



**Joint Guidance on Federal Title IX Regulations:
Comparison of Title IX Regulations & New York Education Law Article 129-B
August 10, 2020**

Note: This document focuses on a summary analysis of the interactions between the Title IX Final Rule and NY Education Law 129-B.¹ For a full overview of the changes from the Proposed Regulations, see Title IX Text for Text Proposed to Title IX Summary Proposed to Final Comparison, available at https://system.suny.edu/media/suny/content-assets/documents/sci/tix2020/TIX-Regulations-Text-for-Text-Comparison-Chart_v2.pdf

The Department both directly and indirectly addressed the potential conflict between the new regulations and the requirements of New York State’s “Enough is Enough” campus safety law (NYS Education Law 129-B) in several places. The preamble to the Final Rule noted:

One commenter argued that the Department has no right to invade the police powers of a State like New York, which has already regulated extensively on the topic of campus sexual harassment and assault, and the NPRM would inappropriately “lessen the effectiveness” of New York’s “Enough is Enough” law as well as the New York’s Dignity for all Students Act (DASA), if not outright contradict it. 85 Fed. Red. 30,026, 30,455 (May 19, 2020).

The Department expressed a belief that the final regulations do not “generally conflict with State and local laws,” but left no doubt it expected schools to abide by federal requirements in the event of a conflict. *Id.* Federal preemption is addressed explicitly in § 106.6(h) of the final regulations, which provides that any conflict between state or local law and Title IX as implemented by §§ 106.30, 106.44, and 106.45, is resolved in favor of compliance with the federal regulations.

¹ The effective date of 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.

We compare here the requirements of Education Law 129-B and the new Title IX Regulations, and note actual and potential conflicts between the two. Potential areas of overlap and conflict to pay particular attention to when updating institutional policies and procedures include requirements relating to: no contact orders, interim suspensions (particularly as opposed to emergency removals allowed under the Title IX regulations), the decision to move forward without the participation of the reporting individual, allowance of cross-examinations in live hearings, and evidentiary exclusions (including mental health and sexual health history exclusions).

The chart below reflects specific identified conflicts between 129-B and the Final Rule. Other conflicts may arise as review of the Rule continues and the Department provides technical assistance and engages in application of its Rule.

New York Education Law Article 129-B	Final 2020 Title IX Regulations
§ 6439: Definitions 1. “Institution” shall mean any college or university chartered by the regents or incorporated by special act of the legislature that maintains a campus in NY. 2. “Title IX Coordinator” shall mean the Title IX Coordinator and/or his or her designee or designees. 3. “Bystander” shall mean a person who observes a crime, impending crime, conflict, potentially violent or violent behavior, or conduct that is in violation of rules or policies of an institution. 4. “Code of conduct” shall mean the written policies adopted by an institution governing student behavior, rights, and responsibilities while such student is matriculated in the institution. 5. “Confidentiality” may be offered by an individual who is not required by law to report known incidents of sexual assault or other crimes to institution officials, in a manner consistent with state and federal law, including but not limited to 20 U.S.C. 1092(f) and 20 U.S.C. 1681(a). Licensed mental health counselors, medical providers and pastoral counselors are examples of institution employees who may offer confidentiality. 6. “Privacy” may be offered by an individual when such an individual is unable to offer confidentiality under the law but shall still not disclose information learned from a reporting individual or bystander to a crime or incident more than necessary to comply with this and other applicable laws, including informing appropriate institution officials. Institutions may substitute another relevant term having the same meaning, as appropriate to the policies of the institution.	The Final Regulations use overlapping but not identical terms to those used in 129-B. Relevant terms defined in § 106.30 includes: - Defines <i>complainant</i> as “an individual alleged to be the victim of conduct that could constitute sexual harassment.” This definition roughly parallels “reporting individual” as defined in 129-B. - Defines <i>respondent</i> as “an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.” This definition appears to cover both “accused” and “respondent” as defined in 129-B. - Defines “Sexual assault,” “dating violence,” “domestic violence,” and “stalking” consistent with the Clery Act statutory definitions. These are roughly consistent with 129-B definitions. - Defines <i>postsecondary institution</i> consistent with existing definitions in Title IX regulations, in place since the late 1970s. The final regulations do not include a definition of consent, deferring to states and institutions to define consent.

7. “Accused” shall mean a person accused of a violation who has not yet entered an institution’s judicial or conduct process. 8. “Respondent” shall mean a person accused of a violation who has entered an institution’s judicial or conduct process. 9. “Reporting individual” shall encompass the terms victim, survivor, complainant, claimant, witness with victim status, and any other term used by an institution to reference an individual who brings forth a report of a violation. 10. “Sexual activity” shall have the same meaning as “sexual act” and “sexual contact” as provided in 18 U.S.C. 2246(2) and 18 U.S.C. 2246(3). 11. “Domestic violence,” “dating violence,” “stalking,” and “sexual assault” shall be defined by each institution in its code of conduct in a manner consistent with applicable federal definitions.	
§ 6440 (1): General provisions Every institution shall: a. adopt written rules implementing this article by amending its code of conduct or other comparable policies; b. annually file with the department on or before the first day of July, beginning in two thousand sixteen, a certificate of compliance with the provisions of this article; and c. file a copy of all written rules and policies adopted as required in this article with the department on or before the first day of July, two thousand sixteen, and once every ten years thereafter, except that the second filing shall coincide with the required filing under article one hundred twenty-nine-A of this chapter, and continue on the same cycle thereafter.	Conflict uncertain, dependent upon application. Both 129-B and Final Rule in § 106.8(c) require the adoption of a grievance process that complies with their respective requirements; if these federal and state mandates conflict, then the implementation could create a conflict.
§ 6440(2): All institutional services and protections afforded to reporting individuals under this article shall be available to all students and applicable to conduct that has a reasonable connection to that institution. When such conduct involves students or employees from two or more institutions, such institutions may work collaboratively to address the conduct provided that such collaboration complies with the Family Educational Rights and Privacy Act codified at 20 U.S.C. 1232g; 34 C.F.R. Part 99.	Potential Conflict § 106.30(a) of the Final Rule states, “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.” At first glance, it appears that these two sections are in conflict. While 129-B would allow a student to file a complaint against a different institution through a collaborative process, the Final Rule would not permit a non-student to file a formal complaint against a student enrolled at a particular institution. While the Final Rule allows the Title IX Coordinator to sign a formal complaint in lieu of the

	complainant, it is not clear whether the Title IX Coordinator could only do so where the complaint could otherwise be filed by a covered complainant. Thus, the regulations may have the effect of prohibiting two or more institutions from working collaboratively to address conduct committed by a student at one institution against a person unaffiliated with that institution.
§ 6442 (3): If an institution fails to file a certificate of compliance on or before September first beginning in two thousand sixteen, such institution shall be ineligible to receive state aid or assistance until it files such a certificate. The department shall conduct audits of institutions by random selection, at any time after September first, two thousand sixteen, to ensure compliance with the provisions of this article, and shall post information and statistics regarding compliance with this article on the department's website.	No equivalent provision.
§ 6442 (4): A copy of such rules and policies shall be provided by each institution to all students enrolled in said institution using a method and manner appropriate to its institutional culture. Each institution shall also post such rules and policies on its website in an easily accessible manner to the public.	No conflict.
§ 6442 (5): The protections in this article apply regardless of race, color, national origin, religion, creed, age, disability, sex, gender identity or expression, sexual orientation, familial status, pregnancy, predisposing genetic characteristics, military status, domestic violence victim status, or criminal conviction.	No equivalent provision In the preamble to the Final Rule, the Department attests to its belief that the Rule will help “protect against sex discrimination regardless of a person’s race or ethnicity, age, sexual orientation, or gender identity.” 85 Fed. Reg. at 30,064. However there is no equivalent provision in the Rule itself.
§ 6442 (6): The provisions of this article shall apply regardless of whether the violation occurs on campus, off campus, or while studying abroad.	Conflict uncertain, dependent on application The Final Rule imposes certain restrictions on Title IX jurisdiction not present under 129-B. § 106.44 of the Final Rule requires a recipient with actual knowledge of sexual harassment in an education program or activity against a person <i>in the United States</i> to promptly respond in a manner that is not deliberately indifferent. It goes on to define program or activity as including, “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.” § 106.45(b)(3)(i) requires that an institution dismiss formal complaints from its Title IX grievance process if they allege conduct that did not occur in the institution’s education program or activity, or that did not occur “in the United States.”
§ 6442(7): Institutions shall, where appropriate, utilize applicable state and federal law, regulations, and guidance in writing the policies required pursuant to this article.	No equivalent provision.
§ 6442(8) Nothing in this article shall be construed to limit in any way the provisions of the penal law that apply to the criminal action analogous to the student conduct code violations referenced herein. Action pursued through the criminal justice process shall be governed by the penal law and the criminal procedure law.	No equivalent provision.
§ 6442(9): Nothing in this article shall be construed to create a new private right of action for any person.	No equivalent provision.
§ 6442(10): Nothing in this article shall be construed to prevent an institution from continuing an investigation when required by law to continue such investigation.	No equivalent provision.
§ 6441: Affirmative consent to sexual activity <i>{text not excerpted here}</i>	§ 106.30 of the Final Rule declines to require a particular definition of consent. In the preamble to the Final Rule, the Department explicitly addressed 129-B, stating there is no conflict with the requirement that institutions adopt a specific definition of affirmative consent. 85 Fed. Reg. at 30,125.
§ 6442: Policy for alcohol and/or drug use amnesty <i>{text not excerpted here}</i>	No equivalent provision.
§ 6443: Students’ Bill of Rights Every institution shall adopt and implement the following “Students' Bill of Rights” as part of its code of conduct which shall be distributed annually to students, made available on each institution's website, posted in campus residence halls and campus centers, and shall include links or information to file a report and seek a response, pursuant to section sixty-four hundred forty-four of this article, and the options for confidential disclosure pursuant to section sixty-four hundred forty-six of this article: “All students have the right to:	Potential Conflict There are several provisions of the Final Rule that potentially complicate the ability of institutions to proceed through a conduct process without the participation of a complainant/reporting individual, causing potential conflicts with the 129-B-granted right of a reporting individual to decide whether or not to participate in a process.

1. Make a report to local law enforcement and/or state police; 2. Have disclosures of domestic violence, dating violence, stalking, and sexual assault treated seriously; 3. Make a decision about whether or not to disclose a crime or violation and participate in the judicial or conduct process and/or criminal justice process free from pressure by the institution; 4. Participate in a process that is fair, impartial, and provides adequate notice and a meaningful opportunity to be heard; 5. Be treated with dignity and to receive from the institution courteous, fair, and respectful health care and counseling services, where available; 6. Be free from any suggestion that the reporting individual is at fault when these crimes and violations are committed, or should have acted in a different manner to avoid such crimes or violations; 7. Describe the incident to as few institution representatives as practicable and not be required to unnecessarily repeat a description of the incident; 8. Be protected from retaliation by the institution, any student, the accused and/or the respondent, and/or their friends, family and acquaintances within the jurisdiction of the institution; 9. Access to at least one level of appeal of a determination; 10. Be accompanied by an advisor of choice who may assist and advise a reporting individual, accused, or respondent throughout the judicial or conduct process including during all meetings and hearings related to such process; and 11. Exercise civil rights and practice of religion without interference by the investigative, criminal justice, or judicial or conduct process of the institution.”	For example, as discussed further below under Art. 129-B §6444(5)(b), the Final Rule §106.45(b)(6) requires that the processes of postsecondary institutions include live hearings, at which the institution 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” . . . “directly, orally, and in real time.” If a party or witness “does not submit” to cross-examination, the Rule requires that decision-makers “must not rely on any statement of that party or witnesses in reaching a determination regarding responsibility” and may not “draw an inference about the determination regarding responsibility solely on a party’s or witness’s absence from the live hearing or refusal to answer” questions.
§ 6444 (1)(a): Response to Reports Every institution shall ensure that reporting individuals are advised of their right to... Notify university police or campus security, local law enforcement, and/or state police;	No equivalent provision
§ 6444 (1)(b): Every institution shall ensure that reporting individuals are advised of their right to...Have emergency access to a Title IX Coordinator or other appropriate official trained in interviewing victims of sexual assault who shall be available upon the first instance of disclosure by a reporting individual to provide information regarding options to proceed, and, where applicable, the importance of preserving evidence and obtaining a sexual assault forensic examination as soon as possible,	Conflict uncertain, dependent upon application The Final Rule contains requirements that overlap with but are not consistent with these 129-B requirements. § 106.30(a) of the Final Rule imputes knowledge of allegations of sexual harassment to postsecondary institutions only when a recipient’s Title IX Coordinator or any official “who has authority to institute corrective measures on behalf of” the institution has been informed of the

and detailing that the criminal justice process utilizes different standards of proof and evidence and that any questions about whether a specific incident violated the penal law should be addressed to law enforcement or to the district attorney. Such official shall also explain whether he or she is authorized to offer the reporting individual confidentiality or privacy, and shall inform the reporting individual of other reporting options;	allegations. Once that notice has happened, the Rule requires that “The Title IX Coordinator must 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, and explain to the complainant the process for filing a formal complaint.” Final Rule § 106.44(a).
§ 6444 (1)(c), (d), (e) & (f) : C. Disclose confidentially the incident to institution representatives, who may offer confidentiality pursuant to applicable laws and can assist in obtaining services for reporting individuals; D. Disclose confidentially the incident and obtain services from the state or local government; E. Disclose the incident to institution representatives who can offer privacy or confidentiality, as appropriate, and can assist in obtaining resources for reporting individuals; F. File a report of sexual assault, domestic violence, dating violence, and/or stalking and the right to consult the Title IX Coordinator and other appropriate institution representatives for information and assistance. Reports shall be investigated in accordance with institution policy and a reporting individual’s identity shall remain private at all times if said reporting individual wishes to maintain privacy; <i>NOTE:</i> In its guidance on 129-B, NYSED states that to alert an institution of allegations, a “reporting individual may use any or none of” the options to file a report.	Potential Conflict § 106.30(a) of the Final Rule imputes knowledge of allegations of sexual harassment to postsecondary institutions only when a recipient’s Title IX Coordinator or any official “who has authority to institute corrective measures on behalf of” the institution has been informed of the allegations. It further creates a category of “formal” complaints under Title IX that must be documents filed by a complainant or signed by the Title IX Coordinator, and that may only be complaints filed by complainants who are “participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed” at the time of filing.
§ 6444 (1)(g): Disclose, if the accused is an employee of the institution, the incident to the institution’s human resources authority or the right to request that a confidential or private employee assist in reporting to the appropriate human resources authority;	No equivalent provision. Note that the Final Rule applies to conduct of students and employees.
§ 6444 (1)(h): Receive assistance from appropriate institution representatives in initiating legal proceedings in family court or civil court; and	No equivalent provision.
§ 6444 (1)(i): Withdraw a complaint or involvement from the institution process at any time.	Conflict uncertain, dependent upon application.

	As discussed under § 6443 and §6444(5)(b), there are several provisions of the Final Rule that potentially complicate the ability of institutions to proceed through a conduct process without the participation of a complainant/reporting individual, causing potential conflicts with the 129-B-granted right of a reporting individual to decide whether or not to participate in a process.
§ 6444 (2): Every institution shall ensure that, at a minimum, at the first instance of disclosure by a reporting individual to an institution representative, the following information shall be presented to the reporting individual: “You have the right to make a report to university police or campus security, local law enforcement, and/or state police or choose not to report; to report the incident to your institution; to be protected by the institution from retaliation for reporting an incident; and to receive assistance and resources from your institution.”	No equivalent provision.
§ 6444 (3): Every institution shall ensure that reporting individuals have information about resources, including intervention, mental health counseling, and medical services, which shall include information on whether such resources are available at no cost or for a fee. Every institution shall also provide information on sexually transmitted infections, sexual assault forensic examinations, and resources available through the New York state office of victim services, established pursuant to section six hundred twenty-two of the executive law.	Conflict uncertain, dependent upon application. § 106.30(a) of the Final Rule defines <i>supportive measures</i> to include “non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. . . . designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties and/or the recipient’s educational environment, or deter sexual harassment.” It states that “[s]upportive measures may include 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, and other similar measures.”

	§ 106.44(a) further requires that the the Title IX Coordinator 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,” but this is only required when either the Title IX Coordinator or other “official with authority” to redress the allegations know about the allegations.
§ 6444 (4)(a): Every institution shall ensure that individuals are provided the following protections and accommodations ... When the accused or respondent is a student, to have the institution issue a “no contact order” consistent with institution policies and procedures, whereby continued intentional contact with the reporting individual would be a violation of institution policy subject to additional conduct charges; if the accused or respondent and a reporting individual observe each other in a public place, it shall be the responsibility of the accused or respondent to leave the area immediately and without directly contacting the reporting individual. Both the accused or respondent and the reporting individual shall, upon request and consistent with institution policies and procedures, be afforded a prompt review, reasonable under the circumstances, of the need for and terms of a no contact order, including potential modification, and shall be allowed to submit evidence in support of his or her request. Institutions may establish an appropriate schedule for the accused and respondents to access applicable institution buildings and property at a time when such buildings and property are not being accessed by the reporting individual; Both the accused or respondent and the reporting individual shall, upon request and consistent with institution policies and procedures, be afforded a prompt review, reasonable under the circumstances, of the need for and terms of a no contact order, including potential modification, and shall be allowed to submit evidence in support of his or her request.	Potential Conflict § 106.30(a) of the Final Rule defines “Supportive Measures” as non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment, or deter sexual harassment.” This section goes on to provide examples of supportive measures, and states that supportive measures “may include...mutual restrictions on contact between the parties.” To the extent that 129-B requires that when an institution issues a “no contact order” it must require the <i>accused or responding party</i> to immediately leave a public place if they encounter the reporting party, this may be considered disciplinary in nature or an “unreasonable burden” and thus conflict with the Final Rule. Alternatively, this may be adjudged to be only a slight burden and, therefore, not in direct violation of the Final Rule.
§ 6444 (4)(b): Every institution shall ensure that individuals are provided the following protections and accommodations . . . To be assisted by the institution’s police or security forces, if applicable, or other officials in obtaining an order of protection or, if outside of New York state, an equivalent protective or restraining order;	No equivalent provision.

§ 6444 (4)(c): Every institution shall ensure that individuals are provided the following protections and accommodations ... To receive a copy of the order of protection or equivalent when received by an institution and have an opportunity to meet or speak with an institution representative, or other appropriate individual, who can explain the order and answer questions about it, including information from the order about the accused’s responsibility to stay away from the protected person or persons;	No equivalent provision.
§ 6444 (4)(d): Every institution shall ensure that individuals are provided the following protections and accommodations ... To an explanation of the consequences for violating these orders, including but not limited to arrest, additional conduct charges, and interim suspension;	No equivalent provision.
§ 6444 (4)(e): Every institution shall ensure that individuals are provided the following protections and accommodations ... To receive assistance from university police or campus security in effecting an arrest when an individual violates an order of protection or, if university police or campus security does not possess arresting powers, then to call on and assist local law enforcement in effecting an arrest for violating such an order, provided that nothing in this article shall limit current law enforcement jurisdiction and procedures;	No equivalent provision.
§ 6444 (4)(f): Every institution shall ensure that individuals are provided the following protections and accommodations ... When the accused or respondent is a student determined to present a continuing threat to the health and safety of the community, to subject the accused or respondent to interim suspension pending the outcome of a judicial or conduct process consistent with this article and the institution’s policies and procedures. Both the accused or respondent and the reporting individual shall, upon request and consistent with the institution’s policies and procedures, be afforded a prompt review, reasonable under the circumstances, of the need for and terms of an interim suspension, including potential modification, and shall be allowed to submit evidence in support of his or her request;	Conflict uncertain, dependent upon application. § 106.44(c) of the regulations permits emergency removal of a respondent 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.” Any conflict with 129-B will depend, in part, upon application. For example, the regulatory requirement that the respondent be afforded an opportunity to challenge the decision “immediately” may require a faster review than 129-B’s requirement for a “prompt” review.
§ 6444 (4)(g):	Potential Conflict

Every institution shall ensure that individuals are provided the following protections and accommodations ... When the accused is not a student but is a member of the institution’s community and presents a continuing threat to the health and safety of the community, to subject the accused to interim measures in accordance with applicable collective bargaining agreements, employee handbooks, and rules and policies of the institution;	For employees, the Final Rule does not defer to applicable collective bargaining agreements, employee handbooks, or other rules and policies of the institutions. Instead, it applies the same procedures to students and employees. It states in §106.6(f) that it should not “be read in derogation of any individual’s rights under Title VII of the Civil Rights Act” and in §106.44(d) that it does not preclude an institution from “placing a non-student employee respondent on administrative leave during the pendency of a grievance process.”
§ 6444 (4)(h): Every institution shall ensure that individuals are provided the following protections and accommodations ... To obtain reasonable and available interim measures and accommodations that effect a change in academic, housing, employment, transportation or other applicable arrangements in order to help ensure safety, prevent retaliation and avoid an ongoing hostile environment, consistent with the institution’s policies and procedures. Both the accused or respondent and the reporting individual shall, upon request and consistent with the institution’s policies and procedures, be afforded a prompt review, reasonable under the circumstances, of the need for and terms of any such interim measure and accommodation that directly affects him or her, and shall be allowed to submit evidence in support of his or her request.	Conflict uncertain, dependent upon application. Section 106.30(a) defines “Supportive Measures” as non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment, or deter sexual harassment.”
§ 6444 (5)(a): Every institution shall ensure that every student be afforded the following rights . . . The right to request that student conduct charges be filed against the accused in proceedings governed by this article and the procedures established by the institution’s rules.	Conflict § 106.44 of the Final Rule requires a recipient with actual knowledge of sexual harassment in an education program or activity against a person <i>in the United States</i> to promptly respond in a manner that is not deliberately indifferent. It goes on to define program or activity as including, “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.” § 106.45(b)(3)(i) requires recipients to dismiss formal complaints from its Title IX grievance process if they allege conduct that did not occur in the institution’s education program or activity, or that did not occur

	“in the United States” “for the purposes of sexual harassment under title IX.”
§ 6444 (5)(b): Every institution shall ensure that every student be afforded the following rights . . . The right to a process in all student judicial or conduct cases, where a student is accused of sexual assault, domestic violence, dating violence, stalking, or sexual activity that may otherwise violate the institution’s code of conduct, that includes, at a minimum: (i) notice to a respondent describing the date, time, location and factual allegations concerning the violation, a reference to the specific code of conduct provisions alleged to have been violated, and possible sanctions; (ii) an opportunity to offer evidence during an investigation, and to present evidence and testimony at a hearing, where appropriate, and have access to a full and fair record of any such hearing, which shall be preserved and maintained for at least five years from such a hearing and may include a transcript, recording or other appropriate record; and (iii) access to at least one level of appeal of a determination before a panel, which may include one or more students, that is fair and impartial and does not include individuals with a conflict of interest. In order to effectuate an appeal, a respondent and reporting individual in such cases shall receive written notice of the findings of fact, the decision and the sanction, if any, as well as the rationale for the decision and sanction. In such cases, any rights provided to a reporting individual must be similarly provided to a respondent and any rights provided to a respondent must be similarly provided to a reporting individual. <i>Note:</i> NYSED Guidance states that this section should not be read to extend to private colleges the Constitutional due process requirements that apply to public colleges. It establishes minimum requirements for cases of sexual and interpersonal violence covered by 129-B, but institutions may offer more rights and requirements and may offer such rights and requirements for other violations that are outside the scope of the law. The Guidance further specifies that evidence is not defined in the law and should be defined reasonably by an institution. Institutions are not required by 129-B to offer hearings, and may use alternative methods, such as the investigatory model, as allowed under the institution’s policies and applicable law. Further, 129-B	Potential Conflict The Final Rule § 106.45(b)(5)(vii) requires institutions “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.” Final Rule, § 106.45(b)(6), which governs hearings, requires: “For postsecondary institutions, the recipient’s grievance process must provide for a live hearing. 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, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings. 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. 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.

does not require that evidence be offered during a hearing or that evidence be offered in the presence of other parties or witnesses. The law does not specify the type of record or manner of access to the record that must be maintained. It can be a recording, notes, a transcript or any other reasonable type of record.	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. 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." Final Rule § 106.45(b)(7), governing the determination of responsibility, requires "the decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), [to] issue a written determination regarding responsibility." Final Rule § 106.45(b)(10), regarding recordkeeping, sets a seven year recordkeeping requirement for covered records, including determinations regarding responsibility and any audio or audiovisual recording or transcript required, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant.
§ 6444 (5)(c)(i): Every institution shall ensure that every student be afforded the following rights . . . Throughout proceedings involving such an accusation of sexual assault, domestic violence, dating violence, stalking, or sexual activity that may otherwise violate the institution's code of conduct, the right: For the respondent, accused, and reporting individual to be accompanied by an advisor of choice who may assist and advise a reporting individual, accused, or respondent throughout the judicial or conduct process including during all meetings and hearings related to such process. Rules for participation of such advisor shall be established in the code of conduct.	Potential Conflict. Under the Final Rule, § 106.45(b)(6), advisors must be allowed to conduct cross-examination during hearings, and therefore must be present at such hearings, specifically "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, notwithstanding the discretion of the recipient . . . to otherwise restrict the extent to which advisors may participate in the proceedings."

Note: NYSED Guidance states that 129-b does not require an institution to allow an advisor to participate in the meetings or hearings, such as making opening or closing statements or questioning witnesses. While an institution may allow such participation, it may also restrict such advisors from speaking at the meeting or hearing. Institutions may place reasonable restrictions on participation of advisors, such as by having a policy allowing any party to request a five business day delay to allow for the scheduling conflicts of their advisor of choice, and institutions are not required to comply with the busy schedule of advisors of choice who may declare themselves unavailable for days, weeks or months.

§ 6444 (5)(c)(ii):

Every institution shall ensure that every student be afforded the following rights . . . Throughout proceedings involving such an accusation of sexual assault, domestic violence, dating violence, stalking, or sexual activity that may otherwise violate the institution’s code of conduct, the right:

To a prompt response to any complaint and to have the complaint investigated and adjudicated in an impartial, timely, and thorough manner by individuals who receive annual training in conducting investigations of sexual violence, the effects of trauma, impartiality, the rights of the respondent, including the right to a presumption that the respondent is “not responsible” until a finding of responsibility is made pursuant to the provisions of this article and the institution’s policies and procedures, and other issues including, but not limited to domestic violence, dating violence, stalking or sexual assault.

Conflict uncertain, dependent upon application.

Final Rule §106.45(b)(1) requires that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on:

- the definition of sexual harassment in § 106.30,
- the scope of the recipient’s education program or activity,
- how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes,
- how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.
- any technology to be used at a live hearing
- issues of relevance of questions and evidence, including when questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant under the Final Rule

It also requires investigators receive training on issues of relevance “to create an investigative report that fairly summarizes relevant evidence.”

129-B’s requirement of trauma-informed investigations training may expose institutions to attack under the Final Rule on the ground that the training conflicts with the new regulations’ requirements that individuals involved in the Title IX process not “have a . . . bias for or against complainants or respondents generally” and that materials used to train those individuals “not rely on sex stereotypes.” In the Preamble to the Final Rule, the Department “notes that although there is no fixed definition of ‘trauma-informed’ practices with respect to all

	the contexts to which such practices may apply in an educational setting, practitioners and experts believe that application of such practices is possible – <i>albeit challenging</i> – to apply in a truly impartial, nonbiased manner.” 85 Fed. Reg. at 30,256.
§ 6444 (5)(c)(iii): Every institution shall ensure that every student be afforded the following rights . . . Throughout proceedings involving such an accusation of sexual assault, domestic violence, dating violence, stalking, or sexual activity that may otherwise violate the institution’s code of conduct, the right: To an investigation and process that is fair, impartial and provides a meaningful opportunity to be heard, and that is not conducted by individuals with a conflict of interest.	Conflict uncertain, dependent upon application.
§ 6444 (5)(c)(iv): Every institution shall ensure that every student be afforded the following rights . . . Throughout proceedings involving such an accusation of sexual assault, domestic violence, dating violence, stalking, or sexual activity that may otherwise violate the institution’s code of conduct, the right: To have the institution’s judicial or conduct process run concurrently with a criminal justice investigation and proceeding, except for temporary delays as requested by external municipal entities while law enforcement gathers evidence. Temporary delays should not last more than ten days except when law enforcement specifically requests and justifies a longer delay.	No conflict. In its preamble to the Final Rule, the Department expressly addressed this provision of 129-B, stating “for example, there is no inherent conflict with a temporary ten-day delay, which according to a commenter is permissible under New York State law when a concurrent law enforcement action is taking place, as long as a recipient responds promptly when it has actual knowledge of sexual harassment in its education program or activity and also meets the requirement in § 106.45(b)(1)(v) to conclude its grievance process under reasonably prompt time frames the recipient has designated.” 85 Fed. Reg. at 30,456.
§ 6444 (5)(c)(v): Every institution shall ensure that every student be afforded the following rights . . . Throughout proceedings involving such an accusation of sexual assault, domestic violence, dating violence, stalking, or sexual activity that may otherwise violate the institution’s code of conduct, the right:	Conflict. Final Rule §106.45(b)(5)(vi) provides that both parties must be given 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

To review and present available evidence in the case file, or otherwise in the possession or control of the institution, and relevant to the conduct case, consistent with institution policies and procedures.	whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. 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. The recipient must make all such evidence subject to the parties’ inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.
§ 6444 (5)(c)(vi): Every institution shall ensure that every student be afforded the following rights . . . Throughout proceedings involving such an accusation of sexual assault, domestic violence, dating violence, stalking, or sexual activity that may otherwise violate the institution’s code of conduct, the right: To exclude their own prior sexual history with persons other than the other party in the judicial or conduct process or their own mental health diagnosis and/or treatment from admittance in the institution disciplinary stage that determines responsibility. Past findings of domestic violence, dating violence, stalking, or sexual assault may be admissible in the disciplinary stage that determines sanction.	Potential Conflict. The Department creates a bar on the inclusion of <i>some</i> past sexual history, and mental health diagnosis or treatment with a very different scope than 129-B: • The Final Rule’s § 106.45(b)(6) generally excludes questions and evidence about only the <i>Complainant’s</i> “sexual predisposition or prior sexual behavior.” 129-B applies its exclusion to both Reporting Individual and Respondent. • The Final Rule does not include an explicit past mental health history bar for either party, instead stating that institutions may not use “questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.” Final Rule § 106.45(b)(1)(x). The Final Rule does not have a provision limiting past findings of responsibility to the sanction phase equivalent to 129-B. It is unclear if the 129-B exclusions that fall outside of the Final Rule’s scope are allowable under the Rule’s requirement that all “relevant” evidence be considered.
§ 6444 (5)(c)(vii): Every institution shall ensure that every student be afforded the following rights . . . Throughout proceedings involving such an accusation of sexual assault,	Conflict uncertain, dependent upon application. Final Rule § 106.45(b)(2) requires that upon a receipt of a formal complaint, an institution must provide notice to all known parties of grievance process as well as the allegations “of sexual harassment

domestic violence, dating violence, stalking, or sexual activity that may otherwise violate the institution's code of conduct, the right: To receive written or electronic notice, provided in advance pursuant to the college or university policy and reasonable under the circumstances, of any meeting they are required to or are eligible to attend, of the specific rule, rules or laws alleged to have been violated and in what manner, and the sanction or sanctions that may be imposed on the respondent based upon the outcome of the judicial or conduct process, at which time the designated hearing or investigatory officer or panel shall provide a written statement detailing the factual findings supporting the determination and the rationale for the sanction imposed.	potentially constituting sexual harassment as defined in § 106.30, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved in the incident, if known, the specific section of the recipient's code of conduct allegedly violated, the conduct allegedly constituting sexual harassment under § 106.30, and under the recipient's code of conduct, and the date and location of the alleged incident, if known. The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process. The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may request to inspect and review evidence under paragraph (b)(5)(vi) of this section. The written notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process."
§ 6444 (5)(c)(viii): Every institution shall ensure that every student be afforded the following rights . . . Throughout proceedings involving such an accusation of sexual assault, domestic violence, dating violence, stalking, or sexual activity that may otherwise violate the institution's code of conduct, the right: To make an impact statement during the point of the proceeding where the decision maker is deliberating on appropriate sanctions.	No equivalent provision.
§ 6444 (5)(c)(ix): Every institution shall ensure that every student be afforded the following rights . . . Throughout proceedings involving such an accusation of sexual assault, domestic violence, dating violence, stalking, or sexual activity that may otherwise violate the institution's code of conduct, the right: To simultaneous (among the parties) written or electronic notification of the outcome of a judicial or conduct process, including the sanction or sanctions.	No conflict. Similarly to 129-b, the Final Rule § 106.45(b)(7) requires that institutions provide written determinations to all parties simultaneously. It also requires that the written determination include certain content, including the sanctions imposed, if any. However, it goes further, requiring the notification include quite a few other items in this determination.

§ 6444 (5)(c)(x): Every institution shall ensure that every student be afforded the following rights . . . Throughout proceedings involving such an accusation of sexual assault, domestic violence, dating violence, stalking, or sexual activity that may otherwise violate the institution’s code of conduct, the right: To be informed of the sanction or sanctions that may be imposed on the respondent based upon the outcome of the judicial or conduct process and the rationale for the actual sanction imposed.	No conflict. The Final Rule § 106.45(b)(1)(vi) requires that institutions “describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility.”
§ 6444 (5)(c)(xi): Every institution shall ensure that every student be afforded the following rights . . . Throughout proceedings involving such an accusation of sexual assault, domestic violence, dating violence, stalking, or sexual activity that may otherwise violate the institution’s code of conduct, the right: To choose whether to disclose or discuss the outcome of a conduct or judicial process.	No equivalent provision.
§ 6444 (5)(c)(xii): Every institution shall ensure that every student be afforded the following rights . . . Throughout proceedings involving such an accusation of sexual assault, domestic violence, dating violence, stalking, or sexual activity that may otherwise violate the institution’s code of conduct, the right: To have all information obtained during the course of the conduct or judicial process be protected from public release until the appeals panel makes a final determination unless otherwise required by law.	No equivalent provision.
§ 6444 (6): For crimes of violence, including, but not limited to sexual violence, defined as crimes that meet the reporting requirements pursuant to the federal Clery Act established in 20 U.S.C. 1092(f)(1)(F)(i)(I)-(VIII), institutions shall make a notation on the transcript of students found responsible after a conduct process that they were “suspended after a finding of responsibility for a code of conduct violation” or “expelled after a finding of responsibility for a code of conduct violation.” For the respondent who withdraws from the institution while such conduct charges are pending, and declines to complete the disciplinary process,	No equivalent provision.

institutions shall make a notation on the transcript of such students that they “withdrew with conduct charges pending.” Each institution shall publish a policy on transcript notations and appeals seeking removal of a transcript notation for a suspension, provided that such notation shall not be removed prior to one year after conclusion of the suspension, while notations for expulsion shall not be removed. If a finding of responsibility is vacated for any reason, any such transcript notation shall be removed.	
§ 6444 (7): Institutions that lack appropriate on-campus resources or services shall, to the extent practicable, enter into memoranda of understanding, agreements or collaborative partnerships with existing community-based organizations, including rape-crisis centers and domestic violence shelters and assistance organizations, to refer students for assistance or make services available to students, including counseling, health, mental health, victim advocacy, and legal assistance, which may also include resources and services for the respondent.	No equivalent provision.
§ 6444 (8): Institutions shall, to the extent practicable, ensure that students have access to a sexual assault forensic examination by employing the use of a sexual assault nurse examiner in their campus health center or entering into memoranda of understanding or agreements with at least one local health care facility to provide such a service.	No equivalent provision.
§ 6444 (9): Nothing in this article shall be deemed to diminish the rights of any member of the institution’s community under any applicable collective bargaining agreement.	Conflict For employees, the Final Rule does not defer to applicable collective bargaining agreements, employee handbooks, or other rules and policies of the institutions. Instead, it applies the same procedures to students and employees. It states in §106.6(f) that it should not “be read in derogation of any individual’s rights under Title VII of the Civil Rights Act” and in §106.44(d) that it does not preclude an institution from “placing a non-student employee respondent on administrative leave during the pendency of a grievance process.” In the Preamble, the Department makes clear that institutions may have to renegotiate collective bargaining agreements to comply with the Final Rule.
§ 6445: Campus Climate Assessments	No equivalent provision.

{text not excerpted here}	
§ 6446(1): Options for Confidential Disclosure In accordance with this article, every institution shall ensure that reporting individuals have the following: a. Information regarding privileged and confidential resources they may contact regarding domestic violence, dating violence, stalking or sexual assault; b. Information about counselors and advocates they may contact regarding domestic violence, dating violence, stalking, or sexual assault; c. A plain language explanation of confidentiality which shall, at a minimum, include the following provision: “Even [Institution] offices and employees who cannot guarantee confidentiality will maintain your privacy to the greatest extent possible. The information you provide to a nonconfidential resource will be relayed only as necessary for the Title IX Coordinator to investigate and/or seek a resolution.”; d. Information about how the institution shall weigh a request for confidentiality and respond to such a request. Such information shall, at a minimum, include that if a reporting individual discloses an incident to an institution employee who is responsible for responding to or reporting domestic violence, dating violence, stalking, or sexual assault but wishes to maintain confidentiality or does not consent to the institution’s request to initiate an investigation, the Title IX Coordinator must weigh the request against the institution’s obligation to provide a safe, non-discriminatory environment for all members of its community. The institution shall assist with academic, housing, transportation, employment, and other reasonable and available accommodations regardless of reporting choices; e. Information about public awareness and advocacy events, including guarantees that if an individual discloses information through a public awareness event such as candlelight vigils, protests, or other public event, the institution is not obligated to begin an investigation based on such information. The institution may use the information provided at such an event to inform its efforts for additional education and prevention efforts; f. Information about existing and available methods to anonymously disclose including, but not limited to information on relevant confidential hotlines provided by New York state agencies and not-for-profit entities; g. Information regarding institutional crime reporting including, but not limited to: reports of certain crimes occurring in specific geographic locations that shall be included in the institution’s annual security report pursuant to the Clery Act,	Conflict uncertain, dependent upon application.

20 U.S.C. 1092(f), in an anonymized manner that identifies neither the specifics of the crime nor the identity of the reporting individual; that the institution is obligated to issue timely warnings of crimes enumerated in the Clery Act occurring within relevant geography that represent a serious or continuing threat to students and employees, except in those circumstances where issuing such a warning may compromise current law enforcement efforts or when the warning itself could potentially identify the reporting individual; that a reporting individual shall not be identified in a timely warning; that the Family Educational Rights and Privacy Act, 20 U.S.C. 1232g, allows institutions to share information with parents when i. there is a health or safety emergency, or ii. when the student is a dependent on either parent's prior year federal income tax return; and that generally, the institution shall not share information about a report of domestic violence, dating violence, stalking, or sexual assault with parents without the permission of the reporting individual.	
§ 6446(2): Options for Confidential Disclosure The institution may take proactive steps, such as training or awareness efforts, to combat domestic violence, dating violence, stalking or sexual assault in a general way that does not identify those who disclose or the information disclosed.	Conflict uncertain, dependent upon application.
§ 6446(3): Options for Confidential Disclosure If the institution determines that an investigation is required, it shall notify the reporting individuals and take immediate action as necessary to protect and assist them.	Conflict uncertain, dependent upon application.
§ 6446(4): Options for Confidential Disclosure The institution should seek consent from reporting individuals prior to conducting an investigation. Declining to consent to an investigation shall be honored unless the institution determines in good faith that failure to investigate does not adequately mitigate a potential risk of harm to the reporting individual or other members of the community. Honoring such a request may limit the institution's ability to meaningfully investigate and pursue conduct action against an accused individual. Factors used to determine whether to honor such a request include, but are not limited to: a. Whether the accused has a history of violent behavior or is a repeat offender; b. Whether the incident represents escalation in unlawful conduct on behalf of the accused from previously noted behavior; c. The increased risk that the accused will commit additional acts of violence; d. Whether the accused used a weapon or force;	Conflict uncertain, dependent upon application. Final Rule § 106.30(a) allows formal complaints, which initiate investigations under the Rule, to be signed by either complainants or Title IX Coordinators against a complainant's wishes so long as the Coordinator would not be "clearly unreasonable in light of the known circumstances." 85 Fed. Red. 30,045.

e. Whether the reporting individual is a minor; and f. Whether the institution possesses other means to obtain evidence such as security footage, and whether available information reveals a pattern of perpetration at a given location or by a particular group.	
§ 6447: Student onboarding and ongoing education <i>{text not excerpted here}</i>	No equivalent provision.
§ 6448: Privacy in Legal Challenges Pursuant to subdivision (i) of rule three thousand sixteen of the civil practice law and rules, in any proceeding brought against an institution which seeks to vacate or modify a finding that a student was responsible for violating an institution's rules regarding a violation covered by this article, the name and identifying biographical information of any student shall be presumptively confidential and shall not be included in the pleadings and other papers from such proceeding absent a waiver or cause shown as determined by the court. Such witnesses shall be identified only as numbered witnesses. If such a name or identifying biographical information appears in a pleading or paper filed in such a proceeding, the court, absent such a waiver or cause shown, shall direct the clerk of the court to redact such name and identifying biographical information and so advise the parties.	No equivalent provision.
§ 6449: Reporting Aggregate Data to the Department <i>{text not excerpted here}</i>	No equivalent provision.

The Joint Guidance on the 2020 Title IX Regulations is prepared as a service by in-house and firm attorneys, but does not represent legal advice. The Joint Guidance is compliance advice and no attorney/client relationship is formed with any contributor or their organization. Legal advice for specific situations may depend upon state law and federal and state case law and readers are advised to seek the advice of counsel. The Joint Guidance is available absolutely free pursuant to a [Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International license](#) (meaning that all educational institutions are free to use, customize, adapt, and re-share the content, with proper attribution, for non-commercial purposes, but the content may not be sold).