

Title IX Coordinator Training Online Course

Class One: Definitions, Jurisdiction and Preliminary Matters

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Training Course Does Not Constitute Legal Advice

Class Overview

- Title IX Updates
- Definitions
- Jurisdiction
- Formal Complaints
- Supportive Measures
- Dismissals
- Informal Resolution



What's Next?

When?

Biden Administration Initial Steps

- April 6, 2021 – OCR letter to stakeholders announcing a comprehensive review of ED’s existing Title IX regulations, orders, guidance, policies, etc.
- May 20, 2021 – Notice of virtual public hearing June 7–11, 2021
- July 20, 2021 – Questions and Answers on the Title IX Regulations on Sexual Harassment, including policy examples
- August 24, 2021 – ED announces it will no longer enforce the requirement that “prohibits a decisionmaker from relying on statements that are not subject to cross examination.”

What Comes Next from ED

- In December, 2021, The Department anticipated issuing the Title IX notice of proposed rulemaking by April 2022
- June 23, 2022, Title IX's 50th Anniversary, Department issued NPRM
- September, 2022, Notice and Comment period concluded
- 224,000 Comments posted, unclear how long it will take DOE to respond (Department will then have to summarize and respond to comments received and issue the resulting final regulations, which will include an effective date.)
- February 2023, OCR issues athletic resource guide, "Title IX and Athletic Opportunities in Colleges and Universities"
- April 6, 2023, OCR issues proposed rule related to eligibility standards for male and female teams.



In the meantime,

- The existing rules control, and any college receiving federal funds must obey them.
- In addition, the NPRM is just that – proposed rulemaking.
- The administration must address all of the comments, recommendations, and concerns submitted.
- In so doing, the final regulations may be very different.



What's In the Proposed New Rules?



April 6, 2023 “Colleges Could Keep Transgender Students Off Some Athletic Teams Under Title IX Proposal,” Chronicle of Higher Education

- **May 2020 regulations:**
 - Narrowed definition of "hostile environment sexual harassment"
 - Must respond only to severe, pervasive and objectively offensive behavior
 - Narrowed definition of "hostile environment sexual harassment" and
 - Required schools to focus their Title IX procedures on on-campus or program-related conduct that fit within that definition
- **Proposed regulations in NPR:** Restore the definition to that which was implemented by Obama Administration, which is more likely to require investigations of a broader category of unwelcome conduct of a sexual nature.
 - **April 6 2023 Proposed regulations:** Establish guidance for limiting participation on athletic teams.
 - Permits eligibility standards related to achieving an “important educational interest.”
 - Must “minimize harms” to students whose participation would be affected by their gender identity
 - Restrictions on eligibility would be permitted only after consideration of the circumstances of individual sport, level of competition and educational level.

What's next? Procedural Changes...

- Possibility of “single investigator model” returns
- Allows for continuation of live hearings, but no longer required.
- Eliminates the requirement of cross-examination.
- Allows instead for the investigator to test credibility of parties or witnesses at “individual meetings.”
- Allows schools to provide access to evidence or investigative report, but no longer required to provide both.

Biden's Title IX reforms would roll back Trump-era rules, expand victim protections (Dustin Jones)

Updated June 23, 2022:40 PM ET



Education Secretary Miguel Cardona speaks at the White House on April 27. The Biden administration proposed a dramatic rewrite of campus sexual assault rules on Thursday, moving to expand protections for LGBTQ students, bolster the rights of victims and widen colleges' responsibilities in addressing sexual misconduct. *Susan Walsh/AP*

Litigation Challenges

EDUCATION

Biden vows 'quick end' to DeVos' sexual misconduct rule

Biden disavowed Education Secretary Betsy DeVos' Title IX rule.



- **Three Challenges to Current Rule Unsuccessful**

- Know Your IX, et al. v. DeVos, filed May 14, 2020 in D. Md.
- New York v. U.S. Department of Education, filed June 4 in S.D.N.Y.
- Pennsylvania, et al. v. DeVos, filed June 4 in D.D.C.

- **One Challenge Altered Application of a Provision**

- Victim Rights Law Center, et al. v. DeVos, filed June 10 in D. Mass.
 - Court vacated the provision prohibiting use of testimony from persons who did not submit to cross-examination but upheld all other challenged provisions of the rule.
 - Dept. of Education announced it would not enforce the provision the Court vacated. August 2021

- **Challenge to DOE Guidance Upheld**

- State of Tenn., et al. v. U.S. Dep't of Educ., July 2022
 - Department of Education enjoined from enforcing the part of the Title IX Anniversary Letter that includes gender orientation and gender identity discrimination as sex discrimination against the 20 states that participated as plaintiffs in this lawsuit.

- **Challenge to State Ban on "Boys" Participation in Girls Sports**

- West Virginia v. By Jackson, April 6, 2023
 - U.S. Supreme Court let stand Appeals Court temporary injunction, against enforcing the ban.
 - As written, law defines "boys" based on "individual's form... at birth."

Definitions

Definition of Sexual Harassment

Sexual Harassment includes one or more of the following:

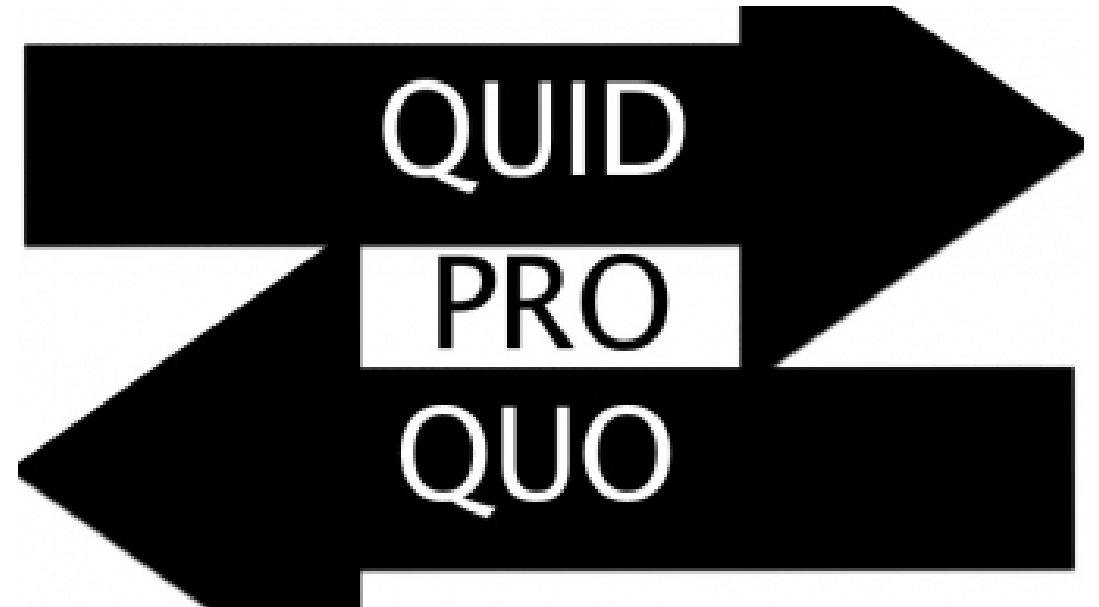
1. Quid Pro Quo
2. Hostile Environment
3. Clery Definitions

§106.30(a)



Quid Pro Quo

- Conditioning provision of an aid, benefit or service on participation in unwelcome sexual conduct
- Carried out by an employee



Hostile Environment

- Unwelcome sexual conduct
- “So severe, pervasive, *and* objectively offensive”
- “Effectively denies equal access”
- “Determined by a reasonable person”
 - “[S]tanding in the shoes of the complainant.” (Preamble, p. 514)



Clery Definitions

- **Sexual Assault** – a forcible or non-forcible sex offense under the FBI UCRS (as defined by the Clery statute) including NIBRS
 - Forcible -- Any sexual act “directed against another person without the consent of the victim including if the victim is incapable of giving consent.”
 - Focus on proscribed actions rather than terms
- **Dating Violence** – violence by a person who is or has been in a romantic or intimate relationship (Clery statute)
- **Domestic Violence** – violence by a current or former spouse or intimate partner, co-parent, living partner, youth or other under state law
- **Stalking** – fear for safety or safety of others or suffer substantial emotional distress

Complainant & Respondent

- Complainant – an individual who is alleged to be the victim of conduct that could be sexual harassment
- Respondent – an individual who has been reported to be the perpetrator of conduct that could be sexual harassment



Actual Knowledge

- Institution has actual notice of sexual harassment or allegations when reported to the:
 - Title IX Coordinator(s), OR
 - An Official With Authority to Take Corrective Actions (OWA)
- Not when reported to a respondent
- Not when reported to others, even if the school has decided that they may or must report
 - (But ... other causes of action may exist created by the existence of a policy or contractual provision requiring reports by certain non-OWA employees)



Jurisdiction

Education Program or Activity



- Locations, events, or circumstances over which IHE exercises substantial control over *both* the respondent and the context in which the sexual harassment occurred, **or**
- Any building owned or controlled by a recognized student organization, **and**
- Against a person in the United States.

Filing a Formal Compliant

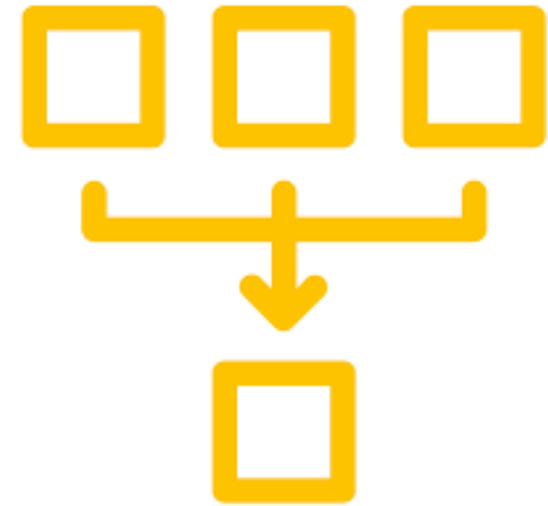
Filing a Formal Complaint

- In person, by mail, email or approved method.
- Requests that the IHE investigate the allegations of sexual harassment.
- Filed by the Complainant participating in or attempting to participate in the IHE's education program or activity or signed by the Title IX Coordinator.
- Title IX Coordinator may file even if the Complainant is not associated in any way to protect other students.



The Formal Complaint: More Than One Respondent

- *May* consolidate formal complaints against more than one respondent, or by one party against the other party
 - Allegations arise out of the same facts or circumstances.
- Complaints may be filed and sanction imposed *only* against individuals, not groups



Written Notice of Allegations

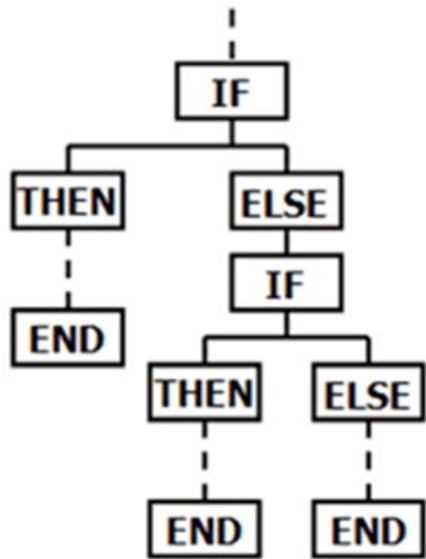
- Notice of the grievance process.
- Notice of the allegations, including sufficient details and time to prepare a response *before* the initial interview.
- Statement that the Respondent is presumed not responsible.
- Right to advisor of choice.
- Right to inspect and review evidence.
- Any prohibition of false statements or information.

Provide updated notice with any later discovered additional allegations.



IMPORTANT
NOTICE

Dismissals



Mandatory/Discretionary Dismissals



Mandatory if:

- Conduct alleged would not constitute sexual harassment even if proved;
- Conduct alleged did not occur in the IHE's education program or activity; or
- Conduct alleged did not occur in the U.S.



Discretionary If:

- Complainant notifies the Title IX Coordinator in writing of a wish to withdraw complaint or any allegations in it;
- Respondent is no longer enrolled or employed; or
- Specific circumstances prevent sufficient gathering of evidence to reach a determination.

Dismissal Results





If a formal complaint is dismissed, school must:

- Provide written notice of dismissal and reasons to both parties.
- Provide an appeal process.
- The matter *may* proceed under another provision, policy or code.

Supportive Measures

Response to a Report

- Offer *supportive measures* promptly to the Complainant. 
- Explain the process for filing a formal complaint.
- Consider the Complainant's wishes as to supportive measures. 
- Follow a grievance process that complies with the regulations *before* imposing any disciplinary sanctions or other actions that are not supportive measures against the Respondent.



Supportive Measures



- Available to complainant and respondent
- Non-disciplinary and non-punitive
- Treat complainant and respondent equitably
- No fee/charge to either party
- Restore or preserve equal access without *unreasonably* burdening the other party
- Confidential to the extent possible

Informal Resolution

Informal Resolution Requirements



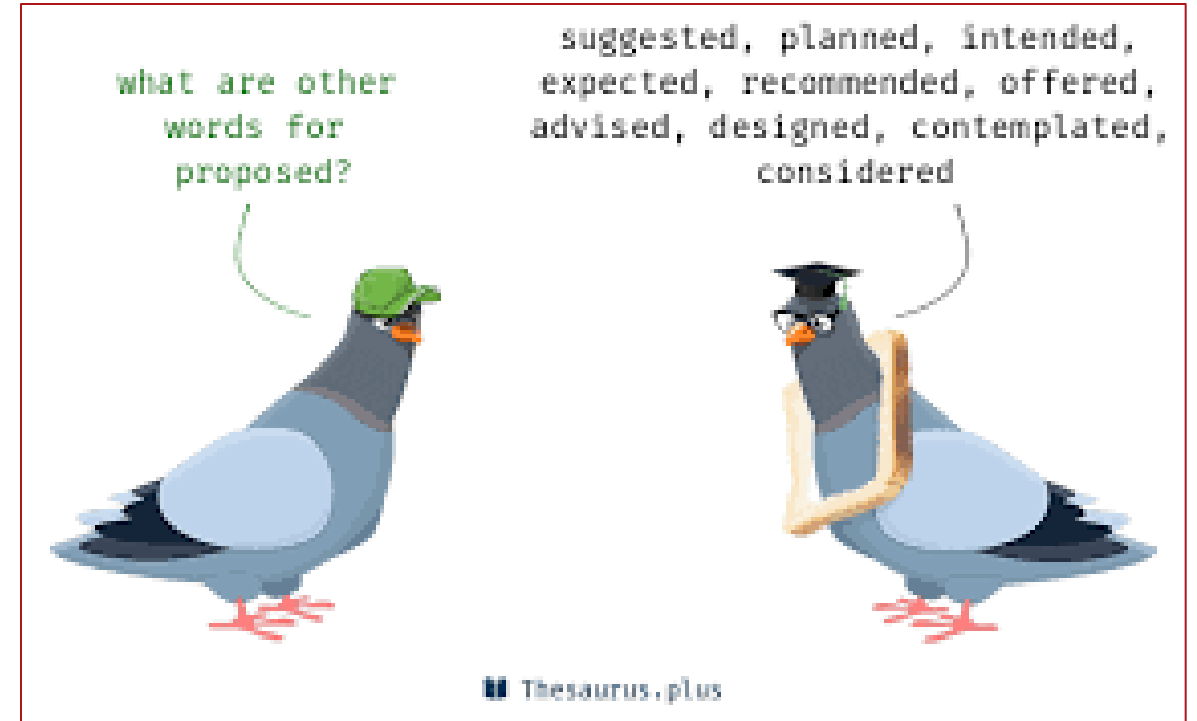
- At any point in the formal process
 - BUT only after a formal complaint is filed
 - May return to formal process if informal resolution does not resolve the matter
- May address all forms of sexual harassment:
 - *EXCEPT* – Allegations of employee against student harassment
 - *ONLY* – When the institution deems it appropriate
- Process must be facilitated by trained individuals with no conflict of interest or bias
- Written, voluntary consent by the parties, which requires ...

Informal Resolution Process

- Parties must be given written notice of:
 - The allegations and the requirements of the informal resolution process;
 - The right to withdraw from the informal procedure at any time prior to agreeing to a resolution;
 - The circumstances precluding parties from resuming the formal complaint arising from the same allegations; and
 - Any consequences associated with informal resolution, including records that will be maintained or could be shared.

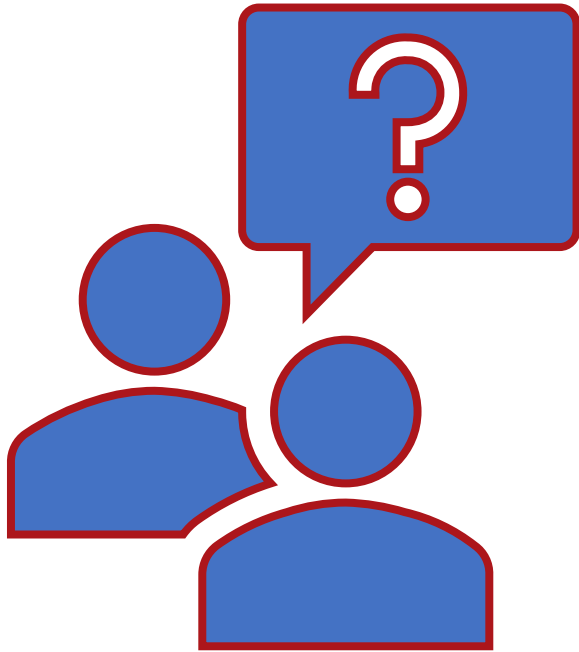


What are some of the Proposed Changes?



Proposed Changes

- Quid Pro Quo Harassment
 - Expanded definition
- Hostile Environment
 - “Denies *or Limits*” access
- Specific Offenses
 - Defines Clery Offenses
- Complainant & Respondent
 - Applies in all sex discrimination
- Respond to any sex discrimination
- Respond to sex discrimination in a program or activity
 - “Off campus” if disciplinary authority
 - Even if outside of US
- Complaint
 - Any oral or written request to initiate the grievance process
- Dismissal
 - Permissive in some circumstances
- Supportive Measures
 - May burden R during pendency of process
 - Opportunity for C or R to request modification
 - Review by impartial party with authority to change
- Informal Resolution
 - Available at any time with required notice



Questions?

Note

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