

TITLE IX:
DECISION-MAKER TRAINING

A look at the Title IX adjudication process from the viewpoint of the decision-maker's role. Starting with the conclusion of the investigation, this training outlines the steps taken to appropriately reach a determination of responsibility regarding Title IX sexual harassment complaints.

Learning Objectives:

- Understand the role and responsibilities of the decision-maker within the Title IX process.
- Identify guiding frameworks written into Title IX such as equity and due process.
- Outline the process for reaching determinations of responsibility including facilitating party questions, evaluating facts and applying policy.

NOTE:
The following adjudicatory processes outline the requirements under Title described in 34 CFR 106.45(b)(6-8). Investigations that arise out of jurisdiction created under state law or district specific student conduct policy may have mandated processes that differ.

Training Overview:

1. Role of the decision-maker
2. Guiding frameworks
3. Process overview
4. Reaching a determination

Language and definitions:

Title IX Coordinator | Investigator | Decision Maker

Who can appropriately serve as decision maker?

"The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s)....."

- 34 CFR 106.45(b)(7)(i)

Training requirements:

Conflicts of interest and bias:

"Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker... not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent."

- 34 CFR 106.45(b)(1)(iii)

Guiding Frameworks: How must we approach the adjudication process?

Written "grievance procedure"

Deliberate indifference:

"*[School] response to sexual harassment is clearly unreasonable in light of the known circumstances." - 34 CFR 106.44(a)*

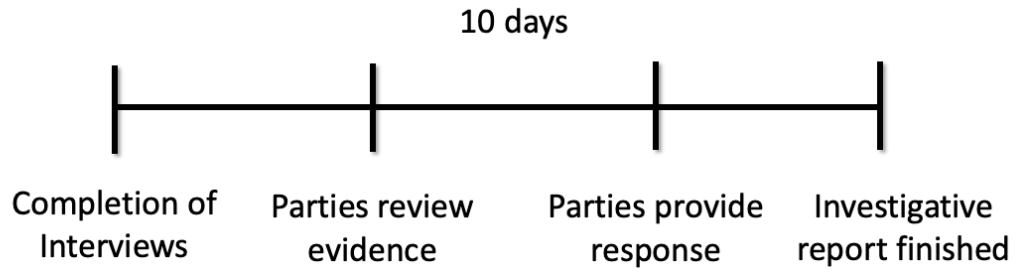
Equitable treatment of parties:

Respondent presumed not responsible:

"[R]easonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals... and a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause..." - 34 CFR 106.45(b)(1)(v)

Temporary delays and extensions:

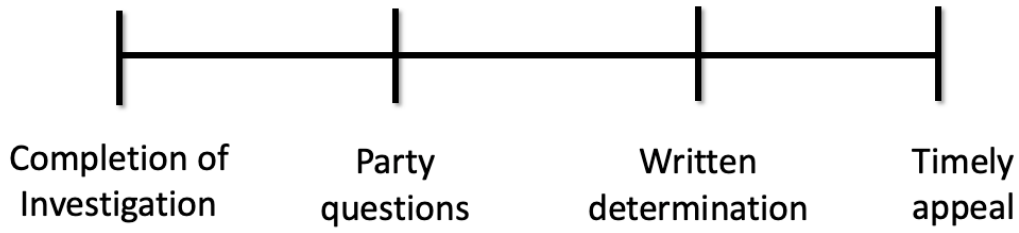
Pre-adjudication process overview:



Post-investigation materials:

"For recipients that are elementary and secondary schools, and other recipients that are not postsecondary institutions, the recipient's grievance process may, but need not, provide for a hearing." - 34 CFR 106.45(b)(6)(ii)

Optional hearings:



Process overview:

"[B]efore reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party."

- 34 CFR 106.45(b)(6)(ii)

Party questions:

Advisor of choice:

Parent(s) and/or gaurdian(s):

Facilitation of questions:

Limitations on questions and evidence:

- relevancy
- redundancy
- inculpatory and exculpatory
- privileged information
- complainant's sexual predisposition and sexual behavior

Inculpatory and exculpatory evidence:

Redundancy:

“The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied.”

- Office for Civil Rights, USDOE,July 20, 2021 Questions and Answers

Relevance: *"Outcome determinate fact."*

"Not require, allow, rely upon, or otherwise 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."

- 34 CFR 106.45(b)(1)(x)

Privileged information:

"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."

- 34 CFR 106.45(b)(6)(i)

Complainant's sexual behavior or predisposition:

False statements:

Party lack of participation:

"The decision-maker(s).... must issue a written determination regarding responsibility. To reach this determination, the recipient must apply the standard of evidence described..."

- 34 CFR 106.45(b)(7)(i)

Determination regarding responsibility:

Determination regarding responsibility:

- Allegations of potential sexual harassment
- Description of procedural steps taken
- Findings of fact that support determination
- Application of policy to facts
- Determination of responsibility for each allegation and rationale
- If finding of responsible - remedies for complainant
- Options and process to appeal

Allegations:

Procedural steps:

Application of policy:

Jurisdiction considerations:

Title IX Jurisdiction Considerations:

1. Type of conduct
2. Educational program or activity
3. Person in the United States

Sex Based Discrimination:

"[N]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination" 34 CFR 106.31(a)

Non-Sexual Harassment:

Sexual Harassment

1.
2.
3.
4.
5.

Notes:



Sexual Harassment:

1. **Sexual harassment**
2. **"Quid pro quo" harassment**
3. **Sexual assault**

"Quid Pro Quo" Harassment:

"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." 34 CFR 106.30(a)(1)

Sexual Harassment:

"Unwelcome conduct that a reasonable person would determine is so severe, pervasive and objectively offensive that it effectively denies person's equal access to education." 34 CFR 106.30(a)(2)

Using a reasonable person standard:

1. severe;
2. pervasive;
3. objectively offensive; AND
4. effective denial

Sexual Harassment:

"Clery Act/VAWA offenses are NOT evaluated for severity, pervasiveness, offensiveness or denial of equal educational access ... because such conduct is sufficiently severe..."

Sexual Assault:

"[M]eans an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the [FBI]"

1. Rape
2. Sodomy
3. Sexual assault with an object
4. Fondling
5. Incest
6. Statutory rape

"A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent." 34 CFR 106.44(a)

"Person in the United States"

"Education program or activity"



School Grounds



School Property

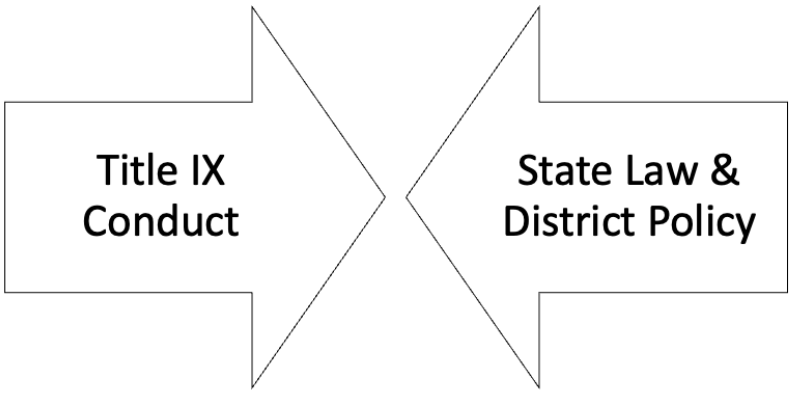


Off-School Grounds

1.

AND

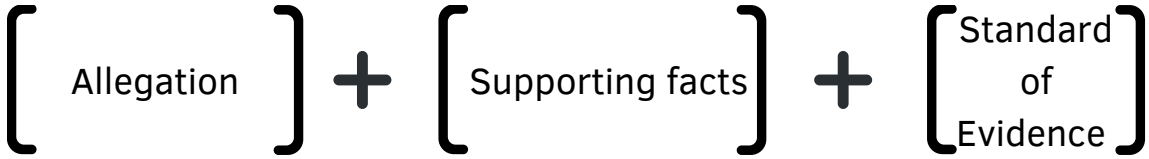
2.



What if the complaint doesn't fall under Title IX?

"Findings of fact supporting the determination":

"Conclusions regarding the application of the[school's] code of conduct to the facts":



Standard of evidence:

1. preponderance of the evidence - "more likely than not"
2. clear and convincing - "highly probable"

"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."

- 34 CFR 106.45(b)(1)(ii)

Rationale for determination(s):

"[P]roviding remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent... Remedies must be designed to restore or preserve equal access to the recipient's education program or activity."

- 34 CFR 106.45(b)(1)(i)

Remedies:

Written determination:

"A [school] must offer both parties an appeal from a determination regarding responsibility..."

- 34 CFR 106.45(b)(8)(i)

Appeals:

Available bases for appeal:

1. procedural irregularity
2. new evidence
3. conflict of interest or bias

} Required bases for appeal to be included in policy.

Procedural Irregularity:

"*Procedural irregularity that affected the outcome of the matter."*
34 CFR 106.45(b)(8)(i)(A)

New Evidence:

"*New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter."*
34 CFR 106.45(b)(8)(i)(B)

[New Evidence] + [Not Reasonably Available] + [Affect On Outcome]

What is the process for parties to file an appeal?

How must appeals be resolved?

34 CFR 106.45(b)(8)(iii)



"Reasonably prompt time frames:"

Written notification of appeal:

Decision-Maker:

- [x] Did not make the initial decision that is being appealed.
- [x] Is not the Title IX Coordinator.
- [x] Is not the Investigator.
- [x] No conflict of interest or bias.
- [x] Received training.

Parties' opportunity to respond:

Written outcome:

[Bases for Appeal] + [Appeal Decision] + [Rationale]

SEXUAL HARASSMENT:

1. An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;

2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or

3. "Sexual assault" as defined in 20 U.S.C. § 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

SEXUAL ASSAULT:

"[M]eans an offense classified as a forcible or non-forcible sex offense under the uniform crime reporting [UCR] system of the Federal Bureau of Investigation [FBI]." 20 U.S.C. § 1092(f)(6)(A)(v)

**NOTE: FBI switch from SRS to NIBRS January, 2021

FBI SEX OFFENSES (NIBRS)

Rape: The carnal knowledge of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

Sodomy: Oral or anal sexual intercourse with another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

Sexual Assault With An Object: To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

Fondling: The touching of the private body parts of another person for the purpose of sexual gratification without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

FBI SEX OFFENSES (NIBRS) Continued

Incest: Non-forcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

Statutory Rape: Nonforcible sexual intercourse with a person who is under the statutory age of consent.

VAWA OFFENSES:

Dating violence 34 U.S.C. § 12291(a)(10)

Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the complainant; where the existence of such a relationship shall be determined based on a consideration of the following factors: (1)The length of the relationship (2) The type of relationship (3) The frequency of interaction between the persons involved in the relationship.

VAWA OFFENSES Continued

Domestic Violence 34 U.S.C. § 12291(a)(8)

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

Stalking 34 U.S.C. § 12291(a)(30)

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for the person's safety or the safety of others; or suffer substantial emotional distress.