

October 30, 2024



Navigating Investigation Compliance with Title IX and Title VII

Alisha Carter Harris, M.S., Senior Consultant, TNG

Elexandria Reese, M.S.Ed, SHRM-CP, Title IX & EEO Investigator,
Auburn University



Alisha Carter Harris, M.S.
Senior Consultant, TNG and ATIXA



Elexandria Reese, M.S.Ed, SHRM-CP
Title IX & EEO Investigator, Auburn University

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

“2024 Title IX Regulations”

2024 Title IX Regulations

- Issued **April 19, 2024**, by the Dept. of Education Office for Civil Rights (“OCR”)
- Became effective and enforceable **August 1, 2024**
- Applies to incidents occurring **on or after August 1, 2024**, regardless of when the incident is reported
 - Opponents of the 2024 Title IX Regulations sought, and were granted, **injunctions** to delay or halt implementation of the Regulations
- Addresses discrimination **on the basis of sex*** in education programs and activities and prohibits retaliation (*including employees’ workplace*)
 - *sex includes **sex stereotypes, sex characteristics, pregnancy or related conditions*, sexual orientation, and gender identity**

Enforcement Guidance on Harassment in the Workplace

“Title VII”

Enforcement Guidance on Harassment in the Workplace

- Issued **April 29, 2024**, by the Equal Employment Opportunity Commission (“EEOC”)
- EEOC enforces laws that make discrimination illegal in the workplace
- This Guidance supersedes all previously issued guidance and is EEOC’s position on important legal issues regarding harassment in the workplace under EEOC-enforced laws
- Addresses how harassment based on **race, color, religion, sex*, national origin, age, disability, or genetic information** is defined and the analysis for determining whether employer liability is established
 - “Sex” includes pregnancy, childbirth, and related medical conditions, sexual orientation, and gender identity
- Prohibits retaliation

Honorary Mention – PWFA

- On **April 19, 2024**, the EEOC released its final rule to implement the **Pregnant Workers Fairness Act** (“PWFA”)
- PWFA requires employers to provide reasonable accommodations to a qualified employee’s or applicant’s known limitations related to, affected by, or arising out of **pregnancy, childbirth, or related medical conditions**, unless the accommodation would cause an undue hardship on the operation of the employer’s business
- PWFA also overlaps with the 2024 Title IX Regulations

Overlapping Legal Landscapes

EEOC Guidance: Grievance Process

- Requires an employer to show it exercised **reasonable care** both to **prevent** and **correct** harassment
 - Requires employers to adopt an anti-harassment policy
- Upon receiving notice of potentially harassing conduct, take “reasonable corrective action” to prevent the conduct from continuing
- Conduct a “prompt,” “adequate,” and “effective” grievance process
- Investigations should be conducted by an “impartial party” and seek information about the conduct from all parties involved
- Alleged harasser should **not** have supervisory authority over the investigator or direct/indirect control over the investigation

EEOC Guidance: Grievance Process

- Credibility assessments should be made by the investigator when there are conflicting versions of relevant events
- Investigator should be well trained on interviewing skills and evaluating credibility
- Inform the Parties of its determination and any corrective action(s) to be taken
- Corrective action(s) must be “reasonably calculated to prevent further harassment”
- Retain records of all harassment complaints and investigations

Title IX Regulations Resolution Process

- Treat parties equitably
- Requires TIXCs, Investigators, Decision-Makers have **no** conflict of interest or bias
 - DMs may be the same person as the TIXC or Investigator
- Presume that Respondent is not responsible for sex discrimination
- Establish reasonably prompt timeframes for “major stages” of the process
 - E.g., Evaluation, Investigation, Determination, Appeal
- Ensure Investigators and Decision-makers are trained on the Recipient’s regulatory obligations, how to serve impartially, and the meaning and application of the term “relevant”

Title IX Regulations Resolution Process

- Take reasonable steps to protect the privacy of the parties and witnesses
 - Cannot restrict ability of parties to:
 - Obtain and present evidence
 - Consult with family members, confidential resources, or Advisors
 - Otherwise prepare for or participate in the Resolution Process
- Require an objective evaluation of relevant (and not otherwise inadmissible) evidence
- Maintain all records associated with the resolution for a period of at least seven (7) years

Title IX Regulations: Two-Track Resolution Process

- Which Resolution Process applies depends on the identities of the parties
 - Section 106.45 provides a civil rights Resolution Process for resolving complaints of sex-based discrimination
 - Section 106.46 incorporates § 106.45 and adds some due process protections
 - Retains many, but not all, features of the formal process from the 2020 Regulations
- Two separate processes are permitted but **not** required
 - If using only one, it must be § 106.46

§ 106.45	§ 106.46
<ul style="list-style-type: none">■ Sex discrimination complaints that are not sex-based harassment■ Sex-based harassment complaints that do not involve a post-secondary student	<ul style="list-style-type: none">■ Sex-based harassment complaints involving a post-secondary student Complainant and/or Respondent

Title IX Regulations: Notice of Investigation

§ 106.45

- Does **not** need to be in writing
- **Must include:**
 - Recipient's Resolution Process, including Informal Resolution (if available)
 - Sufficient available information to permit parties to respond to the allegations, such as identities (who), allegations (what), date (when), location (where)
 - Statement that retaliation is prohibited
 - Statement that parties have opportunity to access relevant evidence or description of the evidence

§ 106.46

- Incorporates elements of NOIA from § 106.45, with alterations
- Notice must be in writing, with time for parties to prepare before any initial interview
- Right to an Advisor
- Parties will have an opportunity to present relevant evidence to a DM
- Presumption of non-responsibility
- Statement that parties will be able to access relevant evidence or an investigation report
- Any prohibition against false statements

§ 106.45 Investigations

§ 106.45

- **Adequate, reliable, and impartial**
- Gather evidence
- Permit parties to present fact witnesses and inculpatory and exculpatory evidence
- Recipient must review all evidence gathered through the investigation and determine relevance
- Provide parties opportunity to access relevant evidence or accurate description of such evidence
- Provide parties reasonable opportunity to respond to evidence
- Investigation report not required
- Take reasonable steps to prevent and address parties' unauthorized disclosure of information and evidence obtained through process

§ 106.46 Investigations

§ 106.46 (+ non-conflicting elements of § 106.45)

- Permit Advisors
- Provide written notice of all meetings or proceedings with time to prepare
- Provide parties with the same opportunities to have support persons present
- Provide equal opportunity to review relevant evidence or an investigation report
- Provide opportunity to respond to evidence or an investigation report
 - If using a hearing, must permit review of evidence prior to hearing
- May equitably permit expert witnesses

§ 106.45 and § 106.46: Decision-Making

§ 106.45

- Use **preponderance of the evidence** standard
 - Unless clear and convincing is used for all “comparable proceedings”
- Provide a process enabling DM to question parties and witnesses to assess credibility
 - DM may be the same person as the TIXC or Investigator

§ 106.46 (+ non-conflicting elements of § 106.45)

- Provide the Parties with an opportunity for proposing/asking relevant questions either via live hearing or individual meetings
- DM must make relevance determinations of all questions prior to a Party or witness answering
- A DM may place **less or no weight** on statements by a Party or witness who refuses to respond to relevant questions
- A DM may **not** draw an inference about whether sex-based harassment occurred **solely** on a Party or witness’s refusal to respond to relevant questions

Exceeding the Floor of Compliance

Floor vs. Ceiling Compliance

- Both the 2024 Title IX Regulations and EEOC Guidance set a floor for compliance, but do not infuse many best practices into the resolution processes
 - However, the Title IX Regulations require an enhanced process for employees when a student is also party to a complaint
- Things to consider for grievance processes generally:
 - Create one policy and one procedure for all civil rights-based complaints
 - Require written documentation for all stages of the resolution process including an investigation report
 - Separate the Investigator and Decision-maker roles
 - Permit advisors
 - Use the **preponderance of the evidence** standard of proof

Investigator Best Practices

- Follow the institution's policy and ensure correct policy(ies) are used to investigate complaints
- Maintain adequate, written records
 - Obtain interviewee verification of transcripts/notes
- Understand the scope of the investigation and apply correct policy definitions
- Ensure transparent investigations
 - Do what you say you will
 - Provide Parties/advisors with a well-organized evidence file/draft report
 - Explain the grievance process/Parties' rights and allow questions

Investigator Best Practices

- Ensure NOIAs are adequate and correct
- Conduct an adequate and reliable investigation
 - Document inability to gather evidence and the reason(s) why
 - Document witnesses who did not participate in the investigation
 - Verify documentary evidence with others (such as screenshots of messages)
 - Gather relevant evidence from all sources, both internal and external
- Remain neutral, impartial, and unbiased

Investigator Training

Ensure the Investigator is well-trained on the following topics:

- Definitions of Prohibited Conduct
- Scope of education program or activity
- How to conduct a fair and adequate investigation and resolution process
- How to serve impartially, including by avoiding prejudgment of facts, conflicts of interest, and bias
- The meaning and application of the term relevant in relation to questions and evidence
- Types of evidence that are impermissible regardless of relevance
- Facilitating the Decision-making process, including questioning
- Determining relevance
- Assessing credibility
- Making a finding of fact
- Determining whether policy was violated
- Assigning sanctions (if applicable)
- How to write a determination rationale

Best Practices for Investigators Serving as Decision-Makers

- Permit an appeal*
- Ensure that the Title IX Coordinator and/or General Counsel reviews the Investigator's work product
- Investigators make non-binding recommended findings and final determinations that are reviewed by separate administrator (*i.e.*, Title IX Coordinator) for final review/implementation
 - Allow this individual to engage in additional fact finding, when necessary
- Where violations of policy are found, have a separate administrator determine sanctions

Questions?

