



# 2020 TITLE IX REGULATIONS IMPLEMENTATION TRAINING & CERTIFICATION COURSE

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Summer Certification Series | June 11-12, 2020

2020  
Regs  
Rapid  
Response

R<sup>3</sup>

# Your Faculty



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# Current State

- Withdrawn:
  - 2011 Dear Colleague Letter (DCL)
  - 2014 Q&A on Title IX and Sexual Violence
  - 2016 DCL on Transgender Students
- Still in effect:
  - 1975 Regs, as amended
  - 2001 OCR Revised Sexual Harassment Guidance (has force and effect of law; conflicts with 2020 Regs)
  - 2003 DCL on Title IX and Free Speech
  - 2010 DCL on Harassment and Bullying
  - 2013 DCL on Pregnant and Parenting Students
  - 2015 DCL on the role of Title IX Coordinators
  - 2017 Q&A on Campus Sexual Misconduct issued as interim guidance, still in place

# Trumping Title IX

- 2020 Title IX Regulations
- Issued May 6<sup>th</sup>, 2020 (Publication date May 19<sup>th</sup>, 2020)
- Effective and enforceable August 14<sup>th</sup>, 2020
  - Amend the Code of Federal Regs. and have force and effect of law
  - Some provisions already mandated by due process case law in some jurisdictions
  - Intervening variables (litigation and election) may impact enforcement in the shorter or longer term
  - Lawsuits against Regs anticipated from:
    - SSAIS, KYIX (represented by ACLA), etc.
- Regulations are significant, legalistic, surprisingly prescriptive, very due-process heavy, and go well beyond what any court has required under 5<sup>th</sup>/14<sup>th</sup> Amendment case law.

# Regulations have the Force and Effect of Law

- **Laws** passed by Congress (e.g.: Title IX) – Enforceable by courts/OCR
- **Federal regulations** promulgated under Title IX have **force and effect of law**, meaning they are enforceable by OCR
- What effect will these regulations have on courts?
  - Controlling weight (substantive/legislative)?
  - Persuasive weight (procedural/interpretive)?
  - Could form the basis of Section 1983 actions (personal liability)
  - Could constitute deliberate indifference (?) or disparate treatment
- OCR “regulatory guidance” or “sub-regulatory guidance”
  - Influential but not strictly enforceable (e.g., 2011 and 2015 DCLs)
- State and local pre-emption issues – 2020 regs pre-empt state law

# Commitment Beyond Compliance

- Industry standards = the floor. Best practices = the ceiling.
- Statutes, case law, and federal regulations set the floor.
- Some states have laws that exceed federal requirements and do not conflict with 2020 Regs. Where they do conflict, Regs control.
- Aiming for the floor = doing the bare minimum
  - Will continue the cycle of inequity and unfairness; Activists won't stand for it
- Civil rights issues demand more than the bare minimum
- Effect of new “not deliberately indifferent” OCR standard is to institutionalize deference, rather than encourage excellence.
  - OCR is saying to schools: Congrats, at least you didn't *completely* ignore invidious discrimination.

# Regulatory Changes

- Grievance Procedures
- Jurisdiction
- Notice to Community / Notice to Parties
- Definition of Sexual Harassment
- Supportive Measures
- Formal Investigation and Hearing
- Due Process Elements

# Shifting Terminology

ATIXA IS SHIFTING ITS TERMINOLOGY TO MATCH THE NEW REGS:

- You = Recipient
- Various titles = Title IX Coordinator
- Reporting Party = Complainant
- Responding Party = Respondent
- Resolution = Grievance Process
- ATIXA model policy offenses NCSL/NCSI = sexual assault
- Intimate Partner Violence = Dating and domestic violence

AND OCR DEFINITIONS OF THESE OFFENSES MUST BE ADOPTED:

- Including OCR definition of Sexual Harassment, Clery Act definition of sexual assault, and VAWA definitions of DV/DV and stalking.
- How will recipients exceed the floor OCR is setting with these terms/definitions?

# Regs Protect Constitutional Rights

- Within Title IX-related policies and procedures, do not restrict any rights guaranteed against government action by the U.S. Constitution.
  - First Amendment of the U.S. Constitution
  - Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution
  - Fourth Amendment
  - Other Amendments and Rights?
- But, consider the issue of the definition of stalking OCR has required recipients to use – could it be interpreted or applied in a way that violates the First Amendment? Focus on conduct, rather than speech, but ATIXA still thinks a court could strike it as overbroad.

# Conflict and Overlap with Other Laws

- Comply with these regulations irrespective of FERPA provisions to the contrary.
- Nothing in these regulations should be used to deny any individual's rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. or any regulations promulgated thereunder.
  - Okay, but let's unpack this and explore what it really means in practice.
- Nothing in these regulations should deny any legal right of a parent or guardian to act on behalf of a "complainant," "respondent," "party," or other individual, including the ability to file a formal complaint.
  - By this, OCR is talking about specific legal rights parents may already have to act on behalf of children.

# Conflict and Overlap with Other Laws

- If these regulations conflict with a State or local law applicable to your recipient, Title IX pre-empts that law to the extent of the conflict, and you should follow Title IX.
- A recipient may use the same procedures elaborated under Title IX for resolution of allegations arising under Title VI, especially when arising from the same course of conduct.

# Title IX Coordinator

- Designate a Title IX Coordinator.
- Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, who must be referred to as the “Title IX Coordinator.”
- Would you consider having more than one Title IX Coordinator?
- What kind of blended titles might be appropriate to the role?
- More than anything, the breadth and depth of the regs make the case for how vital a Title IX Team will be to achieving compliance.

# Who Is on Your Title IX Team?

- Title IX Coordinator (at least one).
- Investigator(s)
- Decision-Maker (at least one)
- Appeal Officer (at least one)
- Advisors (at least two)
- Title IX Teams can be as small as 5 people, but commonly will be more, including: TIXC + 3-5 deputies, 2-4 investigators, 4 decision-makers (panel+alternate), 1-3 appeal officers, and at least 4-6 trained advisors = 15-25 members

# Community Notification

- Notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, including:
  - of the name or title
  - office address
  - electronic mail address
  - and telephone number

# Non-Discrimination Statement

- Notify persons entitled to a notification as noted above that the recipient does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by title IX and this part not to discriminate in such a manner.
  - Such notification must state that the requirement not to discriminate in the education program or activity extends to admission (unless a regulatory exception applies) and employment.
  - Inquiries about the application of Title IX and this part to such recipient may be referred to the recipient's Title IX Coordinator, to the Assistant Secretary, or both.

# Websites and Publications

- Each recipient must prominently display the contact information required to be listed for the Title IX Coordinator on its website, if any, and in each handbook or catalog that it makes available to persons entitled to a notification as noted above.
  
- A recipient must not use or distribute a publication stating that the recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by Title IX.
  - Know the exceptions spelled out in the [1975 regulations](#). Did you know Father-Daughter dances are specifically permitted?

- Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report.
- Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator.

# Ways of Providing Notice to TIXC

- If there is any other way to file a formal complaint with the Title IX Coordinator in addition to doing so in person, by mail, or by electronic mail, or by using the contact information required to be listed for the Title IX Coordinator above, indicate any additional method of doing so.
  - Accept a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.
  - Indicate that where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party and must otherwise comply with their regulatory duties.

# Grievance Procedures

- Adopt a grievance process that complies with § 106.45 for formal complaints as defined in § 106.30.
- Provide to persons noted above who are entitled to a notification of this section notice of the recipient's grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond.

# Religious Exemption

- Seek assurance of a religious exemption by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part that conflict with a specific tenet of the religious organization.

OR

- If the recipient is under investigation for noncompliance with this part and the institution wishes to assert an exemption the institution can raise the exemption then by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a **specific tenet** of the religious organization, whether or not the institution had previously sought assurance of an exemption from the Assistant Secretary.

# Actual Knowledge

- Define actual knowledge to mean notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient (can include anonymous reports).
- We have replaced Responsible Employees with OWAs
  - Also define actual knowledge to mean notice of sexual harassment or allegations of sexual harassment to any employee of an elementary and secondary school, regardless of confidentiality.
  - Notice would also include personal observation of sexual harassing conduct by any employee.
  - This standard is not met when the only official of the recipient with actual knowledge is the respondent.
  - Now when OCR says sexual harassment, they mean the Big Five Offenses: sexual harassment, sexual assault, domestic violence, dating violence, and stalking.

# Complainant

- Define complainant as an individual who is alleged to be (*who alleges themselves to be*) the victim of conduct that could constitute sexual harassment.
- Treat the complainant as a party even if the complainant chooses not to participate in the grievance process.
- This is true under VAWA § 304 as well, for the rights created by that statute.

# Formal Complaint

- ❑ A formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment.
  - ❑ Note OCR fully embracing adversarial language
  - ❑ Not sure how and why a “formal” complaint is different than a complaint
  - ❑ “Filed” is actually broader in interpretation than it would seem to be based on OCR’s word choice.
- ❑ Remember, nothing in this prescriptive approach would stop you from acting on informal notice or constructive knowledge, if you wanted to write your policy accordingly.

# Respondent

- Define respondent as an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.
- Respondent and complainant together are “the parties.”
- Witnesses are not parties.
- By most common understandings, the recipient is not “a party.”

# Sexual Harassment Policy

- Create an umbrella sexual harassment policy and define sexual harassment as conduct on the basis of sex that satisfies one or more of the following:
  - 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.
  - 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
    - Education program or activity means employment, too!

# Sexual Assault

## Define sexual assault as (six sub offenses now):

Sex Offenses, Forcible—Any sexual act directed against another person, without the consent of the Complainant including instances where the Complainant is incapable of giving consent.

Forcible Rape—Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the Complainant.

Forcible Sodomy—Oral or anal sexual intercourse with another person, forcibly and/or against that person's will (*non-consensually*) or not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

# Sexual Assault

- ❑ Sexual Assault With An Object—To use an object or instrument to penetrate, however slightly, the genital or anal opening of the body of another person, forcibly and/or against that person’s will (*non-consensually*) or not forcibly or against the person’s will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.
- ❑ Forcible Fondling—The touching of the private body parts of another person (*buttocks, groin, breasts*) for the purpose of sexual gratification, forcibly and/or against that person’s will (non-consensually) or not forcibly or against the person’s will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

# Sexual Assault

- ❑ Sex Offenses, Nonforcible—Nonforcible sexual intercourse.
  - ❑ Incest—Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by [insert state] law.
  - ❑ Statutory Rape—Nonforcible sexual intercourse with a person who is under the statutory age of consent of [insert age in your state].
    - ❑ This offense only applies if conduct is “consensual” with minor. If forced or against will of victim, revert to Forcible Rape definition.

# Consent

- Define consent per state law or best practices.
- ATIXA Model Definitions found in 1P1P or The Playbook.
- While new SRS definition of sexual assault is ostensibly consent based, it's not a great analytical tool. Luckily, the working is generic enough to permit ATIXA best practice interpretations to be fully applicable.
  - Possible challenge based on “against the will of” language
  - No knowledge element in the incapacity language
  - Be aware that SRS definition of rape will be replaced with NIBRS definition, likely in 2021. Your definition will have to shift then as well.
    - NIBRS Rape definition is even worse than the SRS definition – “carnal knowledge” coming soon to a campus sexual assault policy near you!

# Dating Violence

- ❑ Dating Violence, defined as: violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the Complainant. The existence of such a relationship shall be determined based on the Complainant's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. For the purposes of this definition—
  - ❑ Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
  - ❑ Dating violence does not include acts covered under the definition of domestic violence.

# Domestic Violence

- Domestic Violence, defined as: a felony or misdemeanor crime of violence committed—
  - By a current or former spouse or intimate partner of the Complainant;
  - By a person with whom the Complainant shares a child in common;
  - By a person who is cohabitating with, or has cohabitated with, the Complainant as a spouse or intimate partner;
  - By a person similarly situated to a spouse of the Complainant under the domestic or family violence laws [insert your state here];
  - By any other person against an adult or youth Complainant who is protected from that person's acts under the domestic or family violence laws of [insert your state here].

# Domestic Violence

- ❑ To categorize an incident as Domestic Violence, the relationship between the Respondent and the Complainant must be more than just two people living together as roommates. The people cohabitating must be current or former spouses or have an intimate relationship.

# Stalking

- ❑ Stalking, defined as: engaging in a course of conduct directed at a specific person that would cause a reasonable person to—
    - ❑ Fear for the person’s safety or the safety of others; or
    - ❑ Suffer substantial emotional distress.
  - ❑ For the purposes of this definition—
    - ❑ Course of conduct means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person’s property.
    - ❑ Reasonable person means a reasonable person under similar circumstances and with similar identities to the Complainant.
    - ❑ Substantial emotional distress means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling.
- Please, please, please, don’t interpret this to violate anyone’s First Amendment rights.***

# Definition Notes

This definition set is not taken from SRS/NIBRS verbatim. ATIXA has substituted Complainant for “victim,” has removed references to his/her throughout, has defined “private body parts,” has removed the confusing and unnecessary term “unlawfully,” and has inserted language clarifying that the Recipient interprets “against the person’s will” to mean “non-consensually.”

These are liberties ATIXA believes are important to take, but users should consult legal counsel before adopting them.

# Supportive Measures

Previously referred to by OCR as “interim measures”

- Define supportive measures as non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.
- Design such measures to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment, or deter sexual harassment.

# Supportive Measures

☐ Supportive measures may include:

- Referral to counseling, medical, and/or other health services
- Referral to the Employee Assistance Program
- Visa and immigration assistance
- Student financial aid counseling
- Education to the community or community subgroup
- Altering campus housing situation
- Altering work arrangements for employees or student-employees
- Safety planning
- Providing campus escorts
- Providing transportation accommodations
- Implementing contact limitations (no contact orders) between the parties
- Academic support, extensions of deadlines, or other course-related adjustments
- Trespass, Persona Non Grata, or Be On the Lookout (BOLO) orders
- Timely warnings
- Class schedule modifications, withdrawals, or leaves of absence
- Increased security and monitoring of certain areas of the campus
- Etc.

# Supportive Measures

- The recipient must maintain as “confidential” any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures.
- The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

# Response to Sexual Harassment

- Respond promptly in a manner that is not deliberately indifferent to actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States
  - Education program or activity means locations, events, or circumstances over which the recipient exercises substantial control over both the respondent and the context in which the sexual harassment occurs and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.
- Treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant.
  - What are supportive measures for a respondent then?

# Response to Sexual Harassment

- The Title IX Coordinator will promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30.
  - Consider the complainant's wishes with respect to supportive measures
  - Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint
  - Explain to the complainant the process for filing a formal complaint.

# Emergency Removal

- Remove a student respondent from the recipient's education program or activity on an emergency basis, only after:
  - Undertaking an individualized safety and risk analysis, and
  - Determining if an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and
  - Providing the respondent with notice and an opportunity to challenge the decision immediately following the removal while respecting all rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act, as applicable.

# Employee Administrative Leave

- Place a non-student employee respondent on administrative leave during the pendency of a grievance process under existing procedures, without modifying any rights provided under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.

# General Equity of Rights

- Apply any provisions, rules, or practices other than those required by this section equally to all parties.
  - Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent.
  - Remedies must be designed to restore or preserve equal access to the recipient's education program or activity.
  - Such post-determination remedies may include the same individualized services described in § 106.30 as "supportive measures" and can be disciplinary or punitive and need not avoid burdening the respondent.

# Neutrality, Conflict of Interest, and Objectivity

- Objectively evaluate all relevant evidence – including both inculpatory and exculpatory evidence – and determine credibility without respect to a person’s status as a complainant, respondent, or witness.
- Implement an evaluative/vetting process to ensure that the Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process does not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

# Training Minimums

- Train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, as applicable, on:
  - The definition of sexual harassment in § 106.30
  - How to apply definitions used by the recipient with respect to consent (or the absence or negation of consent) consistently, impartially, and in accordance with the other provisions of § 106.45.
  - The scope of the recipient's education program or activity
  - How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes
  - How to serve impartially, by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
  - Any technology to be used at a live hearing
  - Issues of relevance of questions and evidence
  - Issues of relevance to create an investigative report that fairly summarizes relevant evidence.

- ❑ Ensure that any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.

# Presumption of Innocence

- ❑ Include in the grievance process a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process by the applicable standard of proof.

- Include reasonably prompt time frames for conclusion of the grievance process, including:
  - Reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes, and
  - Implement a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action.
    - Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities.

# Sanctions

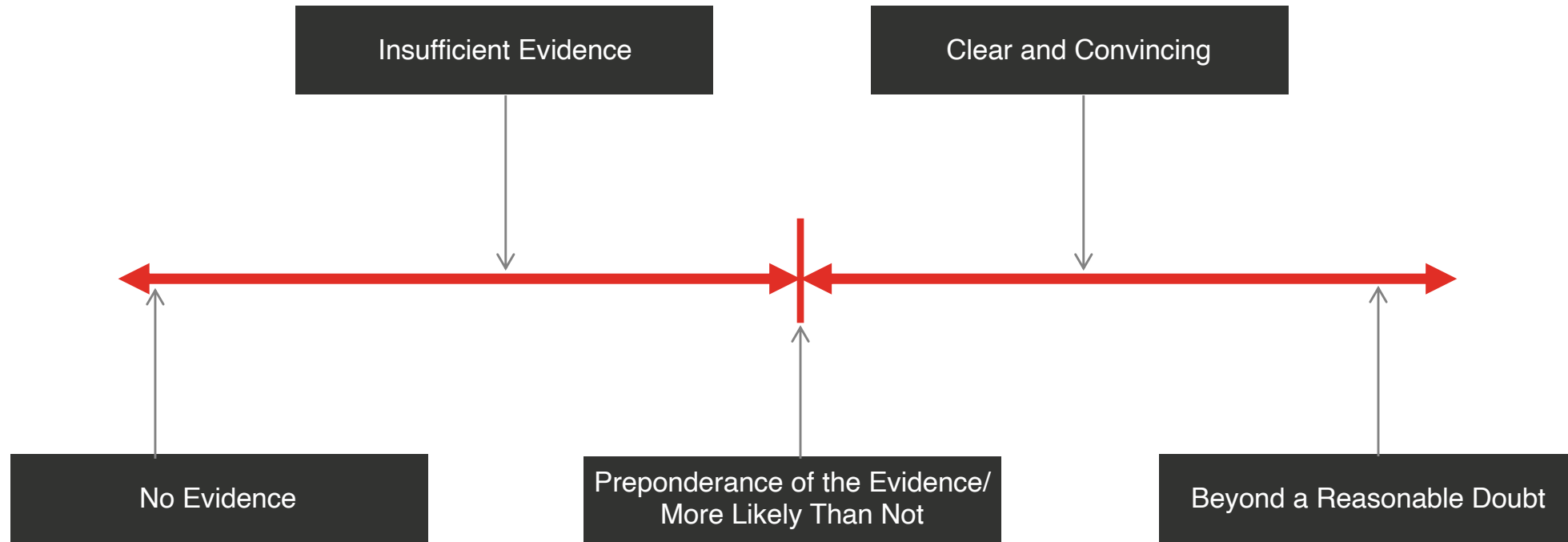
- Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility.
  - Mirrors Clery Act language

# Standard of Proof

- Choose either the preponderance of the evidence standard or the clear and convincing evidence standard and apply it uniformly for all formal complaints of sexual harassment against students and employees, including faculty.
  - Probably one of the more challenging provisions in the regs.
  - Will this survive legal challenge?
  - How are you planning to navigate this for your community?

# Understanding Evidence Thresholds

## EVIDENTIARY STANDARDS



# Privileged Information

- Implement a procedure that does not 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.

# Notice to Parties

- Upon receipt of a formal complaint indicating that the complainant wants a formal investigation, provide the following written notice to the parties who are known:
  - Notice of the recipient's grievance process that complies with this section, including any informal resolution process.
  - Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in § 106.30, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview, including.
    - The identities of the parties involved in the incident, if known
    - The conduct allegedly constituting sexual harassment under § 106.30
    - The date and location of the alleged incident, if known
    - 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

# Notice to Parties

- 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
- 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
- Provide notice of any additional allegations added after the initial notice to the parties whose identities are known.

# Mandatory Dismissal (Four Grounds)

- If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, and/or
- If the conduct did not occur in the recipient's education program or activity, or
- If the conduct did not occur against a person in the United States, or
- If at the time of filing a formal complaint, a complainant is not participating in or attempting to participate in the education program or activity of the recipient.

# Complaint Reinstatement

- Consider reinstating the complaint under another provision of the recipient's code of conduct or other applicable resolution procedures.
- This approach is both logical and problematic.
- What will you reinstate as?
- Will those procedures be like Part 106.45, or a different approach?
- What justifications will you offer to your community, depending on what path you choose?

# Discretionary or Permissive Dismissal

- Consider dismissing a complaint (may, not must) if at any time during the investigation or hearing:
  - A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; and/or
  - The respondent is no longer enrolled or employed by the recipient; and/or
  - Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

# Notice of Dismissal

- Upon a required or permitted dismissal, promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties.
- Dismissal is appealable (see appeal procedures below)

# Consolidation of Formal Complaints

- Decide whether to consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances.
  - This requires clear policy/protocols.
  - This provision needs unpacking and some discussion of best practices.
  - Consider this the floor of what is allowed.

# Burden of Proof and Burden of Gathering Evidence

- Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties.
  - Burden of production
  - Burden of persuasion
  - Effect of affirmative consent standards
  - How do the burden of proof and presumption of innocence intersect?
  - While burden of gathering is on recipient, the option to gather is broadly granted to the parties by the regs.

# Written Consent for Records

- Provide that the recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for a grievance process.
  - If a party is not an "eligible student," as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a "parent," as defined in 34 CFR 99.3.

# Investigation Procedures

- Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.
  - What is it going to be like to have expert witnesses in the grievance process?
  
- Implement a policy that does not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.

# Advisor of Choice

- Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding.
  - Recipients don't have to provide attorneys or equivalently talented advisors to one party just because the other party has one.
- Establish policy regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to all parties.

# Investigation Report

- Write an investigation report appropriately summarizing the investigation and all relevant evidence obtained.
  - OCR has created a two-step vetting process for review of the evidence and the report.
  - This is intended to allow the parties and advisors to comment on the report prior to finalization and then to prepare for the hearing with the report in hand in advance.

# Party Access to Evidence/Report

- ❑ Prior to completion of the investigation report, send to each party and the party's advisor, if any, all evidence obtained that is **directly related** to the complaint, to review in an electronic format or a hard copy, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source.
  - ❑ Give the parties at least 10 days to submit a meaningful written response, which the investigator will consider prior to completion of the investigation report.
  - ❑ Whether included as relevant in the investigation report or not, make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.

# Final Investigation Report

- ❑ Finalize an investigation report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigation report in an electronic format or a hard copy, for their review and written response.

- Postsecondary institutions (IHEs) must provide for a live hearing.
- At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.
  - Only relevant cross-examination and other questions may be asked of a party or witness.
  - Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.

# Provision of an Advisor

- If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.
  - This advisor must conduct thorough cross-examination.
  - What about direct examination?
  - What if a party refuses to cooperate with their advisor?

# Questioning & Cross-Examination

- If a party or witness does not submit to cross-examination at the live hearing, policy must clarify that the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility.
- Policy should clarify that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based **solely** on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.
- Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally.

# Prior Sexual History

- ❑ Implement a policy that 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.

# Hearing Technology

- At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions. Hearings may be conducted with all parties physically present in the same geographic location or, at the recipient's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other.
- Create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

# Formal Resolution for K-12 Schools and Other Recipients

- Elementary and secondary schools, and other recipients that are not postsecondary institutions (e.g., scouting organizations), may, but need not, provide for a hearing (some already have to under state, board or, district rules, and will continue to do so).
- With or without a hearing, after the recipient has sent the investigation report to the parties pursuant to paragraph (b)(5)(vii) of this section and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.

# Formal Resolution for K-12 Schools and Other Recipients

- With or without a hearing, 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.

# Excluded Questions

- The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.
  - The regs establish a questioning protocol. The advisor poses the question, process pauses while the decision-maker considers the relevance of every question, and then decides whether to permit the question, explaining any decision to exclude.
  - The regs are silent on whether the decision-maker can instruct other options beyond excluding a question, such as rephrasing or asking the advisor to reframe.
  - Abusive and unduly repetitious questions are not relevant.
  - Regs leave open question of whether advisor can/should make a showing of relevance to the decision-maker.

# Determination of Responsibility

- Determine responsibility and issue a written determination applying the standard of evidence described in paragraph (b)(1)(vii) of this section.
  - The decision-maker(s) cannot be the same person(s) as the Title IX Coordinator or the investigator(s)
    - The Coordinator can investigate or serve as hearing facilitator (not both), but not as chair.
  - Provide the written determination to the parties simultaneously
  - The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

# Written Determinations

- The written determination must include—
  - Identification of the allegations potentially constituting sexual harassment as defined in § 106.30.
  - A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held
  - Findings of fact supporting the determination
  - Conclusions regarding the application of the recipient’s code of conduct (policies) to the facts
  - A statement of, and rationale for, the result as to each allegation, including:
    - any disciplinary sanctions the recipient imposes on the respondent
    - and whether remedies designed to restore or preserve equal access to the recipient’s education program or activity will be provided by the recipient to the complainant

- The Title IX Coordinator is responsible for effective implementation of any remedies.
  - Who determines?
  - Do decision-makers recommend?
  - Can/should this be influenced by impact statements?

- Offer all parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:
  - 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; and
  - The Title IX Coordinator, investigator(s), or decision-maker(s) 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
  - Other additional bases (sanction?), as long as applied to the parties, equitably.

# Appeals

- Notify the other party in writing when an appeal is filed and implement appeal procedures equally for all parties.
- Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator.
- Give the parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome.

# Informal Resolution

- Considerations
- Requirements

# Informal Resolution

- ❑ Informal resolution, that does not involve a full investigation and adjudication, may be offered at any time prior to reaching a determination regarding responsibility, as long as:
  - ❑ Policy may not require informal resolution participation as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section.

# Informal Resolution

- Policy may not require the parties to participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed.
- Must obtain the parties' voluntary, written consent to the informal resolution process; and
- May not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

# Requirements of Informal Resolution Options

- The parties receive a written notice disclosing:
  - The allegations
  - The requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations
  - At any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint
  - Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.

# Additional Issues

- Training
- Impact on Employees
- Record Keeping

# Impact on Employees

- Regulations often refer exclusively to “students,” but employees are also protected.
- Wholesale revision of faculty resolution/employee grievance processes may be necessary.
- Union employees – diminished right to an advisor because of union representation?
- Extends significant due process protections for at-will employees accused of misconduct – not really at-will anymore under Title IX?
- Potential inequity in employee processes for Title VII-based sexual harassment.
  - More due process for sex discrimination than other forms of discrimination.

# Record Keeping

- Must maintain for a period of seven years records of –
  - Each sexual harassment investigation including any determination regarding responsibility.
  - Any audio or audiovisual recording or transcript required under paragraph (b)(6)(i) of this section
  - Any disciplinary sanctions imposed on the respondent
  - Any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity
  - Any appeal and the result therefrom
  - Any informal resolution and the result therefrom

# R<sup>3</sup> Record Keeping

- All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process
- Records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment.
  - In each instance, document the basis for the conclusion that its response was not deliberately indifferent
  - Document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity
  - If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.

# Training Records

- Make all materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process publicly available on its website, or if the recipient does not maintain a website, the recipient must make these materials available upon request for inspection by members of the public.
  - The most recent materials used to train the Title IX Team should be posted.
  - While seven year of materials need to be maintained, only most recent need to be posted.
  - This requirement is not retroactive, so seven years starts August 14, 2020.

# Retaliation

- ❑ Implement policy that no recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under Title IX.
- ❑ Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, *for the purpose of interfering with any right or privilege secured by title IX or this part*, constitutes retaliation.

# Retaliation

- Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).
- The exercise of rights protected under the First Amendment does not constitute retaliation.
- Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding does not constitute retaliation as long as a policy recognizes that determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

# “Confidentiality”

- ❑ Maintain the confidentiality of the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

# OCR Enforcement – What to Expect?

- OCR will continue to administratively enforce by:
  - Conducting investigations based on complaints filed with the U.S. Dept. of Education.
    - Narrower in scope than previous Obama-era practice
  - Engaging in “voluntary compliance” reviews and investigations
- Compensatory requirements (counseling, tuition, etc.) can be imposed.
- May include equitable and injunctive actions as well as financial compensation to victims of discrimination or regulatory violations
- OCR still retains authority to withhold federal funding; however, this power has never been used.

# Questions?



# Contact Information

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