

NACUA
Title IX Coordinator Training Online Course
Fundamentals of the August 2020 Regulatory Requirements

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Title IX Coordinator Training: Fundamentals of the August 2020 Regulatory Requirements Resources List

Required Reading

[Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance](#) (Title IX Regulations Addressing Sexual Harassment, 34 CFR Part 106; pages 30572 - 30579) (May 19, 2020)

[Summary of Major Provisions of the Department of Education's Title IX Final Rule](#) (U.S. Department of Education, Office for Civil Rights, May 6, 2020)

Other Resources

[Title IX of the Civil Rights Act of 1964](#). 20 U.S.C. § 1681

[Title IX Final Regulations Grid with Preamble](#) (NACUA, May 17, 2020) (Please access this document via the "Title IX Final Regulations Grid" section on the course's home page.)

[Title IX Final Rule Overview](#) (U.S. Department of Education, Office for Civil Rights, May 6, 2020)

[Summary of Major Provisions of the Department of Education's Title IX Final Rule and Comparison to the NPRM](#) (U.S. Department of Education, Office for Civil Rights, May 6, 2020)

[Title IX Regulations Addressing Sexual Harassment](#) (Webinar) (U.S. Department of Education, Office for Civil Right, May 6, 2020)

[Schools Must Post Important Information Regarding Title IX on School Websites Under the New Title IX Rule](#) (U.S. Department of Education, Office for Civil Rights Blog, May 18, 2020)

[The New Title IX Rule: Excluding Reliance on a Party's "Statements" When the Sexual Harassment at Issue Consists of Verbal Conduct](#) (U.S. Department of Education, Office for Civil Rights Blog, May 22, 2020)

[The Title IX Rule Is Effective on August 14, 2020, and Is Not Retroactive](#) (U.S. Department of Education, Office for Civil Rights Blog, August 5, 2020)

**Title IX Coordinator Training
Online Course: Fundamentals of
the August 2020 Regulatory
Requirements**



**Module 1: Jurisdiction and Other
Threshold Topics**

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Course Overview

- Jurisdiction and Other Threshold Topics
- Formal Complaints, Investigations, and Grievance Procedures
- Policy and Training Obligations



Title IX Final Regulation

- Effective August 14, 2020
- Where to Begin
 - Inventory
 - Implementation Plan



PLAN & DOCUMENT YOUR EFFORTS

- Inventory
 - Current Title IX Procedures
 - Clery Act Policies & Compliance
 - Student Conduct Code
 - HR Policies & Agreements
 - State or Local Laws or Regulations
- Implementation Plan
 - What?
 - Who?
 - When?

**Jurisdiction: What,
Who, Where, When,
How?**

WHAT?

DEFINITION OF SEXUAL HARASSMENT

§106.30(a): Sexual Harassment to include one or more of the following:

1. Quid Pro Quo
2. Hostile Environment
3. Clery Definitions

QUID PRO QUO

1. Conditioning provision of an aid, benefit, or service on participation in unwelcome sexual conduct
2. Carried out by an employee

HOSTILE ENVIRONMENT

- Unwelcome sexual conduct
- “So severe, pervasive, *and* objectively offensive” (2020)
 - Pattern or practice or sustained and non-trivial (2001)
- “Effectively denies equal access”
 - Denies or limits a student’s ability to participate in or benefit from (2001)
 - Interferes with or limits a student’s ability to participate or benefit from (2011)
- “Determined by a reasonable person”
 - “[S]tanding in the shoes of the complainant.” (Preamble, p. 514)

CLERY DEFINITIONS

- Sexual Assault – a forcible or non-forcible sex offense under the FBI UCRS (as defined by the Clery statute)
 - Rape, attempted rape, sodomy, fondling, statutory rape
- Dating Violence – violence by a person who is or has been in a romantic or intimate relationship (Clery statute)
- Domestic Violence – violence by a current or former spouse or intimate partner, co-parent, living partner, youth or other under state law
- Stalking – fear for safety or safety of other or suffer substantial emotional distress

COMPARE TO

- Institution Conduct Code
- Court standards
- Title VII
- State law

WHO?

IN ADDITION TO STUDENTS...APPLIES TO EMPLOYEES

§106.51 Employment

- “No person shall, on the basis of sex, be excluded from participation in, or denied benefits of, or be subjected to discrimination in employment...”
- Remains unchanged by current amendments

WHAT'S NEW THEN...

- 2011 Guidance directed at student-on-student sexual violence
- Courts and OCR have relied on Title VII when considering employees' complaints alleging sexual harassment even under Title IX.
- OCR acknowledges differences, expects institutions of higher education (IHEs) to comply with both Title IX and Title VII requirements.
 - OCR will try to “avoid an actual conflict” regarding employer's obligations. (Preamble p. 1511.)

OTHER CHANGES

- Requires IHEs to handle allegations by employees, including at-will employees, using the same procedures it uses for students
- Independent contractors and volunteers are *not* considered employees who may create *quid pro quo* Title IX liability.
- Actions by non-employees may create liability for other types of sexual harassment. (Preamble p. 448)
- Volunteers who experience discrimination *may* be covered. (Preamble p. 1544)

TITLE VII – SEXUAL HARASSMENT DEFINITION

- Conduct
 - Unwelcome sexual advances
 - Requests for sexual favors
 - Other verbal or physical conduct of a sexual nature
- Viewed by a reasonable person in the Complainant’s position

WHEN...

- Submission becomes a term or condition of employment
- Rejection is used as the basis for an employment decision
- The conduct unreasonably interferes with work performance or creates a hostile, intimidating or offensive environment

EMPLOYEE-EMPLOYEE HARASSMENT

- Employer’s knowledge
 - Knew or should have known
- Immediate and appropriate corrective action
 - Reasonably calculated to end the harassment and prevent recurrence
- Actions by third parties

SUPERVISOR LIABILITY

- Tangible Employment Action
 - Strict liability
- No tangible employment action
 - Employer takes reasonable care to prevent and correct promptly
 - and*
 - Employee unreasonably failed to use employer's preventive or corrective options

INSTITUTIONAL REQUIREMENTS

- Contractual Obligations
 - Collective bargaining agreements
 - Employee handbooks
 - Individual employee contracts



OTHER LEGAL REQUIREMENTS

- Conflicting state requirements
 - State laws
 - State administrative rules and regulations
- Choice of IHE to accept federal funding

OTHER ISSUES

- Procedures
 - Serial or parallel
 - Clearly identify what applies to employees
- Student employees
- Clergy obligations to employees
- Notification to all employees and applicants (§106.8)

WHERE?



JURISDICTION

- No distinction between on- or off-campus
 - If in a location, at an event, or in circumstances that meet the definition
- Only in the United States
 - Harassment must occur against a person *in the United States*
 - Study abroad & foreign employment

BUT DON'T FORGET...

- May apply other institutional conduct standards and procedures
- Clery applies to students and employees regardless of location.
- Title VII applies to U.S. citizens working for U.S. corporations abroad.

EDUCATION PROGRAM OR ACTIVITY

- §106.44(a): Locations, events, or circumstances over which IHE exercises substantial control over *both* the respondent and the context in which the sexual harassment occurred
- Any building owned or controlled by a recognized student organization
- Training on the scope of the institution program or activity

WHEN?

ACTUAL KNOWLEDGE

- §106.30 (a): Notice to Title IX Coordinator or *any official who has authority to institute corrective measures*
- Sexual harassment or allegations of sexual harassment
- No vicarious liability, constructive notice or “should have known”

OFFICIAL WITH AUTHORITY

- Authority to institute corrective measures
- Not an official with authority (OWA)
 - An official with only the ability or obligation to report
 - An official with only the ability or obligation to inform student about how to report
 - An official having been trained to report or inform students how to report
- Respondents are not OWAs

IMPLEMENTATION ISSUES

- Institutions determine who is OWA
 - Institutions decide who must, may or may only with a student’s consent report sexual harassment.
 - Make a list of who has authority
 - Need not give notice of all OWAs only Title IX Coordinator information
- Responsible employees
 - No longer in regulations
 - Institutions now may want to re-conceptualize if or how they will designate.
 - May require employees to inform IHE
 - Resident Assistants

RETALIATION §106.71(a)

- No retaliation by any person to interfere with any right “secured by Title IX”
- No retaliation for
 - Making a report or complaint
 - Participating or refusing to participate
- Filing charges regarding conduct that arises out of the “same facts or circumstances” but does not involve sex discrimination

CONFIDENTIALITY

- IHEs must keep confidential the identity of any individual
 - Who has made a report or filed a complaint
 - Who has been reported as a perpetrator
 - Who has been a witness
- Exceptions
 - FERPA
 - Legal obligations
 - Carry out the purposes of these regulations

RETALIATION AGAINST EMPLOYEES

- Future employment decisions
- Employment references
- Licensing Boards

HOW?

THE INITIAL REPORT

- Anyone may report
 - Not automatically a formal complaint
- Institution response to notice
 - Offer of supportive measures
 - Explanation of formal complaint process
 - Compare to Clery

MAKING REPORTS

- Who
 - Any individual
 - alleged to be the victim of conduct that could be sexual harassment
 - Distinguish from Formal Complaint
- Against Whom
 - Any individual
 - Reported as perpetrator of conduct that could be sexual harassment
 - Distinguish from Formal Complaint

INSTITUTION RESPONSE

- Promptly contact the Complainant to discuss the availability of supportive measures
 - Consider complainant's wishes
 - Make clear available with or without formal complaint
- Explain the process for filing a formal complaint
- Treat complainants and respondents equitably
- Consider Clery obligations

SUPPORTIVE MEASURES §106.30(a)

- Non-disciplinary, non-punitive individualized services
 - Impose actions that are disciplinary sanction or not supportive measure only *after* a grievance process
- Appropriate, reasonably available, free to complainant or respondent
- Restore equal access without unreasonably burdening the other party
- Confidential, if possible

EMERGENCY REMOVALS §106.44(c)

May remove respondent from *education program or activity* if:

- Conduct an individualized safety and risk analysis,
- Determine that respondent poses an immediate [imminent] threat to the *physical* health or safety of *anyone* justifying removal,
- The threat arises from the allegations of sexual harassment, and
- Provide opportunity for respondent to challenge removal immediately thereafter.

BUT...



- This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the American with Disabilities Act.
- Review disability policies regarding danger to self or others

EMERGENCY REMOVALS

Other Points to Consider:

- Not limited to instances of sexual assault
- Who will conduct the assessment and make the decision?
- Beyond verbalized threats, what information will be considered?
- Institution can determine the scope of removal.
- No specific timeframes – may (not required to) reassess
- What will respondent’s ability to challenge it look like?
- Separate from non-student employee Administrative Leave

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**THE FORMAL
COMPLAINT PROCESS**



The Formal Complaint

- Filed by the Complainant or signed by the Title IX Coordinator.
 - Title IX Coordinator ≠ Complainant
- Filed in person, by mail, by email or another approved method.
- Includes allegations of Title IX sexual harassment and requests that the IHE investigate those allegations.
- Complainant must be participating in or attempting to participate in the IHE's education program or activity at the time of filing.

§106.30(a)



The Formal Complaint – Consolidation

- **May** consolidate formal complaints if sexual harassment allegations:
 - Are against more than one respondent, or
 - Are by more than one complainant against one or more respondents, or
 - Are by one party against the other party (*i.e.*, "counterclaim").
- **As long as** the allegations of sexual harassment arise out of the same facts or circumstances and are so intertwined that the allegations directly relate to all of the parties.

§106.45(b)(4)

Written Notice of Allegations

Written notice of the allegations to the parties must include:

- Notice of the grievance process.
- Notice of the allegations that may constitute Title IX sexual harassment, including sufficient details and time for the respondent to prepare a response before an initial interview.
- A statement that the respondent is presumed not responsible unless and until a determination of responsibility is reached at the conclusion of the process.

§106.45(b)(2)

Written Notice of Allegations (cont.)

Written notice of the allegations to the parties must also include:

- Notice of the parties' right to an advisor of choice at any meeting, interview or other proceeding related to the formal complaint.
- Notice of the parties' (and their advisor's) right to inspect and review evidence gathered during the investigation.
- The institution's prohibition against false statements.

NOTE: IHE must provide notice of additional allegations as they arise and are subject to investigation, if applicable.

§106.45(b)(2)

Mandatory Dismissal of a Formal Complaint



If the conduct alleged:

- Would not constitute Title IX sexual harassment even if proved,
- Did not occur in the IHE's education program or activity, or
- Did not occur in the United States.

§106.45(b)(3)(i)

Discretionary Dismissal of a Formal Complaint

If:

- Complainant notifies the Title IX Coordinator in writing of their wish to withdraw the complaint or any allegations in it,
- Respondent is no longer enrolled or employed by the IHE, *or*
- Specific circumstances prevent sufficient gathering of evidence to reach a determination.

§106.45(b)(3)(ii)

Upon Dismissal ...

- Provide written notice of and the reasons for dismissal to both parties.
- Party may appeal dismissal.
- Dismissal does not preclude investigation and adjudication under another provision or policy.

Advisors

- IHE must 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.
 - Advisor may be, *but is not required to be*, an attorney.
 - IHE may not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding.
 - IHE may establish advisor guidelines (e.g., Rules of Decorum).
- NOTE: IHE must provide an advisor at no cost for purposes of cross-examination at the hearing, if the party does not have one.

§106.45(b)(5)(v)

Informal Resolution

- Only an option *after* the formal complaint is filed.
- IHE **may** informally resolve allegations of Title IX sexual harassment at any time prior to reaching a determination regarding responsibility, provided that:
 - Allegations do not involve an employee engaging in sexual harassment of a student;
 - Informal resolution is facilitated by trained individuals with no conflict of interest; and
 - IHE obtains parties' voluntary, written consent to the informal resolution process.

§106.45(b)(9)

Informal Resolution (cont.)

- IHE must provide parties involved in the process with written notice of:
 - The allegations and the requirements of the informal resolution process.
 - Circumstances precluding parties from resuming formal complaint process/same allegations.
 - The right to withdraw and resume the formal complaint grievance process any time prior to agreeing to a resolution.
 - Any consequences associated with informal resolution, including records that will be maintained or could be shared.

§106.45(b)(9)

INVESTIGATIONS & GRIEVANCE PROCEDURES

Investigation

- IHE cannot access, consider, disclose or otherwise use a party's records prepared by a professional in a treatment capacity without the voluntary, written consent of that party.
- Each party must have an equal opportunity to present witnesses (fact and expert), and to identify inculpatory and exculpatory evidence.
- IHE cannot restrict a party's ability to discuss allegations or gather evidence.

§106.45(b)(5)

Investigation (cont.)

- Parties must have sufficient written notice of all hearings, interviews and other meetings to sufficiently allow them to prepare.
- IHE must provide the parties (and their advisors) all evidence directly related to the allegations at least 10 days before the investigator completes the investigative report, so that the parties may review and respond.
 - Directly Related ≠ Relevant
 - IHE must make that evidence available at the hearing

§106.45(b)(5)

Investigative Report

- Must fairly summarize relevant evidence.
- IHE must send the investigative report to the parties (and their advisors) at least 10 days before the hearing for their review and written response.

§106.45(b)(5)(vii)

Live Hearing

- Decision-maker cannot be the Title IX Coordinator or the investigator.
§106.45(b)(7)
- Either party may request that the parties be in separate rooms, but IHE must provide technology allowing the decision-maker and parties to simultaneously see and hear the party or the witness providing information.
- Must record or create a transcript.
§106.45(b)(6)

Cross-Examination / Advisors

- Cross-examination must be conducted by each party's advisor – directly, orally and in real time.
- Allow all relevant questions and follow-up questions, including those challenging credibility.
 - Cross-examination **cannot** be conducted by a party – if the party does not have an advisor, the IHE must provide one at no cost.
- IHE can establish rules of decorum governing hearing, including cross-examination.
- §106.45(b)(6)(i)

Relevancy Determinations

- Before a party or witness answers a question, the decision-maker must determine whether it is relevant and explain any decision to exclude the question as not relevant.
- Questions and evidence about complainant's sexual predisposition or prior sexual behavior, unless to prove that someone other than respondent committed the conduct alleged or, if concerning specific incidents of complainant's conduct with respondent, offered to prove consent, are not relevant.

§106.45(b)(6)(i)

Relevancy Determinations (cont.)

Preamble:

- It is enough for the decision-maker to say the question is not probative of any material fact.
- The decision-maker may not require questions in writing in advance of hearing.
- IHE may have rules precluding the parties (or advisors) from challenging relevancy decisions during the hearing.
- May only exclude questions based on relevance.
 - Not because they are unduly prejudicial, concern prior bad acts or seek character evidence.
 - Questions may be deemed not relevant when they are duplicative of other evidence already in the record.
 - But, the decision-maker must exclude (a) medical, etc. records if the party has not consented in writing; and (b) statements when the party/witness is not subject to cross.

Excluding Statements from Consideration

If a party or witness is not subject to cross-examination, the decision-maker may not rely on their statement in determining responsibility.

- But, the decision-maker may not draw any inferences as to responsibility as a result of individuals not subjecting themselves to cross-examination.

§106.45(b)(6)(i)

Hearing Decorum

May have rules that, *e.g.*,

- Require advisors be respectful and prohibit abusive/intimidating questioning.
- Limit or prohibit objections to relevancy determinations.
- Govern the timing and length of breaks to confer, and prohibit disruption.
- Require that *parties* make openings and closings, if any, and set time limits.

Standard of Evidence

May use preponderance of the evidence or clear and convincing standard, but must use the same standard for formal complaints of sexual harassment against students as for formal complaints against employees, including faculty.

§106.45(b)(1)(vii)

Hearing Outcome / Written Determination

Written determination must include:

- Identification of allegations potentially constituting sexual harassment.
- Description of the procedural steps from the filing of the formal complaint through the determination.
- Findings of fact supporting the determination.
- Conclusions regarding the application of the policy to the facts.
- Statement of and rationale for the result as to each allegation.
- Sanctions and whether remedies will be provided.
- Appeal instructions.

§106.45(b)(7)

Hearing Outcome / Written Determination (cont.)

The determination becomes final on the date the IHE provides the parties with the written determination of the appeal, if any, or the date on which an appeal would no longer be timely, if there is no appeal.

§106.45(b)(7)

Appeals

Must allow for appeals based on:

- Procedural irregularities that affected the outcome.
- New evidence not reasonably available at the time of determination that could affect the outcome.
- Bias or conflict of interest of the Title IX Coordinator, investigator or decision-maker that affected the outcome.
- May include other grounds, equally available to both parties.

§106.45(b)(8)

Recordkeeping

Records regarding the following must be maintained for 7 years:

- Investigation, including the determination regarding responsibility, the hearing recording or transcript, sanctions and remedies
- Appeal and outcome
- Informal resolution and result
- Supportive measures
- Training

§106.45(b)(10)

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