

Title IX Decision-maker Training

Final Title IX
Regulations

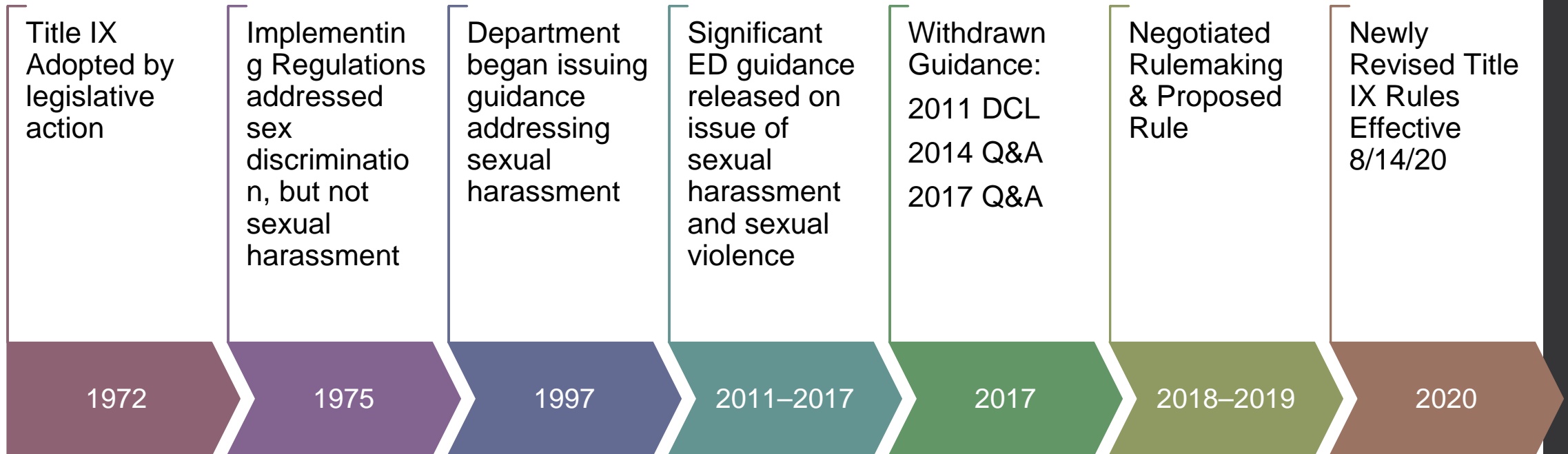
34 CFR Part 106

Effective August 14, 2020

Title IX Decision



History & Evolution



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

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).

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 objective evaluation of all relevant evidence – 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-maker, or hearing officer must be conflict-free and bias-free.



Presumption of Non-Responsibility

106.45(b)(1)(iv)

- Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility at the conclusion of the grievance process.



Independent/Neutral Decision -

Hearing

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

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

- $\frac{3}{4}$ The Rule protects every individual's right to choose whether to participate
- $\frac{3}{4}$ A party's absence from the hearing cannot be used against that person
- $\frac{3}{4}$ The decision maker may not make an inference about their exercise of the right not to appear or submit to cross
- $\frac{3}{4}$ 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 or refused to participate in any manner.

Non-Cooperating Party or Witness

- If a party or witness does not submit to cross examination at the hearing, the 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

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

Standard of Evidence

Preponderance
of the
Evidence

Clear and
Convincing

