

Title IX Decision-Maker and Informal Resolution Facilitator

Presented by
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Higher Education Practice Group

August 11, 2020

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Today's Presentation

- Recap and Overview of Title IX Investigator and Advisor roles
- Role of the Informal Resolution Facilitator
- Role of the Decision-Maker
- Impartiality, Bias and Conflicts of Interest



RECAP AND OVERVIEW OF TITLE IX COMPLAINT PROCESS

Recap

- Final Rule published 5-19-2020 (85 Fed Reg 30026)
- Effective **August 14, 2020**
- Amends 34 CFR Part 106
- 2011 Q&A and 2001 OCR guidance remain good to the extent consisted with Final Rule

Title IX Complaint Process Overview

- Formal Complaint Received by Title IX Coordinator
- **Optional Informal Resolution Process**
- Investigation
- **Live Hearing**
- **Decision and Remedial Measures**
- Appeals

Sexual Harassment

- Under the 2020 Final Rule, Sexual Harassment is conduct on the basis of sex that falls into one or more of the following 3 categories
- Definition located in 34 CFR 106.30

1. Quid Pro Quo

- An employee of the school conditioning the provision of an aid, benefit, or service of the school on an individual's participation in unwelcome sexual conduct;

2. Hostile Environment

- Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or

3. Sexual Violence

- “Sexual assault” as defined in 20 U.S.C. 1092(f)(6)(A)(v),
“dating violence” as defined in 34 U.S.C. 12291(a)(10),
“domestic violence” as defined in 34 U.S.C. 12291(a)(8), or
“stalking” as defined in 34 U.S.C. 12291(a)(30)

Sexual Violence

- **Sexual Assault:** As defined in 20 U.S.C. 1092(f)(6)(A)(v), means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.
- **Dating Violence:** As defined in 34 U.S.C. 12291(a)(10), means violence committed by a person (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (B) where the existence of such a relationship shall be determined based on a consideration of the following factors: the length of the relationship; the type of relationship; and, the frequency of interaction between the persons involved in the relationship.

Sexual Violence

- **Domestic Violence:** As defined in 34 U.S.C. 12291(a)(8), includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.
- **Stalking:** As defined in 34 U.S.C. 12291(a)(30), means engaging in a course of conduct directed at a specific person that would cause a reasonable person to: (A) fear for his or her safety or the safety of others; or (B) suffer substantial emotional distress.

Recap – Investigator

- Title IX Coordinator, other school employee or 3rd party
- Cannot be the Decision-Maker
- Must be trained
- Conduct and impartial investigation to gather the facts
- Put Decision-Maker in best possible position to understand relevant evidence for the live hearing

Recap – Advisor

- Parties have the right to an advisor of their choice
- Required for live-hearing (cross-examination)
- If school-selected can be an employee or 3rd party
- No training required
- School can implement advisor guidelines



INFORMAL RESOLUTION

Informal Resolution Facilitator

- School employee or 3rd party
 - Ensure no bias or potential conflicts of interest
- Must be trained on the informal resolution process

Informal Resolution

- Can only be utilized when there is a Formal Complaint
- Discretionary—can be used so long as both parties give voluntary, informed, written consent to attempt informal resolution
- School may not require a waiver of the right to a formal investigation and adjudication of Formal Complaints of Sexual Harassment as a condition of enrollment, employment, or enjoyment of any other right
- At any time before resolution, a party can withdraw from the informal resolution process and resume the grievance process

Informal Resolution Considerations

- Cannot be used to resolve allegations that an employee sexually harassed a student
- Cautiously consider using informal resolution severe situations or violent incidents
- Title IX Coordinator determines if informal resolution should be utilized

Informal Resolution Considerations

- Can create ground rules – provide in writing
 - Maximize potential for resolution
- Can be technology facilitated
- Can result in an agreement between the parties
 - Supportive Measures
 - Voluntary acceptance of disciplinary action

Pros and Cons

- Pros:
 - Simplified process – potentially no live hearing
 - Quicker
 - Complainant and Respondent are involved in the outcome
- Cons:
 - Less safeguards
 - Can delay the grievance process if unsuccessful

Best Practices

- Goal is to help the Complainant and Respondent reach an agreement on their terms
 - Discuss potential resolution terms
- Be compassionate and neutral
 - Do not take sides
 - Do not make assumptions



LIVE HEARING

Selecting Decision-Maker(s)

- School employee or 3rd party
- Can be more than one person
- Cannot be the Title IX Coordinator
- Must be trained

Decision-Maker Training

- School's policies and procedures including technology
 - Not responsible presumption
- Definition of Sexual Harassment
- Relevance
- Impartiality, bias and conflicts of interest
- How to analyze evidence in relation to legal standard
- Determination of responsibility
- Documentation requirements

Live Hearing Requirements

- Postsecondary institutions must provide a live hearing (no requirement for elementary/secondary schools)
- Requirements for a live hearing include:
 - Opportunity for parties' advisors to examine and cross-examine witnesses, including challenging the credibility of witnesses
 - Examinations must be direct, oral, and in real time (Advisors)
 - Parties may be required to stay in separate rooms with a live video+audio connection
 - Only relevant questions may be asked

Refusing Cross Examination

- If a party does not submit to cross-examination at a live hearing, the Decision-Maker cannot rely on that party's statements in reaching a determination
 - Does not apply to Decision-Maker (neutral fact finder, not cross examination)
- Decision-Maker also cannot draw an inference regarding responsibility based solely on that party's absence from live hearing

Presumption of Innocence

- Ensures the school does not take action and impose sanctions until the grievance process has been applied
- Does not mean that the Decision-Maker should presume that the alleged harassment did not occur
- No prejudgment of the facts at issue

Relevance

- Determined by Decision-Maker (with explanation)
- Evidence is relevant if it is pertinent to proving whether facts material to the allegations are more or less likely to be true
 - Repetition of the same question is irrelevant
- A Complainant's sexual predisposition or prior sexual behavior is not relevant, unless:
 - Offered to provide that someone other than the Respondent committed the alleged conduct; or
 - To prove consent

Evidence

- Types:
 - Direct
 - Circumstantial
 - Character Evidence
 - Inculpatory
 - Exculpatory

Character Evidence

- Evidence that concerns a party's character or prior bad acts
- Can be considered if relevant
- Decision-Maker must objectively evaluate

Evidence Limitations

- School cannot use, rely on or seek disclosure of information protected under legally recognized privilege unless party has waived privilege
 - ex: Attorney/Client, Doctor/Patient
 - Medical records

Live Hearing Rules

- School can implement rules/procedures for live hearing so long as they do not conflict with final rule
- For example:
 - Act professionally
 - Length of breaks
 - No disruption to the hearing
 - Prohibit witness badgering
- What happens if an advisor refuses to comply with rules?

Making a Determination

- Review the school policy
- Review the evidence
- Assess credibility of evidence and witness statements
 - Credibility = assessing the extent to which you can rely on the statement
- Assess consistency of the story
- Evaluate evidence in light of standard of evidence

Written Determination

- Use published standard of evidence
- Identify the allegations constituting sexual harassment
- Describe procedure from formal complaint through hearings
- Make findings of fact and conclusions
- Provide a rationale for the outcome on each allegation and imposition of any sanctions
- State the procedures and allowable bases for any appeal
- Be provided simultaneously to both parties

Sanctions

- Determined by Decision-Maker
- Imposed on the Respondent
- Reasonable based on the severity of the behavior
- May be educational
- Determine what is appropriate based on the case specifics
- Take steps to confirm and document sanctions were enforced

Sanction Examples

- Warning
- Suspension
- Termination
- No contact
- Counseling
- Additional training

Remedies

- Title IX Coordinator is responsible for implementation
- Required to be provided to a Complainant when a Respondent is found responsible
- Must be designed to maintain Complainant's equal access to education and may include supportive measures
- Remedies do not need to be non-disciplinary or non-punitive and do not need avoid burdening the respondent

Working with Title IX Coordinator

- Decision-Maker selected by Title IX Coordinator
- Title IX Coordinator and Decision-Maker should coordinate with Decision-Maker on:
 - Coordinating hearings
 - Sanctions
 - Remedies
 - Overseeing appeals process

Record Keeping

- Seven years
- Includes basis for conclusion, response was not deliberately indifferent, and measures taken to restore or preserve equal access to the education program or activity
- Additional record keeping requirements for investigation and Supportive Measures

IMPARTIALITY, CONFLICTS OF INTEREST & BIAS

Fair and Impartial Investigation

- § 106.45 requires recipients to adopt a grievance process where Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions are free from conflicts of interest and bias and are trained to serve impartially without prejudging the facts at issue

Why Does it Matter?

- The Department sought to:
 - Improve perceptions that Title IX sexual harassment allegations are resolved fairly and reliably
 - Avoid intentional or unintentional injection of sex-based biases and stereotypes into Title IX proceedings, and
 - Promote accurate, reliable outcomes, all of which effectuate the purpose of Title IX to provide individuals with effective protection from discriminatory practices

Impartiality

- Cannot have a conflict of interest or bias for or against Complainants or Respondents generally or an individual Complainant or Respondent
- Avoid prejudgment of the facts at issue
- No one should be automatically believed or not believed
- Objectively evaluate all relevant evidence

Conflict of Interest

- When an individual has competing interests or loyalties
- Potential to reap personal gain from decisions, actions or inaction
- Inclination to filter decisions through lens of self-interest

Bias

- Prejudice in favor of or against an individual or situation
- Disproportionate weight in favor or against certain facts that prevents objectivity
- Insensitivity to facts that otherwise would be significant
- Avoid inferences based on whether someone is a Complainant or Respondent

Training

- Does not have to include implicit bias (subconscious stereotyping and unconscious evaluation) training
- Nature of the training is left to the school's discretion so long as it achieves the directive that such training provide instruction on how to serve impartially and avoid:
 - Prejudgment of the facts at issue
 - Conflicts of interest
 - Bias
- Materials used in training avoid sex stereotypes

QUESTIONS?



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