

Title IX Decision-maker Training

Final Title IX
Regulations

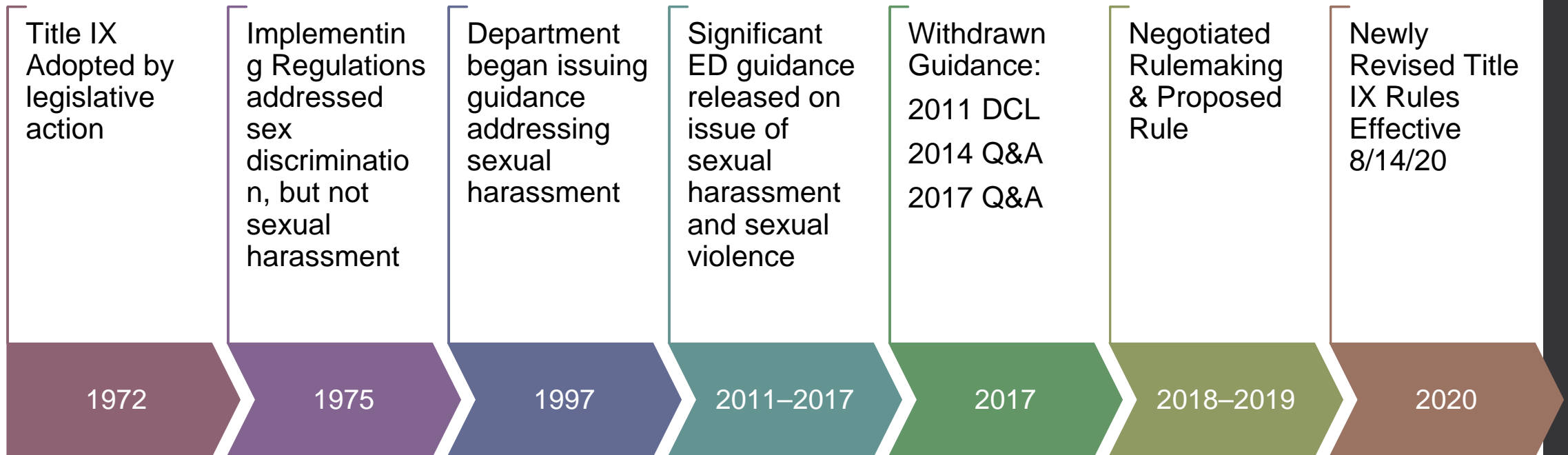
34 CFR Part 106

Effective August 14, 2020

Title IX Decision



History & Evolution



Title IX Personnel

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

Definition of Sexual Harassment 3- Prongs

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

Definition of Sexual Harassment 3- Prongs

1. An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
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 Harassment : Quid Pro Quo

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

Sexual Harassment: Severe, Pervasive, Offensive

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- “Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity”
- directed at verbal or expressive conduct
- evaluated under the “reasonable person standard” taking into consideration the characteristics of the alleged victim

Sexual Harassment: Clery/VAWA Crimes

“sexual assault” as defined in 20 U.S.C. 1092(f)(6)(A)(v),

“dating violence” as defined in 34 U.S.C. 12291(a)(10),

“domestic violence” as defined in 34 U.S.C. 12291(a)(8), or

“stalking” as defined in 34 U.S.C. 12291(a)(30).

Sexual Assault

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

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

Domestic Violence

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

Stalking

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

Educational Program or Activity 106.44

- Locations, events, or circumstances where the school exercises substantial control over both:
 - the Respondent
 - the context in which the alleged sexual harassment or discrimination occurs
 - includes any building owned or controlled by the school or by a student organization that is officially recognized by the school.

Formal Grievance Process

Grievance Process Basic Requirements

Treat parties equitably

Require objective evaluation of all relevant evidence

Train Title IX personnel & post all training on web -site

Include a presumption that respondent is not responsible

Include reasonably prompt time frames

Describe the range of, or list, possible disciplinary sanctions and remedies

State standard of evidence: preponderance or clear and convincing

Include process and bases for appeals

Exclude privileged evidence

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

How to Serve Impartially & Objectively

Require on objective evaluation of all relevant evidence- including both inculpatory and exculpatory evidence -and that provides credibility determinations may not be based on a person's status as a complainant, respondent or witness;

Presumption of Non -Responsibility

106.45(b)(1)(iv)

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



Independent/Neutral Decision -maker 106.45(b)(7)

Hearing

Live Hearing

- ₪ Postsecondary institutions must conduct a live hearing that must allow for real-time, cross-examination.
- ₪ At the request of either party, the recipient must provide for the entire hearing to occur with the parties located in separate room with technology enabling the parties to see and hear each other.
- ₪ Live hearings may be conducted with all the parties physically present in the same location or, at the school's discretion, any or all parties, witnesses or other participants may appear at the live hearing virtually.

Live Hearing & Cross -Examination

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

Directly

Orally

In real time

Never by a party personally

The advisor may question the other party and any witnesses

May ask follow -up questions including those challenging credibility

Questions may not be prescreened or submitted in writing

Parties have the right to present evidence and witnesses, including expert witnesses

School carries the burden of proof

Technology to be Used at Hearing

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

Rules of Order & Decorum

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

Confidentiality

The regulations require the school to maintain the confidentiality of the parties

Only participants that need to at hearing should be there

Relevancy & Cross-examination

- Only relevant evidence is considered at the hearing
- Decision-maker must make a determination on relevancy after each question is asked, and before the witness/party responds
- Must provide their rationale for excluding question on relevancy basis
- Challenge on relevancy determination could be a basis for a party to appeal

No ability to compel participation of parties or witnesses

The Rule protects every individual's right to choose whether to participate

A party's absence from the hearing cannot be used against that person

The decision maker may not make an inference about their exercise of the right not to appear or submit to cross

If a party does not show up for a hearing, the hearing cannot be dismissed, but a decision would have to be made on available relevant evidence

Retaliation Prohibited 34 CFR 106.71

No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege under Title IX, or because the individual has made a report or complaint, testified, assisted, or participated _____.

Non-Cooperating Party or Witness

- If a party or witness does not submit to cross examination at the hearing, the decision -maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility;
- However, the decision -maker cannot draw an inference based solely on that party's or witness's absence or refusal to answer questions
- School has no ability to compel either parties or witnesses to cooperate, appear at the hearing, provide testimony or otherwise participate in the process

Evidence

Burden of Evidence

Parties have the right present evidence and witnesses, including expert witnesses

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Relevancy

Evidence pertinent to proving whether facts material the allegation are more or less likely to be true and that do not relate to complainant's sexual predisposition or prior sexual acts

Relevancy



Related-to vs. Relevant

Related-to

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

Relevant

Relevant evidence is all evidence related to, except that which is protected under the rape shield provisions (and not otherwise privileged, medical records)

Relevancy & Rape Shield Protections

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

Relevancy, Rape Shield Protections & Exceptions

Questions and evidence about the complainant's prior sexual behavior are NOT RELEVANT, offered to prove

“Mistaken Identity ”: that someone other than the respondent committed the conduct alleged by the complainant, or

Consent: concern specific incidents of the complainant's

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

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 in writing .

Patient -doctor

Attorney -client

Spousal privilege

Other Inadmissible Evidence

Treatment records from doctor, psychologist, or any other health or mental health provider may not be used without prior written consent of a party.

Other Evidence
Which May Not
be Considered

Statements of a party or witness that does not submit to cross examination may not be considered by the decision -

Assessing Credibility/Weighing Evidence

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

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

Standard of Evidence

Preponderance
of the
Evidence

Clear and
Convincing

Written Determination Regarding Responsibility 34

CFR 106.45(b)(7)

Allegations potentially constituting sexual harassment

A description of the procedural steps taken

Findings of fact supporting the determination

Conclusions regarding the application of code of conduct to the facts

Statement and rationale for each allegation

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

Bases & procedure for Appeal

The determination must be provided to the parties in writing simultaneously



