

# The Title IX New Regulations: ***How to Effectively Prioritize & Implement New Title IX Regulations***

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# Effect of New Title IX Regulations

## 1. Regulations Have Full Force and Effect of Law

- Different from impact of OCR Guidance

## 2. Overall Intent of Changes

- “Strengthen Title IX protections for survivors of sexual misconduct” [and] “also provide due process protections to students facing accusations of sexual misconduct”

## 3. If Conduct falls under Title IX Jurisdiction & California Title 5 Jurisdiction

- Follow Title IX Grievance Process and Title 5 timelines
- Err on following the law that provides the “ceiling” not the “floor”

## 4. Pending Court Challenges

- Current complaints challenging new regulations have been filed, but no injunction or decision yet

# Hypothetical

***On or about Friday, August 21, 2020, Respondent tutored Complainant on campus in the library. Respondent put a hand on Complainant's knee, made comments about sexual acts (e.g., "smashing"), and then touched Complainant's groin area. When Complainant moved away, Respondent moved towards Complainant. Complainant immediately left the library. Complainant reported the matter to the Title IX Coordinator on August 28, 2020, and filed a formal complaint.***

# Overview of Requirements

## Top Ten Issues

1. Title IX Team
2. Sexual Harassment
3. Supportive Measures
4. Respondent's Presence on Campus
5. Investigation
6. Hearing
7. Determination of Responsibility
8. Appeals
9. Retaliation
10. Recordkeeping

# 1. Title IX Team

## **1. Title IX Coordinator**

- Oversees Title IX compliance, accepts initial complaint, implements remedies

## **2. Investigator(s)**

- Investigates the complaint and provides written findings

## **3. Hearing Officer/Decision Maker**

- Conducts hearing, facilitates “cross-examination” & renders decision

## **4. Appeal Decision Maker**

- Addresses appeal requests & renders decision

## **5. Informal Process Facilitator**

- If informal process is feasible, likely a separate facilitator



# Title IX Team: Title IX Coordinator

## **Title IX Coordinator Duties:**



- Coordinates Title IX compliance and training
- Conducts Intake meeting with Complainant
- Offers supportive measures to Complainant & Respondent
- Explains grievance process, accepts formal complaint & determines mandatory dismissal
- Evaluates emergency removal
- Evaluates use of informal resolution process
- Assigns unbiased investigator free from conflicts
- Sends notices (e.g., Notice of Allegations)
- Considers permissive dismissal of complaint

# Title IX Team: Title IX Coordinator

## Title IX Coordinator duties, continued:

- Reviews investigative reports, written decision, & appeal decision, but **does not make decision** about responsibility
- Drafts letter of outcome after written decision issued
- *Likely does not* determine sanctions
- If applicable, ensures effective implementation of remedies for Complainant, sanctions for Respondent, and overall corrective plan
- *May* investigate when needed
- *May* act as facilitator of an informal resolution process

# Meeting with Complainant

## The Title IX Coordinator:

- Promptly schedules a meeting with Complainant and listens to allegations and concerns
- If Complainant describes sexual harassment allegations, the Title IX Coordinator explains the Title IX grievance process
- Informs Complainant of the right to file or **not** to file a formal complaint and the right to supportive measures even if a formal complaint is not filed
- If **no** formal complaint filed, Title IX Coordinator informs Complainant of right to file a formal complaint at a later time and assesses whether to independently initiate a complaint based on a threat to safety



# Meeting with Complainant

## **The Title IX Coordinator:**

- If a formal complaint is filed, Title IX Coordinator gathers the signature of Complainant, parent/guardian, and/or Title IX Coordinator
- Informs Complainant of right to request an informal resolution process after submission of a formal complaint and the right to exit informal resolution process at any time
- If a formal complaint is filed, Title IX Coordinator determines if the complaint falls within the scope of mandatory dismissal and informs Complainant and Respondent
- Best practice to provide a written summary of the intake meeting

# Title IX Team: Investigator(s)

## Investigator Role:



- Trained and Knowledgeable
- Impartial, unbiased, & free from general or specific conflicts of interest
- Investigates formal complaint
  - Reviews complaint
  - Gathers, reviews, weighs, and synthesizes evidence
  - Interviews parties and witnesses
  - Assesses relevance and credibility
- Coordinates two review processes and assesses responses
- Prepares a written investigative report and compiles evidence
- Investigator does **not** make decision about whether Respondent is “responsible” for violation of sexual harassment policy

# Title IX Team: Decision Maker

## Decision Maker Role:



- Reviews Final Investigative Report with “fresh eyes” to see if any information is missing or incomplete
- Hearing officer and/or panel conducts hearing & asks questions of parties and witnesses
- Advisors facilitate “cross-examination” between parties
- Makes conclusions about whether alleged conduct occurred and the determination of responsibility
- Prepares written determination with findings of fact, conclusions, and rationale for the result as to each allegation
- If applicable, recommends sanctions and remedies

# Title IX Team: Appeals Officer


## **Appeal Officer Role:**



- If an appeal is filed, the Appeal Officer evaluates the appeal request(s) to determine if within the scope of appeal
- Provides a written Notice of Appeal to both parties
- Reviews both written statements and arguments from the parties
- Renders written decision on appeal and explains rationale for the result
- Provides the written decision to parties at same time

# Title IX Team: Informal Resolution Process Facilitator

## **Informal Resolution Process Facilitator Role:**



- Cannot require the parties to participate in informal process or to waive the right to an investigation
- Obtains voluntary, written consent of the parties to resolve the matter anytime before a determination of responsibility is made
- Process does not involve full investigation or adjudication, but includes a written notice to the parties disclosing the allegations, the requirements of the process, and notice that the parties can withdraw and resume the grievance process
- May consider the use of a trained mediator or trained restorative justice facilitator, if requested and appropriate
- Process cannot be used where an employee is alleged to have sexually harassed a student

## 2. Sexual Harassment

Sexual harassment is conduct on the ***basis of sex*** under one of the following:

### 1. Quid Pro Quo Harassment

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

### 2. Hostile Environment Sexual Harassment

- Unwelcome conduct determined by a reasonable person to be so severe, pervasive, ***and*** objectively offensive that effectively denies equal access to the educational program or activity

### 3. “Sexual Acts”

- Sexual assault (Clery Act), dating violence, domestic violence, or stalking (VAWA)



# Other Sexual Acts as Sexual Harassment under Title IX

## 1. Sexual Assault

### – Forcible:

- Any sexual act directed against Complainant, forcibly, against Complainant's will, or without consent, including rape, sodomy, sexual assault with an object, and fondling

### – Nonforcible:

- Offenses that do not involve force where the Complainant is incapable of giving consent, including statutory rape and incest

# Other Sexual Acts

## 2. Dating Violence (34 U.S.C. 12291(a)(10))

- Violence (on the basis of sex) committed by Respondent:
  - who is or has been in a social relationship of a romantic or intimate nature with the Complainant; and
  - where the existence of such a relationship shall be determined based on a consideration of the following factors:
    - (i) The length of the relationship
    - (ii) The type of relationship
    - (iii) The frequency of interaction between the persons involved in the relationship

# Other Sexual Acts

## 3. Domestic Violence (34 U.S.C. 12291(a)(8))

Felony or misdemeanor crimes of violence (on the basis of sex) committed by:

- A current or former spouse or intimate partner of the Complainant
- A person with whom the Complainant shares a child in common
- A person who is cohabitating with or has cohabitated with the Complainant as a spouse or intimate partner
- A person similarly situated to a spouse of the Complainant under the domestic or family violence laws of the jurisdiction receiving grant monies, or
- 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 the jurisdiction

# Other Sexual Acts

## 4. Stalking (34 U.S.C. 12291(a)(30))

The term “stalking” means engaging in a course of conduct (on the basis of sex) directed at Complainant that would cause a reasonable person to:

- **Fear** for their safety or the safety of others; or
- Suffer substantial **emotional distress**

# 3. Supportive Measures

## 1. Requirement to Offer

- Must be offered to Complainant as soon as educational entity has notice of possible Title IX allegations and to the Respondent after a formal complaint is filed

## 2. Avoid Burden on Parties

- Supportive Measures must be non-punitive, non-disciplinary, and not unreasonably burdensome to the other party

## 3. Individualized

- Ensure equal educational access, protect safety, or deter sexual harassment

## 4. Examples

- Counseling, course-related adjustments, modify schedule, escort, increased security and monitoring, and mutual restrictions on contact between the parties

# Discuss Advisor of Choice

- The Title IX regulations provide the Complainant and Respondent with the same opportunities to have “**others present**” during any grievance proceeding
  - An advisor may be a parent, family member, attorney, or other person
  - The advisor may be present for any meeting, interview, and hearing and may inspect and review any evidence obtained as part of the investigation
  - The advisor **shall** ask the cross-examination questions during the live hearing process
    - If a party does not have an advisor to conduct cross-examination at a live hearing, the institution must provide one to the party
  - The institution may establish restrictions on the extent of an advisor’s participation, if restrictions apply equally to both parties



## 4. Respondent's Presence on Campus

- ***Employee Administrative Leave*** – Institution may place a non-student employee Respondent on administrative leave, per §106.44(d) during the pendency of a grievance process that complies with §106.45
  - Remember: Follow Ed. Code section 87623 for paid administrative leave for faculty members
- ***Emergency Removal Student Respondent*** – Allowed when an individualized safety and risk analysis reveals that the student Respondent poses an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment
  - Respondent receives notice and opportunity to challenge the decision immediately following the removal
  - Procedure cannot modify rights under Section 504 or ADA

# 5. Investigation

## 1. Presumption

- The institution must presume Respondent is *not responsible* for the alleged conduct

## 2. Evidence Gathering

- Investigator for the educational institution has the burden of proof and the burden to gather sufficient evidence; these burdens are not on the Complainant or Respondent
- Investigator cannot gather privileged information without voluntary, written consent (e.g., physician or psychiatrist records, etc.)

## 3. Written Notice with Time to Prepare

- Provide written notice for all interviews with sufficient time for the party to prepare to participate

# Investigation, continued

## **4. Equal Opportunity for Parties**

- To present witnesses, including fact & expert witnesses and other inculpatory and exculpatory evidence
- To have an advisor present for any meeting, interview, or hearing

## **5. No “Gag” Orders or Directives**

- Cannot restrict the ability of the Complainant or Respondent to discuss the allegations under investigation or to gather and present relevant evidence
- Likely can direct parties and witnesses not to tamper with evidence

# Investigation, continued

## 6. Equal Opportunity to Inspect and Review Evidence

- Provide parties with opportunity to meaningfully respond to the evidence *before* the conclusion of the investigation
- Parties may review evidence that is directly related to the allegations, including evidence which the investigator does *not* intend to rely upon, as well as inculpatory and exculpatory evidence regardless of where it was obtained

# Investigation, continued

## 7. Prepare and Share Draft Report of Evidence

- Before completing the Investigative Report, provide a **Draft Report of Evidence and Attachments** to both parties and their advisor, if any, via electronic format or a hard copy
- Provide the parties and advisors, if any, with at least 10 days to review the Draft Report of Evidence and Attachments & submit written responses before the investigation is concluded
- Share any new evidence with the parties and continue the investigation related to new information, if needed
- Consider and incorporate new information and responses in the ***Final Investigative Report***

# Investigation, continued

## **8. Investigator Prepares Final Investigative Report**

- Fairly summarize relevant evidence
- Relevant evidence may include the weight of the evidence and/or credibility assessments

## **9. Provide Investigative Report to Parties & Advisors**

- At least 10 days prior to a hearing to determine responsibility, send the investigative report to each party and the party's advisor, if any, in an electronic format or a hard copy, for their review and written response
- Review written response, revise if needed, and attach written response to the Investigative Report



## 6. Hearing

Live Hearing with Cross-Examination Required For *Postsecondary Institutions*

### 1. Separate Room Virtual Option

- At request of either party, entire live hearing conducted with parties separate through technology

### 2. Cross-Examination

- Each party's advisor may ask other party and witnesses relevant, follow-up, and credibility questions
- Failure to be at hearing for cross-examination eliminates that person's prior statements or evidence

### 3. Rape Shield Protections

- Evidence about Complainant's sexual predisposition or prior sexual behavior is irrelevant unless offered to prove someone else committed the conduct or if the questions concern specific of Complainant's prior sexual behavior with Respondent to prove consent

# 7. Decision After Hearing

## 1. Decision Maker Determines Responsibility

- The Decision Maker cannot be the Title IX Coordinator or investigator
- Must be trained to rule on relevant questions and weigh evidence
- Understands the “preponderance of the evidence” or “clear and convincing evidence” standard

## 2. Written Decision

- Includes the identification of allegations, description of procedural steps taken during grievance process, findings of fact, conclusion, determination regarding responsibility, rationale, disciplinary sanction for Respondent, remedies to the Complainant, how to file an appeal

# 8. Appeals

## 1. Equal Opportunity

- Both parties must have opportunity to appeal the determination of responsibility or the dismissal of a formal complaint or allegations
- The Appeal Officer cannot be the Title IX Coordinator or the Decision Maker

## 2. Bases for Appeal

- Procedural irregularity that affected the outcome
- New evidence that was not reasonably available & could have affected outcome
- Conflict of interest or bias for or against complainants or respondents generally or against the individual Complainant or Respondent by the Title IX Coordinator, Investigator, or Decision Maker that affected the outcome of the matter
- An educational entity may include other bases for appeal if both parties have equal right to use it

# 9. Retaliation

## 1. Section 106.71(a) – Retaliation Prohibited

- 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 an investigation, proceeding, or hearing.

## 2. Avoiding the Title IX Process May Be Retaliation

- If the alleged behavior falls under Section 106.30 definitions, a recipient cannot use the student conduct process or other complaint process as a way to avoid the rigorous Title IX grievance procedures; such a decision may constitute retaliation.

## 3. Retaliation Complaints Filed Under Same Process

- Retaliation complaints must be filed under the Section 106.8 grievance process.

# Retaliation, Continued

## 4. Confidentiality Required by Recipient

- Recipient must keep identity of Complainant, Respondent, and witness(es) confidential unless required by law “or as necessary to carry out Title IX proceeding”
- Regulations imply that the improper release of this confidential information could be retaliation

## 5. First Amendment Rights

- Parties exercising their 1<sup>st</sup> Amendment rights does not constitute retaliation under Section 106.71(a)

## 6. False Statement Charge

- Recipient charging an individual with making a false statement in bad faith during Title IX process is **not** retaliation
- A responsibility determination (or no responsibility determination) is not sufficient evidence to conclude there was a bad faith false statement

# 10. Recordkeeping

## **1. A recipient must maintain records for 7 years, including records of:**

- Each sexual harassment investigation
- Any appeal and the result of the appeal
- Any informal resolution and the result of the informal process
- All materials used to train Title IX coordinators, investigators, decision-makers, appeal officers, and any person who facilitates an informal resolution process
- Any actions, including supportive measures, taken in response to a report or formal complaint of sexual harassment



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# Thank You

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