

Title IX Training

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- ◇ The content of this presentation is intended to be informational and is not offered as legal advice. Participants should consult privately with their own legal counsel for advice regarding specific situations.

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Content Advisory

- ◇ The policies discussed in this presentation describe instances of sexual violence and sexual misconduct.
- ◇ While the presentation omits graphic details, the presenters recognize that this topic may impose emotional hardship on some participants.
- ◇ Please do whatever necessary to engage in self-care.

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Introduction

Who Must be Trained:

- Title IX Personnel: Title IX Coordinator, any investigator, any decision-maker, and any person who facilitates an informal resolution

Training Topics Must Include:

- Title IX's definition of "sexual harassment"
- The scope of the IHE's education program or activity
- How to conduct an investigation and grievance process
- How to serve impartially, including by avoiding prejudgment of the facts at issue
- How to avoid conflicts of interest and bias
- Decision-makers: technology to be used at a live hearing, and issues of relevance of questions and evidence (including when complainant's sexual predisposition or prior sexual behavior is not relevant)
- Investigators: issues of relevance to create an investigative report that fairly summarizes relevant evidence

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Today's Topics

Part I: Background

Part II: Key definitions and terms

Part III: Operational Requirements

Part IV: Initial Action and assessing complaints

BREAK

Part V: Investigations

Part VI: Hearing and Appeal

Part VII: Additional Considerations

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Part I: Background

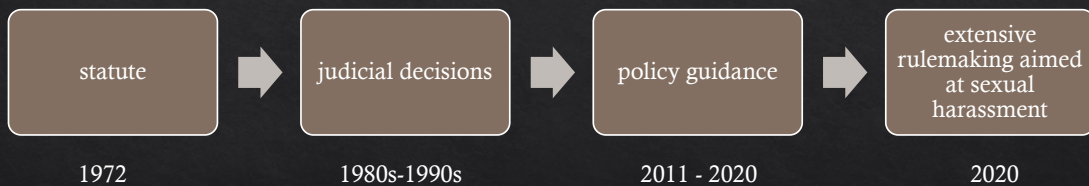
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Background

- ◆ Title IX of the Education Amendments of 1972 prohibits sex-based discrimination in education programs, activities, and employment.
 - Applies to all IHEs that receive federal financial assistance
 - Protects students and employees
 - DOE's Office of Civil Rights has the authority to enforce

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Background, Cont.



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Part II: Key Definitions and Terms

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Sex-based Discrimination

- ◆ Not defined in Title IX
- ◆ “The Department follows the Supreme Court’s approach in interpreting conduct ‘on the basis of sex’ to include conduct of a sexual nature or conduct referencing or aimed at a particular sex.”
- ◆ Includes sexual harassment (e.g., unwelcome sexual advances, requests for sexual favors), and sexual violence, which is a subset of sexual harassment (e.g., dating violence, domestic violence, sexual assault, or stalking)

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Sexual Harassment

- ◆ **Sexual harassment** means conduct on the basis of sex that is:
 - Unwelcome conduct determined by a reasonable person to be so severe, pervasive and objectively offensive that effectively denies a person equal access to the IHE's education program or activity,
 - An employee of the IHE conditioning the provision of an aid, benefit, or service of the IHE on an individual's participation in unwelcome sexual conduct (*i.e.* quid pro quo);
 - Sexual assault, as defined in the Clery Act; or
 - Dating violence, DV, or stalking as defined in VAWA

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Sexual Assault as Defined in the Clery Act

- ◆ "Sexual assault" means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation. "Sexual assault" includes rape, fondling, statutory rape, and incest.
- ❖ The Federal Bureau of Investigation (FBI) currently uses NIBRS, which defines "forcible sex offenses to include any sexual act, including rape, sodomy, sexual assault with an object, or fondling directed against another person, without the consent of the victim including instances where the victim is incapable of giving consent."

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VAWA Definitions

- ◇ Dating violence: violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim
- ◇ Domestic violence: violence or threatened act of violence by current or former spouse or intimate partner of the victim, or one who shares a child in common with the victim
- ◇ Stalking: engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others; or suffer substantial emotional distress

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The Parties

Complainant: An individual who is alleged to be the victim of conduct that could constitute sexual harassment.

Respondent: An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

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Consent

Consent. IHEs are not required to adopt a particular definition of consent with respect to sexual assault.

But:

- ◆ IHEs cannot shift the burden to a respondent to prove consent or shift the burden to a complainant to prove the absence of consent.
- ◆ IHEs must clearly define consent and must apply that definition consistently.
- ◆ Title IX Personnel must be trained on how to apply definitions used by the IHE with respect to consent (or the absence or negation of consent) consistently, impartially, and in accordance with the other provisions of § 106.45.

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Part III: Operational Requirements

Designation of Title IX Coordinator

Dissemination of Policy

Grievance Procedures

Training Materials

Publications

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Designation of Title IX Coordinator

- ◆ IHE must designate and authorize at least one employee to coordinate its efforts to comply with Title IX responsibilities, which employee must be referred to as the Title IX Coordinator. § 106.8(a)
- ◆ IHE must notify **applicants for admission and employment, students and all unions or professional organizations holding collective bargaining professional agreements with the IHE**, of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator. § 106.8(a)
- ◆ IHE must prominently display contact information for the Title IX Coordinator on its website, if any, and in each handbook or catalog that it makes available to persons entitled to notification per the regulations. § 106.8(b)(2)(i)

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Dissemination of Policy: Title IX requirements

- ◆ IHE must notify persons entitled to notification under these rules that the IHE does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by Title IX not to discriminate in such a manner. § 106.8(b)(1)
- ◆ Such notification must state that the requirement not to discriminate in the education program or activity extends to admission and employment, and that inquiries about Title IX's application may be referred to the IHE's Title IX Coordinator, the Assistant Secretary of Education, or both. § 106.8(b)(1)

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Dissemination of Policy: CO Requirements

- ◇ Colorado law also has notice and posting requirements. *See* § 23-5-146, C.R.S.
 - ◇ IHE's website
 - ◇ CDHE website

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Grievance Procedure

- ◇ IHE must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by Title IX and a grievance process that complies with Title IX's requirements for formal complaints as defined in the regulations. § 106.8(c)
- ◇ IHE must provide notice of its grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond. § 106.8(c)

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Content of Grievance Procedure

- ◆ Description of the range of possible disciplinary sanctions and remedies or a list of possible disciplinary sanctions and remedies that the IHE may implement following any determination of responsibility;
 - ◆ Statement of whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard
 - ◆ **Note: Colorado law requires use of Preponderance of Evidence**
 - ◆ Procedures and permissible bases for the complainant and respondent to appeal; and
 - ◆ Description of the range of supportive measures available to complainants and respondents.
- § 106.45(b)(1)(vi) – (ix).

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Training Materials

- ◆ IHE must make its Title IX training materials publicly available on its website, or if the IHE does not maintain a website, it must make the materials available upon request for inspection by members of the public.

See § 106.45(b)(10)

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Publications Generally

- ◆ IHE must not use or distribute a publication stating that the IHE treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by Title IX. § 106.8(b)(2)(ii)

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Part IV: Initial Action and Assessing Complaints

Reporting and Duty to Act

Interim and Supportive Measures

Formal Complaints

Dismissals

Informal Resolution

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Reporting

anyone can report
sexual harassment

both informal
reports and formal
complaints trigger
IHE duty to act

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Duty to Act

- ◇ IHEs with **actual knowledge** of sexual harassment in an **education program or activity of the IHE** against a person in the United States must respond promptly in a manner that is **not deliberately indifferent**, meaning not clearly unreasonably in light of the known circumstances. § 106.44(a)
- ◇ Duty to act if IHE has:
 - ◇ Actual knowledge
 - ◇ Of sexual harassment
 - ◇ In its education program or activity
 - ◇ Against a person physically located in the United States

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Actual Knowledge

- ◊ An IHE has actual knowledge if notice of sexual harassment provided to a school's Title IX Coordinator or any official of the school who has authority to institute corrective measures on behalf of the institution.
- ◊ Discretion as to "mandatory" and/or "confidential" reporters

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Education Program or Activity

Locations, events or circumstances over which the IHE 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. § 106.44(a).

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Education Program or Activity, Cont.

- ◇ All incidents of sexual harassment on campus
- ◇ Off campus if:
 - ◇ Part of IHE's operations (e.g. digital platforms)
 - ◇ IHE as substantial control over the respondent and the context of the alleged sexual harassment
 - ◇ Building owned or controlled by student org officially recognized by IHE

Factors such as whether the IHE funded, promoted, or sponsored the event or circumstance where the alleged harassment occurred . . . may be helpful or useful for IHEs to consider . . . to determine the scope of an IHE's program or activity, [but] no single factor is determinative.

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Sexual Harassment in and outside education program and activity

- ❖ Title IX requires that an IHE dismiss the allegations in a formal complaint about conduct not occurring in the IHE's education program or activity.
- ❖ However, the IHE may still take action on such allegations pursuant to violations of a code of conduct or other policy violation.

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Response to Actual Knowledge

- ◇ Must not be deliberately indifferent
- ◇ A Title IX Coordinator must promptly contact the complainant to:
 - ◇ Discuss the availability of supportive measures (with or without formal complaint)
 - ◇ Consider complainant's wishes with respect to supportive measures
 - ◇ Explain the process for filing a formal complaint
- ◇ IHE must follow a compliant grievance process before imposition of sanctions against a respondent.

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Grievance Process & Appeals

An IHE's grievance process must:

- ◇ include a description of the procedures and permissible bases for both parties to appeal. § 106.45(b)(1)(viii)
- ◇ include a reasonably prompt timeframe for resolving complaints. § 106.45(b)(1)(v)
 - ◇ Colorado statute requiring good faith effort to complete adjudication process within average of 60 to 90 days is exclusive of appeals. § 23-5-146(3)(d)(I), C.R.S.

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Supportive Measures

Individualized services offered as appropriate, as reasonably available, to the complainant or the respondent before or after the filing of a complaint (formal or not).

Measures should restore or preserve equal access to the school's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the school's educational environment, or deter sexual harassment.

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Supportive Measures

counseling

extensions of deadlines or other course-related adjustments

modifications of work or class schedules

campus escort services

mutual restrictions on contact between the parties

changes in work or housing locations

leaves of absence

increased security and monitoring of certain areas of the campus

other similar measures

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Interim Measures: Removal of Respondent

An institution would be permitted to remove a **student-respondent** from campus on an emergency basis, provided:

- that the school undertakes an individualized safety and risk analysis;
- determines that an immediate threat to the physical health or safety of any student or other individual **arising from the allegations of sexual harassment** justifies removal; and
- provides the respondent with notice and an opportunity to challenge the decision immediately following the removal.

An institution also would be permitted to place an “employee respondent” on administrative leave during the “pendency of [its] grievance process.”

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Formal Complaints

Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the IHE investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant **must be participating in or attempting to participate in the education program or activity of the IHE** with which the formal complaint is filed.

Examples given of individuals, other than current students or employees, who may be “participating in or attempting to participate” in the education program or activity:

- ◇ Alumni
- ◇ Complainant on a leave of absence
- ◇ Desire to re-enroll
- ◇ Admitted students
- ◇ Applicants

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Reports Covered by Title IX *but without* a Formal Complaint

When a complainant has not made a formal complaint, yet the alleged conduct falls under Title IX, the **Title IX Coordinator must either**:

- ◆ **close** the report – if, for example the complainant does not want an investigation; or
 - ◆ **sign a formal complaint** and initiate the Title IX grievance process.
- ◆ “Some circumstances may require Title IX Coordinator to initiate an investigation and adjudication of allegations in order to protect the IHE’s educational community or otherwise avoid being deliberately indifferent to known sexual harassment.”

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Notifications After Formal Complaint

IHE must provide:

- ◆ notice of the IHE’s **grievance process** that complies with this section, including any informal resolution process
- ◆ notice to the Respondent of the allegations of sexual harassment potentially constituting sexual harassment as defined in § 106.30, including **sufficient details known at the time** and with sufficient time to prepare a response before any initial interview. Sufficient details include:
 - ◆ the **identities** of the parties involved in the incident, if known,
 - ◆ the **conduct** allegedly constituting sexual harassment under § 106.30,
 - ◆ and the **date and location** of the alleged incident, if known.

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Notifications Continued

Written notice must also:

- ◇ include a statement that the respondent is **presumed not responsible** for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process
- ◇ inform parties they may have an **advisor of their choice**, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section
- ◇ inform parties of any provision in the IHE's code of conduct that **prohibits knowingly making false statements** or knowingly submitting false information during the grievance process
- ◇ If the IHE decides to investigate allegations about the complainant or respondent that fall within Title IX and are not included in the notice provided pursuant to paragraph (b)(2)(i)(B) of this section, the recipient must provide notice of the additional allegations to the parties whose identities are known.

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Mandatory Dismissal

Must dismiss a complaint from Title IX process if the alleged conduct:

- ◇ would not constitute sexual harassment as defined in the regulations;
- ◇ did not occur in the IHE's education program or activity; OR
- ◇ did not occur against a person in the United States.

§ 106.45(b)(3)(i)

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Discretionary Dismissal

May dismiss a complaint from the Title IX process, at any time, if:

- ◇ complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein;
- ◇ the respondent is no longer enrolled or employed by the IHE; or
- ◇ specific circumstances prevent the IHE from gathering evidence sufficient to reach a determination.

§ 106.45(b)(3)(ii)

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Dismissal Requirements

Upon dismissal from Title IX process, IHE must:

- ◇ promptly send written notice of dismissal and the reason to both parties, and
- ◇ offer an appeal based on procedural irregularity, new evidence, or conflict of interest/bias.

§ 106.45(b)(3)(iii)

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Informal Resolution

An IHE can use informal resolution when all of the following are true:

- ◆ A formal complaint has already been filed.
- ◆ The complaint does not allege that an employee sexually harassed a student.
- ◆ Both parties provide voluntary, written consent to an informal resolution.
- ◆ The IHE gives the parties a written notice disclosing the allegations and the requirements of the informal process.

An IHE may not condition enrollment, employment, or any other right of students or employees on agreeing to an informal process.

At any time prior to agreeing to a resolution, either party has the right to withdraw from the informal process and resume the formal grievance process with no consequences.

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Informal Resolution

Method: Informal resolutions can include: mediation, arbitration, restorative justice, or other strategies.

Who facilitates: Facilitators can be third party providers, and do not have to sign MOUs with the IHE. All facilitators are subject to the same training and impartiality requirements as are an IHE's Title IX coordinators, investigators, and other decision-makers.

Sanctions: An IHE can impose any disciplinary consequence after an informal process that they could also impose in a formal process, including expulsion. However, the respondent may withdraw from the informal process at any point, and can thus choose to begin or resume a formal process instead of agreeing to a particular sanction.

Serving as witnesses: Under the regulations, facilitators can serve as witnesses in a subsequent grievance procedure as long as this possibility is disclosed to the parties in the written notice prior to the informal process beginning. However, IHEs may also want to consider Colorado state law concerning confidentiality of mediation communications.

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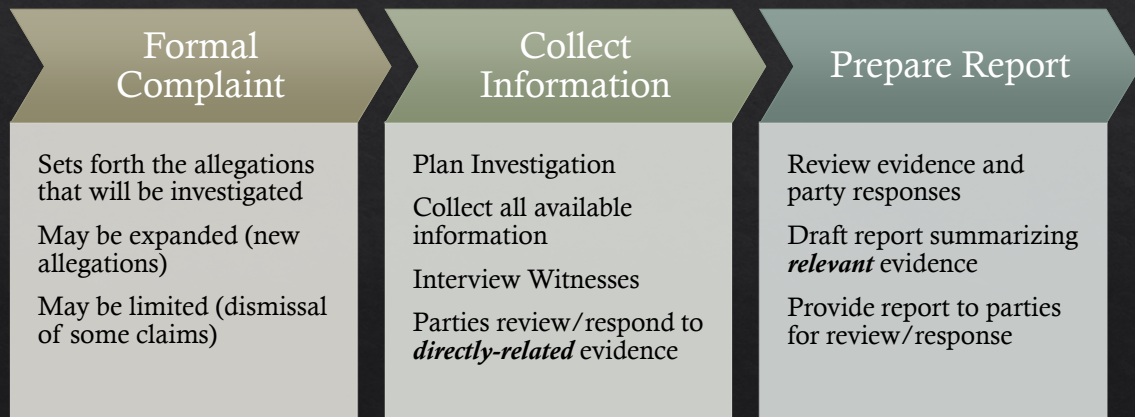
Break

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Part V: Investigations

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Investigation Overview



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Who should conduct the investigation?

The investigator should be:

- Objective and impartial.
- Familiar with the Title IX regulations and the IHE's rules, policies, and procedures.
- Trained in conducting the type of investigation required by the grievance process.
- Able to maintain confidentiality, as appropriate.
- Detailed and organized.

Note: investigator cannot be decision-maker for hearing or appeal

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Planning the Investigation

- ◇ Equal opportunity for the parties to present witnesses, and evidence. § 106.45(b)(5)(ii).
- ◇ Scope
 - ◇ Confined only to original allegations;
 - ◇ Expanded to include additional allegations after notice provided
 - ◇ May consolidate formal complaints where the allegations of sexual harassment arise out of the same facts or circumstances. §106.45(b)(4).
- ◇ Collect available background information before conducting interviews.
- ◇ Obtain necessary, written, consent for certain information. § 106.45(b)(5)(i).
 - ◇ Records maintained by a physician, psychiatrist, psychologist, or other recognized professional in connection with the provision of treatment to the party.

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Conducting the Investigation

Deciding whom to interview.

Representation at the interviews.

- Parties have the right to be accompanied by an advisor of their choice, but the IHE can place restrictions on the extent to which the advisor can participate, so long as restrictions are applied equally to both parties. § 106.45(b)(3)(iv).

Conducting the interviews.

- Must provide parties with written notice of investigative interviews with sufficient time for the party to prepare and participate. §106.45(b)(5)(v).

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Conducting an Interview

Types of questions to ask

Demeanor toward interviewees

Preserving a record of the interview

Cautions about promising confidentiality

Cautions about promising certain results

Avoiding assumptions

Presuming a conclusion

Failing to show your work

Avoiding personal bias

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Conducting the Investigation, Cont.

- ◇ IHE must provide directly related evidence to the parties **prior** to completion of investigative report:
 - ◇ Parties (and advisors, if any) must have equal opportunity to inspect and meaningfully respond to directly related evidence before report finalized
 - ◇ Must send in an electronic format or a hard copy
 - ◇ Parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report.
 - ◇ The IHE must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.

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Directly-Related vs. Relevant Evidence

DIRECTLY RELATED	RELEVANT
Directly related to the allegations in the formal complaint	Pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true
Includes evidence the IHE does not intend to rely upon in reaching a determination	Must be summarized in investigative report and provided to decision-maker for consideration
Parties/advisors must have at least 10 days to review and respond prior to completion of investigative report	Parties/advisors must be able to review and respond to evidence and final investigative report summarizing such at least 10 days prior to hearing

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Evidentiary Exclusions

Title IX bars the following types of evidence as not relevant (or otherwise excluded):

- ◇ information protected by a legally recognized privilege, unless waived
- ◇ any party's medical, psychological, and similar records, unless party gives voluntary written consent
- ◇ information protected by rape shield provisions

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Rape Shield Provisions

(1) All questions and evidence of a complainant's sexual predisposition (dress, speech, or lifestyle) are irrelevant, with no exceptions; and

(2) Questions and evidence about a complainant's prior sexual behavior are irrelevant, unless:

- ◇ offered to prove that someone other than the respondent committed the conduct alleged; or
- ◇ concerning specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent

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Finalizing the Investigative Report

What to put in/leave out of the report: report must fairly summarize the relevant evidence. §106.45(b)(5)(vii).

Cautions about including recommendations or conclusions in the report.

Regulations require: At least 10 days prior to a hearing, ..the IHE must send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response. §106.45(b)(5)(vii).

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Uses for Investigative Reports

- ◆ Grievance Hearing.
 - ◆ Can be presented by the IHE, Complainants, or Respondents.
- ◆ Appeal, Discrimination Lawsuits, Federal Civil Rights Claim, or other Litigation.
- ◆ Presented as part of an IHE's defense to those lawsuits.
- ◆ Personnel Action.

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Part VI: Hearing and Appeal

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Hearing



Grievance process must include live hearing. This requirement cannot be waived by either or both parties, or by the IHE.



Live hearings may be conducted with all parties physically present or, at the IHE's discretion, or the request of either party, the hearing can be done virtually, with technology enabling participants simultaneously to see and hear each other.



The live hearing must be recorded or transcribed.

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Hearing, Cont.

Advisors

Parties have the right to an advisor of their choice, who may be, but does not have to be, an attorney.

An advisor must be provided if a party does not have one to conduct cross-examination.

Only an advisor can conduct cross examination.

Advisors may conduct direct examination at IHE's discretion.

Support Persons

In some cases, a party may not have a person (including a support person), other than their advisor, attend the hearing, except as permitted under FERPA, as required by law, or as necessary to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

For instance, if a party has a disability, IHEs must comply with disability laws that may require accommodations. A person assisting a party with a disability may accompany a party to the hearing.

Decision-Makers

Right and responsibility to ask questions. Must determine relevancy of each question.

Must objectively evaluate the evidence, and independently reach a determination without deference to the investigative report.

Must evaluate relevant evidence for weight or credibility.

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Hearing Procedure & Evidence

Procedural Issues

- No pre-hearing depositions or hearing subpoenas allowed
- Rules of decorum permitted

Evidentiary Issues

- Parties must have equal opportunities to present evidence, including expert evidence
- IHE can also present evidence
- Standard of Evidence: must be clear and convincing, or preponderance of the evidence. But, consider Colorado law on standard of evidence.
- Relevance is the standard that the final regulations require, and any evidentiary rules that an IHE chooses must respect this standard. For example, an IHE may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence.
- Credibility determinations

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Hearing, Cross-Examination

- ◇ Cross Examination
 - ◇ ~~If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.~~
 - ◇ ~~Exceptions~~
 - ◇ ~~Video Evidence (not including statements in the video)~~
 - ◇ ~~Statement = Sexual Harassment~~
 - ◇ 106.45(b)(6)(i) VACATED as arbitrary and capricious by *Victim Rights Law Center, et al. v. Cardona* (2021)

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Hearing, Determination

Written Determination Regarding Responsibility

- ◆ Identification of the allegations potentially constituting sexual harassment as defined in § 106.30.
- ◆ 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.
- ◆ Findings of fact supporting the determination;
- ◆ Conclusions regarding the application of the IHE's code of conduct to the facts;
- ◆ A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the IHE imposes on the respondent, and whether remedies designed to restore or preserve equal access to the IHE's education program or activity will be provided by the IHE to the complainant; and
- ◆ The IHE's procedures and permissible bases for the complainant and respondent to appeal.

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Technology for Virtual Hearings

- ◆ Know how to share content/screen to show exhibits.
- ◆ Know how to control the mute settings.
- ◆ Know how to record the hearing if needed, as the regulations require the hearing to be recorded or transcribed.
- ◆ If platform allows, know how to put participants in lobby or waiting area.
- ◆ Consider having an advance test of the technology with participants before the actual live hearing.
- ◆ Consider having parties submit and/or exchange potential exhibits in advance of the hearing.
- ◆ Encourage participants to participate in a location that has strong internet connection, is private and quiet, and has adequate lighting.
- ◆ Encourage participants to silence computer and telephone notifications during the hearing.



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Appeals

Mandatory Opportunity for Appeals

- ◇ IHEs must allow both parties to appeal:
- ◇ a determination regarding responsibility
- ◇ a dismissal of a formal complaint

§ 106.45(b)(8)

- ◇ Regulations suggest that informal resolution agreements should be treated as binding contracts and are not appealable. § 106.45(b)(9) & p. 30405

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Appeal Grounds

Either party may appeal on these grounds:

- ◇ procedural irregularity that affected the outcome of the matter;
- ◇ new evidence that was not reasonably available at the time the determination was made that could affect the outcome of the matter; or
- ◇ Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias for or against one of the parties that affected the outcome of the matter.

§ 106.45(b)(8)

- ◇ Schools may also offer opportunity for appeal equally to both parties on additional bases. § 106.45(b)(8)

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Appeal Procedural Requirements

For all appeals, IHE must:

- ◆ notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
- ◆ ensure that the decision-maker for the appeal is not the same person as the decision-maker that reached the determination regarding responsibility or dismissal, the investigator, or the Title IX Coordinator;
- ◆ ensure that the decision-maker for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of section 106.45, i.e., the training requirements and prohibitions against conflicts of interest and bias;
- ◆ give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
- ◆ issue a written decision describing the result of the appeal and the rationale for the result; and
- ◆ provide the written decision simultaneously to both parties.

§ 106.45(b)(8)

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Appeals: Additional Considerations

- ◆ A written determination becomes “final” only after the time period to file an appeal has expired, or if a party does file an appeal, after the appeal decision has been sent to the parties. p. 30393
- ◆ Supportive measures to maintain the status quo may need to continue during pendency of appeal. p. 30393
- ◆ IHE must maintain any records of an appeal and its result for 7 years. § 106.45(b)(10)
- ◆ IHE must ensure decision-makers for appeals receive training. § 106.45(b)(1)(iii)

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Part VII: Additional Considerations

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Sanctions and Remedies

Sanctions

- IHEs not required to implement certain sanctions, and sanctions do not have to be proportional to the conduct
- IHE can consider mitigating circumstances in imposing sanctions
- Sanctions cannot be effective until after appeal, if an appeal is initiated by either party

Remedies

- Where a determination of responsibility has been made against respondent, IHE must provide remedies to complainant
- Remedies must be designed to restore or preserve equal access to the IHE's education program or activity.
- Remedies may overlap with sanctions
- IHEs are prohibited from disclosing remedies to the respondent when the remedies do not directly affect the respondent

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Bias and Conflicts of Interest

Any individual designated by an IHE as a Title IX Coordinator, investigator, decisionmaker, or any person designated by an IHE to facilitate an informal resolution process, cannot have a conflict of interest or bias for or against complainants or respondents generally, or an individual complainant or respondent.



Dictionary definitions of conflicts of interest, bias, and partial



Based on a reasonable person standard

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Best Practices for Avoiding Bias and Conflicts of Interest

- ◆ Treat complainants and respondents equitably
- ◆ Avoid using sex stereotypes in training materials, policies, or procedures
- ◆ Treat each person as an individual, not as a member of a class
- ◆ Objectively examine relevant evidence before reaching a determination
- ◆ Give both parties equal opportunity to present witnesses and evidence
- ◆ Continue to evaluate bias and conflicts of interest throughout the process

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Examples:

- ◆ IHE's training materials were one-sided;
- ◆ IHE failed to conduct adequate investigation and objectively pursue the evidence;
- ◆ IHE failed to reveal information learned during the investigation to both parties;
- ◆ IHE investigator advocated for certain discipline;
- ◆ IHE personnel made statements demonstrating favor towards complainants or respondents;
- ◆ IHE failed to follow its own policies;
- ◆ IHE failed to follow established procedures for Title IX investigations and hearings
- ◆ Decision-maker was influenced by other school officials in reaching a decision;
- ◆ Decision-maker had professional connections with one of the party's parents.

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Regulations' Intersection with Other Laws

Internal References to:

- ◆ Constitutional protections: First, Fifth, & Fourteenth Amendments
- ◆ FERPA
- ◆ Title VII
- ◆ Title VI (procedural provisions)
- ◆ Parent/Guardian legal rights
- ◆ Clery Act and VAWA
- ◆ IDEA, Section 504, & ADA

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...and more
potential areas
for overlap

- ◇ HIPAA
- ◇ Open Meeting Laws
- ◇ Criminal law and proceedings

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Current Status of Title IX Regulations

- ◇ August 14, 2020: regulations take effect
- ◇ June 23, 2022: Notice of Proposed Rulemaking, with significant changes
- ◇ October 2023: anticipated date for final Title IX rules

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Proposed Rules

- ◆ Clarify that Title IX's prohibition of discrimination based on sex includes protections against discrimination based on sex stereotypes and pregnancy and applies to sexual orientation and gender identity;
- ◆ Expand the definition of sexual harassment;
- ◆ Expand protections for students and employees who are pregnant or have pregnancy-related conditions;
- ◆ Permit, but not require, live-hearings and cross examination to adjudicate sex discrimination complaints; and
- ◆ Establish clear requirements for schools to conduct a reliable and impartial investigation of all sex discrimination complaints, as Title IX requires as opposed to only formal complaints of sexual harassment

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Title IX Training Summer 2023

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