



D. STAFFORD
& ASSOCIATES

Introduction to Title IX Class

Presented by DSA Associate:

Adrienne Murray

D. Stafford & Associates, LLC
179 Rehoboth Avenue, #1121
Rehoboth Beach, DE 19971
302-344-5809

Dolores@DStaffordandAssociates.com

www.dstaffordandassociates.com

©All rights reserved by DSA

(Limited permission is granted to each attendee of this class to make training materials available per the requirements outlined in the Title IX Regulations published on May 19, 2020)



Adrienne Meador Murray, Vice President, Equity Compliance and Civil Rights Services



In January 2014, Adrienne Meador Murray joined D. Stafford & Associates where she currently serves as the Vice President, Equity Compliance and Civil Rights Services after having been affiliated with D. Stafford & Associates as a part-time Associate since 2012 and the National Association of Clery Compliance Officers & Professionals (NACCOP) where she currently serves as Director of Training and Compliance Activities. Murray began her career in municipal law enforcement as a civilian employee with the City of Richmond Police Department (Virginia). She graduated from the Virginia Commonwealth University Police Training Academy and began her career as a sworn police officer for the University of Richmond (UR) Police Department (Virginia). At UR, Murray progressed through the ranks from a night shift patrol officer to Operations Lieutenant (overseeing criminal investigations, crime prevention and patrol) over the span of a decade before becoming the Chief of Police at Davidson

College in North Carolina. Most recently, Murray served as Chief of Police at Trinity Washington University (in Washington, D.C.).

As the Executive Director, Equity Compliance and Civil Rights Services for DSA, Murray builds on her 17-year career in law enforcement in which she became a nationally recognized expert in the field of best practice postsecondary institutional response to the sexual victimization of college women in the United States and in Canada. She is also a trained civil rights investigator and is well respected throughout the country for her ability to aid institutions in understating how to do best practice criminal and civil rights investigations concurrently. She is well known for her work in having provided support, advocacy and criminal investigative services for victims of sexual assault, stalking and intimate partner violence and is a sought-out speaker and investigator. She has expertise in the construction of best practice law enforcement standard operating procedures and training police officers to respond in best practice and trauma-informed ways to victims of sexual assault and intimate partner violence. In her current role, Murray coordinates curriculum development and instruction for national classes, including basic and advanced sexual misconduct investigation classes; an investigation of dating violence, domestic violence and stalking class; and a Title IX Coordinator/Investigator class offered through D. Stafford & Associates. To date, Murray has trained more than 3,500 criminal and civil rights investigators throughout the U.S.

Drawing on her experiences as a trained criminal and civil rights investigator, Murray also oversees independent investigations of complex sexual misconduct cases; conducts audits of Title IX/VAWA



D. STAFFORD & ASSOCIATES

P.O. Box 1121
Rehoboth Beach, DE 19971
Phone: (202) 438-5929
dolores@dstaffordandassociates.com

Compliance; drafts institutional sexual misconduct policies and procedures; and conducts campus-based trainings pertaining to the resolution of sexual misconduct offenses on college and university campuses. Murray frequently presents at regional and national conferences on topics such as the *Sexual Victimization of College Women*, *Understanding Consent and Incapacitation*, and *Responding to Sexual Assault on Campus: Clery Act and Title IX Implications*. Murray also conducts provincially specific sexual misconduct trainings throughout Canada.

Murray is a graduate of the University of Richmond, where she received her Bachelor's Degree in Applied Studies in Human Resource Management and of New England College, where she received her Master's Degree in Campus Public Safety Administration. Murray is also a graduate of the 235th session of the prestigious FBI National Academy where she was awarded a graduate certificate in Criminal Justice from the University of Virginia. She has authored numerous journal articles.



Catherine Cocks, M.A.
Consultant, Student Affairs, Title IX, and
Equity Compliance Services



Ms. Cocks has been a higher education professional for over thirty years. Her work with D. Stafford & Associates focuses on Title IX investigations and training; assessment of student affairs policies, practices and services; and behavioral threat assessment. Cathy was the Director of Community Standards for the University of Connecticut for 14 years where she managed the student conduct process, which included managing all Title IX cases involving student respondents and chaired the University's student threat assessment team. Prior to that, she held several positions within Residential Life at the University of Connecticut and Roger Williams University.

She is a faculty member for the Association for Student Conduct Administration's (ASCA) Donald D. Gehring Academy teaching on subjects such as ethics, governance, threat assessment, media relations, and higher education trends. She was an affiliated faculty

member for many years in the University of Connecticut's Higher Education and Student Affairs Master's program teaching "The Law, Ethics, and Decision-Making in Student Affairs."

Cathy has co-authored the "Philosophy of Student Conduct" chapter in the 2nd edition of "Student Conduct Practice" (2020) and was a member of the writing team for CAS Standards' Cross-functional Framework for Identifying and Responding to Behavioral Concerns.

Cathy is a Past President of ASCA. She has also served as a Circuit representative, co-chair of the Public Policy and Legislative Issues Committee, and as a member of the ASCA Expectations of Members Task Force. Cathy has served in a variety of leadership roles in NASPA Region I.

She was the 2015 recipient of ASCA's Donald D. Gehring Award. She is a past recipient of the NASPA Region I Mid-Level Student Affairs Professional Award and the NASPA Region I Continuous Service Award.

She earned her Master's degree in Higher Education Administration from the University of Connecticut and Bachelor's degree in Communications/Media from Fitchburg State University.



Beth Devonshire, Consultant
Equity Compliance and
Title IX/Civil Rights Training



Beth Devonshire, J.D. is an experienced student affairs professional with expertise in student conduct, Title IX, threat assessment teams, policy development, trainings for various constituencies, and the impact legislative and legal decisions have on higher education. From 2006-2018, Ms. Devonshire worked as the Associate Dean of Students at UMass Boston, the Director of Community Standards at Bridgewater State University, and the Director of Community Standards at Stonehill College. In these roles, Ms. Devonshire was charged with oversight of the student conduct systems, membership in CARE/BIT teams, serving as the Deputy Title IX Coordinator, and drafting policies and procedures related to students. Prior to her work in higher education, Beth served as a law clerk for the Justices of the Superior Court in Massachusetts and in multiple roles at the Massachusetts State House.

Ms. Devonshire has been an Associate with D. Stafford & Associates (DSA) since 2012 and she joined as a full-time consultant in August of 2018. In this role, Beth works with institutions on issues involving Title IX, Clery Act, threat assessment, and other compliance related issues; and advises on policy and procedures, conducts trainings, participates in investigations, reviews enforcement practices of campus law enforcement, and serves in interim roles. Ms. Devonshire also speaks on a variety of other topics including legislative and legal issues impacting higher education including FERPA, Clery, and Alcohol and other Drug Prevention.

Ms. Devonshire is a faculty member in New England College's Doctorate of Education Program and the Higher Education Administration program at Bridgewater State University. Additionally, Ms. Devonshire serves on the Public Policy Division for NASPA, and is also the former Massachusetts Public Policy Liaison for MA NASPA. Beth also served as the Director of the Legislative Committee for the Association for Student Conduct Administrators (ASCA) for two years.

Ms. Devonshire is a member of the Massachusetts Bar. She is a graduate of Stonehill College with a degree in English and Secondary Education and holds a J.D. from Suffolk University School of Law. She is also a trained mediator.



Ann Todd

Consultant, Equity Compliance and Civil Rights Investigations



Ann Todd, Esq is a seasoned civil rights investigator in higher education for D. Stafford & Associates (DSA). Ms. Todd is a graduate of Davidson College with a degree in psychology and holds a JD from the University of Nebraska. Prior to joining DSA, she practiced law in Charlotte, NC, specializing in employment and civil rights and worked for a number of non-profit organizations. She returned to her alma mater (Davidson College) in 2008 and worked there through March of 2016 serving as the Assistant Director of Human Resources with the responsibility of managing employee relations and the learning and development function while also serving as the deputy Title IX Coordinator.

Ms. Todd joined the DSA in 2015 and currently serves as the Consultant, Equity Compliance and Civil Rights Investigations. She is the Senior Investigator for the DSA Title IX Investigation Team. She conducts external investigations on behalf of colleges and universities, specializing in investigating student allegations of sex discrimination, sexual assault, intimate partner violence, and stalking. Additionally, she brings a strong Human Resources background to investigating a range of employee misconduct—from performance issues to discrimination.

In addition to conducting investigations, Ms. Todd is a frequent speaker and consultant on Title IX investigations, conducting 20-30 courses every year on best practices for investigating sex discrimination and sex crimes on campus. She works with schools to draft policies and processes that provide equity and fairness to

INVESTIGATION CLASS ACRONYMS

- ASR:** Annual Security Report (often used as a reference to the Annual Security Report and/or the Annual Security and Fire Safety Report) that must be published by each institution of higher education.
- CSA:** Campus Security Authority—Individuals on each campus who have been identified by the Department of Education as persons who are required to report crimes that they become aware of to the Reporting Structure at each institution.
- DCL:** Dear Colleague Letter—this is a formal name of the method of communication from the Department of Education to college campuses. It is like naming their official “memo” to campuses.
- FERPA:** Family Educational Rights and Privacy Act—governs the confidentiality of student records.
- FNE:** Forensic Nurse Examiners
- GO:** General Order—some departments describe their operating procedures as general orders
- HEOA:** Higher Education Opportunity Act—the broader law that contains the Clery Act language and the fire safety and missing person language that is in the law but not contained within the “Clery Act” portion of the law.
- HIPAA:** Health Insurance and Privacy and Portability Act—governs privacy of medical records.
- MOU:** Memorandum of Understanding—an official agreement developed between agencies.
- NIBRS:** National Incident-Based Reporting System. 1 of 2 crime reporting systems developed by the FBI, but not the system that you are required to use for Clery Reporting—the only portion of this system that is used for Clery Act purposes are the 4 forcible and 2 non-forcible sex offense definitions.
- OCR:** Office of Civil Rights—the unit of the Department of Education that oversees Title IX Compliance.
- PD:** Police Department
- PS:** Public Safety
- PNG:** Persona-non-Grata—process used by some campuses not keep students from entering certain areas of the campus or the entire campus (administrative process) versus legal bar notice or trespass warning.
- SACC:** Sexual Assault Crisis Center, also known as Women’s Center.
- SANE:** Sexual Assault Nurse Examiner

SART: Sexual Assault Response Team

SOP: Standard Operating Procedures—some departments describe their operating procedures as Standard Operating Procedures. Some call them General Orders, etc...

SWA: Senior Women's Administrator (Athletics)

TWN: Timely Warning Notice

UCR: Uniformed Crime Report. This is 1 of 2 crime statistics reporting systems developed by the FBI. Institutions are required to use UCR Standards for counting and classifying crimes for reporting the Clery statistics.

VAWA: Violence Against Women Act



D. STAFFORD & ASSOCIATES

179 Rehoboth Avenue, #1121
Rehoboth Beach, DE 19971
Phone: (202) 438-5929
dolores@dstaffordandassociates.com

all parties involved and is adept at facilitating discussions with institutions to ensure the end product represents the values of the campus community.

Ms. Todd is licensed private investigator and a member of the NC Bar. She is a Certified Clery Compliance Officer through the National Association of Clery Compliance Officers and Professionals (NACCOP) and she is also a certified 360 facilitator through the Center for Creative Leadership. Ms. Todd lives in Davidson, NC where she volunteers on a number of local and town boards.



TITLE IX

Copyright

(Limited permission is granted to each attendee of this class to make training materials available per the requirements outlined in the Title IX Regulations published on May 19, 2020)

These materials are copyright of D. Stafford & Associates, LLC © 2020 D. STAFFORD & ASSOCIATES. All rights reserved.

Any distribution or reproduction of part or all of the contents in any form is prohibited other than the following:

- As required by 34 C.F.R. § 106.45(b)(1)(iii) and § 106.45(B)(10)(i)(D), this material in its entirety may be posted to the website of the institution in which you were associated with at the time in which you were enrolled in this training.*
- Public inspection upon request.*

You may not, except with our express written permission, distribute or commercially exploit the content. Nor may you transmit it or store it in any other website or other form of electronic retrieval system.



ISSUANCE OF CERTIFICATES FOR COMPLETION OF DSA/NACCOP CLASSES


To receive a certificate for classes held by D. Stafford & Associates, LLC or the National Association of Clerly Compliance Officers and Professionals (NACCOP), attendees must attend the majority of the class. This includes in-person classes and virtual classes. DSA and NACCOP understands that attendees may need to miss class for a legitimate reason for longer periods of time or may need to leave the room during a class for a few minutes to take a phone call or attend to other business. That said, our general rule of thumb for our 4 and 5 day classes is that if an attendee misses more than 1 hour of class time, they will not be issued a certificate of completion for the class. If the class is a 1, 2 or 3 day class, the amount of time that can be missed may be less, as classes of those lengths are more condensed.

For virtual classes, because we can't see all of the attendees all of the time like we can in an in-person class (based on the attendee controlling whether they have their camera turned on or not), the criteria for receipt of a certificate is determined based on missed class time (no more than 1 hour or less, depending on the length of the class) and participation in the Attendance Polls that will be launched throughout each day of class. Attendance polls are left up for approximately 5 minutes and the instructor notifies the attendees that a poll is being launched before doing so, to ensure that everyone who is there can/will respond to the poll. If there is an issue with responding to the attendance poll, the attendee would need to **immediately notify the Administrative Support person** in the course via the chat function in the zoom platform. That way we can immediately resolve any issues and give the attendee credit for being in attendance for the poll. Notifying us hours or days after having an issue with not being able to complete the attendance poll will not allow us to give the attendee credit for being in class during the poll.


Our classes qualify for credit toward a Master's Degree at New England College (and regardless if you decide to seek credit or not, but accreditation requirements mandate that we follow the same standards for all class attendees), so we have strict attendance standards that we follow for issuance of a certificate, which equates to verification that the participant attended the complete class. For DSA and NACCOP, issuance of a Certificate of Completion is verification of that fact.

If the attendee missed class for a legitimate reason, that doesn't mean that an attendee wasn't there for much of the class and that they didn't benefit from that attendance. It just means that based on the missed time and/or attendance polls (in virtual classes only), we aren't able to issue you a certificate of completion.

If an attendee has to miss time in class, the instructions attendees receive before the class provide instructions for notifying the Administrative Support person about the time that will be missed **IN ADVANCE**, so we can jointly identify what blocks of instruction will be missed, and the DSA/NACCOP team will then work with the attendee to see if we can get them in a future class module to make up that material, which would result in us being able to issue the attendee a certificate. We provide this service and opportunity at no additional cost, as we want each attendee to finish the class and get a certificate of completion. Effective communication by each attendee is the key to this option.



INTRODUCTION TO TITLE IX



1




AGENDA

- The Law
- The 2020 Regulations
- VAWA Procedural Requirements
- Admission and Financial Assistance
- Athletics
- Pregnancy and Parenting
- Discipline and Other Considerations
- Looking Ahead - The 2022 Proposed Regulations

© 2020 Stafford & Associates




2



ATTORNEYS

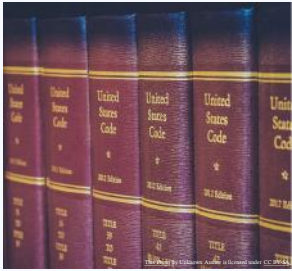
- Not your attorney
- Always consult with YOUR legal counsel

© 2020 Stafford & Associates



3





THE LAW



© 2022 D. Stafford & Associates

4

FEDERAL LAW

			
Statutes	Regulatory Guidance	Sub-Regulatory Guidance	Case Law
20 U.S.C.D. §1681-1688	34 C.F.R. § 106	Dear Colleague Letters OCR Website Executive Orders	

© 2022 D. Stafford & Associates

5

TITLE IX STATUTE



© 2022 D. Stafford & Associates

6

FEDERAL STATUTE - PROHIBITION

20 USC § 1681 Sex (a) Prohibition against discrimination

No person in the United States 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

7

FEDERAL STATUTE - EXCEPTIONS

- Admission policies
- Institutions changing from single-sex status
- Religious institutions
- Military services or merchant marines
- Public traditional single-sex institutions
- Social fraternities or sororities
- Voluntary youth organizations
- Boys or girl conference
- Father-son/mother-daughter activities
- "Beauty pageants"

8

FEDERAL STATUTE - "EDUCATIONAL INSTITUTION"

Any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department (§1681)

9

FEDERAL STATUTE - "PROGRAM OR ACTIVITY"

The term "program or activity" and the term "program" mean all of the operations of . . . a college, university, or other postsecondary institution, or a public system of higher education . . . any part of which is extended Federal financial assistance, except that such term does not include any operation of an entity which is controlled by a religious organization if the application of section 1681 of this title to such operation would not be consistent with the religious tenets of such organization. (§1687)

10

"OTHER" RESPONSIBILITIES



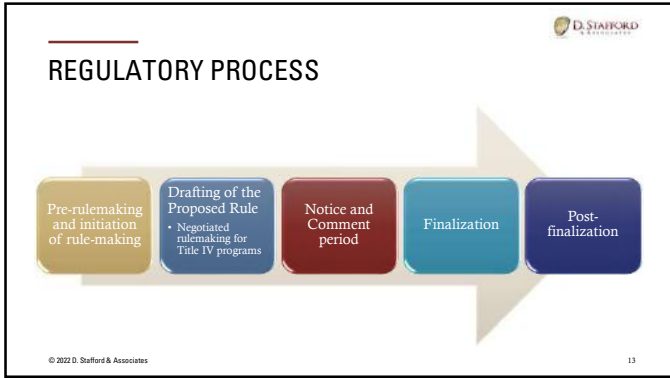
- Athletics
- Admission and Financial Aid
- Pregnancy
- Employment
- Discipline and other

11

REGULATORY GUIDANCE ("TITLE IX REGULATIONS")



12



13

-
- SUBPARTS**
- Subpart A: Introduction (106.1 - 106.9)
 - Subpart B: Coverage (106.11 – 106.17)
 - Subpart C: Admission and Recruitment (106.22 – 106.23)
 - Subpart D: Education Programs/Activities (106.31-106.43)
 - Subpart E: Employment (106.51– 106.61)
 - Subpart F: Procedures (106.71)
- © 2022 D. Stafford & Associates 14

14

KEY REGULATION LANGUAGE (PRE-2020)

Subpart A: Introduction

106.8 (a) Designation of responsible employee. Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part...

106.8 (b) "A recipient must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part"

© 2022 D. Stafford & Associates 15

15



SUB-REGULATORY GUIDANCE

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS THE ASSISTANT SECRETARY

April 4, 2011

Dear Colleges:


Education has long been recognized as the great equalizer in America. The U.S. Department of Education and its Office of Civil Rights (OCR) have been working to ensure that all students with an educational or economic disadvantage have an equal opportunity to succeed. The sexual harassment of students, including sexual violence, interferes with students' right to receive an education free from discrimination and, in the case of sexual violence, is a crime.

Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681 et seq., and its implementing regulations, 34 C.F.R. Part 101, prohibit discrimination on the basis of sex in education programs or activities operated by recipients of Federal financial assistance. Sexual harassment of students, which includes acts of sexual violence, is a form of sex discrimination prohibited by Title IX. In order to avoid its penalties, which include substantial, college and university financial "sticker" or "tag" charges¹ in meeting these obligations, this letter explains that the requirement of Title IX prohibits sexual violence and sexual harassment, which includes acts of sexual violence, and that the specific Title IX requirements applicable to sexual violence. "Sexual violence" is defined as any act of sexual violence, which is physical contact with a person's genital or groin area or when a person is incapable of giving consent due to the victim's use of drugs or alcohol. An individual also may be unable to give consent due to an intellectual or other disability. A number of different acts fall into the category of sexual violence, including rape.


¹The Department has determined that this letter fulfills its obligation under the "significant guidance document" under the other provisions of the Education Amendments of 1972.

© 2022 D. Stafford & Associates 16

16



SUB-REGULATORY GUIDANCE



1972 Title IX passed

1997 Guidance

2001 Guidance

2006 Guidance

2008 Guidance

2010 Guidance

2011 Guidance


2014 Guidance

2015 Guidance


2017 Guidance

© 2022 D. Stafford & Associates 17

17



SUB-REGULATORY GUIDANCE



2018 NPRM

2020 Regulations

2021 Executive Order and Q&A

2022 NPRM

2022 Draft Regulations

2022 Reissued Q&A

© 2022 D. Stafford & Associates 18

18

© 2022 D. Stafford & Associates

EXECUTIVE ORDERS




THE WHITE HOUSE
WASHINGTON

This Photo by Unknown Author is licensed under CC BY-SA

19

19



BRIEFING ROOM

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

JANUARY 20, 2021 • PRESIDENTIAL ACTIONS

20



FEDERAL REGISTER
The Daily Journal of the United States Government



W T SIGNATURE

Rule

Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County

A Rule by the Education Department on 01/22/2021

21

D. STAFFORD
ASSOCIATES


CASE LAW



© 2022 D. Stafford & Associates 22


22

Geographic Boundaries
of United States Courts of Appeals and United States District Courts



© 2022 D. Stafford & Associates 23

23



D. STAFFORD
ASSOCIATES

GEBSER V. LAGO VISTA IND. SCHOOL DISTRICT, SCOTUS (1998)

“The question in this case is when a school district may be held liable in damages in an implied right of action under ...Title IX... for the sexual harassment of a student by one of the district’s teachers. We conclude that damages may not be recovered in those circumstances unless an official of the school district who at a minimum has authority to institute corrective measures on the district’s behalf has actual notice of, and is deliberately indifferent to, the teacher’s misconduct.”

© 2022 D. Stafford & Associates 24

24



D. STAFFORD & ASSOCIATES

DAVIS V. MONROE COUNTY BOARD OF EDUCATION, SCOTUS (1999)

“We consider here whether a private damages action may lie against the school board in cases of student-on-student harassment. We conclude that it may, but only where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities. Moreover, we conclude that such an action will lie only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.”

25



D. STAFFORD & ASSOCIATES

JACKSON V. BIRMINGHAM BOARD OF EDUCATION, SCOTUS (2005)

“We consider here whether the private right of action implied by Title IX encompasses claims of retaliation. We hold that it does where the funding recipient retaliates against an individual because he has complained about sex discrimination.”

26



D. STAFFORD & ASSOCIATES

DOE V. CINCINNATI, 6TH CIRCUIT (2017)

“Here, the University’s disciplinary committee necessarily made a credibility determination in finding John Doe responsible for sexually assaulting Jane Roe given the exclusively “he said/she said” nature of the case. Defendants’ failure to provide any form of confrontation of the accuser made the proceeding against John Doe fundamentally unfair.”

27



**DOE V. BAUM,
6TH CIRCUIT (2018)**

“Here, the University’s disciplinary committee necessarily made a credibility determination in finding John Doe responsible for sexually assaulting Jane Roe given the exclusively “he said/she said” nature of the case. Defendants’ failure to provide any form of confrontation of the accuser made the proceeding against John Doe fundamentally unfair.”

28



**HAIK V. UMASS-AMHERST,
1ST CIRCUIT (2019)**

“...we find that the university violated Haidak’s federal constitutional right to due process in suspending him for five months without prior notice or a fair hearing, but that it did not thereafter violate his rights in expelling him after providing a fair expulsion hearing.”

“Some opportunity for real-time cross-examination, even if only through a hearing panel.”

29



**DOE V. UNIVERSITY OF THE
SCIENCES, 3RD CIRCUIT (2020)**

“We hold that USciences’s contractual promises of “fair” and “equitable” treatment to those accused of sexual misconduct require at least a real, live, and adversarial hearing and the opportunity for the accused student or his or her representative to cross-examine witnesses—including his or her accusers. We do not, however, attempt to prescribe the exact method by which a college or university must implement these procedures.”

30




31



32



33



2020 REGULATION CHANGES


New Subpart A: Introduction

106.8(a) Designation of responsible employee coordinator. Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part employee must be referred to as the "Title IX Coordinator."

106.8(c) Adoption of grievance procedures. A recipient must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part and a grievance process that complies with § 106.45 for formal complaints as defined in § 106.30.

© 2022 D. Stafford & Associates 34

34



2020 REGULATION CHANGES


Subpart A: Introduction (106.1 - 106.9)
CHANGE: coordinator; publication; grievance procedures; preservation of rights

Subpart B: Coverage (106.11 – 106.17)
CHANGE: Religious institutions

Subpart D: Education Programs/Activities (106.31-106.43)
New: 106.30: Definitions of sexual harassment
New: 106.44: Recipient's response to sexual harassment
New: 106.45: Grievance process formal complaints of sexual harassment

© 2022 D. Stafford & Associates 35

35



2020 REGULATIONS OVERVIEW


Applies to
Higher
Education and
K-12

Covers wide
range of sex
discrimination


© 2022 D. Stafford & Associates 36

36

2020 REGULATIONS OVERVIEW



Preamble



Process for Sexual Harassment ONLY

© 2022 D. Stafford & Associates 37

37


GENERAL PROVISIONS




© 2022 D. Stafford & Associates 38

38

§106.3 - REMEDIAL ACTION



Fix t



No monetary damages

© 2022 D. Stafford & Associates 39

39

§106.6 - EFFECT OF OTHER REQUIREMENTS AND PRESERVATION OF RIGHTS

Constitutional Protections FERPA Title VII

Parents and Guardians State and Local Laws

© 2022 D. Stafford & Associates 40

40

§106.8 - DESIGNATION OF COORDINATOR

Title IX Coordinator Notification of parties Contact information Reporting information

© 2022 D. Stafford & Associates 41

41

§106.8 - DISSEMINATION OF POLICY

Notification Publications

© 2022 D. Stafford & Associates 42

42

§106.8(C) - ADOPTION OF GRIEVANCE PROCEDURE

“grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part and a grievance process that complies with § 106.45 for formal complaints as defined in § 106.30.”

43



44

§106.12 - RELIGIOUS INSTITUTION - EXEMPTION

- May submit in writing seeking assurance of the exemption
- Must identify the provision and explain how it conflicts with a specific tenet
- Not required to seek assurance
- May raise its exemption at any time

45

§106.71 - RETALIATION

- Intimidation, threats, coercions, discrimination
- May use same grievance procedure*
- 1st Amendment
- False reports

© 2022 D. Stafford & Associates 46

46

§106.30 DEFINITIONS



© 2022 D. Stafford & Associates 47


47

§106.30 - PARTIES

- Complainant**
 - An individual who is alleged to be the victim of conduct that could constitute sexual harassment (§106.30)
- Respondent**
 - An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment (§106.30)

© 2022 D. Stafford & Associates 48


48

 **TITLE IX PERSONNEL**

- Title IX Coordinator
 - Coordinates its efforts to comply with its responsibilities (§106.30)
- Investigator
- Decision-maker
- Informal Resolution Facilitator

© 2022 D. Stafford & Associates 49


49

 **ADVISORS**

- Advisors are not “officially” defined.
- Role:
 - Provide support, advice, and/or advocacy throughout the process
 - Receive the draft and final reports
 - Conduct cross-examination by asking the questions wanted by their advisee

© 2022 D. Stafford & Associates 50


50

 **§106.30 - ACTUAL KNOWLEDGE**

Notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is the respondent. The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient (§106.30)

© 2022 D. Stafford & Associates 51

51



D. STAFFORD & ASSOCIATES

§106.30 - FORMAL COMPLAINT


... a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment.

At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.

Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party. (§106.30)

52

52



§106.30 - SUPPORTIVE MEASURES

Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.

Such measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment. (§106.30)

53

53



§106.30
SEXUAL
HARASSMENT

54

54

§106.30 - SEXUAL HARASSMENT

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

1. 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;
2. 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;
3. "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

55

ON THE BASIS OF SEX

The U.S. Department of Education (Department) issues this interpretation to clarify the Department's enforcement authority over discrimination based on sexual orientation and discrimination based on gender identity under Title IX of the Education Amendments of 1972 in light of the Supreme Court's decision in Bostock v. Clayton County . . .

Consistent with the analysis above, OCR will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that receive Federal financial assistance from the Department. As with all other Title IX complaints that OCR receives, any complaint alleging discrimination based on sexual orientation or gender identity also must meet jurisdictional requirements as defined in Title IX and the Department's Title IX regulations, other applicable legal requirements, as well as the standards set forth in OCR's Case Processing Manual


[Enforcement of Title IX with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County (June 16, 2021)]




56

PRONG 1: QUID PRO QUO

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 (§106.30)

57

 §106.30 - QUID PRO QUO


-  Must be an employee respondent (not volunteer, visitor, student)
-  "This for that" harassment
-  When favorable professional or educational treatment is conditioned on a sexual activity

© 2022 D. Stafford & Associates 58

58


PRONG 2:
HOSTILE ENVIRONMENT+
(THE DAVIS STANDARD)




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 (§106.30)



© 2022 D. Stafford & Associates 59

59

 §106.30 - HOSTILE ENVIRONMENT+


-  No definition of consent required
-  Not the same Title VII "hostile environment" or 2001 Guidance
-  First Amendment protections

© 2022 D. Stafford & Associates 60

60

**PRONG 3:
THE VAWA
OFFENSES**




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




© 2022 D. Stafford & Associates 61

61


§106.30 - THE VAWA OFFENSES

 Sexual Assault	Rape Fondling Incest Statutory Rape
 Intimate Partner Violence	Dating Violence Domestic Violence
 Stalking	




© 2022 D. Stafford & Associates 62

62




CONSENT

The Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault. (§106.30)




© 2022 D. Stafford & Associates 63

63




**§106.44
 RECIPIENT'S
 RESPONSE TO
 SEXUAL
 HARASSMENT**




© 2022 D. Stafford & Associates 64

64




§106.44 - GENERAL RESPONSE




© 2022 D. Stafford & Associates 65


65



§106.44 - TITLE IX JURISDICTION - LOCATION



Occurred in the context of
 educational program or activities



Occurred in the United States

© 2022 D. Stafford & Associates 66

66

§106.44 - TITLE IX JURISDICTION - PERSON

At the time of filing a formal complaint...the complainant must be participating in or attempting to participate in the education program or activity" (§106.44)

The institution must exercise control over the respondent

All regulations apply to students and employees

© 2022 D. Stafford & Associates 67

67

§106.44 - EMERGENCY REMOVAL

Immediate threat to physical health or safety

Must arise from the allegations

Provide notice and an opportunity to challenge


© 2022 D. Stafford & Associates 68

68

§106.45 GRIEVANCE PROCESS FOR FORMAL COMPLAINTS OF SEXUAL HARASSMENT

© 2022 D. Stafford & Associates 69

69

 **§106.45 - TRAINING**

All Title IX Personnel

- Definition of sexual harassment
- 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
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias

Decision-makers


- Technology to be used at a live hearing
- 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

Investigators

- Issues of relevance to create an investigative report that fairly summarizes relevant evidence

© 2022 D. Stafford & Associates 70


70

 **§106.45 - RECIPIENT'S TREATMENT OF PARTIES**

A recipient's treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under Title IX.

© 2022 D. Stafford & Associates 71

71

 **§106.45 - GRIEVANCE PROCESS**

Equitable

Objective Evaluations

No conflict of interest or bias

© 2022 D. Stafford & Associates 72

72

§106.45 - GRIEVANCE PROCESS

Presumption of not responsible | Prompt time frames | Range of sanctions | Standard of evidence

Appeal | Supportive measures | Respect Privilege

© 2022 D. Stafford & Associates 73

73

§106.45 - NOTICE REQUIREMENTS

Grievance process | Sufficient details and sufficient time to prepare | Identities of the parties, alleged conduct | Date and location of incident

Presumed not responsible | Advisor of choice | False statements

© 2022 D. Stafford & Associates 74

74

§106.45 - Additional Allegations

An amended notice must be sent to the parties when additional allegations will be investigated that were not in the original notice letter.

© 2022 D. Stafford & Associates

75

§106.45 - DISMISSAL OF FORMAL COMPLAINT

Must Dismiss

- Behavior does not constitute sexual harassment
- Did not occur in educational program or activity, not in the United States

May Dismiss

- Complainant withdraws formal complaint
- Respondent no longer enrolled/employed
- Insufficient evidence

76

§106.45 - CONSOLIDATION OF FORMAL COMPLAINTS

Multiple respondents

More than one complainant against one or more respondent

One party against other party

77

§106.45 - INFORMAL RESOLUTION



Notice

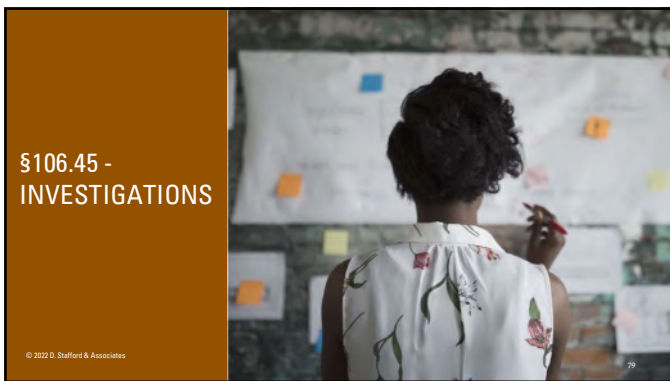


Voluntary

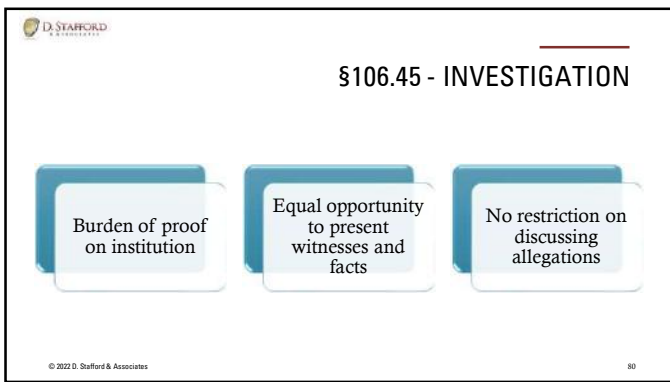


Not allowed for Employee/student

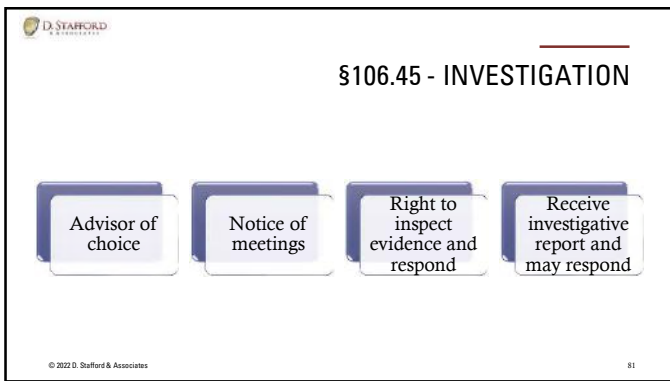
78



79



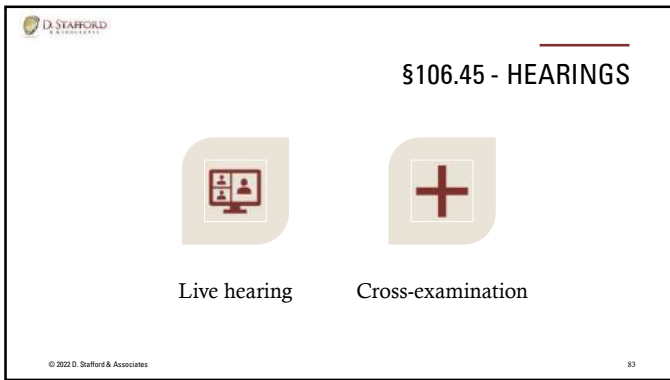
80



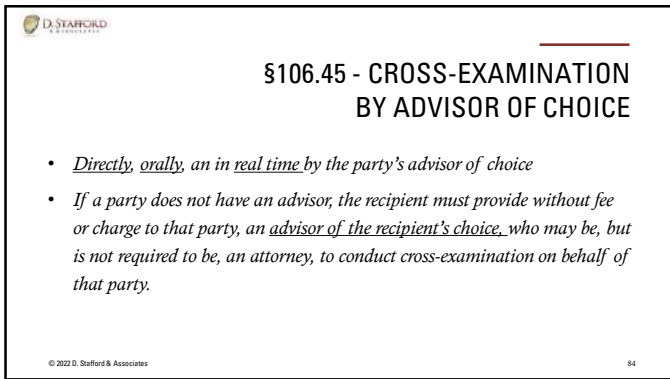
81




82



83



84




§ 106.45 - RELEVANCY DETERMINATION

Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.

© 2022 D. Stafford & Associates 85

85




§ 106.45 - RELEVANCY - SEXUAL PREDISPOSITION AND HISTORY



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.

© 2022 D. Stafford & Associates 86

86



§ 106.45 - "PHYSICALLY PRESENT"



© 2022 D. Stafford & Associates 87

87

 §106.45 - HEARING RECORDING



Audio




Video



Transcript

© 2022 D. Stafford & Associates 88

88

 §106.45 - DETERMINATION OF RESPONSIBILITY

- _____ Allegations
- _____ Procedural steps
- _____ Findings of fact
- _____ Conclusion/application
- _____ Rationale
- _____ Appeal procedures

© 2022 D. Stafford & Associates 89

89

 §106.45 - SANCTIONS AND REMEDIES



Sanctions



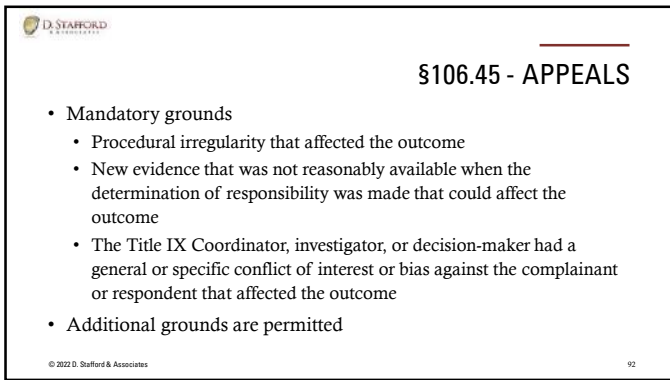
Remedies

© 2022 D. Stafford & Associates 90

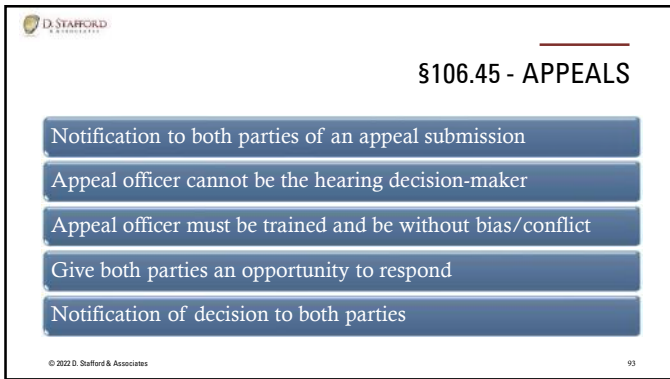
90



91



92



93

 \$106.45 - RECORDKEEPING

 Case Materials

 Training materials

© 2022 D. Stafford & Associates 94

94

Discussion:
Challenges and
Opportunities



© 2022 D. Stafford & Associates 95

95

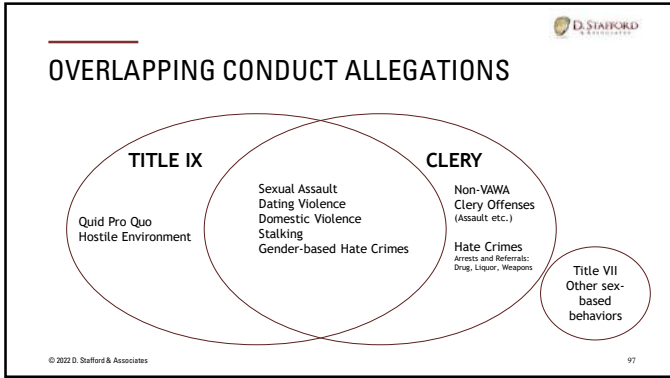


VAWA
PROCEDURAL
REQUIREMENTS

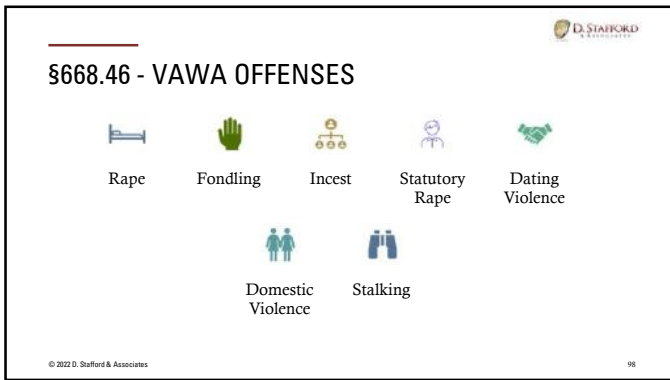


© 2022 D. Stafford & Associates

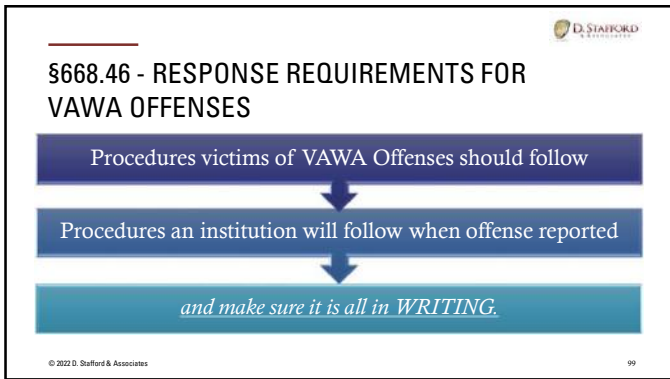
96




97



98



99





§ 668.46 - WRITTEN EXPLANATION OF STUDENT OR EMPLOYEE'S RIGHTS

(b)(11)(vii) "When a student or employee reports to the institution that the student or employee has been a victim of dating violence, domestic violence, sexual assault, or stalking, whether the offense occurred on or off campus, the institution will provide the student or employee a written explanation of the student's or employee's rights and options, as described in paragraphs (b)(11)(ii) through (vi) of this section. . ."

© 2022 D. Stafford & Associates 100

100







§ 668.46 - WRITTEN EXPLANATION OF RIGHTS AND OPTIONS

- The importance of preserving evidence** that may assist in proving that the alleged criminal offense occurred or may be helpful in obtaining a protection order
 - Not required but recommended: Where to obtain forensic exams, contact info, does not require police report and can have exam now, decide later
- How and to whom the alleged offense should be reported**
 - List any person or organization that can assist the victim
 - Recommended: Also include community organizations

© 2022 D. Stafford & Associates 101

101






§ 668.46 - WRITTEN EXPLANATION OF RIGHTS AND OPTIONS

- Notification of the victim's option to**
 - Notify proper law enforcement authorities, including on-campus and local police
 - Be assisted by campus authorities in notifying law enforcement authorities if the victim so chooses
 - Decline to notify such authorities
- The rights of victims and the institution's responsibilities for**
 - Orders of protection
 - "No contact" orders
 - Restraining orders
 - Similar lawful orders issued by a criminal, civil, tribal, or institutional

© 2022 D. Stafford & Associates 102

102



D. STAFFORD & ASSOCIATES

§ 668.46 - WRITTEN EXPLANATION OF RIGHTS AND OPTIONS

5. To students AND employees about existing


- Counseling, health, mental health services
- Victim Advocacy
- Legal Assistance
- Visa and Immigration Assistance
- Student Financial Aid
- Other services available for victims

6. Options for, available assistance in, and how to request changes to (if requested and reasonably available)

- Academic, living, transportation, working

103

103



D. STAFFORD & ASSOCIATES

§ 668.46 - WRITTEN EXPLANATION OF RIGHTS AND OPTIONS

7. Confidentiality

- Publicly available recordkeeping has no personally identifying information about the victim (not required for respondent but best practice in most cases)
- Accommodations and protective measures are confidential (to the extent they can be without impairing the ability to provide them)

8. Disciplinary Procedures

- An explanation of the procedures for institutional disciplinary action in cases of alleged dating violence, domestic violence, sexual assault, or stalking, as required

104

104


D. STAFFORD & ASSOCIATES

RESPONSE TO "ACTUAL KNOWLEDGE"


<p>Title IX</p> <ul style="list-style-type: none"> • Contact the complainant • Offer and/or implement supportive measures • Explain the process for filing a formal complaint 	<p>Clery Act</p> <ul style="list-style-type: none"> • Written explanation of victim's rights and options including: <ul style="list-style-type: none"> • procedures to follow (preserve evidence, where report) • information about confidentiality • existing counseling, mental health, assistance, etc. • access to law enforcement and no contacts, etc. • changes to academic, living, transportation, and working situations, institutional procedures • process for institutional disciplinary process • Assess for Timely Warning Notice OR Emergency Notification
---	--

105


105




CLERY ACT REQUIREMENTS FOR DISCIPLINARY PROCEEDINGS




Anticipated timelines
("reasonably prompt")




Decision-making process




How to and options for
filing a school complaint
(with contact info)




How school determines
which process to use



Who makes decisions




Include employee
procedures



Use procedures
regardless of Clery
geography

© 2022 D. Stafford & Associates 106

106




ADVISORS PER THE CLERY ACT

- Provide the accuser and the accused with the same opportunities to have others present during any institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice
- Not limit the choice of advisor or presence for either the accuser or the accused in any meeting or institutional disciplinary proceeding; however, the institution may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties

© 2022 D. Stafford & Associates 107

107




INFORMAL RESOLUTIONS

<p>Title IX</p> <ul style="list-style-type: none"> • Can offer, but may not require • Not allowed for "employee on student" sexual harassment • Party may withdraw up to a point 	<p>Clery Act</p> <ul style="list-style-type: none"> • Written information about procedures the institution will follow for VAWA offenses (does not differentiate between formal vs informal)
--	--

© 2022 D. Stafford & Associates 108

108




FORMAL COMPLAINT RIGHTS



<p>Title IX</p> <ul style="list-style-type: none"> • Treat equitably with goal to restore/preserve access to education; due process for respondent <ul style="list-style-type: none"> • Include presumption of not responsible • Include any discipline for false statements • Reasonably prompt time-frames* <ul style="list-style-type: none"> • Describe the <u>range</u> of sanctions • Describe range of supportive measures 	<p>Clery Act</p> <ul style="list-style-type: none"> • Prompt, fair and impartial investigation and resolution <ul style="list-style-type: none"> • Anticipated timeframes • List <u>all</u> possible sanctions for each offense (employees and students) • Consistent with policy and transparent • Not required to list all protective measures
--	---

© 2022 D. Stafford & Associates 109

109




FORMAL (LIVE HEARING)

 <p>2020 Title IX Regulations</p> <p>Requires live hearing with cross examination by advisor</p>	 <p>Clery Act</p> <p>Clery is silent regarding live hearing</p>
--	---

© 2022 D. Stafford & Associates 110

110




WRITTEN DETERMINATION

<p>Title IX</p> <ul style="list-style-type: none"> • Identification of the allegations • Procedural steps taken from receipt through determination • Findings of fact supporting the determination • Conclusions regarding the application of code of conduct to the facts • Result (responsibility, rationale, sanctions, remedies for each allegation) • Appeals procedures • When results become final (post appeal) 	<p>Clery Act</p> <ul style="list-style-type: none"> • Result (include any sanctions and rationale for results and sanction) • Appeals procedures • Any change to the result • When such results become final
---	---

© 2022 D. Stafford & Associates 111

111




CLERY ACT - BIAS FREE AND TRAINING FOR "OFFICIALS"

Annual training on the issues related to dating violence, domestic violence, sexual assault and stalking and on how to conduct an investigation and hearing process that protects the safety of the victims and promotes accountability

© 2022 D. Stafford & Associates 112

112




APPEALS

<p>Title IX</p> <ul style="list-style-type: none"> • Must offer both parties an appeal • Based on specific grounds 	<p>Clery Act</p> <ul style="list-style-type: none"> • Not required (but must provide notice if allowed along with appeal procedures) • Simultaneous written decision describing result, sanction, any changes to the result, when it becomes final
---	---

© 2022 D. Stafford & Associates 113

113



RECORDKEEPING

<p>Title IX</p> <ul style="list-style-type: none"> • Must offer both parties an appeal • Based on specific grounds 	<p>Clery Act</p> <ul style="list-style-type: none"> • Not required (but must provide notice if allowed along with appeal procedures) • Simultaneous written decision describing result, sanction, any changes to the result, when it becomes final
---	---

© 2022 D. Stafford & Associates 114

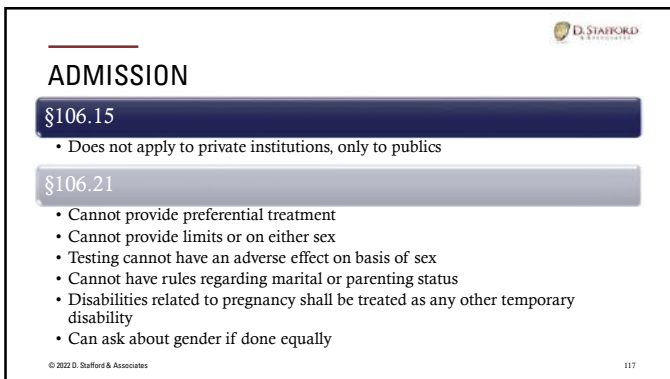
114



115



116



117

ADMISSION

§106.22

- Preference in admission

§106.23

- Equal recruitment of gender
- Must recruit from diverse schools


§106.36

- Admission materials must be the same
- Testing instruments must not promote discrimination
- Examine disproportionate gender breakdown in classes


© 2022 D. Stafford & Associates 118

118


FINANCIAL ASSISTANCE




§106.31 Education programs or activities



§106.37(a) - General



§106.37 (b) Financial aid established by legal instruments



§106.37 (c) – Athletic scholarships

© 2022 D. Stafford & Associates 119

119

FINANCIAL ASSISTANCE

§106.37(a) provide different amount or types of such assistance, limit eligibility for such assistance which is of any particular type or source, apply different criteria, or otherwise discriminate

“Sex-restricted” scholarships allowed in limited cases

© 2022 D. Stafford & Associates 120

120




ATHLETICS



© 2022 D. Stafford & Associates

121




§106.41 ATHLETICS

No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.


(§106.41)

© 2022 D. Stafford & Associates 122


122




§106.41 ATHLETICS




Participation



Separate Teams




Equal Opportunity




Adjustment Period

© 2022 D. Stafford & Associates 123


123




TITLE IX ATHLETIC REQUIREMENTS



Effective
Accommodation of
Interest and Abilities




Financial Assistance




Benefits and
Opportunities (“the
laundry List”)

© 2022 D. Stafford & Associates 124


124




ATHLETICS THREE-PART TEST



Substantially
proportionate



Program expansion



Interest and abilities

© 2022 D. Stafford & Associates 125

125



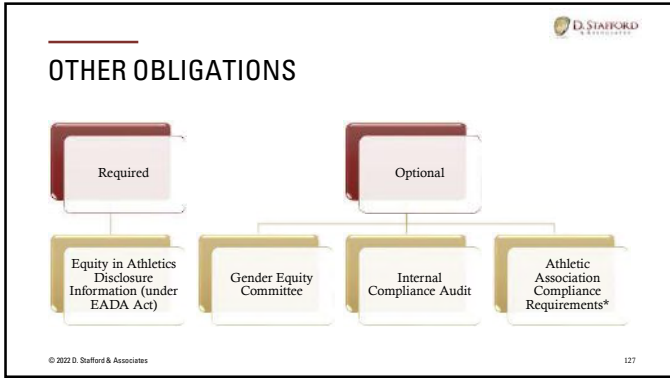


§106.41 - LAUNDRY LIST

- Equipment and supplies
- Scheduling
- Travel and per diem
- Tutors
- Assignment and compensation
- Locker room and other facilities
- Medical and training services
- Housing and dining services
- Publicity
- Support services _____

126

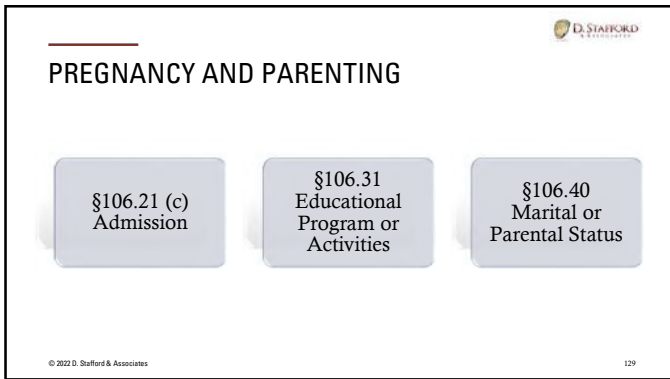
126




127



128



129




INSTITUTIONAL RESPONSIBILITIES

<p>Must Allow or Provide</p> <ul style="list-style-type: none"> • Continued participation in programs/activities • Reasonable adjustments • Excuse absences • Leave of absence • Return status • Temporary medical condition • Protects against harassment • Policies and procedures • Breastfeeding 	<p>Cannot . . .</p> <ul style="list-style-type: none"> • Require doctor's note ONLY for pregnancy • List pregnancy as an infraction • Exclude from programs/activities • Remove financial aid
--	---

© 2022 D. Stafford & Associates 130

130




POLICY CONSIDERATIONS

- Allow for flexibility
- Apply to all parents
- Use non-gendered language
- Provide resources

© 2022 D. Stafford & Associates 131

131



POLICY EXAMPLE - PARENTAL ACCOMMODATION

University of Michigan, Rackham Graduate School:

Graduate students in good standing are entitled to a "Parental Accommodation" period of up to 6 weeks following the birth of a child or adoption of a child under six years of age. During this time the student is entitled to "a modification of deadlines and academic expectations to accommodate the student's new parental responsibilities" including assignments, exams and other requirements, as determined in consultation with the student's advisor. During the Accommodation Period, students retain any salary or stipend and benefits, except as otherwise stated in their contract or grant. Following the expiration of the six-week term, Rackham encourages faculty to remain flexible with their academic expectations.

© 2022 D. Stafford & Associates 132

132




EMPLOYMENT



Photo by Catherine Johnson on Shutterstock

© 2022 D. Stafford & Associates

133




KEY TAKEAWAY

Title IX common rule applies its prohibition against sex-based discrimination to the full range of activities related to the recruitment, evaluation, classification, payment, assignment, retention or treatment of employees. The Title IX common rule addresses various areas including the treatment of pregnancy as a temporary disability, pre-employment inquiries regarding marital or parental status, imposition of employment criteria or testing devices having a disproportionate impact, recruitment, and compensation and benefits (including equal pension contributions and benefits).

The Department of Justice, Title IX Legal Manual

© 2022 D. Stafford & Associates 134

134




EMPLOYMENT

§106.7 Effect of employment opportunities	§106.51 Employment	§106.52 Employment criteria	§106.53 Recruitment
§106.54 Compensation	§106.55 Job classification and structure	§106.56 Fringe benefits	§106.57 Marital or parental status
§106.58 Effect of other laws	§106.59 Advertising	§106.60 Pre-employment inquiries	§106.61 Sex as a bona-fide occupational qualification

© 2022 D. Stafford & Associates 135

135



DISCRIMINATION EXAMPLES

- Utilize narrow applicant pools
- Only hire women TAs
- Separate tenure lines
- Different health insurance or retirement programs
- Only hire or promote men as they “don’t get pregnant”

© 2022 D. Stafford & Associates 136

136



DISCIPLINE AND OTHER CONSIDERATIONS



© 2022 D. Stafford & Associates

137




EQUITY IN DISCIPLINE



© 2022 D. Stafford & Associates 138

138



PROGRAMMATIC CONSIDERATIONS

External Programs


- Girls in STEM programs

Campus programming

- Women-only workshops

© 2022 D. Stafford & Associates139

139




§106.32 - HOUSING

A recipient shall not, on the basis of sex, apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this section (including housing provided only to married students).

(§106.32)

© 2022 D. Stafford & Associates140

140



§106.33 - COMPARABLE FACILITIES

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex. (§106.33)

© 2022 D. Stafford & Associates141

141

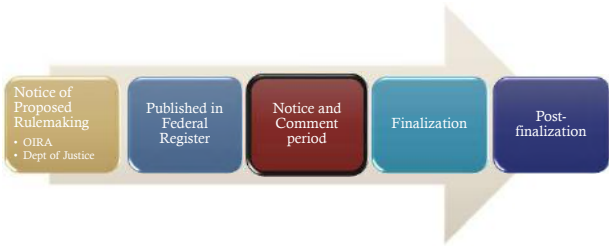
LOOKING AHEAD -
THE 2022
PROPOSED
REGULATIONS



© 2022 D. Stafford & Associates

142

REGULATORY PROCESS - WHERE WE ARE



Notice of Proposed Rulemaking
• OIRA
• Dept of Justice

Published in Federal Register

Notice and Comment period


Finalization

Post-finalization

© 2022 D. Stafford & Associates

143

THE PROPOSED REGULATIONS




Just a draft

Current rules
STILL IN EFFECT

Not about athletics and gender identity (coming later)

© 2022 D. Stafford & Associates

144




SCOPE OF TITLE IX

Sex Discrimination

<p>Sex-based Harassment</p> <ul style="list-style-type: none"> • Sexual Assault • Dating/Domestic Violence • Stalking • Hostile Environment • Quid Pro Quo 	<p>Sex Discrimination</p> <ul style="list-style-type: none"> • Pregnancy & related conditions • Parental, family or marital status • Inequity in funding and programming • Applies to <ul style="list-style-type: none"> • Admission • Employment • Educational programs • Athletics
--	--

© 2022 D. Stafford & Associates 145

145



PROHIBITIONS

Sex Discrimination


- sex stereotypes
- sex characteristics
- pregnancy or related conditions
- sexual orientation
- gender identity

Sex-based harassment

- Sexual harassment;
- Quid pro quo
- Hostile environment
- Sexual assault, dating violence, domestic violence and stalking
- Harassment based on sex discrimination (see above)

© 2022 D. Stafford & Associates 146

146



SEX-BASED HARASSMENT

<p style="text-align: center; background-color: #4682b4; color: white; padding: 5px;">Quid pro quo</p> <ul style="list-style-type: none"> • when an employee or other person authorized by a recipient to provide an aid, benefit, or service explicitly or impliedly conditions that aid, benefit or service on a person's participation in unwelcome sexual conduct 	<p style="text-align: center; background-color: #4682b4; color: white; padding: 5px;">Specific Offenses</p> <ul style="list-style-type: none"> • sexual assault • dating violence • domestic violence • stalking 	<p style="text-align: center; background-color: #4682b4; color: white; padding: 5px;">Hostile environment</p> <ul style="list-style-type: none"> • unwelcome sex-based conduct that is sufficiently severe or pervasive that, based on the totality of the circumstances and evaluated subjectively and objectively, it denies or limits a person's ability to participate in or benefit from the recipient's education program or activity
---	---	---

© 2022 D. Stafford & Associates 147

147

REPORTERS

© 2022 D. Stafford & Associates 148

148

REPORTING REQUIREMENTS (POST-SECONDARY)

Employee Role	Involving	Notify T9	Provide T9 info
Confidential Employee	Student or Employee	No	Yes
Employee with ability to institute corrective measures	Student or Employee	Yes	
Employee responsible for administrative leadership, teaching, or advising	Student	Yes	
Employee responsible for administrative leadership, teaching, or advising	Employee	Yes	Yes
All other employees	Student or Employee	Yes	Yes

© 2022 D. Stafford & Associates 149

149

EXAMPLES

- Employee or student tells chaplain: NO
- Student tells Dean of Students who happens to be ordained minister? YES
- Student tells advisor to outdoors program: YES
- Student worker tells student working as a supervisor: YES
- Student living off campus tells friend that happens to be an RA: NO
 - RA continues to be a CSA for Clery purposes
- Student tells neighbor who happens to be a professor: YES?
- Student tells housekeeper in building: YES to EITHER tell OR provide Title IX Coordinator contact information
- Employee tells colleague? ~~NO~~, unless colleague is an administrator, teacher, or advisor and then can EITHER tell OR provide Title IX Coordinator contact information
- Employee tells any other employee: YES to EITHER tell OR provide contact information

© 2022 D. Stafford & Associates 150

150

 CONFIDENTIAL EMPLOYEES DEFINED



Privileged (in role)




Designated (when providing services)



Human-subjects research on sex discrimination

© 2022 D. Stafford & Associates 151


151

 NOTIFICATION REQUIREMENT


Must notify the Title IX Coordinator when the employee has information about conduct that may constitute sex discrimination under Title IX.

© 2022 D. Stafford & Associates 152


152

 LOCATION JURISDICTION CHANGES


A recipient has an obligation to address a sex-based hostile environment under its education program or activity, even if sex-based harassment contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States.



Outside the US?



Off campus?



Still includes student orgs

© 2022 D. Stafford & Associates 153

153

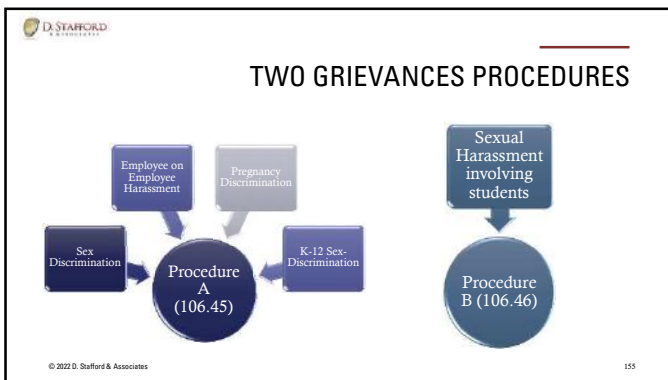
13 STAFFORD UNIVERSITY

ADDITIONAL TIDBITS

- Can have temporary Supportive Measures that “burden” a respondent (with some parameters)
- While different treatment is permissible, cannot cause more than “de minimis harm”
- Permissive dismissal (not mandatory dismissal)
- Complaint can be written or oral (and not formal)
- Informal is option without “formal” complaint

© 2022 D. Stafford & Associates 154

154



155

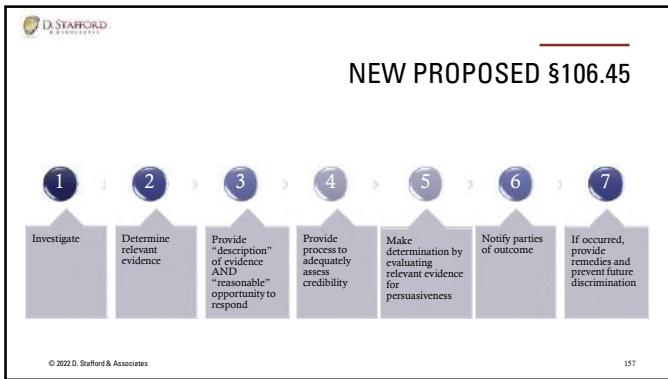
13 STAFFORD UNIVERSITY

COMPARING NOTICE

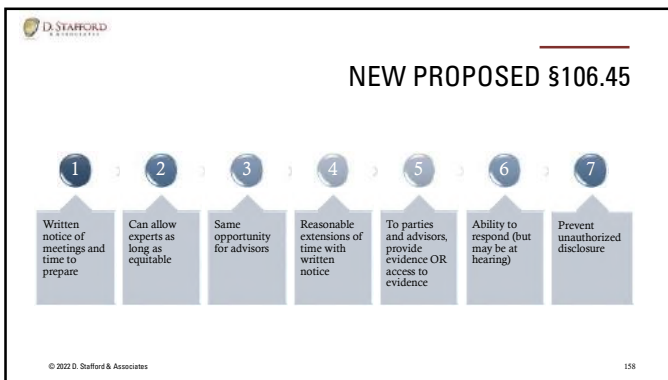
2020	NEW 106.45 (DOES NOT NEED TO BE IN WRITING!!!)	NEW 106.46
Grievance Procedures	YES	YES
“Sufficient details” (parties, conduct, date, location)	YES “Sufficient information”	YES “Sufficient information”
Statement that retaliation prohibited	YES	YES
Respondent is presumed not responsible		YES
Right to advisor of choice		YES
Right to inspect and review evidence		YES (Evidence OR summary in report with evidence by request)
Prohibition on false statements*		YES

© 2022 D. Stafford & Associates 156

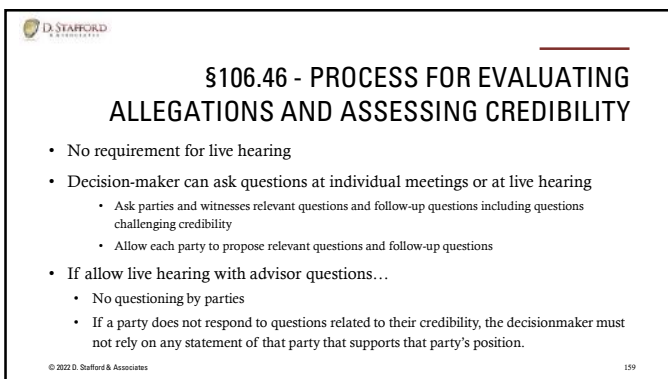
156



157



158



159

APPEALS (\$106.46 ONLY)

- Procedural irregularity that would change the determination of whether sex-based harassment occurred
- New evidence that would change the outcome of the matter and that was not reasonably available at the time the determination of whether sex-based harassment occurred or dismissal was made
- Title IX Coordinator, investigator, or decision-maker had conflict of interest or bias that would change the outcome

© 2022 D. Stafford & Associates 160

160

PREGNANCY AND PARENTAL STATUS

- Sections applying to Employees and Students
- Lactation time and space
- Comparable treatment to temporary disabilities or conditions
- When employee informed of student pregnancy ...promptly informs that person of how to notify the Title IX Coordinator
- When Title IX learns...must inform student
 - prohibit sex discrimination
 - reasonable modifications
 - Allow access to separate and comparable program or activity
 - Allow voluntary leave of absence
 - Lactation space
 - Grievance procedures

© 2022 D. Stafford & Associates 161

161

REMINDERS!

It's a **DRAFT**

Nothing changes **NOW**

But...how do you address Sex **DISCRIMINATION?**

© 2022 D. Stafford & Associates 162

162

DIRECTED QUESTIONS FROM OCR

<p>FERPA</p> <ul style="list-style-type: none"> • Intersection between the proposed Title IX regulations and FERPA, any challenges and any steps the Department might take to address those challenges 	<p>Recipient's obligation to provide an educational environment free from sex discrimination</p> <ul style="list-style-type: none"> • Additions or subtractions to proposed grievance procedures and application to various subgroups 	<p>Single investigator</p> <ul style="list-style-type: none"> • Experiences using that model and steps taken to ensure adequate, reliable, and impartial investigation and resolution of complaints, (and from parties and advisors) 	<p>Standard of proof</p> <ul style="list-style-type: none"> • Preponderance or Clear and Convincing?
--	---	--	--

© 2022 D. Stafford & Associates 163

163

Discussion: The proposed Regulations



© 2022 D. Stafford & Associates 164

164



© 2022 D. Stafford & Associates 165

165



THANK YOU



© 2022 D. Stafford & Associates 166
