Title IX Decision-maker Training

Final Title IX Regulations 34 CFR Part 106 Effective August 14, 2020

Title IX Decision

History & Evolution

Title IX Adopted by legislative action	Implementin g Regulations addressed sex discriminatio n, but not sexual harassment	Department began issuing guidance addressing sexual harassment	Significant ED guidance released on issue of sexual harassment and sexual violence	Withdrawn Guidance: 2011 DCL 2014 Q&A 2017 Q&A	Negotiated Rulemaking & Proposed Rule	Newly Revised Title IX Rules Effective 8/14/20
1972	1975	1997	2011–2017	2017	2018–2019	2020

Title IX Personnel

Title	Responsibilities	Training	Status
Title IX Coordinator (multiple &/or deputies)	Coordinate, Intake Reports & Complaints, T9 analysis, Initiate Formal Complaint, Implement Supportive Measures	Sexual Harassment, Investigation & Grievance Procedure, Hearings, Appeals & Informal Resolution (as applicable); Impartiality, Relevance, Privilege	Must be Employee May Not Serve as Decision-Maker
Investigator	Conduct Fair, Objective and Impartial Investigation, Differentiate b/w Related & Relevant Evidence & Privilege	Sexual Harassment; How to Conduct an Investigation, Impartiality, Relevance, Privilege, Report-Writing	Staff or External May Not Serve as Decision-Maker
Decision Makers	Evaluate Evidence, Make & Write Decision, "Rule" on Relevancy during Cross- Examination	Sexual Harassment, Hearing Process, Technology, Evidence/Relevancy	Staff or External Cannot Serve in Any Other Capacity
Advisor(s)	Question Opposing Party & Witnesses	None required	Party provided Staff or External
Informal Resolution Facilitator	Informal Resolution Processes	Informal Resolution Processes	Staff or External

Definition of Sexual Harassment 3- Prongs

Quid Pro Quo	Employee Conditions Something of Value for Sexual Favor
Davis Standard	So Severe, Pervasive and Objectively Offensive
VAWA Crimes	Sexual Assault, Stalking, Dating & Domestic Violence

Definition of Sexual Harassment 3- Prongs

- 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
- "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)(30)
 U.S.C. 12291)a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30)

Sexual Harassment : Quid Pro Quo

- •Applies solely to an employee respondent
- Involves an abuse of authority by an employee
- Doesn't require a showing of severity, pervasiveness or offensiveness
- •Need not be explicit, could be implied

Sexual Harassment: Severe, Pervasive, Offensive (Davis)

"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"

directed at verbal or expressive conduct

•evaluated under the "reasonable person standard" taking into consideration the characteristics of the alleged victim

Sexual Harassment: Clery/VAWA Crimes

"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).

Sexual Assault

Sexual assault means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation

Includes any sexual act directed against another person without their consent, including rape, sodomy, sexual assault with an object, fondling, incest and statutory rape

Dating Violence

(10) DATING VIOLENCE The term dating violence means violence committed by a person—

(A)who is or has been in a social relationship of a romantic or intimate nature with the victim; and

(B)where the existence of such a relationship shall be determined based on a consideration of the following factors:

- (i) The length of the relationship.
- (ii)The type of relationship.

(iii)The frequency of interaction between the persons involved in the relationship.

Domestic Violence

8)DOMESTIC VIOLENCE THE term domestic violence includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.

Stalking

(30) STALKING THE term stalking means engaging in a course of conduct directed at a specific person that would cause a reasonable person to -(A) fear for his or her safety or the safety of others; or

(B)suffer substantial emotional distress.

Educational Program or Activity 106.44

Formal Grievance Process

Grievance Process Basic Requirements

Treat parties equitably			
Require objective evaluation of all relevant evidence			
Train Title IX personnel & post all training on web -site			
Include a presumption that respondent is not responsible			
Include reasonably prompt time frames			
Describe the range of, or list, possible disciplinary sanctions and remedies			
State standard of evidence: preponderance or clear and convincing			
Include process and bases for appeals			
Exclude privileged evidence			

Require objective evaluation of all relevant evidence Title IX personnel must be conflict & bias free

(ii)Require an <u>objective evaluation of all relevant evidence</u> – including both inculpatory and exculpatory evidence – and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness;

(iii)Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision -mlvaai6 dor

Presumption of Non -Responsibility 106.45(b)(1)(iv)

 Include a presumption that the respondent is no t responsible for the alleged conduct until a determination regarding responsibility at the conclusion of the grievance process. Ţ

Independent/Neutral Decision -

Hearing

Live Hearing

Postsecondary institutions must conduct a live hearing that must allow for real-time, crossexamination.

At the request of either party, the recipient must provide for the entire hearing to occur with the parties located in separate room with technology enabling the parties to see and hear each other.

Live hearings may be conducted with all the parties physically present in the same location or, at the school's discretion, any or all parties, witnesses or other participants may appear at the live hearing virtually.

Live Hearing & Cross - Examination

Cross-examination must be conducted the party's Advisor:

9Directly

9Orally

9In real time

9Never by a party personally

9The advisor may question the other party and any witnesses

9May ask follow -up questions including those challenging credibility

9Questions may not be prescreened or submitted in writing

9Parties have the right to

Technology to be Used at Hearing

- At the request of either party, the recipient must provide for the entire hearing to occur with the parties located in separate room with technology enabling the parties to see and hear each other.
- Live hearings may be conducted with all the parties physically present in the same location or, at the school's discretion, any or all parties, witnesses or other participants may appear at the live hearing virtually.
- , Hearings must be recorded and the recording must be maintained by seven years under the record keeping provision of this rule; additionally, the parties have the right to inspect the recording.

Rules of Order & Decorum

May have a hearing officer or facilitator

- •May be more than one decision -maker or panel
- •May adopt rules of order and procedure
- •May also adopt rules regarding appropriate conduct
- •Process is inherently adversarial
- •Any rule that the school adopts can't conflict with the regulations
- •Any rules must apply equally to both parties

Confidentiality

³/The regulations require the school to maintain the confidentiality of the parties ³/Only participants that need to at hearing should be there

Relevancy & Cross-examination

•Only relevant evidence is considered at the hearing

•Decision-maker must make a determination on relevancy after each question is asked, and before the witness/party responds

•Must provide their rationale for excluding question on relevancy basis

•Challenge on relevancy determination could be a basis for a party to appeal

No ability to compel participation of parties or witnesses

- ³/₄ The Rule protects every individual's right to choose whether to participate
- A party's absence from the hearing cannot be used against that person
- ³/₄ The decision maker may not make an inference about their exercise of the right not to appear or submit to cross
- ³/₄ If a party does not show up for a hearing, the hearing cannot be dismissed, but a decision would have to be made on available relevant evidence

Retaliation Prohibited 34 CFR 106.71

No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege under Title IX, or because the individual has made a report or complaint, testified, assisted, or participated <u>or refused to participate in any manner</u>.

Non-Cooperating Party or Witness

- If a party or witness does not submit to cross examination at the hearing, th e decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility;
- However, the decision -maker cannot draw an inference based solely on that party's or witness's absence or refusal to answer questions

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Evidence

Burden of Evidence

Relevancy

Relevancy

Related -to vs. Relevant

Related-to

Investigator must collect all evidence that is related to the allegations whether or not relevant (excluding evidence subject to privilege, medical records)

Relevant

Relevant evidence is all evidence related to, except

Relevancy & Rape Shield Protections

Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. Relevancy, Rape Shield Protections & Exceptions

Privileged Evidence Inadmissible 106.45(b)(1)(x)

Other Inadmissible Evidence

Other Evidence Which May Not be Considered

Assessing Credibility/Weighing Evidence

³Credibility assessments must be bias free, and cannot be made based on sex stereotypes, or on the basis of a party's status as a complainant or status as a respondent

³Schools are free to provide additional training on these topics, and may adopt specific guidelines for use by decision makers, as long as they do not conflict with the regulations

Standard of Evidence

Preponderance of the Evidence

> Clear and Convincing

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Written Determination Regarding Responsibility 34 CFR 106.45(b)(7)

Allegations potentially constituting sexual harassment

A description of the procedural steps taken

Findings of fact supporting the determination

Conclusions regarding the application of code of conduct to the facts

Statement and rationale for each allegation

- , Including determination of responsibility
- Any disciplinary sanctions
- Any applicable remedies

Bases & procedure for Appeal

The determination must be provided to the parties in writing simultaneously

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