

The New Title IX Final Regulations: What You Need To Know To Stay In Compliance Day 2

Bev Baligad, J.D.

Presenter

bevbaligad@gmail.com



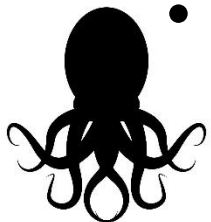


Day 2

- A. General Requirements
- B. Informal Resolution Process

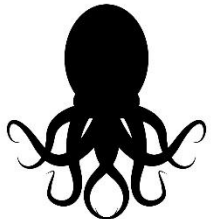
Required Training under the new Regs:

- Days 2-4 will include most required trainings for Title IX Coordinators, investigators, decision makers and individuals involved with the informal process
- All designated campus representatives listed above must attend Days 2-4 **before** they may publish the powerpoints on their webpages
- Training regarding the institutions preferred use of technology for the purpose of hearings and a schools' educational program or activity must be provided by the campus separately (since they differ)
- Any training provided cannot rely on sex stereotypes



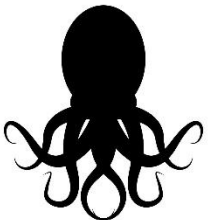
Title IX Coordinators, investigators, adjudicators, and individuals facilitating informal resolution

- Definition of sexual harassment *
- Scope of the schools' education program or activity
- Conducting an investigation
- Grievance process*
- Hearings, Appeals and informal resolutions
- Impartiality, conflicts of interest and bias
- Relevance and sufficiency (credibility)
- Creating an investigative report that fairly summarizes relevant evidence



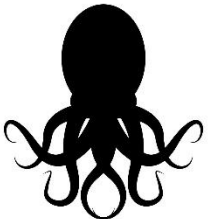
A. General requirements: Definitions *[34 CFR 106.30(a)]*

- A. Actual knowledge
- B. Complainant/Respondent
- C. Consent
- D. Formal complaint
- E. Sexual harassment
- F. Supportive measures



General Requirements- “Grievance Process”

- A. Equitable treatment of parties *[34 CFR 106.45(b)(1)(i)]*
- B. Objective evaluation of all evidence *[34 CFR 106.45(b)(1)(ii)]*
- C. Train Coordinators, Investigators & Adjudicators *[34 CFR 106.45(b)(1)(iii)]*
- D. Presumption of innocence *[34 CFR 106.45(b)(1)(iv)]*
- E. Reasonably prompt grievance process timeframes *[34 CFR 106.45(b)(1)(v)]*

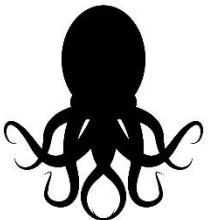


General Requirements- “Grievance Process” (cont’d)

F. Describe or list possible sanctions or remedies- post finding of responsibility *[34 CFR 106.45(b)(1)(vi)]*

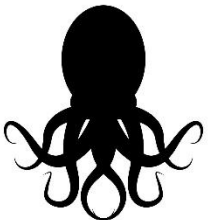
G. Standard of evidence; process and permissible bases for parties to appeal *[34 CFR 106.45(b)(1)(vii)]*

H. Range of supportive measures available to both parties *[34 CFR 106.45(b)(1)(viii)]*



General requirements: Notifications (Formal Complaints)

- A. Written notification of institution's grievance process and informal processes [34 CFR 106.45(b)(2)(i)(A)]
- B. Notice of allegations of potential sexual harassment; sufficient details of the incident and involved parties (if known) [34 CFR 106.45(b)(2)(i)(B)]
- C. Mandatory disclosure statements [34 CFR 106.45(b)(2)(i)(B)]
- D. Parties' ability to have an advisor present (may be a lawyer) [34 CFR 106.45(b)(2)(i)(B)]



General requirements: Notifications (Formal Complaints)

E. Ongoing notice (with sufficient information) if new allegations will be investigated [34 CFR 106.45(b)(2)(ii)]

F. Notice of dismissal, if applicable [34 CFR 106.45(b)(3)(iii)]

-Mandatory dismissal; “**must**” dismiss

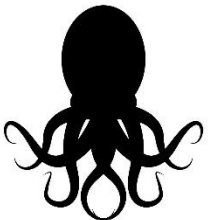
[34 CFR 106.45(b)(3)(i)]

-Permissive dismissal; “**may**” dismiss

[34 CFR 106.45(b)(3)(ii)]

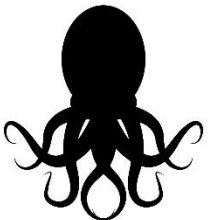
-If dismissal, institution must promptly send written notice of the dismissal and reasons simultaneously to parties

[34 CFR 106.45(b)(3)(iii)]



Investigations

- A. Responsibility for burden of proof and burden of gathering evidence; respect privileged info [34 CFR 106.45(b)(5)(i)]
- B. Equal opportunity to present witnesses and evidence (inculpatory & exculpatory) [34 CFR 106.45(b)(5)(ii)]
- C. Restricts use of “gag orders” so parties can gather and present relevant evidence [34 CFR 106.45(b)(5)(iii)]
- D. Provide parties with the same opportunities to have advisors present for any meetings [34 CFR 106.45(b)(5)(iv)]



Investigations (cont'd)

E. Provide expected advisors information and sufficient time to prepare for meeting dates, times and purpose

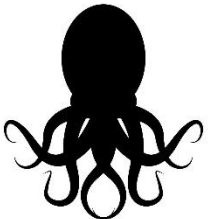
[34 CFR 106.45(b)(5)(v)]

F. Opportunities for parties to inspect and review ALL evidence gathered relating to the formal complaint

[34 CFR 106.45(b)(5)(vi)]

G. Create an investigative report that fairly summarizes relevant evidence; provide the report 10 days prior to any hearing

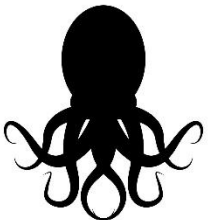
[34 CFR 106.45(b)(5)(vii)]



Hearings- Higher Ed

A. Postsecondary institutions [34 CFR 106.45(b)(6)(i)]

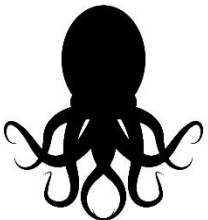
- Must provide for a live hearing
- Decision Maker (DM) must permit advisors (never the parties) to ask the other party and witnesses relevant follow up questions, including those that challenges the credibility of a witness [aka “cross examination”]
- If a party does not have an advisor, the institution must provide one who can engage in cross examination appropriately
- Cross examination must be conducted at the hearing orally, and in real time
- DM must make a determination regarding relevancy; if question will not be allowed, the DM must explain why on the record



Hearings – K-12 (cont'd)

B. K-12 institutions [34 CFR 106.45(b)(6)(ii)]

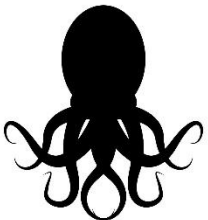
- MAY provide for a live hearing (permissive)
- Must send the investigative report to both parties and allow each party to submit written relevant questions of any party or witness
- Must provide each of the parties/witnesses sufficient time to respond to the questions and provide each party with the responses
- If DM excludes any questions, the DM must explain to the party who asked the question why the question will not be sent to the party/witness



Hearings (cont'd)

C. Written determination regarding responsibility must include: [34 CFR 106.45(b)(7)(ii)(A-F)]

- identification of allegations of potential of sexual harassment; and
- description of the procedural steps taken; and
- findings of fact supporting the determination; and
- conclusion regarding the application of the institution's code of conduct (policy) to the facts; and
- statement of (and rationale for) the result as to each allegation, including regarding responsibility and disciplinary sanctions imposed on the respondent; and



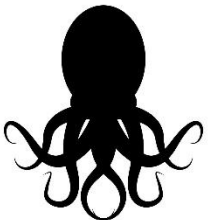
Hearings (cont'd)

C. Written determination regarding responsibility must include: [34 CFR 106.45(b)(7)(ii)(A-F)]

-whether remedies designed to restore or preserve equal access to the institution's education program or activity will be provided to the complainant; and

-procedures and permissible bases for complainant and respondent to appeal

D. Written determination must be delivered to both parties simultaneously; information as to when the determination becomes finalized (after appeals or when date for appeal has lapsed) [34 CFR 106.45(b)(7)(iii)]

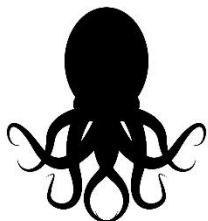


Appeals

A. Both parties must have the ability to appeal a determination of responsibility or when the institutions has dismissed the formal complaint [34 CFR 106.45(b)(8)(i)]

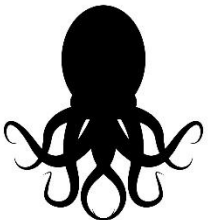
B. Appeals must be for the following reasons: [34 CFR 106.45(b)(8)(i)(A-C)]

- Procedural irregularity that affected the outcome; or
- New information that was not available at the time the decision was made, that could affect the outcome of the matter; or
- Conflict of interest or bias by the Title IX Coordinator, investigator or DM that affected the outcome of the matter



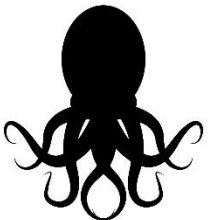
Subsequent OCR Clarifications

- ✓ OCR's Outreach, Prevention, Education and Nondiscrimination (OPEN) Center
- ✓ Information & clarification regarding final regs
- ✓ Blog also addresses technical issues submitted to the OPEN center by institutions
- ✓ Training and informational videos
- ✓ 4 specific blogs have been posted since May 6th, 2020



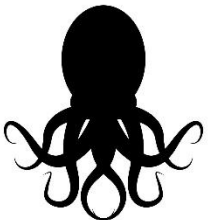
Subsequent OCR Clarifications (cont'd)

- ✓ Posting of important info on websites [20200518]
- ✓ Requirement to continue investigations during the pandemic [20200521]
- ✓ Use of information when a party does not submit to cross-examination [20200522]
- ✓ Final regs are not retroactive [20200805]



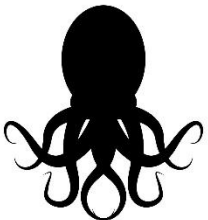
Finally,

- ✓ The new regs were adopted on May 6, 2020 amidst a global pandemic.
- ✓ The date ED expected institutions to be in compliance was August 14th, 2020.
- ✓ Institutions are scrambling to try to implement the new regs on campus; most are still working on it.
- ✓ Some institutions have not even begun to implement these changes- and there are a lot.



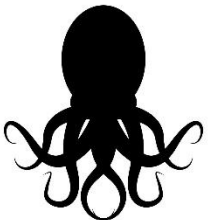
Some Suggestions for Moving Forward

- ✓ Identify current roles & responsibilities. Do those need to change? Job descriptions?
- ✓ Training requirements. How will you meet and publish them asap?
- ✓ Understand institutional policies and barriers [governance, policy adoption, lack of personnel, etc.]; start discussing them with administration now. Develop a plan, and work towards that plan.
- ✓ Do something. Show a good faith effort to comply.



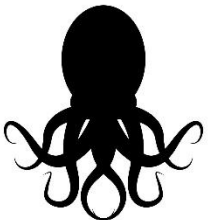
B. Informal Resolution [*§106.45(b)(9), et seq.*]

- A formal complaint must first be filed then the institution may offer to the parties an informal resolution option
- Institutions may not require parties to participate in the informal resolution process
- Informal resolution may not be required as a condition of continuing enrollment or continuing employment
- Institutions cannot require parties to waive their rights to an investigation or formal adjudication
- At any time, prior to reaching a determination regarding responsibility, informal resolution may be offered



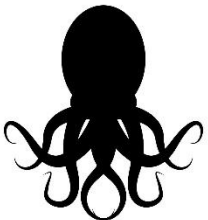
B. Informal Resolution [*§106.45(b)(9), et seq.*] **cont'd**

- The informal resolution process does not involve a full investigation and adjudication
- Written notification to both parties must include [*§106.45(b)(9)(i-iii)*]
 - the allegations, the requirements of the informal resolution process, etc.
 - obtain the parties voluntary written consent to engage in the formal process
 - allegations may not involve allegations that an employee sexually harassed a student



B. Informal Resolution [*§106.45(b)(9), et seq.*] **cont'd**

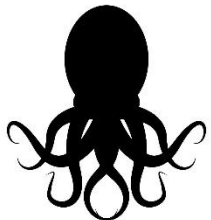
- Any party has the right to withdraw from the informal resolution process and resume the formal grievance process
- Once the grievance process commences, information with regard to the formal complain or any information provided during the informal resolution process may be maintained and/or shared as allowed under the new regs.
- Informal resolution may include any form of mediation, arbitration, restorative justice
- Any records regarding informal resolution and the results must be kept and maintained for 7 years.



Mahalo!

Any Questions?

End of Day 2 of 4



BEVERLY V BALIGAD

