# Title IX Decision-maker Training

## Final Title IX Regulations

**34 CFR Part 106**

**Effective August 14, 2020**

# Title IX
# Decision-maker Training

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# Title IX Decision-maker Training

- ✓ *Title IX History and Background on Rule Revisions*
- ✓ *On Title IX's definition of "sexual harassment"*
- ✓ *On the scope of the school's education program or activity*
- ✓ *On how to serve impartially, including by avoiding prejudgment of the facts at issue*
- ✓ *On how to avoid conflicts of interest and bias*
- ✓ *On how to conduct an investigation and grievance process, as applicable*
- ✓ *Evidence: Relevancy, Privilege, Exclusions, Rape Shield Protections*
- ✓ *Training on any technology to be used at a live hearing*

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# History & Evolution

| 1972 | 1975 | 1997 | 2011–2017 | 2017 | 2018–2019 | 2020 |
|---|---|---|---|---|---|---|
| Title IX Adopted by legislative action | Implementing Regulations addressed sex discrimination, but not sexual harassment | Department began issuing guidance addressing sexual harassment | Significant ED guidance released on issue of sexual harassment and sexual violence | Withdrawn Guidance:<br>2011 DCL<br>2014 Q&A<br>2017 Q&A | Negotiated Rulemaking & Proposed Rule | Newly Revised Title IX Rules Effective 8/14/20 |

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# Principles Underlying the New Rules

| | |
|---|---|
| Protect | Protect Due Process & Fundamental Fairness |
| Improve | Improve Integrity of the Grievance Process |
| Effectuate | Effectuate Purpose of the Law in Preventing Sex Discrimination |

# Procedural Protections 106.45

| CITATION | SUMMARY |
| --- | --- |
| 106.45(a) | School's treatment of parties may constitute discrimination |
| 106.45(b)(1)(i)-(x) | Grievance Process Requirements |
| 106.45(b)(2) | Written Notice of Allegations to Both Parties |
| 106.45(b)(3)-(b)(4) | Formal Complaints Must be Investigated, Dismissals, Consolidation |
| 106.45(b)(5)(i)-(vii) | Investigation Requirements |
| 106.45(b)(6) | Cross Examination Conducted by Advisor |
| 106.45(b)(7) | Independent/Neutral Decision-maker, Standard of Evidence Same, Written Determination |
| 106.45(b)(8) | Appeals: Procedural Irregularities, New Evidence, Bias or Conflict of Interest |
| 106.45(b)(9) | Informal Resolution: Voluntary, Written Consent. Not Allowed for Employee Respondent |
| 106.45(b)(10) | Record Keeping, Publication of Training Material |
| | |

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# 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<br>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<br>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<br>Cannot Serve in Any Other Capacity |
| Advisor(s) | Question Opposing Party & Witnesses | None required | Party provided<br>Staff or External |
| Informal Resolution Facilitator | Informal Resolution Processes | Informal Resolution Processes | Staff or External |
| | | | |

# Definition of Sexual Harassment 3-Prongs

| | |
|---|---|
| Quid Pro Quo | ***Employee*** **Conditions Something of Value for Sexual Favor** |
| *Davis* 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 (*Davis)*

- "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

# Dating Violence

(10)DATING VIOLENCE The term dating violence means violence committed by a person—

(A)who is or has been in a social relationship of a romantic or intimate nature with the victim; and

(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.

(iii)The frequency of interaction between the persons involved in the relationship.

# 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.

# Mandatory & Discretionary Dismissals 106.45(b)(3)

- Mandatory: Doesn't meet definition or jurisdictional requirements
- Discretionary: Complainant wants to withdraw complaint or any allegation therein
- Discretionary: Respondent is no longer enrolled or employed
- Discretionary: Specific circumstances prevent school from gathering evidence sufficient to reach a determination

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# 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

*(ii)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;*

*(iii)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. A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment in § 106.30, the scope of the recipient's education program or activity.*

# 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;

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# 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.

# Conflicts of Interest and Bias

- Schools must have process to ensure no conflict/bias
- May provide a process for parties to assert claims of conflict/bias during the grievance process
- Conflict & bias of Title IX personnel is a basis for appeal

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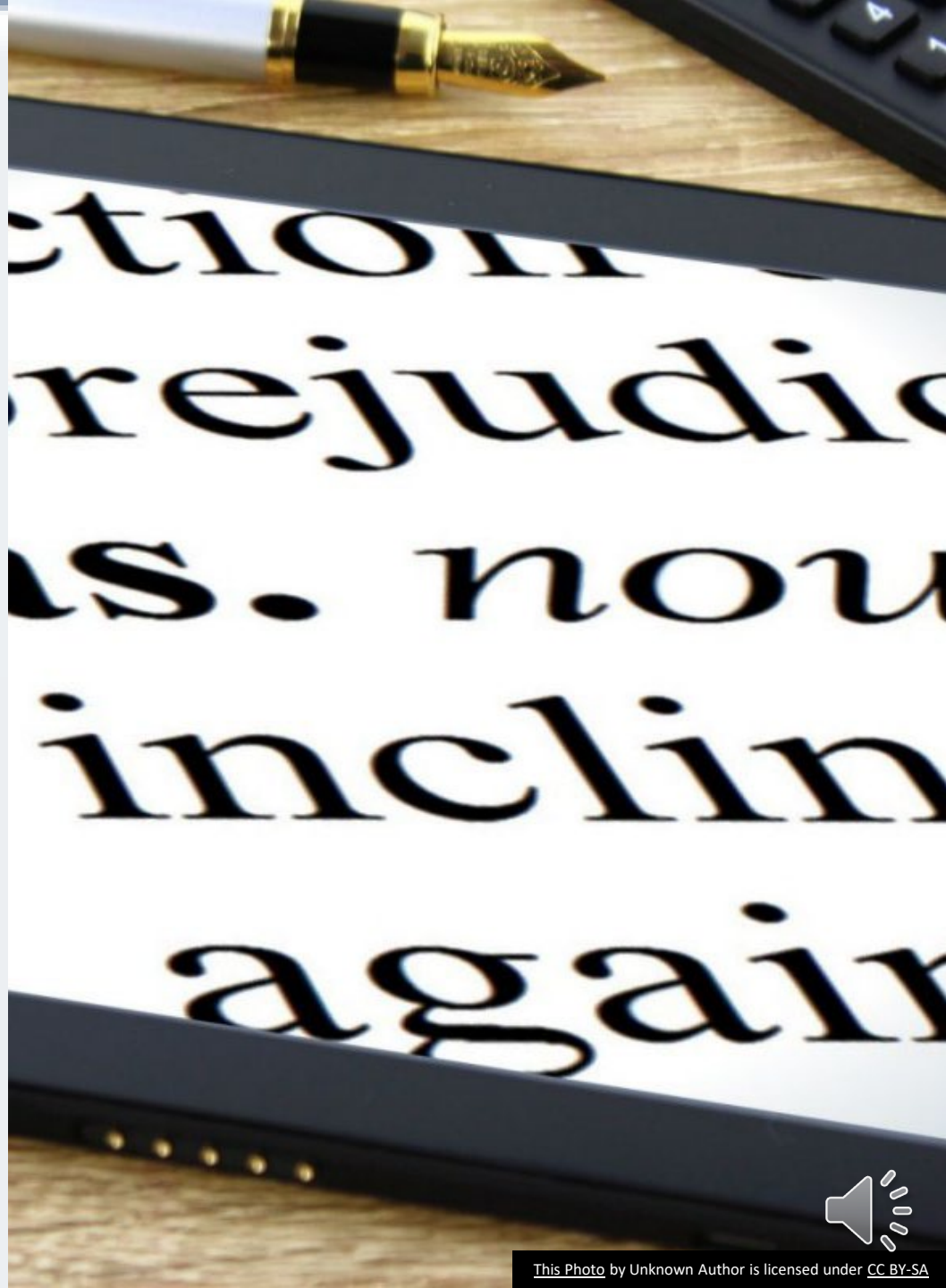


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# Independent/Neutral Decision-maker 106.45(b)(7)

- ✓*Decision-maker must be independent*
- ✓*Appeal decision-maker must also be independent, they must be different from the hearing decision-maker, so you will need to have two trained decision-makers available for every case in the event a party appeals*
- ✓*Schools may utilize multiple decision-makers in a case, such as a panel, within their discretion*
- ✓*Decision-maker makes relevancy determinations during the hearing, after each question, and prior to each answer during cross, will need to provide the rationale for any determination that evidence is not relevant*

# 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 <u>the party's Advisor:</u>***

- ✓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 *or refused to participate in any manner*.

# 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

**School carries the burden of evidence**

## 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 *(with two exceptions)*.

# Relevancy

Decision-maker "rules" on relevancy of every question asked during cross examination during the hearing.

If they determine a question is not relevant, they must explain why/or provide the rationale for the decision

Schools may adopt rules that the parties may not challenge these findings during the hearing, but exclusions of questions and testimony based on relevance could be appealable as a "procedural irregularity" after the determination has been issued

# 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, *unless* 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 *prior* sexual behavior with respect to the respondent and are offered to prove consent.
- Note that questions about a Complainant's predisposition are never allowed, *they are not subject to the exception*

# 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-maker in rendering a 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

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# 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

# Appeals

**Procedural irregularity that effecting outcome**

**New evidence, not reasonably available at the time of determination, that could affect the outcome**

**Title IX Coordinator, Investigator or Decision-maker had a conflict of interest or bias**

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# Re-Cap & Key Takeaways

1. Definition of sexual harassment and the scope and application of Title IX is significantly narrowed under the revised rules. The formal grievance process is triggered only upon the filing of a formal complaint and only if within the strict definition, scope and jurisdiction of the rule.
2. Decision-makers must be trained under these rules, free of any conflicts of interest or bias and must objectively evaluate the evidence in reaching a determination. Decision-makers may not function in any other Title IX role. And the Decision-maker in any appeal, must be a different individual.
3. The school carries the burden of proof and a respondent is presumed not responsible until application of the grievance process and a determination of responsibility.
4. Live hearings must include cross-examination conducted only by a party's Advisor. Decision-maker "rules" on the relevancy and admissibility of every question asked during cross-examination.
5. The Decision-maker assesses credibility and weighs the evidence, and makes a determination using either the preponderance of the evidence or clear and convincing standard, which is applied consistently across all sexual harassment cases.

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