



TITLE IX: THE WAY
FORWARD

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Know. More.



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UNDERSTAND

All of the following requirements are grafted onto your existing substantive and procedural rules and regulations.

Every school may have a different process, but **every process must comply** with the following requirements.

PART 106 CHANGES

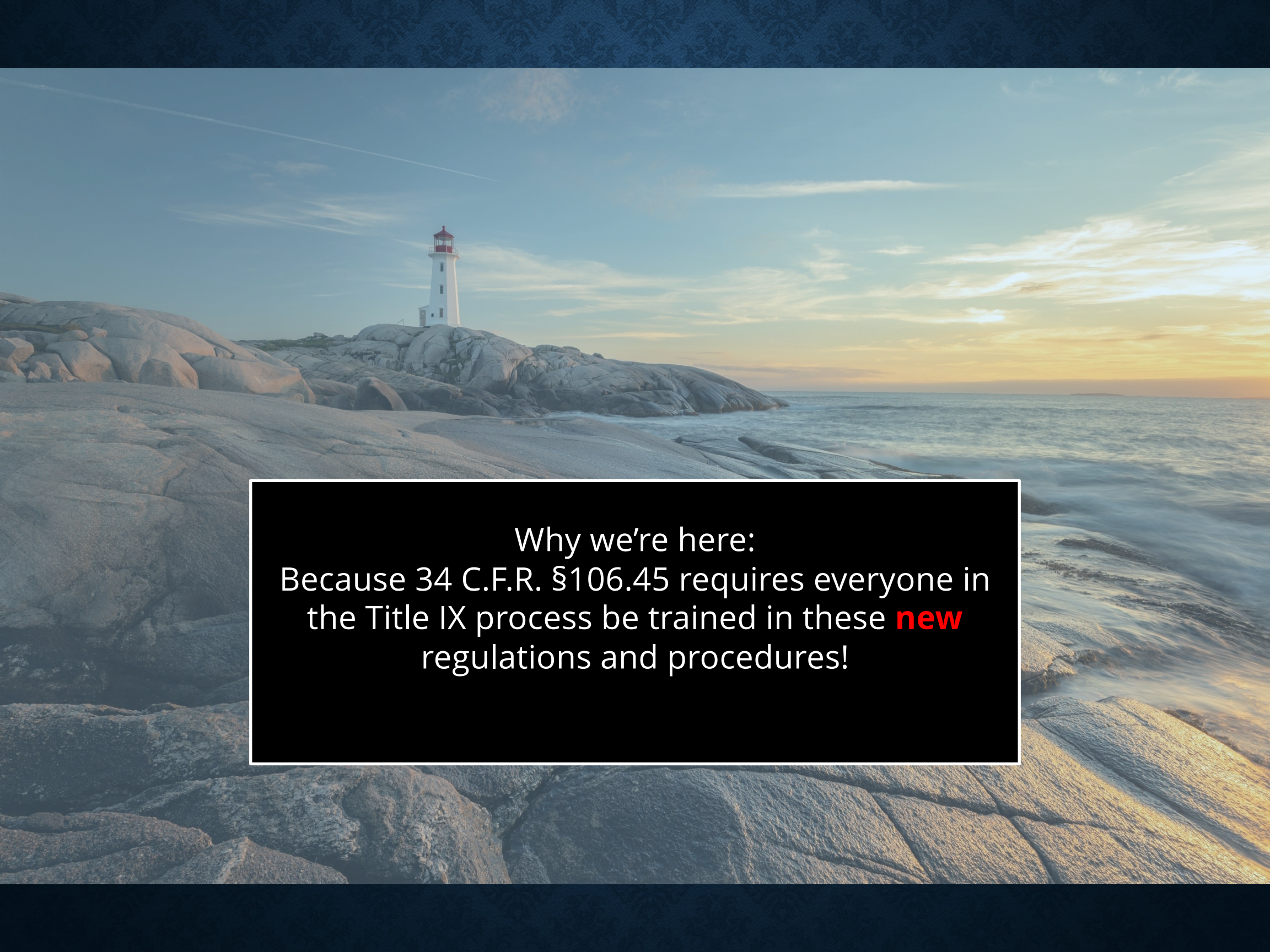
Nondiscrimination on the basis of sex in education

▶ Cite as 34 C.F.R. 106

Sexual harassment, including sexual assault, is unlawful sex discrimination, effective **08.14.20**.

34 C.F.R. §106.45 requires everyone is trained on new regulations and procedures



A scenic photograph of a white lighthouse with a red lantern room, situated on a rocky island. The sky is a mix of blue and orange, indicating sunset or sunrise. The foreground is dominated by large, smooth, grey rocks.

Why we're here:
Because 34 C.F.R. §106.45 requires everyone in
the Title IX process be trained in these **new**
regulations and procedures!

For the first time, the Title IX regulations recognize that sexual harassment, including sexual assault, is **unlawful sex discrimination**.

34 C.F.R. §106.6

Compliance with new regs is not obviated or alleviated by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99.

For instance: A parent or guardian may act on behalf of a "Complainant," "Respondent," "Party," or other person covered by the new regs, including but not limited to filing a formal complaint.

34 C.F.R. §106.8

USC must notify applicants for admission and employment of the name/title, office address, electronic mail address, and telephone number of the **Title IX Coordinator**

34 C.F.R. §106.8

Any person may report sex discrimination/harassment (whether or not the person reporting is the victim) in person, by mail, by telephone, or by e-mail, using the Title IX Coordinator's contact info - or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report.

34 C.F.R. §106.8

USC must notify APPLICANTS that it does not discriminate on the basis of sex and that USC is required by Title IX not to discriminate in such a manner.

34 C.F.R. §106.8

USC must adopt/publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging sex discrimination/harassment.



NEW DEFINITIONS

Take note



34 C.F.R. §106.30

ACTUAL KNOWLEDGE

Means notice of sexual harassment or allegations of sexual harassment to USC's Title IX Coordinator or any official of USC who has authority to institute corrective measures on behalf of USC.

COMPLAINANT

Means a person who is alleged to be the **victim** of sexual harassment or violence

34 C.F.R. §106.30





34 C.F.R. §106.30

RESPONDENT

Means an individual who has been reported to be the perpetrator of conduct that could constitute **sexual harassment.**

FORMAL COMPLAINT

34 C.F.R. §106.30

Means a document filed by a Complainant or signed by the Title IX Coordinator alleging sexual harassment against a Respondent and requesting that USC 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 an education program or activity at USC.

SEXUAL HARASSMENT

Means conduct on the basis of sex that satisfies one or more of the following:

- (1) A USC employee who conditions the provision of an aid, benefit, or service of 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 USC's education program or activity; or



34 C.F.R. §106.30

(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).



Your Response to Sexual Harassment

34 C.F.R. §106.44

When you have actual knowledge of sexual-harassment, **you must respond promptly** in a manner that is not deliberately indifferent.

USC must treat complainants and respondents equitably by offering supportive measures to both.

Must follow grievance process of compliance with section 106.45 before the imposition of any disciplinary sanctions.

USC'S RESPONSE TO SEXUAL HARASSMENT

34 C.F.R. §106.44

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 the process for filing a formal complaint to the Complainant.

34 C.F.R. §106.44

If Complainant files a **Formal Complaint**, USC must follow a grievance process that complies with §106.45.

34 C.F.R.
§106.44

Emergency Removals

**Talk to
your GC –
ASAP**

USC can remove a Respondent from school on an emergency basis. If USC undertakes an **individualized safety and risk analysis**, determines that an immediate threat to the physical health or safety of any person arising from the allegations of sexual harassment justifies removal, and provides Respondent with notice and an opportunity to challenge the decision **immediately** following the removal.

RESPONDING TO FORMAL COMPLAINTS OF SEXUAL HARASSMENT

34 C.F.R. §106.45

Be aware: USC'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.

USC'S GRIEVANCE PROCESS MUST

Treat Complainants and Respondents equitably.

Provide remedies to a Complainant where a determination of responsibility for sexual harassment has been made against Respondent.

Follow a grievance process that complies with new regs before the imposition of any disciplinary sanctions.




34 C.F.R. §106.45

GRIEVANCE PROCESS

**Must be concluded in a
“Reasonably Prompt Time
Frame” (No more “60 days!”)**

Good cause for delays may include **considerations** such as the absence of a party, a party’s advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities



34 C.F.R. §106.45

**USC CANNOT IMPOSE
“GAG ORDERS” ON ANYBODY**

34 C.F.R. §106.45

34 C.F.R. §106.45

Requires an objective evaluation of all relevant evidence – including both **inculpatory** and **exculpatory** evidence – and provide that credibility determinations may not be based on a person's status as a Complainant, Respondent, or witness.

34 C.F.R. §106.45

Requires that the Title IX Coordinator, investigator, decision-maker, or any person designated by USC to facilitate an informal resolution process **not have a conflict of interest or bias for or against Complainants or Respondents generally or the current parties.**

34 C.F.R. §106.45

Requires that ALL persons involved in the Title IX process affirmatively **avoid prejudice** of the facts at issue, conflicts of interest, and bias.

34 C.F.R. §106.45

Investigators must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.

All parties in the process must presume that the Respondent is NOT responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.

34 C.F.R. §106.45

Investigators must understand issues of relevance to create an investigative report that fairly summarizes relevant evidence.

34 C.F.R. §106.45

Investigators must be trained to seek and develop both **inculpatory** and **exculpatory** evidence.

A glass sphere sits on a sandy beach, reflecting the sunset over the ocean. The reflection shows a bright sun low on the horizon, with clouds catching the light. The background is a blurred view of the actual sunset over the ocean.

MOST IMPORTANT CHANGE

34 C.F.R. §106.45

Decision Makers MUST be impartial; **must be trained** on issues of relevance; on admissibility of evidence, including when questions and evidence about the Complainant's sexual predisposition or prior sexual behavior are irrelevant.

34 C.F.R. §106.45

Decision-makers **must presume** that the Respondent is NOT responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.

34 C.F.R. §106.45

Decision Makers **must be trained:** Do not 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.

34 C.F.R. §106.45

USC must determine and publish what standard of proof will be used to determine responsibility: “**preponderance of the evidence standard**” or the “clear and convincing evidence standard.”

Must apply the same standard of evidence for formal/informal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment.

34 C.F.R. §106.45

USC must publish the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that USC may implement following any determination of responsibility.

34 C.F.R. §106.45

USC **must publish** procedures and permissible bases for Complainant and Respondent to appeal.

LET'S TAKE A BREAK



Once USC receives a
Formal Complaint:

USC MUST PROVIDE TO THE PARTIES WRITTEN NOTICE THAT CONTAINS:

Description of USC's grievance process including any informal resolution process.

The allegations of behavior that potentially constitutes sexual harassment.

Sufficient details known at the time.

Sufficient time to prepare a response before any initial interview.

A statement that the Respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made only at the conclusion of the grievance process.

WRITTEN NOTICE ALSO CONTAINS

34 C.F.R. §106.45

Notice that the parties may have an advisor of their choice.

The right to inspect and review evidence.

Any provision in the USC code of conduct that prohibits lying during the grievance process.

34 C.F.R. §106.45

If the investigation reveals that the conduct alleged in the formal complaint would not constitute sexual harassment **OR** did not occur in the USC's education program or activity **OR** did not occur against a person in the United States, then USC **must dismiss the formal complaint.**

ALSO MAY DISMISS THE FORMAL COMPLAINT IF

The Complainant notifies the Title IX Coordinator in writing that the Complainant would like to withdraw the formal complaint, or

The Respondent is no longer enrolled in or employed by USC.

Specific circumstances prevent USC from gathering evidence sufficient to reach a determination.

WHAT ABOUT NEW ALLEGATIONS NOT LISTED IN THE ORIGINAL NOTICE?

USC must provide **notice of the additional allegations** to the parties whose identities are known.

A scenic photograph of a white lighthouse with a red lantern room, situated on a rocky island. The lighthouse is positioned in the middle ground, slightly to the left of the center. The foreground is dominated by large, smooth, grey rocks. The background shows a vast ocean under a sky with soft, golden light from a setting or rising sun, creating a warm and serene atmosphere. A thin white line, possibly a power line, stretches across the upper left portion of the sky.

The Investigator

THE INVESTIGATOR MUST

Ensure that the burden of proof and the burden of gathering evidence rests on USC and not on the parties!

USC must obtain party's voluntary, **written consent** to obtain/use medical records.



34 C.F.R. §106.45

THE INVESTIGATOR MUST

34 C.F.R. §106.45

Give parties equal opportunity to present witnesses, including fact and expert witnesses, and other **inculpatory** and **exculpatory** evidence.

SET TIMELINES & BENCHMARKS FOR:

- Interviewing parties
- Interviewing witnesses
- Compiling statements
- Verifying statements
- Gathering/obtaining documentation
- Testing medical evidence
- Research
- Drafting the report

INITIAL CONTACT WITH COMPLAINANT

Confidentiality
important, but **not**
guaranteed

Identify the team and
explain its mission.
Explain the investigatory
process; the steps to be
taken; timing.

Complainant is entitled
to be fully involved and
informed regarding the
process.



NO STEREOTYPING

Investigative techniques and approaches that apply **sex stereotypes** or generalizations may **violate Title IX** and should be avoided so that the investigation proceeds objectively and impartially.

THROUGHOUT THE PROCESS

The parties have equal opportunities to have others present (the advisor of their choice) during any grievance proceeding, or USC 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.

NOTICE FOR ALL HEARINGS

USC must provide written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings to all parties, with sufficient time for **each** party to prepare to participate.



34 C.F.R. §106.45

INVESTIGATOR MUST

34 C.F.R. §106.45

While the regulations require the Decision Maker to “consider” **all relevant** evidence, the regulations also require that both parties be provided an equal opportunity to inspect and review **any evidence** obtained during the investigation that is “directly related” to the allegations.

Parties must be given least **10 days to submit a written response** to the evidence, which the investigator will consider prior to completion of the investigative report.

INVESTIGATOR MUST ENSURE THESE STEPS ARE TAKEN:

Report must fairly summarize **relevant** evidence.

At least 10 days before the hearing, must send each party (and the party's advisor) a copy of the investigative report for review and written response.

IMPARTIALITY IS KEY

The report must also summarize the relevant **exculpatory evidence**, thus underscoring the need for impartiality.

“Formal” means a live, evidentiary hearing with a presiding decision maker; presentation of testimony and evidence; cross-examination of witnesses, results in a written decision

“Informal” means something like mediation

USC can't require waiver of the right to an investigation and adjudication of formal complaints of sexual harassment.

“Formal” vs “Informal” Resolutions



“INFORMAL” RESOLUTION

After a formal complaint is filed, and at any time before final determination, USC may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that USC provides to the parties a written notice disclosing: the allegations, the requirements of the informal resolution process (including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations).

Any party has the right to withdraw from the informal resolution process and resume the formal grievance process at any time.

USC must obtain the parties' voluntary, written consent to an informal resolution process.

NO INFORMAL RESOLUTION

IF:

Complaint contains allegations that
an employee sexually harassed a
student.



Parties may
have their own
advisors.

**IF A PARTY DOES NOT
HAVE AN ADVISOR
PRESENT AT THE LIVE
HEARING**

USC must provide a FREE
advisor of USC's choice,
to conduct cross-
examination on behalf of
that party.

DECISION-MAKER

34 C.F.R. §106.45

The Decision Maker cannot be the same person as the Title IX Coordinator or **the Investigator.**

WHAT COURTS EXAMINE

Courts will review university student conduct hearings (much as they analyze the administrative decisions of any other agency) on the “**abuse of discretion**” standard.

WHAT COURTS EXAMINE

Courts give **great deference** to the actions USC takes, if your decisions are supported by professionally-drafted, superbly-detailed findings of fact with citations to the evidentiary record.

If you can establish that your student conduct decisions were based on “**substantial evidence**” obtained during the hearing, courts unlikely to find your results were “**arbitrary or capricious**” or violative of Title IX.

SUCCESS STARTS WITH THE **DECISION MAKER**

Rules on the admissibility of evidence.

Understands the meaning of legal **relevance**.

Considers inculpatory as well as exculpatory evidence.

Applies the **rape shield law** and the exception thereto.

SUCCESS STARTS WITH THE DECISION MAKER

Applies a **presumption of not responsible.**

Oversees cross-examination.

Controls the hearing - particularly in the presence of experienced, **aggressive counsel.**

Applies the “preponderance” standard of proof.

MOST IMPORTANTLY

The Decision Maker makes highly-detailed, written *findings of fact* based upon testimony and evidence adduced during the hearing.

AT THE HEARING

34 C.F.R. §106.45

USC must provide for a live hearing.

The Decision Maker 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.

AT THE HEARING

34 C.F.R. §106.45

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. Questions must elicit relevant information.

If a party or witness does not submit to cross-examination at the live hearing, the Decision Maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility. However.....

HOWEVER...

The Decision Maker **cannot draw an inference** about determination regarding responsibility based solely upon a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.

IF EITHER PARTY ASKS

USC must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the Decision Maker and parties to simultaneously see and hear the party or the witness answering questions.

USC must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

**MUST
RECORD**

34 C.F.R. §106.45

USC must keep records of investigation/hearing for 7 years.

DECISION MAKER

AFTER THE HEARING ISSUES A WRITTEN DECISION REGARDING
RESPONSIBILITY

34 C.F.R. §106.45

THE WRITTEN DECISION

34 C.F.R. §106.45

A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held.

THE WRITTEN DECISION

34 C.F.R. §106.45

Must contain an identification of the allegations potentially constituting sexual harassment.

THE WRITTEN DECISION

34 C.F.R. §106.45

Findings of fact supporting the determination.

Conclusions regarding the application of USC's code of conduct to the facts.

A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions that USC imposes on the Respondent, and whether remedies designed to restore or preserve equal access to USC's education program or activity will be provided by USC to the Complainant.


THE WRITTEN DECISION

34 C.F.R. §106.45

USC's procedures and permissible bases for the Complainant and Respondent to appeal.

USC must provide the written determination to the parties simultaneously.

The determination regarding responsibility becomes final either on the date that USC provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.



**Title IX Coordinator Must
Ensure Effective
Implementation of Remedies.**



Appeals 34 C.F.R. §106.45

USC MUST OFFER BOTH PARTIES AN APPEAL FROM A DETERMINATION REGARDING RESPONSIBILITY AND FROM USC'S DISMISSAL OF A FORMAL COMPLAINT OR ANY ALLEGATIONS THEREIN, ON THE FOLLOWING BASES:

Procedural irregularity that affected the outcome of the matter.

The Title IX Coordinator, investigator(s), or decision-maker(s) conflict of interest or bias for or against any party.

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;

USC may offer an appeal equally to both parties on additional bases.

MORE ABOUT APPEALS

Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties.

Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome.

Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker or the investigator(s), or the Title IX Coordinator.

Issue a written decision describing the result of the appeal and the rationale for the result.

Ensure that the decision-maker for the appeal complies with 34 C.F.R. §106.45.

Provide the written decision simultaneously to both parties.

ANTI-RETALIATION

34 C.F.R. §106.71

Neither USC nor any 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 this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing.

HOWEVER....

34 C.F.R. §106.71

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 under this part 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.

QUESTIONS?



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Know. More.