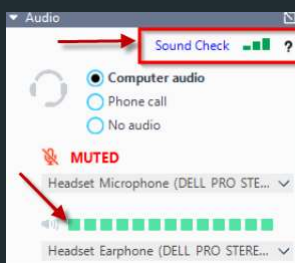


# FAME Community Forum IX

COVID-19 Update  
May 13, 2020

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## Reminder

The information presented is fluid, changing daily and FAME is doing its best to keep you informed.

Today's guidance could be different even next week.

The Presenters

**Sally Samuels**

*Director of Compliance*



Sally is one of the country's leading authorities on Federal financial aid administration with 40 years of "in the trenches" experience, and currently serves as Director of Compliance for FAME.

The Presenters

**Tom Netting**

*Director of Government Strategies*



Tom Netting has more than 30 years of experience working in government relations and public policy and has established himself as a leader in strategic policy development and advocacy in the fields of higher education. Tom has also directed government relations activities of several associations and higher education organizations.

## The Presenters

### Chris DeLuca

DeLuca Law LLC  
Of Counsel, Rouse Frets  
White Goss Gentile Rhodes,  
P.C.



Chris has served as in-house legal counsel and chief financial officer for a multi-state school group. Chris has 28 years of experience providing legal, financial and management services to business owners and career school operators

# Overview

- Title IX Regulations
- EA May 6, 2020 HEERF Grant Reporting
- May 2020 Office of Civil Rights Q & A's

# New Title IX Regulations

Presented by Chris DeLuca, DeLuca Law LLC  
Of Counsel, Rouse Frets White Goss Gentile Rhodes, P.C.

## Final Rule Published May 6, 2020

- Effective date August 14, 2020
- "This new regulation requires schools to act in meaningful ways to support survivors of sexual misconduct, without sacrificing important safeguards to ensure a fair and transparent process. We can and must continue to fight sexual misconduct in our nation's schools, and this rule makes certain that fight continues."

- U.S. Secretary of Education Betsy DeVos, Press Release May 6, 2020

## § 106.8 (b) *Dissemination of Policy*

- Each recipient must:
  - Provide notice that it does not discriminate on the basis of sex in the education program or activity that it operates;
  - Prominently display the Title IX Coordinator contact information and grievance policy on its website, if any, and in each handbook or catalog

## § 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 Title IX complaints
- ▶ A recipient must provide notice of the recipient's grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond

## § 106.30 *Definitions*

- *Actual knowledge* means 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. 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
- *Complainant* means an individual who is alleged to be the victim of conduct that could constitute sexual harassment
- *Consent*. The Department will not require recipients to adopt a particular definition of consent with respect to sexual assault,

## § 106.30 *Definitions*

- *Formal complaint* means 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
- *Respondent* means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment

## § 106.30 *Definitions*

- *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; or
  - (3) "Sexual assault," "dating violence," "domestic violence," or "stalking" as defined for VAWA purposes

## 106.44 (a) General Response to Sexual Harassment

- A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent
- A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances
  - "Education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.
  - A recipient's response must treat complainants and respondents equitably
  - Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint

## *Response to a Formal Complaint*

- In response to a formal complaint, a recipient must follow a grievance process that complies with § 106.45. With or without a formal complaint, a recipient must comply with § 106.44(a)
- *Emergency removal.* Recipient may remove a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal
- *Administrative leave.* Recipient may place a non-student employee respondent on administrative leave during the pendency of a grievance process

## *§ 106.45 (b)(1) Basic Requirements for Grievance Process*

- (i) Treat complainants and respondents equitably;
- (ii) Require an objective evaluation of all relevant evidence;
- (iii) Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated to facilitate an informal resolution process, not have a conflict of interest or bias. Title IX Coordinators, et. al. must receive proper training;
- (iv) Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process;
- (v) Include reasonably prompt time frames for conclusion of the grievance process;

## § 106.45 (b)(1) *Basic requirements for Grievance Process*

- (vi) Describe the range of possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility;
- (vii) State the standard of evidence to be used to determine responsibility (preponderance of the evidence or clear and convincing evidence);
- (viii) Include the procedures and permissible bases for the complainant and respondent to appeal;
- (ix) Describe the range of supportive measures available to complainants and respondents; and
- (x) Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege

## § 106.45 (b)(2) *Notice of Allegations upon Receipt of Formal Complaint*

- (A) Notice of the recipient's grievance process
- (B) Notice of the allegations of sexual harassment, including:
  - Sufficient details with sufficient time to prepare a response before any initial interview
  - A statement that the respondent is presumed not responsible and that a determination regarding responsibility is made at the conclusion of the grievance process
  - Notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, and may inspect and review evidence
  - Notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process

## § 106.45 (b)(3) *Dismissal of a Formal Complaint*—

- The recipient must dismiss a formal complaint if:
  - The conduct alleged in the formal complaint would not constitute sexual harassment under Title IX even if proved,
  - Did not occur in the recipient's education program or activity, or
  - Did not occur against a person in the United States, then the recipient must dismiss the formal complaint;
  - *Such a dismissal does not preclude action under another provision of the recipient's code of conduct.*

## § 106.45 (b)(3) *Dismissal of a Formal Complaint*—

- (ii) The recipient may dismiss the formal complaint if:
  - A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint;
  - The respondent is no longer enrolled or employed by the recipient;  
or
  - Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein

## § 106.45 (b)(5) *Investigation of a Formal Complaint*

- When investigating a formal complaint and throughout the grievance process, a recipient must—
  - i. Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties;
  - ii. Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;
  - iii. Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;
  - iv. Provide the parties with the same opportunities to have others present during any grievance proceeding, including an advisor of their choice;

## § 106.45 (b)(5) *Investigation of a Formal Complaint*

- When investigating a formal complaint and throughout the grievance process, a recipient must—
  - v. Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate;
  - vi. Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint; and
  - vii. Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report, for their review and written response.

## § 106.45 (b)(6) *Hearings*

- **For postsecondary institutions, the recipient's grievance process must provide for a live hearing**
  - At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility
  - Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally
  - At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions

## § 106.45 (b)(6) *Hearings*

- Only relevant cross- examination and other questions may be asked of a party or witness
  - Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant
  - If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party
  - 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

## § 106.45 (b)(6) *Hearings*

- If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility
- Live hearings may be conducted with all parties physically present in the same geographic location or, at the recipient's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other
- Recipients must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review

## § 106.45 (b)(7) *Determination Regarding Responsibility.*

- The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility
- The written determination must include—
  - Identification of the allegations potentially constituting sexual harassment;
  - A description of the procedural steps taken from the receipt of the formal complaint through the determination;
  - Findings of fact supporting the determination;
  - Conclusions regarding the application of the recipient's code of conduct to the facts;
  - A statement of, and rationale for, the result as to each allegation; and
  - The recipient's procedures and permissible bases for the complainant and respondent to appeal.
- The recipient must provide the written determination to the parties simultaneously
- The Title IX Coordinator is responsible for effective implementation of any remedies.

## § 106.45 (b)(8) *Appeals*

- A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:
  - Procedural irregularity that affected the outcome of the matter;
  - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
  - The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias that affected the outcome

## § 106.45 (b)(9) *Informal Resolution*

- At any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient:
  - Provides to the parties a written notice disclosing the allegations and the requirements of the informal resolution process;
  - Notifies parties that any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint;
  - Obtains the parties' voluntary, written consent to the informal resolution process; and
  - Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student

## § 106.45 (b)(10) *Recordkeeping*

- A recipient must maintain for a period of seven years records of:
  - Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required, any disciplinary sanctions imposed on the respondent, and any remedies provided;
  - Any appeal and the result therefrom;
  - Any informal resolution and the result therefrom; and
  - All materials used to train Title IX Coordinators, et. al.
    - These training materials must be publicly available on the recipient's website, or if the recipient does not maintain a website then upon request.
- In response to receipt of actual knowledge of sexual harassment, a recipient must create, and maintain for a period of seven years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment.

## § 106.71 - Retaliation Prohibited

- No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in a Title IX investigation, proceeding, or hearing
- Except as otherwise noted in the regulations, the recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness.
- Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding does not constitute retaliation, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

UNITED STATES DEPARTMENT OF EDUCATION OFFICE FOR CIVIL RIGHTS

May 2020 Questions and Answers for Postsecondary Institutions Regarding the COVID-19 National Emergency. OCR will continue to update this document as needed throughout the crisis. 05/12/2020

Question 1: To prevent learning from coming to a halt during the COVID-19 outbreak, many postsecondary institutions are moving to virtual or online education (distance learning). Do institutions that provide distance learning still have to comply with Federal disability laws?

Question 2: If postsecondary institutions are offering distance learning, what resources are they required to provide to students with disabilities in order to comply with Federal civil rights laws?

Question 3: For public colleges and colleges receiving Federal financial assistance from the Department that are offering distance learning, may institutions use captioning rather than sign language interpreters in order to fulfill their legal obligations to students who are deaf and hard of hearing under Title II and Section 504?

UNITED STATES DEPARTMENT OF EDUCATION OFFICE FOR CIVIL RIGHTS

Question 4: What if a postsecondary institution providing distance instruction determines it cannot offer a student with a disability a particular effective academic adjustment?

Question 5: If a postsecondary institution has suspended instruction or is only offering distance learning, is the institution still required to continue with their investigations of harassment complaints pending or made under Title IX of the Educational Amendments of 1972 (Title IX), Title VI of the Civil Rights Act of 1964, and other civil rights statutes?

Question 6: What if an institution needs more time than usual to complete a Title IX sexual harassment investigation and adjudication due to circumstances arising from operational challenges relating to COVID-19?

Question 7: If an institution has suspended instruction or is only offering distance learning, may it modify its Title IX procedures for resolving complaints due to the current circumstances?

# Contact Presenters

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# QUESTIONS