

**Title IX- What's Up Now?**  
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**Paul Apicella**  
Montgomery McCracken  
1735 Market St.  
Philadelphia, PA 19103  
[papicella@mmwr.com](mailto:papicella@mmwr.com)  
215-772-7227



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**Road Map**

- Background
- Substantive Changes
- Procedural Changes
- Takeaways and What to Do?



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**Background**

- New admin, new outlook
- Out with the old guidances...
- ... In with the new regs



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## Substantive Changes

- Knowledge/Notice Requirement
- Definition of “Sexual Harassment”
- Scope – Context and Geography
- Standard of Response (care, investigate, support)



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## Substantive Changes – Knowledge/Notice

2011 DCL

...knows or reasonably should know...



**106.44(e) (6)**  
**Actual knowledge** ...notice ...to an official ...who has authority to institute corrective measures...

Respondent superior/constructive notice insufficient  
...  
“Mere” ability or obligation to report not enough

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## Substantive Changes – “Sexual Harassment”

2011 DCL

Sexual harassment is **unwanted conduct of a sexual nature**. ... that creates a **hostile environment**,

**106.44(e)(1)**  
Sexual harassment:

(i) **Conditioning** provision of aid, benefit, or service on participation in unwelcome sexual conduct

(ii) **Unwelcome** conduct ...that is so **severe, pervasive, and objectively offensive** that it **denies... access**

(iii) [Clery] **Sexual assault**



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## Substantive Changes – Context

### 2011 DCL

obligation to respond to... sexual harassment that **initially occurred off school grounds, outside a school's education program or activity.**



### 106.44(b)(1) (Commentary)

... not responsible for addressing the **continuing effects** of conduct that occurred **exclusively outside of the education program or activity...**



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## Substantive Changes – Geography

### 2011 DCL

Obligation to respond to... sexual harassment that **initially occurred off school grounds, outside a school's education program or activity.**



### 106.8(d) (Commentary)

[a school's] policy and grievance procedures apply to all students and employees located in **the United States** ...



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## Substantive Changes – Standard of Care

Response to Title IX issues evaluated under "reasonableness" standard



Must respond in a manner that is not "*deliberately indifferent.*"

Deliberate indifference: clearly unreasonable in light of the known circumstances.

**Safe Harbor**- if you follow your procedures you are "not deliberately indifferent." 106.44(b)(1)



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## Substantive Changes – Duty to Investigate

### 2014 Q&A

Must take immediate and appropriate steps to investigate or otherwise determine what occurred



106.44(e)(5)

Need only investigate “formal complaints” [doc. signed by a complainant or Title IX Coord. requesting investigation]



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## Substantive Changes – Interim Measures

### 2014 Q&A

Required to “take steps to ensure equal access to its education programs and activities and protect the complainant...”



106.44(b)(3), (e)(4)

Supportive measures - Must be **non-punitive**, **time-limited**, and **narrowly tailored** to support continued access ... **without unreasonably burdening** ...



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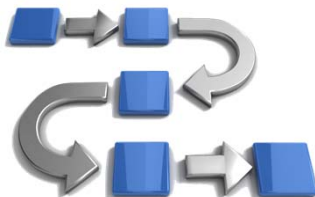
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## Procedural Changes

- Notice
- Investigation
- Adjudication
- Recordkeeping



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## Procedural Changes – Adjudication

### 106.45(b)(1)

- Due process for Respondent
- Evaluate all relevant evidence – Inculpatory *and* Exculpatory
- Presumption of non-responsibility
- Reasonably prompt time frames – no more 60 days



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## Procedural Changes - Notice

### 106.45(b)(2) Notice

- **Sufficient details** known at the time
- **Sufficient time** to respond
- **Identities** of the parties
- Specific **Conduct**
- **Date and location**
- Specific **policy sections**
- **Availability** of all evidence
- **Presumption** of innocence



\*\*Notice obligation is ongoing\*\*



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## Procedural Changes – Investigative Procedure

### 106.45(b)(3)

- Cannot restrict ability to discuss allegations or gather/present evidence
- Equal opportunity to pose questions to parties/witnesses
- Permit cross-examination (or effective substitute)
- Equal access to evidence, opportunity to respond
- Disclosure of **any** evidence obtained, upon request



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## Procedural Changes – Informal Resolution

### 2011 DCL

“Moreover, in cases involving allegations of sexual assault, mediation is not appropriate even on a voluntary basis.”



### 106.45(b)(6) – Informal Resolution

Informal resolution of any allegation is okay (with notice and voluntary written consent)



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## Procedural Changes – Standard of Proof

### 2011 DCL

Preponderance of evidence



### 106.45(b)(4) – Standards

- Preponderance OR clear/convincing
- Must be same standard for students and employees



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## Procedural Changes - Appeals

### 2011 DCL

Must provide equal appeal rights to both parties



### 106.45(b)(5) – Appeals

Option to provide appeal rights to:

- Neither Party
- Both parties
- Respondent only



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## Procedural Changes - Recordkeeping

### 106.45(b)(7)

- Must retain and make available all records of grievance/resolution process for 3 years
- Must create and maintain records of all other actions for 3 years
- Must document the basis for each decision/response



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## Takeaways

- Change is afoot, but not settled
- Equality v. Equity – “Fairness” to accused
- “Clarity”
- Narrowing duties, expanding duties
- Uncertain impact – Goals vs. Reality



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## What to Do?

- Stay the Course – for now
- (But begin evaluating and preparing for change)
- Notice and Comment!



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## Questions/Discussion



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