



HUSCH BLACKWELL



ICUT

INDEPENDENT COLLEGES & UNIVERSITIES OF TEXAS



GOOD



Administrative Enforcement

“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.”

“The Assistant Secretary will not deem a recipient’s determination regarding responsibility to be evidence of deliberate indifference by the recipient, or otherwise evidence of discrimination under title IX by the recipient, solely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence.”



**GOOD
NEWS!**

Interim Measures

“Nothing in this part precludes a recipient from removing 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.”

“Nothing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45.”



KEEP
CALM
NEW STUFF
COMING
SOON

(b) *Response to a formal complaint.* (1) 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).

What Does 106.44 (a) Say?



“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.”



“For the purposes of this section, §§ 106.30, and 106.45, ‘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 by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.”

Intersection with SB 212

How are mandatory reporting obligations affected?

When is the institution's Title IX obligation triggered?

- To provide support and resources?
- To investigate?

Tex. Edu. Code § 51.252(a) [SB 212]

“An employee of a postsecondary educational institution who, **in the course and scope of employment**, witnesses or receives information regarding the occurrence of an incident that the employee **reasonably believes constitutes sexual harassment, sexual assault, dating violence, or stalking** and is alleged to have been **committed by or against a person who was a student enrolled at or an employee of the institution** at the time of the incident **shall promptly report the incident to the institution's Title IX coordinator** or deputy Title IX coordinator.”

34 CFR § 106.44

(a) 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.**

34 CFR § 106.30(a)

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 . . . **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. . . .**

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.

Title IX Coordinator Responsibilities When Actual Knowledge Exists

“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”

“explain to the complainant the process for filing a formal complaint”

“Such measures are designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party”

- Counseling
- Extensions of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Campus escort services
- Mutual restrictions on contact between the parties
- Changes in work or housing locations
- Leaves of absence
- Increased security and monitoring of certain areas of the campus
- “Other similar measures”

Required Texas Supportive Measures

Tex. Educ. Code Ann. § 51.282 [HB 1735]

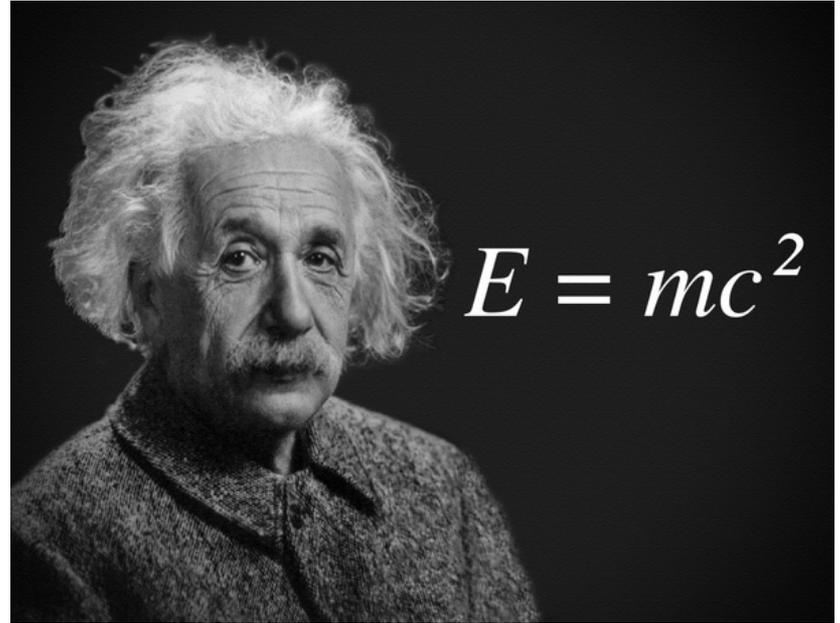
As part of the protocol for responding to reports of sexual harassment, sexual assault, dating violence, and stalking adopted under Subsection (a), each postsecondary educational institution shall:

(1) to the greatest extent practicable **based on the number of counselors employed by the institution, ensure that each alleged victim or alleged perpetrator** of an incident of sexual harassment, sexual assault, dating violence, or stalking and any other person who reports such an incident **are offered counseling provided by a counselor** who does not provide counseling to any other person involved in the incident; and

(2) notwithstanding any other law, **allow an alleged victim or alleged perpetrator** of an incident of sexual harassment, sexual assault, dating violence, or stalking **to drop a course in which both parties are enrolled without any academic penalty.**

Complicated = “Formal Complaint” + “Sexual Harassment”

- “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.”



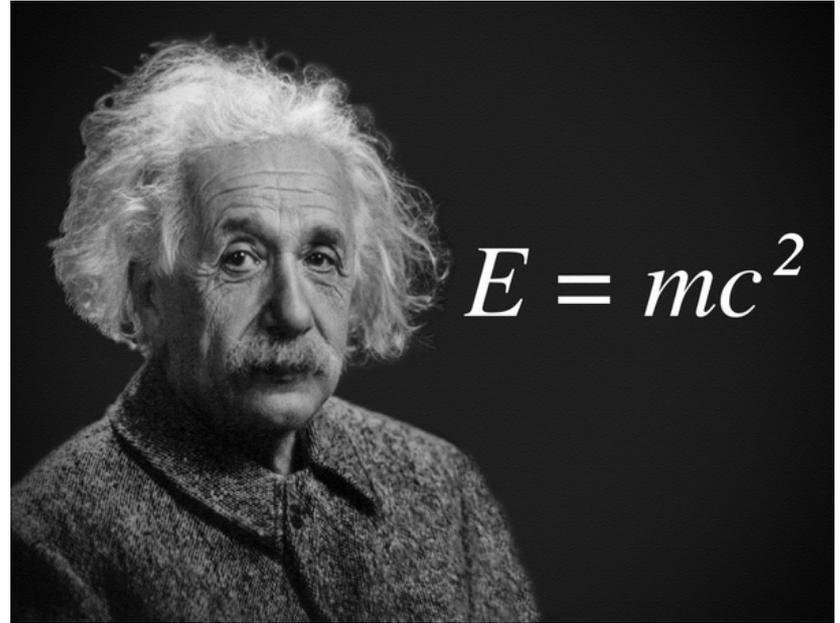
Complicated = “Formal Complaint” + “Sexual Harassment”

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; or
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).

Who is included?

What’s not included?



What Happens When It's Complicated (FC+SH)?

1. Specific (separate) grievance policy (10 required elements) – person accused is presumed not responsible
2. Notice to the respondent “upon receipt of a formal complaint”

What Happens When It's Complicated(FC+SH)?

3. Consideration of dismissal -- “If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 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 with regard to that conduct for purposes of sexual harassment under title IX or this part” . . . **BUT** “such a dismissal does not preclude action under another provision of the recipient’s code of conduct.

What Happens When It's Complicated(FC+SH)?

4. If no dismissal, we must investigate

- “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”
- “Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence”
- “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, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility”
- “Prior to completion of the investigative report, the recipient must send to each party and the party’s advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report.”
- “Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party’s advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.”



Live Hearing Required (FC+SH)

- “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.”
- “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.”

Live Hearing Required (FC+SH)

- “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.”
- “Live hearings pursuant to this paragraph 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.”

Live Hearing Required (FC+SH)



“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; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions.”

Some Practical Questions

- What if complainant does not want to proceed but we think safety risk?
- What if 3rd party refuses to attend hearing?
- Can we rely upon documents with statements in them (police reports, SANE exams)?
- What happens if party refuses to answer a cross examination question?
- How do regs square with our obligations under VII?

Appeal Requirement (FC + SH)

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 at least the following bases:

- A. Procedural irregularity that affected the outcome of the matter;
- B. 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
- C. The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

Informal Resolution

- Permissible only after a formal complaint is filed
 - Parties must provide voluntary, written consent after receiving detailed notice of allegations and explanation of informal resolution process
 - *How will you assess voluntariness?*
 - *What methodology? Who will facilitate?*
 - Cannot compel students to agree to informal resolution as a condition of continued access to education or employment
 - Not permitted where accusation against employee

Recordkeeping

A recipient must maintain for a period of seven years records of –

- A. Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required under paragraph (b)(6)(i) of this section, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity;
- B. Any appeal and the result therefrom;
- C. Any informal resolution and the result therefrom; and
- D. All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.

Additionally, “For each response required under § 106.44, 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. In each instance, the recipient must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity. If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances.”

(h) *Preemptive effect.* To the extent of a conflict between State or local law and title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.

“Sexual Harassment”

- Meaningful difference?
- Different standard for other conduct/policy violation?

Texas Education Code	Title IX Regs
<p>TEC § 51.281(4) [HB 1735] TEC 51.251(5) [SB 212]</p> <p>“Sexual Harassment” defined as “unwelcome, sex-based verbal or physical conduct that:</p> <p>(A) in the employment context, unreasonably interferes with a person’s work performance or creates an intimidating, hostile, or offensive work environment; or</p> <p>(B) in the education context, is sufficiently severe, persistent, or pervasive that the conduct interferes with a student’s ability to participate in or benefit from educational programs or activities at a postsecondary educational institution.”</p>	<p>34 C.F.R. § 106.3(a)</p> <p><i>Sexual harassment</i> means conduct on the basis of sex that satisfies one or more of the following:</p> <p>(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;</p> <p>(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</p> <p>(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. 2291(a)(8), or “stalking” as defined in 34 U.S.C. 12291(a)(30).</p>

Compare: Required Disciplinary Process

- Title IX regs largely consistent with TX law (minus hearing and evidentiary requirements)
- TEC requirements apply to “violations of institution’s code of conduct . . .”
- Title IX regs apply to “formal complaints of sexual harassment”

TEC § 51.286

A postsecondary educational institution that initiates a **disciplinary process concerning** an allegation that a student enrolled at the institution **violated the institution's code of conduct by committing sexual harassment, sexual assault, dating violence, or stalking shall:**

(1) provide to the student and the alleged victim a prompt and **equitable opportunity to present witnesses and other evidence** relevant to the alleged violation during the disciplinary process;

(2) ensure that both the student and the alleged victim have **reasonable and equitable access to all evidence** relevant to the alleged violation in the institution's possession, including any statements made by the alleged victim or by other persons, information stored electronically, written or electronic communications, social media posts, or physical evidence, redacted as necessary to comply with any applicable federal or state law regarding confidentiality; and

(3) take reasonable steps to **protect the student and the alleged victim from retaliation and harassment** during the pendency of the disciplinary process.

34 CFR § 106.45

(b) For the purpose of **addressing formal complaints of sexual harassment**, . . . (1) [a] recipient's grievance process must—

(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 the opportunity to be accompanied to any related meeting or proceeding by the **advisor of their choice**, who may be, but is not required to be, an **attorney**, . . .

(v) Provide, . . . **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, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. . . .; and

(vii) Create an **investigative report** that fairly summarizes relevant evidence . . .

(6) **Hearings**

Compare: Required Policy Elements

Texas Education Code	Title IX Regs
<p data-bbox="170 194 475 219">TEC 51.282(a)(1) [HB 1735]</p> <p data-bbox="170 252 1045 336">Each postsecondary educational institution shall adopt a policy on sexual harassment, sexual assault, dating violence, and stalking applicable to each student enrolled at and each employee of the institution. The policy must include:</p> <ul data-bbox="208 369 1064 893" style="list-style-type: none"><li data-bbox="208 369 606 394">(A) definitions of prohibited behavior;<li data-bbox="208 399 498 424">(B) sanctions for violations;<li data-bbox="208 430 1006 481">(C) the protocol for reporting and responding to reports of sexual harassment, sexual assault, dating violence, and stalking;<li data-bbox="208 487 1064 598">(D) interim measures to protect victims of sexual harassment, sexual assault, dating violence, or stalking during the pendency of the institution's disciplinary process, including protection from retaliation, and any other accommodations available to those victims at the institution; and<li data-bbox="208 603 1064 893">(E) a statement regarding:<ul data-bbox="253 636 1064 893" style="list-style-type: none"><li data-bbox="253 636 1064 718">(i) the importance of a victim of sexual harassment, sexual assault, dating violence, or stalking going to a hospital for treatment and preservation of evidence, if applicable, as soon as practicable after the incident;<li data-bbox="253 723 1064 805">(ii) the right of a victim of sexual harassment, sexual assault, dating violence, or stalking to report the incident to the institution and to receive a prompt and equitable resolution of the report; and<li data-bbox="253 811 1064 893">(iii) the right of a victim of a crime to choose whether to report the crime to law enforcement, to be assisted by the institution in reporting the crime to law enforcement, or to decline to report the crime to law enforcement[.] <p data-bbox="170 926 852 951">*Must be approved by institution's governing board [51.282(a)(2)]</p>	<p data-bbox="1097 194 1263 219">34 CFR § 106.8</p> <p data-bbox="1097 252 1740 511">(c) <i>Adoption of grievance procedures.</i> 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. A recipient must provide to persons entitled to a notification under paragraph (a) of this section notice of the recipient's grievance procedures and grievance process, including</p> <ul data-bbox="1136 516 1740 636" style="list-style-type: none"><li data-bbox="1136 516 1740 547">• how to report or file a complaint of sex discrimination,<li data-bbox="1136 552 1740 603">• how to report or file a formal complaint of sexual harassment, and<li data-bbox="1136 609 1503 636">• how the recipient will respond.

Effect of student separation from education?

- Title IX language is permissive (“may dismiss”) v. non-discretionary language in TEC (“may not”)
- Conflict?

Texas Education Code	Title IX Regs
<p>SB 212: If a student withdraws or graduates from an institution pending a disciplinary charge alleging sexual misconduct, the institution “may not end the disciplinary process or issue a final transcript to the student until the institution makes a final determination of responsibility” and must “expedite” the disciplinary process to accommodate “the student’s and the alleged victim’s interest in a speedy resolution.”</p> <p>[TEC 51.287(a)]</p> <p>HB 449: “If a student withdraws from a postsecondary educational institution pending disciplinary charges that may result in the student becoming ineligible to reenroll in the institution for a reason other than an academic or financial reason, the institution may not end the disciplinary process until the institution makes a final determination of responsibility, including, if applicable, a determination of whether the student will be ineligible to reenroll in the institution for a reason other than an academic or financial reason.”</p> <p>[TEC 51.9364(c)]</p>	<p>34 CFR § 106.45(b)(3)</p> <p>(ii) The recipient may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; 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.</p>