



**WHAT'S
NEXT?**

**Proposed Title IX Regulations and Implications
for Higher Education**



Bricker & Eckler
ATTORNEYS AT LAW

Disclaimer



- We are not giving you legal advice. Consult with your legal counsel regarding how best to address a specific situation.
- Use chat function to ask general questions and hypotheticals.
- We have a variety of stakeholders here, so please keep that in mind.
- Watch for your “Thanks for Attending” email, which will include a link to the **slides** and to the **recording** of this webinar.
- Yes, you may share the slides/recording with your colleagues!
- The recording will also be posted online.

Reminders



- This session is for Higher Education. Our K-12 session is scheduled for July 26th at 12:00 ET. Register online at www.bricker.com/events
- We cannot possibly cover every detail, but we're trying to focus on what we believe are the biggest changes.

Your Presenters



Rob Kent
Melissa Carleton
Joe Hall
Jessica Galanos

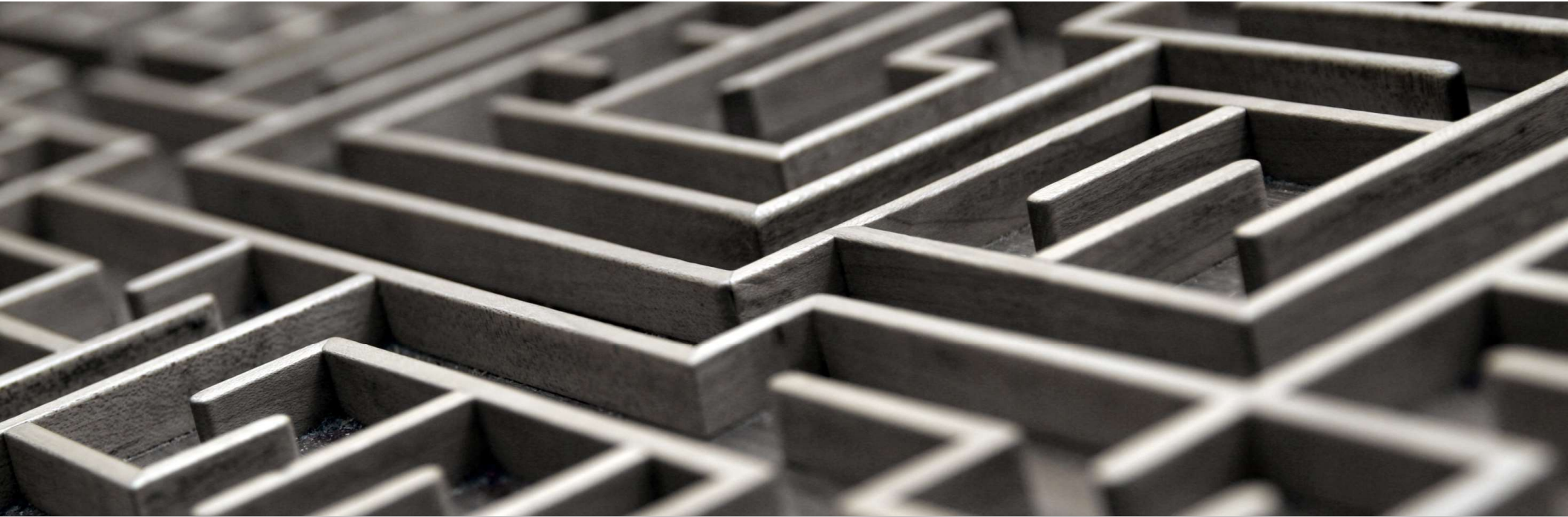


Josh Nolan
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Agenda



- Big Picture
- Details:
 - *Bostock* protections
 - Athletics?
 - Sex Discrimination vs. Sex-Based Harassment
 - Pregnancy/Parenting
 - Off-Campus Conduct
- Title IX Coordinator Duties/Training Requirements
- Supportive Measures
- Emergency Removal
- Informal resolution
- Two new grievance procedures
- Retaliation



Big Picture Thoughts

As in: remember these rules aren't effective yet.

Basics



- 701 page PDF – unofficial version
- Official version will likely be much shorter because of the formatting used in the Federal Register
- Start reading on page 650 where the proposed regulations start
- Go back and read the commentary for additional details on the thought process

What We Look For



- Clarity
- Consistency
- Fair Treatment
- Flexibility (to an extent?)
- Does the commentary offer any guidance on how to implement the current regulations right now?

Things to Know



- Likely to be published in the register in another week
- Once published, likely a 60 day comment period is triggered
 - All comments are PUBLIC, so do not include confidential information
- Will likely take at least 18 months before we see final regulations
- All references would be to 34 C.F.R. 106.xx of the regulations



Definitional Shifts

Expansions of coverage

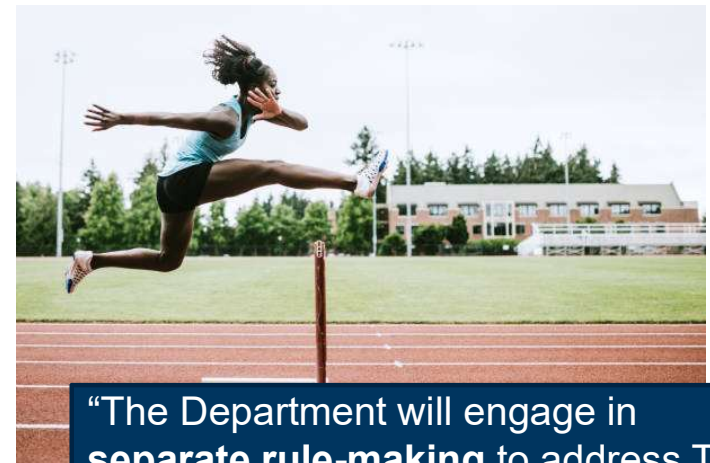
***Bostock* Protections**



- Title IX prohibits discrimination “on the basis of sex”
- “Discrimination on the basis of sex” would include “discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.”
 - See newly proposed 106.10, page 666.
- Policy that prevent a person from participating in an education program/activity consistent with the person’s gender identity “subjects a person to more than de minimis harm on the basis of sex” – see 106.31(a)(2).
- Religious exemptions still apply.

Athletics Implications §106.41

- Relevant to definition of sex discrimination, which now includes sexual orientation, gender identity, and sex characteristics
 - NPRM: Prohibits schools from separating or treating any person differently based on sex in a manner that subjects that person to more than minimal harm (unless otherwise permitted by Title IX).
 - The Department recognizes that exclusion from a particular male or female athletics team may cause some students more than de minimis harm, and yet that possibility is allowed under current § 106.41(b).
- Where we currently stand in athletics
- Where we are going in athletics →
- Why separate rule-making



“The Department will engage in **separate rule-making** to address Title IX’s application to the context of athletics and, in particular, what criteria recipients may be permitted to use to **establish students’ eligibility to participate on a particular male or female athletic team.**” (p. 542-54)

Sex Discrimination and Sex-Based Harassment (1 of 2)



- prohibit **all forms of sex discrimination**, including discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity. (Proposed § 106.10)
- Quid pro quo sex-based harassment
- Sexual misconduct, domestic violence, dating violence, stalking
- Hostile environment

Sex Discrimination and Sex-Based Harassment (2 of 2)



Compare Proposed and Current Definitions of Hostile Environment

Current: “so severe, pervasive, **and** objectively offensive that it effectively **denies** a person **equal access** to the recipient’s education program or activity.” (Current § 106.30)

Proposed: “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.” (Proposed § 106.2)

VAWA Amendments



- Domestic Violence definition still includes “crimes of violence”
 - Commentary says that you do not need to use the portion of the definition that applies to victim services

Non-Discrimination on the Basis of Parental, Family, or Pregnancy/Related Conditions (1/2)



1. Expanded Non-Discrimination prohibition (34 C.F.R §§ 106.40 (a) and (b));
2. Added definitions of Family Status and Pregnancy or Related Conditions (34 C.F.R § 106.2);
3. Imposed an obligation to provide information (34 C.F.R § 106.40(b)(2)); and
4. Imposed obligations to take action to prevent sex-discrimination on the basis of Parental, Family or Pregnancy and Related Conditions once Title IX Coordinator is aware of Pregnancy or Related Condition (34 C.F.R § 106.40(b)(3)).

Note: 34 C.F.R § 106.57 addresses a recipient's obligations regarding the parental, family, or marital status and pregnancy or related conditions of employees.

Non-Discrimination on the Basis of Parental, Family, or Pregnancy/Related Conditions (2/2)



Current Rule – 106.40

(a) *Status generally.* A recipient shall not **apply any rule** concerning a student's **actual or potential parental, family, or marital status** which treats students differently on the basis of sex.

(b) *Pregnancy and related conditions.*

- (1) A recipient **shall not discriminate** against any student, or exclude any student from its education **program or activity**, including any class or extracurricular activity, on the basis of such student's **pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom**

Proposed Rule – 106.40

(a) *Status generally.* A recipient **must not adopt or apply any policy, practice, or procedure** concerning a student's **current, potential, or past parental, family, or marital status** that treats students differently on the basis of sex.

(b) *Pregnancy or related conditions.*

- (1) Nondiscrimination. A recipient **must not discriminate** in its **education program or activity** against any student based on the student's **current, potential, or past pregnancy or related conditions** . . .

Definitions: 106.2



Parental Status

1. A biological parent;
2. An adoptive parent;
3. A foster parent;
4. A stepparent;
5. A legal custodian or guardian;
6. In loco parentis with respect to such a person; or
7. Actively seeking legal custody, guardianship, visitation, or adoption of such a person

Pregnancy or Related Conditions

- 1) Pregnancy, childbirth, termination of pregnancy, or lactation;
- 2) Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation; or
- 3) Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or their related medical conditions.

Provide Information: 106.40(b)(2)

“A recipient must ensure that when any **employee** is informed of a student’s pregnancy or related conditions by the student or a person who has a legal right to act on behalf of the student, **the employee promptly informs that person of how the person may notify the Title IX Coordinator of the student’s pregnancy or related conditions for assistance and provides contact information for the Title IX Coordinator**, unless the employee reasonably believes the Title IX Coordinator has already been notified.”

Take Action: 106.40(b)(3)



Once the Title IX Coordinator is informed of a student's pregnancy or related condition, the Title IX Coordinator must provide the student with and inform the student of the recipient's obligations to:

- Provide the student with reasonable modifications;
- Allow voluntary access to a separate but comparable portion of the recipient's educational program or activity;
- Allow a voluntary leave of absence;
- Ensure lactation space is available; and
- Maintain grievance procedures for the resolution of sex discrimination.

Record Keeping: A recipient must keep "all records documenting the actions the recipient took to meet its obligations under §§ 106.40 and 106.57" for a period of seven years. 34 C.F.R § 106.8(f)(4).

Dobbs v. Jackson Women's Health Organization



-
- How will your campus respond to potential increasing numbers of pregnant or parenting students?
 - Start reviewing your policies and practices to ensure your College or University is compliant with the current regulations; and
 - Review the 2013 Pamphlet on Supporting the Academic Success of Pregnant and Parenting Students for additional guidance on your obligations.



Off Campus Conduct

Yep, they go there.

Two Types of Off-Campus Conduct



- **Off-Campus Consistency:** If you typically consider off-campus conduct within the scope of your disciplinary authority, then Title IX would also reach off-campus to the same extent.
- **On-Campus Hostile Environment:** If off-campus conduct creates a hostile environment on campus, you are required to *address* the hostile environment.
 - Supportive measures
 - Does this mean you must discipline for the on campus hostile environment even if no actual conduct was committed within your disciplinary authority?



Title IX Coordinators

More responsibility. More team training.

Coordinator Duties



Expanded requirements specific to the Title IX Coordinator in section 106.44 (Note: Express permission to delegate at 106.8(a)(2))

- Equitable treatment of complainant and respondent - (f)(1)
- Notification of parties re grievance and informal resolution procedures when complaint made - (f)(2)
- Offer and coordinate supportive measures - (f)(3)
- Initiate grievance procedures/informal resolution - (f)(4)
- Determine whether to initiate a complaint process to address conduct that may constitute sex discrimination - (f)(5)
- “Take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur...” - (f)(6)

Training Requirements (1 of 2)



Expanded to encompass all employees, even those outside of grievance process 106.8

All employees – (g)(1)

- When to notify Title IX Coordinator of potential sex discrimination
- How students can report sex discrimination for (1) confidential assistance, and (2) to initiate grievance procedures

Training Requirements (2 of 2)



Investigators, decisionmakers, others responsible for grievance procedures or who have authority to modify or terminate supportive measures – (g)(2)

- Response obligations, grievance procedures, impartial service, meaning of term “relevant”

Facilitators of informal resolution – (g)(3)

- Rules associated with informal resolution process, impartial service

Title IX Coordinator and designees – (g)(4)

- All training for others in process, recordkeeping system and recordkeeping requirements, any other necessary training

Mandatory Reporting “Lite” – 106.44(c)



Who	Duty if Student Complainant	Duty if Employee Complainant
Confidential Employees	Not discussed (state law)	Not discussed (state law)
Administrator, Teaching, Advising	Report to Coordinator	Report to Coordinator or Provide Notice of How to Report
All Other Employees	Report to Coordinator or Provide Notice of How to Report	Report to Coordinator or Provide Notice of How to Report
Student Employees	Fact-Specific Inquiry	Fact-Specific Inquiry
Employee is Complainant	No Requirement	No Requirement



Supportive Measures

Not as equitable?

Supportive Measures (1 of 2)

- Retaining current definition: non-disciplinary, non-punitive, individualized measures, offered as appropriate, as reasonably available, without unreasonably burdening a party, and without fee or charge to the complainant or respondent, with some clarifying amendments.
- Make available ways access to supportive measures without complaint to restore or preserve access to education program.
- Offered to both Complainant and Respondent.
- Range of supportive measures and Title IX Coordinator's obligation to offer and coordinate supportive measures. (Proposed § 106.44(g)(6))
- Supportive measures may include, for example, counseling, extension of deadlines, restrictions on contact between the parties, and voluntary or involuntary changes in class, work, or housing. (Proposed § 106.44(g))

Supportive Measures (2 of 2)

- Supportive measures should be outlined for grievance process and informal resolution process. (Proposed § 106.45(k))
 - Confidentiality and sharing of supportive measures. (Proposed 106.44(g)(5))
 - Supportive measures can now burden respondent during pendency of a grievance procedures.
- * Measures should be non-punitive and for non-disciplinary reasons. (restrictions on contact)
- * Respondent provided the opportunity (prior to or asap) to seek modification or reversal of issued measures. (Proposed 106.44(g)(4))

Emergency Removals - Current



Current:

Institution may remove a respondent from its program or activity on an emergency basis after conducting an individualized health and risk analysis and determining that respondent poses an immediate threat to physical health or safety

Respondent is entitled to notice and immediate opportunity to challenge removal

Emergency Removals - Proposed



Proposed:

Expanded authority for emergency removal when the threats are to physical and non-physical health.

Threat must be serious

Emergency removal is available to address threats arising from all forms of alleged sex discrimination, not just sex-based harassment



Informal Resolutions

More opportunities to get together?

Informal Resolutions (IRs)



- Current:
 - An option for parties to address complaints, except those involving a student complainant and employee respondent
 - Required notices to parties
 - Required training for IR facilitators
 - Must provide supportive measures to the parties during IR
 - Available any time before a determination of responsibility and process can be terminated at any time
 - Need voluntary, written consent to proceed
 - IR doesn't result in a finding of responsibility, so no resulting sanction/discipline. But respondent can agree to terms that may otherwise constitute discipline had there been a determination of responsibility through the grievance procedures.
 - Records requirement

IR - Proposals



- Can offer the option of IR before a complaint is filed
- Institution has discretion whether to offer IR, but must exercise discretion in an equitable manner and must not require or pressure the parties to participate
- More detailed notice requirement, including explanation of the process, confidentiality expectations, and the types of terms the parties might agree to as a part of an IR process
- Supportive measures that only burden the respondent are not an option during IR
- Even if parties come to an agreement through IR, the institution must take steps to ensure that discrimination does not continue or recur

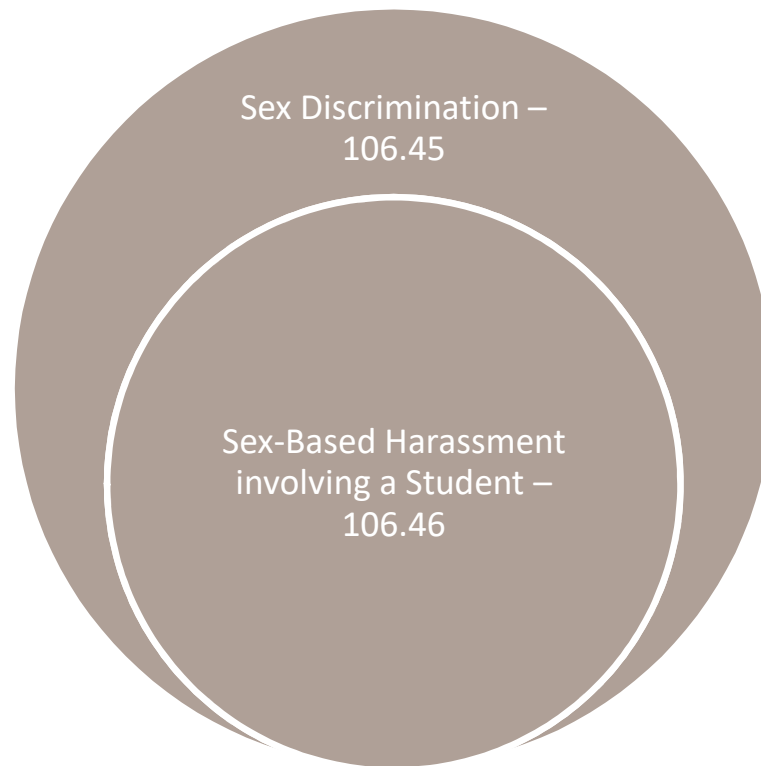


New Grievance Procedures

106.45 – Sex Discrimination

106.46 – Sex-Based Harassment involving a Student

Which applies?



“Formal Complaints”



- No more “formal complaints” – can be oral or written
- Complaint can be initiated by:
 - Complainant
 - Parent/guardian/guardian ad litem
 - Title IX Coordinator
- For sex discrimination that is not sex-based harassment, any student or employee, or any third party participating or attempting to participate in your education program/activity when the discrimination occurred

Single Investigator Model is Back



- Decision-maker may now be the Coordinator or the Investigator
- Remember: this may not apply to you, depending on court decisions in your jurisdiction
- Question: How might your campus community respond to a shift away from a hearing?

Mandatory Dismissal



- No more mandatory dismissal text
- Discretionary dismissal available:
 - Unable to identify the respondent
 - Respondent is not participating in educational program/activity and is not employed by institution
 - Complainant voluntarily withdraws
 - Doesn't constitute sex discrimination

Must have appeal for dismissal

Other Changes



- No more 10/10 day reviews
- Can provide evidence OR summary for review
- Both parties get opportunity to provide FACT witnesses
- Must have a process to evaluate credibility (flexibility!)
- Preponderance standard unless you use clear and convincing standard in **all other comparable proceedings**

Sex-Based Harassment Grievance Procedure (§106.46)



2020 Final Rule	2022 NPRM
Applies to Title IX Sexual Harassment that occurs against any person in the U.S.	Applies to Sex-Based Harassment complaints* involving student complainants or student respondents at postsecondary schools
No Single Investigator Model	Permits Single Investigator Model
Hearing Required for Title IX Sexual Harassment	Hearing OPTIONAL for Title IX Sexual Harassment <ul style="list-style-type: none"> BUT requires mandatory process for assessing credibility
Advisor-conducted questions at live hearing	Advisor-conducted questions at live hearing
Relevance determinations by decision-maker	Relevance determinations by decision-maker
Emphasis of relevance, but no definition	Relevance definition
Exclusion of certain evidence (rape shield, treatment records, privileged communications)	Exclusion of certain evidence (rape shield, treatment records, privileged communications)
Simultaneous written determination to the parties	Simultaneous written determination to the parties (required components reorganized)
Opportunity to Appeal on a minimum of 3 grounds	Opportunity to Appeal on a minimum of 3 grounds

New Prohibition on Party Statements (1 of 3)



- Acknowledges *VRLC v. Cardona*, but...
- Proposed 106.46(f)(4) states:

Refusal to respond to questions related to credibility. If a party does not respond to questions related to their credibility, the decisionmaker must not rely on any statement of that party that supports that party's position...

Unofficial, p. 695

New Prohibition on Party Statements (2 of 3)



- Rationale: “The Department is concerned, however, that placing no limitations on the decisionmaker’s ability to consider statements made by a party who does not submit to a credibility assessment could lead to manipulation by the parties.” (Unofficial, p. 436)
 - Examples: email or voicemail to a friend that supports a party’s factual account
 - Concerns about considering email or voicemail “for their truth”

New Prohibition on Party Statements (3 of 3)



- So... what is a question “related to [a party’s] credibility”?
 - Questions about other purported victims, if the complainant has alleged there are others?
 - Questions about cheating on a test freshman year?
 - Questions about drug use at the time of the incident?
- And... what is a “statement of that party that supports that party’s position”?
 - Emails, voicemails, text messages?
 - Statements against interest?

Note: Revised Guidance

- June 28, 2022 – ED revised its July 2021 Q&A to remove exclusionary rule – **EFFECTIVE NOW**
- “To the extent that statements made by a party or witness who does not submit to cross-examination at a live hearing satisfy the regulation’s relevance rules, they **must be considered** in any postsecondary school’s Title IX grievance process that is initiated after July 28, 2021.”
- You can find the guidance at www.bricker.com/titleix



Retaliation

New: Peer Retaliation, Defined.

Retaliation – 106.2



- **“Intimidation, threats, coercion, or discrimination** against any person **by a student, employee, person authorized by the recipient to provide aid, benefit, or service under the recipient’s education program or activity, or recipient** for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the person has reported information, made a complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part...”

Peer Retaliation – 106.2



- “Retaliation by a student against another student.”

Upcoming Events



- July 26-27: Two-Day Higher Ed Title IX Investigator and Advisor Training at Heidelberg University in Tiffin, OH (\$300)
- July 28, 12 ET - FREE webinar: Proposed Title IX Regulations – An Overview for College and University Governing Board Members
- August 16, 12 ET – FREE webinar: What You Missed This Summer in Higher Education
- Register at: www.bricker.com/events
- Registration for our Level 1/Level 2 virtual synchronous trainings are online at www.bricker.com/titleix (more being scheduled)

Keep in Touch!



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