From One Coordinator to Another: Title IX in a Post Regulatory World

East-West Center

Jody Shipper
Vision
We exist to help create safe and equitable work and educational environments.

Mission
Bring systemic change to how school districts and institutions of higher education address their Clery Act & Title IX obligations.

Core Values
- Responsive Partnership
- Innovation
- Accountability
- Transformation
- Integrity
Today’s Agenda

01 Regulatory Overview
02 The Hearing
03 Hearing Logistics
04 After the Hearing
05 Building a Foundation of Success
06 Training and Education

April 30, 2021
Regulatory Overview

Narrowed jurisdiction and expansive procedural requirements
To Start: What Is Covered by the New Title IX Regs?

- New Sex Harassment
- Stalking/basis of sex
- DV basis of sex
- Quid Pro Quo EE/Student

IF ... § 106.30

NOT § 106.30
DEFINITIONS

NOT IN §106.45
PROCESS
What are the §106.30 definitions?
Definition of Sexual Harassment

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

(1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;

(2) 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

Note: They Do Not Match Up

Harassment, Discrimination, Title IX OTHER, retaliation, Title VII, bullying

New regs process

VAWA
What is Covered by Title IX

- Achievement Awards
- Athletics
- Benefits
- Financial Aid
- Leaves of absence and re-entry policies
- Opportunities to join groups
- Pay rates
- Recruitment
- Retention Rates
- Safety
- Screening Exams
- Sign-on Bonuses
- Student and Employee Benefits
- Thesis Approvals
- Vocational or College Counseling
- Research opportunities

Hint: Not in Regs
What (Mis)Conduct is Covered by the 2020 Title IX Regulations’ Processes?

- Sexual Harassment*
  - Hostile Environment*
- Quid Pro Quo (employee to student)*
- Sexual Assault*
- Dating Violence (on basis of sex)*
- Domestic Violence (on basis of sex)*
- Stalking (on basis of sex)*

* Using 106.30 definitions
It Was Bad, But Not (New) Title IX Bad

Sexual harassment, DV, Stalking, Discrimination Retaliation: If it does not meet § 106.30 definition, then not mandated to use §106.45 process
A Sample Decision-Tree

I. Nature of Complaint:
   A complaint of sexual harassment in which the harassment was so severe and pervasive that it denied the complainant equal access to an educational program or activity, or denied the employee the equal ability to continue their work;
   A complaint of Dating Violence, Domestic Violence, Stalking, or Sexual Assault;
   A complaint of quid pro quo sexual harassment by an employee respondent against a student.
   If yes to one of the above, continue. If no, please see (name of basic sex harass policy).

2. Location:
   The incident(s) occurred at school, within the United States;
   The incident(s) occurred in any building owned or controlled by a student organization that is officially recognized by a postsecondary institution, and within the United States;
   The incident(s) was part of one of the school's programs or activities, such as part of a field trip or team athletic event, and within the United States.
   If yes to one of the above, continue. If no, please see (name of basic sex harass policy).

3. The institution has control over the respondent, meaning the Respondent is a student (whether applicant, admitted, or currently enrolled) or employee (applicant, hired but not yet working, or employed). In addition, the institution may have control over a respondent who is a contractor, an alum, or a vendor under certain circumstances.
   If yes to one of the above, continue. If no, please see (name of basic sex harass policy).

4. Complainant is a student (whether applicant, admitted, or currently enrolled) or employee (applicant, hired but not yet working, or employed), or otherwise still accessing or attempting to access a university program or activity, within the United States.
   If yes to one of the above, continue. If no, please see (go to basic sex harassment policy).
Mandatory Response to Each Report

- All reports, or those within scope of the Regs?
- Actual knowledge
- What about responsible employees?
Mandatory Response

1. Discuss support measures

2. Explain that support measures are available without filing formal complaint

3. Explain options for resolution and how to file
Outreach

Rights, resources, options

Discuss support measures

Can have support without filing formal complaint

Options for resolution and how to File

What the process will look like (optional step)
Supportive Measures

Interim, not forever

Interim also includes “before investigation”

Equitable ≠ Equal
Not Punitive

- No default
- Case by case
- Document the connection to preserving equal access
- Document reason for any requested measures not implemented
Supportive Measures

- Non-Disciplinary
  - May not unreasonably burden the other party

- Non-punitive

- Supportive Measures
  - Designed to restore or preserve equal access

- Confidential
  - As appropriate and reasonably available

Confidentially designed to restore or preserve equal access. May not unreasonably burden the other party. Non-punitive measures are appropriate and reasonably available.
Emergency Removal of Student

- High threshold
- Not a determination of responsibility
- Whether or not grievance is underway
- Individualized
- Immediate threat (physical)
- Opportunity to challenge
Complaint . . . or FORMAL Complaint?
Mandatory Investigation

Complaint filed, SIGNED, requests investigation

Coordinator SIGNS, starts investigation
But Do You START the Investigation?

Does it meet the elements? If not, DISMISS

Trying to do some pre-investigation to identify respondent
## Dismissing Complaints

<table>
<thead>
<tr>
<th>MANDATORY</th>
<th>DISCRETIONARY</th>
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<tbody>
<tr>
<td>● Not sexual harassment</td>
<td>● Complainant withdraws complaint</td>
</tr>
<tr>
<td>● Did not occur in program or activity</td>
<td>● Respondent no longer enrolled/employed</td>
</tr>
<tr>
<td>● Not against person in the U.S.</td>
<td>● School unable to collect sufficient info</td>
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</table>
Overview of Formal Resolution Process
How to Proceed?

Remedies-based
No formal process

Alternative/Informal
Signed agreement;
Voluntary;
What records?

Formal: Investigation/
Hearing
All requirements of 106.45
Overview of Investigation

• Trained investigator collects information
• Investigator shares evidence “directly related” to allegations with parties
• Parties have 10 days to respond
• Investigator creates summary of “relevant” evidence and shares with parties
• Parties have 10 days to respond
Procedural Requirements for Investigations

- Notice TO BOTH PARTIES
- Equal opportunity to present evidence
- An advisor of choice
- Written notification of meetings, etc., and sufficient time to prepare
- Opportunity to review ALL evidence, and 10 days to submit a written response to the evidence prior to completion of the report
- Report summarizing relevant evidence and 10 day review of report prior to hearing
Notice Requirements

Notice of the allegations, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include:

- the identities of the parties involved in the incident, if known,
- the conduct allegedly constituting sexual harassment under § 106.30,
- and the date and location of the alleged incident, if known.

The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.

The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section.

The written notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.
Advisor of Choice

The advisor can be anyone, including an attorney;

Institutions cannot place restrictions on who can serve;

No training required;

Institution must provide advisor for the purposes of cross examination, only.
Written notification of meetings and sufficient time to prepare
Equal opportunity to present evidence
Evidence review
Review draft report
“Directly Related” and “Relevant Evidence”
What is Directly Related Evidence?

- Directly Related
- “All relevant evidence”
- “any information that will be used during informal and formal disciplinary meetings and hearings” as used in Clery Act
Logical connection between the evidence and facts at issue

Assists in coming to the conclusion – it is “of consequence”

Tends to make a fact more or less probable than it would be without that evidence
Not Permitted

• “Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant,
  • unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
  • if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.”

• “require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.”

• Physical and mental health records and attorney-client privileged communications would fit within scope of this prohibition
The Investigator

- Must be trained in accordance with the requirements in the regulations
- Must conduct the investigation in an impartial manner, avoiding bias/pre-judgment, and conflicts of interest
After Evidence Review

Additional investigation?

Evidence Review 2?

Summary of Relevant Evidence Report
Pre-Hearing Preparation of Participants
The Parties and their Advisors, and the Witnesses

Pre-hearing instructions
- Via conference or meeting
- In writing

Set expectations
- Format
- Roles of the parties
- Participation
- Evidence
- Decorum
- Impact of not following rules
The Hearing
Procedural Requirements for Hearings

- Must be live, but can be conducted remotely
- Participation cannot be compelled
- Standard of proof used may be preponderance of the evidence or clear and convincing; standard must be the same for student and employee matters
- Cross examination must be permitted and must be conducted by advisor of choice or advisor provided by the institution
- Decision maker determines relevancy of questions and evidence offered
- Exclusion of evidence if no cross examination
- Written decision must be issued that includes finding, rationale, and sanction, as well as information on right to appeal
Other Considerations

- Time Limits
- Breaks
- Formality, Order and Gate-Keeping
- Handling disruptions and interruptions
- Poor behavior?
- Recording
Purpose of the Hearing

Why does it matter?

1. Review and Assess Facts
2. Make Findings of Fact
3. Determine Responsibility / Findings of Responsibility
4. Determine Sanction and Remedy
The Essential Elements of All Hearings

- Clear Procedures
- Due/Fair Process
- Fair, Equitable, and Neutral
- Consistency
- Trauma Informed
- Well Trained Personnel
Hearing Elements

- Providing advisors
- Live cross examination by advisors
- Exclusions of evidence if no cross-examination
- No compelling attendance
- Only ONE communication about hearing and sanction
You Need to Determine:

The Process
- Pre-hearing process, submission of evidence, opening statements, other statements, closing statements, findings, impact statements, etc.

The Players
- The roles of all participants

The Evidence
- Relevancy, exclusions, timing of submission, how to submit, and WHO DECIDES?

The Outcome
- Deliberations; Notice; manner and method communicated.
Opening Instructions by the Chair

- Set the stage
- Reiterate charges
- Reiterate rules and expectations
- Reiterate logistics for the day

*This should be scripted and used consistently.*
Opening Statements

- Permitted, but not required
- Policy should include purpose and scope
- If permitted, consider
  - Requiring submission prior to hearing
  - Word limit
  - Time limit
Testimony

Procedures should be clear about:

- **Order of/parties and witnesses**
  - Could simply leave this up to the decision maker

- **Order of examination**
  - Questioning by the decision maker
  - Cross examination by the advisor
  - Will the advisor be permitted to question their own party?
  - Will there be a second round of questioning?

- **Consistency is essential. Consider putting this all in your procedures.**
Cross Examination
Who does it?

- Must be conducted by the advisor

- If party does not appear or does not participate, advisor can appear and cross

- If party does not have an advisor, institution must provide one
Cross Examination
Permissible Questions

Questions must be relevant

Not relevant

• Duplicative questions
• Questions that attempt to elicit information about
  • Complainant's prior sexual history
  • Privileged information
  • Mental health
## Cross Examination
### Role of the Decision Maker

<table>
<thead>
<tr>
<th>Rulings by Decision Maker required after each question is asked by the advisor</th>
<th>Explanation only required where question not permitted</th>
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<tbody>
<tr>
<td>Can allow advisors to make case as to why question should be asked, but not required</td>
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Cross Examination
Impact of Not Appearing

- Exclusion of all statements of that party
- Exception - DOE Blog
- What if a party or witness appears, but does not answer all questions
Common Challenges

- Non-appearance by a party or witness
- Non-appearance by an advisor
- Party or witness appears but declines to answer some (or all) questions
- Disruptions
- Maintaining Decorum
Being Trauma-Informed

Training your panel/adjudicators

• Asking questions
• Asking “why”
• Filtering questions of the parties

Preparing parties

• Reviewing the investigation report
• Sharing their story again
• Answering questions again

The attraction of prurient interests
### Other Decisions

<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
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<tbody>
<tr>
<td>Will you include Opening, Closing, or Impact Statements?</td>
<td>NOT required, but you need to decide.</td>
</tr>
<tr>
<td>How will questioning take place?</td>
<td>Direct cross examination, indirect?</td>
</tr>
<tr>
<td>How will questions be submitted?</td>
<td></td>
</tr>
<tr>
<td>Will there be any restrictions on questions that can be asked, such as due to relevancy, already asked and answered, unduly harassing?</td>
<td></td>
</tr>
<tr>
<td>If done remotely, how will the technology be set up?</td>
<td></td>
</tr>
<tr>
<td>If in person, room set-up and who is in the room?</td>
<td></td>
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Options

- Report contains only facts gathered
- Report contains factual findings
- Report contains factual findings and recommendation regarding policy
After the Hearing
Final Report

- The allegations
- Description of all procedural steps
- Findings of fact
- Conclusion of application of facts to the policy
- Rationale for each allegation
- Sanctions and remedies
- Procedure for appeal
Investigative Report Content
List the Witnesses

• List those who were interviewed
• List those who were not interviewed
• List those who appeared at hearing
Preponderance of the Evidence

More likely than not

Does not mean 100% true or accurate

A finding = There was sufficient reliable, credible evidence to support a finding, by a preponderance of the evidence, that the policy was violated.
Policy Analysis

Break down the policy into elements

Organize the facts by the element to which they relate
Mandatory Grounds for Appeal

i. Procedural irregularity that affected the outcome;

ii. New evidence that was not reasonably available when the determination of responsibility was made that could affect the outcome;

iii. The Title IX Coordinator, investigator, or decision-maker(s) had a general or specific conflict of interest or bias against the Complainant or Respondent that affected the outcome.
Appealing Sanctions?

Other grounds for appeal?

Your discretion.
Impartiality

WHAT DOES THIS REALLY MEAN?
Impartiality: Avoiding Prejudgment and Bias

“The 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.”
Impartiality: Avoiding Prejudgment and Bias

- Do not rely on cultural “rape myths” that essentially blame complainants
- Do not rely on cultural stereotypes about how men or women purportedly behave
- Do not rely on gender-specific research data or theories to decide or make inferences of relevance or credibility in particular cases
- Recognize that anyone, regardless of sex, gender, gender identity or sexual orientation, can be a victim or perpetrator of sexual assault or other violence
- Avoid any perception of bias in favor of or against complainants or respondents generally
- Employ interview and investigation approaches that demonstrate a commitment to impartiality
Impartiality: Avoiding Bias

Department also rejected commenters’ arguments that individuals should be disqualified from serving as investigators because of past personal or professional experience.

“Department encourages [schools] to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased” WHILE

“exercising caution not to apply generalizations that might unreasonably conclude that bias exists (for example, assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents”
Impartiality: Avoiding Conflicts of Interest

Commenters argued that investigators and hearing officers employed by schools have an “inherent conflict of interest” because of their affiliation with the school, so Department should require investigations and hearings to be conducted by external contractors.

Department noted that some of those commenters argued that this resulted in bias against complainants, and some argued that this resulted in bias against respondents.

Department’s response: Department’s authority is over schools, not individual investigators and other personnel, so Department will focus on holding school’s responsible for impartial end result of process, without labeling certain administrative relationships as per se involving conflicts of interest.
Impartiality: Avoiding Prejudgment, Bias, and Conflicts of Interest

Bottom line

- Follow facts of every individual case
- Investigate in manner that will not allow even a perception of prejudgment or bias for or against any party
Building a Foundation of Success
Final Rule, Section 106.8(a)

The institution must notify applicants and all members of the community of the Title IX Coordinator’s

1. Name or Title
2. Office address
3. Email address
4. Phone number

Any person may report, at any time, sex discrimination, including sexual harassment in person, by mail, by telephone, by email, or any other means using the contact information listed.
“Responsibilities Required Under Title IX and the Regulations”

• Serve as the primary pathway for receipt of reports of sex discrimination and sexual harassment;
• Upon receipt of a report, promptly contact the complainant to discuss the availability of supportive measures and to explain the process of filing a formal complaint;
• Coordinate the effective implementation of supportive measures;
• Where a report is made, but a formal complaint is not filed by the complainant, determine whether a formal complaint should be filed and sign that formal complaint;
• Effective implementation of any remedies imposed by a decision maker at the conclusion of a grievance process.
Responsibilities Often Delegated to the Title IX Coordinator

- Ensuring that the institutional policies and procedures are compliant with Title IX
- Ensuring dissemination of the policy
- Overseeing the grievance process to ensure it is compliant
- Coordinating a compliant grievance process
- Staffing various roles
- Ensuring training requirements are met
- Record keeping
- Compliance with intersecting federal and state laws
- Education and prevention efforts
The Three Essential Functions of Title IX Compliance

01. Response
02. Education & Prevention
03. Compliance
A Successful Title IX Coordinator…

**CARES**

- Understands the Importance of Consistency
- Adheres to policies and procedures
- Records or documents everything
- Engages meaningfully with the community
- Strategically plans for success
# Title IX Compliance Obligations

<table>
<thead>
<tr>
<th>Designate</th>
<th>Designate a Title IX Coordinator</th>
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<tbody>
<tr>
<td>Disseminate</td>
<td>Disseminate Policy</td>
</tr>
<tr>
<td></td>
<td>• Notification</td>
</tr>
<tr>
<td></td>
<td>• Publications</td>
</tr>
<tr>
<td>Respond</td>
<td>Promptly respond to instances of sex discrimination in a manner that is not deliberately indifferent.</td>
</tr>
<tr>
<td>Respond</td>
<td>Promptly respond to instances of sexual harassment occurring within the educational program or activity of which the institution has actual knowledge in a manner that is not deliberately indifferent;</td>
</tr>
<tr>
<td>Provide</td>
<td>Provide supportive measures in accordance with the requirements of section 160.30</td>
</tr>
<tr>
<td>Utilize</td>
<td>For reports of sexual harassment utilize grievance procedures that comply with section 160.45</td>
</tr>
<tr>
<td>Require</td>
<td>Require that individuals participating in the grievance process do so impartially and that they are trained in accordance with the 160.45(b)(1)(ii).</td>
</tr>
<tr>
<td>Maintain</td>
<td>Maintain records response to sexual harassment in accordance with 160.45 (10)</td>
</tr>
<tr>
<td>Comply</td>
<td>Comply with 160.71 prohibition against retaliation</td>
</tr>
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Categories of Compliance Requirements

- Staffing
- Notice
- Training
- Procedural
- Reporting
Infrastructure for Reporting

- Develop a plan for receiving and reviewing the reports
- Develop a protocol that ensures a prompt response to reports
- Develop and adhere to practices for documenting reports and responses
- Communicate reporting methods and what folks should expect after submitting a report
- Develop methods/avenues for reporting
Title IX Coordinator’s Role

In the Investigation

- Title IX Coordinator is permitted to conduct the investigation, though this is not favored.
- If conducting the investigation, do so in accordance with the applicable institutional policy.
- If not conducting the investigation, may serve as a support to the investigators.
- May serve as a resource to the parties.
Title IX Coordinator’s Role
In the Adjudication

- Title IX Coordinator may not serve as the decision maker
- May serve to support the decision maker(s)
- May participate in the hearing to provide logistical support to decision makers
- Responsible for effective implementation of remedies imposed
Title IX Coordinator’s Role
In the Appeal

- Title IX Coordinator may not serve as an appellate reviewer
- May serve to support the appellate reviewer/panel
- May provide logistical support
- May coordinate implementation of appellate findings, where appropriate.
- Responsible for effective implementation of remedies imposed
Training & Education

Educating ourselves and our communities in a post regulatory world
Training and Education
Two Areas of Focus

1. Response to Sex Discrimination
2. Prevention Education
Who Must Receive Training?

Title IX Staff
- Coordinators
- Investigators
- Decision Makers (hearings and appeals)
- Facilitators of Informal Resolution
- “Those who are charged with ensuring a prompt, fair, and impartial investigation and result.” (VAWA)

Students
- New Students
- Existing Students
- Specialized populations
- Student staff

Faculty
- New faculty
- Existing faculty
- Adjunct Faculty
- Supervising faculty

Staff
- Senior leadership
- Public Safety/campus law enforcement
- Health care workers
Training for Title IX Staff

- The scope of the institution’s education program or activity (i.e., its Title IX “jurisdiction”)
- How to conduct the grievance process
- How to serve impartially
- The technology to be used at a live hearing
- Issues of relevance of questions and evidence
- Rape shield protections; and,
- Issues of relevance in creating an investigative report.
Questions?

Email Us:
Jody@grandriversolutions.com
info@grandriversolutions.com

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