



**Joint Guidance on Federal Title IX Regulations:
Analysis of Section 106.45: Recordkeeping
May 20, 2020**

Note: This document focuses on a summary analysis of Section 106.45(b)(10) of the 2020 Final Title IX Regulations,¹ specifically the requirements related to recordkeeping. For a full overview of the changes from the Proposed Regulations, see *Title IX Text for Text Proposed to Final Comparison* and *Title IX Summary Proposed to Final Comparison*, available at system.suny.edu/sci/tix2020

Section 106.45(b)(10): Recordkeeping

In the Final Rule section 106.45(b)(10), the Department requires institutions to adhere to certain recordkeeping requirements, which have been significantly expanded from the Notice of Proposed Rulemaking (“NPRM”).

These requirements include maintaining for seven years, records of: (A) any sexual harassment investigation, including any responsibility determination, and any required recording or transcript, as well as any sanctions imposed on the respondent, and any remedies provided to the complainant; (B) Any appeal and its result; (C) Any informal resolution and its results; and (D) All materials used to train investigators, adjudicators, and Title IX coordinators with regard to sexual harassment. The rule requires institutions to make these training materials available on its website or upon request for inspection by members of the public.

The institution must also create and maintain for a period of seven years any actions, including supportive measures, taken in response to a report or formal complaint of sexual harassment, as well as document the bases for its conclusions and that it has taken measures designed to preserve access to the institution’s educational program or activity.

¹ The effective date for these regulations will be August 14, 2020 and will apply prospectively. The Department has stated it will provide technical assistance during the transition period and after the effective date.

Record Retention Period

Significantly, the Final Rule extends the required period for maintenance of covered records from a proposed three years to seven years. This period applies even if the recipient has a process for expungement. 85 Fed. Reg. 30,395 (May 19, 2020). The period begins at the moment of a record's creation, *Id.* at 30,411, although the Department notes that recipients may just chose to keep all "records that form part of a "file" representing a particular Title IX sexual harassment case are retained for at least seven years from the date of creation of the last record pertaining to that case." *Id.*

Indeed, the Department states several times that recipients have discretion to determine what happens to records after seven years, including adopting longer retention periods or destroying records. *Id.* at 30,395. It bases the seven-year period on consistency with the record retention period in the Clery Act regulations, 24 CFR 668.24(e)92)(ii). *Id.* at 30,410.

Although the Clery Act recordkeeping requirements do not apply in the K-12 context, the Department notes that it does not believe the seven year period will be more difficult for elementary and secondary schools because they are "often under recordkeeping requirements under other laws with retention periods of similar length." *Id.* at 30,411. It also notes that a seven-year retention period addresses commenters' concerns about three years being too short of a period. *Id.*

Documentation of Each Sexual Harassment Investigation

In its preamble to the Final Rule, the Department clarifies that the required records of "each sexual harassment investigation" includes "any record that the recipient creates to investigate an allegation, regardless of later dismissal or other resolution of the allegation . . . even those records from truncated investigations that led to no adjudication because the acts alleged did not constitute sex discrimination under Title IX and the formal complaint (or allegation therein) was dismissed." *Id.*

Documentation of Actions Taken (or Not Taken)

In its discussion of the Final Rule requirement that institutions document any action taken in response to a report or formal complaint as well as "the bases for its conclusions and that it has taken measures designed to preserve access to the institution's educational program or activity", the Department frames the Rule's language as requiring institutions to document "the reasons why the recipient's response was not deliberately indifferent." *Id.* at 30,044. This documentation, the Department notes, is not "expressly required" by case law regarding the deliberate indifference standard, but instead constitutes a measure required by the Department's "administrative enforcement" of the deliberate indifference standard. *Id.* at 30,209.

Specifically, it states that this includes documentation of:

- “if a recipient does not provide a complainant with supportive measures” - including not providing a specific supportive measure requested by the complainant - “the reasons why such a response was not clearly unreasonable in light of the known circumstances.” *Id.* at 30,226. The Department notes the examples of such rationale may include that the complainant did not wish to receive supportive measures, or refused to discuss them with the Title IX Coordinator. *Id.*
- Why its response was not deliberately indifferent in situations where its Title IX Coordinator has decided to initiate a grievance process when a complainant does not wish to participate *See id.* at 30,045-30,046 fn 177.

Training Materials

The requirement for public posting of training materials is also new in the Final Rule, a move the Department states is intended to “create transparency and better effectuate the requirements” of the training it requires as it allows an institution’s approach to training Title IX personnel to be “transparently viewed by the [institution’s] educational community and the public, including for the purpose of holding a recipient accountable for using training materials that comply with these final regulations.” *Final Regulations* at 30,254.

In the preamble ED indicates that this posting requirement includes materials used for training Title IX Coordinators, investigators, decision-makers, *and persons who facilitate informal resolutions.* *Id.* at 103. In the preamble, the Department also indicates it views this posting requirement to mandate only updating “published training materials when the recipient makes materials changes to the materials” so that the published materials are “up to date and reflect the latest training provided to the Title IX personnel.” *Id.* at 30,411-3,0412. The Department acknowledges that creating, storing and publishing training materials “uses some resources” but alleges it is “not cost prohibitive.” *Id.* Further, addressing concerns that recipients may hire outside consultants to provide training and not own training materials themselves, the Department poses a binary choice: “the Department acknowledges that a recipient in that situation would need to secure permission from the consultant to publish the training materials, or alternatively, the recipient could create its own training materials over which the recipient has ownership and control.”² *Id.*

Interestingly, the Department also states that the addition of this requirement will serve to “ensure that a recipient’s students and employees, and the public, understand the scope of the recipient’s education program or activity for purpose of Title IX,” apparently referencing an indirect educational opportunity - since the materials developed to train institutional officials must contain that information, and those materials must be online, then an institution’s students, employees, and the public may also access. *Id.* at 30,198.

² In a blog post dated May 18, 2020, the Department expands on this position, placing the onus on institutions to either obtain permission to post copyrighted materials or create their own materials “that can lawfully be posted on the school’s website. *Schools must post important information regarding Title IX on school websites under the new Title IX rule*, Office for Civil Rights Blog, (May 18, 2020), <https://www2.ed.gov/about/offices/list/ocr/blog/index.html>.

Confidentiality

The Department acknowledges commenters' concerns that the NPRM's requirements that records kept be made available to the parties might be read to conflict with the requirement to keep supportive measures provided confidential. Therefore, in the Final Rule, it removed this language. *Id.* at 30,411. It reasoned that because "the parties to a formal complaint receive written notice of the allegations, the evidence directly related to the allegations, the investigative report, and the written determination (as well as having the right to inspect and review the recording or transcript of a live hearing)," it was "persuaded that the parties' ability to access records relevant to their own case is sufficiently ensured without" needing to risk disclosure of supportive measures provided to other parties. *Id.* It also noted that this amendment removed any confusion regarding conflict with FERPA, and clarified its stance that these recordkeeping requirements do not conflict with FERPA. *Id.*

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