



BOWDITCH & DEWEY, LLP | OCTOBER 25, 2023

SEXUAL MISCONDUCT & TITLE IX TRAINING

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PART 2: HEARING OFFICER ROLE

TITLE IX GRIEVANCE PROCESS

RESPONSE TO ALLEGATIONS OF SEXUAL HARASSMENT

FOLLOWING A **REPORT** OF SEXUAL HARASSMENT:

- Promptly contact complainant to discuss availability of supportive measures and explain process for filing a formal complaint
- Must document reasons why supportive measures not provided

34 C.F.R. 106.44



RESPONSE TO ALLEGATIONS OF SEXUAL HARASSMENT (CONT'D)



SUPPORTIVE MEASURES

- Non-disciplinary, non-punitive individualized services provided to complainant and respondent to restore or preserve equal access
 - Examples: Counseling, extensions of deadlines, 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

34 C.F.R. 106.30

RESPONSE TO ALLEGATIONS OF SEXUAL HARASSMENT

(CONT'D)

INFORMAL RESOLUTION PROCESS IS AVAILABLE

- Only available if:
 - Formal complaint has been filed
 - School provides notice disclosing allegations and informal process requirements
 - Case does not involve employee on student sexual harassment
 - School obtains voluntary, written advance consent (parties cannot be forced to participate)
- School can facilitate at any time prior to determination
- Parties can return to formal grievance process before resolution

34 C.F.R. 106.45



RESPONSE TO ALLEGATIONS OF SEXUAL HARASSMENT

FOLLOWING **FORMAL COMPLAINT** OF SEXUAL HARASSMENT:

- Immediately send notice of allegations to complaint and respondent
- Offer supportive measures
 - Must document why supportive measures not provided
 - Best practice: document offer and supportive measures that are implemented
- Initiate formal grievance process (investigation, hearing, appeal)

34 C.F.R. 106.44

INSTITUTIONAL RESPONSE TRIGGERED BY REPORT OR FORMAL COMPLAINT:

- “Formal Complaint” is a document filed by a complainant or signed by the Title IX Coordinator. C.F.R. 106.30(A)
 - REQUIREMENTS:
 - A document or electronic submission that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint;
 - Alleging that a respondent(s) has engaged in conduct prohibited under the University’s Sexual Misconduct Policy; and
 - Requesting that the University investigate the allegation
- “Report” is a complaint of sexual harassment not meeting Formal Complaint requirements.

COMPLAINT DISMISSAL

- Dismissal of Complaint Prior to Resolution
 - Mandatory
 - Conduct alleged if proved would not constitute sexual harassment as defined in the regulations (e.g., occurred outside U.S.)
 - Discretionary
 - Complainant withdraws complaint or refuses to participate
 - Respondent is no longer a student or employee
 - Institution has no authority over Respondent
- Must provide notice of dismissal and opportunity for parties to appeal
- Dismissal does not preclude action under other conduct policies

34 C.F.R. 106.45



INITIAL NOTICE REQUIREMENT

NOTICE OF ALLEGATION INCLUDES:

- Notice of grievance process
- Notice of allegations with sufficient details
- Presumption of non-responsibility
- Notice of right to advisor of choice who may be (but is not required to be) attorney
- Notice of right to review evidence
- Notice of prohibition of false statements

34 C.F.R. 106.45

INVESTIGATION

THE INVESTIGATOR WILL GATHER EVIDENCE, AND SUMMARIZE RELEVANT EVIDENCE:

- Witness statements
- Documents (social media, email)
- May include privileged evidence, if the privilege is waived
- May NOT include illegally obtained evidence (recordings)
- Generally, will not include character evidence

34 C.F.R. 106.45



FORMAL GRIEVANCE PROCESS

EQUITABLE TREATMENT OF COMPLAINANTS AND RESPONDENTS

- Presumption that respondent is not responsible
- Determination of responsibility, remedies, and sanctions can only be made at conclusion of compliant formal grievance process
- School has burden of collecting evidence and establishing responsibility
- Parties have equal opportunity to have others present during any institutional disciplinary proceeding, including right to be accompanied by advisor of their choice

34 C.F.R. 106.45



FORMAL GRIEVANCE PROCESS

(CONT'D)

OBJECTIVE EVALUATION OF ALL RELEVANT EVIDENCE

- Consider both inculpatory and exculpatory evidence
- Credibility may not be based on status as complainant, respondent, or witness

34 C.F.R. 106.45

FORMAL GRIEVANCE PROCESS (CONT'D)

NO CONFLICT OF INTEREST OR BIAS

- Conflict of interest exists when individual's knowledge of the matter or relationships with parties or witnesses (personal or professional) would preclude impartiality
- Bias is an unfair prejudice in favor or against a party
- Must report actual and potential conflicts of interest to the Title IX Coordinator

34 C.F.R. 106.45

INSTITUTION MUST ESTABLISH THE STANDARD OF REVIEW TO BE USED IN GRIEVANCE PROCESS

- Preponderance of the evidence **or** clear and convincing evidence
 - Preponderance = more likely than not
- Same standard for all formal complaints
- Same standard for employees, faculty, and students
- Standard applied by decision-makers (cannot be Title IX Coordinator or Investigators)

34 C.F.R. 106.45

STANDARD OF REVIEW

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BASED ON AN IMPARTIAL REVIEW AND EVALUATION OF ALL EVIDENCE DEVELOPED

- Establish the elements of each claim
- Consider strength of evidence (incriminating and exculpatory)
 - Corroborating evidence not required. 85 FED. REG. 30384.
- Evaluate credibility of witnesses and parties
 - Credibility may not be based on status as complainant, respondent or witness
- Draw reasonable inferences

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ADJUDICATORS

DUTIES & RESPONSIBILITIES OF TITLE IX ADJUDICATORS & ADVISORS

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TITLE IX ADJUDICATOR

- Hearing board members are responsible for assisting in the overall implementation of procedures to ensure all participants receive the equality and fair process rights granted to them throughout the hearing process.
- Hearing board chair has additional responsibility for the overall implementation of formal hearing procedures.

TITLE IX ADVISOR

- Advisors are responsible for helping participants prepare for student conduct meetings or conferences, accompanying the party in any conduct proceedings, advising the participant in the sharing of information, and assisting during the appeals process.

34 C.F.R. 106.45

REQUIREMENTS FOR ADJUDICATORS & ADVISORS

TRAINING TOPICS MUST INCLUDE:

- Definition of sexual harassment,
- Scope of “educational program or activity,”
- Investigation and grievance process, policies,
- Impartiality,
- Rape shield protections,
- Relevance (in creating an investigative report), and
- Any technology used at a live hearing

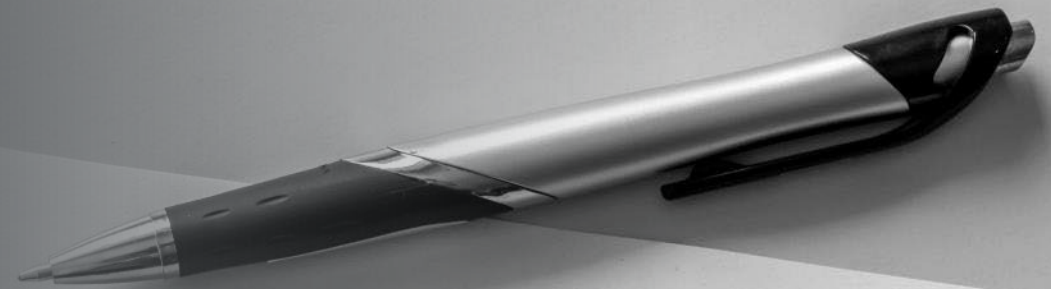
34 C.F.R. 106.45(B)(1)(III)

REQUIREMENTS FOR ADJUDICATORS & ADVISORS

(CONT'D)

CAMPUS SAVE ACT

- Procedures for Campus disciplinary hearings must be conducted by officials, who at a minimum, receive annual training on issues related to Violence Against Women (“VAWA”) crimes – (Sexual Assault, Domestic Violence, Dating Violence and Stalking). (Campus SaVE Act)

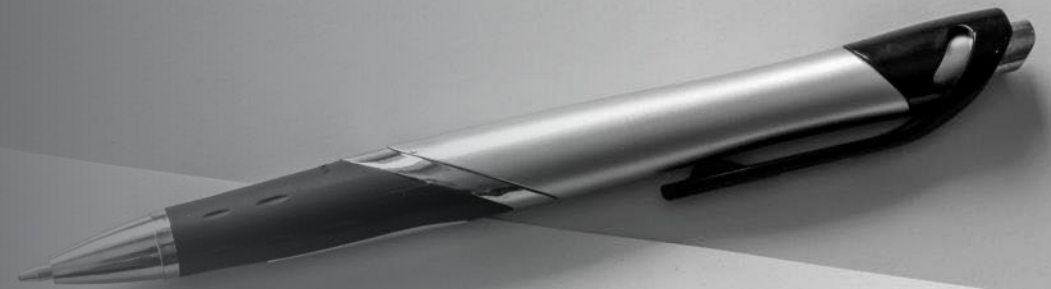


REQUIREMENTS FOR ADJUDICATORS & ADVISORS

(CONT'D)

- Due Process at Private Schools.
 - By Contract/Policy, not Constitution
- Title IX and VAWA disciplinary proceedings must be fair and equitable to both the victim and the accused.
- Equal treatment of the Alleged Victim and the Alleged Perpetrator is required.
- Common Sense Fairness.
- What is allowed for one must be allowed for the other.
- A Hearing that is Fair and Impartial to Both.

(Campus SaVE Act)



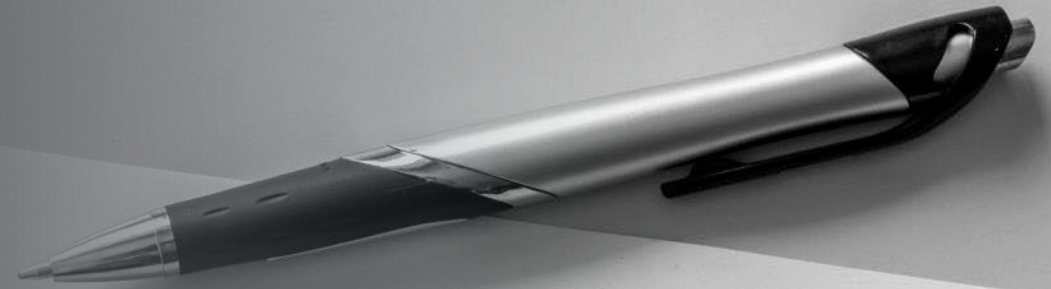
REQUIREMENTS FOR ADJUDICATORS & ADVISORS

(CONT'D)

MA LAW

- Does not require hearings for private institutions
 - May be required for public institutions if suspension or expulsion is possible
- Parties not permitted to personally directly question each other
- Institutions must keep parties' identities private to the extent possible

(M.G.L. c. 6 section 168E)



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ADJUDICATION ORGANIZATION & PLANNING

LIVE HEARINGS

- Hearings may be conducted in-person or at the institution's discretion, virtually by means of technology enabling the participants to see and hear each other simultaneously.
- Each party's advisor will have the opportunity to cross-examine the opposing party and witnesses – directly, orally and in real time
- Decision-maker(s) must determine if questions are relevant before party/witnesses responds. However, cannot require submission of questions in writing in advance
- Institution must provide an advisor for any party who does not have one present at the hearing
 - Institution chooses the advisor who may be, but is not required to be, an attorney to conduct cross-examination
 - Advisor is provided without cost to the party

34 C.F.R. 106.45

HEARING RULES

(CONT'D)

RECORDING

- Institution must record hearings (audio, audiovisual, or transcript) and make it available to the parties for review

34 C.F.R. 106.45



PREPARATION AND INITIAL MATTERS

- Review investigation report
- Identify appropriate time and location for hearing
- Provide written notice for the hearing
 - Address accommodation needs and rules concerning attendance and participation of advisor
 - Give sufficient time to prepare
- Prepare, prepare, prepare
- Assemble documents and other materials you will use
- Create an outline for the hearing. The outline is a guidance document (be flexible and prepared to deviate)
- Inform parties you will be recording and start the recording at the beginning of each hearing
- Provide an introduction concerning the hearing process and the role of the Investigator
- Advise hearing attendees of rights and expectations in the adjudicatory process
- Explain importance of honesty, institution's prohibition on retaliation, and the adjudicatory process

ASKING THE QUESTIONS – THINGS TO DO

- Short, neutral, non-judgmental, and open-ended questions
- Who, What, Where, When and How (sometimes “Why”)
- Ask varied questions on same subject, and allow time to respond
- Ask for clarification of unfamiliar slang words – be sure that you and the witness mean the same thing
- When consent is at issue, probe conclusory statements, e.g., the sex was consensual.
 - What is it that led you to believe he/she consented to sex?
 - What did she do that led you to believe he/she consented?
- Establish the chronology, and confirm that you’ve got it right
- Give the Complainant and the Respondent an opportunity to add information



ASKING THE QUESTIONS – THINGS TO DO (CONT'D)

- When drugs or alcohol make consent questionable, see suggested areas of inquiry below.
- Explore material inconsistencies with prior statements
 - According to the police report/prehearing statements provided to the Panel, you said a friend let you into the complainant's dorm. In your opening statement, you indicated that the complainant let you in. Could you clarify this?

ASKING THE QUESTIONS – THINGS TO AVOID (CONT'D)

- Avoid questions that call for speculation or guessing
 - Example: Why did the victim do that?
- Personal knowledge – avoid asking witnesses questions about their opinions or about subjects on which they lack knowledge, but do probe when the basis for a witness statement is unclear
 - Example: How do you know that [Complainant] wanted to have sex with the accused?
- Traps for the unwary
 - Assumption is the enemy of logic
 - Do not suggest answers for your questions. For example:
 - Q: Did you grab her leg or just happen to bump into her?
 - Q: Did you call her a “bitch” out of anger or were you just kidding?
 - Q: Did you just get into her bed or did she motion for you to come over?

- Questions and evidence about a complainant's prior sexual history are irrelevant ("rape shield protections") unless:
 - Offered to prove that someone other than the respondent committed the conduct alleged by the complaint, or
 - Concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent
- Avoid judgmental questions, such as:
 - "Why didn't you resist?"
 - "What were you wearing when you went to his room?"



CLOSING THE HEARING

- Advise about institution's prohibition on retaliation, and expectations concerning confidentiality and privacy
- Direct the parties and witnesses to contact investigator with any additional information or concerns regarding possible retaliation.

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EVIDENTIARY COMPLEXITIES:
RELEVANCE, CREDIBILITY, CONSENT

STANDARDS FOR COMPLIANCE



- Presumption that respondent is not responsible.
- Determination of responsibility can only be made at conclusion of process.
- Institution has burden of collecting evidence and establishing responsibility.

34 C.F.R. 106.45

CONFIDENTIAL & PRIVILEGED INFORMATION

- Must keep confidential:
 - Identity of parties and witnesses (report or formal complaint) except as permitted by FERPA, required under law, or necessary to conduct Title IX proceedings
 - The provision of supportive measures except as necessary to provide the same. 34 C.F.R. 106.30
- Cannot seek, disclose, or use privileged information (unless waived by privilege holder):
 - Attorney – client
 - Spousal privilege
 - Domestic violence victims' counselor – victim
 - Sexual assault counselor – victim
 - Communications to clergymen
 - Social worker – client
 - Psychotherapist – patient
- Treatment records may not be used in grievance process without voluntary, written consent

34 C.F.R. 106.45

RELEVANCE OF QUESTIONS & EVIDENCE

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RELEVANCE

- Evidence is relevant if it has a tendency to make a fact more or less probable than it would be without the evidence
- Remember rape shield protections

NOT ALL EVIDENCE IS CREATED EQUAL

- Determining the weight of the evidence is not a mathematical exercise.
- Some evidence is more equal than other evidence.
- Example types of evidence
 - Percipient Witness Testimony
 - Independent Witness Testimony
 - Hearsay Evidence





ASKING THE QUESTIONS

- Assess the credibility of the witnesses, taking into account:
 - The person's opportunity and capacity to observe
 - Contradiction or consistency with other evidence
 - Prior inconsistent statements, or prior lies
 - Motive to lie
 - Improbability of person's account (does it make sense?)
 - Demeanor (open and cooperative vs. evasive, argumentative, hostile) – *but be careful*

CREDIBILITY CONSIDERATIONS



- Based on the totality of the circumstances
- Witness statements
- Level of detail and consistency
- Existence or absence of corroborative evidence
- Prior bad acts and/or prior false reports
- Reaction or behavior after the alleged incident (*but not how you think a person should respond*)
- Prompt complaint/disclosure
- Other contemporaneous evidence

CREDIBILITY CONSIDERATIONS (CONT'D)



- Demeanor
- Interest, Bias, Motive
- Detail
- Corroboration
- Common Sense

CONSENT COMPLEXITIES

- Words or activities which indicate a willingness to participate in specific sexual activity
- Alcohol (Drugs)
- Intoxicated \neq Incapacitated
- Inability to make informed, rational judgments and decisions
- When drugs or alcohol are involved, incapacitation should be measured by evaluating how the substances affect:
 - Decision-making capacity
 - Awareness
 - Ability to make informed judgments





CONSENT COMPLEXITIES

(CONT'D)

- It is important to recognize and evaluate the impact of actual and/or apparent authority on consent.
- Consent to a romantic relationship may not be valid where either person has direct or indirect power or control over any aspect of the other person's academic or employment environment (emphasis added).

INTOXICATION V. INCAPACITATION ISSUE

- Goals: Assess the impact of alcohol or drug consumption on the parties and percipient witnesses.
- The impact of alcohol (and drugs) varies from person to person: cannot ask “how many drinks did you have?”



INTOXICATION V. INCAPACITATION ISSUE (CONT'D)

- Type of alcohol consumed?
- Over what period of time?
- How quickly?
- Any food consumed? How much? When?
- Taking any medication that has restrictions regarding alcohol consumption?
- “Can you describe the impact that the consumption of alcohol had on you?”



INTOXICATION V. INCAPACITATION ISSUE

(CONT'D)

- Was the complainant ever unconscious? Did s/he regain consciousness during the incident? If so, what did the respondent do?
- Did the complainant black out?
- Did the complainant vomit?
- What was the complainant's condition when last seen by reliable third-party witnesses?
- Did the complainant seem to understand where s/he was and where s/he might be going?





DECISION

WRITTEN NOTICE OF DECISION REQUIRED

- Simultaneous notice to parties
34 C.F.R. 106.45

MA LAW: DECISION SHOULD ISSUE
7 BUSINESS DAYS AFTER FINAL
DETERMINATION



DECISION (CONT'D)

MUST INCLUDE:

- Identification of allegations potentially constituting sexual harassment;
- Description of procedural steps;
- Findings of fact supporting the determination;
- Conclusions regarding application of code of conduct to the facts;
- Rationale for the result as to each allegation, what disciplinary sanctions will be imposed, and any remedies provided to Complainant (with appropriate confidentiality);
- School's procedures and permissible bases for appeal.

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

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APPEALS

INSTITUTION MUST OFFER BOTH PARTIES AN APPEAL FROM

- Determination regarding responsibility, and
- Dismissal of a formal complaint or any allegations therein on the following grounds:
 - Procedural irregularity that affected the outcome of the matter;
 - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
 - Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter

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RECORDKEEPING

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

QUESTIONS?



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