

Includes in the Training Presentation are:

Title IX Policy Training -- Decision Making and Information Resolution Facilitator

Title IX Policy Training -- The New Role of the Title IX Coordinator DMi Webinar

Title IX Policy Training -- Investigator and Advisor

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# Title IX Decision-Maker and Informal Resolution Facilitator

Presented by  
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August 11, 2020



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# Today's Presentation

- Recap and Overview of Title IX Investigator and Advisor roles
- Role of the Informal Resolution Facilitator
- Role of the Decision-Maker
- Impartiality, Bias and Conflicts of Interest



# RECAP AND OVERVIEW OF TITLE IX COMPLAINT PROCESS

# Recap

- Final Rule published 5-19-2020 (85 Fed Reg 30026)
- Effective **August 14, 2020**
- Amends 34 CFR Part 106
- 2011 Q&A and 2001 OCR guidance remain good to the extent consisted with Final Rule

# Title IX Complaint Process Overview

- Formal Complaint Received by Title IX Coordinator
- **Optional Informal Resolution Process**
- Investigation
- **Live Hearing**
- **Decision and Remedial Measures**
- Appeals

# Sexual Harassment

- Under the 2020 Final Rule, Sexual Harassment is conduct on the basis of sex that falls into one or more of the following 3 categories
- Definition located in 34 CFR 106.30



# 1. Quid Pro Quo

- An employee of the school conditioning the provision of an aid, benefit, or service of the school on an individual's participation in unwelcome sexual conduct;

## 2. 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

### 3. Sexual Violence

- “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 Violence

- **Sexual Assault:** As defined in 20 U.S.C. 1092(f)(6)(A)(v), means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.
- **Dating Violence:** As defined in 34 U.S.C. 12291(a)(10), means 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: the length of the relationship; the type of relationship; and, the frequency of interaction between the persons involved in the relationship.

# Sexual Violence

- **Domestic Violence:** As defined in 34 U.S.C. 12291(a)(8), includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.
- **Stalking:** As defined in 34 U.S.C. 12291(a)(30), means 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.

## Recap – Investigator

- Title IX Coordinator, other school employee or 3rd party
- Cannot be the Decision-Maker
- Must be trained
- Conduct and impartial investigation to gather the facts
- Put Decision-Maker in best possible position to understand relevant evidence for the live hearing

## Recap – Advisor

- Parties have the right to an advisor of their choice
- Required for live-hearing (cross-examination)
- If school-selected can be an employee or 3rd party
- No training required
- School can implement advisor guidelines



# INFORMAL RESOLUTION



# Informal Resolution Facilitator

- School employee or 3<sup>rd</sup> party
  - Ensure no bias or potential conflicts of interest
- Must be trained on the informal resolution process

## Informal Resolution

- Can only be utilized when there is a Formal Complaint
- Discretionary—can be used so long as both parties give voluntary, informed, written consent to attempt informal resolution
- School may not require a waiver of the right to a formal investigation and adjudication of Formal Complaints of Sexual Harassment as a condition of enrollment, employment, or enjoyment of any other right
- At any time before resolution, a party can withdraw from the informal resolution process and resume the grievance process

## Informal Resolution Considerations

- Cannot be used to resolve allegations that an employee sexually harassed a student
- Cautiously consider using informal resolution severe situations or violent incidents
- Title IX Coordinator determines if informal resolution should be utilized

# Informal Resolution Considerations

- Can create ground rules – provide in writing
  - Maximize potential for resolution
- Can be technology facilitated
- Can result in an agreement between the parties
  - Supportive Measures
  - Voluntary acceptance of disciplinary action

# Pros and Cons

- Pros:
  - Simplified process – potentially no live hearing
  - Quicker
  - Complainant and Respondent are involved in the outcome
- Cons:
  - Less safeguards
  - Can delay the grievance process if unsuccessful

## Best Practices

- Goal is to help the Complainant and Respondent reach an agreement on their terms
  - Discuss potential resolution terms
- Be compassionate and neutral
  - Do not take sides
  - Do not make assumptions



# LIVE HEARING

## Selecting Decision-Maker(s)

- School employee or 3<sup>rd</sup> party
- Can be more than one person
- Cannot be the Title IX Coordinator
- Must be trained



# Decision-Maker Training

- School's policies and procedures including technology
  - Not responsible presumption
- Definition of Sexual Harassment
- Relevance
- Impartiality, bias and conflicts of interest
- How to analyze evidence in relation to legal standard
- Determination of responsibility
- Documentation requirements

# Live Hearing Requirements

- Postsecondary institutions must provide a live hearing (no requirement for elementary/secondary schools)
- Requirements for a live hearing include:
  - Opportunity for parties' advisors to examine and cross-examine witnesses, including challenging the credibility of witnesses
  - Examinations must be direct, oral, and in real time (Advisors)
  - Parties may be required to stay in separate rooms with a live video+audio connection
  - Only relevant questions may be asked

## Refusing Cross Examination

- If a party does not submit to cross-examination at a live hearing, the Decision-Maker cannot rely on that party's statements in reaching a determination
  - Does not apply to Decision-Maker (neutral fact finder, not cross examination)
- Decision-Maker also cannot draw an inference regarding responsibility based solely on that party's absence from live hearing

# Presumption of Innocence

- Ensures the school does not take action and impose sanctions until the grievance process has been applied
- Does not mean that the Decision-Maker should presume that the alleged harassment did not occur
- No prejudgment of the facts at issue

# Relevance

- Determined by Decision-Maker (with explanation)
- Evidence is relevant if it is pertinent to proving whether facts material to the allegations are more or less likely to be true
  - Repetition of the same question is irrelevant
- A Complainant's sexual predisposition or prior sexual behavior is not relevant, unless:
  - Offered to provide that someone other than the Respondent committed the alleged conduct; or
  - To prove consent

# Evidence

- Types:
  - Direct
  - Circumstantial
  - Character Evidence
  - Inculpatory
  - Exculpatory

## Character Evidence

- Evidence that concerns a party's character or prior bad acts
- Can be considered if relevant
- Decision-Maker must objectively evaluate

## Evidence Limitations

- School cannot use, rely on or seek disclosure of information protected under legally recognized privilege unless party has waived privilege
  - ex: Attorney/Client, Doctor/Patient
  - Medical records



# Live Hearing Rules

- School can implement rules/procedures for live hearing so long as they do not conflict with final rule
- For example:
  - Act professionally
  - Length of breaks
  - No disruption to the hearing
  - Prohibit witness badgering
- What happens if an advisor refuses to comply with rules?

# Making a Determination

- Review the school policy
- Review the evidence
- Assess credibility of evidence and witness statements
  - Credibility = assessing the extent to which you can rely on the statement
- Assess consistency of the story
- Evaluate evidence in light of standard of evidence

## Written Determination

- Use published standard of evidence
- Identify the allegations constituting sexual harassment
- Describe procedure from formal complaint through hearings
- Make findings of fact and conclusions
- Provide a rationale for the outcome on each allegation and imposition of any sanctions
- State the procedures and allowable bases for any appeal
- Be provided simultaneously to both parties

# Sanctions

- Determined by Decision-Maker
- Imposed on the Respondent
- Reasonable based on the severity of the behavior
- May be educational
- Determine what is appropriate based on the case specifics
- Take steps to confirm and document sanctions were enforced

# Sanction Examples

- Warning
- Suspension
- Termination
- No contact
- Counseling
- Additional training

# Remedies

- Title IX Coordinator is responsible for implementation
- Required to be provided to a Complainant when a Respondent is found responsible
- Must be designed to maintain Complainant's equal access to education and may include supportive measures
- Remedies do not need to be non-disciplinary or non-punitive and do not need avoid burdening the respondent

## Working with Title IX Coordinator

- Decision-Maker selected by Title IX Coordinator
- Title IX Coordinator and Decision-Maker should coordinate with Decision-Maker on:
  - Coordinating hearings
  - Sanctions
  - Remedies
  - Overseeing appeals process

# Record Keeping

- Seven years
- Includes basis for conclusion, response was not deliberately indifferent, and measures taken to restore or preserve equal access to the education program or activity
- Additional record keeping requirements for investigation and Supportive Measures



# IMPARTIALITY, CONFLICTS OF INTEREST & BIAS

## Fair and Impartial Investigation

- § 106.45 requires recipients to adopt a grievance process where Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions are free from conflicts of interest and bias and are trained to serve impartially without prejudging the facts at issue

## Why Does it Matter?

- The Department sought to:
  - Improve perceptions that Title IX sexual harassment allegations are resolved fairly and reliably
  - Avoid intentional or unintentional injection of sex-based biases and stereotypes into Title IX proceedings, and
  - Promote accurate, reliable outcomes, all of which effectuate the purpose of Title IX to provide individuals with effective protection from discriminatory practices

# Impartiality

- Cannot have a conflict of interest or bias for or against Complainants or Respondents generally or an individual Complainant or Respondent
- Avoid prejudgment of the facts at issue
- No one should be automatically believed or not believed
- Objectively evaluate all relevant evidence

# Conflict of Interest

- When an individual has competing interests or loyalties
- Potential to reap personal gain from decisions, actions or inaction
- Inclination to filter decisions through lens of self-interest

# Bias

- Prejudice in favor of or against an individual or situation
- Disproportionate weight in favor or against certain facts that prevents objectivity
- Insensitivity to facts that otherwise would be significant
- Avoid inferences based on whether someone is a Complainant or Respondent

# Training

- Does not have to include implicit bias (subconscious stereotyping and unconscious evaluation) training
- Nature of the training is left to the school's discretion so long as it achieves the directive that such training provide instruction on how to serve impartially and avoid:
  - Prejudgment of the facts at issue
  - Conflicts of interest
  - Bias
- Materials used in training avoid sex stereotypes



QUESTIONS?





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# Thank You!

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# The New Role of the Title IX Coordinator

Presented by  
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June 24, 2020



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# Today's Presentation

- Recap and Overview of Title IX Sexual Harassment Complaint Process
- Implementing a revised Title IX Program
- The Title IX Coordinator's role in the Complaint Process



# RECAP AND OVERVIEW OF TITLE IX COMPLAINT PROCESS

# Recap

- Final Rule published 5-19-2020 (85 Fed Reg 30026)
- Effective August 14, 2020
- Amends 34 CFR Part 106
- 2011 Q&A and 2001 OCR guidance remain good to the extent consistent with Final Rule

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# Roles

Title	Responsibilities	Training	Status
Title IX Coordinator	Intake reports and complaints, initiate formal complaint, supportive measures	Sexual harassment definition, scope of education program, how to conduct and investigation, grievance procedure (hearing, appeals informal resolution), impartiality	Must be institution employee Cannot serve as decision-maker
Investigator	Conduct a fair, objective and impartial investigation	Impartiality, how to conduct an investigation, issues of relevance, rape shield, report-writing	Employee or 3 <sup>rd</sup> party Cannot serve as decision-maker
Decision-maker	Evaluate evidence, determine relevancy during hearing, make and issue determination	Sexual harassment, hearing process, technology to be used in hearing, issues of relevance, evidence, rape shield	Employee or 3 <sup>rd</sup> party Cannot serve in any other capacity
Advisor(s)	Question opposing party and witnesses during hearing	None required	Party provided Employee or 3 <sup>rd</sup> party
Informal Resolution Facilitator	Conduct informal resolution process	Informal resolution process	Employee or 3 <sup>rd</sup> party

# Title IX Complaint Process Overview

- Formal Complaint Received by Title IX Coordinator
- Optional Informal Resolution Process
- Investigation
- Live Hearing
- Decision and Remedial Measures
- Appeals





# TITLE IX POLICY IMPLEMENTATION

# Implementing a Title IX Policy

- Title IX Coordinator responsibility
  - At least one employee
- Publication and Dissemination of Notice of Non-discrimination Based on Sex
- Publication and Dissemination of a “Prompt and Equitable Grievance Procedure” applicable to students and employees
- Publication of training materials (Title IX Coordinators, investigators, decision-makers, individuals who facilitate informal resolution process) must be posted to the website

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# OCR Resources

- Webinar: Title IX Regulations Addressing Sexual Harassment
- OCR Blog
- Email OCR OPEN Center with questions  
(T9questions@ed.gov)

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# Title IX Coordinator Visibility

- Contact information must be posted on website and in each handbook or catalog provided to prospective/current students and employees
  - Name or title, office address, email address, and telephone number
- Copy of grievance procedures and grievance process, including how to report or file a complaint and how the institution will respond
  - must be distributed to all prospective/current students and employees
- Anyone can report sex discrimination (including sexual harassment) even if they are not the victim by mail, telephone email or in person.

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# Training

- Title IX Coordinator must ensure that Title IX “personnel” are trained on:
  - Definition of sexual harassment in the Final Rule
  - Scope of the institution’s education program or activity
  - Conducting an investigation and grievance process including hearings, appeals, and informal resolution processes
  - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

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# Notice

- Title IX Coordinator must ensure that the institution responds when:
  - The institution has actual knowledge of sexual harassment
  - That occurred within the institution's education program or activity
  - Against a person in the United States (no study abroad programs)
- Institution violates Title IX when its response to sexual harassment is clearly unreasonable in light of the known circumstances (deliberate indifference)

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# Reporters

- Identify which employees must, may or must only with Complainant's consent report to the Title IX Coordinator
- Triggers notice

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# Supportive Measures

- Title IX Coordinator must promptly and confidentially contact Complainant and offer supportive measures.
- Offered regardless of whether or not Complainant has filed a Formal Complaint
- Consider Complainant's wishes
- Title IX Coordinator must explain the process of filing a formal complaint.
- Title IX Coordinator responsible for implementation

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# Supportive Measures

- Required in all cases (formal complaint not needed)
- Individualized, appropriate and reasonably available
- Designed to preserve or restore equal access
- Provided without charge
- Non-disciplinary and non-punitive
- Available to Complainant and Respondent, as applicable
- Confidential

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# Supportive Measures

- Designed to:
  - Restore or preserve access to the institution's education program or activity
  - Without unreasonably burdening the other party
  - Protect the safety of all parties and the institution's educational environment, and
  - Deter sexual harassment

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# Examples of Supportive Measures

- Counseling
- Extensions of deadlines or other course-related adjustments
- 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
- Increased security and monitoring of certain areas of the campus

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# Policy Considerations

- Standard of proof
- Mandatory reporters
- Definition of consent
- Informal resolution
- Hearing format and protocols
- Discretionary dismissal
- Process for non-Title IX misconduct

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# TITLE IX COORDINATOR ROLE IN THE COMPLAINT PROCESS

# Formal Complaint

- Must ensure that all formal complaints are investigated
- A formal complaint is signed by a Complainant or Title IX Coordinator alleging sexual harassment against a Respondent, requesting an investigation
- Complainant must be a current or prospective student or employee
- Defer to Complainant's wishes as to whether to pursue an investigation
- Title IX Coordinator can sign a complaint to initiate an investigation if they determine that not pursuing would be deliberately indifferent or that not pursuing a claim would be harmful to the campus community

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# Complainant

- Must be alleged victim unless parent or legal guardian has a legal right to act on behalf
- Note that any person may report sex discrimination, including sexual harassment to the Title IX Coordinator
- Person reporting does not have to be the victim of conduct that could constitute sex discrimination or sexual harassment
- Only a complainant may file a formal complaint that initiates a Title IX grievance procedure

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# Complaint Dismissal

- The institution *must* dismiss a Formal Complaint if:
  - Allegations do not meet the definition of sexual harassment
  - Did not occur in the institution's education program or activity against a person in the United States
- The institution *may* dismiss a Formal Complaint if:
  - Complainant informs the Title IX Coordinator in writing that the complainant desires to withdraw the formal complaint or allegations therein
  - Respondent is no longer enrolled or employed by the institution
  - If specific circumstances prevent the institution from gathering sufficient evidence to reach a determination.

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# Complaint Dismissal

- If a complaint is dismissed, the institution must give the parties written notice of a dismissal (mandatory or discretionary) and include the reason for dismissal.
- institution may still address the allegations under the Conduct Policy

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# Informal Resolution

- Discretionary—can be used so long as both parties give voluntary, informed, written consent to attempt informal resolution
- Any person who facilitates an informal resolution must be trained
- An institution may not require a waiver of the right to a formal investigation and adjudication of formal complaints of sexual harassment as a condition of enrollment, employment, or enjoyment of any other right

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# Informal Resolution

- Can only be utilized when there is a formal complaint
- At any time before resolution, a party can withdraw from the informal resolution process and resume the grievance process
- Cannot be used to resolve allegations that an employee sexually harassed a student

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# Investigations

- Title IX Coordinator can investigate
- Must be free from conflicts of interest and bias against Complainant or Respondent
- Institutions can reserve the right to have a third party investigate

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# Advisors

- Parties have the right to select an advisor during an investigation and hearing
- Can be an attorney, but does not have to be
- If the Complaint goes to a live hearing, the parties must have an advisor
- If the party does not have an advisor, the institution must provide, without charge, an advisor of the institution's choice
- An institution-appointed advisor is not required to be an attorney
- Only advisors may conduct cross-examination of witnesses

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# Investigation

- Impartial, fair and objective
- Burden on the institution
- No gag-orders
- Right to an advisor
- Dismissal
- Written notice with sufficient time to prepare
- Opportunity to inspect and respond to evidence
- Investigative report

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# Investigation

- Send notice to parties of the allegations upon receipt of a formal complaint
- Send notice of any investigative interviews, meetings or hearings
- Provide both parties an equal opportunity for the parties to present fact and expert witnesses and other evidence
- Institutions may consolidate formal complaints where the allegations arise out of the same facts

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# Investigation

- Send the parties evidence directly related to the allegations at least 10 days prior to any hearing for the parties to review and respond
- Complaints against multiple respondents or by multiple complainants may be consolidated
- May consolidate investigations where the complaints arise out of the same facts or circumstances
- Must send the parties an investigative report that fairly summarizes relevant evidence at least 10 days prior to a hearing

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# Live Hearings

- Postsecondary institutions must provide a live hearing
- Title IX Coordinator must ensure these requirements are met
- Requirements for a live hearing include:
  - Opportunity for parties' advisors to examine and cross-examine witnesses, including challenging the credibility of witnesses
  - Examinations must be direct, oral, and in real time
  - Parties may be required to stay in separate rooms with a live video+audio connection
  - Only relevant questions may be asked; prior sexual conduct is not relevant

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# Live Hearings

- Elementary and secondary schools have different hearing requirements:
  - No live hearing required
  - Each party must have opportunity to submit written questions of witnesses
  - Answers from witnesses must be provided to parties
  - Prior sexual conduct of complainant is not relevant

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# Live Hearings

- Live hearings are conducted by an appointed decision-maker (can be more than one person)
- Title IX Coordinator cannot be the decision-maker
- Decision-maker must receive specific training
- Decision-maker must issue a written determination of responsibility

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# Determination

- Written determination of responsibility must:
  - Use published standard of evidence
  - Identify the allegations constituting sexual harassment
  - Describe procedure from formal complaint through hearings
  - Make findings of fact and conclusions
  - Provide a rationale for the outcome on each allegation and imposition of any sanctions
  - State the procedures and allowable bases for any appeal
  - Be provided simultaneously to both parties

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# Remedies

- Title IX Coordinator is responsible for implementation
- Required to be provided to a Complainant when a respondent is found responsible
- Must be designed to maintain Complainant's equal access to education and may include supportive measures
- Remedies do not need to be non-disciplinary or non-punitive and do not need avoid burdening the respondent.

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# Appeals

- Policy must provide for appeals for both parties.
- The bases for an appeal must include:
  - procedural irregularity affected the outcome of the matter
  - newly discovered evidence that could affect the outcome of the matter
  - Title IX personnel had a conflict of interest or bias, that affected the outcome of the matter
- Institutions may offer additional bases for appeal that apply equally to both parties

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# Retaliation

- Title IX Coordinator must ensure that the institution's policy effectively prohibits retaliation
- Policy must prohibit intimidation, threats, coercion, or discrimination for making a complaint or participating in process
- Retaliation does not have to be on the basis of sex or involve sexual harassment

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# Retaliation

- Retaliation complaints may use the same grievance process as sexual harassment complaints
- Institution must keep identities of complainant, respondent, and witnesses confidential except as permitted by FERPA
- The following do not constitute retaliation:
  - First Amendment free speech
  - Charging a person with a code of conduct violation for making a false statement

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# Title IX Investigator and Advisor

Presented by  
Edward Cramp & Jessica High

July 29, 2020

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# Today's Presentation

- Recap and Overview of Title IX Sexual Harassment Complaint Process
- Recap of Title IX Coordinator responsibilities
- Role of the Investigator
- Role of the Advisor
- Impartiality, Bias and Conflicts of Interest



# RECAP AND OVERVIEW OF TITLE IX COMPLAINT PROCESS

# Recap

- Final Rule published 5-19-2020 (85 Fed Reg 30026)
- Effective **August 14, 2020**
- Amends 34 CFR Part 106
- 2011 Q&A and 2001 OCR guidance remain good to the extent consistent with Final Rule

# Title IX Complaint Process Overview

- Formal Complaint Received by Title IX Coordinator
- Optional Informal Resolution Process
- **Investigation**
- Live Hearing
- Decision and Remedial Measures
- Appeals

# Sexual Harassment

- Under the 2020 Final Rule, Sexual Harassment is conduct on the basis of sex that falls into one or more of the following 3 categories
- Definition located in 34 CFR 106.30



# 1. Quid Pro Quo

- An employee of the school conditioning the provision of an aid, benefit, or service of the school on an individual's participation in unwelcome sexual conduct;

## 2. 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

### 3. Sexual Violence

- “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 Violence

- **Sexual Assault:** As defined in 20 U.S.C. 1092(f)(6)(A)(v), means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.
- **Dating Violence:** As defined in 34 U.S.C. 12291(a)(10), means 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: the length of the relationship; the type of relationship; and, the frequency of interaction between the persons involved in the relationship.

# Sexual Violence

- **Domestic Violence:** As defined in 34 U.S.C. 12291(a)(8), includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.
- **Stalking:** As defined in 34 U.S.C. 12291(a)(30), means 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.

# Recap – Title IX Coordinator

- Implementing Title IX policy
- Intake reports and complaints
- Intake Formal Complaints
- Implement Supportive Measures

# Formal Complaint

- All formal complaints must be investigated
- A formal complaint is signed by a Complainant or Title IX Coordinator alleging sexual harassment against a Respondent, requesting an investigation
- Complainant must be a current or prospective student or employee
- Defer to Complainant's wishes as to whether to pursue an investigation
- Title IX Coordinator can sign a complaint to initiate an investigation if they determine that not pursuing would be deliberately indifferent or that not pursuing a claim would be harmful to the campus community



# INVESTIGATION



# Selecting an Investigator

- Title IX Coordinator
- Other school employee (if trained)
- Third party
- Cannot be the Decision-Maker

# Investigator Training

- How to conduct an investigation
- Impartiality/bias/conflicts of interest
- Issues of relevance
- Report writing

# Investigation

- Impartial, fair and objective
- Burden on the institution
- No gag-orders
- Right to an advisor
- Dismissal
- Written notice with sufficient time to prepare
- Equal opportunity for the parties to present fact and expert witnesses and other evidence
- Investigative report

# Investigation Notice

- Send notice to parties of the allegations upon receipt of a formal complaint with sufficient details of the allegations
- Discussion of the grievance process
- Any option for informal resolution
- Statement that the Respondent is present innocent and that a determination of responsibility is made at the conclusion of the grievance process
- Right to an advisor
- Reminder against making false statements or submitting false information

# Additional Notice

- Provide additional notice if investigating additional allegations
- Send notice of any investigative interviews, meetings or hearings
- Include date, time, location, participants and the purpose of the hearing/interview/or other meeting
- Key is providing sufficient time to prepare

# Consolidation

- Complaints against multiple respondents or by multiple complainants may be consolidated
- May consolidate investigations where the complaints arise out of the same facts or circumstances

# Dismissal

- School must dismiss any complaint that:
  - Does not constitute sexual harassment;
  - Did not occur in the program or activity; or,
  - Did not occur against a person in the United States.
- School may dismiss a complaint if:
  - Complainant withdraws the complaint
  - Respondent is no longer enrolled or employed
  - Circumstances prevent institution from investigating
- Dismissal does not prevent action under code of conduct

# Tips for an Investigation

- Select an investigator carefully
- Begin promptly
- Prepare before interviews - review Formal Complaint, school policies, etc.
- Conduct a thorough investigation – when, where, what, who – cover the same questions with all interviewees
- Avoid yes/no questions
- Gather evidence
- Document, document, document



# Access to Evidence

- Both parties must be given an equal opportunity to review and inspect evidence that:
  - Was obtained as part of the investigation; and
  - Is directly related to the allegations
- Includes evidence that the school does not intend to rely on in making a determination of responsibility

# Evidence Restrictions

- School cannot use, rely on or seek disclosure of information protected under legally recognized privilege unless party has waived privilege
- ex: Attorney/Client, Doctor/Patient

# Investigative Report

- Once the investigation has concluded, draft an investigative report that fairly summarizes relevant evidence

# Investigative Report Goals

- Do not reach any conclusions
- Demonstrate how the school responded appropriately to the allegations
- Put decision-maker in best possible position to understand relevant evidence for the live hearing
- Must be maintained for 7 years

# Opportunity to Inspect and Respond

- Prior to issuing investigative report
  - Send the parties evidence directly related to the allegations with at least 10 days to review and submit a written response
- Prior to Live Hearing or other determination
  - Send the parties the investigative report that fairly summarizes relevant evidence at least 10 days prior to a hearing for review and written response

# Relevance

- Evidence is relevant if it is pertinent to proving whether facts material to the allegations are more or less likely to be true
  - Repetition of the same question is irrelevant
- A Complainant's sexual predisposition or prior sexual behavior is not relevant, unless:
  - Offered to provide that someone other than the Respondent committed the alleged conduct; or
  - To prove consent

# Summarizing Relevant Evidence

- Investigative report should have have a clear outline of the steps taken during the investigation
- Consider summarizing:
  - Alleged incident with details provided
  - Complainant, Respondent and witness identified
  - Relevant evidence (objective)
  - Key factual findings

# Timeframe

- Prompt timeframe for conclusion of grievance process
- Set by school's internal timeframe
- Through appeal process



# ROLE OF THE ADVISOR

# Advisors

- Parties have the right to select an advisor during an investigation and hearing
- If the Complaint goes to a live hearing, the parties must have an advisor
- If the party does not have an advisor, the school must provide, without charge, an advisor of the school's choice
- Only advisors may conduct cross-examination of witnesses

# Selecting an Advisor

- Party provided
- If school-selected can be
  - Other school employee
  - Third party
- Can be an attorney but does not have to be

# Advisor Training

- None required by Title IX Final Rule
- Do not need to be free from conflicts of interest or bias to give parties the flexibility to pick an advisor
- Up to the school to determine what training will be provided for school-appointed advisors

# Advisor Policies

- School can implement policies regarding advisor conduct, which should be clearly explained at the outset of each interview, hearing, etc.
- Require all participants behave in an orderly manner
- Schools can require advisors to use evidence received for inspection and review as well as the investigative report only for purposes of the grievance process

# IMPARTIALITY, CONFLICTS OF INTEREST & BIAS

# Fair and Impartial Investigation

- § 106.45 requires recipients to adopt a grievance process where Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions are free from conflicts of interest and bias and are trained to serve impartially without prejudging the facts at issue

# Why Does it Matter?

- The Department sought to:
  - Improve perceptions that Title IX sexual harassment allegations are resolved fairly and reliably
  - Avoid intentional or unintentional injection of sex-based biases and stereotypes into Title IX proceedings, and
  - Promote accurate, reliable outcomes, all of which effectuate the purpose of Title IX to provide individuals with effective protection from discriminatory practices



# Impartiality

- Cannot have a conflict of interest or bias for or against Complainants or Respondents generally or an individual Complainant or Respondent
- Avoid prejudgment of the facts at issue
- No one should be automatically believed or not believed

# Impartiality

- Investigators must objectively evaluate all relevant evidence
  - Inculpatory: evidence that shows or tends to show Respondent's responsibility
  - Exculpatory: evidence that shows or tends to show the Respondent is not responsible

# Bias/Conflict of Interest

- Do not rely on sex stereotypes
- Avoid inferences based on whether someone is a Complainant or Respondent
- Encourage investigator to disclose bias/conflict of interest

# Training

- Does not have to include implicit bias (subconscious stereotyping and unconscious evaluation) training
- Nature of the training is left to the school's discretion so long as it achieves the directive that such training provide instruction on how to serve impartially and avoid:
  - Prejudgment of the facts at issue
  - Conflicts of interest
  - Bias
- Materials used in training avoid sex stereotypes



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