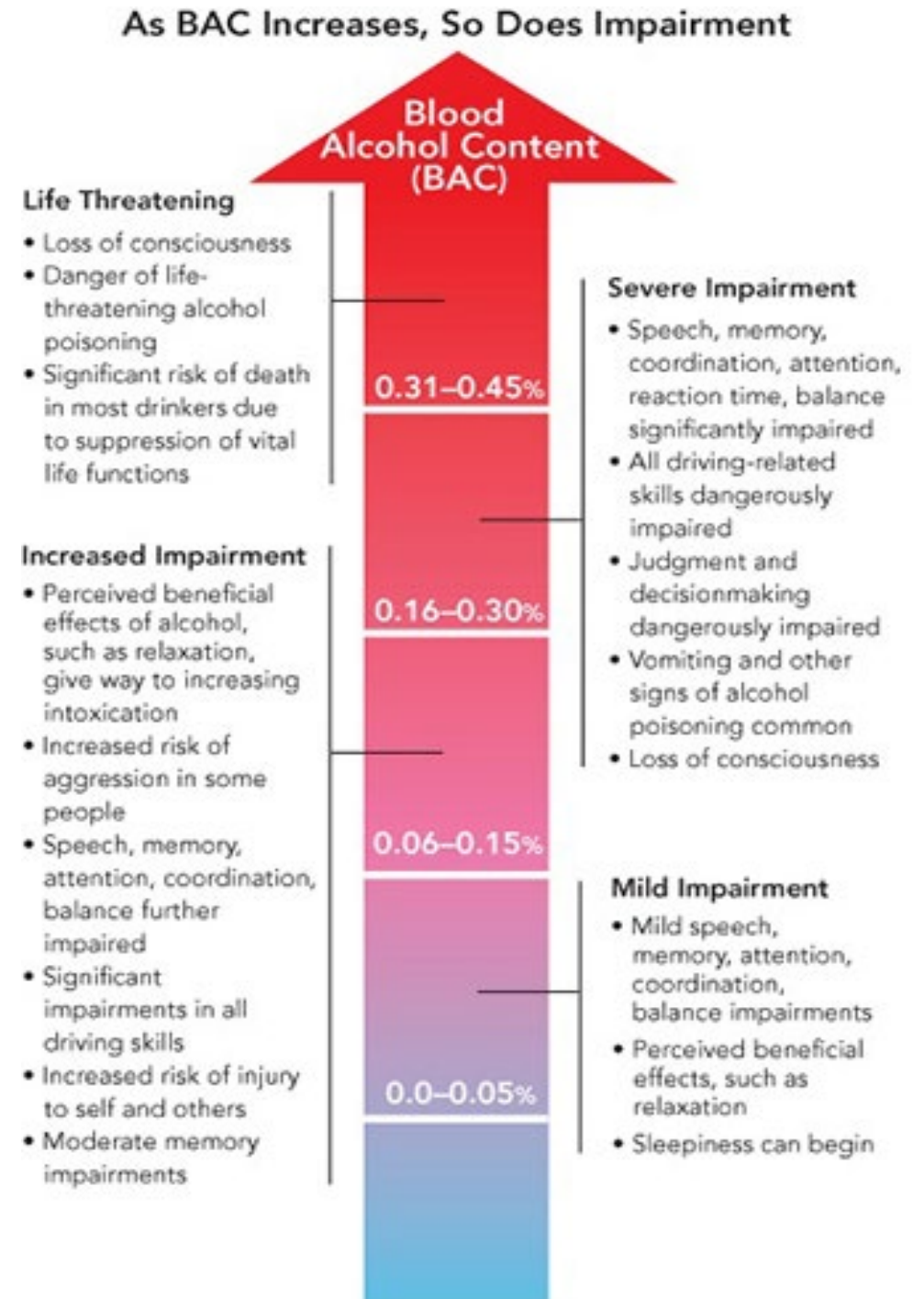


SOURCE: [www.cdc.gov/alcohol/faqs.htm](http://www.cdc.gov/alcohol/faqs.htm)



# Individual Reactions to Alcohol Vary

- Age
- Gender
- Race or ethnicity
- Physical condition
- Amount of food consumed before drinking
- How quickly the alcohol was consumed
- Use of drugs or prescription medicines
- Family history of alcohol problems
- Prior consumption patterns (tolerance)
- **As BAC increases, so does impairment**



# Risk Factors for Binge Drinking & Alcoholism

- Consuming alcohol before age 15
- Family History
- Blackouts
- Pre-gaming
- Other Psychiatric Disorders

SOURCE: [pubs.niaaa.nih.gov/publications/aa37.htm](https://pubs.niaaa.nih.gov/publications/aa37.htm)



# Mixing Alcohol and Drugs



- Antibiotics + Alcohol = can exacerbate drug side effects, reduce energy
- Narcotic Pain Medication + Alcohol = enhances sedative effect of both substances, increases risk of overdose
- Non-Narcotic Pain Medication + Alcohol = can heighten the effects of alcohol
- Antidepressants + Alcohol = can worsen depression symptoms, feel more intoxicated, impair judgment and coordination, exacerbate drug side effects
- Marijuana + Alcohol = can heighten the effects of alcohol or marijuana or both
- Marijuana + Antidepressants = can exacerbate drug side effects, cognitive problems, can heighten the effects of marijuana

SOURCE: [alcoholism.about.com/cs/alerts/l/blnaa27.htm](http://alcoholism.about.com/cs/alerts/l/blnaa27.htm)



# Short-Term Effects of Commonly Abused Drugs

- Cocaine – stimulant; energy, alertness, restlessness, anxiety, violent behavior
- GHB – euphoria, drowsiness, decreased anxiety, confusion, memory loss, hallucinations, excited and aggressive behavior
- Hallucinogens (e.g., ketamine, LSD, PCP) – problems with attention, learning and memory; hallucinations; sedation; confusion and problems speaking (including immobility); rapid emotional swings
- Opiates (e.g., heroin) – depressant; euphoria, heavy feeling, clouded thinking, alternate wakeful and drowsy states
- Marijuana – depressant; enhanced sensory perception and euphoria followed by drowsiness/relaxation, slowed reaction time, problems with balance and coordination
- MDMA (Ecstasy/Molly) – stimulant and hallucinogen; lowered inhibition, enhanced sensory perception, confusion, depression, sleep problems, anxiety, blurred vision
- Methamphetamine – increased wakefulness and physical activity

SOURCE: [www.drugabuse.gov/drugs-abuse/commonly-abused-drugs-charts](http://www.drugabuse.gov/drugs-abuse/commonly-abused-drugs-charts)





# Concerns About Underage Drinking

“The University encourages the reporting of all concerns regarding sexual harassment. Sometimes individuals are hesitant to report instances of sexual harassment because they fear they may be charged with other policy violations, such as underage alcohol consumption. Because the University has a paramount interest in protecting the well-being of its community and remedying sexual harassment, other policy violations will be considered, if necessary, separately from allegations under this Policy.”



# A Brief Look Back at Today's Major Subject Areas

- Basics for Investigative Teams and Hearing Panels
- Prompt and Equitable Investigations and Hearings
- Retaliation, Not in Good Faith, False or Misleading
- Confidentiality in Investigations and Hearings
- Intoxication and Incapacitation

