Introduction

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Overview of the Course

Lesson 1: Introduction & Overview
Lesson 2: Title IX Process Under the New Regulations
Lesson 3: Sexual Harassment and Scope of Education Program/Activity
Lesson 4: Title IX Grievance Process Overview
Lesson 5: How to Serve Impartially
Lesson 6: Role/Responsibilities of Decision Maker
Lessons 7 and 8: The Hearing Part I and II
Lesson 9: Determination
Lesson 10: Wrap Up & Assessment
Learning Outcomes

- Understand the law and regulations
- Explain Title IX process and your role in it
- Analyze the definition of sexual harassment and scope of education program/activity
- Recognize conflicts of interest/bias and how to serve impartially
- Understand role of advisors in a hearing
- Learn about relevant evidence/questions by advisors
- Understand requirements in a determination

Disclaimers

- Not legal advice
- Cannot possibly cover everything
- Level 1 Course
See you in Lesson 2!
Lesson 2
Title IX Process under the New Regulations

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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 education program or activity receiving Federal financial assistance.

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"[The] final regulations represent the Department’s interpretation of a recipient’s legally binding obligations, rather than best practices, recommendations, or guidance... [and] focus on precise legal compliance requirements governing recipients.”

Regulations are attached as a download.

Title IX Team

- Specific Roles
- Discretion of Institution
- No Conflicts of Interest
INDIVIDUALS IN TITLE IX HEARINGS

- Complainant/Reporter
- Respondent
- Advisor vs. Advocate
- Witnesses
- Title IX Coordinator/Investigator

LANGUAGE

- Guilty
- Responsible
- Trial
- Hearing
- Crime
- Violation
RESPONSIBLE EMPLOYEES/OFFICIALS WITH AUTHORITY

- Responsible Employee NOT defined in the regulations-replaced with Title IX Coordinator
- Official authority to institute corrective measures
  106.30 Discretion to give authority outside of the Title IX Coordinator
- CSA’s ONLY a responsible employee if designated as an official with authority
  Obligation to report or inform on how to report, or having been trained to do, does not qualify someone
- Has having ability to institute corrective measures
  Discretion to decide which employees MUST, MAY, or only with student’s consent report sexual harassment to Title IX Coordinator
See you in Lesson 3!
Lesson 3

Sexual Harassment and Scope of Education Program/Activity

PROHIBITED CONDUCT

- Conduct reviewed under Title IX under the new regulations
- Refer to your policy
- Look at EACH element
Sexual Harassment (106.30)

- Conduct on the basis of sex that satisfies one or more of the following:
  - An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct;
  - 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 education program or activity; or
  - “Sexual Assault,” “Dating Violence,” “Domestic Violence” or “Stalking” as defined in the Clery Act.

Sexual Assault: An offense that meets the definition of rape, fondling, incest or statutory rape as used in the FBI's Crime Reporting system.

A sexual offense is any sexual act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent.

Rape: The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.

Fondling: The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.

Incest: Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

Statutory Rape: Sexual intercourse with a person who is under the statutory age of consent.

Domestic Violence (34 U.S.C. 12291 (a)(8): A felony or misdemeanor crime of violence

- committed by a current or former spouse or intimate partner of the victim;
- by a person with whom the victim shares a child in common;
- by a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner;
- by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred; or
- by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.
Dating Violence (34 U.S.C. 12291 (a)(10): Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. The existence of such a relationship shall be based upon the reporting party’s statement with consideration of the following factors:

(i) The length of the relationship

(ii) The type of relationship

(iii) The frequency of interaction between the persons involved in the relationship.

Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.

Stalking (34 U.S.C. 12291 (a)(30): Engaging in a course of conduct directed at a specific person that would cause a reasonable person to

(1) Fear for the person’s safety or the safety of others; or

(2) Suffer substantial emotional distress.

For purposes of this definition:

Course of conduct means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method device, or means follows, monitors, observes, surveils, threatens, or communicates to or about, a person, or interferes with a person’s property.

Substantial emotional distress means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

Reasonable person means a reasonable person under similar circumstances and with similar identities to the victim.
**Conduct + Location**

IT’S MORE THAN THE BEHAVIOR...
MUST EVALUATE
LOCATION/JURISDICTION AS WELL

**JURISDICTION**

Education Program or Activity

- Locations, events, or circumstances (operations) 20 U.S.C. 1687 and 34 CFR 106.2(h)
- Institution exercised substantial control over both the respondent and the context in which the sexual harassment occurs 106.44(a)
- Includes any building owned or controlled by a student organization that is OFFICIALLY RECOGNIZED by institution
- Includes online sexual harassment but it must be analyzed to determine if it occurs in education program or activity
- Does not create or apply a geographic test, does not draw a line between “off campus” and “on campus,” and does not create a distinction between sexual harassment occurring in person versus online.
Jurisdiction Continued

- No single factor to determine exercise of substantial control
- Distinguishable from Clery definitions of non-campus building or property
- May require organization to abide by Title IX policies and procedures
- May have to bifurcate conduct

DISMISSAL OF A FORMAL COMPLAINT (106.45 (b)(3)(i))

**MUST** Dismiss if:
- Would not constitute sexual harassment as defined in regulations
- Did not occur in education program or activity
- Did not occur against a person in the U.S.
  *May act under another provision of code of conduct*

**May** Dismiss if:
- Complainant notifies Title IX Coordinator in writing that Complainant would like to withdraw formal complainant or allegations
- Respondent is no longer enrolled or employed by institution
- Specific circumstances prevent the institution from gathering evidence sufficient to reach a determination
  *Must promptly send written notice of dismissal and reasons for dismissal simultaneously to parties*
See you in Lesson 4!
Lesson 4: Title IX Grievance Process Overview

Response to a Formal Complaint (Grievance Process) – 106.45 (b)(1)(i)-(x)

- Treat parties equitably
- Require an objective evaluation of all relevant evidence (inculpatory and exculpatory)
- No conflict of interest or bias by Title IX Coordinator, investigator, decision-maker or facilitator of informal resolution process
- Trained Title IX Team
- Presumption that respondent is not responsible
- Include reasonably prompt time frames for process and appeals with written notice for limited extensions with good cause (may include absence of party, witness, or advisor, law enforcement activity or the need for language/accommodation of disability)
- Describe range of sanctions and remedies
- Standard of evidence (same for students and employees)
- Procedures and permissible bases for appeals
- Notice of Allegations containing specific information as outlined in regulations
Investigation of Formal Complaint (106.45 (b)(5) )

MUST

- Ensure that burden of proof and burden of gathering evidence with institution, not parties (no medical or counseling records w/o written consent of party)
- Provide equal opportunity to present witnesses (including EXPERT), and inculpatory/exculpatory evidence
- Not restrict ability of either party to discuss the allegations or to gather/present relevant evidence
- Provide opportunity for both parties to have advisor (can be attorney and can restrict the extent to which advisor can participate in the process)
- Provide written notice of date, time, location, participants and purpose of all hearings, investigative interviews, or other meetings with sufficient time to prepare to participate
- Provide equal opportunity to inspect and review evidence obtained as part of investigation (even if not relied on)- sent to party AND advisor (electronic or hard copy) with 10 days to respond prior to completion of investigative report.
- Create investigative report that fairly summarizes relevant evidence
- Provide report to parties AND advisors 10 days prior to hearing for review and written response.

Hearings

- Live Hearing (in same room or using technology in separate rooms- not only via telephone)
- Permit ADVISOR to ask the other party and witnesses RELEVANT questions (including those challenging credibility)
- Cross-Examination
  - Directly, orally, in real time by ADVISOR
  - Recording (audio, visual, or transcript) made available to parties for inspection and review
- Written determination regarding responsibility and sanctions with rationale
  - Decision provided to parties simultaneously
- Effective implementation of remedies (Title IX Coordinator)
- Burden of proof (Clear and Convincing or Preponderance of the Evidence)
**DECISION-MAKERS AT HEARING**

- YOU MUST BE TRAINED (106.45 (b)(1)(iii))
- YOU have specific requirements for the hearing... we will discuss more in detail.

**APPEALS (106.45(b)(8))**

- Must be offered for BOTH parties
- Must be a new Decision-maker
- Cannot be the Title IX Coordinator
- Specific Process and institution may limit the basis for appeals...but they must be clearly outlined
Live Hearings but...

**INFORMAL RESOLUTIONS (106.45 (b)(9))**

**May NOT:**
- Be required/condition of enrollment or employment
- Be offered unless Formal Complaint is filed
- Be offered or facilitated when allegations of employee sexually harassing student

**May:**
- Be facilitated at any time after Formal Complaint and prior to determination regarding responsibility
- Expel if agreed to in Informal Resolution
- Provide Informal Resolution Process (NOT REQUIRED TO PROVIDE)

**Must:**
- Provide information regarding Informal Resolution Process in initial Notice of Allegations
- Provide parties written notice of informal resolution with:
  - allegations
  - requirements of process (including what information/documents will be shared)
  - circumstances which presume Formal Complaint arising from same allegations
  - right to withdraw/resume grievance process
  - consequences including records kept/shared
- Obtain voluntary written consent
- Have reasonably prompt time frames
INFORMAL RESOLUTIONS CONTINUED

Facilitators
- Must be trained and free from conflicts of interest/bias
- May be Title IX Coordinator

Types:
- Arbitration
- Mediation
- Restorative justice
- Other?

Defining this concept may have the unintended effect of limiting parties' freedom to choose the resolution option that is best for them, and recipient flexibility to craft resolution processes that serve the unique educational needs of their communities.

See you in Lesson 5!
Lesson 5
Conflicts of Interest/Bias/Prejudgment of Facts

PROCESS FREE FROM CONFLICT OF INTEREST OR BIAS (106.45(b)(1)(iii))
- For or against Complainants or Respondents generally
- Related to an individual Complainant or Respondent
- Whether a reasonable person believes a bias/conflict of interest exists
**EXPLICIT BIAS**

- “Explicit bias” refers to the attitudes and beliefs we have about a person or group on a conscious level.
  - Expressed directly
  - Aware of bias
  - Operates consciously
- Example: Statement- “I don’t think a woman would make a good CEO... Women are too emotional.”

**IMPLICIT BIAS**

- Implicit bias refers to the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner.
  - Expressed indirectly
  - Unaware of bias
  - Operates subconsciously
- Example: Assuming that a woman entering a hospital room is a nurse instead of a doctor because of her gender.
CONFLICTS OF INTEREST

Legal Definition of conflict of interest
1. conflict of interest { } Code, Art. 4(a)

2. A conflict between the private interests and the official or professional responsibilities of a person in a position of trust
3. A conflict between competing duties (as in an attorney's representation of clients with adverse interests)

BIAS AND/OR CONFLICT OF INTEREST = BASIS FOR APPEAL!
AVOID PRE-JUDGMENT OF THE FACTS AT ISSUE

- Suspend your judgment
- Listen to ALL information before making a decision
- More difficult than it sounds

See you in Lesson 6!
Lesson 6
Responsibilities of Decision Maker in Title IX Process

Title IX Process Flow Chart
General Process Flow Chart

INVESTIGATIVE TIMELINE

1. INVESTIGATE
   - Notice of Allegations
   - Notice of all interviews with sufficient time to prepare

2. OPPORTUNITY TO INSPECT AND REVIEW EVIDENCE AND PROVIDE WRITTEN RESPONSE
   - 10 days

3. INVESTIGATIVE REPORT

4. OPPORTUNITY TO REVIEW FINAL REPORT AND PROVIDE WRITTEN RESPONSE
   - 10 days

5. HEARING

APPEAL

*Formal Complaint MUST be dismissed if it does not meet definition of Sexual Harassment, occur in education program or activity, or in the U.S.*

A Formal Complaint MAY be dismissed at request of Complainant, if Respondent no longer at institution or institution is prevented from gathering evidence.
Decision-Maker Responsibilities

- Review Hearing Packet
- Evaluate evidence
- Hear from witnesses
- Determine if Responsible
- Determine Sanction (if responsible)

Relevance and Your Role

Relevant

Irrelevant
Regulations do not define relevancy

Regulations define some things that are NOT relevant:

- Treatment unless parties agree
- Privileged Information
- Questions and evidence about the Complainant’s sexual predisposition or prior sexual behavior unless they are offered to prove that someone other than Respondent committed the sexual harassment, or if the questions and evidence concern specific incidents of the Complainant’s prior sexual behavior with the respondent and are offered to prove consent (does not extend to Respondent’s)

Ordinary Meaning (Not a legal term)

Does the evidence tend to make a a fact more or less likely to be true
EXAMPLES OF RELEVANCE

- Relevance related to questions
- Relevance related to evidence

OBJECTIVE EVALUATION OF RELEVANT EVIDENCE

**Inculpatory**- shows or tends to show a Respondent's involvement in an act, or evidence that can establish responsibility.

**Exculpatory**- tends to exonerate Respondent of responsibility, favorable to a Respondent
Credibility determinations cannot be based on a party's role as a Complainant or Respondent

- Presumption of NOT RESPONSIBLE (§106.45(b)(2)(i)(B)) Until a determination is made regarding responsibility at the end of the grievance procedures
REMEDY REQUIREMENTS

No disciplinary sanctions prior to grievance process
Does not include supportive measures

Remedies designed to restore or preserve equal access to education program or activity
May include supportive measures

Remedies need not avoid burdening Respondent
Need not be non-disciplinary or non-punitive

UNDERSTAND THE TECHNOLOGY TO BE USED IN ALIVE HEARING

- When parties are in the same room?
- When parties are participating virtually
- Recording
  - Audio only?
  - Video and Audio?
  - Transcription?
- Access to documents
- Protection of documents
KNOW YOUR POLICIES AND PROCEDURES

- Working knowledge of your policies
- Structure of the hearing
- Use policy consistent language
- What are the elements of the alleged violation?
- What are you findings?
- What is your rationale?
- What happens after hearing?
Lesson 7: The Hearing

PRE-HEARING PREPARATION

- Review all documents, evidence, statements, information provided to you, as the decision-maker prior to the hearing.
- Do not pre-judge, keep an open mind.
- Review hearing process, rules of decorum, expectations prior to the hearing.
- Test technology prior to the hearing.
- Do not discuss the case.
- Give the hearing your full, undivided attention.
- Use a script if possible.
CONSOLIDATION OF COMPLAINTS

- Multiple Complainants
- Multiple Respondents
- Multiple Violations
- Violations of Code of Conduct plus Title IX

BE PREPARED FOR DELAYS

- Party doesn’t appear
- Advisor doesn’t appear/dismissed
- Parties move to informal resolution
- Witness doesn’t appear
- Panel member doesn’t appear
- Technology issues
- Illness
- Emergency
- Other
Create Comfortable Space

- Private space
- Comfortable
- Quiet
- Convenient
- Access to technology (internet connection)
- Desk/table space
- Sufficient space between parties
- Private room for breaks/discussion with advisor
- Waiting room for witnesses (and virtual waiting rooms if appearing virtually)

LOCATION

- In same room
- In separate room with technology enabling the parties to simultaneously see and her the other party/witnesses answering questions
Recording

- Audio, audiovisual, or transcript
- Available for the parties to inspect/review
- Make sure to TEST IT!

Set the Tone, Enforce the Rules

- The parties and advisors must abide by the rules of decorum set by the institution
  - Provide the rules to the parties prior to the hearing
- The decision maker must:
  - Set the tone for the hearing
  - Ensure that the rules are clearly outlined
  - Ensure that the rules are explicitly followed
  - Have the ability to take breaks as necessary
ADVISORS (106.45 (b)(5)(iv))

- Of the party’s choice
- Attorney? Can be, but doesn’t have to be
- Does not have to be trained.
- If none, MUST have one provided for purposes of the hearing (cross examination)
- May be present EVEN if party is not
- Must follow rules of decorum if you have them
- Potentially slow down the hearing process

OPENING STATEMENTS

- If process allows, make sure each party has the same access/time limit
- Decide whether parties can use evidence or demonstratives
- Limit interruptions
- Expect nerves
Types of Information/ Evidence

- Direct Information/Evidence: First-hand observation of an incident
- Circumstantial Information/Evidence: Indirect observation of information that offers inferences about the facts of the event
- Documentary Information/Evidence: Written description of an incident
  - Police Report
  - Residence Hall Report
- Hearsay Information/Evidence: Information that is reported through another party
- Expert Information/Evidence: Information that is shared from a person who has acknowledged expertise in a related subject matter

ALLOW EACH PARTY THE SAME OPPORTUNITY TO PRESENT...

FACT WITNESSES

EXPERT WITNESSES

INculpatory/ EXculpatory EVIDENCE
See you in Lesson 8!
Lesson 8: The Hearing Part II

QUESTIONING WITNESSES (106.45(b)(6)(i))

- Advisor must be permitted to ask relevant questions (including follow up questions and questions challenging credibility) of the other party and witnesses.
- Never by a party directly
- Conducted live
- Orally
- In real time
- May be submitted in advance, but not required
**QUESTIONING WITNESSES CONTINUED... DECISION-MAKER**

- Decision-maker must decide whether the question is relevant BEFORE it is answered.
- Decision-maker must **EXPLAIN** any decision to exclude a question as not relevant.
- Decision-maker may ask any additional/follow up questions.

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**Additional Information regarding questioning**

- What if advisors DO NOT ask cross examination questions of opposing party or witness?
- What if a party refuses to answer a decision-maker’s question(s)

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CLOSING STATEMENTS

- If process allows, make sure each party has the same access/time limit
- Decide whether parties can use evidence or demonstratives
- Limit interruptions
- Expect emotion

FACT FINDING

- Was the information a fact?
- Was the information disputed?
  - If no-- this information can be considered “fact”
- Did other evidence corroborate the information?
  - Consistencies
  - Inconsistencies
EVALUATING WITNESSES/REVIEWING EVIDENCE

- Focus on behavior, not character
- What information is known?
- What information is unknown?
- What questions could clarify your unknowns?

See you in Lesson 9!
Lesson 9

Determination and Notice of Outcome

Decision-maker must issue a WRITTEN DETERMINATION regarding responsibility—using standard of evidence established by the institution. 106.45(b)(7)
Standards of Proof

- Preponderance Evidence Standard: understood to mean concluding that a fact is more likely than not to be true
- Clear and Convincing Evidence Standard: understood to mean concluding that a fact is highly probable to be true

Definitions provided by Department in preamble to the regulations

Written Determination MUST Include

106.45(b)(7)(ii): identify
- Identification of ALL allegations potentially constituting sexual harassment
- Description of the procedural steps taken from the receipt of formal complaint through the determination including:
  - notice to parties
  - interviews with parties and
  - witnesses site visits
  - methods used to gather
  - evidence hearings held
- Findings of fact supporting the determination
- Statement of, and rationale for the result as to each allegation
  - including: determination regarding responsibility
  - any disciplinary sanction
  - whether remedies designed to restore or preserve equal access to the institution’s education program or activity will be provided by the institution to the Complainant.
- Institution’s procedures and permissible bases for the Complainant and Respondent to appeal
ARTICULATING DECISION/RATIONALE

- Articulate what you believe happened based on:
  1. Standard of evidence
  2. Elements of alleged violation
  3. Connect rationale to each element
  4. Identify facts supporting each element(s)
  5. Identify facts that do not support the element(s)
  6. Include any admissions that occur during the hearing
  7. If using a formula to weigh evidence/information, make sure to follow explicitly

EXAMPLE: SEXUAL ASSAULT/FONDLING

Fondling: The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.

1. Touching
2. Private body parts
3. Of another person
4. For the purpose of sexual gratification
5. Without Consent (insert definition of consent) of the victim
APPEALS
106.45(b)(8)

- MUST offer both parties an appeal re: responsibility, recipient dismissal of formal complaint, or any allegations on following bases:
  - Procedural irregularity that affected the outcome of the matter
  - New Evidence
  - Conflict of Interest or Bias by Title IX Coordinator, Investigator(s), Decision-Maker(s)- generally toward complainants or respondent or toward specific party
  - May include additional bases
- Most be included in Notice of Outcome
You did it!
Wrap Up and Assessment
Learning Objectives

- Understand the law and regulations
- Understand Title IX process and your role and responsibilities
- Recognize and Evaluate Prohibited Conduct and Jurisdiction
- Identify conflicts of interest/bias
- Understand how to assess relevancy
- Identify and weigh evidence
- Recognize role of advisor/witnesses/parties in a hearing
- Understand requirements in a Notice of Outcome and Determination

Questions???

- We are here for you! (info@titleixu.com)
- Contact your Title IX Coordinator
ASSESSMENT OF KNOWLEDGE