

Title IX Coordinator Training Online Course



Class Two: Conducting a Title IX Investigation

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Contents Intended to Provide Education Only: Does Not Constitute Legal Advice

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Questions from Class One



1. Defining the scope of educational program and activity has been interesting/challenging. We are a University affiliated with multiple Academic Medical Centers and place our students with various affiliated medical/physician groups. How can we decide which employees at each site are “participating/attempting to participate” in the educational program and activity?
2. Do you foresee any backlash once the Biden proposed changes are implemented?



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Case Study

Part I: Reviewing Class 1 Concepts.

Anna Smith,
the Title IX Coordinator
at NACUA University,
woke to the following
email in her inbox.

To: TitleIX@nacua.edu
From: Prof. Jones, Dean, College of Arts & Sciences
Date: Wednesday, October 21, 2020

This morning, a student named Jordan Jones told me that they were sexually assaulted over the weekend and couldn't finish a paper in time. I spoke with Jordan at length about what happened and Jordan gave me permission to share this information with you. This isn't the first time I've learned of something like this. I need to know what I'm supposed to do. Heads up – the perp is in another class of mine.



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Initial Outreach to Jordan Jones



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Ms. Smith receives the following that same day:

Is this a formal complaint, triggering an investigation under your school's Title IX policy?

To: TitleIX@nacua.edu
From: Jordan Jones
Date: October 21, 2020

Thank you for reaching out. On the way home from a party downtown Saturday night, I went with Riley Krill to his room at the ABC Fraternity house. That's where he raped me. At this point, I really just want Riley to have to meet with you and me, so that we can both tell him what he did was wrong. If he apologizes, I don't want to take this any further. I can meet tomorrow, at the time you suggested.

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Jordan meets with Ms. Smith and decides to file a formal complaint. Before calling Riley in for an interview, Ms. Smith needs to send a Notice of Allegations both Riley and Jordan. This is what it contains:

Is anything missing?

NOTICE

- Access to the Title IX-mandated policy.
- Notice of the allegations that may constitute the prohibited conduct, with sufficient detail for Riley to prepare a response before any initial interview.
- Notice of the Parties' entitlement to an Advisor of choice.
- The identity of the Investigator – Jean McDonald.
- Notice that the Parties may inspect and review evidence gathered during the investigation.
- Notice that the University's policies prohibit knowingly making false statements or knowingly submitting false information.

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The day after she issues the notice of allegations, Ms. Smith receives the following email:

What should Ms. Smith do?

To: TitleIX@nacua.edu
From: Amanda Law
Date: October 24, 2020

I represent the Krill family. I have learned that Mr. Krill is being falsely accused of rape and I am writing to have the unfounded charges dismissed immediately. Mr. Krill's parents and I will not permit Mr. Krill's education to be disrupted by a vindictive college student with an ulterior motive. Jordan Jones is bitter because Mr. Krill didn't reciprocate Jordan's feelings after they had a fully consensual sexual encounter. If the University insists on pursuing this matter, the Krills will take all legal measures available to them.



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Investigations

Impartiality & Conflicts of Interest

Impartiality, Bias, Prejudgment & Conflict of Interest



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.

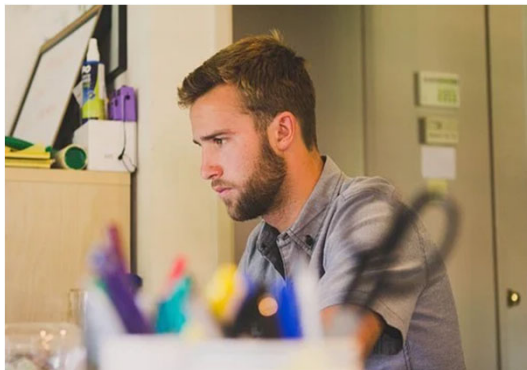
However:

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



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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

- Administrative leave
- Title IX
 - “Reasonably prompt timelines,” and
 - Supportive measures must be non-punitive and non-disciplinary until the process is complete
- Title VII
 - “Immediate and appropriate corrective action”



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Investigating a Formal Complaint

Conducting an Investigation



- 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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Interviews



Consider whether interviews will be:

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

What does your policy say?

When interviewing, the investigator must:

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



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Review of Evidence

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- 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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Understanding Relevance

How is Relevance Defined?



September 4, 2020 Guidance from OCR:

- 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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So What Is 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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BUT YOU JUST SAID ...



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What Is NOT Relevant?



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



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Evidence Rules

Guidance: September 4, 2020:

- A school 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:
 - deemed “not relevant” (e.g., evidence concerning a complainant’s prior sexual history) or
 - otherwise barred from use under § 106.45 (e.g., information protected by a legally recognized privilege).



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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?
- Decision-maker must evaluate only “relevant” evidence during the hearing and when reaching the determination regarding responsibility – and must do so “objectively”
- The decision-maker must determine the relevance of each cross-examination question before a party or witness must answer.
- Make It Easy: “Not probative of any material fact.”



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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, a school 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: A school may 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:** A school's investigators and decision-makers must be trained specifically with respect to "issues of relevance" and any relevance rules adopted by the school should be detailed in the school's publicly available training materials.



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Investigative Report

Investigative Report



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



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Violations of Other Policies

Violations of Other Policies



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

Remember to update notice with later-discovered allegations.



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NPRM:

REMEMBER: NOT IN PLAY NOW



Proposed Changes



- Handling complaints
 - All allegations of sex discrimination, including sexual harassment, must be handled using procedures required by the regulation.
 - The single investigator model is permitted with provisions prohibiting bias or conflicts of interest in addressing all complaints of sex discrimination.
- Title IX Coordinator
 - May investigate and/or decide Title IX grievances.
 - Must monitor for barriers to reporting and take steps to address
- Investigations
 - Burden is on the institution to gather evidence
- Relevance is defined (!!!)
- Institutions must provide parties a description of the relevant evidence
- Requirements that apply only to sexual harassment complaints involving students at post-secondary institutions
- Require all, except confidential, employees to notify the Title IX Coordinator of possible sex discrimination



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Questions?

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