



TRAINING ON TITLE IX REGULATIONS

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September 16, 2020

Before we begin

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Topics we will cover today

- Brief introduction to Title IX
- Understanding the institution's mandatory response: Scope, jurisdiction, and important definitions
- Roles in the process, and how to serve impartially, without bias, and without conflicts of interest
- Formal complaints
- Informal resolution

Title IX of the 1972 Education Amendments

“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.”

- Federal court cases interpreting civil rights statutes
- Federal guidance documents
- Individual resolution agreements between federal government and institutions
- **Regulations**

What are we talking about when we say Title IX?

THE MAY 2020
TITLE IX REGULATIONS
ONLY APPLY TO
SEXUAL HARASSMENT

They do NOT
apply to any
other kind of
discrimination
based on sex



SCOPE, JURISDICTION, AND IMPORTANT DEFINITIONS

Mandatory jurisdiction to respond

- Actual knowledge
- Sexual harassment
- Education program or activity
- Person in the United States



Respond promptly in a manner that is not deliberately indifferent

- Promptly contact complainant to discuss availability of supportive measures regardless of whether complaint is filed and explain process for filing complaint
- Supportive measures for complainants
- Supportive measures for respondents (when the time is right)
- Keep records of supportive measures for seven years

Emergency removal of student

- Not a determination of responsibility
- Must conduct an individualized safety and risk analysis
- For immediate threats to anyone's physical health or safety
- Respondent must have an opportunity to challenge the decision immediately following the removal
- Whether or not grievance process is underway

Administrative leave of employee

- May place employee respondent on administrative leave during the pendency of a grievance process that complies with Title IX regulations



Mandatory jurisdiction to investigate Formal complaint filed by a complainant

- What is a formal complaint?
- How to file it/where is it?
- What does it need to say?



Mandatory jurisdiction to investigate Formal complaint filed by Title IX coordinator

When might a Title IX coordinator
file a complaint?



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
- 3) "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).

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(the offense formerly known as hostile environment sexual harassment)

- 1) Unwelcome conduct
- 2) Determined by a reasonable person to be so
 - a) Severe
AND
 - a) Pervasive
AND
 - a) Objectively offensive
- 3) Effectively denies a person equal access to the institution's education program or activity

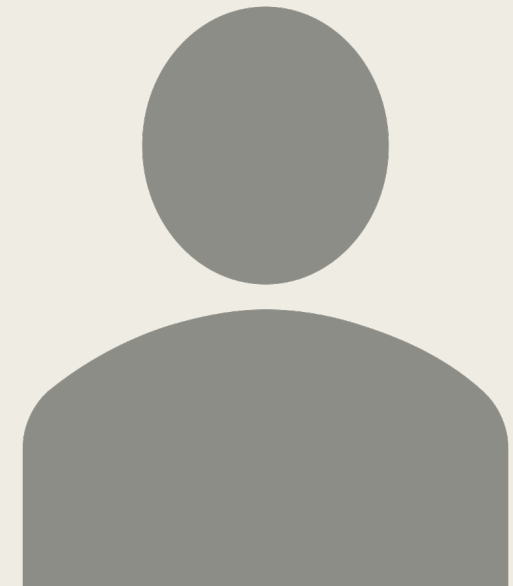




ROLES IN THE PROCESS, AND HOW TO SERVE IMPARTIALLY,
WITHOUT BIAS, AND WITHOUT CONFLICTS OF INTEREST

Title IX Roles

- Title IX Coordinator
- Investigator
- Decisionmaker
- Appeals officer
- Facilitator of informal resolution
- Party advisor



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And what about your sanctioner?



How to serve impartially

- Avoid pre-judgment of the facts
- Bias
- Conflict of interest

Formal complaint is filed ... what now?

- Grievance process
- Allegations, including sufficient details
- Statement of presumption of non-responsibility
- Right to an advisor/attorney
- Right to inspect evidence
- Any provision in code that prohibits making false statements during process



Informal resolution

- Can only be offered after formal complaint has been filed
- May include arbitration, mediation, or restorative justice
- Facilitators must be trained in informal resolution

Dismissing complaints

MANDATORY

- Not sexual harassment
- Did not occur in program or activity
- Not against person in the U.S.

DISCRETIONARY

- Complainant withdraws complaint
- Respondent no longer enrolled/employed
- School unable to collect sufficient info

Bad behavior that must be dismissed pursuant to regulations

- Why might we want to address this conduct?
- Are we prohibited from addressing it?
- If not prohibited, how can we address it?



QUESTIONS?

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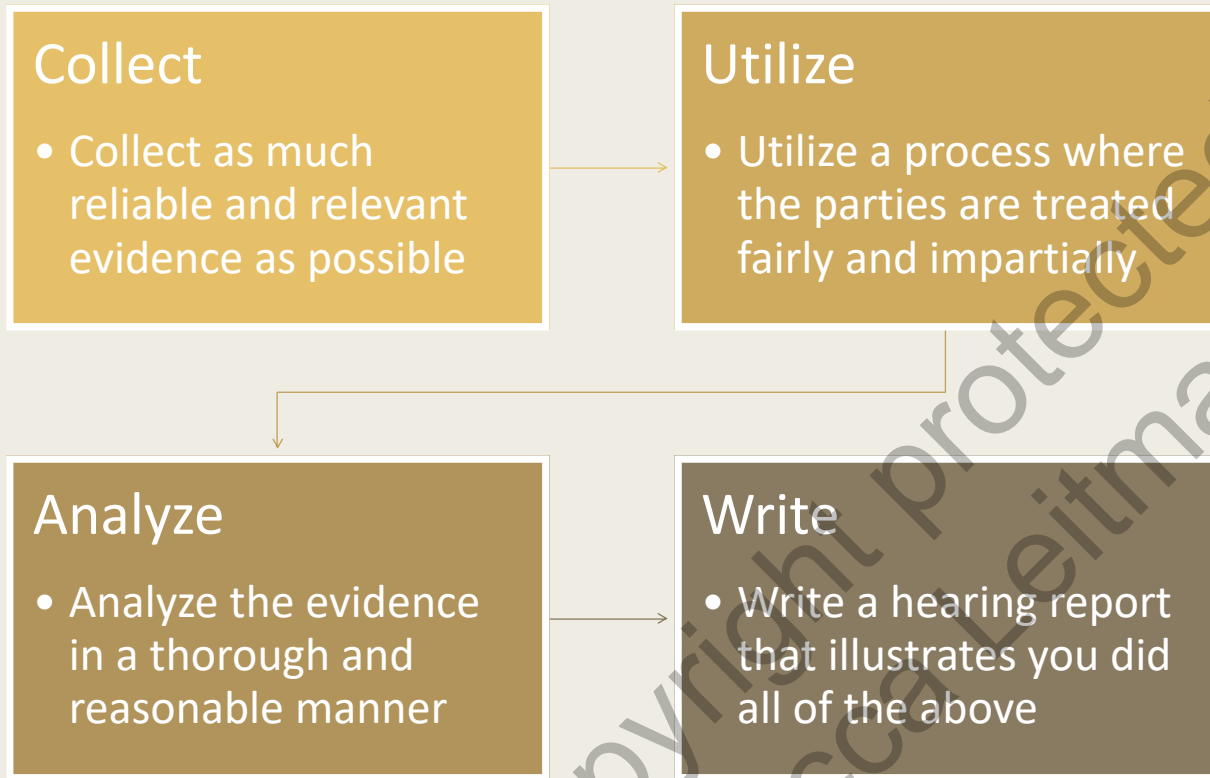
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Topics we will cover today

- How to conduct an investigation
- Relevance and special categories of evidence
- How to convene a hearing
- How to handle appeals



HOW TO CONDUCT INVESTIGATIONS



Overarching Goals of Investigation & Adjudication

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Interviewing Tips

- Clear expectations and communication about process, including lack of confidentiality
- Start with big questions, loop back for details
- For witnesses, ask about relationship to parties/conversations about interview
- Give the witness very little specific information about the allegations
- Last question is a catch-all

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Asking sensitive and difficult questions

Help me understand . .	Tell me all about . . .
What were your thoughts and feelings at that time?	What were you hearing when this was happening?
You said X. I want to make sure I understand what you mean by X.	I don't want to make any assumptions, so can you explain what you mean by X?
I am going to ask some questions about X, because it is important that I understand X.	I am going to shift gears and ask about X.
What part of their body touched your body?	How did you know the other person wanted to do X?

Other Evidence: Burden is on the school

- Surveillance video
- Key card swipes
- Texts/emails/voicemails
- Social media posts
- Police reports
- Photos
- Phone records



Steps 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

Sharing evidence “directly related” to the allegations



- *Consider restrictions on use and non-disclosure agreements*
- *Develop document-sharing protocol*
- *Tips for keeping timeframes “prompt”*

Creating investigative report summarizing “relevant evidence”

- Use logic and common sense
- Toss out old rules/practices regarding categories of information permitted (except for three situations)

Irrelevant

Irrelevant

Relevant

Irrelevant

Irrelevant

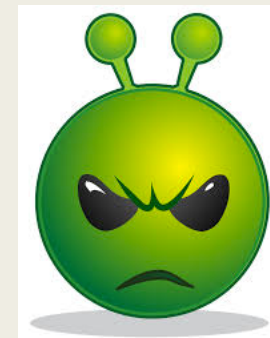
Relevance IS

- Tends to make a fact more or less probable than it would be without that evidence
- Logical connection between the evidence and facts at issue
- Assists in coming to the conclusion – it is “of consequence”



Relevance IS NOT

- Strength of the evidence
- Believability of the evidence
- Based on type of evidence: circumstantial v. direct
- Based on complicated rules of court





Special categories of evidence that are off-limits

- **IRRELEVANT:** Complainant's prior sexual predisposition or prior sexual history (with two exceptions)
- **IRRELEVANT:** Information protected under a legally-recognized privilege
- **CAN'T USE:** Medical, psychological and similar records without written consent of party



HOW TO CONVENE A HEARING

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Pre-hearing work

- Confirm advisors for each party; appoint if necessary; consider having back-ups available
- Figure out who will be requested to attend
- Explain to the parties what to expect
- Establish ground rules and structure of hearing
- Consider convening a pre-hearing conference
- Make logistical and technology decisions (including recording, having info available for parties, and remote access)

“Submitting to cross examination”

- What this means
- What does NOT submitting to cross examination look like?
- Consequences of NOT submitting to cross examination



Managing the questioning process

Order of
questioning

Making
thoughtful rulings
on relevance

Brainstorm and
prepare for
hearing scenarios



Remember special categories of evidence that are off-limits

- IRRELEVANT: Complainant's prior sexual predisposition or prior sexual history (with two exceptions)
- IRRELEVANT: Information protected under a legally-recognized privilege
- CAN'T USE: Medical, psychological and similar records without written consent of party

Decision and written determination

- Use disciplined, unbiased evaluation of relevant evidence
- Include specific elements required by regulations

Concepts we use to evaluate evidence

Relevance

- Tends to make a fact more or less probable than it would be without that evidence
- Assists in coming to the conclusion – it is “of consequence”

Reliability

- Accurate
- Trustworthy

Weight

- The value you assign to the piece of evidence

Fun activity applying evidence in a sexual harassment matter

1. Unwelcome conduct (subjective and objective)
2. Severe
3. Pervasive
4. Objectively offensive
5. Effective denial of equal access to school's education program or activity



Required elements in written determination

- Description of procedural steps from complaint through determination
- Findings of fact
- Conclusions regarding application of policy to facts
- Rationale for each result of each allegations
- Sanctions/remedies
- Appeal options (must permit appeal)

Grounds for appeals

- Procedural irregularity that affected the outcome of the matter
- New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter
- Title IX coordinator, investigator, or decisionmaker 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
- Any other grounds, as long as offered equally to both parties

QUESTIONS?

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