

TIX REGULATIONS COMPLIANCE TRAINING: GENERAL OVERVIEW

**July 31, 2020 Virtual Training
Session 1
presented by
KATIE CLIFFORD, ESQ.**

GENERAL OVERVIEW

- Regulatory History and 2020 Compliance Changes
- Title IX Coordinator and Title IX Team Role Distinctions
- Policy and Procedure Notifications
- “Actual Knowledge” and “Deliberate Indifference”
- Jurisdiction/Initial Assessment
- Dismissal: Mandated and Discretionary
- 2020 Regulation Terminology /Definitions
- Supportive Measures
- Title IX Process

GENERAL OVERVIEW

- Bias and Conflicts of Interest
- Standard of Evidence
- Intersection Title VII and Title IX
- Retaliation
- Appeals
- Record Keeping

Title IX

20 U.S.C. § 1681 & 34 C.F.R. Part 106 (1972)

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance.”



OCR REGULATORY GUIDANCE 2020

- Withdrawn:
 - 2011 Dear Colleague Letter (DCL)
 - 2014 Q & A on Title IX and Sexual Violence
 - 2016 DCL on Transgender Students
- Still In Effect:
 - 1975 regs, as amended
 - 2001 OCR Revised Sexual Harassment Guidance
 - 2003 DCL Title IX and Free Speech
 - 2010 DCL Harassment and Bullying
 - 2013 DCL Pregnant and Parenting Students
 - 2015 DCL Role of Title IX Coordinators
 - 2017 Q & A Campus Sexual Misconduct (Interim Guidance)

2020 COMPLIANCE CHANGES

- 2020 Title IX Regulations Issued May 6, 2020
- Effective and Enforceable August 14, 2020
 - Amends the CFR and has the Force and Effect of Law
 - Intervening variables (litigation and election) may impact enforcement in the shorter and longer term
 - Lawsuits against the 2020 Regs: ACLU, NWLC, etc.
- Regulations are significant, legalistic, prescriptive, very due process heavy, and go well beyond what any court has required under the 5th/14th Amendment case law.

PERTINENT 2020 NEW REGULATIONS

§ 106.30 : Describes the jurisdiction and pertinent definitions within the Final Rule.

§ 106.45: Title IX procedures related to investigation, hearings, and evidence.

-When conduct falls within §106. 30, a recipient must address it with procedures in§ 106.45.

Title IX REGULATORY FRAMEWORK

- Procedures for notice and formal complaint
- Separation between investigation, hearing, and appeal
- Distinct Roles: TIXC, Investigator, Decision-Maker(s)
- Evidentiary Review Periods
- Requirements for Investigation Report

Title IX COORDINATOR DESIGNATION

- 2020 Regs require that recipients use the “Title IX Coordinator” title specifically, and define it as the individual with the duty to coordinate a recipient’s efforts to comply with Title IX. 34 CFR § 106.8 (a)
- Important for the TIXC to be a senior administrator because OCR envisions this person reporting to Superintendent or the Board.
- Due to enhanced duties and responsibilities of TIXC via the 2020 Regs, very important not to allow position to remain unfilled.

TITLE IX GRIEVANCE PROCEDURE ROLE DISTINCTION

- 2020 Regs require role-related “firewalls” around certain roles within the grievance process: investigator(s), decision-maker(s)/adjudicator(s), and appeal decision maker(s)/adjudicator(s).
- Contested allegations require a determination from a separate decision maker(s)/adjudicator(s).
- TIXC should not have any substantive influence on decision and/or appeal.
- Superintendent, General Counsel, or School Board should not be involved as decision maker(s) and/or appeal decision maker(s).

ROLE DISTINCTION: Conflict of Interest

- What is a conflict? Serving in dual roles can be; failing to act independently; making more than one substantive decision in the same case.
- Important Conflict Issues to Consider:
 - Interaction Investigator and Decision-Maker
 - Hearing Decision-Maker Interacts with Appeal Decision-Maker
 - Involvement of Legal Counsel or TIXC reviewing Investigation Report, Hearing Outcome Letter/Rationale, Appeal Outcome Letter/Rationale
 - Investigator/Decision-Maker Bias or lack of independence becomes clear during questioning
 - External Investigator or Decision-Maker hired, whom should be their recipient contact

POLICY AND PROCEDURE NOTIFICATIONS

- Recipient **MUST** include names/titles, office addresses, email address, and telephone numbers of TIXC.
- Any PERSON may report sex discrimination in person, by mail, by telephone, by email, or by any other means that results in TIXC receiving the person's verbal or written report.
- Report can be made at any time (no statute of limitations).

POLICY AND PROCEDURE NOTIFICATIONS

- Policy notice **MUST** be provided to: students, parents/guardians, employees, and all unions with CBAs with a school or institution.
- Policy Requirements:
 - 1) Notice of Non-Discrimination
 - 2) Contact Title IX Coro and Contact ED's OCR
 - 3) Provide to Individuals:
 - Notice of Recipient's Grievance Procedures
 - Notice on how to Report or File a Complaint Sex Discrimination and/or Complaint of Sexual Harassment
 - Notice on how the recipient will respond

NOTICE STANDARD: “Actual Knowledge”

- ED raised the bar when it considers a recipient to be “on notice” of a report of sexual harassment.
- Important because “notice” triggers recipient’s duty to stop, prevent, and remedy.
- Ed imposes an “actual knowledge” notice standard with the 2020 Regs.
- “Actual Knowledge” states that a K-12 recipient is on notice when any employee in elementary and/or secondary is provided notice of sex harassment.

“DELIBERATE INDIFFERENCE” STANDARD

- Upon receipt of information on allegations of sexual harassment, a recipient **MUST** respond promptly in a manner that is not “deliberately indifferent”. **Gebser** and **Davis** caselaw
- When recipient receives “**actual notice**” of alleged discrimination, recipient **MUST** respond in a manner that is not “**clearly unreasonable in light of known circumstances**”. **Davis**
- Did you act “reasonably”? “Were your actions clearly “unreasonable?”

JURISDICTION

- 2020 Regs define “**education program or activity**” as locations, events, or circumstances over which the recipient exercised **substantial control** over both the **Respondent** and the **context** in which the sexual harassment occurs.
- Regulations limit jurisdiction to conduct that occurred in the United States.
- Jurisdiction is about the nexus to the educational program, not to a physical location.

JURISDCITION: MANDATORY DISMISSAL

- i. If conduct did not occur against a person in the United States; and/or
- ii. At the time of the filing of a formal complaint, a Complainant is not participating or attempting to participate in the education program or activity of recipient; and/or
- iii. Conduct did not occur in recipient's education program or activity, and/or
- iv. Conduct alleged does not constitute sexual harassment as defined by 106.30, even if proved.

****Upon dismissal, recipient MUST promptly send written notice of dismissal and reasons simultaneously to the parties.****

JURISDICTION: DISCRETIONARY DISMISSAL

- i. Any time during investigation or hearing, a Complainant notifies the TIXC **in writing** that Complainant would like to withdraw the formal complaint or any allegations therein;
- ii. Respondent is no longer enrolled or employed by the recipient; or
- iii. Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to formal complaint or allegations.**

INITIAL ASSESSMENT

- Previously, “Preliminary Inquiry” and small “i investigation”
- No longer permitted because Ed’s preamble language speaks against making a reasonable cause determination to proceed.
- Upon receipt of Formal Complaint, TIXC conducts brief, initial assessment to gather key info to inform jurisdiction, threat, emergency removal, and Complainant’s willingness to participate.

2020 TERMINOLOGY

- Recipient
- Complainant
- Respondent
- Formal Complaint
- Grievance Process
- Sexual Harassment
 - Quid Pro Quo
 - Hostile Environment

§ 106.30: Sexual Harassment

- Quid Pro Quo
- Hostile Environment
- Dating Violence
- Domestic Violence
- Sexual Assault
- Stalking

§ 106.30: Sexual Harassment

Sexual Harassment can be committed by **any person** upon any other person, regardless of sex, sexual orientation, and/or gender identity of those involved.

Sexual Harassment is an umbrella category includes: sexual harassment, sexual assault, domestic violence, dating violence, and stalking.

§ 106.30:

Sexual Harassment

- **Quid Pro Quo**
 - An **employee** of recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- **“Hostile Environment”**
 - Unwelcome conduct determined by a **reasonable person** to be so **severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the recipient's educational program or activity.

§ 106.30:

Sexual Harassment

- **Sexual Assault**

- Sex offenses, Forcible:** A sexual act directed against another person, **without the consent** of the Complainant including instances where the Complainant is incapable of giving consent. (Forcible rape, forcible sodomy, sexual assault with an object, forcible fondling)

- Sex offenses, Nonforcible:** Nonforcible sexual intercourse. (Incest or Statutory Rape)

§ 106.30: Sexual Harassment

- **Dating Violence**
- **Domestic Violence**
- **Stalking**

SUPPORTIVE MEASURES

- Previously, “interim measures” goal was to restore and preserve access while investigation and resolution process occurred.
- Supportive measures may also be instituted as “remedies” after a final resolution.
- Supportive Measures: “Non-disciplinary, non-punitive individualized services offered as **appropriate, as reasonably available**, and without fee or charge to the complainant or respondent before or after the filing of the formal complaint or where no formal complaint is filed.

Title IX PROCESS: Prompt Process

- 2020 Regs require “reasonably prompt” timeframes for investigation and resolution.
- New Regs no specific timeline target except to require prompt resolutions, avoid unreasonable, bureaucratic delays. (previously 60 day target)
- Prompt in K-12 should be completed within a week or so, maybe, more complicated a little longer.
- Parallel law enforcement process is not a substitute for obligation of recipient or to act remedially.

Title IX Process: Review Timeframes

- 2020 Regs require a ten (10) day review and comment period for all related evidence prior to the finalization of investigation report.
- Hearing cannot be scheduled sooner than ten (10) days after the delivery of the final investigation report.

FORMAL INVESTIGATION: “due process” Requirements

- 2020 Regulatory changes focus on providing “due process” protections for Respondents.
- Treat Complainants and Respondents Equitably
- Allow parties to present and suggest witnesses and submit inculpatory and exculpatory evidence
- Complete an objective evaluation of relevant evidence.
- Presumption Respondent not responsible until determination made at conclusion of grievance process.
- Burden of proof and collection of evidence on recipient.
- No restriction on party’s ability to discuss allegations, gather, and present evidence.
- Regulations acknowledge legal rights parents/guardians to file complaint on behalf of a party.

FORMAL INVESTIGATION: Notice of Investigation/Allegation

Notice of Investigation/Allegation (NOIA)

- Identities of parties involved (if known)
- Specific policy sections alleged to be violated
- Conduct considered sexual harassment/discrimination/retaliation
- Date(s) of alleged incident(s)
- Location(s) of incident(s)
- Statement Respondent presumed “not responsible” until determination made via grievance process
- Statement parties an advisor of choice, attorney
- Expectation of truthfulness and consequences of false statements or submitting false information

FORMAL INVESTIGATION: Notice of Interview or Meetings

- Recipient MUST provide clear written notice to parties before any interview or meeting.
- Notice of Interview MUST Include:
 - Date
 - Time
 - Location
 - Participants
 - Purpose of interview or meeting

*****Notice MUST be provided for each interview and/or meeting*****

FORMAL INVESTIGATION: Advisors

2020 Regs require all parties entitled to an **advisor of their choice** present during the grievance process.

Recipients CANNOT limit the choice of the advisor in any way-faculty, staff, coach, attorney, parent, friend, union rep, community advocate, etc.

Advisors should be available to participate.

Can restrict advisor participation, but not presence.
However, restrict equally to all parties.

FORMAL INVESTIGATION: Bias and Conflict of Interest

- 2020 Regs require recipients to ensure coordinators, investigators, decision-makers (including appeal decision-makers) do not have conflicts of interest or bias against the parties.
- Recipient grievance process should include language that screens for bias and conflicts of interests and includes a provision for a staff member's self-recusal and a process for objection by the parties to any person playing a role in the grievance process whose bias or conflict of interest can be demonstrated. (Include process in NOIA)
- Appeal process effective tool to insulate a recipient's process from bias allegations.
- Built-in opportunity to review and respond to allegations of bias or conflicts of interests at every level of the process is critical.

“BIAS” DEFINED

- “Bias”: Prejudice in favor or against one thing, person, or group compared with another, usually in a way considered to be unfair. (*Oxford Dictionary*)
- “Bias”: An inclination of temperament or outlook; especially, personal or unreasoned judgment, prejudice. (*Merriam-Webster Dictionary*)
- **Confirmation Bias** – Confirm your idea of case=bias
- **“Like Me” or “Similar to Me” Bias**- Causes people to disproportionately favor individuals who are similar to themselves. (gender, ethnicity, nationality, career history, educational background, etc.)
- Prejudicial action is harmful and in an investigation context, the “harm” is an unfair decision.

“Bias” & Prejudice

- Conscious vs. Unconscious
- Social & Cultural Capital
- Stereotyping
- Cultural competence
- Social Justice
- Multi-Partiality

“Bias” Hot Button Issues

- Sexual Orientation
- Gender, transgender, and gender identity
- Race
- Ethnicity
- Religion
- Political Views
- Athletes
- Drug/Alcohol Use
- Prior Student Conduct Unrelated or No Prior Conduct

Conflict of Interests

- Conflicts of Interests create role confusion and compromise impartiality and objectivity
- Simply knowing a student/employee or previously disciplining party is not typically sufficient to create a conflict of interest
- Types of Conflicts
 - Wearing too many hats
 - Legal Counsel
 - Non-impartial appellate decision-maker(s)

“Bias” in Procedure

- Procedure:
 - Exclusion of evidence
 - Failure to follow procedures
 - Burden of proof on Respondent
- Biased Training Materials
- Insufficient Training
- Bias due to internal/external pressures (politics, lawsuits, identity parties/parents)
- Conflicts of Interest

Prevent “Bias”

- Self-Recusal Process
- Process for Parties to raise bias or conflicts
 - Replace personnel
 - Redo portions of grievance process
- TIXC Oversight
 - Regular Check ins
 - Report Review
 - Strategize with Investigator
 - Insulate against external/internal pressures
- Internal Appeal Function/Ground for Appeal

Standard of Evidence

OCR recently reversed 20 yrs. of guidance that now permits recipients to choose between Preponderance of Evidence (POTE) and a more stringent standard- Clear and Convincing (C & C).

Recipient **MUST** consistently apply the chosen standard to all grievance processes addressing sexual harassment that involved students and/or employees.

Review Collective Bargaining Agreement language

Intersection Title VII and Title IX

What does the process look like?

1. Complaint of sex-based misconduct involving EE Respondent
2. Refer to TIXC for initial assessment under § 106.30
3. Are grounds for dismissal present? (yes or no)
4. No dismissal, Investigate subject to § 106.45 Title IX grievance procedures, likely will satisfy Title VII and IX., or
5. Reinstate complaint outside of Title IX under HR or other employment code and procedures.

RETALIATION

- **§ 106.71 : “ No recipient or other person may intimidate, threaten, coerce, or discriminate against an individual for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated, or refused to participate in any manner in an investigation, proceeding or hearing.”**
- Retaliation is a stand alone offense and must be addressed promptly, thoroughly, and impartially.

RETALIATION

- Include information on the prohibition of retaliation in training for students, faculty/teachers, staff, and coaches.
- Employee records and reference checks, fair reading of regulations that any release of info without consent could be considered retaliatory. (may not have been the intent of the language)
- Charging individual with code of conduct violation for making false statement in bad faith does not constitute retaliation and is permitted. (Requires evidence of knowingly falsity or bad faith)

APPEALS

- Recipient **MUST** appoint appeal decision-maker(s) or a panel.
- Appeal is the step that follows a substantive determination (hearing).
- Appeal is a review, not a hearing or re-hearing, and is granted only on limited, defined grounds.

PROCESS FOR APPEALS

- Request for appeal requires TIXC or other appropriate administrator, to notify each party in writing and must provide parties a “reasonable equal opportunity to submit a written statement in support of, or challenging the outcome.” (Require response 3-5 days)
- Opposing party may want to bring a responsive appeal on different grounds. (original appeal party must be given full opportunity to respond to responsive appeal)

PROCESS FOR APPEALS

- Deference to original decision, changes only when evidence of clear error, and compelling reason to make changes to sanctions/remedies.
- Appeals not a “Do Over” of original hearing. Confined to review of written record from original hearing and accompanying documents.
- If uncover material procedural errors or new evidence, preference to remand to original investigator (s) and/or decision-maker (s) for reconsideration.

RECORD KEEPING

- 2020 Regs impose a record-keeping requirement for the first time.
- Records retained and maintained for a period at least 7 years.
- Records Include: records of training, investigations, hearings, informal resolutions, supportive measures, and other processes.
- Maintain training records, attendance records and training materials.
- Follow state-based records retention policies.

QUESTIONS ???

KATIE CLIFFORD, ESQ.

Kaldrich_2000@yahoo.com

Thank You