



SESSION 4: DO'S AND DON'TS IN THE TITLE IX HEARING PROCESS

Final Title IX Regulations

- Announced by Secretary of Education Betsy DeVos on May 6, 2020
- Scheduled for implementation on August 14, 2020
- Litigation filed challenging new rules



Title IX Required Training for “Decision-maker”

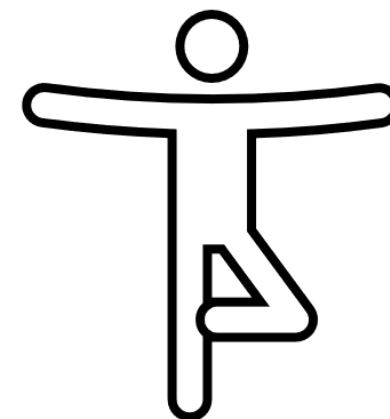
Decision-maker must receive training on:

1. The definition of sexual harassment in the new Title IX regulations;
2. The scope of the recipient’s education program or activity;
3. How to conduct a hearing
4. How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
5. Technology to be used at a live hearing
6. Issues of relevance of questions and evidence
7. Training must not rely on sex stereotypes
8. Training must promote the impartial investigation & adjudication of formal complaints

NOTE: Training materials must be posted on website and maintained for 7 years.

Qualifications of a “Decision-maker”

1. Cannot be the same person(s) as the Title IX Coordinator or the investigator(s)
2. Trained as required by new Title IX regulations
3. No conflict of interest
4. No bias for or against complainants or respondents generally
5. No bias for or against an individual complainant or respondent
6. Knows how to conduct an orderly hearing
7. Knows how to make relevancy decisions
8. Can be an external “decision-maker”



<p>Grievance process for Formal Complaints of Sexual Harassment – Basic requirements 34 C.F.R. § 106.45(b)(1)</p>	--Informal resolution allowed (except for student complaints against employees)
	--Basic requirements for grievance process for formal complaints of sexual harassment:
	(i) Equitable treatment of parties
	(ii) Objective evaluation of evidence
	(iii) No conflicts of interest or bias
	(iv) Presumption of “not responsible” for respondent
	(v) Reasonably prompt timeframes
	(vi) Disciplinary sanctions and remedies
	(vii) Standard of evidence
	(viii) Appeals
(ix) Supportive measures	
(x) Restrictions relating to privileged information	

<p>Grievance Process for Formal Complaints of Sexual Harassment 34 C.F.R. § 106.45</p>	A school’s treatment of a complainant in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under Title IX. A school’s treatment of the respondent may also constitute discrimination on the basis of sex under Title IX.
	The following specific requirements for grievance processes used to address formal complaints of sexual harassment.
	(1) Basic requirements for grievance process (see below);
	(2) Notice of allegations;
	(3) Dismissal of a formal complaint;
	(4) Consolidation of formal complaints;
	(5) Investigation of a formal complaint;
	(6) Hearings;
	(7) Determination regarding responsibility;
	(8) Appeals;
(9) Informal resolution; and	
(10) Recordkeeping.	

NEW TITLE IX REGULATIONS – GRIEVANCE PROCESS

Role of the “Decision-Maker”

Potential Structures for Hearing Process

- Hearing Officer (Administrative)
- Hearing Officer (Sole decision maker)
- Hearing Panel Member



Key Duties

- Sets tone for the hearing
- Communicates with parties – no ex parte communication allowed
- Communicates and oversees advisors at the hearing – if a party does not have an advisor present at the live hearing, the school must provide without fee or charge to that party, an advisor of the school's choice to conduct cross-examination on behalf of that party.
- Coordinates logistics and witnesses with the school
- Maintains order and decorum of hearing
- Ensures hearing follows institution's written procedures



Key Duties (cont)

- Determines, before a complainant, respondent, or witness answers a cross-examination or other question, whether the question is relevant and explains any decision to exclude a question as not relevant
- Role is limited -- NOT to collect information in the first instance
- Weighs the evidence
- Makes determination of responsibility – whether a preponderance of the evidence supports that the respondent violated the applicable policy
- Determines sanctions (at some schools)
- Prepares written determination
- Issues written determination simultaneously to the parties



The School's Obligation to Investigate and Adjudicate a Formal Complaint of Sexual Harassment

- A school with actual knowledge of sexual harassment in an education program or activity of the school against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.
- Actual notice (knowledge) – allegation made to Title IX Coordinator or person with authority to take corrective measures
- For formal complaints of sexual harassment, the school must conduct a investigation and hearing in accordance with the specific Title IX procedural requirements

“Sexual harassment” as defined in the Final Title IX regulations

1. Quid Pro Quo -- An employee of the school conditioning the provision of an aid, benefit, or service of the school on an individual’s participation in unwelcome sexual conduct;
2. Violence Against Women (VAWA) categories --
 - Sexual assault
 - Domestic violence
 - Dating violence
 - Stalking
3. Hostile Environment -- 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 school’s education program or activity



<p>Sexual Assault 34 C.F.R. § 106.30(a)</p>	<p>“Sexual assault”, as defined in the Clery Act at 20 U.S.C. 1092(f)(6)(A)(v), means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation (FBI). The FBI uniform crime reporting system defines “forcible rape” as “the penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.” The FBI uniform crime reporting system defines “forcible fondling” as “the touching of the private body parts of another person for the purpose of sexual gratification, forcibly and/or against that person’s will or not forcibly or against the person’s will in instances where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.”</p>
<p>Domestic Violence 34 C.F.R. § 106.30(a)</p>	<p>“Domestic violence,” as defined by VAWA at 34 U.S.C. §12291(a)(8), 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.</p>
<p>Dating Violence 34 C.F.R. § 106.30(a)</p>	<p>“Dating violence,” as defined as defined by VAWA at 34 U.S.C. 12291(a)(10) , means violence committed by a person—</p> <p>(A)who is or has been in a social relationship of a romantic or intimate nature with the victim; and</p> <p>(B)where the existence of such a relationship shall be determined based on a consideration of the following factors:(i)the length of the relationship; (ii)the type of relationship; and (iii) the frequency of interaction between the persons involved in the relationship.</p>
<p>Stalking 34 C.F.R. § 106.30(a)</p>	<p>“Stalking,” as defined by VAWA at 34 U.S.C. §12291(a)(30), means engaging in a course of conduct directed at a specific person that would cause a reasonable person to—</p> <p>A. fear for his or her safety or the safety of others; or</p> <p>B. suffer substantial emotional distress.</p>

NEW TITLE IX REGULATIONS – DEFINITION OF SEXUAL HARASSMENT AND VAWA CATEGORIES



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Scope of Education Program or Activity

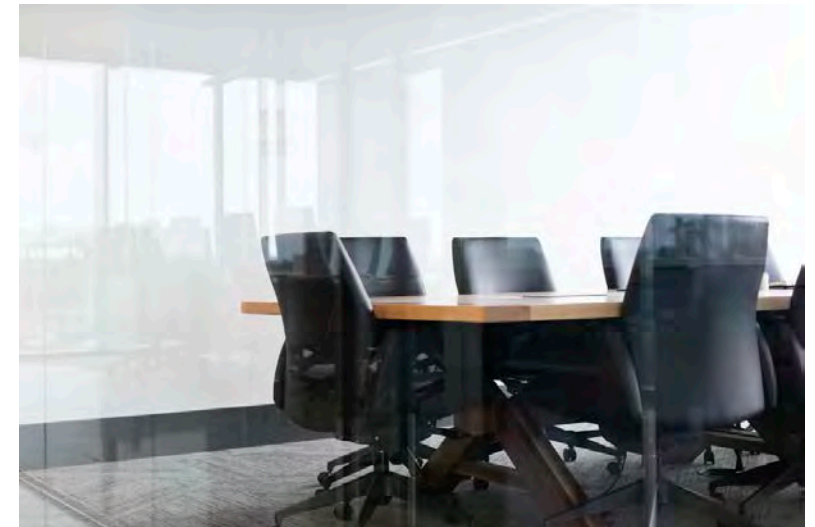
1. “Education program or activity” includes:
 - Locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs
 - Any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.
2. Harassment must be against a person in the United States
3. The Complainant must be participating or attempting to participate in the education program or activity at the time the complaint is filed.
4. The school may dismiss a complaint against a Respondent who is not participating or attempting to participate in the education program or activity.

How to Conduct a Hearing – The Hearing Location

The hearing may be conducted with

- all parties physically present in the same geographic location or
- *at the school's discretion*, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other.

At the request of either party, the school must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions.



Technology

- Audio or audiovisual recording, or transcript, of hearing
- Secure portal for sharing relevant documents (Investigative Report, Evidence, Written Determination)
- Video technology for virtual hearings
- On-site training by school of technology



Issues of Relevance and Evidence

Legal Definition of Relevance:

Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

- (b) the fact is of consequence in determining the action.



Issues of Relevance and Evidence

- Only relevant cross-examination and other questions may be asked of a party or witness.
- Hearing officer must determine whether a question is relevant before a complainant, respondent, or witness answers a cross-examination or other question, and must explain any decision to exclude a question as not relevant.
- 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.

Issues of Relevance and Evidence

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.



Impartiality

- Importance of serving impartially – making decisions based on the facts and applicable policy
- Avoiding prejudgment of the facts at issue
- No conflicts of interest
- No bias against either party or Complainants or respondents generally
- Presumption of Respondent's non-responsibility



Retaliation

- Participants in the hearing process are protected from retaliation.
- No school or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part.
- Complaints alleging retaliation may be filed according to the applicable school procedures.



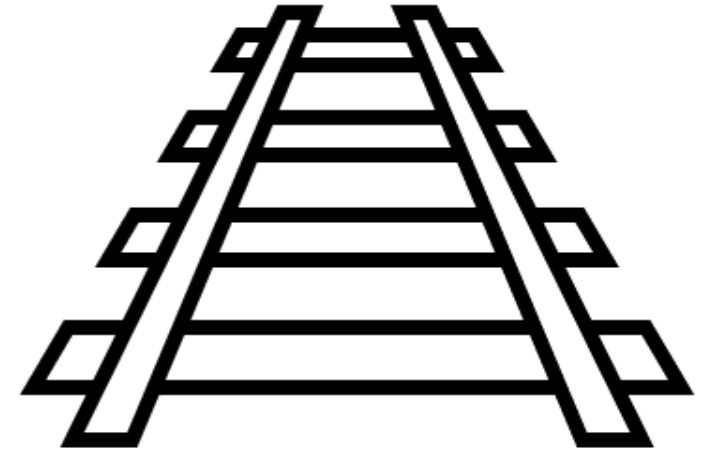
Pre-Hearing Review and Preparation

To Review:

- Investigation report
- Submissions by the parties in advance of hearing
- Written questions for other party and witnesses?
- Applicable Policy
- Hearing procedures

To Prepare:

- Identify areas needing clarification and/or additional questions
- Prepare your opening and closing comments
- Make/review plan for how to handle new evidence
- Make/review plan for how to handle new questions that might arise



WRITTEN DETERMINATION



Written Determination

1. Allegation(s)
2. Procedural history (notices to parties, interviews, methods used to gather evidence, hearings held)
3. Applicable policies and procedures
4. Information considered during investigation (witnesses, documents, and any other evidence)
5. Findings of fact supporting the determination

Written Determination (cont)

5. Conclusions regarding the application of the policy to the facts using the preponderance of the evidence standard
6. A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and 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
7. Appeal procedures and bases for appeals

Sample Letter Language

- “Because the Respondent is presumed not to have violated the policy unless and until the preponderance of the evidence establishes a violation, it cannot be concluded that the Respondent engaged in sexual misconduct.”
- “Based on the totality of the circumstances, it is determined that it is more likely than not that the Complainant was incapacitated at the time of the parties’ sexual interaction.”
- “In consideration of all of the evidence, including ..., it is determined that the preponderance of the evidence does not support the Complainant’s allegation that the Respondent engaged in penetration without his consent.”
- “Both parties presented with credible and reasonable demeanors.”
- “Both parties have provided accounts of the incident that are plausible.”

Considerations for the Imposition of Sanctions

- The nature of the conduct at issue;
- The impact of the conduct on the Complainant;
- The impact of the conduct on the community or the University, including protection of the University community;
- Prior misconduct by the Respondent, including the Respondent's relevant prior discipline history, both at the University or elsewhere, including criminal convictions;
- Maintenance of a safe and respectful environment conducive to learning;
- Whether the Respondent has accepted responsibility for the conduct, which may be considered as a factor that may lessen, not increase, the severity of the sanctions;
- The necessity of any specific action in order to eliminate the prohibited conduct, prevent its recurrence, and remedy its effects on the Complainant or other University community members; and
- Any other mitigating, aggravating, or compelling circumstances, including those set forth in the parties' impact statements, to reach a just and appropriate resolution in each case.

Recordkeeping

School must maintain for a period of seven years records of –

1. Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the school's education program or activity;
2. Any appeal and the result therefrom;
3. Any informal resolution and the result therefrom; and
4. All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. A school must make these training materials publicly available on its website, or if the school does not maintain a website the school must make these materials available upon request for inspection by members of the public.

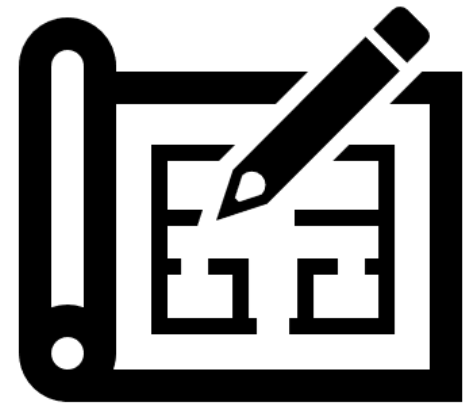


Best Practices -- Hearing Logistics - to think about beforehand

- Information parties should have before the hearing
- Inform yourself of any accommodations required by the parties
- Physical space and use of remote technology—before, during and after hearing
- Plan for order of hearing
- Plan for recording hearing
- Plan for handling/keeping evidence
- Have contact information for Title IX Coordinator/counsel

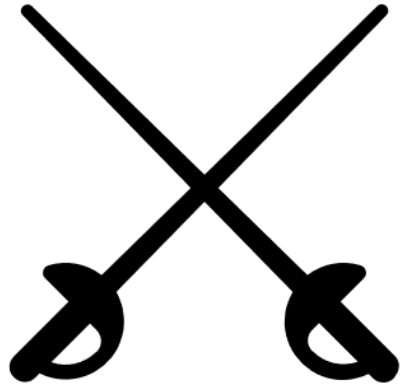
Best Practices: Setting ground rules

- Hearing officer has complete authority
- Limitation on participation of advisors, except regarding cross-examinations
- No ex parte communications
- Interact respectfully
- No interruptions
- Limitations on evidence (timing, etc.)
- Direct procedural questions to hearing officer



Best Practices: Handling Unplanned Situations

- Inappropriate participation of parties, witnesses or advisors
- Attempted introduction of new evidence
- Scope of questions: relevance, ruling on “objections,” and/or inappropriate subject matter
- Defusing high conflict moments
- Handling cross examination
- Witnesses/parties who do not attend hearing



Best Practices: Asking Questions

- First and foremost, always remember your role
- Rapport-building stage—what does this look like in a hearing?
- Connect your questions to the elements of the prohibited conduct
- If asking a sensitive question, explain why
- Use hearing to get clarification of any aspects of investigation report
- Use the hearing to ask about inconsistencies you noted in the evidence
- Ask why just learning new information now
- Ask the challenging party how/what the investigator got wrong

Recap – Dos and Don'ts

- Be knowledgeable about your school's policies and procedures or know who to ask questions
- Carefully review and consider all the investigative materials (report and documentation)
- Remain impartial, calm and patient throughout process
- Allow parties to tell their stories
- Make findings decisions based on the evidence and policy
- Write clear and thorough final determination letters



Recap – Do's and Don'ts

- Prejudge either party
- Allow evidence of prior sexual activity (except in limited circumstances)
- Make public (or private) statements suggesting gender bias
- Be afraid to ask the questions you need to ask
- Breach a confidence
- Unduly delay the resolution

