



## Incorporating the New Title IX Regulations into Policy<sup>1</sup>

The U.S. Department of Education recently issued [new regulations](#) under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, the federal law prohibiting sex discrimination at educational institutions that receive federal funding. The new regulations, effective August 14, 2020, address sexual harassment of students and employees and provide a detailed complaint resolution process.

Title IX is enforced by the [U.S. Department of Education Office for Civil Rights](#) (OCR).

### The New Title IX Regulations and Existing Law

The new Title IX regulations must be read with existing law, most significantly Title VII, the Clery Act, and relevant state law.

**Title VII:** Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17, prohibits discrimination with respect to an employee's compensation, terms, conditions, or privileges of employment because of the person's sex. Title VII is enforced by the [U.S. Equal Employment Opportunity Commission](#) (EEOC).

The similarity in subject matter may raise the concern of a potential conflict between the enforcement schemes but they are distinguishable. Title VII provides the structure for a party to pursue monetary damages for a claim of sex discrimination in employment. *Lakoski v. James*, 66 F.3d 751 (5th Cir. 2005). The new Title IX regulations are enforced through the potential for the loss of federal funds. Further, the regulations do not directly conflict with Title VII, and in fact, they state that they may not be read in derogation of an employee's rights under Title VII. 34 C.F.R. § 106.6(f). Therefore, the Title IX regulations are not rendered inapplicable to employee sexual harassment claims based on Title VII.

**Clery Act:** The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. 1092(f), requires annual reports of crime statistics and related safety and security procedures and programming. The Campus SaVE Act amendments to the Clery Act and the related regulations found at 34 C.F.R. § 668.46 focus specifically on reporting and programming related to dating violence, domestic violence, sexual assault, and stalking. The procedures are phrased as requirements for the statement of policy that must be submitted as the college's annual security report.

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<sup>1</sup> An electronic version of this document is available on [TASB College eLaw](https://tasb.org/services/community-college-services/resources/tasb-college-elaw/documents/incorporating-new-title-ix-regulations-into-policy.pdf) at [tasb.org/services/community-college-services/resources/tasb-college-elaw/documents/incorporating-new-title-ix-regulations-into-policy.pdf](https://tasb.org/services/community-college-services/resources/tasb-college-elaw/documents/incorporating-new-title-ix-regulations-into-policy.pdf).

**State law:** Texas Education Code chapter 51, subchapters E-2 and E-3, and the associated regulations found at 19 Texas Administrative Code chapter 3, subchapter A, address the reporting and processing of complaints of sexual harassment, sexual assault, dating violence, and stalking.

### **General Structure of the TASB Model Policies**

TASB Community College Services offers policy updating services subscribers two model sexual harassment complaint policies, DIAA(LOCAL) for employees and FFDA(LOCAL) for students. The policies are crafted to comply with federal and state law and to enable board oversight of the process.

Past TASB model local versions were structured to serve as the reporting and investigation component of the process while the discipline and corrective action component was handled under the appropriate discipline policies. In response to the new Title IX regulations, the model policies were restructured so that they address reporting, investigation, and initial discipline and corrective action procedures.

### **Nondiscrimination Statement**

Community colleges must notify applicants for admission or employment, employees, students, and parents or legal guardians of elementary and secondary school students that the community college does not discriminate on the basis of sex in its education programs and activities and that it is required by Title IX and 34 C.F.R. part 106 not to do so. The notice must state that the prohibition on discrimination extends to admission and employment, unless excepted by law, and that questions about the federal provisions may be referred to the Title IX coordinator or the Assistant Secretary for Civil Rights. 34 C.F.R. § 106.8(a), (b)(1).

The statement must be prominently displayed on the college 's website and in each handbook or catalog provided to the individuals entitled to notice. 34 C.F.R. § 106.8(b)(2).

### **Title IX Coordinator**

A community college must designate at least one Title IX coordinator. 34 C.F.R. § 106.8(a). If a community college has multiple Title IX coordinators, the college should name one coordinator to serve as lead. U.S. Dep't of Educ., [Dear Colleague Letter: Title IX Coordinators](#) (Apr. 24, 2015).

The community college must notify applicants for admission or employment, employees, students, and parents or legal guardians of elementary and secondary school students of the Title IX coordinator and the coordinator's contact information. The college also must prominently display the information on the college's website and in each handbook or catalog provided to individuals entitled to notice. 34 C.F.R. § 106.8(a), (b)(2).

Prior, a community college was required by the regulations to publish the name and position of the person serving as the Title IX coordinator. The Title IX regulations were amended to permit the college to publish the person's name or position. The college must still publish the address, telephone number, and email of the Title IX coordinator. 34 C.F.R. § 106.8(a). A college may choose to use a generic email address for the Title IX coordinator (e.g., TitleIXcoordinator@college.edu) to provide a defined inbox for complaints and ease the transition between individuals in the role.

Note, state law requires a community college to provide students with the name, office location, and contact information of the institution's Title IX coordinator by emailing the information to each student at the beginning of each semester and including the information in the college's in-person or online orientation. Tex. Educ. Code § 51.282(d); 19 Tex. Admin. Code § 3.4(d).

### **Sexual Harassment**

*Sexual harassment* is defined by the Title IX regulations, Title VII, and state law.

**Quid pro quo harassment:** Both federal and state law address the concept of quid pro quo harassment. The Title IX regulations are specific, defining *sexual harassment* to include conduct on the basis of sex that involves "an employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct." 34 C.F.R. § 106.30(a). The definition under Title VII regulations is similar: unwelcome sexual advances; requests for sexual favors; sexually motivated physical, verbal, or nonverbal conduct; or other conduct or communication of a sexual nature when submission to the conduct is either explicitly or implicitly a condition of an employee's employment, or when submission to or rejection of the conduct is the basis for an employment action affecting the employee. 29 C.F.R. § 1604.11.

The concept is more generally defined under state law to read as part of the hostile environment definition. Tex. Educ. Code §§ 51.251(5), .281(4); 19 Tex. Admin. Code § 3.3(e).

**Hostile environment harassment:** Federal and state law also address hostile environment harassment, but the definition in the new Title IX regulations is more limited than earlier interpretations by OCR, the Title VII regulations, and state law. The Title IX regulations define sexual harassment to include conduct on the basis of sex that constitutes "unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity." 34 C.F.R. § 106.30(a). The requirement that the conduct be pervasive differs from prior OCR guidance that found one incident may be sufficiently severe to constitute sexual harassment. U.S. Dep't of Educ. Office for Civil Rights, [Dear Colleague Letter: Sexual Violence](#) (Apr. 4, 2011). It is intended to more closely match the standard set for student-to-student sexual harassment under *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999).

The Title VII regulations define *sexual harassment* to include “unwelcome sexual advances; requests for sexual favors; sexually motivated physical, verbal, or nonverbal conduct; or other conduct or communication of a sexual nature when . . . such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, threatening, hostile, or offensive work environment.” 29 C.F.R. § 1604.11. Courts have determined that a hostile environment claim is actionable under Title VII if it is sufficiently severe or pervasive to alter an employee’s conditions of employment and create an abusive working environment. [Pennsylvania State Police v. Suders](#), 542 U.S. 129 (2004); [Meritor Sav. Bank v. Vinson](#), 477 U.S. 57 (1986). Therefore, the application of Title VII is broader than the Title IX regulations.

State law is also broader than the Title IX regulations. Under state law, sexual harassment is defined as “unwelcome, sex-based verbal or physical conduct that:

1. In the employment context, unreasonably interferes with a person’s work performance or creates an intimidating, hostile, or offensive work environment; or
2. In the education context, is sufficiently severe, persistent, or pervasive that the conduct interferes with a student's ability to participate in or benefit from educational programs or activities.”

Tex. Educ. Code §§ 51.251(5), .281(4); 19 Tex. Admin. Code § 3.3(e).

Because sexual harassment is more broadly defined under Title VII and state law than the Title IX regulations, the definitions found in the TASB model policies are tailored to meet those laws.

**Sexual assault, dating violence, domestic violence, and stalking:** The Title IX regulations define *sexual harassment* to include *sexual assault*, as defined by the Clery Act, as well as *dating violence*, *domestic violence*, and *stalking*, as defined by the Violence Against Women Act. 20 U.S.C. § 1092(f)(6)(A)(v); 34 U.S.C. § 12291(a)(8), (10), (30); 34 C.F.R. § 106.30(a).

State law does not include the terms in the definition of *sexual harassment* but does apply the same reporting requirements and complaint processes to sexual assault, dating violence, and stalking. The definitions of those terms are the same as those found in the Title IX regulations. Tex. Educ. Code §§ 51.251(2), .281(2); 19 Tex. Admin. Code § 3.3(c).

Because the Title IX regulations incorporate sexual assault, dating violence, domestic violence, and stalking into the definition of *sexual harassment*, the TASB model local policies similarly incorporate the terms.

### **Complainant and Respondent**

The new Title IX regulations describe the parties involved in a Title IX complaint as the *complainant* and *respondent*. The *complainant* is not broadly defined to include anyone who may report the conduct but is instead limited to the person alleged to be the victim of conduct defined by Title IX as sexual harassment. The *respondent* is the person reported to have perpetrated the conduct. 34 C.F.R. § 106.30(a).

The TASB model policies have been amended to incorporate the terms *complainant* and *respondent* but the terms in the policies apply to the alleged victim of prohibited conduct as defined by the policies and the alleged perpetrator of prohibited conduct, respectively. *Prohibited conduct* is defined in the policies to include the sexual harassment, sex discrimination, and gender harassment. Therefore, the terms as used in the TASB model policies apply to reports of prohibited conduct that may not qualify as sexual harassment under Title IX.

### **Education Program or Activity**

*Education program or activity* is defined by the Title IX regulations to include circumstances, locations, and events over which the recipient exercised substantial control over the context in which the sexual harassment occurs and the respondent. The term also includes any building owned or controlled by an officially recognized student organization. 34 C.F.R. § 106.44(a).

As described below, because state law requires employees to report incidents of sexual harassment regardless of where the incidents occur, state law will apply to alleged incidents that occur in a broader range of contexts than set out in the Title IX regulations.

### **Reporting**

The Title IX regulations permit any person to report sexual harassment as defined by the regulations orally or in writing at any time and in any manner, including in person, by mail, by telephone, or by email, that results in the Title IX coordinator receiving the report. 34 C.F.R. § 106.8(a).

State law includes more detailed reporting requirements than the Title IX regulations. State law requires all college employees to promptly report incidents they are made aware of or witness regardless of where the event occurs. The college may provide different methods for reporting but ultimately the report must be routed to the Title IX coordinator or deputy Title IX coordinator. The victim of an incident is not required to make a report, nor is a person who hears about the incident while participating in the college's complaint process or who has confirmed with the person overseeing the process that the report has been made. Those employees who hear about an incident at

an awareness event are exempt from this requirement under state law. However, read with the Title IX regulations, arguably those employees with the authority to take corrective measures cannot take advantage of this exemption. Tex. Educ. Code § 51.252(a), (d); 19 Tex. Admin. Code § 3.5(a), (d).

Employees, such as counselors and health care providers, who are subject to legal confidentiality requirements or who are designated as confidential employees may not make a report without the person's consent or unless required by law. Tex. Educ. Code §§ 51.252(c), .290(a), (c); 19 Tex. Admin. Code §§ 3.5(c), .14.

State law also requires a community college to provide students and employees an anonymous electronic reporting option available through a clearly identifiable link on the college's website. Tex. Educ. Code § 51.283; 19 Tex. Admin. Code § 3.7.

Under state law, a person commits an offense if the person knowingly fails to make a required report or, with the intent to harm or deceive, knowingly makes a false report. A community college must terminate an employee who commits the offense. Tex. Educ. Code § 51.255(a), (c); 19 Tex. Admin. Code § 3.8.

The Title IX regulations do not include the concept of a responsible employee as described in earlier OCR guidance. Despite this fact, state law requires a community college to designate an employee or employees to act as a responsible employee for purposes of Title IX and inform each enrolled student of the designated responsible employees. Consistent with the interpretation of the term in the earlier guidance, because state law requires all employees to report incidents of sexual harassment, sexual assault, dating violence, and stalking, the college should reference all employees. Tex. Educ. Code § 51.290(a); 19 Tex. Admin. Code 3.14(a).

### **Formal Complaint**

A report of sexual harassment must be considered a formal complaint to initiate the formal due process requirements under the new Title IX regulations.

**Who may file:** When the complaint is filed, the complainant must be participating, or attempting to participate, in the college's education program or activity. 34 C.F.R. § 106.30(a).

**Written submission:** The complaint must be submitted in writing to the Title IX coordinator. The complaint may be submitted in person, by mail, or electronically, including by email or an online portal. 34 C.F.R. § 106.30(a).

**Signature required:** The complaint must be signed by the complainant, as defined by Title IX, or must otherwise indicate the complainant filed the formal complaint. Alternatively, the Title IX coordinator may sign the complaint. 34 C.F.R. § 106.30(a). For

example, the Title IX coordinator may sign the complaint if the complainant has requested that a report submitted by a third party not be pursued but the Title IX coordinator determines, after the statutory analysis, to investigate the complaint.

**Contents:** A formal complaint must allege sexual harassment, as defined by the Title IX regulations, and require that the allegation be investigated by the community college. 34 C.F.R. § 106.30(a).

**Consolidation:** A community college may consolidate formal complaints if the allegations arise from the same facts or circumstances. 34 C.F.R. § 106.45(b)(4).

### **Notice**

Upon receipt of a formal complaint, a community college must provide to known parties written notice of the allegations in sufficient detail and with sufficient time for the parties to prepare a response before any initial interview. For example, the college must provide the identities of the known parties, the conduct alleged to constitute sexual harassment under Title IX, and the date and location of the incident, if known. The notice must also inform the parties of the college's Title IX grievance process, that they may have an advisor of their choice, and that they may inspect and review evidence. The notice must also inform the parties of any provision in the college's code of conduct prohibiting knowingly making false statement or submitting false information during the process. 34 C.F.R. § 106.45(b)(2).

If new allegations arise that the college chooses to investigate, the college must provide notice of those allegations to the parties. 34 C.F.R. § 106.45(b)(2).

### **Response to an Allegation of Sexual Harassment**

A community college must act promptly on an allegation of sexual harassment under the Title IX regulations if the college has actual knowledge of the allegation. *Actual knowledge* means notice of sexual harassment or sexual harassment allegations on the part of a college official, including the Title IX coordinator, who has the authority to institute corrective measures on behalf of the college. A college is not considered to have actual knowledge of the incident if the only official with knowledge is the alleged respondent. A person does not have the authority to institute corrective measures simply because the person can, is required to, or is trained to report sexual harassment or inform a student how to make a report. 34 C.F.R. §§ 106.30(a), .44(a).

The college's response must not be *deliberately indifferent*, meaning the response must not be clearly unreasonable considering the known circumstances. The response must treat the parties equitably by following a grievance process described by 34 C.F.R. § 106.45 before imposing sanctions or remedies and by offering supportive measures to the complainant. The Title IX coordinator must promptly discuss available supportive

measures with the complainant and ascertain the complainant's preferences. The coordinator must explain that the measures are available even if the complainant chooses not to file a formal complaint but, if the complainant wishes to file a formal complaint, how to do so. 34 C.F.R. 106.44(a).

The regulations provide that, if a community college restricts a person's free speech or other constitutional rights, the college will not have met its duty not to be deliberately indifferent. 34 C.F.R. 106.44(a).

A community college must respond to a formal complaint by complying with 34 C.F.R. § 106.45. The college's treatment of either party in response to a formal complaint may in itself constitute sex discrimination under Title IX. 34 C.F.R. §§ 106.44(b), .45(a).

### **Complaint Policies and Procedures**

The Title IX regulations require a community college to publish grievance procedures for the prompt and equitable resolution of student and employee complaints of conduct that constitutes prohibited sexual harassment under the regulations. The procedures also must address 34 C.F.R. § 106.45 for formal complaints. These requirements only apply to conduct that occurs in the United States. 34 C.F.R. § 106.8(c)-(d).

The process for formal complaints must include several required components.

**Conflict of interest:** The grievance process must prohibit individuals serving as Title IX coordinator, investigator, informal resolution facilitator, or decisionmaker from having a conflict of interest or bias for or against one of the parties or complainants or respondents generally. 34 C.F.R. § 106.45(b).

**Training:** The Title IX coordinator, investigator, informal resolution facilitator, and decisionmaker must have general training on the sexual harassment definition found in the Title IX regulations, the scope of the community college's education program or activity, and how to serve impartially. The individual must also receive training applicable to the person's position as described in the regulations, such as how to conduct an investigation or a Title IX hearing. 34 C.F.R. § 106.45(b).

The training materials must not rely on sex stereotypes and must promote impartiality. The materials must be published on the college's website. 34 C.F.R. § 106.45(b). As this requirement may implicate a third party's copyright protections, a college should consult with the third party and the college's counsel before publishing the materials.

**Time frames:** A community college must employ reasonably prompt time frames for the steps in the process. The college may temporarily delay the process or apply a limited extension for good cause if the college provides written notice to the parties regarding the



delay or extension and the applicable reasons. Examples of good cause in the regulations include the absence of a party, the party's advisor, or a witness; a simultaneous law enforcement investigation; or a disability accommodation. 34 C.F.R. § 106.45(b).

**Presumption of responsibility:** The policy or procedures must state that the respondent will be presumed not responsible for the alleged conduct until the conclusion of the process when a determination regarding responsibility is made. 34 C.F.R. § 106.45(b).

**Privileged information:** The regulations prohibit a community college from using as part of the process questions or evidence that constitute, or seek disclosure of, privileged information unless the privilege is waived by the person holding the privilege. 34 C.F.R. § 106.45(b).

**Evaluation of evidence and credibility:** A community college must evaluate all relevant evidence objectively, whether inculpatory or exculpatory. When determining a person's credibility, the college may not base the determination on the person's status as complainant, respondent, or witness. 34 C.F.R. § 106.45(b).

**Standard of evidence:** The policy or procedures must specify the standard of evidence, whether preponderance of the evidence or the clear and convincing evidence standard, used to determine responsibility. The same standard must be used for all formal complaints. 34 C.F.R. § 106.45(b).

**Supportive measures:** The policy or procedures must describe the full range of available supportive measures. 34 C.F.R. § 106.45(b).

**Sanctions and remedies:** The process must treat the parties equitably by providing remedies to a complainant when a determination of responsibility is made against the respondent and by following a process that complies with 34 C.F.R. § 106.45 before disciplining, or otherwise imposing measures other than supportive measures on, the respondent. The remedies must be intended to preserve or restore equal access to the college's education program or activity but need not avoid burdening the respondent. They may include the same services considered supportive measures. The policy or procedures must describe the full range of potential sanctions and remedies that the college may implement. 34 C.F.R. § 106.45(b).

**Appeals:** The policy and procedures must include the steps and possible reasons to appeal a determination. 34 C.F.R. § 106.45(b).

**Additional procedures:** Any other procedures adopted as part of the grievance process must apply equally to both the complainant and respondent. 34 C.F.R. § 106.45(b). This provision applies to the policy required to be adopted under state law.

State law requires a community college board of trustees to adopt a policy on sexual harassment, sexual assault, dating violence, and stalking applicable to each employee and student. The policy must define the prohibited behavior and list sanctions for violations. It must provide a protocol for reporting allegations and responding to those reports, including interim measures intended to protect the alleged victim. The policy must also include specific statements described by law, including a statements regarding the right to report the incident to the institution or law enforcement and the importance of the victim going to the hospital for treatment and preservation of evidence. The protocol must also provide that each party be offered the opportunity to meet with a counselor who does not provide counseling to the other party, if possible, and allow the parties to drop a course both parties are enrolled in without penalty. Tex. Educ. Code § 51.282(a), (e); 19 Tex. Admin. Code § 3.4(a), (d)(2)(C).

The college must review the policy at least once each biennium and submit the policy to the board for approval. Tex. Educ. Code § 51.282(b), (f); 19 Tex. Admin. Code § 3.4(b), (e).

**Publication:** A community college must notify applicants for admission or employment, employees, students, and parents or legal guardians of elementary and secondary school students of the grievance procedures and process. The college must describe how to report sex discrimination, how to file a formal complaint of sexual harassment, and how the college will respond to a report or complaint. 34 C.F.R. § 106.8(c).

State law has a similar publication requirement for the required policy on sexual harassment, sexual assault, dating violence, and stalking applicable to each employee and student. The policy must be published in the student and employee handbooks and must be maintained on a webpage that is easily accessible through a clearly identifiable link on the college's website. Tex. Educ. Code § 51.282(b), (f); 19 Tex. Admin. Code § 3.4(b), (e).

### **Supportive Measures**

*Supportive measures* are defined by the Title IX regulations as non-punitive individualized services provided to the complainant or respondent to preserve or restore equal access to the college's education program or activity without unreasonably burdening the other party. Examples of supportive measures include course-related adjustments, work or class schedule modifications, mutual contact restrictions, counseling, and increased security and monitoring at certain campus locations. 34 C.F.R. § 106.30(a).

The Title IX coordinator is tasked with coordinating the effective implementation of supportive measures. 34 C.F.R. § 106.30(a).

Supportive measures, whether provided to the complainant or respondent, must be kept confidential to the extent possible so as not to impair the ability to provide those measures. 34 C.F.R. § 106.30(a).

## **Informal Resolution**

If a formal complaint of sexual harassment is filed, a community college may offer the parties the option to resolve the complaint informally, such as through mediation. The college may facilitate informal resolution at any time prior to making a determination regarding responsibility. First the college must provide the parties written notice of the allegations; the informal resolution process requirements, including the situations that may preclude the parties from resuming a formal complaint; and any consequences of participating in the process, such as the records that may be shared. The parties must consent in writing to participate in the process. A party may withdraw from the informal resolution process and resume the formal complaint process at any time prior to agreeing to a resolution. 34 C.F.R. § 106.45(b)(9).

A community college may not require a party to waive the right to the investigation and adjudication of the complaint or require the party to participate in informal resolution. 34 C.F.R. § 106.45(b)(9).

Informal resolution may not be offered to resolve complaints of employee harassment of a student. 34 C.F.R. § 106.45(9). Arguably the restriction is limited to alleged incidents of sexual harassment that are addressed by the Title IX regulations.

## **Investigation**

A community college must investigate all allegations presented as part of a formal complaint. 34 C.F.R. § 106.45(b)(3). The Title IX regulations set out parameters for the investigation of a formal complaint and the associated grievance process.

**Investigator:** Commentary to the Title IX regulations provides that the Title IX coordinator may serve as the investigator or the college may assign another college official or employee or a third party to serve in that position. 85 Fed. Reg. 30026 (May 19, 2020).

**Request not to investigate:** The Title IX regulations do not provide a formal procedure for the alleged victim to request the community college not to investigate a complaint. However, under state law, if an alleged victim of a reported incident of sexual harassment, sexual assault, dating violence, or stalking requests the institution not to investigate the alleged incident, the college may investigate the incident after considering the seriousness of the incident, any other reports of incidents committed by the same alleged perpetrator, if the alleged incident poses a risk of harm to others, and any other relevant factors. The college must notify the alleged victim of the final decision. If the college chooses not to investigate the incident, the college must take any reasonable steps necessary to protect the health and safety of the college community. Tex. Educ. Code § 51.285; 19 Tex. Admin. Code § 3.9.

**Burden of proof and gathering evidence:** A community college must carry the burden of proof and of gathering sufficient evidence to reach a determination regarding responsibility. The college may not access, use, or disclose as part of the process a party's treatment records made by a recognized medical or mental health professional or paraprofessional without the party's written consent. 34 C.F.R. § 106.45(b)(5).

**Presentation of witnesses and evidence:** A community college must provide the parties the equal opportunity to present witnesses and other inculpatory and exculpatory evidence. 34 C.F.R. § 106.45(b)(5).

**Prohibited restrictions on the parties:** A community college may not restrict a party from discussing the allegations or from collecting and introducing relevant evidence. 34 C.F.R. § 106.45(b)(5).

**Opportunity to have advisors and others present:** A community college must provide the parties the same opportunities to have others, including advisors, present during any meeting or proceeding. Advisors, who are chosen by the parties, may be an attorney. The college may restrict the degree to which an advisor may participate in proceedings. The restrictions must apply equally to both parties. 34 C.F.R. § 106.45(b)(5).

**Sufficient notice of meetings:** A community college must provide a party invited or expected to attend a meeting, including an interview or hearing, in sufficient time to prepare. The notice must be in writing and must include the date, time, location, participants, and purpose of the meeting. 34 C.F.R. § 106.45(b)(5).

**Opportunity to inspect and review evidence:** A community college must provide the parties an equal opportunity to inspect and review evidence directly related to the allegations at issue, even evidence that the college does not intend to use to make a determination regarding responsibility. The parties must have the chance to meaningfully respond prior to the investigation's conclusion. 34 C.F.R. § 106.45(b)(5).

**Investigative report:** A community college must create a report of the investigation. The report must fairly summarize relevant evidence. The college must send an electronic or hard copy of the report to each party and the party's advisor at least ten days prior to a hearing and provide them the opportunity to provide a written response. 34 C.F.R. § 106.45(b)(5).

## **Hearings**

Community colleges must provide a live hearing as part of the grievance process for formal complaints.

**Selection of the decisionmaker:** A community college must assign a decisionmaker to conduct a Title IX hearing and to determine any necessary discipline or corrective action. The new Title IX regulations expressly decline to use the single investigator model. The regulations prohibit a college from selecting the Title IX coordinator or investigator to serve as decisionmaker. 34 C.F.R. § 106.45(b)(7).

Note, to adequately fulfill the board's role as employer and supervisor of the college chief executive officer (CEO) and to facilitate accurate performance evaluations, the board or a third party assigned by the board, not the CEO's designee, should hear complaints filed against the CEO. Permitting the CEO or other administrator to manage the process by which individuals may pursue their complaints against the CEO could result in due process complaints, complaints of a conflict of interest, or complaints of abuse of authority.

**Location of participants:** The hearing may be conducted with all parties present at the same location or the college may choose to permit any or all parties, witnesses, and other participants to appear virtually. If any person participates virtually, the participants must be able to simultaneously see and hear each other. 34 C.F.R. § 106.45(b)(6)(i).

Additionally, on request of a party, the college must hold the hearing with the parties in separate rooms. The decisionmaker and the parties must be able to simultaneously see and hear the party or witness answering questions. 34 C.F.R. § 106.45(b)(6)(i).

**Cross examination:** The decisionmaker must permit each party's advisor to question the other party and witnesses directly, orally, and in real time. The party may never conduct the cross examination. If a party does not have an advisor at the hearing, the community college must provide the party, at no charge, an advisor selected by the college. 34 C.F.R. § 106.45(b)(6)(i).

Any question asked of a party or witness must be relevant. The decisionmaker must determine if the question is relevant before the question may be answered and explained why any excluded question is not relevant. Evidence and questions about the complainant's sexual predisposition and prior sexual behavior will not be considered relevant unless offered to prove someone other than the respondent committed the alleged acts or if they relate to the complainant's past sexual behavior with the respondent and are offered to prove consent. 34 C.F.R. § 106.45(b)(6)(i).

If a party or witness does not appear at the hearing or refuses to submit to cross examination, then the decisionmaker may not rely on a statement of that party or witness when making a determination regarding responsibility. The decisionmaker cannot draw an inference about responsibility based on the person's failure to answer any questions. 34 C.F.R. § 106.45(b)(6)(i).

**Recording:** A community college must record or create a transcript of the hearing. The college must make the recording or transcript available to the parties for inspection and review. 34 C.F.R. § 106.45(b)(6)(i).

### **Determination Regarding Responsibility**

The decisionmaker must issue a written determination regarding responsibility using the standard of evidence selected by the community college. The determination must be provided simultaneously to the parties. 34 C.F.R. § 106.45(b)(7).

The determination regarding responsibility becomes final on the date the college provides the parties the written result of an appeal. If an appeal is not filed, the determination becomes final the date the appeal is no longer timely. 34 C.F.R. § 106.45(b)(7).

The regulations specify the contents of the determination of responsibility:

1. The allegations at issue.
2. A description of the procedural steps, such as notice, interviews, evidence gathering, and hearings, taken since the formal complaint was filed.
3. The written determination must include the supporting facts and conclusions regarding the application of the college's code of conduct to the facts.
4. The result as to each allegation and the rationale for result.
5. Any disciplinary sanctions.
6. Whether the college will be providing the complainant remedies designed to restore or preserve equal access to the college's education program or activity. The Title IX coordinator is responsible for implementation of the remedies.
7. The college's appeal procedures and the permitted reasons for appeal.

34 C.F.R. § 106.45(b)(7).

### **Dismissal of a Formal Complaint**

The Title IX regulations describe the bases for a mandatory or permissive dismissal of a formal complaint following an investigation. Dismissal of the complaint does not prevent the college from acting under another provision of the college's code of conduct. 34 C.F.R. § 106.45(b)(3).

**Mandatory dismissal:** A community college must dismiss a formal complaint if the alleged conduct:

1. if proven, would not constitute sexual harassment as defined in the Title IX regulations;
2. did not occur as part of the college's education program or activity; or
3. did not occur in the United States.

34 C.F.R. § 106.45(b)(3).

**Permissive dismissal:** At any time during the investigation or hearing, a community college may dismiss a formal complaint or individual allegations if:

1. the complainant submits written notification to the Title IX coordinator that the complainant wants to withdraw the complaint or any individual allegations;
2. the respondent is no longer enrolled or employed by the college; or
3. specific circumstances prevent the college from gathering enough evidence to reach a determination.

34 C.F.R. § 106.45(b)(3).

Note, under state law, if a student withdraws while a disciplinary process is pending that may result in a student being ineligible to reenroll for a nonacademic or nonfinancial reason, a community college must complete any disciplinary process and make a final determination of responsibility. Tex. Educ. Code § 51.9364(a), (c); 19 Tex. Admin. Code § 3.30(c).

**Notice:** If a community college dismisses a formal complaint, the college must promptly and simultaneously notify the parties. The notice must be in writing and include the reasons for the dismissal. 34 C.F.R. § 106.45(b)(3).

### **Appeals**

A community college must offer the parties the opportunity to appeal their complaints of sexual harassment.

**Bases for appeal:** The Title IX regulations require a community college to permit the parties to appeal a determination of responsibility or dismissal of a formal complaint or individual allegations on the following bases, if those bases affected or could affect the outcome:

1. a procedural irregularity;
2. new evidence not reasonably available at the time of the determination regarding responsibility or dismissal; and
3. a conflict of interest or bias on the part of the Title IX coordinator, investigator, or decisionmaker against a party or complainants or respondents generally.

The regulations permit a college to provide additional bases for appeal, but those reasons must be offered to the parties equally. 34 C.F.R. § 106.45(b)(8).

Note, state law requires appeals for any reason. Employees, students, and others have the right to petition the community college board for redress of grievances under Texas Constitution article I, section 27. Additionally, Texas Government Code section 617.005 requires government employers to permit all employees to submit grievances on “conditions of work.” Tex. Gov’t Code § 617.005.

**Decisionmaker for appeals:** The decisionmaker for an appeal may not be the Title IX coordinator, the investigator, or the decisionmaker for the determination regarding responsibility or dismissal. Like the decisionmakers earlier in the process, the decisionmaker at the appeals level must not have a conflict of interest or bias and must be trained. 34 C.F.R. § 106.45(b)(1)(iii), (8).

Arguably, the board of trustees should be a part of the appeals process. As described above, state law requires that employees, students, and others have the opportunity to petition a community college board for redress of grievances. Tex. Const. art. I, § 27. Courts applying this provision in the area of educational entities differ as to whether the board simply listening to presentations during the public comment section of a board meeting, without giving some level of consideration, is sufficient, however. *Corpus Christi Indep. Sch. Dist. v. Padilla*, 709 S.W.2d 700 (Tex. App.—Corpus Christi 1986, no writ); *Prof. Assoc. of College Educators v. El Paso County Cmty. Dist.*, 678 S.W.2d 94 (Tex. App.—El Paso 1984, writ ref’d n.r.e.). Further, hearing the complaints can provide the board several practical benefits such as limiting future lawsuits filed by individuals unsatisfied with the lack of board consideration of their complaints, enabling the board’s oversight authority, and providing background information for complaints that otherwise may be brought to public comment without context.

**Procedures upon appeal:** A community college must provide written notice to the other party when a party files an appeal. The appeal procedures must apply equally to both parties, including the reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome. 34 C.F.R. § 106.45(b)(8).

**Written decision:** The decisionmaker must issue a written decision addressing the result of the appeal and the justification for the result. The decision must be provided to the parties simultaneously. 34 C.F.R. § 106.45(b)(8).

### **Confidentiality**

Under the Title IX regulations, a community college must keep confidential the identity of a person who reports sex discrimination or is reported to be the perpetrator of the conduct. The college must also keep confidential the identity of a complainant and respondent as defined by the Title IX regulations and any witness. However, the college



may release the identity if permitted by the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, or associated regulations, 34 C.F.R. part 99; as required by law; or to carry out the purposes of the Title IX regulations. 34 C.F.R. § 106.71(a).

State law provides similar privacy protections for the alleged victim, a person who sought guidance regarding an incident, the person who made the report, a person her participated in the investigation, and the alleged perpetrator or person who assisted the perpetrator in committing the conduct if the college investigates the report and determines the report is unsubstantiated or without merit. The identity of the person is confidential and may only be disclosed to certain individuals, such as an investigator or a witness as necessary to conduct the investigation, a law enforcement officer to conduct a criminal investigation, an health care provider in an emergency, and the alleged perpetrator if required by law. Tex. Educ. Code §§ 51.256, .291; 19 Tex. Admin. Code § 3.17.

### **Prohibited Retaliation**

The Title IX regulations prohibit a community college and others from threatening, coercing, intimidating, or discriminating against a person so as to interfere with any right or privilege under Title IX and the Title IX regulations or because the person has reported sexual harassment or participated or refused to participate in any manner in an investigation, proceeding, or hearing under the regulations. 34 C.F.R. § 106.71(a).

The regulations provide that the exercise of First Amendment rights does not constitute prohibited retaliation. Neither does disciplining a person for making a false statement in bad faith during the grievance process described by the Title IX regulations. 34 C.F.R. § 106.71(b).

A retaliation complaint may be filed under the procedures adopted by the college for sex discrimination complaints. 34 C.F.R. § 106.71.

State law also provides protection from retaliation for employees or others who in good faith report sexual harassment, sexual assault, dating violence, or stalking or participate in the investigation, disciplinary process, or related proceeding. However, the prohibition does not apply to a perpetrator or person who assists in the perpetration of the incident. Tex. Educ. Code §§ 51.254, .257; 19 Tex. Admin. Code §§ 3.5(e)-(f), .18.

### **Emergency Removal or Leave**

The Title IX regulations do not prevent a community college from the emergency removal of a student or other person from the college's education program or activity. The college must first undertake an individualized safety and risk analysis and determine an immediate threat to the health and safety of an individual arising from the allegations

of sexual harassment. The college must provide the respondent notice of the decision and an opportunity to challenge it immediately after the removal. A community college may also place an employee on administrative leave during a process for addressing a formal complaint under 34 C.F.R. § 106.45. 34 C.F.R. § 106.44(c)-(d).

Neither provision may be construed to modify a person's rights under the Americans with Disabilities Act or Section 504 of the Rehabilitation Act of 1973. 34 C.F.R. § 106.44(c)-(d).

### **Awareness**

With new requirements, it is important that a community college provide awareness of the procedures for reporting a complaint of sexual harassment and the process for addressing the complaint. Title IX does not describe specific awareness requirements beyond the publication requirements described above but both the Clery Act and state law do. The provisions are similar, requiring a comprehensive prevention and outreach program with such components as prevention strategies, victim empowerment, bystander intervention, and risk reduction. 34 C.F.R. § 668.46(j); Tex. Educ. Code § 51.282(d); 19 Tex. Admin. Code § 3.4(d).

State law also requires the community college to provide students with information about the reporting protocol by emailing the information to each student at the beginning of each semester and including the information in the college's in-person or online orientation. The college must include the name, office location, and contact information of the institution's Title IX coordinator. Tex. Educ. Code § 51.282(d); 19 Tex. Admin. Code § 3.4(d).

State law also requires the Title IX coordinator to report to the college's chief executive officer every three months on submitted reports and immediately if a safety emergency exists. The CEO must then report annually to the board of trustees on the reports and post that report online, with certain exceptions. Tex. Educ. Code § 51.253; 19 Tex. Admin. Code § 3.6.

### **Recordkeeping**

A community college must maintain for seven years the records of each sexual harassment investigation, any resulting appeal, any related informal resolution, and all materials used to train the Title IX coordinator, investigator(s), decisionmaker(s), and any facilitator of an informal process. The college also must maintain records of any actions taken in response to a report or formal complaint of sexual harassment, including documentation of the basis for the college's conclusion that its response was not deliberately indifferent and that it has taken measures to restore or preserve equal access to the college's education program or activity. If the college does not provide supportive measures to a complainant, then the college must document why the response was not clearly unreasonable in light of the known circumstances. 34 C.F.R. § 106.45(b)(10).

For more information on community college law topics,  
visit TASB Community College eLaw online at [colleges.tasb.org/elaw](https://colleges.tasb.org/elaw).

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