Title IX Coordinator Training
Fall 2020

Na’Tasha Webb-Prather
System Director for Equity & Investigations
Legal Counsel
Understanding The Role of a Title IX Coordinator

Overview of the Updated Sexual Misconduct Policy

Reporting Sexual Misconduct

Investigation and Adjudication of Complaints

Miscellaneous Considerations & Questions
What is Required under the Final Rule

A recipient with **actual knowledge** of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.
The Role of a Title IX Coordinator

- Oversee and coordinate **all** Title IX responsibilities on your campus
  - Compliance
  - Prevention & Awareness
  - Training
  - Investigations
  - Data Collection & Reporting
The Role of a Title IX Coordinator

Serve as an impartial representative of the institution:

– Ensure involved parties are treated equitably throughout the process

– Avoid prejudging the facts of a matter prior to the conclusion of the process

– Avoid conflicts of interest and bias
  • Recuse yourself and others as necessary
Overview of Updated Sexual Misconduct Policy
What Has Changed?

• Definitions of Prohibited Conduct
• Title IX Jurisdiction
• Provisions on Retaliation, Amnesty, False Statements
• Role of Advisors
• Adjudication Process
• Timeframe for Completion
• More...
What Has Remained the Same?

- Scope of Sexual Misconduct
- Jurisdictional reach of Sexual Misconduct
- Responsible/Confidential/Privileged Employee designations
- Definition of consent and incapacitation
- Standard of evidence
- System Office oversight
- Support services, Interim measures
Reporting Prohibited Conduct
Effective Date

• According to the Department of Education the Final Rule is proactive from August 14, 2020, and will be enforced as such

• Board Policy effective August 11, 2020
  – Allegations reported and occurring before: Previous policy
  – Allegations reported and occurring after: Current policy
Title IX Sexual Harassment §106.30

• Conduct on the basis of sex that satisfies one or more of the following:
  – (i) An employee conditioning education benefits on participation in unwelcome sexual conduct (i.e quid pro quo); or

  – (ii) Unwelcome conduct that a reasonable person would determine is so severe, pervasive, AND objectively offensive that it effectively denies a person equal access to the school’s education program or activity; or

  – (iii) Sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in VAWA
# Key Categories of Prohibited Conduct

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<th>Sexual Misconduct</th>
<th>Dating Violence</th>
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<td>Domestic Violence</td>
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<td>Sexual Exploitation</td>
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<td>Sexual Harassment [Under Title IX &amp; Title VII]</td>
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<td>Nonconsensual Sexual Contact</td>
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<td>Nonconsensual Sexual Penetration</td>
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Sexual Harassment (Student on Student)

Unwelcome verbal, nonverbal, or physical conduct based on sex (including gender stereotypes), determined by a Reasonable Person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to participate in or to benefit from an institutional education program or activity.
Sexual Harassment (Other)

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<th>Unwelcome verbal, nonverbal, or physical conduct, based on sex (including gender stereotypes) that may be any of the following:</th>
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<td>• Implicitly or explicitly a <strong>term or condition of</strong> employment status in a course program or activity</td>
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<td>• <strong>A basis for</strong> employment or education decisions; OR</td>
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<td>• Sufficiently severe, persistent, or pervasive to interfere with one’s work or educational performance creating an <strong>intimidating, hostile, or offensive</strong> work environment</td>
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<td>• Note: Behavior may rise to the level of a Title IX violation</td>
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Nonconsensual Sexual Contact

Any **physical contact** with another person of a **sexual nature without the person’s consent**.

Includes:
- Touching of another’s intimate parts (genitalia, groin, breasts, buttocks)
- Touching a person with one’s own intimate parts; or
- Forcing a person to touch his or her own or another person’s intimate parts
Nonconsensual Sexual Penetration

Any penetration of another’s body parts without the person’s consent.

Includes:
- Penetration of the vagina, anus, or mouth by a penis, object, tongue, finger, or other body part
- Contact between the mouth of one person and the genitals or anus of another person
Jurisdiction

Title IX
- Institution’s program or activity in the United States
  - Institution property
  - Institution sponsored or affiliated events [substantial control is key]
  - Buildings owned or controlled by officially recognized student organizations

Sexual Misconduct
- Institution property
- Institution-sponsored or affiliated events
- Off campus as defined by the institution policies
- Domestic or abroad
Required Response to a Report §106.44(a)

Title IX Coordinator must promptly contact the Complainant to discuss:

- Availability and consideration of supportive measures
- Process for filing a complaint
Support Services & Interim Measures §106.30

• Non-disciplinary, non-punitive individualized services must be offered to the Complainant
  – USG policy requires offering support services to Respondents as well
• Offered upon receiving a report [no Formal Complaint is required]
• Ex: counseling, modifications to work or class schedules, mutual no contact directives
Emergency Removal §106.44(c)&(d)

Interim Suspension

- Individualized safety and risk analysis that determines an immediate threat to physical health or safety to students
- Notice required pre and post removal with opportunity to respond or challenge
- Requires approval from the System Director

Administrative Leave

- Individualized safety and risk analysis
- Notice required post removal with opportunity to challenge
- System Office notice and consult permissible
Complaints of Sexual Misconduct
Formal Complaint §106.30

• A document filed by a Complainant OR signed by the Title IX Coordinator

• Alleges Sexual Harassment (Title IX)

• Requests an investigation

• Note: must be filed while the Complainant is participating in or attempting to participate in an education program or activity
Title IX Coordinator Initiated Complaints

• TIXC does NOT become the Complainant

• When to sign? (Permissible)
  – Multiple reports against the same Respondent
  – Violent behavior or use of a weapon

• Caution: Be mindful of bias and conflicts of interest claims
Complaint Process

• If not a Formal Complaint under Title IX determine whether it is a complaint under Sexual Misconduct or other conduct provisions

• Confirm with the Complainant (in writing) that they wish to investigate their claims

• Once a complaint is filed the timeframe for completion begins
Complaint Consolidation

• Permissible consolidation when allegations arise out of the same facts or circumstances:
  – Against more than one Respondent
  – By more than one Complainant against one or more Respondents
  – Cross complaints

• Parties must have the opportunity to object; institution makes final determination
Notice of Complaint  §106.45(b)(2)

• In writing to parties’ institution email*

• Must include:
  – Alleged conduct constituting Sexual Misconduct
  – Identities of the parties involved (if known)
  – Date and location of incident (if known)
  – Presumption that the Respondent is not responsible
  – Final determinations of responsibility are made at the conclusion of the grievance process
  – Notice of the right to an advisor
Notice of Complaint §106.45(b)(2)

Must include:
• Notice of right to inspect and review evidence
• Prohibition against false statements
• Prohibition against retaliation
• Copy or link to Sexual Misconduct Policy and accompanying procedures

Notice must be supplemented as necessary
Retaliation §106.71

• **Who is protected**: Reporters, Complainants, Witnesses, Respondents, even those who choose to not participate

• **What is protected**: Intimidation, threats, coercion, discrimination
  
  – Ex. Charging individuals for code of conduct violations that arise out of the same facts or circumstances
  
  – Ex. Not keeping the identity of the Complainant, Respondent, or any witnesses confidential
Additional Noteworthy Provisions

**False Statements**

Updated standard to cover false statements knowingly made to an institution official

**Amnesty**

Updated to explicitly only apply to information regarding student consumption of drugs or alcohol
Formal Complaint Dismissal  §106.45(b)(3)

**Required**
- Conduct alleged would not constitute Sexual Harassment as defined, even if proved
- Outside the institution’s education program or activity
- Outside of the United States

**Permissive**
- Complainant notifies in writing desire to withdraw the complaint
- The Respondent is no longer enrolled or employed at the institution
- Specific circumstances prevent the gathering evidence sufficient to reach a determination
USG Complaint Dismissal

• Any Sexual Misconduct complaint may be dismissed if:
  – The alleged conduct, even if proved, would not constitute Sexual Misconduct
  – The Complainant requests in writing to withdraw
  – The Respondent is no longer enrolled or employed
  – There are circumstances that prevent the gathering of sufficient evidence to reach a determination

• Must provide written notice to both parties with opportunity to appeal
The Investigation Process
Expectations of Coordinators

• Assign neutral investigators
• Periodic status updates to stay abreast of the investigation status
• Ensure adherence to current policy provisions
  – Procedural rights
  – Ensure objective evaluation of relevant evidence
  – Timelines
• Notify System Director as needed
Advisors

Title IX Complaints
• Parties have a right to an advisor of their choice
• Advisor may accompany party to all meetings and hearings
• Provided a copy of the investigation report and directly related information
• All communication will be between the institution and the party

Sexual Misconduct Complaints
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Evidentiary Considerations §106.45(b)(5)

• The burden of proof AND burden of gathering evidence is on the institution.

• Information protected by legal privilege, may not be accessed, disclosed or relied upon unless a waiver is obtained.

• Questions and evidence regarding the Complainant’s sexual predisposition or prior sexual behavior are not relevant, UNLESS used to prove:
  – Someone other than the Respondent committed the conduct OR
  – Offered to prove consent between the parties.
Access to Information §106.45(b)(5)(vi)

- Parties have a right to review the investigation report prior to its finalization
- Parties have a right to receive a copy of all directly related information
- Procedurally can occur simultaneously or at different times
- 10 calendar days to review
The Investigation Report §106.45(5)(vii)

• Must fairly summarize relevant evidence

• An objective evaluation of the information [inculpatory and exculpatory]
  – Credibility assessments cannot be based on a person’s status

• Sample report sections still apply

• Final report provided to the parties at least 10 days calendar days prior to the hearing
Informal Resolution
Considerations

• The institution is a party to the informal resolution
  – Informal resolution is appropriate
  – The terms of the informal resolution are appropriate

• Parties must engage in the process voluntary

• Parties may end the informal resolution process any time prior to reaching the terms
Informal Resolution under Title IX §106.45(b)(9)

• Not permissible for student allegations against employees

• A Formal Complaint must be filed

• The parties have received notice and explanation of the process and consequences of informal resolution

• The parties have voluntary agreed to engage in the process
Additional Considerations

• What methods of informal resolution are available at your institution?

• Title IX Coordinators may continue facilitating the informal resolution process

• **Note**: Anyone who facilitates informal resolution must receive appropriate training
Formal Adjudication
Live Hearing §106.45(b)(6)

• The Final Rule mandates a bifurcated process

• Final determinations of responsibility and sanctions are made by decision-makers
  – CANNOT be the Title IX Coordinator or assigned investigator

• New due process considerations
  – Cross examination
  – Relevancy determinations
  – Impact of party or witness refusal to submit to cross-examination
Adjudication Processes

**Students**
- All matters not informally resolved will be heard by a Hearing Panel
- Hearing Panels comprised of trained faculty and staff

**Employees**
- Title IX matters not informally resolved will be heard by a designated decision-maker
  - Single decision-maker OR panel
- Sexual Misconduct matters not informally resolved will be resolved according to previously established procedures
  - Institutions may choose to offer a hearing
Hearing Officer

- Considered a decision-maker

- Responsible for facilitating the hearing process
  - Scheduling
  - Selection of panel members
  - Any pre-meetings with parties
  - Conducts the hearing

- Responsible for determining issues of relevancy
Hearing Panel or Single-Decision Maker

• Serves as a neutral decision-maker

• Makes a final determination of responsibility

• Makes a final determination regarding sanctions and other administrative action that may be appropriate

• Must articulate determinations in a written decision
Advisors §106.45(b)(6)

**Title IX**
- Provide advice, counsel, and support to a party
- Perform cross examination of other party and other witnesses

*Note: Institution required to provide if party does not have their own*

**Sexual Misconduct**
- Provide advice, counsel, and support to a party
- May not actively participate in the hearing process
- May provide written questions to the Hearing Panel to read aloud
Notice of Hearing

• At least 10 days prior to the hearing parties must receive:
  – The finalized investigation report
  – Notice of the hearing date, time, and modality
  – Notice of decision-maker(s)

• **Recommended**: Engage institutional advisor
Hearing Logistics

• At the request of either party, the parties must be permitted to be in separate rooms

• Hearings may be conducted in-person or via videoconferencing
  – Ensure decision-makers receive training on how to use technology

• Have available all directly related information

• Institutions permitted to establish rules of decorum

• All hearings must be recorded
Decisions regarding student and employee alleged misconduct are based on a preponderance of the evidence.
The Written Decision §106.45(b)(7)

• Provided to both parties simultaneously must include:
  – The allegations
  – The procedural steps from the complaint through determination
  – Findings of fact supporting the determination
  – Determinations regarding responsibility, sanctions (and remedies) along with the supporting evidence and rationale
  – Information on the appeals process
Appeals

• Parties will continue to have both institutional level and Board level appeal opportunities

• Grounds for an appeal:
  – New information
  – Procedural Error
    • Ex. Bias or conflict of interest of Title IX personnel
  – Finding inconsistent with the weight of the information
Additional Provisions
Record Keeping §106.45(b)(10)

• 7-year records retention mandate:
  – Reports [supportive measures, why not deliberately indifferent and what measures taken to restore or preserve equal access]
  – Investigations [determinations, recording of hearing, sanctions and remedies implemented]
  – Appeals
  – Informal resolutions [results]
  – Training materials
Training Considerations

• §106.45(b)(10)D All materials used to train Title IX Coordinators, investigators, decision-makers, and anyone who facilitates an informal resolution process must be publicly available on your website

• Ensure materials do not include or rely on sex stereotypes

• Promote neutrality and fairness throughout the administrative process
Website Considerations

• §106.8(b) Mandates notification and dissemination of applicable policies and procedures
  – Title IX Coordinator contact information
  – Reporting options
  – Notice of updated policies and procedures
  – Title IX Coordinator and/or Assistant Secretary can field questions
  – Reporting and resolving other alleged Title IX violations