

Title IX Coordinator Training Online Course

Class Two: Conducting a Title IX Investigation

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Training Course Does Not Constitute Legal Advice

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Class Overview:



- Questions from Class One
- President Biden's March 8 Executive Order
- Investigations Involving Employees
- Investigating a Formal Complaint
- Impartiality/Conflicts of Interest
- Relevance
- Violations of Other Policies

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Questions from Class One

Jurisdiction & Complaints

- 1) What level of connection or control by an institution must be established before considering allegations of harassment that occurs exclusively online?
- 2) If a student were sexually assaulted in their home during a virtual lesson, would [Title IX] apply?
- 3) Would you consider a property rented for a weekend by a registered student group to be within the control of the group for that weekend and therefore within Title IX jurisdiction?
- 4) Besides a signed statement, what are other ways that the statement can be "attributed" to the complainant?
- 5) If there are multiple complaints against a respondent by different individuals can those complaints be consolidated against the respondent? If yes, how does that work during the investigation/ hearing process?



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Questions from Class One (cont'd)

Actual Knowledge & Notice of Allegations

- 1) To be clear, actual knowledge (when a report is shared with an OWA) puts the school on notice, but does not require the complainant to file/sign a formal complaint? The school is on notice (and needs to offer supportive measures and take all other steps required by law) but it's possible the complainant may NOT want to file a formal complaint (even after they've made a disclosure/report) and they have the right not to?
- 2) Could someone please touch on the interaction between Title IX and law enforcement? I just received an anonymous report of students filming sexual intercourse with other students and sending the videos around. It seems to me that law enforcement's ability to subpoena phone records etc. could lead to a much more thorough investigation. Please know I'm not suggesting we ignore Title IX policy and procedure. Just curious about timing/best practice.
- 3) What level of detail about the allegations is needed in the notice? (E.g., is it sufficient to provide notice of a report of "sexual harassment by respondent against complainant on X date at X location?" Or, do you think details about the reported sexual harassment must be included?)



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Questions from Class One (cont'd)

The Process

- 1) For mandatory dismissal, if conduct would not constitute sexual harassment if proved – is the Title IX Coordinator making that determination that the conduct was not severe/pervasive/objectively offensive?
- 2) Can the Title IX Coordinator be the facilitator/mediator of the informal resolution?
- 3) At what time do they have a right to inspect and review all the evidence collected?

March 8 Executive Order

The President's Executive Order on *Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*

- **Section 1. Policy.** It is the policy of my Administration that all students should be guaranteed an educational environment free from discrimination on the basis of sex, including discrimination in the form of sexual harassment, which encompasses sexual violence, and including discrimination on the basis of sexual orientation or gender identity.

“OCR will fully enforce Title IX to prohibit discrimination based sexual orientation and gender identity in education programs and activities that receive Federal financial assistance from the Department.” Letter to Educators on Title IX’s 49th Anniversary, June 23, 2021



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Investigations Involving Employees

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The Basics:

- Remember that the regulations also apply to employees – both as those allegedly subject to Title IX sexual harassment and as those accused of engaging in Title IX sexual harassment.
- Investigations of formal complaints of conduct potentially constituting Title IX sexual harassment involving employees must comply with the regulations.
- Institutions must use the same procedures for employee and student allegations of Title IX sexual harassment.



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However:

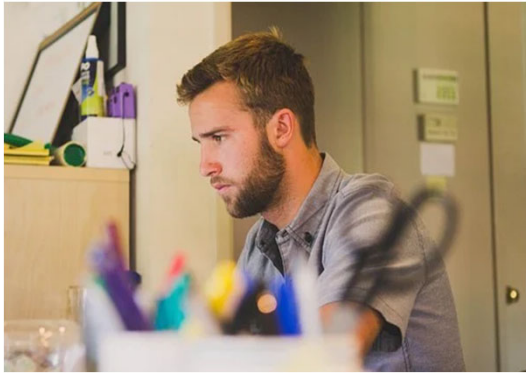
- Title VII also applies and may provide broader remedies and differs in some respects.
- Collective bargaining and other contractual obligations might also apply.
- OCR expects institutions to comply with *all* requirements.



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Title VII Requirements



- Standards
 - Submission becomes a term or condition
 - Unreasonably interferes with work performance or creates a hostile environment
 - Employer knew or should have known
- Immediate and appropriate corrective action
 - End the harassment and prevent recurrence

Special Considerations

- Collective bargaining rights
- Administrative leave
- “Reasonably prompt timelines” (Title IX)
vs.
“Immediate and appropriate corrective action” (Title VII)



Investigating a Formal Complaint

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Conducting an Investigation



- Investigator must be free from bias and conflict of interest.
- Don't restrict the ability of either party to discuss allegations or gather evidence.
- Provide parties written notice sufficient to prepare.
- Allow parties an equal opportunity to identify witnesses, and other inculpatory and exculpatory evidence.
- Allow parties to have advisors.
- Don't access, consider, disclose or otherwise use a party's records prepared by a professional in a treatment capacity without voluntary, written consent.

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Interviewing



Consider in advance whether interviews will be:

- Recorded or not recorded.
- Followed with written statements or summaries.

In interviewing, the investigator must:

- Be prepared.
- Be objective and unbiased, free from stereotypes.
- Be free of conflict of interest.
- Avoid any prejudging of the parties or responsibility.
- Demonstrate respect.
- Take the lead in seeking evidence (inculpatory and exculpatory) – it is not the parties' responsibility to investigate.
- Be alert to non-verbal communications.



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Review of Evidence

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- Parties must have equal opportunity to inspect and review *all* evidence directly related to the allegations.
- Provide access to evidence to both parties and their advisors.
- Ten days prior to completion of the investigative report
- Consider parties' written response before completing report.



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Investigative Report



- Complete an Investigative Report that fairly summarizes relevant evidence.
- Provide to parties and their advisors for review and response at least 10 days before hearing.

Impartiality & Conflicts of Interest

Impartiality, Bias, Prejudgment & Conflict of Interest



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Understanding Relevance

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How is Relevance Defined?



- September 4, 2020 Guidance
- Title IX Rule does not adopt the Federal Rules of Evidence for hearings conducted under Title IX.
- “The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied.”
- A school may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence.
- A school may adopt rules of order or decorum to forbid badgering a witness, and may fairly deem repetition of the same question to be irrelevant.

Relevant Evidence



- Evidence is relevant if:
 - It has any tendency to make a fact more or less probable than it would be without the evidence; *and*
 - The fact is of consequence in proving or disproving the allegations.
- Does the evidence tend to prove or disprove the allegations?
- A determination regarding relevancy can rely on logic, experience or science.

FED. R. EVID. (401), Legal Information Institute, Cornell Law School,
https://www.law.cornell.edu/rules/fre/rule_401

Admission vs. Weight, Credibility, or Persuasiveness

- There is a difference between the admission of relevant evidence, and the weight, credibility, or persuasiveness of particular evidence.
- Because § 106.45 does not address how relevant evidence must be evaluated for weight or credibility by a decision-maker, an IHE can adopt and apply its own rules so long as:
 - The rules do not conflict with § 106.45; and
 - The rules apply equally to both parties.
- For example:
 - An IHE may, e.g., adopt a rule regarding the weight or credibility (but not the admissibility) that a decision-maker should assign to evidence of a party's prior bad acts, so long as its rule applies equally to the prior bad acts of complainants and the prior bad acts of respondents.
- **REMEMBER:** An IHE's investigators and decision-makers must be trained specifically with respect to "issues of relevance" and any relevance rules adopted by the IHE should be addressed in the IHE's publicly available training materials.

What Is NOT Relevant?



- **September 4, 2020 Guidance**
- The Regs direct schools to exclude the following evidence and information:
 - a party's treatment records, without the party's prior written consent [§ 106.45(b)(5)(i)];
 - information protected by a legally recognized privilege [§ 106.45(b)(1)(x)];
 - 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)-(ii)]; and,
 - a decision-maker is not permitted to rely on the statements of a party or witness who does not submit to cross-examination [§ 106.45(b)(6)(i)]. **Currently, not enforced by OCR but may apply under state law or law in some federal circuits.**

Defining Relevance in Policy



- **September 4, 2020 Guidance**
- “An IHE may **not** adopt rules excluding certain types of relevant evidence (e.g., lie detector test results, or rape kits) where the type of evidence is **not** either deemed “not relevant” (as is, for instance, evidence concerning a complainant’s prior sexual history) or otherwise barred from use under § 106.45 (as is, for instance, information protected by a legally recognized privilege).”
- Hmmm ... let’s break it down.



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All Relevant Information Is Not Created Equal



- May weigh evidence
- Considerations:
 - Is it corroborated?
 - Is there a reason the source might not be reliable?
 - Is it logical given other established facts?
- The Regs require the decision-maker to objectively evaluate only “relevant” evidence during the hearing and when reaching the determination regarding responsibility.
- The decision-maker must determine the relevance of each cross-examination question before a party or witness must answer.
- “Not probative of any material fact.”



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Violations of Other Policies

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Violations of Other Policies

- Knowingly making false statements or submitting false information
- Sexual Harassment not covered in the regulations but violating campus policies
 - Violations occurring in programs or at locations outside the current definition
 - Violations that don't meet the standards under the regulations
- Student Conduct violations
- Employee Conduct standards



Update notice with later-discovered allegations.

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Questions?

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