Title IX Coordinator Training Online Course

Class Two: Conducting a Title IX Investigation

Marjory Fisher
Associate Vice President & Title IX Coordinator, Columbia University

Melinda Grier
Melinda Grier Consulting

Janet P. Judge
Education & Sports Law Group

Training Course Does Not Constitute Legal Advice

Class Overview:

- Questions from Class One
- President Biden's March 8, 2021 Executive Order
- Investigations Involving Employees
- Investigating a Formal Complaint
- Impartiality/Conflicts of Interest
- Relevance
- Violations of Other Policies

Questions from Class One

Handling the Complaint, Investigation and Supportive Measures:

1) Is temporarily relocating a Respondent to a different residence hall an acceptable supportive measure?
2) May the written complaint be shared with the Respondent as part of the notice of allegations or should it only be a summary? If the written complaint is not shared as part of the notice of allegations, should it be included in the evidence the Respondent is allowed to inspect?
3) Is a complaint with similar facts against the same Respondent by different Complainants considered one with the same set of facts?
4) Who can pursue the complaint if the Complainant withdraws?

Questions from Class One (cont'd)

Informal Resolution:

1) What training qualifies someone to facilitate an informal resolution?
2) If an informal resolution process moves back to the formal process, could documents that were part of the informal resolution be used in the formal resolution process?
3) If a Respondent admits responsibility during the informal resolution process, should that be treated as a conduct violation on their education record?
4) If a student who participated in sexual misconduct matter that was resolved using an informal resolution process is later subject to a background check, should the institution disclose that the student was the subject of a complaint that was resolved using an informal resolution process?

Questions from Class One (cont'd)

Clery:

1) Does "stalking" as included from the Clery definitions require a sexual component to be a violation?
2) Do the most current VAWA amendments lead to a change in how Title IX works?

The Process:

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

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March 8 Executive Order

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

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

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

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Statement by Secretary of Education Miguel Cardona on Newly Signed Florida State Legislation – 3.28.22

U.S. Secretary of Education Cardona issued the following statement in response to the Florida Legislature's Parental Rights in Education bill being signed into law:

- "By signing this bill, Gov. DeSantis has chosen to target some of Florida's most vulnerable students and families, all while under the guise of 'parents' rights.'
- Make no mistake: this is a part of a disturbing and dangerous trend across the country of legislation targeting LGBTQI+ students, educators, and individuals.
- This comes at a time when we know lesbian, gay, bisexual, and questioning students are three to four times more likely than non-LGBTQI+ students to report experiencing persistent feelings of sadness, hopelessness, and even self harm – not because of who they are but because of the hostility directed at them.
- I've spoken to parents and families in Florida and they've consistently told me that this legislation doesn't represent them or what they stand for. Instead of telling some students or families it's not okay to be who they are, our Department is fighting for dignity and opportunity for every student and family.
- We will continue to prioritize getting billions of dollars of American Rescue Plan funds into schools and classrooms across the country to support the mental health and academic needs of students, educators, and families.
- And, we will be monitoring this law upon implementation to evaluate whether it violates federal civil rights law.
- As always, any student who believes they are experiencing discrimination, including harassment, at school or any parent who is concerned that about their child experiencing discrimination can file a complaint with our Office for Civil Rights."

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Investigations Involving Employees

The Basics:

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

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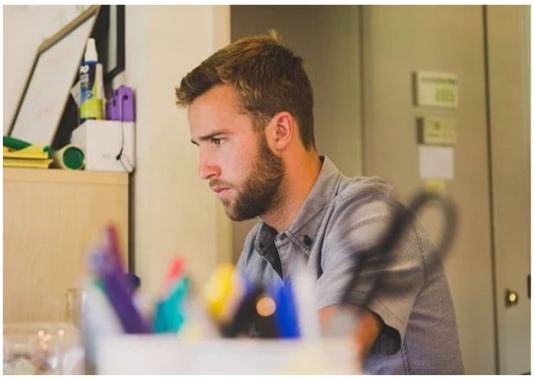
However:

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

Title VII Requirements



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

Special Considerations

- Administrative leave
- Title IX
  - "Reasonably prompt timelines," and
  - supportive measures only against a Respondent until the process is complete
- Title VII
  - "Immediate and appropriate corrective action"

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Investigating a Formal Complaint

Conducting an Investigation

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

Interviewing

Consider in advance whether interviews will be:

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

When interviewing, the investigator must:

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

Review of Evidence

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

Investigative Report

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

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Impartiality & Conflicts of Interest

Impartiality, Bias, Prejudgment & Conflict of Interest

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Understanding Relevance

How is Relevance Defined?

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

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Relevant Evidence

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

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

Admission vs. Weight, Credibility, or Persuasiveness

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

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What Is NOT Relevant?

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

Defining Relevance in Policy

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

All Relevant Information Is Not Created Equal

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

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Violations of Other Policies

Violations of Other Policies

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

Remember to update notice with later-discovered allegations.

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Questions?

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