

Title IX Coordinator Training Online Course



Class One: Definitions, Jurisdiction and Preliminary Matters

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Class Overview

- The New Administration: What to Expect?
- Definitions
- Jurisdiction
- Formal Complaints
- Supportive Measures
- Dismissals
- Informal Resolution



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What's Next?

What is going to happen to the DeVos Title IX Rules under President Biden?

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Biden said he wants to undo DeVos' Title IX rule. How would he replace it?

Revoking the regulation would not be easy, and colleges would need guidance for addressing campus sexual assault in the interim.

Biden wants to scrap Betsy DeVos' rules on sexual assault in schools. It won't be easy.

The Trump administration's Title IX regulations prioritize students accused of sexual misconduct instead of their accusers, victims' advocates say.

Biden Administration Expected to Reverse DeVos's Title IX Regulations, Legal Experts Say

In early May 2020, former Secretary of Education Betsy D. DeVos released a controversial Title IX rule that drummed up controversy, criticism, and confusion at Harvard and beyond. How will the incoming Biden administration deal with the rule?

BY JESSICA LEE AND CHRISTINA T. PHAM 8 hours ago





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Litigation Challenges

- Know Your IX, et al. v. DeVos filed May 14, 2020 in D. Md.
- New York v. U.S. Department of Education, filed June 4 in S.D.N.Y.
 - Motion for Preliminary Injunction (June 25, Denied); Stipulated Dismissal without Prejudice (November 4)
- Pennsylvania, et al. v. DeVos, filed June 4 in D.D.C.
 - Motion for Preliminary Injunction (June 23, Denied)
- Victim Rights Law Center, et al. v. DeVos, filed June 10 in D. Mass.
 - Currently on trial before Judge William G. Young, leave to file amended complaint granted.

EDUCATION

Biden vows 'quick end' to DeVos' sexual misconduct rule

Biden disavowed Education Secretary Betsy DeVos' Title IX rule.



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- Courts unlikely to find DeVos rules “**arbitrary and capricious.**”
- **Biden Administration** will likely seek to roll back regulations. But, to do so it will need to go through same time-consuming process ED just completed.
- **Repeal? Repeal and Replace?**
 - Estimated two years
 - Repeal and replace
 - Single change in rules would require only one change and would be less challenging to institutions
 - Relatively longer effectiveness of existing rules
 - Repeal; replace later
 - Quicker; presumably could implement very quickly
 - Would involve at least two more changes to regulations
 - What rules apply in the interim?
- What will **enforcement** look like in Biden's OCR?
- **In the meantime, the rules are the law, and any college receiving federal funds must obey them.**



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Where Might We Go? No Crystal Ball

- How might changes play out? What controversial features will be kept?
Abandoned?
 - Will the response obligations be significantly changed?
 - Formal complaint requirement?
 - Live hearing requirement?
 - Cross-examination and exclusionary rules?
 - Role of advisors?
 - Will the scope of what constitutes “sexual harassment” and requires a prescribed response be expanded?
 - Severe and/or pervasive and objectively offensive?
 - Participating in programs and activities at the time of the formal complaint?
 - Application to employees?



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Definitions

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Definition of Sexual Harassment

Sexual Harassment includes one or more of the following:

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

§106.30(a)



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Quid Pro Quo

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

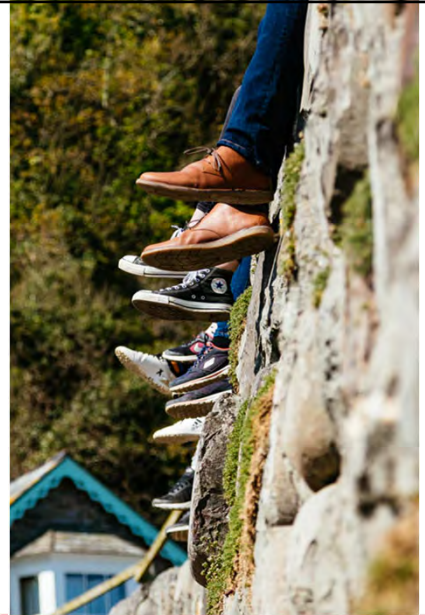


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Hostile Environment

- Unwelcome sexual conduct
- “So severe, pervasive, *and* objectively offensive”
- “Effectively denies equal access”
- “Determined by a reasonable person”
 - “[S]tanding in the shoes of the complainant.” (Preamble, p. 514)



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Clery Definitions

- **Sexual Assault** – a forcible or non-forcible sex offense under the FBI UCRS (as defined by the Clery statute)
 - FBI UCRS/SRS definitions or NIBRS Sex Offenses definitions
 - Focus on proscribed actions rather than terms
- **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



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Complainant & Respondent

- Complainant – an individual who is alleged to be the victim of conduct that could be sexual harassment
- Respondent – an individual who has been reported to be the perpetrator of conduct that could be sexual harassment



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Actual Knowledge

- Institution has actual notice of sexual harassment or allegations when reported to the:
 - Title IX Coordinator(s)
 - Official With Authority to Take Corrective Actions (OWA)
- Not a respondent
- Not others who may or must report



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Jurisdiction

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Education Program or Activity



- Locations, events, or circumstances over which IHE exercises substantial control over *both* the respondent and the context in which the sexual harassment occurred, **or**
- Any building owned or controlled by a recognized student organization, **and**
- Against a person in the United States

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Filing a Formal Complaint

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Filing a Formal Complaint

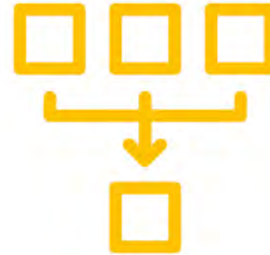
- Filed by the Complainant or signed by the Title IX Coordinator.
- Requests that the IHE investigate the allegations of sexual harassment.
- In person, by mail, email or approved method with Complainant's signature.
- Complainant must be participating in or attempting to participate in the IHE's education program or activity.



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The Formal Complaint: More Than One Respondent

- May consolidate formal complaints against more than one respondent, or by one party against the other party
 - Allegations arise out of the same facts or circumstances.
- Complaints may be filed and sanction imposed *only* against individuals, not groups



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Written Notice of Allegations

- Notice of the grievance process.
- Notice of the allegations, including sufficient details and time to prepare a response *before* the initial interview.
- Statement that the respondent is presumed not responsible.
- Right to advisor of choice.
- Right to inspect and review evidence.
- Any prohibition of false statements or information.

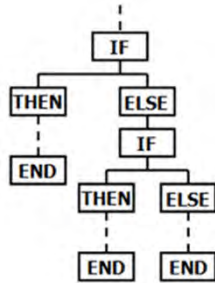
Provide updated notice with any later discovered additional allegations.



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Dismissals



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Mandatory/Discretionary Dismissals

Mandatory if Conduct Alleged:

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

Discretionary If:

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

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Dismissal Results



If a formal complaint is dismissed:

- Provide written notice of dismissal and reasons to both parties.
- Provide an appeal process.
- The matter *may* proceed under another provision, policy or code.



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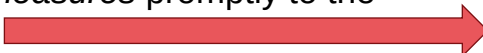
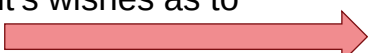
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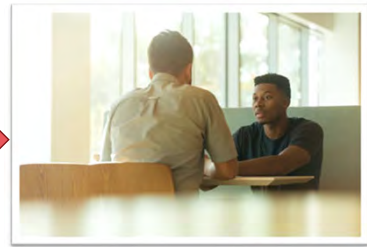
Supportive Measures



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Response to a Report

- Offer *supportive measures* promptly to the Complainant. 
- Explain the process for filing a formal complaint.
- Consider the Complainant's wishes as to supportive measures. 
- Follow a grievance process that complies with the regulations *before* imposing any disciplinary sanctions or other actions that are not supportive measures against the Respondent.



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Supportive Measures



- Available to complainant and respondent
- Non-disciplinary and non-punitive
- Treat complainant and respondent equitably
- No fee or charge to complainant or respondent
- Restore or preserve equal access without *unreasonably* burdening the other party
- Confidential to the extent possible



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Informal Resolution

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Informal Resolution Requirements



- Only *after* a formal complaint is filed
 - At any point in the process
 - May return to formal process if informal resolution does not resolve the matter
- All forms of sexual harassment
 - *NOT* – Allegations of employee against student harassment
 - *ONLY* – When the institution deems it appropriate
- Process is facilitated by trained individuals with no conflict of interest or bias
- Written, voluntary consent by the parties, which requires ...

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Informal Resolution Process

- Parties must be given written notice of:
 - The allegations and the requirements of the informal resolution process;
 - The right to withdraw from the informal procedure at any time prior to agreeing to a resolution;
 - The circumstances precluding parties from resuming the formal complaint arising from the same allegations; and
 - Any consequences associated with informal resolution, including records that will be maintained or could be shared.



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Class Two: Conducting a Title IX Investigation

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Class Overview:



- Investigations Involving Employees
- Investigating a Formal Complaint
- Impartiality/Conflicts of Interest
- Relevance
- Violations of Other Policies



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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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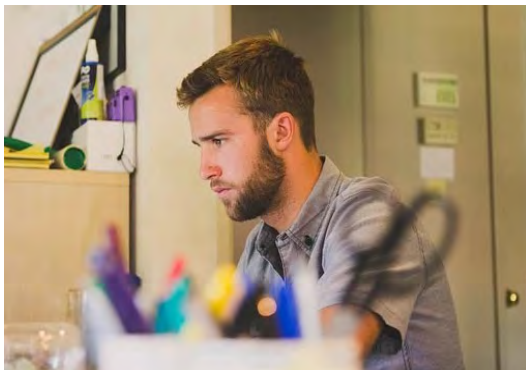
However:

- Title VII also applies.
- Collective bargaining and other contractual obligations might also apply.
- OCR expects institutions to comply with *all* requirements.



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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



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Special Considerations

- Collective Bargaining Rights
 - Administrative Leave
 - “Reasonably prompt timelines”
- vs.
- “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.



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Interviewing



Consider in advance whether interviews will be:

- Recorded or not recorded.
- Be followed with written statements or summaries.

In interviewing, the investigator must:

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



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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.



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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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Impartiality, Bias, Prejudgment & Conflict of Interest

- | | |
|---|--|
| <ul style="list-style-type: none">• Impartiality – basing a conclusion or decision on the facts rather than on a preference for one party over another; unbiased.• Bias – a pre-disposition or pre-conceived opinion that prevents one from impartially evaluating facts | <ul style="list-style-type: none">• Conflict of Interest – demonstrating bias or inability to be impartial because it will be to one's own personal benefit or other competing interest• Prejudgment – reaching a conclusion before considering all relevant evidence |
|---|--|



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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



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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?



- **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)].



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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.



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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.”



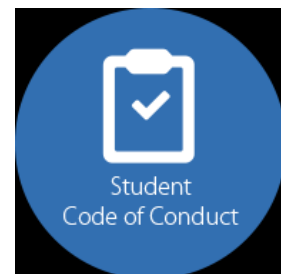
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Violations of Other Policies

Violations of Other Policies

- Knowingly making false statements or submitting false information
- 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



Update notice with later-discovered allegations.



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Questions?

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Class Three: The Grievance Process – Hearings & Appeals

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Class Overview



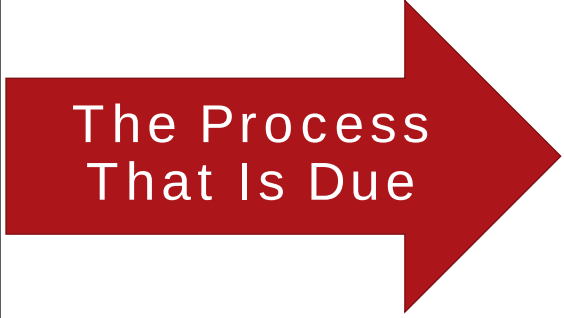
- Due Process / Fundamental Fairness
- Credibility Determinations
- Advisors
- The Written Determination
- Appeals

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Due Process (Fundamental Fairness)

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A Fair Process:

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The Process
That Is Due

- that follows the law,
- is implemented without bias, stereotypes or pre-judgment, and
- provides an equal opportunity for parties to be heard and present evidence,
- so as to allow the decision-maker(s) to reach a determination consistent with the standard of evidence.

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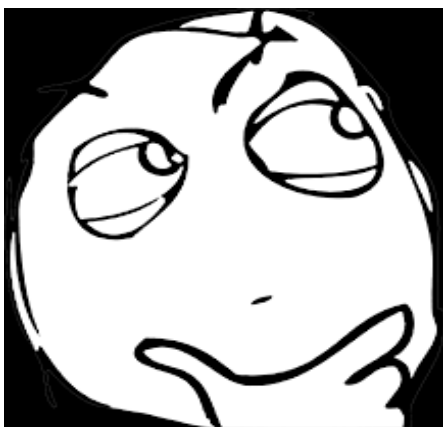


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Credibility Determinations

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Considerations



- What evidence is most believable?
- Corroborating evidence
 - Other testimony
 - Physical evidence
- Consider faulty memories
- Explore reasons for inconsistencies
- There are no “perfect” witnesses, complainants or respondents

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Factors to Weigh

- Consider each material fact separately.
- Credibility as to the facts:
 - Credibility on one fact doesn't make all of that person's testimony credible, and
 - Lack of credibility on one point doesn't make all of that person's testimony non-credible.
- Does the testimony feel rehearsed or memorized?
- Is the testimony exactly the same as another witness?
- Does the testimony make sense?
- Is the testimony detailed, specific & convincing? If not, is there a reason?
- Is it a statement against interest?
- Less credible witness isn't necessarily being dishonest.



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Caution



- Eyewitness accounts
- Bias/Assumptions about witness credibility that may not take account of cultural norms or may stereotype.
- Assumptions about memory that may not reflect witness experiences.
- Failure of decision-maker to explain credibility determinations.



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The Decision-Maker (Hearing Officer)

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Getting Ready

- Self-identify any conflict of interest or bias.
- Prepare, prepare, prepare.
- Read the report carefully and repeatedly, but don't prejudge.
- Understand the conduct at issue and the elements of the alleged violations.
- Identify areas of agreement and disagreement.
- Determine if there are areas that require further inquiry, e.g., did the investigator explore & consider all the relevant evidence?

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Hearing Decorum

Points to Consider: May have rules that:

- Require advisors be respectful and prohibit abusive/intimidating questioning.
 - Deem repetition of the same question irrelevant.
 - Allow for removal of advisors.
- Specify any objection process.
- Govern the timing and length of breaks to confer, and prohibit disruption.
- Require that *parties* make any openings and closings.
- Who will enforce the rules of decorum?
 - How will you train decision-makers?



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Advisors



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Advisors



- Parties must have the opportunity to have an advisor present during any grievance proceeding (hearing or related meeting).
- A party may choose not to have an advisor.
 - However, the institution must provide an advisor to question and cross-examine witnesses if the party isn't accompanied by one.
 - Institutions may require parties to provide advance notice of their advisor's attendance.
 - What if they are a no-show?
- Advisor provided by institution need not be an attorney.
 - Need not be of "equal competency."
- May establish guidelines for advisors.
 - Role of advisors in hearings and meetings.
 - Use of non-disclosure Agreements.

More on the Advisor's Role



- Provide support and advice to the party.
- Understand the allegations and the process.
- Understand the purpose and scope of questioning and cross-examination.
- Ask questions that elicit relevant information.
- Wait for relevancy determinations after asking a question.
- Adhere to rules of decorum and encourage the party to do the same.
- NOTE: Institutions may remove disruptive advisors ... *carefully*.

Working with the Parties' Attorneys

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Advisor or Legal Representative

- Clarify procedures and role in advance.
- Distinguish between advisor and legal representative.
- Emphasize the “ground rules” - provide any rules of decorum.
- Establish lines of communication and points of contact.



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Written Determination

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Written Determination

- Identification of allegations potentially constituting sexual harassment
- Description of the procedural steps
- Findings of fact supporting the determination
- Conclusions regarding the application of the code of conduct/policy to the facts
- Statement of and rationale for the result as to each allegation, including sanctions and whether remedies will be provided
- Appeal procedures and grounds

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Appeals

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Appeals

Must provide an appeal from a determination of responsibility and dismissal of a formal complaint, 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.
- Inappropriate or impermissible dismissal of any formal complaint or allegation.
- May include other grounds, equally available to both parties.

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Appeal Process



- Notify other party upon receipt of appeal.
- Appeal decision-maker can't be Title IX Coordinator, investigator or hearing decision-maker.
- Opportunity for both parties to submit written statement.
- Written decision with the result and rationale simultaneously to both parties.

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Class Four: Anatomy of an OCR Investigation

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Class Overview



- Demystifying the OCR's Multi-Phase Process
- Understanding different aspects of OCR's Case Processing Manual
- Practical Points to Consider in Working with OCR
- Summary

2

Why is this Important to You?

- OCR is the primary enforcement agency regarding Title IX, which may make your department more likely to interact with them
- OCR's process is its own, meaning that responding to OCR often looks different from responding to litigation or even responding to other civil rights enforcement agencies
- Most importantly, understanding OCR's perspectives and the way that it approaches its role can help you maintain policies, files, and other materials in a way that is helpful to you and eases the burden of an OCR review



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What Complaints Does OCR Handle?

- OCR enforces several laws:
 - Title VI
 - Title IX
 - Section 504 of the Rehabilitation Act and Title II of the ADA
 - Age Discrimination Act
- DOJ/USAO and EEOC may also conduct investigations that overlap into these areas, *e.g.*, DOJ reviews disability issues under Title III of the ADA, sexual misconduct issues under VAWA
- OCR may refer complaints to DOJ for enforcement
- NOTE: It's extremely easy for individuals to file complaints!



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Demystifying the OCR Process

- The main phases of an OCR complaint investigation:*
 - Notification to the Institution
 - Early Resolution Options
 - Data Requests
 - Investigation
 - Negotiation and Monitoring of Resolution Agreements (if necessary)
- *Note that OCR can also conduct broad, agency-instituted compliance reviews, but they typically follow these same phases**



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OCR Investigations: Resources

- OCR Complaint Processing Manual (Aug. 2020)
- Dear Colleague Letters and Enforcement Guidance by Statute
- Prior OCR/DOJ Resolution Agreements by Statute
- Case law can be helpful, but OCR does not always recognize court precedent unless it is directly on point



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Phase I: Evaluating the Complaint

OCR evaluates the complaint to determine whether it can investigate:

- Does the complaint allege a violation of law enforced by OCR?
- Was the complaint filed within 180 days of last act which complainant alleges to be discriminatory?
- OCR may:
 - Contact complainant for clarification
 - Waive 180 day filing requirement at its discretion
 - Do all of this without the institution knowing it's happening!



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Phase I: Evaluating the Complaint

OCR may administratively close/dismiss the Complaint if, *e.g.*:

- Complaint does not state a violation of a law OCR enforces
- Complaint is not filed timely
- Complaint is unclear/incomplete and complainant did not provide OCR with clarifying information
- Complaint has been investigated by another federal, state, or local civil rights agency and resolution meets OCR regulatory standards
- Same allegations have been filed by same complainant against same school in state or federal court



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Phase I: Strategies

- There's not much an institution can do to advocate with OCR when it has advance notice that a complaint is headed to OCR
 - OCR uses this period to determine whether it has jurisdiction and sufficient facts to investigate
 - OCR typically does not appreciate outside opinions at this early stage of the process; any efforts to intercede should be done very delicately
- When should an institution intercede?
 - A fundamental premise is inaccurate that might lead to dismissal
 - The matter in question is currently being heard internally at the institution and the process is not completed, or it has been filed in court or with another agency



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Phase II: Notification of Investigation

- OCR sends “**Letter of Notification**” to the institution and the complainant if it determines it will open the complaint for investigation. This letter typically includes:
 - OCR's jurisdiction
 - A brief factual description and allegations to be investigated
 - A statement that OCR is a neutral party
- OCR may refuse to disclose the identity of the student/group bringing the complaint
- OCR may consolidate multiple similar complaints into a single investigation
- OCR may convert a complaint into a broader compliance review



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Phase II: Notification of Investigation

- Notification letters are not typically detail heavy
- OCR will typically provide a link to the Case Processing Manual and the complaint, but some offices only provide the complaint upon request and/or with heavy redactions
 - **Make FOIA request**
 - Simple to do and usually costs nothing
 - OCR is required to respond; but may deny the request until the investigation is concluded
 - May request additional information beyond complaint, *e.g.*, documents submitted by complainant or even prior complaints against the institution



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Phase II: Strategies

- Review regulatory provisions cited by OCR for insight into what OCR will investigate, *e.g.*, facts may cloud the fact that OCR is only focused on the publication of a policy
- Pay particular attention to what OCR says it is investigating, which may be broader or narrower than what is in the complaint
- OCR will remind the institution that it may not retaliate against any complainant or any person who participates in OCR investigation; make sure that is understood by relevant community members who may interact with the complainant



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Early Resolution Options

- Rapid Resolution Process (RRP): Cases chosen by OCR because resolution seems more straight forward or timing is an issue. Often precedes the notification letter and could obviate a finding of any sort.
- Facilitated Resolution Between the Parties (FRBP): An OCR-facilitated mediation-like process:
 - Available only where OCR deems “appropriate.”
 - Both parties must agree to mediate; if unsuccessful the case goes back to mediation . (Different OCR staff mediate v. investigate.)
 - Ultimate agreement not typically monitored by OCR unless a breach is alleged and, even then, OCR will typically revert to investigating the original allegations and not the breach.



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Voluntary Resolution

- Institutions may seek to affirmatively resolve complaint before conclusion of the investigation by initiating negotiations for a Resolution Agreement (a/k/a “302 Agreement,” because it’s defined under CPM Section 302)
- Appropriate when the institution agrees to forego the investigation and enter a compliance agreement on some or all issues
- OCR reserves the right to include any fact learned to date in the Resolution Letter, which may create a strategic advantage in requesting a Voluntary Resolution early if you know that is where it may be headed
- New change to Section 302 allows recipients an opportunity (5 days) to review the draft resolution letter, usually while negotiating draft resolution agreement



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Phase III: Data Request

- OCR will typically include a Data Request with the notification letter:
 - Requests documents, policies, practices, data and explanations
 - Offers opportunity for the institution to provide additional information at its discretion
 - OCR is exempt from FERPA
- Must respond within date on letter, usually 10-30 days
 - Brief extensions may be granted on request
 - Keep in mind OCR has an internal clock for case processing and that clock often runs from date OCR receives complaint

Phase III: Strategies

- Maintain updated and comprehensive records of trainings
- Review accessibility and consistency of policies
- Begin gathering information *promptly* upon receipt of Notification Letter; clearly communicate delays with OCR staff
- PROVIDE A NARRATIVE: An opportunity to educate OCR staff; can also propose witnesses
- OCR does not have authority to compel production in a specific form or create materials; obligation can be satisfied by permitting OCR to come onsite and permit access
- All data submitted to OCR is subject to a FOIA request; consider redactions, as appropriate

Phase IV: Onsite Visit

Types of Activities:

- **Interview employees**, including Title IX Coordinator and Deputies; Director of Student Conduct; Dean of Students; Resident Directors; Athletics Director; coaches; etc.
- **Interview students**, including those trained to respond to reports of sexual misconduct; member(s) of the judiciary/hearing board; members of student organizations; students involved in the grievance process
- **Focus group meetings**, involving community members (including students) who wish to meet with OCR to share their perception of climate on campus regarding presence and effects of sexual harassment
- **File review**, if not already completed (May ask OCR to only review certain sensitive material on campus so it does not end up in the government file.)



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Phase IV: Strategies

- Be involved: The process can take clumps of days over an extended period of time. Be judicious in choosing battles
- Identify / suggest relevant witnesses to OCR
- Prepare witnesses
 - Demystify OCR/DOJ staff by explaining types of questions
 - Provide witnesses with relevant policies/procedures
 - Evidentiary rules don't apply; OCR will weigh hearsay in certain situations – explain this to witnesses
 - Share OCR "Rights of Witnesses" document



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Phase IV: Strategies

- Determine appropriate role of counsel:
 - Will counsel sit in on interviews? Will counsel be able to ask limited questions?
 - Certain lower level employees may have right to refuse to have anyone present during interview and to refuse to reveal interview content
- This is an opportunity to:
 - Demonstrate ongoing compliance efforts to OCR
 - Supplement data response as new information becomes apparent
 - Develop a relationship with OCR staff who will be critical in remaining phases of the case



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Phase V: Compliance Determination

- If OCR determines the institution was out of compliance with a legal requirement, it will issue a Resolution Letter and a Resolution Agreement:
 - Resolution Letters are fact-intensive summaries that apply the law to OCR's factual findings, but OCR makes clear that they are not formal statements of OCR policy
 - The Resolution Agreement then sets forth the agreed upon steps the institution will take to correct the compliance concern
 - Resolution Agreements typically include specific monitoring requirements that often involve continued oversight by OCR



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Phase V: Compliance Determination

- OCR may end Resolution Agreement negotiations at any time if there is an “impasse” or if 90 day period expires. Letter provides OCR will issue findings within 10 days if resolution is not reached
- If institution and OCR are still unwilling or unable to negotiate, OCR will issue a Letter of Impending Enforcement Action
- After that, OCR will initiate administrative enforcement proceedings to suspend, terminate, or refuse to grant or continue Federal financial assistance, or refer to DOJ for litigation
- OCR may also move to defer any new or additional Federal financial assistance to school



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Phase V: Examples

Typical requirements in resolution agreements:

- Mandatory training, with OCR potentially reviewing and approving training content. Occasionally, OCR must approve trainer(s).
- Revision of policies and submission of policies to OCR for approval within a specific period.
- Conduct climate surveys or other assessments in the area of concern.



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Phase V: Strategies

- Seek details on findings to understand how to narrow agreement terms to findings:
 - Discuss proposed terms and how they align with legal/factual concerns
 - Review and be prepared to discuss OCR recent resolution letters addressing the same statute and similar facts
- Focus on flexibility for the institution
 - What is a realistic time period for compliance?
 - Have a candid conversation to try to determine OCR's internal flexibility (or inflexibility – often not driven by regional office) on certain issues, *e.g.*, timing

In Summary ...

- An OCR investigation requires significant internal resources to address data requests and onsite visits
- Be an active participant, as appropriate, in each stage of the process
- Identify and begin taking steps to remedy possible vulnerabilities upon notice of complaint
- Organize files and processes as part of school's regular operations – not just if there is an OCR investigation

Questions?

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Title IX Coordinator Training Online Course

Class Five: Title IX Training & Policies

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PLEASE NOTE: Training Course Only. Does Not Constitute Legal Advice.

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Class Overview



- Audiences To Be Trained
- Elements of a Good Training Program
- Benefits and Perils of Trauma-Informed Training
- Auditing Training Materials
- Developing and Revisiting Policies
- Records Retention and Posting

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Who Do You Train?

3

The Regulations (Title IX Personnel)

- Title IX Coordinators
- Investigators
- Decision-makers
- Anyone who facilitates an informal resolution process



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Consider Training Others, even though not Required by the Regulations

- Title IX staff who are not identified by the regulations
- Officials With Authority to take corrective measures
- Other individuals with the responsibility to report sexual harassment – former Responsible Employees
- Campus Safety Authorities (CSAs)
- The Campus Community

Elements of a Good Training Program

Planning & Preparation

- Identify who must or will be trained on what topics
- Identify who will conduct training
- Identify the method that will be *most effective* and efficient for those to be trained and trainers
 - Live training v. on demand v. hybrid
 - Should groups be combined?
 - When should training occur?
- Consider training resources and campus culture around training
- Ensure training is without bias or stereotypes
 - Complainants vs. Respondents
 - Balanced without regard to gender or other classifications



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Required Training

A school must ensure that Title IX Personnel (coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process) receive training on:

- the definition of sexual harassment;
- the scope of the institution's education program or activity;
- how to conduct an investigation and grievance process including hearings, appeals and informal resolution processes, as applicable; and
- how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest and bias.



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Required Training

Title IX Personnel Continued:

- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest and bias.
- Including: sex, race, ethnicity, sexual orientation, gender identity, disability or immigration status, financial ability, or other characteristic.

**Implicit bias training not required.



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Required for Investigators



- Conducting a fair and thorough investigation.
- Determining relevance in order to prepare an investigative report that fairly summarizes relevant evidence.



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Required for Informal Resolution Facilitators



- How to conduct informal resolution processes (85 FR 30405)
- Document or make public?



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Required for Decision-makers:

- Training on any technology to be used at a live hearing.
- Training on issues of relevance, including how to rule on evidence during a hearing and how to apply the rape shield protections provided only for complainants.
- Include training around the 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.



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Other Training Topics

Investigator	Decision-maker
• Questioning • Institutional policies • Responsibility for proposed findings and conclusions • Redacting privileged information • Coordinating investigation with supportive measures	• Managing the process • Hearing protocol • Institutional policies • Questioning • Preparing findings and conclusions



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Training Transparency

- Post all training materials for Title IX personnel on publicly available website. (If no website, then make materials available for members of the public to inspect.)
- Ensure the materials posted are up-to-date, reflecting the most current training provided.



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Benefits and Perils of Trauma-Informed Training

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How to Be Fair to All

Benefits	Perils
• May help those interviewed retrieve memories • May help those interviewed stick with the process. • May prevent re-traumatizing witnesses	• May be perceived to favor Complainants • May be perceived as less intense questioning or cross-examination of witnesses • May be misused by untrained questioners

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Auditing Training Materials

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When & What to Audit

- Who was trained
- Was training effective
 - Measured outcomes
 - Observed outcomes
- How often to monitor
- Documenting monitoring



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Policies: Management, Notice, and Some Reminders

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Managing the Policies

Developing policies	Monitoring policies
• Existing institutional policies • Existing laws, agreements & practices • Identify conflicts and concurrences and harmonize or change • Include stakeholders	• Changes in law, regulations, guidance or institutional needs • Changes in related laws or guidance, e.g. FERPA, state APA • Effectiveness • Include stakeholders

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Notification and Dissemination

- Title IX Coordinator contact info must be distributed and prominently displayed on the IHE website, and in each handbook or catalog made available to applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations with CBAs.
- Nondiscrimination Policy stating:
 - that the IHE does not discriminate on the basis of sex in the education program or activity it operates.
 - That the IHE is required by Title IX not to discriminate.
 - That the IHE's nondiscrimination policy extends to admission and employment.
 - That inquiries about the application of Title IX may be referred to the school's Title IX Coordinator, to OCR, or to both.



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Adopt & Publish

- Adopt and publish:
 - grievance procedures that provide for the prompt and equitable resolution of student *and* employee complaints alleging *any* action prohibited under Title IX.
 - a grievance process that complies with 106.45 for formal complaints as defined in 106.30.

Notice

WHAT: Notice of the school'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 school will respond.

TO WHOM: 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 school.



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Policy Decision Point: Framework

All-in-One Policy

1. Treat all the Same; or
2. Decision Trees

Two Policies: If not TIX, then ...

1. Title IX Regulation+
2. Everything Else

Three plus:

1. TIX Regulation Conduct
2. Other Sexual Misconduct
3. Other Prohibited Conduct



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Policy Definitions:

- Actual Knowledge
- Complainant/Respondent
- Supportive Measures
- Formal Complaint
- Prohibited Conduct
 - Sexual Harassment
 - Sexual Assault
 - Dating Violence
 - Domestic Violence
 - Stalking
- Consent
- Title IX Coordinator
- Officials with Authority
- Other Reporters, if any.
- Confidential Resources
- Standard of Review
- Evidence
 - Directly Related
 - Relevant
 - Weight
- Deliberate Indifference
- Education Program or Activity
- Informal Resolution
- Emergency Removal



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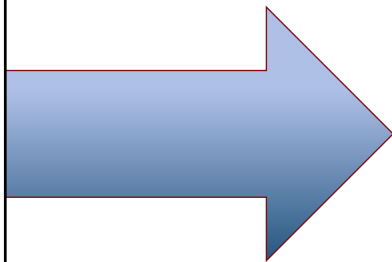
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Please Note:

Where there is a conflict between State or local law and Title IX regulations, Title IX regulations win.

Don't Forget Clery ... Annual Security Report Policies



- Description of proceedings and processes for filing and handling complaints of sexual assault, dating violence, domestic violence and stalking.
- The standard of evidence used in disciplinary actions for covered offenses.
- List of possible sanctions for covered offenses.
- Range of protective measures available to victims.
- Assurances that proceedings will be prompt, fair, impartial & conducted by trained officials.
- Equal opportunity for parties to have an advisor chosen by the party.
- Simultaneous notification of result, process for appeal and when final.
- Description of primary prevention and awareness programs.
- Procedures for victims to follow if a covered crime occurs.
- Notification of services and accommodations for victims.

Record Retention 7 Years



- For formal complaints:
 - Investigation
 - Determination of responsibility
 - Transcripts or recordings of hearings
 - Sanctions, if any
 - Remedies to Complainant, if any
 - Appeal, if any, and result
 - Informal resolution and result, if any
- For all reports, regardless of whether there is a formal complaint:
 - Actions taken and supportive measures, if any, provided in response to a formal complaint.
 - Basis for a determination that the institution was not deliberately indifferent.
 - Measures to restore or preserve equal access or reasons why not providing support was not clearly unreasonable under the circumstances.
- All training materials for Title IX personnel

Questions?

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