



September 4, 2020

Questions and Answers Regarding the Department's Final Title IX Rule

The Department of Education's Office for Civil Rights, through its Outreach, Prevention, Education and Non-discrimination (OPEN) Center, issues the following technical assistance document to support

The Definition of Sexual Harassment

Question 4: One form of sexual harassment is conduct on the basis of sex that constitutes “[u]nwelcome 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.” In this sentence, does “reasonable person” modify only “severe, pervasive, and objectively offensive,” or the effective denial clause as well? To clarify, can an ‘effective denial’ be something that a reasonable person would experience, even if there is not evidence to show that the Complainant was in fact effectively denied?

Answer 4: The “reasonable person” standard in the second prong of the definition of sexual harassment under § 106.30(a) applies to each of the elements from the U.S. Supreme Court’s decision in Davis v. Monroe County Bd. of Ed., 526 U.S. 629 (1999). These elements include: severity, pervasiveness, objective offensiveness, and effective denial of equal educational access. In the Preamble to the Rule at page 515, the Department states “The Davis standard ensures that all students, employees, and recipients understand that unwelcome conduct on the basis of sex is prohibited under Title IX.”

Conducting an Investigation Hearing

Question 6: May a recipient delegate many of the functions required by the Title IX Rule to an outside entity, such as a Regional Center or consortium of schools?

Answer 6: Yes. In particular, many of the elements of the investigation and hearing process lend themselves to delegation. The recipient itself remains ultimately responsible for ensuring compliance with the legal obligations under the Title IX Rule.

At page 273 of the Preamble to the Title IX Rule, the Department expressly contemplates and encourages recipients to consider innovative approaches such as consortiums and regional centers

The Department appreciates commenters' recommendations for using regional center models and similar models involving voluntary, cooperative efforts among recipients to outsource the investigation and adjudication functions required under the final regulations. The Department believes these models represent the potential for innovation with respect to how recipients might best fulfill the obligation to impartially reach accurate factual determinations while treating both parties fairly. The Department encourages recipients to consider innovative solutions to the challenges presented by the legal obligation for recipients to fairly and impartially investigate and adjudicate these difficult cases; the Department will provide technical assistance for recipients with questions about pursuing regional center models.

To be sure, there are limitations on the extent to which a recipient may delegate certain responsibilities to other entities. For instance, each recipient must itself employ a Title IX Coordinator. See § 106.8 ("Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the "Title IX Coordinator."). Similarly, each recipient is responsible for ensuring that its grievance procedures satisfy the Title IX Rule. See § 106.44(c) ("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"). Still, despite these limitations, the Title IX Rule offers ample opportunity for recipients to find efficiencies in cooperation with other recipients, particularly with respect to investigation and adjudication.

Question 7: What are the rules of evidence at a hearing? Do courtroom rules like the Federal Rules of Evidence apply to a hearing under Title IX?

Answer 7: The Title IX Rule does not adopt the Federal Rules of Evidence for hearings conducted under Title IX. For instance, with respect to which evidence may be introduced, the Rule uses "relevance" as the sole admissibility criterion. See § 106.45(b)(1)(ii) (the recipient's grievance process must provide for objective evaluation of all relevant evidence, including evidence that is inculpatory and exculpatory).

The Title IX Rule also deems certain evidence and information to be not relevant or otherwise precludes the recipient from using (i) a party's treatment records, without the party's prior

written consent [§ 106.45(b)(5)(i)]; (ii) information protected by a legally recognized privilege [§ 106.45(b)(1)(x)]; (iii) questions or evidence about a complainant's sexual predisposition, and questions or evidence about a complainant's prior sexual behavior unless it meets one of two limited exceptions [§ 106.45(b)(6)(i)]; and, for postsecondary institutions, the decisionmaker

However, there is a difference between the admission of relevant evidence, and the weight, credibility, or persuasiveness of particular evidence. At pages 981-82 of the Preamble, the Department further explains:

However, the § 106.45 grievance process does not prescribe rules governing how

to compel witness testimony. The Department believes that the final regulations, including § 106.45(b)(6)(i), strike the appropriate balance for a postsecondary institution context between ensuring that only relevant and reliable evidence is considered while not over-legalizing the grievance process.

(emphasis added) And at page 1181 of the preamble to the

Answer 12: The Title IX Rule, in § 106.45(b)(6)(i), states: “At the live hearing, the decision-maker(s) must permit each party’s advisor to ask the other party and any witnesses all relevant

the remedies and disciplinary sanctions decided upon the written determination issued under § 106.45(b)(7).

That provision, at § 106.45(b)(7) requires a recipient's decisionmaker(s) to issue a written determination that must include, among other items, the result as to each allegation and rationale for the result, any disciplinary sanctions imposed by the recipient against the respondent, and whether remedies will be provided by the recipient to the complainant. The issuance of a written determination cannot be a piecemeal process that is broken down into chronologically occurring subparts.

Recipients should also remain aware of their obligation to conclude the grievance process within the reasonably prompt time frames designated in the recipient's grievance process, under § 106.45(b)(1)(v). Additionally, each decisionmaker—whether an employee of the recipient or an employee of a third party such as a consortium of schools—owes an individual and ongoing duty not have a conflict of interest or bias for or against complainants or respondents generally, or with