Title IX: Best Practices in Training and Compliance Part II

In conjunction with VSBA
Virginia School Boards Association
Leadership · Advocacy · Support

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DISCLAIMER

We are not your School Board lawyers

Please consult with your School Board lawyer prior to addressing a specific fact pattern or situation

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Purpose of Part I Training

- Today's training is intended to supplement Title IX Training Part I
  - Select materials from Part I appear in this presentation as a review/reminder regarding substantial regulatory changes and requirements
- Part I Training, as required by recently adopted federal implementing Regulations (34 CFR § 106.45(b)(1)), is designed for Title IX Coordinator, investigator, decision-maker, or any person designated to facilitate an informal process on the following:
  - Definition of sexual harassment
  - Scope of the school division's education program or activity
  - How to conduct an investigation and grievance process - including hearings, appeals, and informal processes, as applicable
  - How to serve impartially (avoiding prejudgment of facts, conflicts of interest, and bias)

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Purpose of Part II Training

- The Regulations at 34 CFR § 106.45(b)(1)require Part II Training:
  - Investigators must receive training on issues of relevance, investigative report that fairly summarizes relevant evidence
  - Decision-makers must receive training on any technology to be used at live hearing, relevance of questions and evidence

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Title IX Training Part I Review

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Title IX

- **Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq. (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"**
  - School division may violate Title IX if it does not respond promptly to actual knowledge of sexual harassment in an education program or activity of the school division against a person in the United States in a manner that is not deliberately indifferent

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Title IX – Types of Harassment

Schools have responsibilities under Title IX both for alleged sexual harassment by staff, and by other students:

- **Staff-student harassment**
  - *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998) established that school district could be liable for sexual harassment of student by teacher where school official with authority to institute corrective measure had notice of, but was deliberately indifferent to, misconduct
- **Student-student harassment**
  - School divisions are not liable for one student harassing another but may be liable for failing to respond adequately. *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999)

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Title IX – 3 Types of Harassment

1) QUID PRO QUO – employee conditions an educational benefit or decision on the student's submission to unwelcome sexual conduct

2) Unwelcome conduct on the basis of sex that is so severe, pervasive and objectively offensive, as determined by a reasonable person, that it denies a person equal access to an educational program or activity

Factors to consider when making a determination regarding whether conduct meets definition of 2)

- Degree to which the conduct affects students' education
- Type, frequency and duration of the conduct
- Identity and relationship between complainant and respondent
- Number of individuals involved (group harassment)
- Age and sex of complainant and respondent
- Size of school, location of incidents, and context
- Welcomeness (depends on age, relationship between complainant and respondent)

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Title IX – 3 Types of Harassment

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)

- One incident of sexual assault can trigger Title IX responsibilities
- "We believe that sexual assault inherently creates the kind of serious, sex-based impediment to equal access to education that Title IX is designed to prohibit, and decline to require 'denial of equal access' as a separate element of sexual assault"

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34 C.F.R. PART 106

Title IX Regulations

Effective August 14, 2020

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History of Sexual Harassment Enforcement

- 1975 - Department of Education promulgated rules to enact Title IX, sexual harassment not contemplated
- 1997 Guidance from DOE included sexual harassment under Title IX
- 1998 - SCOTUS rules an educational entity is liable for Title IX teacher-on-student harassment if it is "deliberately indifferent" to "actual notice" *Gebser v. Lago Vista*
- 1999 - SCOTUS rules peer-on-peer harassment is actionable under Title IX - *Davis v. Monroe County Board of Education*
- 2001 OCR revised 1997 guidance in light of *Gebser* and *Davis*, included "interim measures" to help victims
- 2011 and 2014 – sexual violence added to definition of sexual harassment, 2014 question and answer document based on multitude of questions regarding 2011 guidance
- 2017- OCR rescinded 2011 and 2014 guidance, provided 7pg. Q and A document

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Title IX Recent Developments

- November 16, 2018 Notice of Proposed Rulemaking https://www2.ed.gov/about/offices/list/ocr/docs/proposed-title-ix-regulation-fact-sheet.pdf
- 124,000 + comments received
- May 19, 2020 final rule published - USDOE guidance document is over 2000 pages; previous Title IX regulations did not refer to sexual harassment
- Seventeen states (including Virginia) filed suit challenging the final rule and requesting a stay of its effective date pending judicial review - stay DENIED on August 12, 2020
  - "Although Plaintiffs have raised serious arguments about certain aspects of the Rule, they have not established a likelihood of success on their claims, nor have they established that they are likely to suffer irreparable harm"

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Title IX Regulations – Training Requirements

- 34 CFR § 106.45(b)(1)
  - Training for Title IX Coordinator, investigator, decision-maker, or any person designated to facilitate an informal process on the following:
    - Definition of sexual harassment
    - Scope of the school division's education program or activity
    - How to conduct an investigation and grievance process - including hearings, appeals, and informal processes, as applicable
    - How to serve impartially (avoiding prejudgment of facts, conflicts of interest, and bias)
  - In addition:
    - Investigators must receive training on issues of relevance, investigative report that fairly summarizes relevant evidence
    - Decision-makers must receive training on any technology to be used at live hearing, relevance of questions and evidence

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Title IX Regulations

- Defining Sexual Harassment - 34 CFR § 106.30(a) – Conduct on the basis of sex that meets one or more of the following:
  - Quid pro quo harassment;
  - Unwelcome conduct on the basis of sex that is so severe, pervasive and objectively offensive, as determined by a reasonable person, that it denies a person equal access; or
  - Sexual assault (as defined in the Clery Act regulations)
- What Triggers School's Obligation to Respond
  - Actual knowledge of any of three types of harassment
    - Reporting to a Title IX Coordinator will always give schools actual knowledge
    - In K-12, reporting sexual harassment to any employee at that school gives the school actual knowledge
    - Any individual may report, not just victim
  - Conduct within school division's own program or activity - includes any location, event, or circumstance over which the school division exhibits substantial control over both the alleged harasser and the context in which the harassment occurred
  - Perpetrated against a person "in the United States" (new provision)

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Title IX Regulations

- General Response 34 C.F.R. § 106.44
  - Regulations require school divisions to appoint a Title IX Coordinator - specifically named on website, contact information, annual training, records of that training
    - *authorized to coordinate school division's compliance efforts*
    - *doesn't have to be full-time only job, but individual needs to have sufficient authority and time to carry out role*
  - Liability when school knows of sexual harassment allegations and responds in a way that is "deliberately indifferent" – "clearly unreasonable in light of the known circumstances"
  - Must "respond meaningfully to every report" – but must activate grievance process only when a **formal complaint** is filed
    - If school follows grievance procedures – **safe harbor against finding of deliberate indifference**
  - Must investigate formal complaints

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Title IX Regulations – Receipt of Report

- How a School Must Respond
  - Reports trigger obligation to meet with and offer the complainant supportive measures (available to complainants and respondents)
    - Definition: non-disciplinary, non-punitive, individualized services, offered as appropriate and without charge to a complainant or a respondent before or after the filing of a formal complaint, or where no complaint has been filed 34 CFR § 106.30 (a)
      - counseling, course modifications, schedule changes, monitoring, supervision, extensions of deadlines, security
      - removing a respondent completely from an activity would likely be considered punitive
  - Explain formal complaint process
  - K-12 schools need to protect younger students and may require the Title IX Coordinator to file a formal complaint even when a young victim does not want to file
- Emergency removal/administrative leave of respondent permitted under certain circumstances
  - Must conduct an individualized safety and risk analysis and determine that emergency removal is necessary in order to protect a student or other individual from an immediate threat to physical health or safety
  - School division must provide respondent with notice and an opportunity to challenge the decision immediately after the removal
  - Example: Accusation of sexual harassment leads to respondent's threats of physical self-harm

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Title IX Regulations – Grievance Process
Formal Complaint

- Basic Requirements 34 CFR § 106.45(b)(1)
  - Treat complainants and respondents equitably
  - Objective evaluation of all relevant evidence
  - Presumption of innocence for respondent
  - Burden of proof on the school, preponderance of evidence vs. clear and convincing
  - Reasonably prompt time frames
  - Description of possible disciplinary outcomes and remedies following a determination of responsibility
- Notice of allegations 34 CFR § 106.45(b)(2)
  - Written notice to all parties of grievance process and allegations at issue
  - STATEMENT that respondent is presumed "not responsible" until final decision
  - Notice of right to advisor (who may be an attorney) and to inspect and review evidence
  - Notice of any code of conduct provision regarding false statements

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Title IX – Grievance Process

- Dismissal 34 CFR § 106.45(b)(3)
  - Mandatory if investigation reveals alleged conduct did not occur in school division's program or activity OR against a person in U.S.
  - Permissive if complainant provides Title IX Coordinator in writing a request to withdraw complaint, if respondent is no longer employed by the recipient or enrolled in its education program; or if specific circumstances prevent the school division from gathering enough evidence to reach a decision
- Investigation 34 CFR § 106.45(b)(5)
  - Equal opportunity to present witnesses, evidence, **inspect and review evidence (10-day review period)**
  - *Cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a doctor, psychiatrist, psychologist, and made in connection with treatment to the party unless there is written consent from the parent to do so
  - No gag order
  - Advisors (can be a lawyer) permitted for complainant or respondent in any meeting, any restrictions imposed by school division as to advisors must be applied equally to both parties
  - Written notice of interviews

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Title IX – Grievance Process

- Investigative Report
  - *Must fairly summarize relevant evidence*
  - *At least 10 days before determination of responsibility - send it to each party and the party's advisor for their review and response*
- Hearings for K-12 - optional, but prior to determination, the parties must be allowed to submit written questions to challenge each other's credibility and decision-maker must allow for limited follow-up
  - Questions and evidence about the complainant's prior sexual behavior are not relevant, unless offered to prove that someone other than the respondent committed alleged conduct; or if it concerns specific incidents related to respondent to prove consent
  - Decision-Maker must explain to the party proposing the questions any decision to exclude a question as not relevant

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Title IX – Grievance Process

- Decision-maker's Written Determination 34 CFR § 106.45(b)(7)
  - Must be made by someone other than Title IX Coordinator or investigator and must:
    - *identify allegations potentially constituting sexual harassment;*
    - *describe all procedural steps taken;*
    - *include findings of facts and conclusions about the application of code of conduct to the facts;*
    - *include a statement of, and a rationale for, the decision reached on each allegation;*
    - *identify whether remedies will be provided to complainant;*
    - *identify any disciplinary sanctions imposed on the respondent; and*
    - *include procedures and permissible bases for appeals*

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Title IX – Grievance Process

- Appeals - 34 CFR § 106.45(b)(8)
  - Available to both parties after determination of responsibility or dismissal of formal complaint and based on the following
    - *procedural irregularity;*
    - *new evidence that could affect the outcome and that wasn't available at the time of dismissal or determination of responsiblility; or*
    - *conflict of interest or bias by Title IX Coordinator, investigator, decision-maker*

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Title IX Regulations

- Informal resolution 34 CFR § 106.45(b)(9)
  - Cannot be required
  - May facilitate mediation or other informal process
  - May not be offered in employee-student harassment context
- Documentation 34 CFR § 106.45(b)(10)
  - For 7 years schools must create and maintain records documenting every Title IX sexual harassment investigation and determination of responsibility including:
  - Disciplinary sanctions imposed, if any;
  - Any informal resolution or appeal;
  - All materials used to train their Title IX Coordinators, investigators and decision-makers, and any person who facilitates an informal resolution process (parties may request copies); and
  - Basis for conclusion that its response was not deliberately indifferent
  - School must keep records regarding response to every report – including documentation of supportive measures offered and implemented for complainant

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Title IX – Regulations

- Other miscellaneous requirements and clarifications
  - Notice of policy, grievance procedures, and Title IX Coordinator's name or title, email address, office address, and telephone number published on website and sent to:
    - *applicants for admission and employment*
    - *students' parents or legal guardians*
    - *unions or professional organizations holding agreements with the school division (34 CFR § 106.8)*
  - Must also publish notice of nondiscrimination policy and Title IX Coordinator's contact information in handbooks to students/employees
  - Timelines must be reasonably prompt (see VSBA model policy)
  - No damages assessed by DOE
  - Nothing requires restriction of 1st Amendment, Due Process rights
  - Severability provisions
  - Prohibition on retaliation (34 CFR § 106.71)

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Title IX Regulations – Office for Civil Rights Frequently Asked Questions – September 4, 2020

- Final Rule Effective: August 14, 2020, will not be enforced retroactively
- Districts have a duty under Title IX to address sexual harassment if the alleged victim shows "signs of enduring unequal educational access"
  - skipping a class
  - decline in GPA
  - difficulty concentrating
- An individual may file a formal Title IX complaint as long as she is participating or attempting to participate in the district's programs or activities (alumni groups included), specifically "a complainant who has left school because of sexual harassment, but expresses a desire to re-enroll if the recipient appropriately responds to the sexual harassment, is 'attempting to participate' in the recipient's education program or activity"
- The Title IX Rule does not adopt the Federal Rules of Evidence, uses "relevance" as the sole admissibility criterion
  - Not relevant: treatment records, information protected by legally recognized privilege, certain prior sexual behavior
  - Ordinary meaning of the word should be applied

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Questions and Answers for K-12 Public Schools in the Current COVID-19 Environment (OCR Sept. 28, 2020)

- 4 of 13 questions related to Title IX
- Yes, school divisions must continue to accept and investigate reports and complaints of sexual harassment even in a distance learning only environment
- A school division my need additional time to complete the grievance process as the situation related to COVID-19 may in some circumstances qualify as "good cause"
- If a school division's methods/process changes due to COVID-19 related interruption, it must promptly notify students/employees and display changes in process prominently on the school division website

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VSBA Model Policy - JFHA/GBA

- Compliance officer - receives all complaints of harassment ***other than*** Title IX sexual harassment (there can be more than one)
- Title IX Coordinator - designated and by School Board to coordinate efforts to comply with its responsibilities
- Any student/employee who believes he or she has been a victim of harassment should report it to the Title IX Coordinator
- Title IX Coordinator makes initial decision whether the allegations may be sexual harassment prohibited by Title IX - if it cannot be, then it is referred to the compliance officer who follows the "Compliance Officer Formal Procedure"

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VSBA Model Policy – JFHA/GBA

- Compliance Officer Formal Procedure
  - Set out parameters of Investigation
  - May be conducted by Compliance Officer or third party
  - Completed not later than 14 school days after receipt
  - Written notice to reporting and receiving party
  - Interim measures
- In making determination, School Division shall consider at a minimum:
  - Surrounding circumstances
  - Nature of the behavior
  - Past incidents or past or continuing patterns of behavior
  - Relationship between the parties
  - How often conduct occurred
  - Identity of perpetrator
  - Location
  - Ages
  - Context

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VSBA Model Policy – JFHA/GBA

- Action by Superintendent within 5 days of Compliance Officer Report
- Appeal available to complainant if the superintendent determines that no prohibited harassment occurred
- Informal Procedure available with consent of both parties
- Sexual Harassment Prohibited by Title IX
  - Definitions
  - Title IX Grievance Process
    - Dismissal of Formal Complaints
    - Investigation of Formal Complaints
    - Determination regarding responsibility
      - decision-maker cannot be Title IX Coordinator or investigator
      - determination provided simultaneously

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VSBA Model Policy – JFHA/GBA

- Appeals
  - Gives both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome
  - Reviews the evidence gathered by the investigator, the investigator's report, and the decision-maker's written decision
  - Issues written decision and provides simultaneously to both parties
- Timelines (*tolled if informal process initiated, extended for good cause)
  - Investigative report within 35 days formal complaint filed
  - Determination within 10 working days from the date the investigative report is provided to decision-maker
  - Either party may appeal within 5 working days
  - Appeal resolved within 15 calendar days from the filing of the appeal

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VSBA Model Policy – JFHA/GBA

- Informal Resolution Process
  - Such as mediation
  - When one party requests, the other must respond within 3 days
  - Must be completed within 10 days
  - Facilitated by trained educational professional, consultant, or other individual
  - If resolved, facilitator documents the nature of complaint and resolution, both parties sign and receive a copy, forwarded to Title IX Coordinator
- Recordkeeping

Retaliation

Prevention and Notice of Policy

False Charges

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Administrative Response and Investigations

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Administrative Response to Sexual Harassment or Assault

- All employees must be able to recognize sexual violence and harassment of students by other students or school employees
- All employees must be able to recognize "grooming behaviors" by other employees or other third parties (volunteers, coaches, etc.)
- All employees must know to report suspected harassment or grooming behaviors to principal and Title IX Coordinator
- Failure to do so can contribute to liability of the Division under Title IX and individual liability of the employee under other laws

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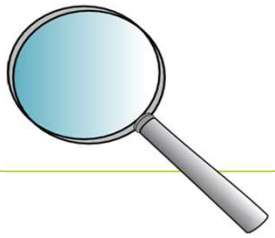
General Response and Investigations

General response: Whether or not the student files a formal complaint or asks the school to take action, if the school knows of an incident of sexual misconduct, school must respond appropriately (immediate effective action to eliminate the hostile environment)

Failure to timely or thoroughly investigate may amount to deliberate indifference

To assemble facts to describe:

- What happened
- Why it happened



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The Best Investigations Are:

- Prompt (meeting school division policy requirements)
- Thorough (and documented)
- Objective

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Step 1 - Intake

- Title IX Coordinator must meet promptly with the complainant and the parents and document the same
  - discuss availability of supportive measures with or without the filing of a formal complaint; explain process
  - If formal complaint is filed, consider whether informal resolution might be appropriate
- Determine the rules and law that apply; consult counsel if necessary
- Map out the investigation
  - Who will investigate?
  - What will be investigated?
  - Who will be interviewed and in what order?
  - Outline a calendar of events to begin without delay
- Give notice to both parties
- Consider whether and what supportive measures are required for the responding party during investigation

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Step 2 – Designate an Investigator(s)

- Free of actual or reasonably perceived conflicts of interest and biases for or against any party
- Maintains confidentiality
- Analyzes and documents available evidence to support reliable decisions
- Objectively evaluates
- Synthesizes available evidence



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Step 3 – Gather Information

Complainant

- Interview them like a journalist and LISTEN and DOCUMENT!
- Chronological order
- Obtain the names, addresses, contact info of anyone with knowledge
- Ask about any proposed resolution

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Step 3 – Gather Information

Supportive Measures

Different for each case –

- Placement of students in different classes
- Provide victim with escort or different transportation services
- Counseling
- Academic, emotional, and social support
- Written agreement with respondent to avoid complainant
- Extension of deadlines
- Safety plan
- Offending employee placed on administrative leave
- Emergency removal

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Step 3 – Gather Information

Respondent

- Give a detailed description of what has been alleged to allow full response
- Inform the responding party that no conclusions have been made
- Inform the responding party that any attempt to influence or coerce or intimidate the reporting party will be grounds for immediate discipline
- Consider the need for a recorded or written statement

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Step 3 – Gather Information

Witnesses

- Interview third-party witnesses with open, not leading, questions
- Provide some background to give witnesses the opportunity to address the issues – but preserve confidentiality if possible
- Remind all witnesses of confidentiality and the prohibition of retaliation
- Compare all stories for consistency and inconsistency

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Step 4 – Record Your Findings – Investigative Report

- Leave out insignificant details
- Highlight misconduct with specific description of the events, not generalized conclusions
- Do not editorialize – but may make credibility determinations, which can't be based on party's status as complainant, respondent or witness
- Make use of evidentiary attachments, such as photos, e-mails, texts, screen shots, videos, handwritten documents, etc.
- Provide to parties and they have 10 days to provide a written response



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Step 5 – Report Results to Decision-Maker

Report should summarize both inculpatory and exculpatory evidence

Takes into account unique and complex circumstances

Decision-maker must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness and explain to the party proposing a question any decision to exclude a question as not relevant

Limited follow-up questions



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Step 6 - Decision-Maker's Written Determination of Responsibility

- Makes decision regarding determination of responsibility, cannot be the investigator OR the Title IX Coordinator
  - Commentary addresses consideration of consistency, accuracy, memory, credibility, implausibility, inconsistency, unreliability, ulterior motives, lack of credibility
- Must include:
  - identification of allegations
  - description of procedural steps taken from the receipt of formal complaint through determination
  - findings of fact supporting the determination
  - conclusions regarding application of code of conduct to facts
  - statement of and rationale for the result as to each allegation, including disciplinary sanctions
  - details regarding appeal procedures
- Is it more likely than not that the respondent engaged in the alleged misconduct?
- Decision is final when provided to both parties simultaneously

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Step 7- Appeal Decision-Maker

- Not the same person as initial decision-maker, investigator, or the Title IX Coordinator
- Decides appeal on following bases:
  - procedural irregularity that affected outcome of matter;
  - new evidence not reasonably available at the time the determination regarding responsibility or dismissal was made; or
  - Title IX Coordinator, investigator, decision-maker bias
- Provides notification in writing to both parties:
  - when appeal filed; and
  - of decision, describing result and rationale for result

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Serving Impartially – Decision-makers

- Regulations' preamble states that being impartial = free from bias
  - Whether bias exists requires examination of facts and school divisions should apply an objective commonsense approach to evaluating whether a particular person is biased
- Consider perceived conflict of interest vs. actual conflict of interest toward complainants or respondents generally or an individual complainant or respondent
  - Past advocacy for victim or respondent's rights
  - Prior adjudication involving complainant or respondent
- Avoid:
  - Reliance on sex stereotypes (complainant always female, respondent always male)
  - Pre-judgement of facts

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Conduct Off-School Grounds

- Regulations do not impose a geographic test or draw a distinction between on-campus and off-campus misconduct
- Required to investigate if the sexual harassment occurred within the scope of an educational program or school-sponsored activity

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Remedies for Student-on-Student Harassment

- Disciplinary sanctions against respondent
- Strict behavioral and "no contact" contract
- Separate classes, schedules, transportation, or programs
- Administrative transfer of complainant (voluntary) or respondent (voluntary or involuntary) to another school
- Targeted training for students who are creating a hostile environment, i.e. an athletic team or band

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Title IX Part II Training

For Investigators and Decision-Makers

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Relevance

- Investigators must receive training on (1) ***relevance*** and (2) writing reports that fairly summarize ***relevant evidence***
- Decision-makers must receive training on ***relevance of questions and evidence***
- So what is relevance?
  - Generally, "relevant" evidence is that evidence tending to prove or disprove an alleged fact
  - Stated differently, it is 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

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Live Hearings

- Live hearings are NOT required for elementary and secondary school Title IX grievance proceedings.
  - ***IF*** your division intends to conduct live hearings, additional training for decision-makers is required, specifically for the use of technology in such proceedings
  - This presentation presumes the recipient is NOT conducting live hearings

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What is Relevant Evidence?

- The Preamble addresses this definition as follows:
  - "The requirement for recipients to summarize and evaluate relevant evidence, and specification of certain types of evidence that must be deemed not relevant or are otherwise inadmissible in a grievance process pursuant to § 106.45, appropriately directs recipients ***to focus investigations and adjudications on evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true (i.e., on what is relevant).***" 85 F.R. 30294

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So What is Relevant Evidence?

- Do recipients have latitude to define relevance on their own?
  - OCR's September 4, 2020 Q&A Document offers guidance:
  - "The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied." Q&A #8
  - "Relevance is the standard that these final regulations require, and any evidentiary rules that a recipient chooses must respect this standard of relevance. For example, a recipient may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence. A recipient may adopt rules of order or decorum to forbid badgering a witness, and may fairly deem repetition of the same question to be irrelevant." Q&A #8

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Rules of Evidence

- Importantly, the regulations specifically do NOT apply formal rules of evidence:
  - "The Department desires to prescribe a grievance process adapted for an educational environment rather than a courtroom, and declines to impose a comprehensive, detailed set of evidentiary rules for resolution of contested allegations of sexual harassment under Title IX." 85 FR 30337
  - "A recipient's grievance process must . . .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 C.F.R. 106.45(b)(1)(ii)
  - Again, from OCR's September 4, 2020 Q&A Guidance:
    - *"The Title IX Rule does not adopt the Federal Rules of Evidence for hearings conducted under Title IX. . . .[T]he Rule uses 'relevance' as the sole admissibility criterion." Q&A #7*

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More on Rules of Evidence and Relevance

The Title IX Rule also deems certain evidence and information to be not relevant or otherwise precludes the recipient from using it:

- *(i) a party's treatment (medical, psychological and similar) records, without the party's prior written consent [§ 106.45(b)(5)(i)];*
- *(ii) information protected by a legally recognized privilege [§ 106.45(b)(1)(x)]; and*
- *(iii) questions or evidence about a complainant's prior sexual behavior unless it meets one of two limited exceptions [§ 106.45(b)(6)(i)-(ii)]*
  - 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

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Legally Privileged Information

- A recipient, when ***investigating*** a formal complaint:
  - "Cannot access, consider, disclose or otherwise use a party's records that are maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for a grievance under this section." § 106.45(b)(5)(i)
- Other recognized privileges:
  - Attorney-client communications
  - Spousal testimony in criminal matters
  - Fifth Amendment (right against self-incrimination)
  - Confessions to a clergy member

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More on Relevance

- The Preamble to the new Rule provides further explanation:
  - "These final regulations require objective evaluation of relevant evidence and contain several provisions specifying types of evidence deemed irrelevant or excluded from consideration in a grievance process; a recipient may not adopt evidentiary rules of admissibility that contravene those evidentiary requirements prescribed under § 106.45. For example, a recipient may not adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice; although such a rule is part of the Federal Rules of Evidence, the Federal Rules of Evidence constitute a complex, comprehensive set of evidentiary rules and exceptions designed to be applied by judges and lawyers, while Title IX grievance processes are not court trials and are expected to be overseen by layperson officials of a school, college or university rather than by a judge or a lawyer." (As cited in Q&A #7)

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More on Relevance

- Continuing, the Preamble states:
  - "Similarly, a recipient may not adopt rules excluding certain types of relevant evidence (e.g., lie detector test results or rape kits) where the type of evidence is not either deemed 'not relevant' (as is, for instance, evidence concerning a complainant's prior sexual history) or otherwise barred from use under § 106.45 (as is, for instance, information protected by a legally recognized privilege)." (As cited in Q&A #7)

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Weight and Credibility

- The guidance documents recognize a difference between the ***admission*** of relevant evidence, and the ***weight, credibility, or persuasiveness*** of particular evidence:
  - "The § 106.45 process does not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by a recipient's decision-maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with § 106.45 and apply equally to both parties." (Q&A #8, citing the Preamble)
  - "A recipient may, for example, adopt a rule regarding the weight or credibility (but not the admissibility) that a decision-maker should assign to evidence of a party's prior bad acts, so long as such a rule applied equally to the prior bad acts of complainants and the prior bad acts of respondents." (Q&A #8, citing the Preamble)

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Gathering the Evidence

- Recall that the grievance process must provide that the parties have an equal opportunity to inspect, review, and respond to evidence directly related to the allegations (§ 106.45(b)(5)(vi)) and an equal opportunity to review and respond to the recipient's investigative report. (§ 106.45(b)(5)(vii))
  - This process "allows each party the opportunity to provide input and make arguments about the relevance of evidence and how a decision-maker should weigh the evidence." Q&A #13.
  - The decision-maker must (i) 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 for each party, and (ii) explain to the party proposing the questions any decision to exclude a question as not relevant § 106.45(b)(6)(ii)
- The Preamble asserts that the Rule ". . . balances the recipient's obligation to impartially gather and objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence, with the parties' equal right to participate in furthering each party's own interests by identifying evidence overlooked by the investigator and evidence the investigator erroneously deemed relevant or irrelevant and making arguments to the decision-maker regarding the relevance of evidence and the weight or credibility of relevant evidence." (As cited in Q&A #13)

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Determining the Facts

- For each fact in dispute, weigh the evidence and argument submitted by the parties – including making credibility determinations – and make a determination: a "finding of fact"
- These findings will inform the overall determination of responsibility/non-responsibility
- The Preamble states that the decision-maker should be looking at consistency, accuracy, memory, credibility, implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility 85 FR 30315 and 30330
  - Consider all witness statements: look for consistency in stories; corroboration; changes in complainant's or respondent's behavior after alleged incident, and potential sources/causes of such changes
  - Timing of complaint MAY inform decision in several aspects: consider whether filed promptly; however, a delay may reflect hesitation that claim may not be believed or a fear of retaliation

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Avoiding Bias in Decision-Making

- The Preamble includes significant discussion addressing concerns by commenters regarding potential bias and unfairness in the grievance process
  - Examples include: decision-maker's financial and reputational interests encourage protecting the institution; inappropriately combining administrative and adjudicative roles; Title IX Coordinator may supervise decision-maker; past role as advocate for victim's or respondent's rights
  - Also includes concerns about marginalized groups: racial minorities, LGBTQ community, disabled persons
- The Rule now provides that a recipient's grievance process must:
  - "Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, ***not have a conflict of interest or bias*** for or against complainants or respondents generally or an individual complainant or respondent"
  - Further, "A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process receive training on . . . ***how to serve impartially***, including by avoiding prejudgment of the facts at issue, conflicts of interests, and bias"

§ 106.45(b)(iii)

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Preventing Biased Decisions

- Bias may be created by differences in cultural backgrounds; age; race; religion; life experiences; trauma
  - Decision-makers must remain impartial, avoiding sympathy or a personal perspective on the claim
  - Avoid sex stereo-types (e.g., women have regret and/or lie about sexual assault; men are sexual aggressors)
- Decision-makers may nonetheless draw reasonable inferences from the evidence
- The Preamble encourages recipients to apply an objective (reasonable person), common sense approach to evaluate whether a particular person is biased

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Weighing the Evidence

- Do not make a decision until all evidence has been received and reviewed, do not "pre-judge" the facts § 106.45(b)(1)(iii)
- Consider only relevant evidence and make findings of fact and determinations based only on the evidence received in its totality
- Determine what evidence is worthy of belief and its importance along with necessary and reasonable inferences
  - Rely on direct evidence whenever possible
- Make witness credibility determinations (motives, bias, probability, consistency, etc.) and ascribe the testimony the weight you believe it deserves
  - But remember you are confirming FACTS
- These determinations do require judgments, but the judgments must be impartial
- Do not consider potential consequences or outcomes of the determination at the fact-finding stage

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Determination of Responsibility/Non-Responsibility

- Findings of fact will then be assessed by applying the recipient's identified standard of proof (e.g., preponderance of the evidence or clear and convincing) to the elements of the alleged offense (e.g., sexual assault, harassment, etc.)
  - Preponderance of the evidence: a fact is more likely than not to be true
  - Clear and convincing: a fact is highly probable to be true
  - 85 FR 30373, fn 1409
- Recall that recipient MUST begin with a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process

§ 106.45(b)(iv)

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Written Determination

- Remember: Decision-maker cannot be the same person as the Title IX Coordinator or the investigator
- Must issue a written decision regarding responsibility/non-responsibility
- Applying standard of evidence identified by recipient's policy

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Written Determination

- The Written Determination Must Include:
  - Identification of the allegations potentially constituting sexual harassment;
  - Description of the procedural steps taken;
  - Findings of fact supporting the determination;
  - Conclusions regarding the application of the recipient's code of conduct to the facts;
  - A statement of, and rationale for, the result as to each allegation, including:
    - *(i) a determination regarding responsibility,*
    - *(ii) any disciplinary sanctions the recipient imposes on the respondent, and*
    - *(iii) whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and*
  - The recipient's procedures and permissible bases for the complainant and respondent to appeal

§ 106.45(b)(7)(ii)(A)-(F)

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Written Determination and Appeals

- The recipient must provide the written determination to the parties simultaneously.
  - The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely

§ 106.45(b)(7)(iii)

- The recipient must offer both parties an appeal from the determination on the following bases:
  - Procedural irregularity that affected the outcome;
  - New evidence not reasonably available at the time the determination was made that could affect the outcome; or
  - The Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter

§ 106.45(b)(8)(i)(A)-(C)

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Questions?

Thank You for your time!





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