

Title IX Prohibited Conduct and Reporting Misconduct

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Prohibited Conduct Under Title IX 2020 Regulations

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"Sexual Harassment" [Three-Prong Test]

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).

"Actual Knowledge"

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, or to any employee of an elementary and secondary school. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is the respondent. 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. "Notice" as used in this paragraph includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator as described in § 106.8(a).

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"Actual Knowledge" §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, or to any employee of an elementary and secondary school. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is the respondent. **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.** "Notice" as used in this paragraph includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator as described in § 106.8(a).*

"Officials with Authority"

- Who is an official with authority—authority to redress?
 - Title IX coordinator
 - CSAs?
 - Who else?

*Determining whether an individual is an "official with authority" is a legal determination that depends on the specific facts relating to a recipient's administrative structure and the roles and duties held by officials in the recipient's own operations. The Supreme Court viewed this category of officials as the equivalent of what 20 U.S.C. 1682 calls an "appropriate person" for purposes of the Department's resolution of Title IX violations with a recipient. *Id.* at 30039.*

*Postsecondary institutions ultimately decide which officials to authorize to institute corrective measures on behalf of the recipient. The Title IX Coordinator and officials with authority to institute corrective measures on behalf of the recipient fall into the same category as employees whom guidance described as having "authority to redress the sexual harassment." *Id.* (emphasis added).*

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Actual Knowledge/Employees

For all recipients, **notice to the recipient's Title IX Coordinator or to "any official of the recipient who has authority to institute corrective measures on behalf of the recipient"** (referred to herein as "officials with authority") conveys actual knowledge to the recipient and triggers the recipient's response obligations. *Id.* at 30039 (emphasis added).

NOTE: The Department of Education has discontinued use of the term and previous structure of "responsible employees," i.e. "mandated reporters."

Rather than using the phrase "responsible employees," these final regulations describe the pool of employees to whom notice triggers the recipient's response obligations. *Id.*

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Limiting Mandatory Reporters A Rejection of "Responsible Employees"

Triggering a recipient's response obligations only when the Title IX Coordinator or an official with authority has notice **respects the autonomy of a complainant in a postsecondary institution better than the responsible employee rubric in guidance.** . . . *Id.* at 30040 (emphasis added).

[T]he approach in these final regulations allows postsecondary institutions to decide **which of their employees must, may, or must only with a student's consent, report sexual harassment to the recipient's Title IX Coordinator** (a report to whom always triggers the recipient's response obligations, no matter who makes the report). *Id.* (emphasis added).

We believe that the best way to avoid reports "falling through the cracks" or successfully being "swept under the rug" by postsecondary institutions, is not to continue (as Department guidance did) to insist that all postsecondary institutions must have universal or near-universal mandatory reporting. . . . **whether universal mandatory reporting for postsecondary institutions benefits victims or harms victims is a complicated issue as to which research is conflicting.** *Id.* at 30106 n.482 (emphasis added).

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"Universal mandatory reporting"

[N]othing in the proposed or final regulations prevents recipients (including postsecondary institutions) from instituting their own policies to require professors, instructors, or all employees to report to the Title IX Coordinator every incident and report of sexual harassment [i.e. a "universal mandatory reporting policy"]. *Id.* at 30107 (emphasis added).

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"Mandatory Reporters"

- Should IHE's designate a large cadre of "mandatory reporters" even if they are permitted to?
- Pros/cons?
- Conflicts in research?
- How much time to you have to notify folks of the change?
- Does it make sense to stay the course – for this first year, and wait and see if a change is needed?

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"Notice"

Notice results whenever . . . Title IX Coordinator, or any official with authority: **witnesses sexual harassment; hears about sexual harassment or sexual harassment allegations from a complainant (i.e., a person alleged to be the victim) or a third party (e.g., the complainant's parent, friend, or peer); receives a written or verbal complaint about sexual harassment or sexual harassment allegations; or by any other means.** These final regulations emphasize that **any person may always trigger a recipient's response obligations by reporting sexual harassment to the Title IX Coordinator using contact information that the recipient must post on the recipient's website.** **The person who reports does not need to be the complainant (i.e., the person alleged to be the victim); a report may be made by "any person" who believes that sexual harassment may have occurred and requires a recipient's response.**

Id. at 30040 (emphasis added, internal citations omitted).

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Actual Knowledge Can Be Triggered By...

- Report from the complainant
- Third party report ("bystander" reporting)
- Anonymous report (by the complainant or by a third party)

See *id.* at 30087.

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Anonymous Reports

[T]he Department does not take a position in the NPRM or these final regulations on whether recipients should encourage anonymous reports of sexual harassment . . .

Id. at 30087.

[I]f a recipient cannot identify any of the parties involved in the alleged sexual harassment based on the anonymous report, then a response that is not clearly unreasonable under light of these known circumstances will differ from a response under circumstances where the recipient knows the identity of the parties involved in the alleged harassment, and the recipient may not be able to meet its obligation to, for instance, offer supportive measures to the unknown complainant.

Id. at 30087.

Notice Cont'd

[N]otice of sexual harassment or allegations of sexual harassment to the recipient's Title IX Coordinator or to an official with authority to institute corrective measures on behalf of the recipient (herein, "officials with authority") will trigger the recipient's obligation to respond. Postsecondary institution students have a clear channel through the Title IX Coordinator to report sexual harassment, and § 106.8(a) requires recipients to notify all students and employees (and others) of the Title IX Coordinator's contact information, so that "any person" may report sexual harassment in person, by mail, telephone, or e-mail (or by any other means that **results in the Title IX Coordinator receiving the person's verbal or written report**), and specifies that a report may be made at any time (including during non-business hours) by mail to the Title IX Coordinator's office address or by using the listed telephone number or e-mail address.

Id. at 30106 (emphasis added).

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"Complainant"

Complainant means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.

What is "alleged?"

"Respondent"

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

Allege = "report?"

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More on Complainants/Respondents

- A person may be a complainant, or a respondent, even where no formal complaint has been filed and no grievance process is pending. *Id.* at 30030.
- References . . . to a complainant, respondent, or other individual with respect to exercise of rights under Title IX should be understood to include situations in which a parent or guardian has the legal right to act on behalf of the individual. *Id.*
- **[T]he definitions of "complainant" and "respondent" do not restrict either party to being a student or employee, and, therefore, the final regulations do apply to allegations that an employee was sexually harassed by a student.**

Id. at 30071-72 (internal citations omitted).

"Consent"

The Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault, as referenced in this section.

This has been a central issue in fairness/consistency.

How does "consent" fit into the new framework for "sexual harassment?"

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"Formal Complaint"

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. A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under § 106.8(a), and by any additional method designated by the recipient.

(emphasis added)

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"Formal Complaint" Cont'd

As used in this paragraph, the phrase "document filed by a complainant" means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint. Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party under this part or under § 106.45, and must comply with the requirements of this part, including § 106.45(b)(1)(iii).

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§106.44(a) General response to sexual harassment.

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.

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§106.44(a) Cont'd

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. The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, 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 to the complainant the process for filing a formal complaint.

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§ 106.71(a)

(a) Retaliation prohibited. No recipient or 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 under this part. Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation.

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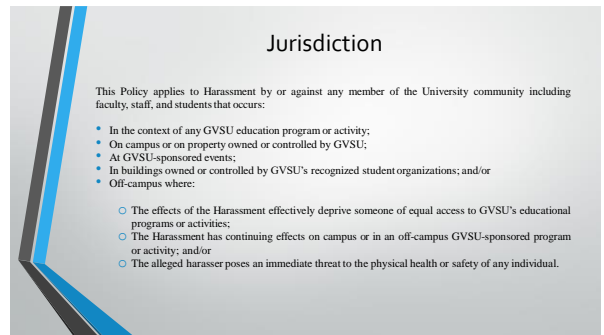
§ 106.71(a) Cont'd

The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 12329, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).

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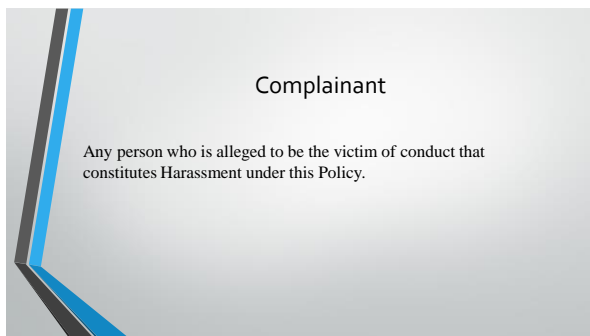


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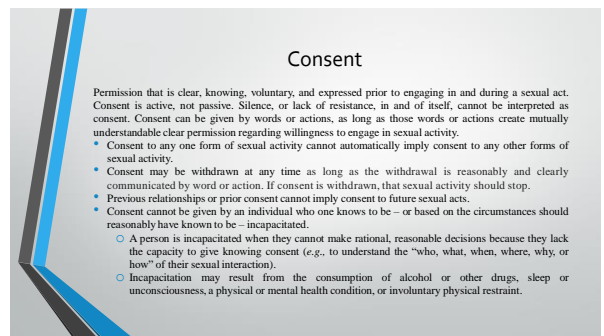


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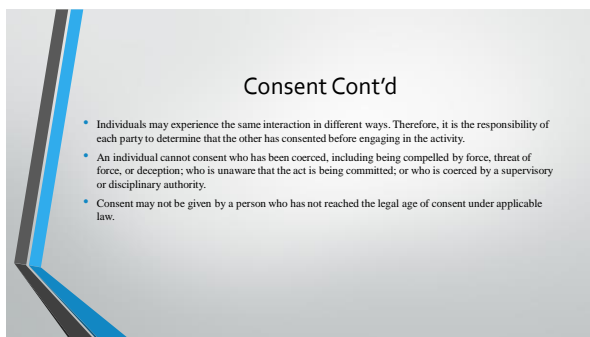


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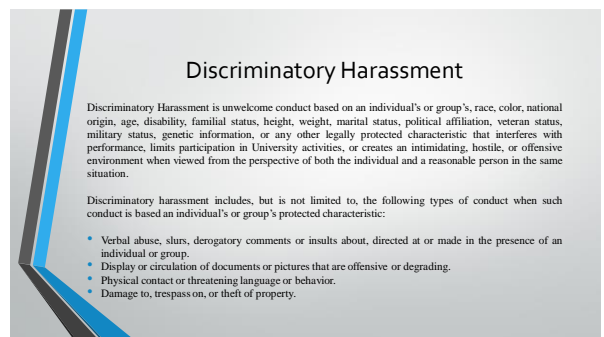


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Respondent

An individual who is alleged to have violated this Policy.

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Retaliation

Any adverse employment or educational action taken against a person because of their participation in a complaint or investigation of Harassment.

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Sexual Misconduct

Sexual Misconduct is unwelcome conduct based on sex, sexual orientation, gender identity, and/or pregnancy that does not fall within the purview of Title IX Sexual Harassment because it does not meet the definition of Title IX Sexual Harassment and/or because GVSU lacks jurisdiction over the conduct under Title IX.

Examples of Sexual Misconduct include, but are not limited to, the following:

- Unwelcome conduct based on sex, sexual orientation, gender identity, and/or pregnancy based on the circumstances and evaluated subjectively and objectively, that is determined by a reasonable person to be so severe, or pervasive that it effectively denies or limits a person equal access to participate in or benefit from the University's education program or activity.
- Conduct that meets the definition of Title IX Sexual Harassment but occurs off campus.
- Conduct that meets the definition of Title IX Sexual Harassment but occurs in a GVSU educational program or activity outside the United States such as in a GVSU study abroad program.

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Title IX Sexual Harassment

Title IX Sexual Harassment is unwelcome conduct on the basis of sex, sexual orientation, gender identity and/or pregnancy that satisfies one or more of the following:

- *Quid Pro Quo Harassment*: An employee or agent of GVSU conditioning the provision of an aid, benefit, or service on an individual's participation in unwelcome sexual conduct.
- *Hostile Environment*: 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 University's education program or activity.
- *Sexual assault*: Any forcible or non-forcible sex act proscribed by law. "Forcible sexual assault" includes sexual intercourse and fondling without consent. "Non-forcible sexual assault" includes incest and statutory rape.
 - "Sexual intercourse" includes oral, anal, and vaginal intercourse or penetration, to any degree, with any part of the body or other object.
 - "Fondling" is defined as touching of the genitals, buttocks, and/or breasts of another person for the purpose of sexual gratification, without consent.
- "Incest" is defined as sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
- "Statutory rape" is nonforcible sexual intercourse with a person who is under the statutory age of consent according to Michigan law.

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Title IX Sexual Harassment Cont'd

- *Dating violence*: Physical violence or the threat of physical violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with an individual, and the existence of such a relationship shall be determined based on factors such as the length and type of relationship, and frequency of interaction between the persons involved.
- *Domestic violence*: Physical violence or the threat of physical violence committed by a current or former spouse or intimate partner of an individual, by a person with whom the individual shares a child in common, by a person who is cohabitating with or has cohabitated with the individual as a spouse or intimate party, by a person similarly situated to a spouse of the individual under applicable domestic or family violence laws.
- *Stalking*: Knowingly or intentionally engaging in a course of conduct involving repeated or continuing harassment of another person that would cause a reasonable person to fear for their safety or the safety of others or suffer substantial emotional distress.

Only conduct that meets the definition of Title IX Sexual Harassment, that occurs in a GVSU education program or activity, and that occurs against a person in the United States constitutes Title IX Sexual Harassment. An "education program or activity" includes locations, events or circumstances over which GVSU exercised substantial control over both the Respondent and the context in which the alleged sexual harassment occurs, including on campus or on property owned or controlled by GVSU, at GVSU-sponsored events, or in buildings owned or controlled by a student organization that is officially recognized by GVSU.

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Mandatory Reporters

While GVSU encourages all members of its community to report incidents of Harassment, persons designated as Mandatory Reporters, *must* do so. Mandatory reporters include the following:

- Members of the Board of Trustees;
- Executive Officers and Appointing Officers;
- Deans, Directors, Department Heads/Chairpersons, and those serving in Assistant or Associate roles;
- Supervisors;
- GVSU faculty or staff providing oversight to, or traveling with, students on GVSU-related travel, including GVSU-sponsored study abroad, research, fieldwork, clinicals or internship programs;
- Faculty and staff who serve as advisors to or coaches of GVSU-recognized student groups;
- Any person who serves as a coach of a club sports team, whether employed by the University or not;
- All employees, including student-employees (while working), working in the Division of Student Affairs (including Resident Assistants at all times), Division of Inclusion and Equity, Enrollment Development Division, Department of Public Safety, and Athletics, except those who serve in non-supervisory clerical capacities;
- Campus Security Authorities designated by GVSU under the Clery Act not otherwise specified; and
- Individuals serving in any of the positions described above on an acting or interim basis.

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Reference to Procedures

GVSU's *Procedures for Reporting and Resolving Allegations of Title IX Sexual Harassment, Sexual Misconduct and Discriminatory Harassment* describe the necessary steps for resolving concerns of violations of this Policy. Anyone wishing to report a violation of this Policy should refer to those Procedures.

- Process A: Formal Grievance Process Under 2020 Title IX Regulations
- Process B: Grievance Process for University Sexual Misconduct
- Process C: Resolution Process for Discrimination & Harassment

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Brief Look at Some Language from the 2022 Proposed Title IX Rules

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Sex-Based Harassment

Sex-based harassment prohibited by this part means sexual harassment, harassment on the bases described in § 106.10, and other conduct on the basis of sex that is:

1. **Quid pro quo harassment.** *An employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient's education program or activity explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct;*

(2) **Hostile environment harassment.** *Unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from the recipient's education program or activity (i.e., creates a hostile environment). Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following:*

- (i) *The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;*
- (ii) *The type, frequency, and duration of the conduct;*
- (iii) *The parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the alleged unwelcome conduct;*
- (iv) *The location of the conduct, the context in which the conduct occurred, and the control the recipient has over the respondent; and*
- (v) *Other sex-based harassment in the recipient's education program or activity.*

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(3) **Specific Offenses.**

- (i) *Sexual assault meaning an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation;*
- (ii) *Dating violence meaning violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim;*
- (iii) *Domestic violence meaning felony or misdemeanor crimes of violence committed by a person who:*
 - (A) *Is a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction of the recipient, or a person similarly situated to a spouse of the victim;*
 - (B) *Is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner;*
 - (C) *Shares a child in common with the victim; or*
 - (D) *Commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction; or*
- (iv) *Stalking meaning engaging in a course of conduct directed at a specific person that would cause a reasonable person to:*
 - (A) *Fear for the person's safety or the safety of others; or*
 - (B) *Suffer substantial emotional distress.*

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Complainant means:

- (1) *a student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX; or*
- (2) *a person other than a student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX and who was participating or attempting to participate in the recipient's education program or activity when the alleged sex discrimination occurred.*

Complaint means an oral or written request to the recipient to initiate the recipient's grievance procedures as described in § 106.45, and if applicable § 106.46.

Respondent means a person who is alleged to have violated the recipient's prohibition on sex discrimination.

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Confidential employee means:

- (1) an employee of a recipient whose communications are privileged under Federal or State law associated with their role or duties for the institution;
- (2) an employee of a recipient whom the recipient has designated as a confidential resource for the purpose of providing services to persons in connection with sex discrimination—but if the employee also has a role or duty not associated with providing these services, the employee's status as confidential is limited to information received about sex discrimination in connection with providing these services; or
- (3) an employee of a postsecondary institution who is conducting an Institutional Review Board-approved human-subjects research study designed to gather information about sex discrimination—but the employee's confidential status is limited to information received while conducting the study.

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Who Must Report?

[T]he Department's tentative position is that it would be appropriate to obligate recipients other than elementary schools or secondary schools to require any employee who is not a confidential employee and who has authority to institute corrective measures on behalf of the recipient to notify the Title IX Coordinator when the employee has information about conduct that may constitute sex discrimination under Title IX. The Department's tentative position is also that it would be appropriate to obligate recipients other than elementary schools or secondary schools to require any employee who is not a confidential employee and who has responsibility for administrative leadership, teaching, or advising in a recipient's education program or activity, to notify the Title IX Coordinator when the employee has information about a student being subjected to conduct that may constitute sex discrimination under Title IX.

NPRM at 179-180.

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