2020 Title IX Regulations: Investigator and Coordinator Training
August 6, 2020
Presented by Jackie Wernz

Agenda - Investigators
- Investigator Responsibilities
- Serving Impartially
- Investigation Requirements & Best Practices
- Sharing Evidence and the Investigative Report
- Understanding “Relevant Evidence”
- Recordkeeping

Agenda - Coordinators
- Coordinator Responsibilities, Including Delegation
- Key Terms
- Example Report

Remember Your “Basic Training”
- Definition of Title IX Sexual Harassment
- Scope of Education Program/Activity

Title IX Investigator Responsibilities
- Identify and interview parties and witnesses
- Gather and assess evidence
- Share evidence with parties and provide for written response
- Draft and transmit investigative report
Title IX Coordinator Responsibilities

• Must be called Title IX Coordinator and “authorized”
• Must be identified (with name or title, address, phone, and email) in policy and on website

Title IX Coordinator Responsibilities

• Must meet with alleged victims of Title IX Sexual Harassment – Supportive Measures + Formal Complaint process
• Can “sign” a complaint when the CP doesn’t want to file

Delegation

• Can delegate responsibilities
• Delegate should be trained (can be by you)
• Examples:
  ➢ Evaluate reports
  ➢ Determine what reports require formal proceedings
  ➢ Coordinate responses to reports
  ➢ Sign a formal complaint

Delegation

BUT the recipient itself is responsible for ensuring that the recipient's obligations are met, including the responsibilities specifically imposed on the recipient's Title IX Coordinator under these final regulations, and the Department will hold the recipient responsible for meeting all obligations under these final regulations
Serving Impartially

Who should be on the team?

- Trained, unbiased
  - No actual or perceived conflict of interest
  - Check “institutional interests”
  - No presumption for or against any party
- Appeal: bias and conflict of interest that affected the outcome of the matter

Bias

The Title IX Team Member must not have a conflict of interest or bias for or against Complainants or Respondents generally or for or against any individual Complainant or Respondent. And that they not prejudge any matter before them.

Conflict of Interest

- Flexibility to choose employees or outsource adjudication functions
- No per se prohibited conflicts of interest when using school employees or individuals with histories of working in field of sexual violence as decisionmaker
- Caution against using generalizations to identify conflict of interest

Pre-Judgment

Tips for avoiding pre-judgment of facts:
- Each case is fact-specific
- Keep an open mind
- Listen to facts presented
- Statements by parties that do not submit to cross-examination cannot be considered

Sex Stereotypes

- Must not rely on sex stereotypes such as:
  - Women are “asking for it” based on actions or clothing
  - Men cannot be sexually assaulted
  - Women only decide they were assaulted after the fact due to regret or embarrassment
  - Men are more likely to be sexual aggressors
- Consider intersection of sex stereotypes with race, ability, sexuality, and gender identity
Key Terms

“Actual Knowledge”
Definition (106.30(a)):
• To the TIXC or OWA (including through a "report" to the TIXC)
• Vicarious liability/constructive notice insufficient
• Not met when only OWA is the Respondent
• Mere ability to report sexual harassment or inform a student about how to respond (or be trained to do so) not = OWA
“Notice” is defined broadly

OWAs vs. Responsible Employees
• New definition eschews two prongs of the “responsible employee” rubric (“duty to report” and “student could reasonably believe”)
• Goal: Respect control of Complainant by encouraging confidential reporting options

Inquiring is Bad?
• Inquiring about possible sexual harassment could invade the privacy and autonomy of students and employees
• Not necessary because of clear, accessible reporting options

Who Should be an OWA?
• Is wide-net/universal mandatory reporting system beneficial?
• Respecting autonomy, giving control, and offering clear reporting options help recover, avoid increasing trauma, “institutional betrayal”
“Deliberate Indifference”

- Two response paths
  - Investigation to determine how to adequately respond
  - Investigation for the purpose of potential punishment for RP

Response must
- Be prompt
- Offer supportive measures
- Include contact from TIXC to CP for supportive measure + formal complaint discussion
- Investigate a Formal Complaint
- Contain specific requirements

“Deliberate Indifference”

- Mandatory, proactive, and interactive process
- Must treat parties equitably
  - For CPs, means offering supportive measures
  - For RPs, means no disciplinary sanctions until completion of compliant grievance process
  - For CPs, remedies if RP found responsible for Title IX Sexual Harassment including discipline for RP

No “second guessing” of institutional decisions by OCR
- Read: SHOW YOUR WORK

Investigation

- Must contain specific elements
- Must treat parties equally
- Must end in a report, followed by a hearing with live cross, a written decision from the decisionmaker, and the opportunity to appeal

Example Report
Robin’s Report

- Report from an RA
- Robin, a freshman, rooms with Cameron, another freshman. Cameron told Robin that another student, a senior, Parker, had been sending inappropriate email messages to Cameron.

Robin’s Report

- Robin encouraged Cameron to report, but Cameron refused
- Robin was talking to another student, Peyton, at a party last weekend. Peyton reported also receiving inappropriate messages from Parker.

Because this seemed like a pattern, Robin felt the need to report.

When asked for details about the types of messages, they began with requests for dates but evolved into name calling (slut, skank), rambling comments about the recipient’s “obvious” desire for Parker, and incessant requests for connection.

Is the conduct alleged Title IX Sexual Harassment?

- Yes
- No - not severe
- No - not pervasive
- No - not objectively offensive

Title IX Sexual Harassment

- Employee quid pro quo
- Hostile environment (newly defined)
- Clery/VAWA “Big 4”
VAWA “Big Four”
- Domestic Violence 34 U.S.C. 12291(a)(8)
- Dating Violence 34 U.S.C. 12291(a)(10)
- Stalking 34 U.S.C. 12291(a)(30)

Sexual Assault under VAWA
- Sexual Assault:
  - Penetration without consent (rape)
  - Fondling without consent
  - Incest
  - Statutory rape

Don’t Forget – TIX Quid Pro Quo
Definition: An employee of the recipient conditioning an aid, service, or benefit of the recipient on an individual’s participation in unwelcome sexual conduct
- New: Only an employee (not a volunteer, another student, etc.)
- Codified: Severity and harm presumed

You think it’s TIX SH…. What do you do next?
- Contact Robin to obtain more information
- Contact Robin to offer an opportunity to file a formal complaint and supportive measures
- Contact Cameron to offer an opportunity to file a formal complaint and supportive measures

Title IX Coordinator must promptly, even if no Formal Complaint is filed:
- Contact the Title IX Complainant to discuss the availability of “supportive measures”
- Consider the Title IX Complainant’s wishes with respect to supportive measures
- Inform the Title IX Complainant of the availability of supportive measures with or without the filing of a formal complaint
- Explain the process for filing a Formal Complaint

Meeting with Cameron
- Cameron confirms all of the allegations
- Cameron wants a No Contact Order against Parker
- Cameron does not want to be named to Parker
<table>
<thead>
<tr>
<th>Can you honor Cameron's confidentiality request?</th>
</tr>
</thead>
<tbody>
<tr>
<td>No, names must always be provided to the Respondent when a Complainant reports Title IX Sexual Harassment.</td>
</tr>
<tr>
<td>No, because this situation warrants &quot;signing&quot; a formal complaint and Cameron might be harmed.</td>
</tr>
<tr>
<td>Yes, because respecting the autonomy and wishes of the Complainant is Paramount under the new regulations.</td>
</tr>
<tr>
<td>None of the above.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Can you honor the request for a No Contact Order</th>
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<tbody>
<tr>
<td>Yes, even if it's unilateral.</td>
</tr>
<tr>
<td>Yes, but only if it's mutual.</td>
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</table>

**Forms/Notices**

<table>
<thead>
<tr>
<th>Initial Contact and Meeting with the CP</th>
</tr>
</thead>
<tbody>
<tr>
<td>Notice to Complainant of Report of Title IX Sexual Harassment (Franczek Notice 1(a))</td>
</tr>
<tr>
<td>Summary of Supportive Measures Meeting with the Title IX Complainant (Franczek Notice 1(b))</td>
</tr>
<tr>
<td>Title IX Formal Complaint (Franczek Form A)</td>
</tr>
</tbody>
</table>

**Forms/Notices**

<table>
<thead>
<tr>
<th>Notice of Emergency Removal</th>
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</thead>
<tbody>
<tr>
<td>Notice of Title IX Emergency Removal of Student (Franczek Letter 4(a))</td>
</tr>
<tr>
<td>Notice of Title IX Emergency Removal of Student (Franczek Letter 4(b))</td>
</tr>
</tbody>
</table>

**Can you remove Parker using an "Emergency Removal"?**

| Yes |
| No, Because Cameron has not filed a formal complaint |
| No, Because the standards for emergency removal have not been met |

**Your institution offers face-to-face restorative justice. Can this be done with Cameron?**

| Yes, because the new Title IX regs now clearly allow informal resolution |
| Yes, as long as the facilitator has been trained on Title IX |
| No, because Cameron has not filed a formal complaint |
| No, because sexual harassment cannot be addressed through informal resolution |
**Forms/Notices**

**Informal Resolution Process**

- Offer of Title IX Informal Resolution Process (Franczek Notice 5(a))
- Notice of Closure of Title IX Informal Resolution Process (Franczek Notice 5(b))

**Back to Robin**

- Let’s assume Cameron doesn’t want to file a complaint....

**“Signing a Complaint”**

- Consider:
  - Pattern of alleged conduct
  - Involvement of violence, weapons, etc.
  - Seriousness of alleged conduct
  - Relative ages of individuals involved
- Decision to sign or not to sign a Formal Complaint reviewed for “deliberate indifference”

**Formal Complaint – Next Steps**

- Written notice to all known parties
  - Grievance process
  - Allegations
  - Respondent presumed not responsible
  - Right to advisor
  - Right to inspect/review evidence
  - Notice of provision on false statements
NEW: Cameron’s Formal Complaint

- Cameron, a freshman, claims that another student, a senior, Parker, sexually assaulted Parker in on-campus housing two weeks ago.
- You receive the formal complaint and the written notices of Title IX allegations to the parties.

You (the Investigator) signed the Formal Complaint as Title IX Coordinator or designee. Is that a conflict of interest?

Yes  No

You attend the same church as Parker. Is that a conflict of interest?

Yes  No

You have a history of working as a victim advocate. Is that a conflict of interest?

Yes  No

You are the ADA compliance officer. Is that a conflict of interest?

Yes  No
You have had training on trauma informed interviewing practices. Does that create bias or the risk of preijudgment?

Yes  No

Standard

- Declined to define “bias,” “conflict of interest,” “prejudge”
- The Department encourages recipients to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased, exercising caution not to apply generalizations that might unreasonably conclude that bias exists....

What Might be Bias, Conflict, Prejudgment?

- Discouraging a party from submitting certain evidence
- Using terms like “victim” (even if used in Clery)
- Permitting credibility inferences or conclusions based on party status

What Likely Is Not...

- Deciding an allegation warrants an investigation
- Being an employee (and even attorney)
- Finding in favor of one party over another

Investigation Requirements & Best Practices

Franczek
Investigation

- Must contain specific elements
- Must treat parties equally
- Must end in a report, followed by a hearing with live cross, a written decision from the decisionmaker, and the opportunity to appeal
Investigation 34 C.F.R. 106.45(b)(5)

• Burden of proof on school
• Certain treatment records cannot be obtained without voluntary, written consent
• No restriction of rights of parties to discuss allegations or gather present evidence
• Same opportunities for others present during interviews or related proceedings (e.g., attorney or non-attorney advisor)
• Written notice to parties of date, time, participants, purpose, and location of each investigative interview with sufficient time to prepare
• All evidence provided to parties and their advisors with 10 days to respond before report
• Written investigative report “fairly summarizes the relevant evidence” provided to parties and advisors at least 10 days before hearing or other determination of responsibility

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The Investigation Plan

• Witness List
• Order of Interviews
• Questions for Witnesses
• Physical Evidence Needed, e.g., records, documents, reports, photos, and letters

Concurrent Law Enforcement

• Police plan to release evidence on a specific timeframe that is material to investigation
• Only “temporary” or “limited” allowed
• Not “more than briefly” beyond timeframes
• Not required
What must you do while delaying for law enforcement reasons?

Indefinitely suspend Parker because of the violent nature of the alleged offense
Provide equal supportive measures to the parties
Comply with timelines in other laws, if applicable
Require Parker to sit for an interview

None of the above

Order of Interviews

What is your order of interviews?

Ali
Bobbie
Cameron
Dr. Smith
Parker
Police Witness
Medical Witness

Before Party Interviews

Communicate in Writing:
• Date, time, location, participants, purpose
• With sufficient time to prepare
Recommend same for witnesses (not required)

Forms/Notices

Notice of Interview

Notice of Title IX Interview or Meeting with Title IX Party (Franczek Notice 6(a))
Notice of Title IX Interview or Meeting with Non-Party Witness (Franczek Notice 6(b))

Notice to Advisors

Advisor Conduct Expectations
Prefaces for Parties

- Your Identity and Role as a Neutral
- Notes and Records
- Allegations
- Process
- Role of Advisor
- Confidentiality
- Retaliation
- Rapport Building

Prefaces for Witnesses

- Your Identity and Role as a Neutral
- Notes and Records
- Allegations (if necessary)
- Role of Advisor (if allowed)
- Confidentiality
- Retaliation
- Rapport Building

Questions

- Relationships
- Identities of Parties
- Details of Conduct Between the Parties
- Effect of Alleged Conduct on the Parties
- Outcry/Reports
- Other Responses of Parties
- Documentary and Other Evidence
- Identities of Witnesses

Avoid

- Discussing theories or assessment of the evidence
- Suggesting agreement or outcome
- Pressuring for more information on irrelevant incidents
- Body language or words suggesting judgement

Closing

- Anything else?
- Any questions?
- Advisor questions (if allowed)
- Encourage follow-up
- Process (again for parties)

Potential Trauma for CP and RP
Practical Tips – Trauma

- Acknowledge pain/difficult situation
  - "It's ok if you can't remember every detail. We will just focus on what you can recall. I can tell this is difficult for you, I can give you a little time"
- Do not demand starting at the beginning & providing every detail
- Ask open ended questions

Emotions

- Silence is ok
- Sympathy is ok (within reason/neutral) – "I can tell this is hard" "I’m sorry this is difficult"
- Allow breaks
- Remember equality not equity is goal for processes

Retaliation and Gag Orders

- Gag order not allowed
- Warn of risks from speaking about the complaint
- Notify all parties and witnesses of retaliation rights and encourage follow up

Cardinal Sins of Interviewing

- Questions that are evaluative
- Long, confusing questions
- Sticking blindly to a script
- Using undefined terms (witness can define)
- Interrupting and rushing

In your own words, what happened?
What did you witness?
Did you respond? If so, how?
For all: where, when, who present?
How did the conduct affect you?

Parties: What would you like to see as an outcome? (avoid making any promises)

Consider whether appropriate to ask for more incidents than offered

Perhaps instead, focus on repeating “Is there anything else you’d like to tell me or for me to look into?”

Parker’s Interview

- Parker reports the intention during the interview to withdraw from the institution that day

What can the institution do?

Nothing; regardless of whether Parker is leaving, there is a risk to the community

Dismiss the complaint once Parker withdraws

How do you respond if no jurisdiction?

Consider other code of conduct or policy violations
Send both parties a formal dismissal notice
Meet with Cameron to discuss supportive measures for the remainder of time at the school
All of the above
None of the above

It turns out that the incident occurred two years ago, before Cameron was a student. What CAN’T you do?

Dismiss the complaint because of the difficulty in gathering enough evidence to reach a determination
Continue with the complaint because Parker was attending the school at the time of the incident
Dismiss the complaint because Cameron was not a student at the time conduct occurred
Forms/Notices

Notice of Dismissal

Notice of Mandatory Dismissal of Allegations of Title IX Sexual Harassment (Franczek Letter 3(a))

Notice of Permissive Dismissal of Allegations of Title IX Sexual Harassment (Franczek Letter 3(b))

Remember – Employees

• Whether or not you have jurisdiction over an employee you can remove the teacher while you investigate
  ➢ Administrative leave (can be used with or in lieu of emergency removal)
  ➢ Check your policies/procedures, agreements and contracts, laws, etc.

After Interviews

• Follow up in writing to summarize any points that might need confirmation
• Clean up notes
• Document less formal interactions
• Send links/copies to policies if relevant
• REASSESS allegations, investigation plan, and supportive measures

Scope of the Investigation

Must be “thorough,” but not required to review all potential sources of evidence parties or witnesses identify

Gathering Other Evidence

If the Respondent is an employee and you lack Title IX jurisdiction, what can you do?

You can provide Supportive Measures to Cameron
You can put the employee on administrative leave
You can discipline the employee for a violation of another policy
None of the above
All of the above
Sharing Evidence and the Investigative Report

So the investigation is done....

- Must share evidence directly related to the allegations with both parties and advisors simultaneously with 10 days to respond before writing the report
  - Review/consider responses
  - Share responses with the other side

Forms/Notices

Sharing of Evidence

- Notice of Directly Related Evidence (Franczek Letter 7(a))
- Notice of Other Party’s Written Response to Evidence (Franczek Letter 7(b))

Which of these is NOT directly related evidence in Cameron’s Formal Complaint?

Investigation Report

- Applicable policies and procedures
- Timeline of investigation
- Description of allegations
- Unbiased summary of evidence gathered, including interviews
- Credibility determination(s)

Forms/Notices

Investigative Report

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Investigation Report

- Must fairly summarize relevant evidence
- Relevant evidence is different from evidence "directly related to the allegations"

Hearing and Decision

- Notice of Hearing
- Written determination (Franczek Form C - Written Determination Template)

Appeal Notice

- Upon receipt of an appeal, the Title IX Coordinator must notify the other party/parties of the appeal
- Both parties must be given an opportunity to submit a written statement for or against the appeal

Understanding Relevant Evidence

Rape Shield Law

- Exclude evidence of Complainant’s sexual behavior or predisposition
- Two narrow exceptions
  - Someone other than RP committed conduct
  - Past conduct between CP & RP to show consent
- Does not apply to Respondent
Treatment Records

- Can't access, consider, disclose, or use records
- Made by a physician, psychologist, or other recognized professional
- Which are made and maintained in connection with the provision of treatment,
- Unless the party gives voluntary, written consent

Legally Privileged Information

- Cannot use questions or evidence that seek disclosure of legally privileged information, unless waived
- Consider:
  - Attorney-client communication
  - Privilege against self-incrimination
  - Confessions to a clergy member or religious figure
  - Spousal privilege
  - Confidentiality and trade secrets

Recordkeeping

**Investigation File**

- What should be in the investigation file?
  - Complaint
  - Applicable Policies
  - Investigation Plan (can be a living document)
  - Records of Communications
  - Interview Notes
  - Evidence Collected
  - Report

Interview Notes

- Include: Facts + Statements (consider quotes)
- Don't Include: Conclusions + Judgements
- Label: Name of Witness, Date, Time, Interviewer, Location, Method, Those Present

Recordkeeping Essentials

- Overview of Required Recordkeeping
- File Checklist
Questions
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