



University of Colorado

Boulder | Colorado Springs | Denver | Anschutz Medical Campus

Title IX Training: Investigations, Hearings, and Determinations

Introduction:
34 C.F.R.
§106.45(b)(1)(iii)

WHO?

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

WHAT?

- The definition of “Sexual Harassment” in § 106.30
- The scope of CU’s “education program or activity”
- How to conduct a grievance process – both the investigation and the hearing
- How to serve impartially by avoiding prejudgment of the facts, conflicts of interest, and bias
- Issues of relevance
- Technology to be used

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BACKGROUND

Title IX of the Education Amendments of 1972

20 U.S.C. § 1681:

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

- Athletics
- Recruitment & admissions
- Financial assistance
- Discipline
- Employment
- Sex-based harassment

1972: Statute



1975: Limited
Rulemaking



1980s-1990s:
Judicial
Decisions



1997-2017:
Guidance



2020:
Rulemaking

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2024 Regulations: Not Active or Enforced

Biden Administration formal rulemaking process

Pre-Aug. 1, 2024: *Kansas v. United States Dep't of Educ.*, 739 F. Supp. 3d 902, 936–37 (D. Kan. 2024)

- Partial injunction covering “schools attended by the members of Young America's Foundation or Female Athletes United, as well as the schools attended by the children of the members of Moms for Liberty.”

Jan. 9, 2025: *Tennessee v. Cardona*, 762 F. Supp. 3d 615, 627 (E.D. Ky. 2025)

- Completely set aside: “the entire Final Rule and corresponding regulations are invalid and must be set aside.”

February 4,
2025
“Dear Colleague
Letter”

“This letter is to clarify that . . . the United States Department of Education’s (ED) Office for Civil Rights (OCR) will enforce Title IX under the provisions of the 2020 Title IX Rule, rather than the 2024 Title IX Rule. Accordingly, lawful Title IX enforcement includes, inter alia, the definition of sexual harassment, the procedural protections owed to complainants and respondents, the provision of supportive measures to complainants, and school-level reporting processes as outlined in the 2020 Title IX Rule.”

Concepts and Key Definitions

§ 106.8 Designation of Title IX Coordinator: The Equity Offices

CU System: Office of Ethics, Risk, and Compliance (OERC)

- Valerie Simons, Vice President of Compliance and Equity and System Title IX Coordinator

CU Boulder: Office of Institutional Equity and Compliance (OIEC)

- Llen Pomeroy, Vice Chancellor and Title IX Coordinator

CU Denver | Anschutz: Office of Equity (OE)

- Elizabeth Schrock, Title IX Coordinator

CU Colorado Springs: Office of Institutional Equity (OIE)

- Laura Emmot, Associate Vice Chancellor of Institutional Equity and Title IX Coordinator

What triggers the University's obligations to respond?

§ 106.44(a) – When the University has actual knowledge of sexual harassment in an education program or activity of the University against a person in the United States, it must respond promptly in a manner that is not deliberately indifferent.

Actual knowledge

§ 106.30(a) - “Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient.”

Sexual Harassment

§106.30: Conduct on the basis of sex that satisfies one or more of the following:

Quid Pro Quo Sexual Harassment: An employee of the University conditioning the provision of an aid, benefit, or service of the University on an individual's participation in unwelcome sexual conduct;

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

"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 Assault

The Clery Act: “The term ‘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”

FBI: “Sex Offenses—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; also unlawful sexual intercourse.”

Dating Violence: VAWA

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:

(i) The length of the relationship.

(ii) The type of relationship.

(iii) The frequency of interaction between the persons involved in the relationship.

Domestic Violence: VAWA

Felony or misdemeanor crimes committed by a current or former spouse or intimate partner of the victim . . . and . . . includes the use or attempted use of physical abuse or sexual abuse, or a pattern of any other coercive behavior . . . to gain or maintain power and control over a victim, including verbal, psychological, economic, or technological abuse that may or may not constitute criminal behavior, by a person who—

- (A) is a current or former spouse or intimate partner of the victim, or person similarly situated to a spouse of the victim;
- (B) is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner;
- (C) shares a child in common with the victim; or
- (D) commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction.

Stalking: VAWA

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.

Some Examples

A professor tells a student she'll give them an "A" if they'll sleep with her – *Quid Pro Quo Harassment*

A student repeatedly sends another student graphic pornography using a University-owned computer – *Hostile environment*

A student engages in sexual intercourse with another student, while that student was too intoxicated to consent – *Sexual assault*

§ 106.44(a) – When the University has actual knowledge of sexual harassment in an education program or activity of the University against a person in the United States, it must respond promptly in a manner that is not deliberately indifferent.

In an education program or activity of the University

§ 106.44(a): Education program or activity includes locations, events, or circumstances over which the University 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 the University

Some examples

EDUCATION PROGRAM OR ACTIVITY

NOT

On campus locations (e.g., dorms, classrooms)

On or off-campus university events (e.g., athletic events, music festivals)

Activities in buildings controlled by officially recognized student organization (e.g., sororities and some fraternity houses)

Actions that use University-controlled technology (e.g., equipment, networks)

Circumstances over which the University exercised substantial control over the respondent and the context in which the harassment occurs (e.g., internships)

Activities in off-campus, non-University locations (e.g., bars, private housing)

Activities in buildings controlled by non-officially recognized organizations (e.g., some fraternities)

Personal travel

Against a person in the United States

§ 106.8(d):

“Application outside the United States. The requirements of paragraph (c) of this section apply only to sex discrimination occurring against a person in the United States.”

§106.45(b)(3)(i): Mandatory Dismissal

Is the conduct sexual harassment as defined in §106.30?

Did the conduct occur in an education program or activity of the University?

Did the conduct occur within the United States?

If the answer to any of those questions is “no”, the complaint must be dismissed from the Title IX process

§ 106.45(b)(3)(ii): Discretionary Dismissal

The University may dismiss a formal complaint if at any time during the investigation or hearing:

- the complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint
- the respondent is no longer enrolled or employed by the University or
- “specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination”

Addressing Non-Title IX Sexual Misconduct

§ 106.45(b)(3)(i):

dismissal of allegations about conduct that does not fall within the definition of Title IX Sexual Misconduct does not preclude the University taking action under another provision of the its code of conduct

The “Two Buckets” of Sexual Misconduct

TITLE IX SEXUAL MISCONDUCT

Harassment on the basis of sex that falls within the Rule’s definition and jurisdiction:

Conduct that occurs in an education program or activity against a person in the United States.

OTHER SEXUAL MISCONDUCT

Harassment on the basis of sex that does not meet the definition or jurisdiction of Title IX Sexual Misconduct, but still

- (1) occurred in an education program or activity of the University; or
- (2) both complainant and respondent are affiliated with the University; or
- (3) the University’s degree of control over the respondent and the surrounding circumstances led the Title IX coordinator to determine it appropriate to exercise jurisdiction

Includes broader concepts like sexual exploitation, as defined in APS 5014

Is it Title IX Sexual Misconduct?

Nonconsensual sexual contact between two students in an off-campus apartment.

- **NO.** Not “in the education program or activity.”

Professor makes lewd comments to student in class on one occasion.

- **NO.** Not “severe, pervasive, and objectively offensive.”

Nonconsensual sexual intercourse between two students in a study abroad program.

- **NO.** Not “in the United States.”

Nonconsensual sexual intercourse between two students in a dorm room.

- **YES.**

§106.30(a): A formal complaint

A document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the University investigate the allegation of sexual harassment.

At the time of filing, a complainant must be participating in or attempting to participate in the education program or activity of the University.

§106.44(a) Response to Formal Complaint

The Title IX Coordinator must promptly contact the complainant to discuss:

- the availability of supportive measures, with or without the filing of a formal complaint
- consider the complainant's wishes with respect to supportive measures, and
- explain to the complainant the process for filing a formal complaint.

Grievance Process

§ 106.8(c): Adoption of Grievance Procedures

“A recipient 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 this part and a grievance process that complies with § 106.45 for formal complaints as defined in § 106.30.”



Investigation of a Formal
Complaint



Informal Resolution

Key
Requirements
of § 106.45 for
the formal
grievance
process:

University bears the burden of proof (preponderance of the evidence)

Must treat parties equitably

Objective evaluation of all relevant evidence

Decision-makers must be impartial

Presume that the Respondent is not responsible

Apply the same burden of proof (preponderance of the evidence) to students and employees

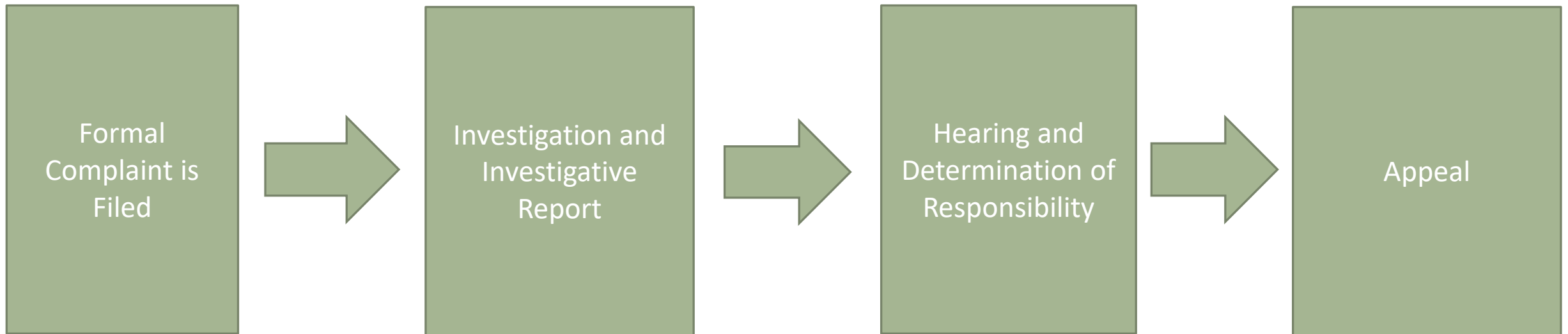
Create an investigative report that fairly summarizes relevant evidence

Hold a live hearing with live cross examination

Allow an advisor or provide an advisor for the hearing

Provide for an appeal

The University's Formal Grievance Process



Who is Involved
in the Grievance
Process?

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

Advisor

Each party may have an advisor of his or her own choosing

May or may not be an attorney

Advisor's role is to conduct cross-examination: directly, orally, and in real time

- must permit all relevant questions and follow-up questions, including those challenging credibility

If a party does not have an advisor, the University must provide an advisor to conduct cross-examination on behalf of that party

If a party does not appear and that party's advisor does not appear, a university-provided advisor must still cross-examine any other party or witness who appears

Investigator

(1) Conduct the investigation

- Conduct interviews
- Gather directly related evidence

(2) Prepare the investigative report

Hearing Officer

(1) Conduct the hearing

- Enforce the Rules of Decorum
- Make relevancy determinations
- Ask relevant questions

(2) Make a Written Determination of Responsibility

- Findings of fact
- Conclusions regarding the application of the Policy to the facts
- A statement of, and rationale for, a determination regarding responsibility

Other Important Roles

Title IX Coordinator

Witnesses

Support persons

Formal Investigation

§ 106.45(b)(5): The Formal Investigation

The burden of proof and of gathering evidence rests on the University and not the parties

Cannot use a party's privileged medical records unless the University has the party's voluntary, written consent

Provide an equal opportunity for the parties to present witnesses and evidence

Parties have same opportunities to have an advisor; rules about advisor participation must apply equally

Provide written notice of the date, time, location, participants, and purpose of all meetings with sufficient time to prepare

Provide equal opportunity to inspect and review any evidence that is directly related to the allegations raised in a formal complaint

Create an investigative report that fairly summarizes relevant evidence and send to each party and advisor for their review and written response

Relevant Evidence

From DOE: “The § 106.45 grievance process is designed to bring all **relevant evidence** concerning sexual harassment allegations to the decision maker’s attention so that a determination regarding responsibility is reached fairly and reliably.”

The Rules of Evidence do not apply, and the University is prohibited from adopting rules that contravene the purposes of the evidentiary requirements under § 106.45 (for instance, cannot adopt a rule prohibiting relevant evidence that is unduly prejudicial).

The investigator must collect and make available to the parties for review all **relevant and directly related evidence**.

The investigative report and the determination of responsibility may only be based on **relevant evidence**

Directly Related vs. Relevant Evidence

“Directly related” is not defined in the rules.

Directly related is a broader universe than “relevant.”

Relevant is not defined in the rules.

The Preamble states relevant evidence is:

- “evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true.”

What is **NOT** Relevant

Information protected by a legally recognized privilege unless waived

Any party's medical, psychological, and similar records unless party has given consent

All questions and evidence of a complainant's sexual predisposition

All questions and evidence of a complainant's prior sexual behavior, unless offered for 2 exceptions

Sexual Predisposition v. Prior Sexual Behavior

A complainant's "sexual predisposition:"

- Includes mode of dress, speech, and lifestyle
- Never relevant, no exceptions

A complainant's prior sexual behavior:

- Includes activities such as physical conduct like sexual intercourse and sexual contact, or activities that imply physical conduct like use of contraceptives. Also includes "behavior of the mind," like fantasies.
- Not relevant unless offered to show:
 - Someone other than the Respondent committed the conduct alleged
 - Concern specific instances of Complainant's prior behavior with Respondent and are offered to prove consent

§106.45(b)(5): The Investigative Report

At least 10 days prior to a hearing the University will send each party the investigative report, for their review and written response. The report must fairly summarize the relevant evidence.

The Hearing

Requirements of the Live Hearing

Cross Examination: each party's advisor asks the other party and any witnesses all relevant questions and follow-up questions

- directly, orally, and in real time
- never by a party personally

Virtual: CU uses Zoom

Advisors: Parties may have an advisor of their choice. **If a party does not have an advisor, the University must provide an advisor to conduct cross-examination on behalf of that party.**

Recorded: University must create a recording or transcript of any live hearing and make it available to the parties for inspection and review.

Technology

The University's hearings will be conducting using Zoom

Know how to control mute settings. Encourage participants to be on "mute" when not speaking.

Understand who will let witnesses in from the waiting room, and who will share the content of a screen to allow for viewing exhibits

Encourage participants to turn off computer and phone notifications during the hearing

Enforcing the Rules of Decorum

Although less formal than courtroom proceedings, the University requires a respectful hearing.

Any abuse, interference, or failure to comply with university hearing processes could result in the exclusion of individuals from the hearing or referral to other university offices.

Advisors who violate these expectations after warnings may be asked to leave

Hearing Officer has broad discretion and authority to respond to disruptive or harassing behaviors, including adjourning the hearing or excluding disruptive persons.

Impartiality: An Essential Focus

From the Preamble:

“[T]he Department’s interest in ensuring impartial Title IX proceedings that avoid prejudgment of the facts at issue necessitates a broad prohibition on sex stereotypes so that decisions are made on the basis of individualized facts and not on stereotypical notions of what ‘men’ or ‘women’ do or do not do.”

Avoid: Pre-judging the facts, conflicts of interest, and bias for/against any party

Do NOT

Rely on stereotypes about how men or women purportedly behave

Draw inferences about credibility based on a party's status as a complainant or respondent

For the decision-maker, be influenced by other school officials in reaching a decision

"I've seen this before – classic frat party case."

"One drunk girl can ruin a young man's life."

DO

Follow the University's policies and procedures

Treat the parties equally

Conduct the investigation, hearing, and appeal in manner that does not allow even a perception of bias for or against any party

Continue to evaluate bias throughout the process

Making on-the-spot relevancy rulings

Only relevant cross-examination and other questions may be asked of a party or witness.

Before a party or witness answers a cross-examination question, the Hearing Officer must first determine whether the question is relevant and explain any decision to exclude it.

Excluding statements of a person who has not submitted to cross examination

VACATED and does not apply.

~~§ 106.45(b)(6)(i) "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"~~

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Making the Determination

§106.45(b)(7): Written Determination of Responsibility

Decision-maker cannot be the same as the Title IX Coordinator or the investigator(s)

Written determination regarding responsibility must:

1. Apply the standard of evidence (Preponderance)
2. Identify the conduct allegedly constituting Sexual Misconduct;
3. Describe the procedural steps taken from the formal complaint through the determination, including notifications to the parties, interviews, methods used to gather other evidence, or hearings held;
4. Findings of fact supporting the determination;
5. Conclusions regarding the application of the Policy to the facts;
6. A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility

Potential overlap with other laws and processes

FERPA

Title VII

Clery Act and VAWA

IDEA, Section 504, & ADA

HIPAA

Criminal law and proceedings

Appeals

§ 106.45(b)(8): Appeal Requirements

Must offer both parties an appeal from a determination regarding responsibility

Must offer an appeal of the University's dismissal of a formal complaint

Basis for both appeals:

(A) Procedural irregularity that affected the outcome

(B) New evidence that was not reasonably available at the time the determination was made, that could affect the outcome of the matter; and

(C) The 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

The Appeal decision-maker(s) cannot be the same as the hearing officer, the investigator(s), or the Title IX Coordinator

Conclusion

§ 106.45 Grievance process for formal complaints of sexual harassment.

(a) Discrimination on the basis of sex. A recipient's treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under Title IX.



Questions?
