Title IX Coordinator Training
Part 3 of 3

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Organization & Content

01

- History & Context
- Conflicts of Interest, Bias & Impartiality
- Title IX Personnel
- Key Terms
- Record-keeping

02

- Sexual Harassment Definition
- Scope & Jurisdiction
- What to do When You Receive a Report/Complaint
- Dismissals
- Grievance Process Timeframe

03

- Investigation
- Hearing
- Dismissals
- Appeals
- Sanctions & Remedies

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Part 2 Review

- Definition of Sexual Harassment
- Reports & Complaints
- Does Title IX Apply? Scope & Jurisdiction
- What to Do When You Receive a Report of Sexual Harassment
- Dismissals
- Reasonably Prompt Timeframe

Part 3

- Grievance Process
- Due Process & Fundamental Fairness
- Investigation
- Evidentiary Considerations
- Hearing
- Cross-Examination
- Appeals
- Sanctions & Remedies

Mandatory Training Requirements 106.45(b)

- ✓ *On Title IX's definition of "sexual harassment"*
- ✓ *On the scope of the school's education program or activity*
- ✓ *On how to serve impartially, including by avoiding prejudgment of the facts at issue*
- ✓ *On how to avoid conflicts of interest and bias*
- ✓ *Any materials used to train must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.*
- ✓ ***On how to conduct an investigation and grievance process***
- ✓ *Decision-makers must receive training on any technology to be used at a live hearing, and on issues of relevance of questions and evidence, including when questions and evidence about a complainant's sexual predisposition or prior sexual behavior are not relevant*
- ✓ *Investigators must receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence*

Procedural Protections 106.45

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

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Grievance Process: Basic Requirements

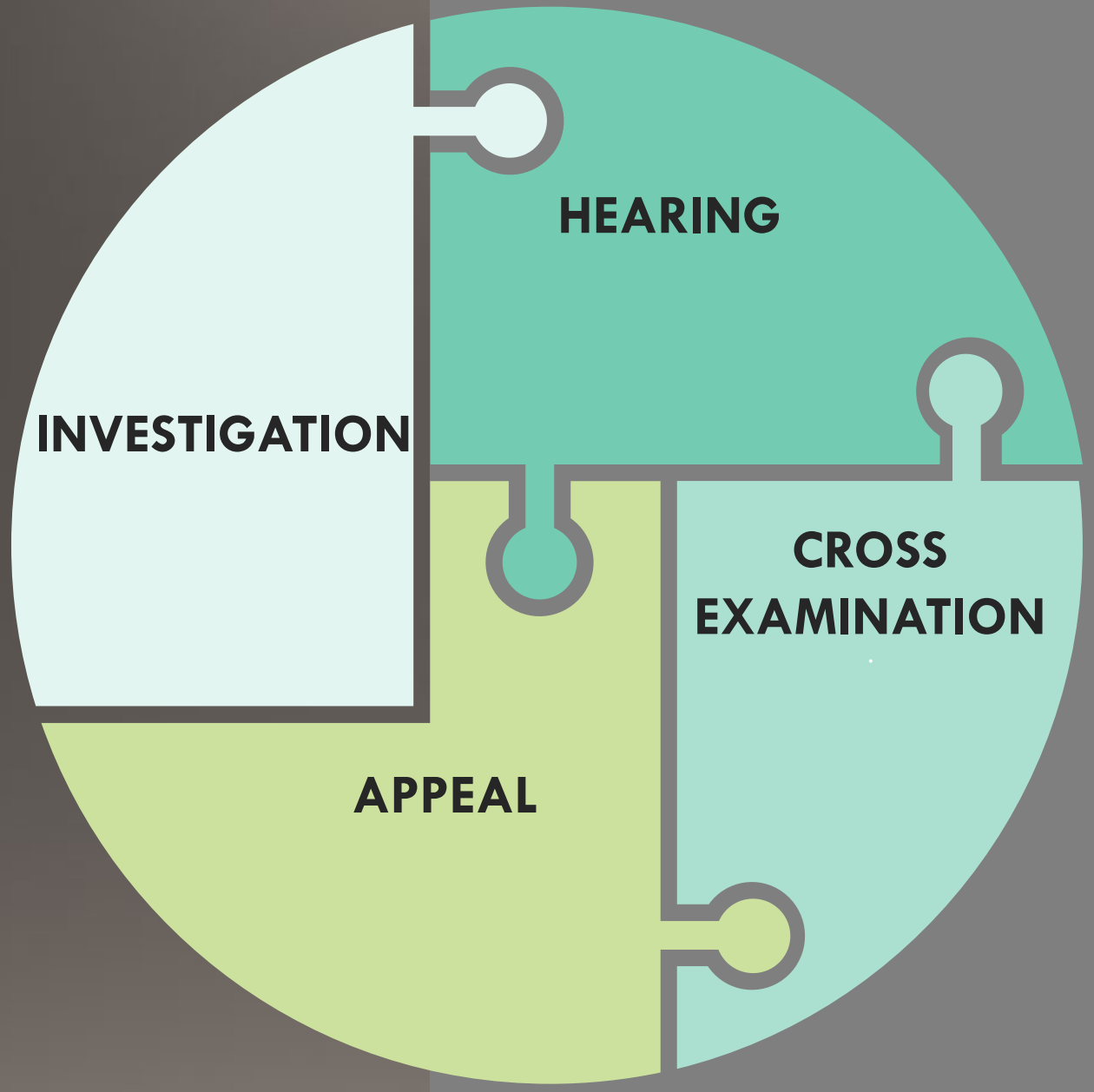
(i) Treat parties equitably
(ii) Require objective evaluation of all relevant evidence
(iii) Train Title IX personnel & post all training on web-site
(iv) Include a presumption that respondent is not responsible
(v) Include reasonably prompt time frames
(vi) Describe the range of, or list, possible disciplinary sanctions and remedies
(vii) State standard of evidence: preponderance or clear and convincing
(viii) Include process and bases for appeals
(ix) Exclude privileged evidence

School's treatment of parties may constitute discrimination 106.45(a)

(a) A recipient's treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination…

(b)…Any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment…apply equally to both parties.

FORMAL GRIEVANCE PROCESS: MAJOR COMPONENTS



Treat parties equitably 106.45(b)(1)(i)

(i)Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures against a respondent. Remedies must be designed to restore or preserve equal access to the recipient's education program or activity. Such remedies may include the same individualized services as "supportive measures"; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent;

Require objective evaluation of all relevant evidence 106. 45(b)(1)(ii) Title IX personnel must be conflict & bias free

(ii)Require an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence – and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness;

(iii)Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment in § 106.30, the scope of the recipient's education program or activity….

Presumption of Non-Responsibility 106.45(b)(1)(iv) Reasonably Prompt Timeframes

- Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility at the conclusion of the grievance process.

- Include reasonably prompt timeframes for the conclusion of the grievance process, including appeals and informal resolutions, with allowance for short-terms, good cause delays or extensions of timeframes

Describe the range of, or list, possible disciplinary sanctions and remedies 106.45(b)(1)(vi)

(vi)Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility;

Title IX Coordinator responsible for effective implementation of remedies: addressed under § 106.45(b)(7)(iii)

*Sanctions/discipline are punitive, the intent is to punish and prevent future recurrence; Focus is on the respondent

*Remedies and are provided ensure equal access; Focus is on the victim, or on the campus community at large

*Both sanctions and remedies are imposed after a finding of responsibility

*Remedies are similar to supportive measures, but they differ in that supportive measures are offered prior to any grievance process (or without a grievance process) and may not be punitive or unreasonably burden the respondent

*Remedies, however, are implemented after a finding of responsibility and they may place a burden on respondent and may be punitive

*Remedies MUST be implemented upon a finding of responsibility

State standard of evidence: preponderance or clear and convincing 106.45(b)(1)(vii)

State 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, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment;

*Standard must be used consistently across all cases

*Same standard must apply to both student and employee cases

*Preponderence: 51% or more likely that conduct did or did not occur

*Clear and Convincing: higher bar, evidence is more than 51% but less than beyond a reasonable doubt

Include process and bases for appeals 106.45(b)(1)(viii) and Range of Supportive Measures 106.45(b)(1)(ix)

- ✓ Describe the procedures and permissible bases for the complainant and respondent to appeal;
- ✓ Describe the range of supportive measures available to complainants and respondents

Privileged Evidence Inadmissible 106.45(b)(1)(x)

Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege in writing.

- ✓medical records
- ✓psychological records
- ✓attorney-client communications
- ✓spousal privilege
- ✓school remains subject to any other applicable privacy laws

Notice of Allegations (NOA) 106.45(b)(2)

Notice of allegations—(i) Upon receipt of a formal complaint, a recipient must provide the following written notice to the parties who are known:

(A)Notice of the recipient's grievance process that complies with this section, including any informal resolution process.

(B)Notice 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.

Notice of Allegations

- Identity of parties involved
- The conduct allegedly constituting sexual harassment
- Date and location of incident
- Statement of presumption of non-responsibility
- Determination will be made at the conclusion of the grievance process
- The right to have an advisor, who may be, but is not required to be an attorney
- Right to inspect and review evidence
- If school has policy that prohibits knowingly making false statements or submitting false information need to be provided
- Parties must receive written notice of the addition of any new allegations, or the dismissal of any allegations in the Notice.

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Sufficient Details of NOA 106.45(b)(2)(B)

- ✓Identities of the parties involved in the incident, if known,
- ✓Conduct allegedly constituting sexual harassment
- ✓Date and location of the alleged incident, if known
- ✓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
- ✓Right to an advisor of their choice, who may be, but is not required to be, an attorney
- ✓Right to inspect and review evidence
- ✓Include any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process

**Protect PII (SS#, homes address, phone numbers,etc) to extent possible*

Formal Complaints Must be Investigated Dismissals & Consolidation 106.45(b)(3)-(5)

<u>Formal Complaints Must be Investigated</u>

- must undertake an investigation in all cases where a formal complaint is filed
- concurrent law enforcement activity or investigation could justify delay *but* any such delay would only apply *after* the NOA is provided
- investigative techniques used in criminal setting would not necessarily apply; no delay in NOA or investigation; parties must have notice and opportunity to prepare

<u>Mandatory Dismissal</u>

- if allegations do not meet the definition, scope and jurisdictional requirements of Title IX they must be dismissed

<u>Consolidation</u>

- may (but are not required to) consolidate complaints

Investigation: Rights of the Parties

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Investigator

Preamble: "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 these functions free from conflict of interest and bias"

- Single investigator model prohibited (Investigator cannot be decision-maker)
- May have more than one investigator on a case
- Title IX Coordinator may serve as Investigator, although this could raise issues in terms of potential conflict of interest or bias
- Conflict & bias of Title IX personnel is a basis for appeal
- Schools must have process to ensure no conflict/bias and *may* provide a process for parties to assert claims of conflict/bias during the investigation

Burden of Proof 106.45(b)(5)(i)

**The burden of gathering evidence and the burden of proof must remain on schools not the parties*

- Both parties have the right to provide evidence and witnesses, but it is not their responsibility
- It is the school's job to conduct the investigation, track down and gather all of the evidence possibly and interview witnesses…
- The school is neutral during this process, they are not focusing on gathering evidence to prove respondent "guilty" or to prove respondent is not responsible; they are not "building a case"
- The goal is a truth-seeking mission; gather everything so that a neutral decision maker can reach an accurate determination based on the facts

Opportunity to Present Evidence 106.45(b)(5)(ii)

Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence

*note witnesses may be “expert” witnesses although what constitutes an expert witness, and who qualifies as an expert, is not defined

*same rules/evidentiary considerations would apply, i.e. evidence concerning complainant’s prior sexual behavior is not relevant (with limited exceptions), privileged evidence is inadmissible unless waived, etc.

Right to Discuss the Allegations & Gather Evidence 106.45(b)(5)(iii)

- ✓ Schools must not restrict the ability of the parties to discuss the allegations or gather evidence (no gag orders)

- ✓ Parties have the right to discuss the allegations with anyone they choose with limited exceptions:
  - ✓ no-contact directive
  - ✓ retaliatory manner

Right to an Advisor 106.45(b)(5)(iv)

Parties must have the same ability to select an advisor of choice, who may be, but need not be an attorney

- ✓ Parties can choose anyone to be their advisor
  - ✓ friend, parent, classmate, attorney
- ✓ Role of advisors
  - ✓ provide support, accompany party to meetings/interviews
  - ✓ adversarial with respect to their role in the hearing and in conducting cross examination
- ✓ School may limit to advisor's role with respect to their participation
- ✓ Any rules around the role of advisors must apply equally to both parties
- ✓ If a party does not have an advisor, the school must provide one at no cost to the party for the limited purpose of conducting cross exam during the hearing
- ✓ Advisor does not have to match the qualifications of the other party's, so if the other party has an attorney, the school is not obligated to provide an attorney

Written Notice 106.45(b)(5)(v)

Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate;

*School must balance promptness with procedural protections/due process

Opportunity to Review Evidence &Investigative Report

Prior to completion of investigative report, school must send to parties and their advisors, all evidence gathered that is directly related to the allegations, inculpatory & exculpatory, and provide at least 10 days to review and respond in writing

Final investigation report must fairly summarize relevant evidence and be provided to party and the party's advisor at least 10 days prior to a hearing with an opportunity to review and respond in writing

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Investigation Requirements 106.45(b)(5)(vi) Right to Inspect Evidence

Schools must send the parties *and their advisors:*

- ✓ **ALL** evidence directly related to the allegations
  will include relevant **and irrelevant evidence <u>including that which would otherwise be excluded under the rape shield protections</u>*
- ✓ includes evidence the school will <u>not</u> use/rely in making a decision
- ✓ includes inculpatory or exculpatory evidence whether obtained from a party or other source
- ✓ electronic format or a hard copy, otherwise, method and format of delivery up to school
- ✓ parties must have *at least 10 days* to submit a written response
  **consider when determining reasonable timeframes*
- ✓ the investigator <u>will</u> consider parties input prior to completion of the investigative report
- ✓ evidence *must be made available at hearing*

Investigation Requirements 106.45(b)(5)(vii) Right to the Investigative Report & Evidence

AFTER the initial review period which includes all evidence:

- ✓the investigator will finalize the investigative report incorporating feedback received from the parties as appropriate.
- ✓The final report will summarize RELEVANT evidence
  - * will exclude evidence about complainant's prior sexual history with two limited exceptions
- ✓The final report must be provided to the parties and their advisors in electronic or hard copy, at least ten (10) days prior to the hearing, with an opportunity to respond in writing.

Dismissals 106.45(b)(3)

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

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Evidentiary Considerations

Burden of Proof: school carries the burden to collect evidence

Related-to: all evidence that is related to the allegations; includes relevant and irrelevant evidence

Relevant: all evidence directly related to the allegations EXCEPT evidence related to the complainant's prior sexual behavior unless it is offered to provide identity or consent

Privileged: evidence subject to a legally recognized privilege, attorney-client, physician-patient, spousal, clergy, medical/health or psychological records

Statements of non-cooperating party or witness: the statements of a party or witness that does not submit to cross examination may not be considered by the decision-maker in rendering a decision

Appeal: appeal based on procedural irregularity could include appeal of a decision to include or not include evidence based on categorization as relevant or not, or on school's failure to objectively evaluate all relevant evidence

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

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

Live Hearing

<u>Cross-examination must be conducted the party's advisor of choice (or school provided if party does not have one):</u>

- ✓ directly
- ✓ orally
- ✓ in real time
- ✓ never by a party personally

*At the request of either party, the recipient must provide for the entire hearing to occur with the parties located in separate room with technology enabling the parties to see and hear each other

*Live hearings may be conducted with all the parties physically present in the same location or, at the school's discretion, any or all parties, witnesses or other participants may appear at the live hearing virtually.

Relevancy & Rape Shield Protections

Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

Non-Cooperating Party or Witness

- If a party or witness does not submit to cross examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility;
- However, the decision-maker cannot draw an inference based solely on that party's or witness's absence or refusal to answer questions
- School has no ability to compel either parties or witnesses to cooperate, appear at the hearing, provide testimony or otherwise participate in the process

Record of Hearing

Schools must create an audio or audiovisual recording, or transcript of the hearing

- ✓ Must maintain for seven-years
- ✓ Parties have the right to inspect

Written Determination 106.45(b)(7)

The written determination must include:

- Allegations potentially constituting sexual harassment
- Procedural steps taken
- Findings of fact
- Conclusions regarding the application of code of conduct to the facts
- Statement and rationale for each allegation
  - Including determination of responsibility
  - Any disciplinary sanctions & applicable remedies
- Bases & procedure for Appeal

Appeals

Appeals of final determination or dismissal <u>MUST be offered to both parties on the following bases:</u>

Procedural irregularity that effecting outcome

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

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

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Part 3 Re-cap & Key Takeaways

- Formal Grievance Process requires that respondent must be presumed not responsible, and must incorporate the principles of due process & fundamental fairness
- The school carries the burden of proof and must conduct an impartial investigation, allowing the parties to provide evidence and witnesses and an opportunity to inspect and meaningfully respond to ALL evidence prior to completion of a final investigative report
- The school must provide a live hearing with cross examination conducted by advisors; only relevant and non-privileged evidence may be considered
- Both parties have a right to appeal under four different bases
- Sanctions may only be imposed after a finding of responsibility and Remedies must be afforded to complainant after a finding of responsibility

Supplemental Training Materials/Suggestions, and updates to the Rules will be posted at www.T9Now.com or you may contact me directly at Christine@T9Now.com with any questions.

Thank you!

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