



Putting Title IX into Play

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Quick Review

TIXC Intake STEPS

34 C.F.R. 106.44

1. Division receives report
2. Would these facts violate Title IX?
Yes? Title IX process
No? Other process
3. Meet with complainant
 - supportive measures
 - formal process
4. Respondent: supportive measures
5. Emergency removal?
6. Formal Process iff
 - Complainant files
 - TIXC believes would violate TIX
7. Informal Resolution vs. Investigate Complaint
 - If investigating, detailed written notice to parties
 - if investigating, discipline for the *sexual* misconduct must wait until TIX process completed
8. Is external reporting mandated?

Complaint

Must Retain

- **Harassment**
 - unwelcome
 - Severe
 - Pervasive (AND)
 - Objectively offensive
 - Effective denial of access
- **Quid pro quo**
- **Sexual assault, dating violence, domestic violence, stalking**



regulatory definition of
sexual harassment

34 C.F.R. 106.30(a)

Must Dismiss*

- Not sexual harassment even if true
- Did not occur in school program or activity
- Did not occur in US

* Send written notice to all parties of dismissal and reasons; can address conduct under other policies

34 C.F.R. 106.45(b)(3)

May Dismiss*

- Complainant requests withdrawal**
- Respondent's employment or enrollment ends **
- Circumstances prevent gathering sufficient evidence to reach determination (passage of time, lack of cooperation of complainant, etc)

** don't be too quick to dismiss for these circumstances

34 C.F.R. 106.45(b)(3)

Scope of division's "educational program or activity"

34 C.F.R. 106.44(a)

ANY LOCATION, EVENT,
CIRCUMSTANCE OVER
WHICH DIVISION EXHIBITS
SUBSTANTIAL CONTROL
OVER BOTH ALLEGED
HARASSER(S) AND
CONTEXT IN WHICH
HARASSMENT OCCURRED

- CAN INCLUDE OFF-CAMPUS,
"NON-SCHOOL" CONDUCT ◦

Who does what?

Title IX
Coordinator

Investigator

Informal
Resolution
Processor

Decision Maker

Appeal Decision
Maker

Impartiality: avoid bias or conflict of interest

34 C.F.R. 106.45(b)(iii)

BIAS

- Implicit
- Stereotyping
- History of taking a particular side
- Personal history/experiences
- Against complainants or respondents "generally"
- Against individuals involved

CONFLICT OF INTEREST

- Financial or reputational interest encourage protection of division
- Overreaching in role: stay in your lane

NOTICE OF COMPLAINT

34 C.F.R. 106.45(b)(2)

1. Notice of grievance process (and any available informal resolution process)
2. Provide sufficient detail of allegations to allow respondent(s) to prepare response
 - names of known parties
 - conduct alleged
 - date/location
3. State respondent presumed “not responsible” and determination is at end
4. Notice of right to advisor
5. Notice of right to inspect and review evidence
6. Notice of any code of conduct regarding false statements
7. Explain (or refer to policies for) range of possible discipline/remedies; preponderance standard; process for appeal; and available supportive measures
 - supplement if “open” case as to new allegations

Investigator

STEPS

34 C.F.R. 106.45(b)(5)

1. Written notice to parties before interviews
 - Sufficient notice/time to prepare
2. Equal access to parties to present evidence
3. Allow advisors to parties at all meetings
 - Cannot prevent discussion outside of process
4. Do not use health record evidence without consent
5. Make all evidence available upon request during process
 - redact names?
6. *Send evidence* to all parties at least 10 days before finishing report
 - Including evidence not being relied upon
7. Factor comments submitted by parties into report
8. Written report, sent to all parties at least 10 days before sending to decision maker
 - within 35 days after complaint filed (VSBA)
9. "reasonably prompt"
10. Maintain confidentiality

Investigation Best Practices

1. Read policies, etc (*this slide show!*) before you start each time, and PLAN (timeline!)
2. Explain why you are interviewing the individual in general terms
 - maintain confidentiality if possible
 - inform *respondent* presumed not responsible, no decision has been made
3. Question all with open-ended, who, what, when, where, how Qs
 - (1) Complainant(s); (2) witnesses; (3) respondent(s)
4. Inquire along a timeline, in chronological order
5. Ask "single issue," nonleading questions (and "anything else you'd like to add?")
6. Obtain other witness contacts and any documentary evidence available from each
 - written or recorded statements?
7. Explain retaliation prohibition
 - can no longer requires *parties* to "keep confidential," but can ask Ws to
8. Compare all statements and evidence
9. Gather and include evidence that weighs on: consistency, accuracy, memory, credibility (or lack thereof), implausibility, inconsistency, unreliability, ulterior motive, lack of cooperation

Written report

34 C.F.R. 106.45(b)(5)(vii)

- ▶ “Summarize” relevant evidence – **please be specific**
 - ▶ Omit truly insignificant, irrelevant* details
 - ▶ Include both inculpatory and exculpatory evidence
 - ▶ Provide enough factual information (if available) to allow decision maker to consider: consistency, accuracy, memory, credibility (or lack thereof), implausibility, inconsistency, unreliability, ulterior motive
- ▶ Note credibility evidence
 - ▶ Cannot base credibility determination on the speaker’s status (C, W, R)
- ▶ Append and refer to documentary evidence
- ▶ Indicate consideration of comments submitted by parties in response to evidence
- ▶ Do not make findings of responsibility, just recite evidence/facts

“rules of
evidence”

Presumption

Throughout process, respondent(s) must be presumed
“not responsible”

- do not pre-judge any fact or question ◦
- collect and review all evidence before decision ◦



Relevance

YES

NO

- ▶ “tends to prove or disprove a fact”
- ▶ Does this make the existence of any fact of consequence more or less likely to be true?
- ▶ Can be either inculpatory or exculpatory
- ▶ Questions about complainant’s prior sexual conduct, unless offered to prove (1) someone other than respondent committed alleged conduct or (2) specific incidents involving respondent, to prove consent
- ▶ Health care/treatment records
- ▶ Protected by privilege (e.g., 5th A, attorney-client)

34 C.F.R. 106.45(b)(1)(x);
(b)(5)(i); (b)(6)(ii)

Weighing relevant evidence

CREDIBILITY

reliability of the evidence or
source:

*Is there bias, motive, lack of
consistency?*

PERSUASIVENESS

believability,
relative strength

*Is this evidence believable,
plausible?*

- To be done *only after all evidence is gathered and reviewed*
- Consider only relevant evidence in totality
- Assign weight to relevant evidence based on believability, credibility
- Direct evidence is preferred to circumstantial
- Draw *necessary/objectively reasonable* inferences

Burden of proof (and gathering evidence)

34 C.F.R. 106.45(b)(5)(i)

ours





decision

STEPS

34 C.F.R. 106.45(b)(6),
(b)(7)

1. Review report, evidence
2. Review parties' responses to report
3. Provide notice that parties can submit relevant questions (and reasonable followup questions) parties want asked of any party or witness
4. Oversee Q&A process
 - explain any Q excluded as irrelevant
5. Written decision: determine responsibility
 - within 10 work days of report (VSBA)
6. Notice of right to appeal

How to decide

34 C.F.R. 106.45(b)(1)

- ▶ Objective and unbiased
- ▶ Objective evaluation of evidence
- ▶ Conclusion about whether respondent is responsible for harassment prohibited by Title IX
- ▶ Exercise independent judgment
- ▶ No conflict of interest or bias
- ▶ Ultimate Question (for each allegation): is it more likely than not that the respondent engaged in (or is responsible for) the alleged conduct?

Standard: preponderance

34 C.F.R. 106.45(b)(1)

“more likely than not”

- remember to begin with the presumption *not responsible*; the evidence must establish respondent “more likely than not” **is** responsible ◦

Written determination

34 C.F.R. 106.45(b)(7)

- ▶ Identify allegations
- ▶ Describe procedural steps taken
- ▶ Find facts – for each fact, weigh evidence and determine whether it happened or not
 - ▶ *Consider: consistency/corroboration, accuracy, memory, credibility (or lack thereof), implausibility, inconsistency, unreliability, ulterior motive*
- ▶ Apply code of conduct to facts
- ▶ State result of each allegation and rationale
- ▶ Recommend discipline, remedies
 - ▶ Remedies designed to restore or preserve equal access to school's educational program or activity
- ▶ Notify about appeal procedure
- ▶ Provide to parties
 - ▶ Final if no appeal filed within 5 work days (VSBA policy)

appeal

STEPS

1. Review timeliness of filing
 - within 5 work days of written decision (dismissal or determination) (VSBA)
2. Confirm bases for appeal are appropriate
 - procedural irregularity
 - new evidence not reasonably available during investigation
 - TIXC, investigator, decision maker bias, conflict of interest
3. Notice of appeal to both parties
4. Receive written statement(s) from parties (VSBA)
5. Review evidence, investigator report, written decision (VSBA)
6. Decision on appeal, in writing, describing result and rationale
 - within 15 calendar days of filing of appeal

34 C.F.R. 106.45(b)(8)

Informal resolution

STEPS

1. For student-on-student cases *only*
2. If one requests, other(s) must respond (yes/no) within 3 days (VSBA)
3. Obtain voluntary, written consent
4. Provide notice of allegations, informal process "rules," and ability to resume formal process
5. Complete with in 10 days (VSBA)
6. If resolved, document complaint and resolution, parties sign, retain copies

34 C.F.R. 106.45(b)(9)

record retention

RULES

34 C.F.R. 106.45(b)(10)

1. Documents relating to every complaint
 - investigation
 - determination
 - discipline imposed
 - informal resolution
 - appeal
2. Training materials *
3. Documents relating to every report (whether or not becomes complaint)
 - supportive measures (or why not)
 - basis for conclusion response was not deliberately indifferent

Questions?

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