Title IX Training

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Introduction

Who Must be Trained:

- Title IX Personnel: Title IX Coordinator, any investigator, any decision-maker, and any person who facilities an informal resolution

Training Topics Must Include:

- Title IX's definition of "sexual harassment"
- The scope of the IHE's education program or activity
- How to conduct an investigation and grievance process
- How to serve impartially, including by avoiding prejudgment of the facts at issue
- How to avoid conflicts of interest and bias
- Decision-makers must receive training on any technology to be used at a live hearing, and on issues of relevance of questions and evidence, including when questions and evidence about a complainant's sexual predisposition or prior sexual behavior are not relevant
- Investigators must receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence

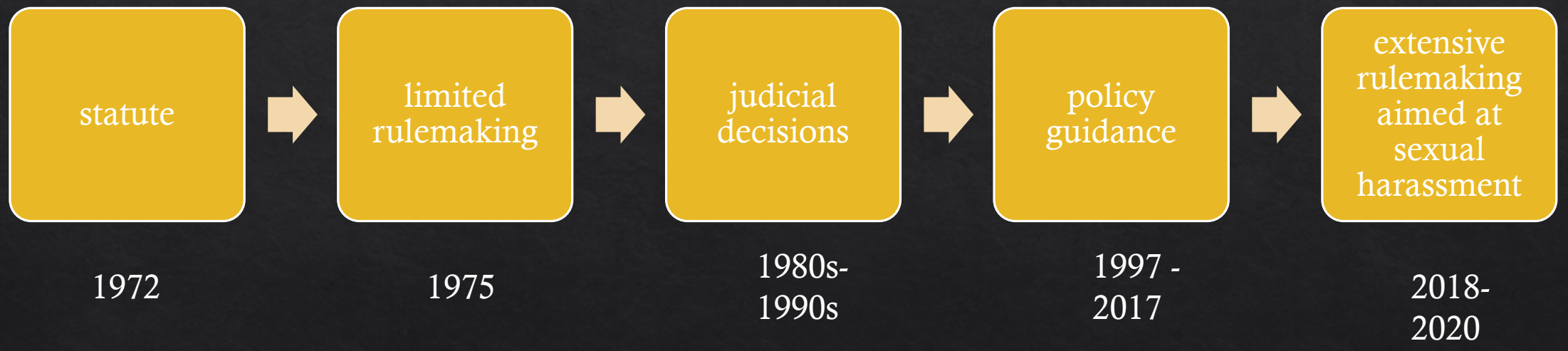
What Has Changed

Title IX

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

- Background
- Overview of New Regulations
- But, not everything changed. There is room for discretion and policy choices…

Background


statute
limited rulemaking
judicial decisions
policy guidance
extensive rulemaking aimed at sexual harassment
1972
1975
1980s-1990s
1997 - 2017
2018-2020

Current Status of Title IX Regulations

- May 6, 2020: DOE released new regulations
- May 19, 2020: new regulations published in federal register
- August 14, 2020: regulations take effect
- **multiple lawsuits challenging the rules are pending**

Policy Guidance vs. Rules

- Most recent federal guidance on Title IX—Dear Colleague Letters and Q&A Documents from 2011, 2014, and 2017—was policy guidance.
- New regulations (also known as rules) were promulgated through the Administrative Procedure Act's rulemaking process and have the force and effect of law.
- New rules are 26 pages long.
- Preamble is more than 2,000 pages long.

Overview of Changes and New Requirements

Substantive

Procedural

Substantive

- new terms and definitions
- emphasis on impartiality and prohibition of bias, conflicts of interest, and prejudgment
- changes to scope of conduct actionable under Title IX
- IHE response and liability standards
- confidentiality requirements
- emphasis on protection of constitutional rights
- rape shield protections
- no “gag orders”

Procedural

- reporting
- notice requirements
- supportive measures
- informal resolution
- prescriptive grievance process
- no single-investigator model
- live hearing and cross examination
- mandatory appeals
- training

Discretionary Areas

- standard of evidence
- misconduct that falls outside of Title IX's scope
- which employees to impose reporting duties upon
- defining undefined terms
- adoption of rules of procedure and/or rules of decorum
- setting parameters on advisors' roles
- developing templates/forms for IHE and party use
- reasonable timelines
- emergency removal process
- types of supportive measures and sanctions
- option of virtual hearings

Definitions and Key Terms

Actual Knowledge: means notice of sexual harassment or allegations of sexual harassment to an IHE's Title IX Coordinator or any official of the IHE who has authority to institute corrective measures on behalf of the IHE.

- Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge.

Definitions and Key Terms

Consent. IHEs are not required adopt a particular definition of consent with respect to sexual assault.

But:

- IHEs cannot shift the burden to a respondent to prove consent, or shift the burden to a complainant to prove the absence of consent.
- IHEs must clearly define consent and must apply that definition consistently.
- Title IX Personnel must be trained on how to apply definitions used by the IHE with respect to consent (or the absence or negation of consent) consistently, impartially, and in accordance with the other provisions of § 106.45.

Definitions and Key Terms

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 IHE 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 IHE** with which the formal complaint is filed.

Examples given of individuals, other than current students or employees, who may be "participating in or attempting to participate" in the education program or activity:

- Alumni
- Complainant on a leave of absence
- Desire to re-enroll
- Admitted students
- Applicants

Definitions and Key Terms

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- An employee of the IHE conditioning the provision of an aid, benefit, or service of the IHE on an individual's participation in unwelcome sexual conduct (*i.e.* quid pro quo);
- 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 IHE's education program or activity;
- "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);
- "Stalking'' as defined in 34 U.S.C. 12291(a)(30).

Definitions and Key Terms

Sexual harassment continued…

Unwelcome conduct:

- Must be severe, pervasive, **and** objectively offensive
- Based on a reasonable person standard
- No concrete injury required to conclude a reasonable person was denied the ability to access the IHE's education program or activity

Definitions and Key Terms

Sexual harassment continued…

"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. "Sexual assault" includes rape, fondling, statutory rape, and incest.

- The Federal Bureau of Investigation (FBI) currently has two crime reporting systems: the SRS and the NIBRS.
- The Clery Act directs IHEs to look to the SRS for a definition of rape, and to the NIBRS for a definition of fondling, statutory rape, and incest as the offenses falling under "sexual assault."
- The FBI has announced it will be retiring the SRS on January 1, 2021, and moving entirely to the NIBRS.

Definitions and Key Terms

Education program or activity includes locations, events, or circumstances over which the IHE 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. § 106.44(a).

- Includes all incidents of sexual harassment occurring on an IHE's campus.
- Includes incidents of sexual harassment off campus if **any** of the three conditions are met:
  - if the off campus incident occurs as part of the IHE's "operations;"
  - if the IHE exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus pursuant to § 106.44(a);
  - if a sexual harassment incident occurs at an off-campus building owned or controlled by a student organization officially recognized by the IHE pursuant to § 106.44(a).

Definitions and Key Terms

Education program or activity continued…

What constitutes an IHE's operations?

"Operations" may certainly include computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of, the IHE.

Definitions and Key Terms

Education Program or Activity Continued…

What constitutes "substantial control over the respondent and the context of the alleged sexual harassment":

- Factors such as whether the IHE funded, promoted, or sponsored the event or circumstance where the alleged harassment occurred . . . may be helpful or useful for IHEs to consider . . . to determine the scope of an IHE's program or activity, [but] no single factor is determinative.

- A teacher's sexual harassment of a student is likely to constitute sexual harassment ''in the program'' of the school even if the harassment occurs off campus.

- As another example, a student using a personal device to perpetrate online sexual harassment during class time may constitute a circumstance over which the IHE exercises substantial control.

Definitions and Key Terms

Education Program or Activity Continued…

Officially recognized student organizations:

- Where sexual harassment occurs in an off campus location **not** owned or controlled by an officially recognized student organization yet involving members of the organization, the IHE's Title IX obligations will depend on whether the IHE exercised substantial control over the respondent and the context of the harassment, or whether the circumstances may otherwise be determined to have been part of the ''operations of'' the IHE.

- As part of the process for official recognition, an IHE may require a student organization that owns or controls a building to agree to abide by the IHE's Title IX policy an procedures under the regulations.

Definitions and Key Terms

Education Program or Activity Continued…

Considerations when alleged sexual harassment occurs both in and outside of the education program and activity:

- Under Section 106.45(b)(3)(i), an IHE must dismiss the allegations in a formal complaint about conduct not occurring in the IHE's education program or activity for the purpose of Title IX.
- However, such dismissal does not preclude action under another provision of the IHE's code of conduct.
- The IHE has the option of resolving allegations of conduct outside the IHE's education program or activity by applying the same grievance process required under § 106.45 for formal complaints of Title IX sexual harassment, even though such a process is not required under Title IX or the regulations.

Notifications

- Designation of Title IX Coordinator
- Dissemination of Policy
- Grievance Procedures
- Training Materials
- Publications

Designation of Title IX Coordinator

- IHE must designate and authorize at least one employee to coordinate its efforts to comply with Title IX responsibilities, which employee must be referred to as the Title IX Coordinator. § 106.8(a)

- IHE must notify applicants for admission and employment, students and all unions or professional organizations holding collective bargaining professional agreements with the IHE, of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator. § 106.8(a)

- IHE must prominently display contact information for the Title IX Coordinator on its website, if any, and in each handbook or catalog that it makes available to persons entitled to notification per the regulations. § 106.8(b)(2)(i)

Dissemination of Policy

- IHE must notify persons entitled to notification under these rules that the IHE does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by Title IX not to discriminate in such a manner. § 106.8(b)(1)

- Such notification must state that the requirement not to discriminate in the education program or activity extends to admission and employment, and that inquiries about Title IX's application may be referred to the IHE's Title IX Coordinator, the Assistant Secretary of Education, or both. § 106.8(b)(1)

- Colorado law also has notice and posting requirements. *See* § 23-5-146, C.R.S.

Grievance Procedure

- IHE must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by Title IX and a grievance process that complies with Title IX's requirements for formal complaints as defined in the regulations. § 106.8(c)

- IHE must provide notice of its grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond. § 106.8(c)

Content of Grievance Procedure

- description of the range of possible disciplinary sanctions and remedies or a list of possible disciplinary sanctions and remedies that the IHE may implement following any determination of responsibility;
- statement of whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard
- procedures and permissible bases for the complainant and respondent to appeal; and
- description of the range of supportive measures available to complainants and respondents.

§ 106.45(b)(1)(vi) – (ix).

Training Materials

- IHE must make its Title IX training materials publicly available on its website, or if the IHE does not maintain a website, it must make the materials available upon request for inspection by members of the public. § 106.45(b)(10)

Publications Generally

- IHE must not use or distribute a publication stating that the IHE treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by Title IX. § 106.8(b)(2)(ii)

Intake and IHE Response

- reporting
- duty to act
- response obligations
- dismissals

Reporting

anyone can report sexual harassment

both informal reports and formal complaints trigger IHE duty to act

Actual Knowledge and Duty to Act

- IHEs with actual knowledge of sexual harassment in an education program or activity of the IHE against a person in the United States must respond promptly in a manner that is not deliberately indifferent, meaning not clearly unreasonably in light of the known circumstances. § 106.44(a)

Who counts as having actual knowledge?

- For postsecondary institutions, the regulations limit actual knowledge to only when a Title IX Coordinator or an official with authority to take corrective measures has notice. § 106.30(a).
- Determining whether an employee is an official with authority to institute corrective measures depends on the IHE's operational structure and the employee's roles and duties. p. 30039.
- Standard is not met when the only official of the IHE with actual knowledge is the respondent. § 106.30(a).

General Response Obligations

- must treat complainants and respondents equitably. § 106.44(a)
- Burden of proof and burden of gathering evidence sufficient to reach a determination regarding responsibility rests on IHE, not the parties. § 106.45(b)(5)(i)
- must follow Title IX grievance process before imposing discipline § 106.44(a)
- Regulations require "reasonably prompt time frames." § 106.45(b)(1)(v)
  - Colorado law requires good faith effort to complete the adjudication process, exclusive of appeals, within an average of sixty to ninety days. § 23-5-146(3)(d)(I), C.R.S.
- IHE may need to undertake some degree of investigation or inquiry at outset to determine whether allegations fall under scope of Title IX.

Initial Response to Sexual Harassment Report

Upon receipt of a sexual harassment report from anyone, Title IX Coordinator must:

- contact complainant to discuss availability of supportive measures, with or without formal complaint;
- consider complainant's wishes with respect to supportive measures; and
- explain to complainant the process for filing a formal complaint.

§ 106.44(a)

Formal Complaints

Formal complaint triggers IHE's obligation to initiate grievance process. § 106.44(b)(1). To be a formal complaint, a report must:

- allege sexual harassment;
- be made by a person (or the parent of a person) who: (1) allegedly experienced the conduct complained of, and (2) is participating or attempting to participate in a program or activity;
- be a document filed by a complainant or signed by a Title IX Coordinator;
- be made "against a respondent"; and
- request an investigation.

Reports Covered by Title IX *but without* a Formal Complaint

When a complainant has not made a formal complaint, yet the alleged conduct falls under Title IX, the Title IX Coordinator must either:

- close the report – if, for example the complainant does not want an investigation; or
- sign a formal complaint and initiate the Title IX grievance process.
  - Some circumstances may require Title IX Coordinator to initiate an investigation and adjudication of allegations in order to protect the IHE's educational community or otherwise avoid being deliberately indifferent to known sexual harassment. p. 30132

Notifications after Formal Complaint

IHE must provide:

- notice of the IHE's grievance process that complies with this section, including any informal resolution process
- notice of the allegations of sexual harassment 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 conduct allegedly constituting sexual harassment under § 106.30,
  - and the date and location of the alleged incident, if known.

Notifications Continued

Written notice must also:

- 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
- inform parties 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 inspect and review evidence under paragraph (b)(5)(vi) of this section
- inform parties of any provision in the IHE's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process

- If IHE decides to investigate allegations about the complainant or respondent that fall within Title IX and are not included in the notice provided pursuant to paragraph (b)(2)(i)(B) of this section, the recipient must provide notice of the additional allegations to the parties whose identities are known.

§ 106.45(b)(2)(i)(A)-(B), and (ii)

Mandatory Dismissal

Must dismiss a complaint from Title IX process if the alleged conduct:

- would not constitute sexual harassment as defined in the regulations;
- did not occur in the IHE's education program or activity; OR
- did not occur against a person in the United States.

§ 106.45(b)(3)(i)

Discretionary Dismissal

May dismiss a complaint from the Title IX process, at any time, if:

- complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein;
- the respondent is no longer enrolled or employed by the IHE; or
- specific circumstances prevent the IHE from gathering evidence sufficient to reach a determination.

§ 106.45(b)(3)(ii)

Dismissal Requirements

Upon dismissal from Title IX process, IHE must:

- promptly send written notice of dismissal and the reason to both parties, and
- offer an appeal based on procedural irregularity, new evidence, or conflict of interest/bias.

§ 106.45(b)(3)(iii)

Non-Title IX Misconduct

- Dismissal from Title IX proceeding does not preclude action under another provision of the IHE's code of conduct. § 106.45(b)(3)(i)

- Word of Caution:
  - carefully categorize reports and complaints
  - potential Title IX violation for mis-categorizing complaints and using "wrong" grievance procedure, 30221 & 30283

Supportive Measures

Nondisciplinary, 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 IHE's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the IHE's educational environment, or deter sexual harassment.

Supportive Measures

- 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
- other similar measures

Supportive Measures

- Considerations when offering supportive measures:
  - Consider the complainant's wishes.
  - Do not have to be ''proportional to the harm alleged'' or constitute the ''least burdensome measures'' possible.
  - Cannot impose an unreasonable burden on the other party.
  - Cannot amount to a sanction.
  - Must be kept confidential.
  - Must be documented when they are, or are not, provided.

Informal Resolution

An IHE can use informal resolution when all of the following are true:

- A formal complaint has already been filed.
- The complaint does not allege that an employee sexually harassed a student.
- Both parties provide voluntary, written consent to an informal resolution.
- The IHE gives the parties a written notice disclosing the allegations and the requirements of the informal process.

An IHE may not condition enrollment, employment, or any other right of students or employees on agreeing to an informal process.

At any time prior to agreeing to a resolution, either party has the right to withdraw from the informal process and resume the formal grievance process with no consequences.

Informal Resolution

Method: Informal resolutions can include: mediation, arbitration, restorative justice, or other strategies.

Who facilitates: Facilitators can be third party providers, and do not have to sign MOUs with the IHE. All facilitators are subject to the same training and impartiality requirements as are an IHE's Title IX coordinators, investigators, and other decision-makers.

Sanctions: An IHE can impose any disciplinary consequence after an informal process that they could also impose in a formal process, including expulsion. However, the respondent may withdraw from the informal process at any point, and can thus choose to begin or resume a formal process instead of agreeing to a particular sanction.

Serving as witnesses: Under the regulations, facilitators can serve as witnesses in subsequent grievance procedure as long as this possibility is disclosed to the parties in the written notice prior to the informal process beginning. However, IHEs may also want to consider Colorado state law concerning confidentiality of mediation communications.

Relevance

Big Picture – how does relevance fit in Title IX?

- investigators and decision-makers must objectively evaluate *all relevant evidence*
- Title IX grievance process is designed to bring *all relevant evidence* to decision-maker's attention in order to reach a fair and reliable result

Relevance Definitions

Merriam Webster Definition

- affording evidence tending to prove or disprove the matter at issue or under discussion

Legal Definition in Federal Rules of Evidence

- "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Federal Rule of Evidence Rule 401

Preamble Explanation

- "evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true." (p. 30294).

Title IX Exclusions

Title IX bars the following types of evidence as not relevant (or otherwise excluded):

- information protected by rape shield provisions
- information protected by a legally recognized privilege, unless waived
- any party's medical, psychological, and similar records, unless party gives voluntary written consent
- party or witness statements from person not subject to cross exam

Rape Shield Provisions

(1) All questions and evidence of a complainant's sexual predisposition are irrelevant, with no exceptions; and

(2) Questions and evidence about a complainant's prior sexual behavior are irrelevant, unless:

- questions and evidence are offered to prove that someone other than the respondent committed the conduct alleged; or
- questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent

Sexual Predisposition and Prior Sexual Behavior

- The regulations do not define these terms. Preamble explains that Title IX's rape shield provisions are patterned after Federal Rule of Evidence 412. Rule 412's Advisory Committee Notes provide guidance:
  - sexual behavior = all activities involving actual physical contact or that imply sexual intercourse or sexual contact, including victim's use of contraceptives, evidence of childbirth, and sexually transmitted diseases
    - includes "behavior of the mind" such as dreams or fantasies
  - sexual predisposition = the victim's mode of dress, speech, or lifestyle

p. 30350, FN 1343 *citing* Advisory Committee Notes, Fed. R. Evid. 412

Relevance Considerations

- grievance process generally
- investigation
- hearing/cross-examination
- appeal
- training
- effect of IHE violation of relevance rules

RELEVANCE HYPOS

Investigations

Formal Complaint

- Sets forth the allegations that will be investigated
- May be expanded

Collect Information

- Plan Investigation
- Collect all available information
- Interview Witnesses
- Provide parties opportunity to review directly related evidence

Prepare Report

- Parse through available evidence
- Provide report to parties before completion
- Complete report
- Provide completed report to parties

Why are Investigations Important

- **Standard of Review**
- **Burden of Proof**
  - **Burden lies with the IHE**
- **Inspect and Review**

Relevance Considerations

Directly Related vs. Relevance

- Directly Related
  - Evidence that relates to the allegations under investigation.
- Relevance
  - Evidence related to an allegation, that makes a fact at issue more or less likely.

Uses for Investigative Reports

- Grievance Hearing.
  - Can be presented by the IHE, Complainants, or Respondents.
- Appeal, Discrimination Lawsuits, Federal Civil Rights Claim, or other Litigation.
- Presented as part of an IHE's defense to those lawsuits.
- Personnel Action.

Who should conduct the investigation?

The investigator should be:

- Objective and impartial.
- Familiar with the Title IX regulations and the IHE's rules, policies, and procedures.
- Trained in conducting the type of investigation required by the grievance process.
- Able to maintain confidentiality, as appropriate.
- Detailed and organized.

Planning the Investigation

- Equal opportunity for the parties to present witnesses, and evidence. § 106.45(b)(5)(ii).
- Scope
  - Confined only to original issue; or
  - Expand to include additional allegations
    - Must provide notice to all known parties if additional allegations added. §106.45(b)(2)(B)(ii).
    - IHE may consolidate formal complaints where the allegations of sexual harassment arise out of the same facts or circumstances. §106.45(b)(4).
- Collect available background information before conducting interviews.
- Obtain necessary, written, consent for certain information. § 106.45(b)(5)(i).
  - Records maintained by a physician, psychiatrist, psychologist, or other recognized professional in connection with the provision of treatment to the party.

Conducting the Investigation

Deciding whom to interview.

Representation at the interviews.

- Parties have the right to be accompanied by an advisor of their choice, but the IHE can place restrictions on the extent to which the advisor can participate, so long as restriction applied equally to both parties. § 106.45(b)(3)(iv).

Conducting the interviews.

- Must provide parties with written notice of investigative interviews with sufficient time for the party to prepare and participate. §106.45(b)(5)(v).

Conducting an Interview

- Types of questions to ask
- Demeanor toward interviewees
- Alternatives for preserving a record of the interview
- Cautions about promising confidentiality
- Cautions about promising certain results
- Avoiding assumptions
- Presuming a conclusion
- Failing to show your work
- Avoiding personal bias

Concluding the Investigation

- IHE must provide directly related evidence to the parties **prior** to completion of investigative report:
  - Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation, so that each party can meaningfully respond to the evidence prior to the conclusion of the investigation. § 106.45(b)(5)(vi).
  - Prior to completion of the investigative report, the IHE 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. *Id*.
  - The IHE 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. *Id*.

Writing the Investigative Report

What to put in/leave out of the report: report must fairly summarize the relevant evidence. §106.45(b)(5)(vii).

Cautions about including recommendations or conclusions in the report.

Regulations require: At least 10 days prior to a hearing…the IHE must 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. §106.45(b)(5)(vii).

Hearing

Grievance process must include live hearing. This requirement cannot be waived by either or both parties, or by the IHE.

Live hearings may be conducted with all parties physically present or, at the IHE's discretion, or the request of either party, the hearing can be done virtually, with technology enabling participants simultaneously to see and hear each other.

The live hearing must be recorded or transcribed.

Hearing

Advisors

Parties have the right to an advisor of their choice, who may be, but does not have to be, an attorney.

An advisor must be provided if a party does not have one to conduct cross-examination.

Only an advisor can conduct cross examination.

Advisors may conduct direct examination at IHE's discretion.

Support Persons

Generally, a party **cannot** have a person (including a support person), other than their advisor, attend the hearing.

However, if a party has a disability, IHEs must comply with disability laws that may require accommodations. A person assisting a party with a disability may accompany a party to the hearing.

Decision-Makers

Right and responsibility to ask questions.

Must determine relevancy of each question.

Must objectively evaluate the evidence, and independently reach a determination without deference to the investigative report.

Must evaluate relevant evidence for weight or credibility.

Hearing

Procedural Issues

- No pre-hearing depositions or hearing subpoenas allowed
- Rules of decorum permitted

Evidentiary Issues

- Parties must have equal opportunities to present evidence, including expert evidence
- IHE can also present evidence
- Standard of Evidence: must be clear and convincing, or preponderance of the evidence. But, consider Colorado law on standard of evidence.
- Relevance is the standard that the final regulations require, and any evidentiary rules that an IHE chooses must respect this standard. For example, an IHE may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence.
- Credibility determinations

Hearing

- Cross Examination
  - 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.
  - Exceptions
    - Video Evidence (not including statements in the video)
    - Statement = Sexual Harassment

Hearing

Written Determination of Responsibility

- Identification of the allegations potentially constituting sexual harassment as defined in § 106.30.
- A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held.
- Findings of fact supporting the determination;
- Conclusions regarding the application of the IHE's code of conduct to the facts;
- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the IHE imposes on the respondent, and whether remedies designed to restore or preserve equal access to the IHE's education program or activity will be provided by the IHE to the complainant; and
- The IHE's procedures and permissible bases for the complainant and respondent to appeal.

Technology for Virtual Hearings

- Know how to share content/screen to show exhibits.
- Know how to control the mute settings.
- Know how to record the hearing if needed, as the regulations require the hearing to be recorded or transcribed.
- If platform allows, know how to put participants in lobby or waiting area.
- Consider having an advance test of the technology with participants before the actual live hearing.
- Consider having parties submit and/or exchange potential exhibits in advance of the hearing.
- Encourage participants to participate in a location that has strong internet connection, is private and quiet, and has adequate lighting.
- Encourage participants to silence computer and telephone notifications during the hearing.

Appeals

Mandatory Opportunity for Appeals

- IHEs must allow both parties to appeal:
- a determination regarding responsibility
- a dismissal of a formal complaint

§ 106.45(b)(8)

- Regulations suggest that informal resolution agreements should be treated as binding contracts and are not appealable. § 106.45(b)(9) & p. 30405

Appeal Grounds

Either party may appeal on these grounds:

- procedural irregularity that affected the outcome of the matter;
- new evidence that was not reasonably available at the time the determination was made that could affect the outcome of the matter; or
- Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias for or against one of the parties that affected the outcome of the matter.

§ 106.45(b)(8)

- Schools may also offer opportunity for appeal equally to both parties on additional bases. § 106.45(b)(8)

Grievance Process & Appeals

An IHE's grievance process must:

- include a description of the procedures and permissible bases for both parties to appeal. § 106.45(b)(1)(viii)

- include a reasonably prompt timeframe for filing and resolving appeals. § 106.45(b)(1)(v)
  - Colorado statute requiring good faith effort to complete adjudication process within average of 60 to 90 days is exclusive of appeals. § 23-5-146(3)(d)(I), C.R.S.

Appeal Procedural Requirements

For all appeals, IHE must:

- notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
- ensure that the decision-maker for the appeal is not the same person as the decision-maker that reached the determination regarding responsibility or dismissal, the investigator, or the Title IX Coordinator;
- ensure that the decision-maker for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of section 106.45, i.e., the training requirements and prohibitions against conflicts of interest and bias;
- give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
- issue a written decision describing the result of the appeal and the rationale for the result; and
- provide the written decision simultaneously to both parties.

§ 106.45(b)(8)

Appeals: Additional Considerations

- A written determination becomes "final" only after the time period to file an appeal has expired, or if a party does file an appeal, after the appeal decision has been sent to the parties. p. 30393
- Supportive measures to maintain the status quo may need to continue during pendency of appeal. p. 30393
- IHE must maintain any records of an appeal and its result for 7 years. § 106.45(b)(10)
- IHE must ensure decision-makers for appeals receive training. § 106.45(b)(1)(iii)

Sanctions and Remedies

Sanctions

- IHEs not required to implement certain sanctions, and sanctions do not have to be proportional to the conduct
- IHE can consider mitigating circumstances in imposing sanctions
- Sanctions cannot be effective until after appeal, if an appeal is initiated by either party

Remedies

- Where a determination of responsibility has been made against respondent, IHE must provide remedies to complainant
- Remedies must be designed to restore or preserve equal access to the IHE's education program or activity.
- Remedies may overlap with sanctions
- IHEs are prohibited from disclosing remedies to the respondent when the remedies do not directly affect the respondent

Bias and Conflicts of Interest

Any individual designated by an IHE as a Title IX Coordinator, investigator, decisionmaker, or any person designated by an IHE to facilitate an informal resolution process, cannot have a conflict of interest or bias for or against complainants or respondents generally, or an individual complainant or respondent.

Dictionary definitions of conflicts of interest, bias, and partial

Based on a reasonable person standard

Bias and Conflicts of Interest

Avoiding Bias and Conflicts of Interest

- Treat complainants and respondents equitably
- Avoid using sex stereotypes in training materials, policies, or procedures
- Treat each person as an individual, not as a member of a class
- Objectively examine relevant evidence before reaching a determination
- Give both parties equal opportunity to present witnesses and evidence
- Continue to evaluate bias and conflicts of interest throughout the process

Examples of Allegations of Bias from Prior Cases Nationwide

- IHE's training materials were one-sided;
- IHE failed to conduct adequate investigation and objectively pursue the evidence;
- IHE failed to reveal information learned during the investigation to both parties;
- IHE investigator advocated for certain discipline;
- IHE personnel made statements demonstrating favor towards complainants or respondents;
- IHE failed to follow its own policies;
- IHE failed to follow established procedures for Title IX investigations and hearings
- Decision-maker was influenced by other school officials in reaching a decision;
- Decision-maker had professional connections with one of the party's parents.

Regulations' Intersection with Other Laws

Internal References to:

- Constitutional protections: First, Fifth, & Fourteenth Amendments
- FERPA
- Title VII
- Title VI (procedural provisions)
- parent/guardian legal rights
- Clery Act and VAWA
- IDEA, Section 504, & ADA

…and more potential areas for overlap

- HIPAA
- Open Meeting Laws
- criminal law and proceedings

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