

Hinds Community College Title IX Training



**Title IX Coordinators, Investigators,
and Decision-Makers**

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Presenter - Jessica



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Disclaimer



We can't help ourselves. We're lawyers.

- We are not giving you legal advice. Consult with your legal counsel regarding how best to address a specific situation.
- This training satisfies both annual Clery training and Title IX regulations training for Coordinators, Investigators, and Decision-Makers.
- This training is not being recorded, but we will provide you with a packet of the training materials to post on your websites for Title IX compliance.

Presentation Rules



- Questions are encouraged
- “For the sake of argument...” questions help to challenge the group, consider other perspectives, and move the conversation forward
- Be aware of your own responses and experiences
- Follow-up with someone if you have any questions or concerns
- Take breaks as needed

Agenda



- Introduction, Discussion of Title IX Roles, Ethic of Care & Themes of Title IX
- Overview of Title IX, existing guidance, the 2020 Title IX regulations, and jurisdiction
- Sexual Harassment under Title IX, employees, mandatory and discretionary definitions
- Title IX Investigations and hearings

Title IX Roles



- Title IX Coordinators & Deputy Coordinators
- Title IX Investigators
- Title IX Decision-Makers

The Title IX Coordinator



Oversees procedural integrity

- Oversees the whole process and helps to ensure the written process and the as applied process are the same
- Often the person who ensures the investigators, decision-makers, informal resolution officers and appeals officers are properly trained
- Often the person who ensures advisors are available for hearings
- Makes decisions on new issues that arise to keep them in compliance with the policy

The Roles of the Investigator



1. The **gatherer** of all relevant evidence
2. The **organizer** of all relevant evidence

Decision-Makers



1. **Oversee** the Hearing
2. **Decide** whether there's been a policy violation

Posting these Training Materials?



YES – Post away!

- The “recipient” is required by §106.45(b)(10)(i)(D) to post materials used to train Title IX personnel on its website
- Look for PowerPoint slides to post



Training Requirements for All Title IX Team Members



- Definition of sexual harassment
 - Scope of the institution's program or activity
 - How to conduct an investigation and grievance process, including hearings, appeals, and informal resolution processes, as applicable, under YOUR policy
- How to serve impartially
 - Avoiding prejudgment of the facts
 - Conflicts of interest
 - Bias (use reasonable person/ "common sense" approach)
 - Not relying on sex stereotypes
- See 34 CFR §106.45(b)(1)(iii)

Additional Training Requirements for Decision-Makers

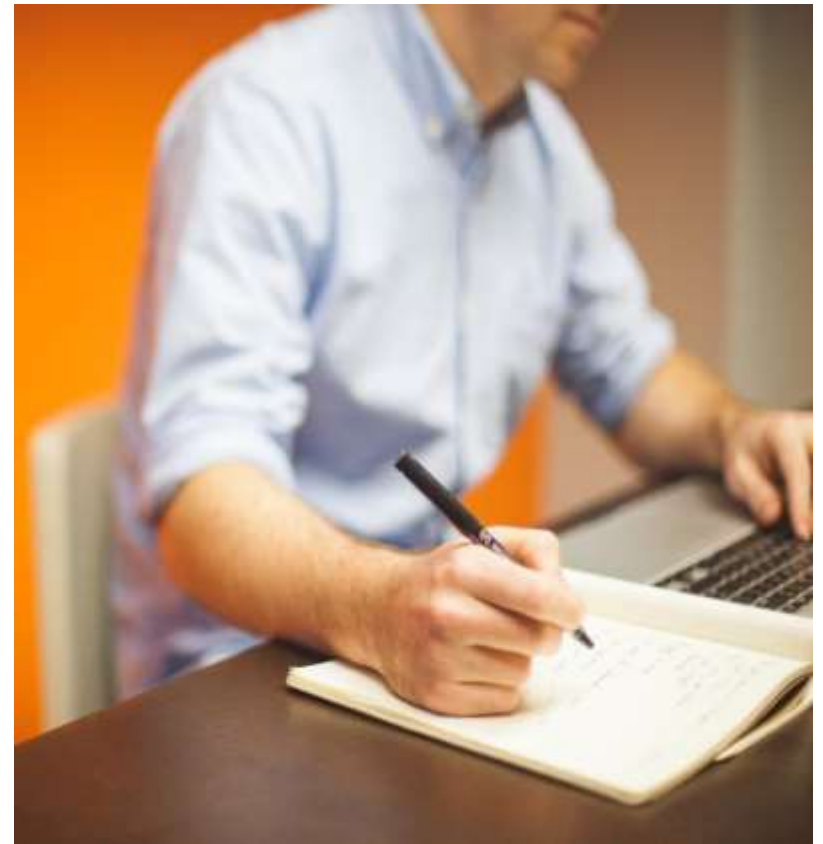


- Technology to be used at a live hearing**
- Issues of relevance of questions and evidence
 - Including rape shield provisions in 34 CFR §106.45(b)(6)

Additional Training Requirements for Investigators



- Issues of relevance to create an investigative report that fairly summarizes relevant evidence



Annual Clery Training



From the Clery regulations:

Proceedings involving sexual assault, dating violence, domestic violence, and stalking must –

- “Be conducted by officials who, at minimum, receive annual training on the issues related to dating violence, domestic violence, sexual assault, and stalking, and on how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability”
- 34 CFR 668.46(k)(2)(ii)

Training Check for Clery



Ensure training for all individuals handling:

- Investigations
- Adjudications
- Appeals

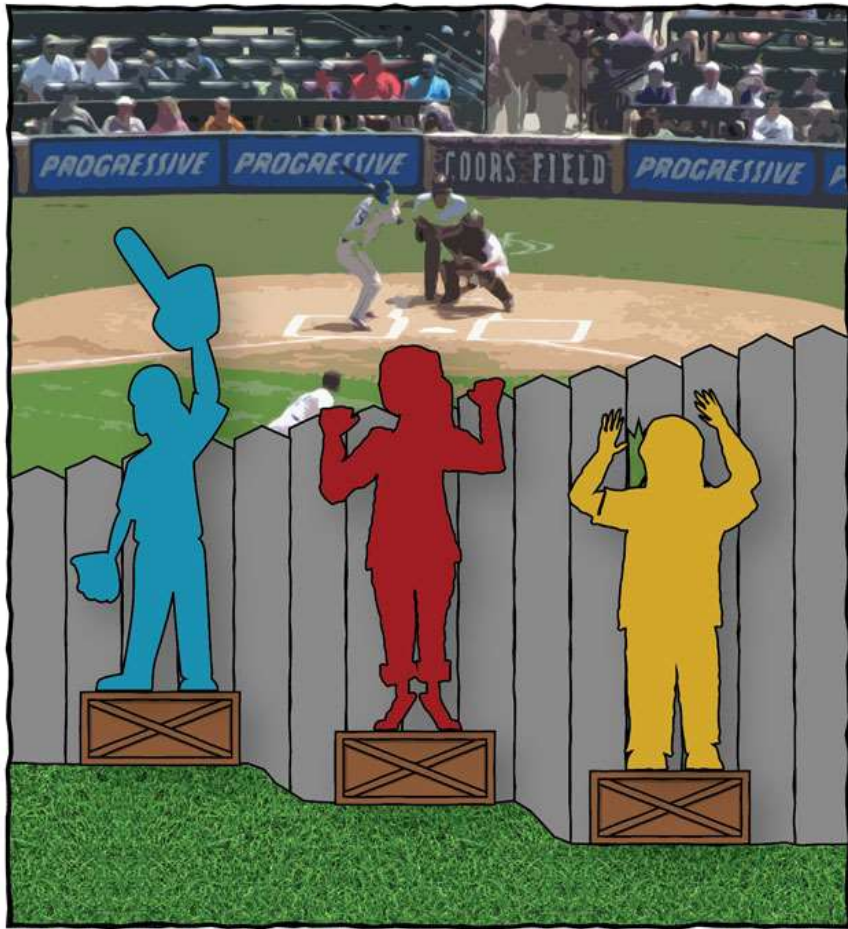
For cases involving sexual assault, dating violence, domestic violence, and stalking, make sure all of the above receive **annual** training

(This includes Title IX team members)



Ethic of Care & Title IX Themes

Title IX is an Equity Statute



EQUALITY



EQUITY

Overview of Themes



Themes - Access



- Title IX is meant to ensure **ACCESS** to your programs and activities, regardless of sex.
- **“What we do for one, we do for the other”** (or at least consider whether it is appropriate under the circumstances)
- Why are you treating someone differently?

Themes - Protect



- We have an obligation to **PROTECT** our campus.
 - **“They are all our students.”**
 - Supportive measures
 - Any action by a recipient that results in changes or removal of access to education for respondents require a process to respond (if interim emergency measure) or engage in live cross-examination (if formal process that could lead to disciplinary action).

Themes - Transparency



- **TRANSPARENCY** is key to trusting the process.
 - Know your grievance process
 - Help them understand next steps.

Themes - Evidence



- We base decisions on **EVIDENCE**.
 - “Don’t weigh your gut.”
 - We can make reasonable inferences and credibility determinations, but be mindful of implicit bias, stereotypes, and using our own behavior as a yardstick.

Themes - Improvement



Always be working to **IMPROVE**:

- Yourself as a neutral
- Your campus as a healthy and fair place to be
- Your policy to provide a better process informed by case law, regulations, guidance, and experience
- Your resources for all involved

Themes – Lack of Bias

- Always be working to **avoid** actual or perceived:
 - Conflicts of interest, and/or
 - **Bias**

Institution Duties and Interests vs. Personal interests

- Your work can impact the lives of others: take periodic self-inventories to be mindful of your activities, involvements, social media, and biases you may have and work to reset them to neutral.

Your Policy



ACCOUNTABILITY TREATMENT DISTRESS
SEXUAL ASSAULT CONDUCT STALKING
DOMESTIC VIOLENCE EXPLOITATION
OFFENSE DATING VIOLENCE
INFORMATION TRAINING
AWARENESS

Title IX Sexual Harassment for Employees and Students

Biggest Font Themes:

- Support
- Awareness
- Prevention
- Intervention

SUPPORT
PREVENTION INTERVENTION
ASSISTANCE HARASSMENT
SAFETY PERSONAL SPACE
COUNSELING APPEALS EVIDENCE
EMOTIONAL
TAKE ACTION
CONFIDENTIALITY
UNDERSTANDING

Your Policy Statement



POLICY STATEMENT

The College is committed to providing an environment in which the rights of students and employees of the campus community are protected while they pursue their education and activities. The College prohibits any form of sex discrimination, including sexual harassment.

Title IX /Sexual Harassment is a broad term encompassing any non-consensual behavior of a sexual nature that is committed by force or intimidation or that is otherwise unwelcome. Sexual harassment may include behaviors such as sexual assault, domestic violence, dating violence, stalking and any other behavior that is non-consensual or that has the purpose or effect of threatening, intimidating, or coercing a person(s). Such actions occurring through the use of social media are also covered under this policy. The policy covers misconduct occurring between members of the same sex or members of the opposite sex.

The Sexual Harassment Policy provides guidance for individuals who want to file a complaint, response to a complaint procedure, supportive measures, investigative procedures, grievance process, live hearing and sanctions and appeal procedures. The policy applies regardless of the complainant or respondent race, gender, disability, age, marital status, religion, color, national origin, sexual orientation or other personal characteristic.

Title IX will address formal complaint for students currently enrolled or employees who are currently employed.

All trained Title IX Team Members will serve impartially, without conflict of interest and bias, including avoiding prejudgment of facts.

The College is required under the Clery Act to issue a timely warning to the College community if a situation poses a serious or ongoing threat to students and employees. The College is required to report sexual assaults, dating violence, domestic violence and stalking incidents in the annual Clery Act report.



Title IX – Law and Regulation

What applies?



The law itself:

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...

(20 U.S.C. 1681 *et seq.*)

Regulations – 34 C.F.R. Part 106

- Athletics, employment, admissions, housing, etc.

The Clery Act & Regulations – 20 U.S.C. 1092(f); 34 C.F.R. 668.46

What else applies?



To the extent they do not conflict with the Regulations:

- 2001 Guidance (Rescinded)
- 2015 – DCL on obligations of TIX Coordinators (Rescinded)
- 2015 – DCL on VAWA Final Regulations
- 2017 – DCL and Q&A – reaffirming 2001 Guidance (Rescinded)

Rolled into or addressed in Regulations.

Court Decisions



- Case Law
 - Supreme Court, federal courts
 - State courts
 - Look to other court decisions for persuasive authority

Title IX Policy



ACCOUNTABILITY
TREATMENT
DISTRESS
CONDUCT
STALKING
SEXUAL ASSAULT
DOMESTIC VIOLENCE
EXPLOITATION
OFFENSE
DATING VIOLENCE
INFORMATION
TRAINING
AWARENESS

Title IX Sexual Harassment for Employees and Students

SUPPORT
PREVENTION
INTERVENTION
ASSISTANCE
HARASSMENT
SAFETY
PERSONAL SPACE
COUNSELING
APPEALS
EVIDENCE
EMOTIONAL
TAKE ACTION
CONFIDENTIALITY
UNDERSTANDING

And of course...



The 2020 Title IX Regulations,
which may be changing

****Look for new regs in Oct. 2023**

(and Title VII and your student conduct code,
as discussed more throughout)

Formal Rulemaking



Preamble/Guidance and the Regulations

Preamble/Guidance:

- Dept. of Ed. Interpretation
- May rely on legal precedent
- Entitled to deference
- Potential for change based on Dept. of Ed. leadership
 - Ex: 2011 Dear Colleague Letter

The Regulations:

- 34 C.F.R. § 106
- Force and effect of law
- Will require notice and comment rulemaking in order to amend

PART 106—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

■ 1. The authority citation for part 106 continues to read as follows:

Authority: 20 U.S.C. 1681 *et seq.*, unless otherwise noted.

2020 Regulations



“Non-negotiable principles” include the right of every survivor to be taken seriously and the right of every person accused to know that guilt is not predetermined.

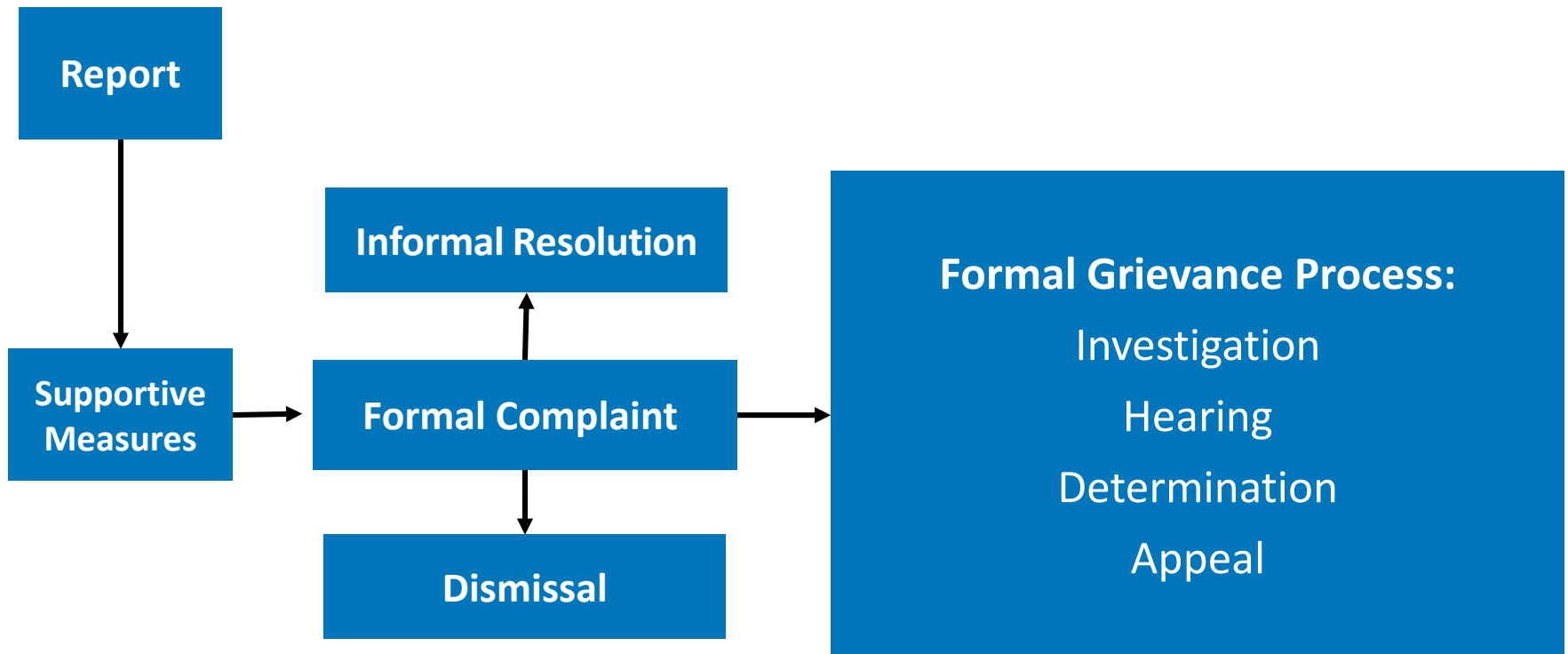
(Preamble, p. 30059 and throughout)

- Training requirements
- Different definitions
- Different processes

- “Complainant” – “an individual who is alleged to be the victim of conduct that could constitute sexual harassment.” §106.30
 - Not just students (employees, guests, visitors)
- “Respondent” – “an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.” §106.30
 - Not just students (employees, guests, visitors)

- “Recipient” – “means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, **any public or private** agency, **institution**, or organization, or other entity, or any person, **to whom Federal financial assistance is extended** directly or through another recipient and which operates an education program or activity which receives such assistance, including any subunit, successor, assignee, or transferee thereof.” §106.2

Flow of the Process



Actual Knowledge



Notice of sexual harassment or allegations of sexual harassment **to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient** (discretion of the postsecondary institution)

- Notice to employees is no longer enough to trigger actual knowledge (ability or obligation to report not enough)
- Purpose to allow complainants to speak with employees without automatically triggering process

Formal Complaint



A document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting the recipient investigate the allegation of sexual harassment

- In response to a formal complaint, a recipient must follow a grievance process (set by 106.45)
- Title IX Coordinator must offer complainant supportive measures (regardless if files formal complaint – if complainant does not want to file a formal complaint)

Formal Grievance Process (1 of 4)



Any provisions, rules, or practices, other than those in the regulations, must apply equally to both parties.

Basic requirements:

- Treat complainants and respondents equitably
- Follow grievance process
- Only impose any disciplinary sanctions against a respondent after grievance process followed

Formal Grievance Process (2 of 4)



- Requires an objective evaluation of all relevant evidence (inculpatory and exculpatory)
- Provide credibility determinations not based upon person's status as complainant, respondent, or witness
- Require individual designated by recipient as Title IX Coordinator, investigator, decision-maker, informal resolution officer, and/or appeals officer be free from conflict of interest or bias

Formal Grievance Process (3 of 4)



- Include presumption that respondent is not responsible for the alleged conduct until a determination regarding responsibility is made through the grievance process
- Include prompt time frames (some discretion)
- Describes range of possible disciplinary outcomes
- Identify the standard of evidence to be used – Hinds CC uses **Preponderance of the Evidence**

Formal Grievance Process (4 of 4)



- Include procedures and bases for complainant and respondent to appeal
- Describe range of supportive measures available to complainants and respondents
- Not require or allow legally privileged evidence absent a voluntary written waiver by the holder of the privilege

Written Notice

(1 of 2)



- Recipient's grievance process and informal resolution process
- Allegations with sufficient time for review with sufficient detail, such as date, location if known
- Respondent presumed not responsible for alleged conduct and determination made at conclusion of grievance process
- Parties may have an advisor of choice

Written Notice

(2 of 2)



- Any provision in recipient's code of conduct that prohibits knowingly making false statements or providing false information during the grievance process
- Additional notification to parties if new allegations arise as apart of the investigation

Dismissal



- Recipient MUST investigate allegations in a formal complaint
- BUT recipient MUST dismiss
 - If conduct alleged would not constitute sexual harassment, even if proven, OR
 - Conduct did not occur within recipient's education program or activity or in the United States

- Only of a formal complaint
- Burden of proof and evidence gathering rests with recipient
- Cannot access, require, disclose, or consider treatment records of a party without that party's voluntary, written consent
- Provide equal opportunity for parties to present witnesses (fact and expert)

- Provide equal opportunity for parties to present inculpatory and exculpatory evidence
- Not restrict ability of either party to discuss or gather and present relevant evidence
- Provide parties same opportunities to have others present during the grievance process, including advisor of choice

- Provide written notice of date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings with sufficient time to prepare
- Provide both parties equal opportunity to inspect and review any evidence obtained in the investigation – recipient must send to party and party's advisor with at least 10 days to submit a written response before completion of investigation report

- Recipient must make all such evidence subject to inspection and review at any hearing
- Create an investigation report at least 10 days before a hearing that fairly summarizes the relevant evidence and send to each party and party's advisor

Hearings



- Must provide a live, cross-examination hearing
- Parties must have an advisor and the recipient must provide an advisor for a party if the party does not have one
- Advisors ask only relevant cross-examination questions—no party-on-party questioning
- May be virtual, but must be recorded or transcribed

Determinations

(1 of 3)



- Decision-maker (not Title IX Coordinator or investigator) must issue a written determination regarding responsibility
- Must include
 - Allegations
 - Procedural steps taken from receipt of formal complaint

Determinations

(2 of 3)



- Findings of fact
- Conclusions
- Statement of and rationale for each result of each allegation, including determination of responsibility and any disciplinary imposition and whether remedies designed to restore or preserve access to educational program or activity will be provided to complainant

Determinations

(3 of 3)



- Procedures and bases for appeal by both parties
- Provide written determination to parties simultaneously

- Recipient must offer to both parties the following bases of appeal:
 - Procedural irregularity that affected outcome
 - New evidence not reasonably available at the time regarding responsibility or dismissal that could affect outcome
 - Conflict of interest or bias by the Title IX Coordinator, investigator, and/or decision-maker that affected the outcome

- The decision-maker for the appeal cannot be the same decision-maker from the hearing, or the Title IX Coordinator or investigator
- Must provide both parties a reasonable, equal opportunity to submit a written statement in support of or challenging the determination
- Must issue a written decision describing the result of the appeal and rationale and provide the decision simultaneously to the parties

- At any time prior to the determination regarding responsibility, the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication
- Recipient cannot require this and also cannot offer unless a formal complaint is filed

- Recipient can offer informal resolution if:
 - Provides written notice to the parties
 - Obtains the parties' voluntary, written consent to the informal process
 - Does not offer for employee sexual harassment of a student

Retaliation



RETALIATION IS PROHIBITED

Title IX will keep confidential the identity of complainants, respondents and witnesses, except as may be permitted by FERPA, as required by law, or as necessary to carry out a Title IX proceeding.

Retaliation is defined as conduct intended to interfere, stop or intimidate any person involved with resolution and investigation of a report. Retaliation against an employee, student or non-student for filing a sex discrimination, which includes sexual harassment complaint, or participation in the investigation of a report, is a violation of the law and is strictly prohibited. The College will take appropriate student conduct action, may file criminal charges, and may invoke academic dismissal if retaliation occurs.

- 9 -

- Slightly different than regulatory language
- According to the regulations, “recipients” may also engage in retaliation
- Coordinators, watch for this
 - “... including charges of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination...”
- 34 CFR 106.71(a)

Confidentiality



Recipient **must keep confidential the identity of any individual** who has made a report or complaint of sex discrimination, including any individual who made a report, any complainant, any alleged perpetrator, any respondent, and any witness, **unless required by law**, permitted by FERPA, or **for the purposes of carrying out Regulations grievance process**.

- 34 CFR 106.71(a)

Jurisdictional Changes



- No obligation under Title IX to address off-campus conduct that does not involve a program or activity of school, BUT...
 - What about your ethic of care?
 - What does your community expect?
 - On-campus sexual assault versus off-campus sexual assault example

- A recipient with actual knowledge of sexual harassment in an educational program or activity of the recipient against a person in the United States, **must respond promptly in a manner that is not deliberately indifferent.**
- A recipient is only deliberately indifferent if its response to sexual harassment is unreasonable in light of known circumstances.

“Education program or activity”

“includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.”

§106.30(a)

Education Program or Activity



Locations, events, or circumstances with substantial control – the easy ones:

- Residence halls
- Classrooms
- Dining halls

Off Campus?

(1 of 2)



Any of the three conditions must apply to extend Title IX jurisdiction off campus:

- (1) Incident occurs as part of the recipient's "operations" (meaning as a "recipient" as defined in the Title IX statute or the Regs 106.2(h));
- (2) If the recipient exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus; and

Off Campus?

(2 of 2)



(3) Incident occurred in an off-campus building owned or controlled by a student organization officially recognized by a post secondary institution

- Discussion specifically addresses off campus sorority and fraternity housing and, as long as **owned by or under control of organization that is recognized by the postsecondary institution**, it falls within Title IX jurisdiction
- Must investigate in these locations (30196-97)

Not an Education Program or Activity



Locations, events, or circumstances without substantial control:

- **Anything** outside of the United States;
- Privately-owned off campus apartments and residences that do not otherwise fall under the control of the postsecondary institution (example: privately owned apartment complex not run by a student organization)

Fact-Specific Analysis



Education Program or Activity?

Depends on fact-specific analysis for “substantial control”:

- Conventions in the United States?
- Holiday party for an academic department?
- Professor has students over to house?

“In an educational
program or activity”?

Jurisdictional Hypotheticals Disclaimer



Disclaimer: The following hypotheticals are not based on any actual cases we have handled or of which we are aware. Any similarities to actual cases are coincidental.

Jurisdictional Hypotheticals Questions



For each of the following hypotheticals, you will need to determine whether there is jurisdiction under the Title IX Regulations based on the facts as provided.

After review of each hypothetical, you will be prompted to answer by voting whether:

- Yes, there is jurisdiction
- No, there is not jurisdiction
- I need more information

Think Through the Elements



- In an educational program or activity?
- In the United States?
- On campus?
- If off campus,
 - Did the institution exercise substantial control over Respondent and the context?
 - Off campus building owned or operated by recognized student group?

Jurisdiction Hypothetical 1

- Sarah, a student, informs the Title IX Coordinator or designee that she was sexually assaulted at a party over the weekend, by another student she knows, James.
- Sarah states that the party and assault occurred at Terrance Manor apartments.
- Sarah believes this is part of campus.
- Terrance Manor apartments is a complex directly behind the university and sits in between two university-owned senior apartment complexes, but Terrance Manor is owned by a private landlord.

Jurisdiction Hypothetical 2

- Jessi, a student, informs the Title IX Coordinator or designee that a stranger sexually assaulted him at a fraternity party over the weekend.
- The fraternity house is affiliated with the university, but the university does not own the house and the house is located off-campus.

Jurisdiction Hypothetical 3

- The university has partnered with the city for an improvement district along the main street that runs through campus.
- The improvement district removes and rebuilds buildings on the street, oversees the cleanliness of the sidewalks, and has a task force that patrols the area on bicycles to deter crime.
- Alex, a student, informs the Title IX Coordinator or designee that a stranger sexually assaulted her on the main street in front of campus over the weekend.

Jurisdiction Hypothetical 4

- Enrique, a student, calls the Title IX Coordinator or designee frantically from Italy, where he is enrolled in the university's "Italy Program," in which professors and students from the university hold courses at a sister university in Italy.
- Enrique states that one of the university's professor's told Enrique that he could only get an A in the course if he slept with the professor.

Jurisdiction and Mandatory Dismissal

(1 of 3)



Dismissal of a formal complaint— §106.45(b)(3)(i)

The recipient **must** investigate the allegations in a formal complaint.

(BUT) If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in §106.30 even if proved, did not occur in the recipient's **education program or activity**, ...

Jurisdiction and Mandatory Dismissal

(2 of 3)



or did not occur against a person in the United States,

Jurisdiction and Mandatory Dismissal

(3 of 3)



then the recipient **must** dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; **such a dismissal does not preclude action under another provision of the recipient's code of conduct.**

Study Abroad Programs



- Draws a bright line-not outside of the United States: plain text of Title IX “no person in the United States,” means no extraterritorial application. Must dismiss. (Preamble, pp. 30205-06)
- Programs of college based in other countries? No jurisdiction and must dismiss.
- Foreign nationals in the United States covered.

Online Study



- “Operations” of the recipient may include computer and online programs and platforms “owned and operated by, or used in the operation of, the recipient.” (Preamble, p. 30202)
- Still has to occur in educational program or activity
- And in United States...

Mandatory Dismissals for TIXCs



- Would not constitute sexual harassment even if proved
 - New definitions for *quid pro quo*, unwelcome conduct, Clery crimes
- Did not occur in the recipient's education program or activity
- Did not occur against a person in the US

Discretionary Dismissals for TIXCs



- Complainant notifies TIXC in writing they would like to withdraw the formal complaint
- Respondent is no longer enrolled or employed by the recipient
- Specific circumstances prevent the recipient from gathering sufficient evidence

Dismissal/Referral \neq Merit



Preamble, p. 30214

- Permitting recipient to dismiss because they deem allegation meritless or frivolous without following grievance procedure would defeat the purpose of the regulations
- Don't base this decision on your opinion of the merits



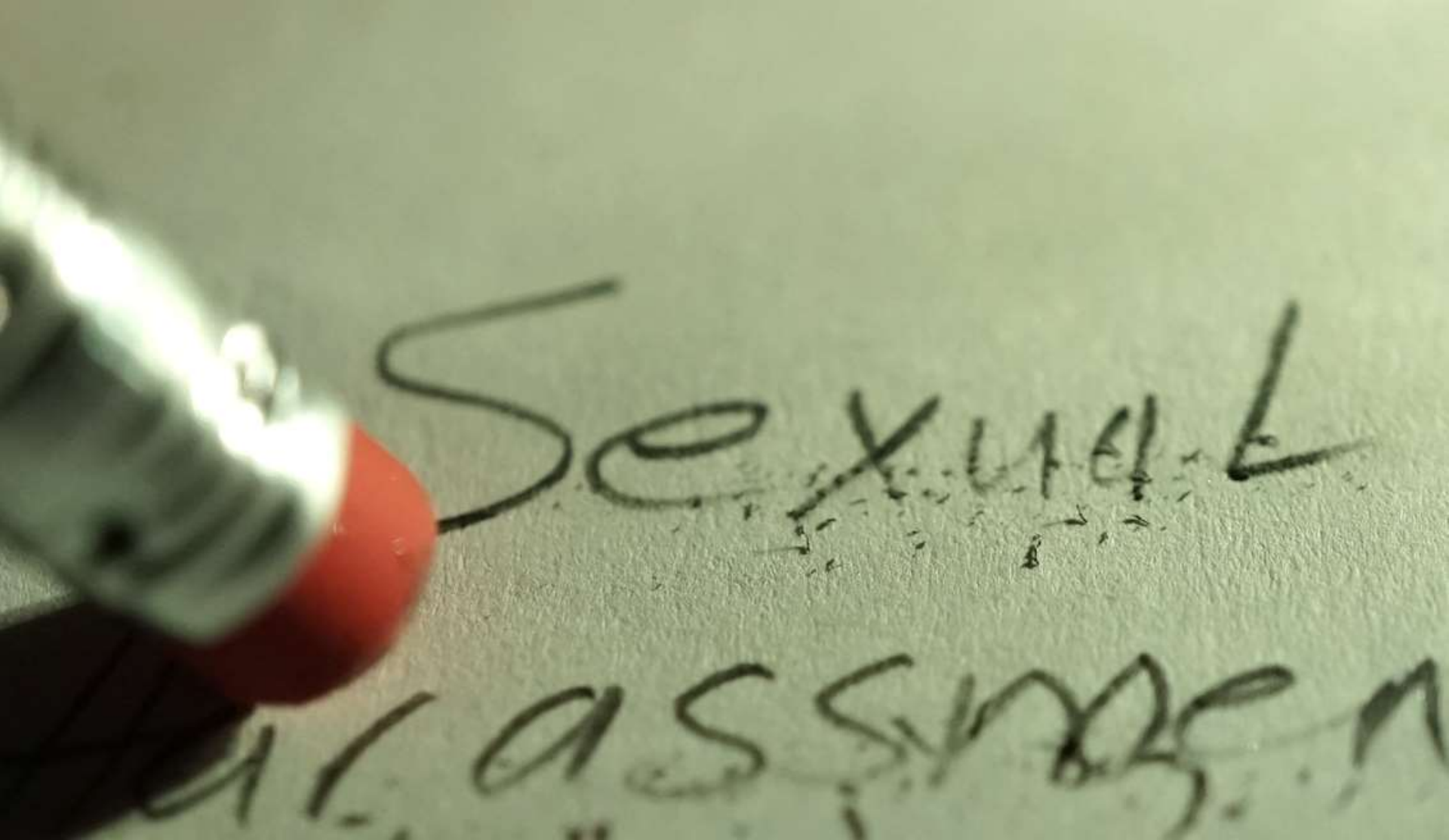
Notice & Timing



34 C.F.R § 106.45(b)(3)



- Must promptly send written **notice** of dismissal/**reasons** simultaneously to the parties
- Jurisdictional issues can arise **at any time**, even during the investigation



Title IX Sexual Harassment Definitions

Sexual Harassment



According to the Regulations (34 CFR 106.30(a)):

- **Sexual harassment** means conduct on the basis of sex that satisfies one or more of the following:
 - [**Quid pro quo Harassment**] An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
 - [**Unwelcome Conduct Harassment**] 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
 - [**Clery crimes**] Sexual assault, dating violence, domestic violence, or stalking

Sexual Harassment:

Quid Pro Quo



- Only applies to employee respondents (can be any complainant)
- DOE interprets this broadly to encompass implied *quid pro quo*
- No intent or severe or pervasive requirements, but must be unwelcome
- “[A]buse of authority in the form of even a single instance...is inherently offensive and serious enough to jeopardize educational access...” Preamble, p. 30147.

Sexual Harassment: *Unwelcome Conduct*



- New definition for most institutions – comes from two court cases relied upon by the Department
- The second prong: **severe, persistent, and objectively offensive** and deny equal access (which is not the same as under Title VII)
- Does not require intent
- Reasonable person standard – means a reasonable person in the shoes of the complainant (Preamble, p. 30159)

Severe



- Takes into account the circumstances facing a particular complainant
- Examples: age, disability status, sex, and other characteristics
- Preamble discussion states that this removes the burden on a complainant to prove severity (Preamble, p. 30165)

- Preamble indicates pervasive must be more than once or involve more than one bad actor (Preamble, pp. 30165-66)
 - Examples in the Preamble include revenge porn that is widely disseminated or a conspiracy by a group
- Preamble reminds us that quid pro quo and Clery/VAWA (domestic violence, dating violence, stalking) terms do not require pervasiveness

Objectively Offensive



Reasonable person is very fact-specific (Preamble, p. 30167)

- Because so fact-specific, different people could reach different outcomes on similar conduct, but it would not be unreasonable to have these different outcomes
- Preamble notes that nothing in the Regulations prevents institutions from implicit bias training

Sexual Harassment Considerations



The preamble notes that the Regulations do not prohibit postsecondary institutions from:

- Publishing a list of situations that would violate Title IX as “sexual harassment”
- Advising when similar conduct has been found to violate Title IX
- Publishing a list of situations that would violate code of conduct (Preamble, p. 30158)

Applies to Employees

(1 of 3)



- This was unsettled in most Circuits
- Title IX regulations made it clear
 - Commentary notes that “severe or pervasive” definition (Title VII) shouldn’t apply because elementary, secondary, and postsecondary schools are unlike the adult workplace.
 - *Davis* – 5th grade students
 - Instead - “**severe, pervasive, and objectively offensive**”
- Due Process protections found in § 106.45 (live hearing, advisors, cross-examination) apply to employees, not just students (Preamble, p. 30440)

Applies to Employees

(2 of 3)



The preamble clarified:

- Recipients that are subject to both Title VII and Title IX must comply with both (Preamble, p. 30440)
- “Deliberate Indifference” standard “most appropriate” for both Title VII and Title IX (Preamble, p. 30440)
- Because Title IX recipients are “in the business of education”
- “Marketplace of ideas” makes postsecondary institutions special

Applies to Employees

(3 of 3)



- Conflicts between Title VII and Title IX noted by Commenters:
 - Formal complaint requirement
 - Notice requirement
 - Deliberate Indifference Standard (noted above)
 - Definition of Sexual Harassment
 - Live hearing (as opposed to notice and opportunity to respond)

“Clery Crimes”



- Disclaimer: this section uses the terms “rape,” “victim,” and “perpetrator” - terms more commonly used in the criminal process
- Sources:
 - **Sexual assault** is defined as forcible and non-forcible sex offenses as defined in the FBI’s Uniform Crime Reporting (UCR) database, which you can find in the National Incident-Based Reporting System (NIBRS) manual
 - **Dating violence, domestic violence,** and **stalking** definitions are from Clery statute (not regulations) as amended by VAWA
- Remember – must be on the basis of sex to fall under Title IX jurisdiction

Your Policy Definition of “Sexual Assault”



Sexual Assault is any attempted or actual sexual act directed against another person without consent of the victim, including instances where the victim is incapable of giving consent.

Types of Sexual Assault identified in your Policy:

- Rape
- Fondling
- Incest
- Statutory Rape

Rape is 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. This offense includes the rape of both males and females.

- Fondling is the touching of the private parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.
- Incest is sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
- Statutory Rape is sexual intercourse with a person who is under the statutory age of consent.

Your Policy Definition of “Dating Violence”



Dating Violence is violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. The existence of such a relationship shall be determined based on the complainant statement and with consideration of the length of the relationship, the type of relationship and the frequency of interaction between the persons involved in the relationship. For the purpose of this definition:

- Dating Violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
- Dating violence does not include acts covered under the definition of domestic violence.

Your Policy Definition of “Domestic Violence”



Domestic Violence is violence committed:

- By a current or former spouse or intimate partner of the victim;
 - By a person with whom the victim shares a child with;
 - By a person who is live together, or has lived together, the victim as a spouse of intimate partner;
 - By a person similarly situated to a spouse of the victim under the domestic or family violence laws of jurisdiction in which the crime of violence occurred.
 - By any other against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.
-
- Remember that to qualify as “sexual harassment” under Title IX, it must be domestic violence conduct “on the basis of sex.” Therefore, it may be very hard for something to qualify as “sexual harassment” for Title IX under this fifth bullet point.
 - If domestic violence isn't on the basis of sex, the institution must still have a policy that prohibits it and deals with it according to the procedures dictated in the Clery regulations.

Your Policy Definition of Stalking



Stalking is engaging in a course of conduct directed at a specific person that cause a reasonable person to:

- Fear for the person's safety or the safety of others; or
- Suffer substantial emotional distress. For the purpose of this definition:
 - (1) Course of conduct means two or more acts, including, but limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, interferes with a person's property.
 - (2) Reasonable person means a reasonable person under similar circumstances and with similar identities to the victim.
 - (3) Substantial emotional distress means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling,

- Remember that to qualify as “sexual harassment” under Title IX, it must be stalking conduct “on the basis of sex.”
- If stalking isn't on the basis of sex, the institution must still have a policy that prohibits it and deals with it according to the procedures dictated in the Clery regulations.

Is this Sexual Harassment under Title IX?



- Disclaimer: The following hypotheticals are not based on any actual cases we have handled or of which we are aware. Any similarities to actual cases are coincidental.
- For each of the following hypotheticals, you will need to determine whether the allegations, if proven true, would constitute sexual harassment under the Title IX Regulations based on the facts as provided. Assume jurisdiction exists.
- After review of each hypothetical, you will be prompted to answer by voting whether:
 - Yes, this is Title IX sexual harassment
 - No, this is not Title IX sexual harassment
 - I need more information

Title IX Sexual Harassment

Hypo #1



- Wendy and Cody are dating. Wendy believes that Cody is emotionally manipulative and calls the Title IX office to report him.

Is this Title IX Sexual Harassment?

Title IX Sexual Harassment

Hypo #2



- During her initial Title IX meeting, Wendy reports that Cody often yells at her and gets very jealous when she talks to other guys.

Is this Title IX Sexual Harassment?

Title IX Sexual Harassment

Hypo #3



- Wendy said that during a recent fight, which was one of their worst fights ever, Cody called her “psychotic,” accused her of being jealous and controlling, told her she was “worthless,” referred to her as a “bitch,” and said that he never really loved her.

Is this Title IX Sexual Harassment?

Title IX Sexual Harassment

Hypo #4



- Wendy tells her best friend and roommate, Rachel Rex, that she feels Cody is abusive. Rachel feels compelled to tell the other women in their residence hall to stay away from Cody because of his “abusive tendencies.”

Is this Title IX Sexual Harassment?

Title IX Sexual Harassment

Hypo #5



- Wendy tells her best friend and roommate, Rachel Rex, that she feels Cody is abusive. Rachel feels compelled to tell the other women in their residence hall to stay away from Cody because of his “abusive tendencies.”

Is this Title IX Sexual Harassment?

Title IX Sexual Harassment

Hypo #6



- At a recent fraternity party, Rachel stands near to Cody (to keep an eye on him) and sees him talking to a young woman she doesn't recognize. In an effort to get the young woman's attention over the loud music, Rachel yells, "I feel sorry for the person who dates Cody next since he's known to be an abusive boyfriend!" There are at least 10 people standing nearby who hear Rachel's comment.

Is this Title IX Sexual Harassment?

def.i.ni being wrong, *been wrong about Diana.* | It's not worth that much
"No, definitely not!" —see OF COURSE (USAGE)
(USAGE)
def.i.ni.tion /,defɪˈnɪʃən/ **n** 1 [C] a phrase or
that says exactly what a word, phrase, or idea
definition in a dictionary | [+ of] No one has
with a satisfactory definition of terrorism.
nition if something has a particular quality
definition, it must have that quality because all
type have it: A message that cannot be seen
definition, not effective. 3 [U] the degree
thing such as a picture, sound etc is
nition The photograph lacks definition
fin.i.tive /dɪˈfɪnɪtɪv/ **adj** 1 [usu
book, study of something
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Discretionary Definitions that Affect Your Process

Discretionary: Consent, Coercion, Incapacitation, Exploitation



- Discretion is left to the institution on consent, coercion, and incapacitation, which, as we will discuss, allows institutional discretion on the extent of these violations, especially under “sexual assault”

Your Policy Definition of Consent



Consent is a voluntary (freely given) informed agreement through mutually understandable words or actions indicating a willingness to engage in sexual activity.

- Consent cannot be given by someone who is incapacitated.
- Past consent does not imply current or future consent.
- Silence or absence of resistance does not imply consent.
- Consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another person.
- Consent can be withdrawn at any time.
- Coercion, force, or threat of either invalidates consent.

Evidence of Consent?

(1 of 2)



- What words or actions did complainant use to convey consent/non-consent?
 - Must examine sexual contacts, acts in detail
- Was complainant capable of consenting?
(Asleep? Passed out? Not understanding what was happening?)

Evidence of Consent?

(2 of 2)



- Who took off what clothes?
- Who provided the condom?
- Who initiated physical contact?
- Who touched who where?
- “They gave consent” = What did you say to them, and what did they say to you?

Coercion, generally



- Often considered to be unreasonable pressure for sexual activity
 - Not defined in your policy but referenced in the definition of consent
- Compare: “I will break up with you” versus “I will kill myself”

Your Definition of Incapacitation



Incapacitation is when a physically helpless person is considered to be one who is asleep, unconscious or for any other reason unable to communicate unwillingness to engage in any act. A mentally incapacitated person may be one who is under the influence of alcohol or a drug or who is mentally incapable of understanding the implications and consequences of any act.

- Physically helpless – asleep, unconscious, unable to communicate unwillingness to engage
- Not the same as being intoxicated – often misunderstood
 - Intoxicated people **can** consent. Incapacitated people **cannot** consent.

- Nothing in the Regulations precludes a postsecondary institution from providing amnesty to students for personal alcohol and/or drug use when participating in a Title IX investigation

Incapacitation

(1 of 2)



- Determined by how the alcohol (or drugs) consumed impacts a person's decision-making capacity, awareness of consequences, and ability to make informed judgments
- Beyond mere intoxication
- No requirement for incapacitation to be voluntary or involuntary on the part of the complainant

Incapacitation

(2 of 2)



- To be responsible where a complainant is incapacitated, policies typically require that the **respondent knew or reasonably should have known about the incapacitation**
- Incapacitation of the respondent is not a defense
- We will discuss incapacitation in more detail for each of the roles we are discussing today (Title IX Coordinators, investigators, decision-makers, appeals officers)



Title IX Investigations

Remember: The Roles of the Investigator



1. The **gatherer** of all relevant evidence
2. The **organizer** of all relevant evidence

Your Policy on Investigations



INVESTIGATION

- The complainant and the respondent will be scheduled separate times to meet with the investigation team to discuss their statements.
- The complainant and the respondent will be allowed to have their advisor present during the investigation meeting.
- The complainant and the respondent will have an equal opportunity to present fact witness(es), and other inculpatory and exculpatory evidence.
- Prior to the completion of the investigative report, the investigation team will send a copy to the complainant and the respondent as well to their advisors, if any, all evidence obtained that is directly related to the complaint to review.
- The complainant and the respondent has ten days to submit a meaningful written response, which the investigator will consider prior to completion of the investigative report.
- The Title IX Coordinator/Lead Deputy Title IX Coordinator will review the investigation report and make a determination whether dismissal is appropriate.

Investigative Techniques

(1 of 3)



- Initial Review
- Begin Evidence List
- Begin Witness List
- Prepare Questions for Each Witness
- Organizing for Interviews
- Note-Taking Tips
- Setting Up Interviews

Initial Review



- Review notes and information collected by the Title IX Coordinator
- Review Notices to Complainant and Respondent
- Review Policy/Code of Conduct
- Define Scope of Investigation
 - What elements do you think will be disputed?
 - Agreed upon?

Track Your Evidence



- If there is a criminal investigation, work with law enforcement to collect and preserve evidence

Types of evidence

- Electronic communications
- Security information

- Pictures, videos, audio
- Police reports
- Personnel files
- Prior complaints against respondent

Begin Witness List



- If there is a criminal investigation, work with law enforcement to ensure permission to question witnesses
- Who should be included?
- Who should NOT be included?
- In what order should the witnesses be interviewed?
- Be flexible

Craft Questions for Each Witness



- Refer to the policy
- Consider what information they are likely to have related to each element
- Consider what information they are likely to have that may assist the decision-maker in determining credibility
- Be flexible

Organizing for the Interview



- What should you have with you?
 - Intake Report
 - Written notice with allegations
 - Pre-prepared questions
 - Evidence you may need to reference or show witness
 - Policy or Handbook

Note-taking Tips



- Use predictable symbols in the margin to easily skim during the interview:
 - **?** ← Follow-up questions
 - ***** ← Potential evidence
 - **W** ← Potential witness
- Try to record exact quotes when possible
- Interview notes are now required to be produced as part of the record

Remember: The gatherer of relevant evidence



- To ensure burden of proof and burden of gathering evidence is not on the parties (106.45(b)(5)(i))
- To provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory or exculpatory evidence (106.45(b)(5)(ii))
- Not restrict the ability of either party to discuss the allegations under investigation or to gather or present relevant evidence (106.45(b)(5)(iii))

Setting Up the Interview

(1 of 2)



- Identify yourself, your role, and a general outline of what you're investigating
- Consider requesting the TIX Coordinator check in with those who fail to respond or refuse to participate
- Don't give up on the interview till you've tried several times, in at least 2 different methods

Setting Up the Interview

(2 of 2)



You must now provide any party whose participation you seek, with written notice (email) with “sufficient” time to prepare:

- Date
- Time
- Location
- Participants
- Purpose of interview or meeting

(106.45(b)(5)(v))

Investigative Techniques



- Set the Stage for the Interview
- Begin Broadly
- Freeze Frames
- Ask Follow-Up Questions
- Credibility
- When Consent is at Issue
- Closing the Interview

Set the Stage



- Make introductions
- Be hospitable
- Give overview of why they are being interviewed
- Explain retaliation policy
- Explain the amnesty policy
- Invite questions about the process

Begin Broadly



- Elicit a monologue about the incident
 - What happened earlier that day before the incident?
 - What happened with regard to the incident?
 - What happened next?

Freeze Frames



- Ask the witness to “freeze” on the moment and describe details
 - What could they see? Feel? Smell? Taste? Hear?
 - Where was the other person? How were they positioned?
 - Where were you? How positioned?
 - What did you say to the other person? Them to you?
 - Describe other person’s tone, demeanor, body language

Ask Follow-Up Questions



- Re-review your notes
- Re-review the elements of each charge
 - Have you elicited all of the information this witness might have about each element?
 - Do you have an understanding of how the witness obtained the information they shared?

Credibility



- Gather facts to assist **decision-maker**
- Ask questions to test memory
- Ask follow-up questions that may resolve disputed factual issues
- Identify where the witness may corroborate or contradict their testimony, or other witnesses, and physical evidence
- Be sensitive to potential trauma experienced by witnesses

When Consent is at Issue



- Consider the wording and tone of your questions
- Utilize “freeze frame” strategy
- Ask questions about what happened to determine whether there was unspoken consent
- Ask questions to identify whether alcohol/drugs may have played a role regarding consent

Investigating Incapacitation



- Did they take any medications that might have interacted with alcohol or otherwise affected their level of intoxication?
- Did they take any drugs that may have altered their ability to stay awake, understand what was happening, etc.?
- What, how much, and when?
- Remember: can have amnesty in your policy for personal drug and alcohol use (also a good way to avoid institutional retaliation!) at 30536

Ask about Physical Effects:

- Conscious or unconscious?
- Vomiting?
- Slurred speech
- Difficulty walking
- Difficulty holding a coherent conversation

Closing the Interview



- Closing questions
- Request copies of all evidence potentially available to the witness
- Discuss confidentiality - but do not prohibit a party from discussing allegations
- Inform the witness of next steps and how to reach you

Investigative Techniques

(3 of 3)



- After an Interview
- Physical Evidence
- Advisors/Support Persons
- Inspection & Review of Evidence
- Create Investigative Report

After the Interview



- Update investigation log
- Review notes, make corrections/clarifications
- Update witness list
- Update list of evidence to be obtained
- Write down questions to ask other witnesses
- Consider whether appropriate to send email
- Consider whether there are additional allegations that you need to bring to the Title IX Coordinator
- Ensure you are not leaving the burden of proof on any party or witness alone (106.45(b)(5)(i))

Physical Evidence



- Follow up on anything identified during interviews
- Is law enforcement involved? Could they be?
- Ensure physical evidence is in a secure location and documented in the investigation log

What about advisors or support persons in interviews?



Must provide parties the same opportunity to be accompanied by the advisor of their choice

- Nothing in the preamble prohibits support persons in the interview process (this is different at the hearing)
- Allowed to limit participation of advisor in process
- Whatever rules your institution selects, apply them equally to both parties

(106.45(b)(5)(iv))

Inspection and Review of Evidence



Provide ALL Evidence to both parties and advisors

- Include everything related to allegations, even if you don't expect decision-maker to rely on it
- Allow 10 days to review
- Allow written response
- Follow up where necessary
- Consider responses when preparing report

(106.45(b)(5)(vi))

Create Investigative Report



- Summarize **facts**
- No determination
- Provide to parties and advisors
- Allow 10 days to review prior to hearing

The new Regulations provide that the investigator must create a report that:

- Fairly summarizes relevant evidence (34 CFR 106.45(b)(5)(vii))

What does this mean?

Start with the basic information



Identify with just factual information:

- Complainant
- Respondent
- Investigator
- Witnesses
 - Perhaps organize by fact v. expert witnesses or by party whom requested the witness

Consider general organization



Natural and neutral organization suggestions:

- Chronological order
- By topic or allegation
 - Perhaps by chronology within each topic or allegation
- By chronology of how the information came in to the investigation
- By witness summary

Explain how organized



Explain your structure. Example:

“The information in this report is a summary of the facts as agreed upon by the parties and the witnesses. Where there is a difference in the accounts, it is noted in the report. For the sake of clarity, the report is organized chronologically and by subject matter when appropriate.”

Other basic information to include



- Basic description of charges
- How did the complaint make its way to an investigation?
- Witnesses Interviewed
- Witnesses Not Interviewed (and why)
- The procedure followed, step-by-step
- Any procedural anomalies that need explained?

Identification of witness sign-off



If this is your practice:

“Each person interviewed was provided with a written copy of a summary of their interview, and was given an opportunity to provide feedback and approve the accuracy of the summary.”

- Did everyone do so?

A statement regarding relevant evidence



“All relevant information gathered during the course of the investigation has been included in this report.”

- Identify if you thought something was not relevant and why – consider still including in attachment for decision-maker
- Provide a table or list of all relevant evidence gathered and attach that evidence

Identify and include all alleged policy violations



- Definition of prohibited conduct alleged from applicable policy
- Related definitions as appropriate (e.g. consent, incapacitation) or any code of conduct included if done together
- Include verbatim, in entirety

Give an Overview of the Evidence Collected



and

Attach as appendices any statements
and important evidence

Be helpful to reviewers – keep it transparent



- Citations to the record – always
 - Be helpful for your decision-makers!
- Hearing packet or exhibits – helpful to number the pages sequentially for easy citation
- Insert into the report screenshots of text messages and pictures where relevant
- If information is attached but not referred to in a summary, may want to drop a footnote explaining why not

What not to include in report (but note requested and why not included)

(1 of 3)



The specific type of evidence deemed not relevant in the Regulations:

- Information protected by a legally recognized privilege
- Party's medical, psychological, and similar records unless voluntary written consent
- Rape Shield protection for Complainant

What not to include in report (but note requested and why not included)

(2 of 3)



If evidence is requested by a party and/or you determine it is not relevant,

- **always** explain that it was requested, and
- **why** you determined it was not relevant.

Speaking of relevance...



Issues of Relevance

What is Relevant?



From the Regulations...

- No definition of relevance

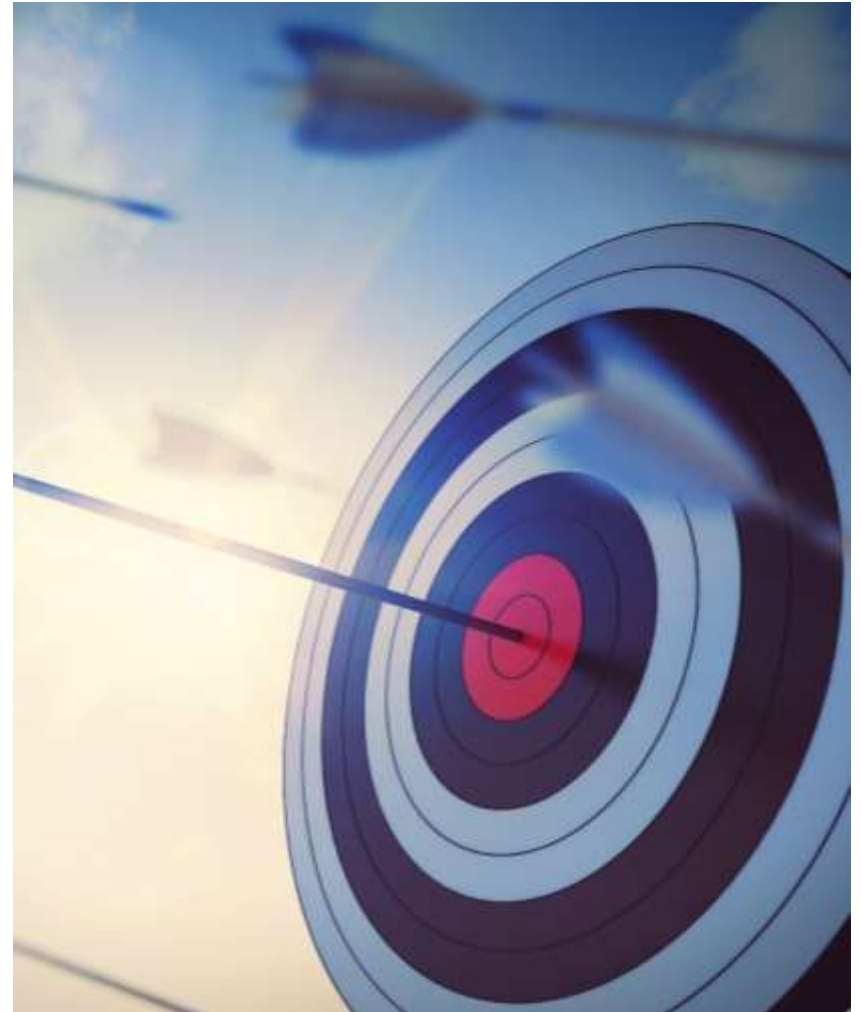
But What *is* Relevant?



From the Preamble...

- The preamble discussion indicates relevance may include: evidence that is “**probative of any material fact concerning the allegations.**” (Preamble, p. 30343)
- “[E]vidence 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)” (Preamble, p. 30294)

Relevancy Visuals



Issues of Relevance (NOT Rules of Evidence)

(1 of 2)



- The Rules of Evidence do **NOT** apply and **CANNOT** apply
- “The Department appreciates the opportunity to clarify here that the final regulations **do not allow a recipient to impose rules of evidence that result in the exclusion of relevant evidence**; the decision-maker must consider relevant evidence and must not consider irrelevant evidence.” (Preamble, p. 30336-37)

Issues of Relevance (NOT Rules of Evidence)

(2 of 2)



- Cannot *per se* exclude certain types of evidence:
 - A recipient may not adopt rules excluding certain types of relevant evidence (**lie detector** or rape kits) where that type of evidence is not labeled irrelevant in the regulations (e.g., sexual history) or otherwise barred for use under 106.56 (privileged) and must allow fact and **expert witnesses**. (Preamble, p. 30294)

NOT Rules of Evidence

What does that mean?



- Cannot exclude redundant evidence
 - Cannot exclude character evidence
 - Cannot exclude hearsay
 - Cannot exclude evidence where the probative value is substantially outweighed by the danger of unfair prejudice (Preamble, p. 30294)
- Cannot rely on a statement against a party interest (Preamble, p. 30345)
 - Cannot rely on a statement of deceased party (Preamble, p. 30348)

What isn't relevant?



- Information protected by a legally recognized privilege
- Party's medical, psychological, and similar records unless voluntary written consent
- Party or witness statements that have not been subjected to cross-examination at a live hearing

Relevancy: Medical treatment and Investigations



Section 106.45(b)(5)(i): when investigating a formal complaint, recipient:

- “[C]annot access, consider, disclose, or otherwise use a party’s records that are made or 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 process under this section.**”

Relevancy: Legally Privileged Information



Section 106.45(b)(1)(x):

- A **recipient's** grievance process **must...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.

Relevancy: Legally Privileged Information – What does this include?



- Preamble identifies medical and treatment records
- Jurisdiction-dependent
 - Attorney-client communications
 - Implicating oneself in a crime
 - Confessions to a clergy member or other religious figures
 - Spousal testimony in criminal matters
 - Some confidentiality/trade secrets

Issues of Relevancy: What isn't relevant? – Rape Shield Provision



- Evidence about **complainant's** prior sexual history (must exclude) unless such questions/ evidence:
 - are offered to prove that someone other than the respondent committed the conduct, or
 - if the questions/evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

Rape Shield Provisions

(Cont.)



- Rape shield protections do not apply to Respondents
 - Plain language of the regulations concerns “complainant’s sexual predisposition or prior sexual behavior” only (34 CFR 106.45(b)(6))
 - “The Department reiterates that the rape shield language...does not pertain to the sexual predisposition or sexual behavior of respondents, so **evidence of a pattern** of inappropriate behavior by an alleged harasser **must be judged for relevance as any other evidence must be.**” (Preamble, p. 30353)

Relevance and the Investigator



The gatherer of all relevant evidence

- **Recipient** must ensure that “all *relevant* questions and evidence are admitted and considered (though varying weight or credibility may of course be given to particular evidence by the decision-maker).” (Preamble, p. 30331)

Relevance and the Investigation and Report



Focus of Investigations (according to the Preamble):

- “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 section 106.45, appropriately direct **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 that is relevant.)” (Preamble, p. 30294)



Title IX Hearings

Live Cross-Examination Hearings Overview of the Hearing



- Recipients must provide a live hearing with cross-examination
 - Parties may be in different locations
 - “Live” means in real-time
 - No submitting written questions that may be answered later
- Parties must be represented by an advisor
 - If a party does not have one, the university must provide one
 - Does not have to be a lawyer – can be a parent, friend, or witness
 - Emphasis on the right of parties to have an advisor of their choice
- Must be recorded or transcribed

Live Cross-Examination Hearings

Who can be a Decision-Maker?



- Does not have to be a lawyer
- May be a panel of individuals
- Must be impartial and free from bias or conflict-of-interest
- Must have received training outlined in 34 C.F.R. 106.45(b)(1)(iii)

Live Cross-Examination Hearings

Why Cross-Examination?



Per Dept. of Ed., cross-examination is essential for truth-seeking

- Provides opportunity to both parties to test “consistency, accuracy, memory, and credibility”
- Regs do not require strict interpretation of cross-examination (leading) questions

Per the 6th Circuit in *Doe v. Baum*, cross-examination

- “Due process requires cross-examination in circumstances [where a determination turns on credibility] because it is the greatest legal engine ever invented for uncovering the truth.” [internal citations omitted]

Live Cross-Examination Hearings

Cross-Examination Overview



- ONLY advisors may cross-examine, NOT the parties themselves
- Institutions can set rules of decorum to avoid abusive questioning
- Be aware of provisions re: consideration of prior statements if not subjected to cross
- In the Live Hearing, if the party or witness does not submit to cross-examination, the decision-maker(s) must rely on previous written statements of that party or witness in reaching a 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.
- How has this been interpreted at Hines?

Live Cross-Examination Hearings & Relevance



34 C.F.R. § 106.45(b)(6)(i)

- Relevance rulings req'd for EVERY question
- All “relevant” questions must be allowed, including those challenging credibility
- Questions that do not seek “relevant” information are NOT allowed
- No definition of relevance in the regulations
 - Preamble information re: Rules of Evidence
 - Polygraph examinations, expert witnesses, private investigators

Live Cross-Examination Hearings

Inadmissible Evidence



34 C.F.R. § 106.45(b)(6)(i)

Must consider relevant evidence with the following exceptions:

- (1) Complainant's sexual behavior ("Rape Shield Provisions")
 - Two exceptions apply (see next slide)
- (2) Information protected by a legal privilege
- (3) Party's treatment records (absent voluntary written waiver by the party)

Relevancy Takeaways



Big Picture Items

- *All* relevant questions must be allowed
- *Only* relevant questions may be asked
- Every question must be evaluated for relevance
 - Requires decision-makers to make “on the spot” determinations
 - When a question is excluded, the decision-maker(s) must explain the decision

Relevance versus Weight



Something may be relevant, but not given much weight in the decision

- “[D]oes not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by 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.” (Preamble, p. 30294)

WARNING:

- “[I]f a recipient trains Title IX personnel to evaluate, credit, or assign weight to types of relevant, admissible evidence, that topic will be reflected in the recipient’s training materials.” (Preamble, p. 30293)

Exclusion



- Cannot *per se* exclude certain types of evidence:
 - A recipient may not adopt rules excluding certain types of relevant evidence (**lie detector** or rape kits) where that type of evidence is not labeled irrelevant in the regulations (e.g., sexual history) or otherwise barred for use under 106.56 (privileged) and must allow fact and **expert witnesses**. (Preamble, p. 30294)

Cross-Examination Without a Party



- A party's advisor may appear and conduct cross-examination even when the party whom they are advising does not appear (Preamble, 30346)
- If both the party and the party's advisor do not appear, "a recipient-provided advisor must still cross-examine the other, appearing party, resulting in consideration of the appearing party's statements (without any inference being drawn based on the non-appearance)." (Preamble, 30346)
 - Does your institution have a back-up for this situation?

Cross-Examination of a Third Party Substitute



- Third party cross-examination of what a non-appearing party stated does not count as statements tested on cross-examination. (Preamble, p. 30347)
- Examples: family and friends showing up and answering questions on behalf of a non-appearing party
- Rationale: “[A] rule of non-reliance on untested statements is more likely to lead to reliable outcomes than a rule of reliance on untested statements.” (Preamble, 30347)

Other Considerations



- What about sex stereotyping questions?
- What about questions by advisor about why a party isn't participating?
- What about decorum?

Rules of Decorum



According to the Preamble

- Institutions may adopt rules regarding conduct and decorum at hearings
- They must apply equally to both parties
 - What we do for one, we do for the other
- Goal of cross-examination is to allow for truth-seeking that benefits both parties, while “minimizing the discomfort or traumatic impact of answering questions about sexual harassment” (Preamble, p. 30315)

According to the Preamble

- Relevant questions must not be abusive
- Enforcement of decorum rules must be evenhanded
 - “[W]here the **substance of a question is relevant**, but the manner in which an advisor attempts to ask the question is **harassing, intimidating, or abusive (for example, the advisor yells, screams, or physically ‘leans in’ to the witness’s personal space)**, the recipient may appropriately, evenhandedly enforce rules of decorum that require relevant questions to be asked in a respectful, non-abusive manner.” (Preamble, p. 30331)

According to the Preamble

- Concerns about aggressive and victim-blaming cross-examination should be addressed by educating a recipient's community
 - “The Department acknowledges that predictions of harsh, aggressive, victim-blaming cross-examination may dissuade complainants from pursuing a formal complaint out of fear of undergoing questioning that could be perceived as interrogation. However, recipients retain discretion under the final regulations to educate a recipient's community about what cross-examination during a Title IX grievance process will look like, including developing rules and practices (that apply equally to both parties) to oversee cross-examination to ensure that questioning is relevant, respectful, and non-abusive.” (Preamble, p. 3031,6 see also 30315; 30340)

According to the Preamble

- Remember the essential function of cross-exam is to probe competing narratives, not humiliate
 - “[T]he essential function of cross-examination is **not to embarrass, blame, humiliate, or emotionally berate a party**, but rather to ask questions that probe a party’s narrative in order to give the decision-maker the fullest view possible of the evidence relevant to the allegations at issue.” (30319)
- Institutions may impose consequences (according to the Preamble)
 - Nothing in this rule prevents recipient from enforcing decorum rules in the hearing and “the recipient may require the party to use a different advisor” if the advisor does not comply and may provide a different advisor to conduct cross examination on behalf of that party (Preamble, p. 30320)

LIVE CROSS-EXAMINATION:

Theory and Practice

Cross Examination



Traditionally, cross-examination questions are those that try to elicit “yes” or “no” answers, not explanations.

Examples:

- You were at the party that night, weren't you?
- You'd agree with me that you had three beers, wouldn't you?
- You didn't call an Uber, did you?

Live Cross-Examination: Theory

(1 of 3)



From the Preamble

According to the Dept. of Ed., cross-examination is

- Essential for truth seeking (Preamble, p. 30313)
- Provides opportunity of both parties to **test “consistency, accuracy, memory, and credibility** so that the decision-maker can better assess whether a [party’s] narrative should be believed” (Preamble, p. 30315)

Live Cross-Examination: Theory

(2 of 3)



From the Preamble

According to the Dept. of Ed., cross-examination is

- Provides parties with the opportunity to “direct the decision-maker’s attention to **implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility**” in the other party’s statements. (Preamble, p. 30330)
- Promotes transparency and equal access (Preamble, p. 30389)

Live Cross-Examination: Theory

(3 of 3)



The Preamble pointing to the Regulations

According to the Department, the process in 106.45 best achieves the purposes of:

- (1) effectuating Title IX's non-discrimination mandate by ensuring **fair, reliable outcomes** viewed as **legitimate** in resolution of formal complaints of sexual harassment so that victims receive remedies
- (2) **reducing and preventing sex bias** from affecting outcomes; and
- (3) ensuring that Title IX regulations are consistent with **constitutional due process and fundamental fairness** (Preamble, p. 30327)

Live Cross-Examination: How it should look



According to the Dept. of Ed.,

- “[C]onducting cross-examination consists simply of posing questions intended to advance the asking party’s perspective with respect to the specific allegation at issue.” (Preamble, p. 30319)

Takeaways:

- Questions
- Intended to advance the asking party’s perspective
- Regarding a specific allegation

Live Cross-Examination:

34 CFR 106.45(b)(6)

(1 of 2)



From the Regulations

In this process:

- Decision-maker must permit each party's advisor to ask the other party and any witnesses **all relevant** questions and follow-up questions, including those challenging **credibility**
- Must be conducted directly, orally, and in real time by the party's advisor, but never party personally
- Only relevant cross-examination and other questions may be asked of a party or witness

Live Cross-Examination:

34 CFR 106.45(b)(6)

(2 of 2)



From the Regulations

In this process:

- Before a party or witness may answer a question, the decision-maker must first determine whether the question is relevant and explain the reason if not relevant
- Must audio record, audio-video record or provide a transcript of the hearing

Cross-Examination by Decision-Makers?



According to the Preamble

Remember:

- Decision-Makers are Neutral
- Cross-Examination is intended to advance one party's perspective
- No "taking sides"
- "To the extent that **a party wants the other party questioned in an adversarial manner** in order to further the asking party's views and interests, that questioning is conducted by the party's own advisor, **and not by the recipient...**
- Thus, no complainant (or respondent) need feel as though the recipient is "taking sides" or otherwise engaging in cross-examination to make a complainant feel as though the recipient is blaming or disbelieving the complainant." (Preamble, p. 30316)

Questioning by Decision-Makers

According to the Preamble

Remember:

- Burden to get the information you need
- Can and should ask questions if more information is needed
- “[O]n the decision-maker’s initiative [can] ask questions and elicit testimony from parties and witnesses,
- **as part of the recipient’s [burden](#) to reach a determination regarding responsibility based on objective evaluation of all relevant evidence** including inculpatory and exculpatory evidence.
- **Thus , the skill of a party’s advisor is not the only factor in bringing evidence to light for a decision-maker’s consideration.”** (Preamble, p.30332)

From to the Regulations

- 34 C.F.R.106.71 requires that recipients keep party and witness identities confidential except as permitted by law or FERPA, and as needed to conduct an investigation or hearing (30316)

According to the Preamble

- Confidentiality concerns prevents anyone other than advisors from attending the hearing with the party, unless otherwise required by law (Preamble, p. 30339)
- ADA accommodations-required by law
- CBA require advisor and attorney?

Reminders for Decision-Makers

(1 of 3)



- Individual cases are not about statistics
- Decision in every case must be based on preponderance of evidence presented
- Cannot fill in evidentiary gaps with statistics, personal beliefs or information about trauma
- Process must be fair and impartial to each party
- Institution may proceed without active involvement of one or both parties; base conclusions on impartial view of evidence presented

Reminders for Decision-Makers

(2 of 3)



- **Withhold pre-judgment:** The parties may not act as you expect them to
- Be aware of your own biases as well as those of the complainant, respondent, and witnesses
- Let the available facts and standard of proof guide your role in overseeing the live cross-examination hearing, not unfair victim-blaming or societal/personal biases

- Burden of gathering the evidence on the recipient, not the parties (Preamble, p. 30333)
- This is an issue for the investigation, but might be something you see as the decision-maker

Practical Tips for Conducting a Title IX Hearing

The Setup



- Can have in one room if a party doesn't request separate rooms and recipient chooses to do so.
- Separate rooms with technology allowing live cross examination at the request of either party
- “At recipient’s discretion, can allow any or all participants to participate in the live hearing virtually” (30332, see also 30333, 30346) explaining 106.45(b)(6)(i)

Process

(1 of 2)



- Discretion to provide opportunity for opening or closing statements
- Discretion to provide direct questioning (open-ended, non-cross questions)
- Cross-examination must to be done by the party's "advisor of choice and never by a party personally."

Process

(2 of 2)



- An advisor of choice may be an attorney or a parent (or witness) (30319)
- Discretion to require advisors to be “potted plants” outside of their roles cross-examining parties and witnesses. (30312)

If a party does not have an advisor present at the live hearing, the recipient **must provide** without fee or charge to that party, an advisor **of the recipient's choice**, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.

(106.45(b)(6)(i) and preamble 30339)

- Advisors do not require Title IX Training, however a recipient may train its own employees whom the recipient chooses to appoint as party advisors (30342)
- A party cannot “fire” an appointed advisor (30342)
- “But, if the party correctly asserts that the assigned advisor is refusing to ‘conduct cross-examination on the party’s behalf’ then the recipient is obligated to provide the party an advisor to perform that function, whether counseling the advisor to perform the role or stopping the hearing to assign a different advisor” (30342)

- Regulations permit a recipient to adopt rules that (applied equally) do or do not give parties or advisors the right to discuss relevance determinations with the decision-maker during the hearing. (30343)
- “If a recipient believes that arguments about a relevance determination during a hearing would unnecessarily protract the hearing or become uncomfortable for parties, the recipient may adopt a rule that prevents parties and advisors from challenging the relevance determination (after receiving the decision-maker’s explanation) during the hearing.” (30343)

Advisors: But Other Support People?



- Not in the hearing, unless required by law (30339)
BUT July 2021 Q&A allows for support persons for the parties
- “These confidentiality obligations may affect a recipient’s ability to offer parties a recipient-provided advisor to conduct cross-examination in addition to allowing the parties’ advisors of choice to appear at the hearing.”
- ADA accommodations-required by law
- CBA require advisor and attorney?

Recording the Hearing



- Now required to be audio, audio visual, or in transcript form
- Decision-makers have to know how to use any technology you have

The Hearing



- Order of questioning parties and witnesses – not in regulations
 - Consider time restraints on witnesses
 - Questioning of Complainant
 - Questioning of Respondent

Hearing Toolbox: Prehearing Conference



- Pre-hearing conference – helps inform parties and set expectations – have one separate with each party and the party’s advisor
- Provides opportunity to address issues common to both parties:
 - Parties and their representatives will often not understand the process: help educate and answer questions (again, know your institution’s grievance process)
 - Jurisdictional challenges: perhaps less of an issue with new jurisdictional terms—many issues were related to off-campus extension of jurisdiction (may tell advisor that you will provide the opportunity for advisor to state on the record at the hearing)

Hearing Toolbox: PHCs and Evidence



- Parties may want to add evidence and witnesses that were not in the investigation for the first time at the hearing (perhaps outside of the process).

Hearing Toolbox: Use of a Script



- Responsible for running an orderly and fair hearing.
- A script can serve as a checklist of everything the decision-maker wants to cover and a cheat sheet for reminders of allegations, alleged policy violations, and elements of the alleged policy violations
- Helps ensure rights, responsibilities, and expectations are set
- Helps provide consistency between one hearing and the another
- Helps provide transparency
- Can even have a separate one for prehearings

Hearing Toolbox: Decorum



- Evaluating each question for relevancy before a party or witness can answer can help set the tone
- Remind parties about expectations of decorum

Hearing Toolbox: Breaks



- Preamble discusses the use of breaks to allow parties to recover from panic attacks or emotional questioning
- Also helpful to reset tone and reduce emotion and tension
- Can use to review policy and procedures to address relevancy issues that arise

Hearing Toolbox: Questions



- Do you have the information you need on each element to be able to evaluate the claims?
- Consider neutral phrasing of questions:
 - “In the report you said... Help me understand...”
 - “You stated... Tell me more about that.”
 - “Could you give more information about what happened before/after...”

Hearing Toolbox: Considerations for Panels



Hearing panel:

- Identify one person on the panel to make relevancy rulings
- Identify one person to draft the decision (for review of other panel members)
- Determine how panel members will ask questions (e.g., will only one person ask the questions or will panelists take turns?)

Objectively Evaluating Evidence and Resolving Credibility Disputes

Objectively Evaluating Relevant Evidence



- As addressed in the preamble and discussed earlier, the decision-maker should evaluate:
- “consistency, accuracy, memory, and credibility” (30315)
- “implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility” (030330)
- Standard of proof and using it to guide decision

Standard of Proof



- Standard of Evidence: Preponderance of the Evidence
- Must use same standard for formal Title IX complaints against both students and employees (including faculty) for all policies and procedures with adjudication for sexual harassment complaints (e.g., union grievances procedures, faculty conduct)
- Must begin with a presumption of no violation by Respondent.

Making credibility decisions



The preamble discussion includes the following additional information on credibility:

- “Studies demonstrate that inconsistency is correlated with deception” (30321)
- Credibility decisions consider “plausibility and consistency” (30322)

Resolving Disputes (1 of 4)



Considerations:

- Statements by any witnesses to the alleged incident
- Evidence about the relative credibility of the complainant/respondent
 - The level of detail and consistency of each person's account should be compared in an attempt to determine who is telling the truth
 - Is corroborative evidence lacking where it should logically exist?

Resolving Disputes (2 of 4)



- Evidence of the complainant's reaction or behavior after the alleged harassment
 - Were there witnesses who saw that the complainant was upset?
 - Changes in behaviors? Work-related? School? Concerns from friends and family? Avoiding certain places?
 - May not manifest until later

Resolving Disputes (3 of 4)



- Evidence about whether the complainant filed the complaint or took other action to protest the conduct soon after the alleged incident occurred
 - But: failure to immediately complain may merely reflect a fear of retaliation, a fear that the complainant may not be believed, etc. rather than that the alleged harassment did not occur

Resolving Disputes (4 of 4)



- Other contemporaneous evidence:
 - Did the complainant write about the conduct and reaction to it soon after it occurred (e.g. in a diary, email, blog, social media post)?
 - Did the student tell others (friends, parents) about the conduct and their reaction soon after it occurred?

#1 Keep An Open Mind



- Keep an open mind until all statements have been tested at the live hearing
- Don't come to any judgment, opinion, conclusion or belief about any aspect of this matter until you've reviewed or heard all of the relevant evidence

#2 Sound, Reasoned Decision



- You must render a sound, reasoned decision on every charge
- You must determine the facts in this case based on the information presented
- You must determine what evidence to believe, the importance of the evidence, and the conclusions to draw from that evidence

#3 Consider All/Only Evidence



- You must make a decision based solely on the relevant evidence obtained in this matter
- You may consider nothing but this evidence

#4 Be Reasonable and Impartial

- You must be impartial when considering evidence and weighing the credibility of parties and witnesses
- You should not be swayed by prejudice, sympathy, or a personal view that you may have of the claim or any party
- Identify any actual or perceived conflict of interest

#5 Weight of Evidence

(1 of 2)



- The quality of evidence is not determined by the volume of evidence or the number of witnesses or exhibits.
- It is the weight of the evidence, or its strength in tending to prove the issue at stake that is important.
- You must evaluate the evidence as a whole based on your own judgment.

#5 Weight of Evidence

(2 of 2)



- Decision-makers who are trained to perform that role means that the same well-trained decision-maker will determine the weight or credibility to be given to each piece of evidence, and how to assign weight (30331)

Weight of Evidence Example



The preamble provides in the discussion:

“[W]here a cross-examination question or piece of evidence is relevant, but concerns a party’s character or prior bad acts, under the final regulations **the decision-maker cannot exclude or refuse to consider the relevant evidence, but may proceed to objectively evaluate that relevant evidence by analyzing whether that evidence warrants a high or low level weight or credibility**, so long as the decision-maker’s evaluation treats both parties equally **by not, for instance, automatically assigning higher weight to exculpatory character evidence than to inculpatory character evidence.**” (30337)

#6 Evaluate Witness Credibility

(1 of 3)



- You must give the testimony and information of each party or witness the degree of importance you reasonably believe it is entitled to receive.
- Identify all conflicts and attempt to resolve those conflicts and determine where the truth (standard or review/proof) lies.

#6 Evaluate Witness Credibility

(2 of 3)



- Consider the reasonableness or unreasonableness, or probability or improbability, of the testimony.
- Does the witness have any motive?
- Is there any bias?

#6 Evaluate Witness Credibility

(3 of 3)



- Credibility is determined fact by fact, not witness by witness
 - The most earnest and honest witness may share information that turns out not to be true

#7 Draw Reasonable Inferences



- Inferences are sometimes called “circumstantial evidence.”
- It is the evidence that you infer from direct evidence that you reviewed during the course of reviewing the evidence.
- Inferences only as warranted and reasonable and not due to decision to opt out of cross-examination or questioning.

#8 Standard of Evidence

(1 of 2)



Use your standard of evidence as defined by your policy when evaluating whether someone is responsible for each policy violation and ALWAYS start with presumption of no violation.

- Preponderance of the evidence: a fact is more likely than not to be true (30373 fn. 1409)

#8 Standard of Evidence (2 of 2)



- Look to all the evidence in total, and make judgments about the weight and credibility, and then determine whether or not the burden has been met.
- Any time you make a decision, use your standard of evidence

#9 Don't Consider Impact



- Don't consider the potential impact of your decision on either party when determining if the charges have been proven.
- Focus only on the charge or charges brought in the case and whether the evidence presented to you is sufficient to persuade you that the respondent is responsible for the charges.
- **Do not consider the impact of your decision.**

The Written Decision

Written Determination in 106.45(b)(7)(ii)(A) & (B)



Written determination must include:

- Identification of the allegations potentially constituting sexual harassment;
- A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence; and hearings held;

Written Determination in 106.45(b)(7)(ii)(C) & (D)



Written determination must include (cont.):

- Findings of fact supporting the determination;
- Conclusions regarding the application of the recipient's code of conduct [or Title IX Policy] to the fact;

Written Determination in 106.45(b)(7)(ii)(E)



- A statement of, and rationale for, the results as to each allegation, including 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

Written Determination in (Rationale for the Rationale)



- Statement of rationale: requiring recipients to describe, in writing, conclusions (and reasons for those conclusions) will help prevent confusion about how and why a recipient reaches determinations regarding responsibility (30389)
- The requirement of “Transparent descriptions of the steps taken in an investigation and explanations of the reasons why objective evaluation of the evidence supports findings of facts and conclusions of facts” helps prevent injection of bias (30389)

Written Determination in 106.45(b)(7)(ii)(F)



- Institution's procedures and permissible bases for complainant and respondent to appeal

Contemporaneous Distribution to the parties



- Determination must be provided to both parties in writing contemporaneously (106.45(b)(7)(ii))
- Receiving decision simultaneously will ensure both parties have relevant information about the resolution of the allegations

References to other policies



Reference to code of conduct not prohibited:

“Recipients **retain discretion to also refer to in the written determination to any provision of the recipient’s own code of conduct** that prohibits conduct meeting the [Title IX definition] of sexual harassment; however” the final regulations apply to recipient’s response to Title IX portion only. (30389)

The preamble discussion notes that it does not “expressly require the written determination to address evaluation of contradictory facts, exculpatory evidence, all evidence presented at a hearing, or how credibility assessments were reached, because the decision-maker is obligated to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence (and to avoid credibility inferences based on a person’s status as a complainant, respondent, or witness.”

Note: Consider including these anyway for a more thorough determination.



Being Impartial and Avoiding Bias, Conflict of Interest, and Prejudgment of Facts

Impartiality and Avoiding Bias, Conflict of Interest and Prejudgment of Facts (1 of 2)



Section 106.45 **requires** that investigators, Title IX Coordinators, decision-makers, informal resolution officers and appeals officers:

- be free from **conflict of interest, bias,** and
- be trained **to serve impartially** and **without prejudging facts.**

(Preamble, p. 30053)

Impartiality and Avoiding Bias, Conflict of Interest and Prejudgment of Facts (2 of 2)



- We will discuss each of these individually and provide examples, but some of the factors for each overlap.
- For example, being impartial is greatly aided by not pre-judging facts.

(Preamble, p. 30249-30257; 30496)

Impartiality



- Be neutral
- Do not be partial to a complainant or a respondent, or complainants and respondents generally
- Do not judge: memory is fallible [and it's contrary to your neutral role] (Preamble, p. 30323)

Bias: Concerns raised in comments in preamble



Examples:

- Neutrality of paid staff in Title IX positions
 - Institutional history and “cover ups”
 - Tweets and public comments
 - Identifying as a feminist
-
- **No *per se* bias** based on these issues alone
 - Will always be a fact-specific analysis

How the Department tried to prevent bias



No single-investigator model (34 C.F.R. 106.45(b)(7)(i)):

- Decision-maker (or makers if a panel) must not have been the same person who served as the Title IX Coordinator or investigator (Preamble, p. 30367)
- Separating the roles protects both parties because the decision-maker may not have improperly gleaned information from the investigation that isn't relevant that an investigator might (Preamble, p. 30370)
- The institution may consider external or internal investigators, decision-makers, and appeals officers (Preamble, p. 30370)

Bias: Objective Rules and Discretion



“[R]ecipients *should* have **objective rules** for determining when an adjudicator (or Title IX Coordinator, investigator, or person who facilitates an informal resolution) is biased, and the **Department leaves recipients discretion to decide how best to implement the prohibition on conflicts of interest and bias...**” (Preamble, p. 30250)

Conflict of Interest: Concerns raised in comments in preamble



Examples:

- Financial and reputational interests of Title IX employee aligns with institution
- Past advocacy for a survivor's group
- Past advocacy for a respondent's group
- **No *per se* bias** based on these issues alone
- Will always be a fact-specific analysis

Conflict of Interest

(1 of 3)



- Final regulations “leave recipients **flexibility to use their own employees, or to outsource** Title IX investigation and adjudication functions, and
- the Department encourages recipients to pursue alternatives to the inherent difficulties that arise when a recipient’s own employees are expected to perform functions free from conflicts of interest and bias.” (Preamble, p. 30251)

Conflict of Interest

(2 of 3)



- Example: it is **not** a ***per se* bias** or **conflict of interest** to hire professionals with **histories of working in the field of sexual violence** (Preamble, p. 30252)
- Cautions against using generalizations to identify bias and conflict of interest and instead **recommends** using a **reasonable-person test** to determine whether bias exists.

“[F]or example, assuming that all self-professed feminists, or self-described **survivors**, are biased against men, or that a **male** is incapable of being sensitive to women, or that prior work as a **victim advocate**, or as a **defense attorney**, renders the person biased for or against complainants or respondents” is **unreasonable** (Preamble, p. 30252)

Training, Bias, and Past Professional Experience



- This required training (that you are sitting in right now) can help protect against disqualifying someone with prior professional experience (Preamble, p. 30252)

Examples of (Possible) Bias



- An investigator who used to supervise one of the parties
- Information “gleaned” by the investigator is shared with the decision-maker outside the investigation report (in meetings to discuss pending cases, in passing while at work, etc.)

Avoiding Prejudgment of Facts



A good way to ensure impartiality and avoid bias:

- Keep an open mind and actively listen
- Each case is unique and different



Questions?

Additional information available at:



Title IX Resource Center at
www.bricker.com/titleix

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