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MICU | MICHIGAN INDEPENDENT COLLEGES & UNIVERSITIES

Title IX Coordinator Training - MICU

August 4, 2020

9 a.m. - 2 p.m.

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Discussion Topics:

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- Title IX Overview
- Regulatory Changes
- Formal Complaints, Grievance Procedures & Hearings
- Model Policy
- Key Takeaways
- **Next Up:**
  - Investigator Training & Decision Maker/Advisor Trainings
  - August 12, 2020

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Presented by Janilyn Daub

TITLE IX OVERVIEW

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What is Title IX?

Federal civil rights statute that prohibits sex discrimination, sexual harassment, and retaliation in all aspects of the educational experience, including academics, extracurricular activities, and athletics

Title IX of the Educational Amendments of 1972 to the Civil Rights Act of 1964

"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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Key Issues Covered by Title IX

- Recruitment, admissions, and counseling
- Financial assistance
- Athletics
- **Sex-based Harassment**
- Pregnant and Parenting Students
- Discipline
- Single-Sex Education (schools, classes, and extracurricular activities)
- Employment
- Retaliation

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Title IX Regulations

- Title IX's statutory language is brief.
- Federal government has issued guidance clarifying how it interprets and enforces those regulations
    - Obama 2011 and 2014 guidance
    - Trump 2017 Interim guidance

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DeVos revoked Obama-era guidance in September 2017

- Released Q&A “Interim Guidance”
  - removed the preponderance of evidence standard as the appropriate standard of proof for investigating allegations of sexual violence;
  - eliminated the 60-day timeframe from Title IX investigation proceedings;
  - allowed an appeals process initiated either by both parties or solely by accused students; and
  - created an informal resolution option

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Guiding Principles

- Rulemaking process rather than mere guidance
- Greater clarity to ensure that all schools clearly understand their legal obligations under Title IX and that all students clearly understand their options and rights
- Fair process for the accused

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Proposed Regulations

- Published November 16, 2018. (first Title IX guidance published by OCR to go through a formal notice-and-comment process since 1997)
- Comments were taken until January 30, 2019 (appx. 124,000 comments)
- Final regulations **effective August 14, 2020**
  - Effect of Coronavirus?
- Remember—the regulations are the law!

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Timing Problems

What about claims regarding events that occurred before August 14, but whose investigation hasn't started?

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Timing Problems

What about claims regarding events that occurred before August 14, but whose investigation hasn't started?

What if the investigation was started but is not completed by August 14th?

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Timing Problems

What about claims regarding events that occurred before August 14, but whose investigation hasn't started?

What if the investigation was started but is not completed by August 14th?

What if a case has been resolved but an appeal is initiated after August 14th?

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REGULATORY CHANGES

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What's New?

- Roles (the same but different)
- Sexual Harassment Definition
- Scope of Coverage
- Supportive Measures
- Grievance & Hearing Procedures
  - Live Hearings, Advisors, Cross Examination, "single investigator" model is banned
- Mandatory Training / Retention of Records

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Key Roles

- Title IX Coordinator (must be an employee)
- Investigator
- Advisor (party permitted to have an advisor of his/her choice)
- Decision-maker(s)

Key Change: The Decision-maker **cannot be** the same person as the Title IX Coordinator or the Investigator.

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Sexual Harassment Definition

(1) 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;

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Sexual Harassment Definition

(1) 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;

(2) 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

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(2) 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

(3) "Sexual assault" as defined in 20 U.S.C.1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

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Let’s consider a few examples…

Multiple students come forward to report singular instances where the same Professor has made stray remarks to the student during office hours. Sexual harassment?

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Let’s consider a few examples…

What if the students want to remain anonymous. Can/should the school investigate?

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Off-Campus Harassment

- Covers sexual harassment occurring “in the school’s education program or activity, against a person in the United States.”

What does this mean for study abroad programs?

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Off-Campus Harassment

- What is the school's "education program or activity?"
  - Locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs.
  - Specifically includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

Fraternity or Sorority Housing? Athletic Housing?

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What triggers a school's responsibility?

"**Actual knowledge**" means notice of sexual harassment or allegations of sexual harassment

Who can report?

ANY PERSON – victim, parent, friend, or bystander

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Actual Knowledge – Who?

- Title IX Coordinator, AND
- A designated school official
  - Must have authority to institute corrective measures on the school's behalf

Is anyone *a mandatory reporter?*

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Training Requirements

- Must train all Title IX personnel on:
  - Key definitions.
  - How to conduct investigations/grievance process.
  - How to be impartial.
- Must provide decision-makers and investigators with training on evidentiary issues.
  - Relevancy.
  - Rape shield protections.
- Must train decision-makers on any technology using at hearings.

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Presented by Don Lawless

GRIEVANCE PROCEDURE: PRE-INVESTIGATION

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Pre-Investigation Topics

- Filing of Formal Complaint
- Mandatory Supportive Measures
- Non-Retaliation Provisions
- Dismissals
- Informal Resolution Process

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Formal Complaints

- Anyone can make a report of harassment
- The grievance procedure is triggered by a Formal Complaint
- Formal Complaints can be filed by:
  - The Complainant (the aggrieved party), or
  - The Title IX Coordinator

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How must the school respond?

- The school can't be "deliberately indifferent" to the knowledge
- The Title IX Coordinator must provide the following information to the individual:
  - Availability of supportive measures;
  - The right to file a complaint; and
  - How to file a complaint

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Respondent Notice

- The Title IX coordinator must provide written notice to the respondent including:
  - Actual allegations of facts that constitute sexual harassment and evidence that supports this
  - That there is a presumption of innocence
  - That parties are entitled to advisor of their choice
  - That parties can inspect and review evidence
  - Information regarding any code of conduct provisions that prohibit false statements

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Respondent Notice

- Certain actions can be taken with regard to the respondent for the duration of the investigation
  - Can be put on administrative leave if they are an employee
  - Can be removed from educational activities subject to emergency removal procedures – §106.44(c)
    - Conduct an individualized safety and risk analysis which determines respondent poses an imminent threat to the *physical* health or safety of *anyone* which arises from the allegations of sexual harassment
    - Respondent is given the chance to challenge removal immediately

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Does This Situation Justify an Emergency Removal?

The weekend offender strikes again…

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Supportive Measures

- When a school learns of sexual harassment, its mandatory response must include an offer of supportive measures for both parties.
- The Title IX Coordinator should promptly contact the parties to discuss the availability of supportive measures, consider the party's wishes with respect to supportive measures, etc.
- Supportive measures must remain as confidential as possible.

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What are examples of supportive measures a University could offer?

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Supportive Measures

- Free, individualized services designed to restore or preserve equal access to education, protect safety, or deter sexual harassment
  - Support a student – not punitive or disciplinary with respect to another student
- Does NOT need to be a formal complaint
- Don't unreasonably burden any other person

What about supportive measures for a non-student?

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Non-Retaliation Provision

- Any person retaliated against can file a complaint with the school and the school must have a procedures in place for the prompt and equitable resolution of those complaints
- Any situation that could “chill” the bringing of Title IX violations can qualify as retaliation
- Regulations provide that protected speech under the First Amendment never constitutes retaliation.

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Is this retaliation?

A complainant reports a sexual assault that happened while under the influence of alcohol at a party and is punished for underage drinking – a code of conduct violation.

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Dismissals

- Two types
  - Mandatory dismissals
  - Discretionary dismissals
- For both types, notice must be promptly sent to all parties

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Mandatory Dismissals

- Alleged actions fail to meet definition of sexual harassment
- Alleged actions did not occur "in the school's education program or activity, against a person in the United States."

These types of claims *can* still be addressed under their Code of Conduct – they are just not Title IX violations!

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Discretionary Dismissals

- If the complainant notifies Title IX Coordinator in writing that they wish to withdraw some or all of their allegations
- If respondent is no longer enrolled or employed by school
- If specific circumstances prevent school from gathering sufficient evidence to reach a determination about allegations

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Informal Resolution Process

- Requires *voluntary* and *written* consent from both parties
  - Can *not* be a condition of employment or enrollment
- Unavailable if respondent is an employee (including faculty) of the school
- May take any form, but the school must must provide a facilitator who
  - is free from conflicts of interest or bias
  - has received special training
- Either party may abandon the informal resolution process *"at any time prior to agreeing to a resolution"* and proceed the investigation and hearing process

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GRIEVANCE PROCEDURE: INVESTIGATION & HEARINGS

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Investigation & Hearings Topics

- Big Picture Items
- Roles Within School's Title IX Department
- Evidence Gathering
- Hearings
- Advisors & Cross Examinations

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Big Picture Items

- Both the investigation and hearing processes have gone through significant changes as a consequence of the regulations
- Cannot be discriminatory on the basis of sex and must apply to complainants and respondents

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Roles Within School's Title IX Department

- Single investigator model is no longer allowed
  - Investigators and Decision Maker(s) cannot be the same in any given case
- All individuals in the case must be unbiased

This is one area that could result in requiring additional staff!

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Does this situation cause bias?

A member of the Title IX department shares the following image on their personal social media page:

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Timeline

- Investigations need to be done in order to provide a prompt resolution
- Interview the Complainant first to identify any witnesses
- Witnesses frequently name more witnesses
- Witnesses' memories and statements are less reliable the more time passes
- Leave plenty of time for the hearing

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Investigation Overview

- Coordinate with law enforcement as needed
  - Never force *or* discourage a complainant go to the police
- Gather as much evidence as possible
  - Texts, e-mails, pictures, etc.
- Strategically schedule interviews
  - But surprise interviews are now barred
- Conduct an exhaustive and complete investigation

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Evidence Gathering

- Equal opportunities for both parties to have witnesses
- Can’t restrict parties from discussing allegations or presenting evidence
- Access to have other people present, including advisors or attorneys
- Must provide written notice to all parties of date, time, location, participants, and purpose of all hearings, interviews, and other meetings with sufficient time for the party to prepare
- Equal opportunities for parties to inspect and review evidence obtained and a opportunity to respond to evidence

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Interview Basics

- Put the witness at ease
- Explain the procedure and situation
- Let the witness give a narrative
- Ask questions based on the narrative as well as questions that may be outside the narrative

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Putting the Witness at Ease (or Not)

- Private location
- Comfortable
- Avoid displays of power
  - "Scary" office
  - Sitting across desk
  - High chair, etc.
- Have a note-taker so the interviewer can just have a conversation

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Explain the Procedure

- Set the tone for the interview
- Review the policy as necessary
  - Be clear about privacy/anonymity
  - Explain what steps have been taken
  - Remind them of anti-retaliation provisions
- After the interview, explain the next steps

How much do you tell the witness?

Come back to our investigator training to find out more!

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Questioning

- The goal is an open-ended conversation
- The narrative – Just let the witness talk
  - Fill in the gaps and get specifics
- Questions outside the narrative are particularly helpful for third party witnesses
- Be non-judgmental
- Get more information than you give
- Listen carefully for witnesses and tangible evidence that would be helpful for the investigation

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Making Credibility Determinations

- Watch for witnesses changing their story – particularly after witnesses may have talked with one another
- Is the witness' story consistent with tangible evidence
- Does it make sense?
- A Respondent's statements are not inherently less valid than a Complainant's *and* vice versa

Do you need to make credibility determinations at this stage?

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Production of *All* Evidence to Both Parties

- Universities are required to produce all evidence directly related to the allegations to both sides
- The parties get ten days to respond to this evidence before the investigative report can be finalized

What does this mean for the identity of any witnesses?

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Investigative Report - Requirements

- Universities must prepare investigative report on the allegations of the formal complaint
- Must provide ten days after finalizing to circulate before hearing and determination of responsibility

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Hearings

- Hearings are now *mandatory* for all post-secondary schools
- Must be conducted live with both parties able to simultaneously see and hear each other
  - If requested by either party, the hearing can be conducted in separate rooms with technology to enable this requirement
  - Can also be done virtually

How can hearings be conducted during quarantine?

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Hearings

- Recordings of the hearings must be available for all parties to inspect and review
  - Audio
  - Audiovisual
  - Transcript

Disability accommodations must still be made!

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Advisors & Cross Examinations

- Cross-examinations are now allowed by regulation
- Parties can *not* directly cross-examine each other
  - Questions must be asked by a parties advisor or attorney
- Schools must provide an advisor for the purpose of cross-examinations if parties do not have one
  - Does not have to be a lawyer

This is another area that may result in requiring additional staff!

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Advisors & Cross Examinations

- Questions must be relevant before the party or witness provides an answer
- Relevancy is not defined within the regulations
- Questions regarding prior sexual history are only allowed when:
  - Such information is offered to prove someone other than the respondent committed the sexual harassment, or:
  - It is prior sexual behavior between the parties offered as proof that there was consent

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Are these questions relevant?

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Limitations on Advisor's Role

- Advisors must be allowed to cross-examine and question witnesses
- Any other restrictions are allowed, but must be applied equally to all parties

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QUESTIONS & ANSWERS

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LUNCH BREAK

THE PROGRAM WILL RESUME WITH MORE Q&A

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GRIEVANCE PROCEDURE: POST-HEARING

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Post-Hearing Topics

- Evidentiary Standards
- Determinations
- Remedies
- Appeal Process
- Record Retention

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Evidentiary Standard

- New regulations allow schools to choose between two standards of evidence
  - Preponderance of the Evidence
  - Clear and Convincing
- Same standard must be used for allegations against students and staff/faculty

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Evidentiary Standard

- Preponderance of the Evidence
  - Lower level of proof required
  - 51% certainty
- Clear and Convincing
  - Higher level of proof required
  - Significantly more than 50% certainty

The choice between these two standards will dictate how easy or hard it is to prove an allegation!

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Why would a University choose one standard over the other?

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Determinations – Final Decision Maker

- Must conduct an objective evaluation of the evidence
- Cannot be biased
- Cannot be the same person that conducted the investigation
- Must receive special training on how to be impartial and how to decide what evidence is relevant

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Written Determinations Must Include:

- Identification of the allegations potentially constituting sexual harassment;
- Description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
- Findings of fact supporting the determination;
- Conclusions regarding the application of the recipient's code of conduct to the facts;
- Statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant;
- Must be sent simultaneously to parties with information on appeal process.

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Remedies

- The **Title IX Coordinator** is responsible for effective implementation of any remedies.
- Restore or establish access to educational programming and activities when the investigative and evaluation process results in a finding of responsibility

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Appeals

- Both parties have the right to appeal
  - At dismissal; or
  - At the completion of the formal grievance process

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Bases for Appeals

- Procedural irregularity affecting the outcome of the matter;
- New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter;
- The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias.
- *May* offer an appeal equally to both parties on additional bases.

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Requirements for Appeals

- Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
- Decision-maker for the appeal is not the same person as the decision-maker that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;
- Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of this section;
- Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
- Issue a written decision describing the result of the appeal and the rationale for the result; and
- Provide the written decision simultaneously to both parties.

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Record Retention

The following must be retained on file for seven years:

- Records of investigation
- Records of appeals and associated materials
- Records of any informal resolution process
- All materials used to train Title IX staff and any person who facilitates an informal resolution
- Records of supportive measures taken in response to a complaint

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COMPLIANCE & POLICY CONSIDERATIONS

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Consequences of Potential Noncompliance

Department of Education Office of Civil Rights

- Potential steps
  - Complaint
  - Investigation
  - Enforcement action
- Publication

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Consequences of Potential Noncompliance

- Civil suit
  - Private right of action
- Relations: campus, alumni, community, public

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Other Impacts and Considerations

- Law enforcement
  - Campus police
  - Local law enforcement
- Privacy and protection
  - FERPA
  - Privilege
  - Public records (are you are likely NOT covered)

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Policy Considerations

- Where do you want your university to come down on certain issues?
  - How difficult will it be to prove sexual harassment
  - How far will the policy spread
  - Will your policy encourage or discourage filing complaints in unintentional ways
- What are consequences of these choices from a marketing or outreach perspective?

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MODEL POLICY

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Policy Requirements

There are limited regulatory requirements…

- Who must receive notice of the policy
- Where the policy must be published

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Who must receive notice of the policy?

- Students (current and applicants)
- Employees (current and applicants)
- Unions or Professional Organizations

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What must they receive?

- Contact information of the Title IX Coordinator
- *Notice of Non-Discrimination* which includes:
  - Statement that policy applies to both admissions and employment
  - Where to address questions

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Where does the policy need to be published?

Non-Discrimination policy must be published:

- On the school website
- In each school handbook or catalog

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…and then comes the grievance process.

The regulations are much more explicit about what needs to be included in the policy regarding the grievance process!

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Grievance Process

- The policy must include information on how to report or file
- The Grievance Process must include:
  - Standard of Evidence
  - Presumption of Innocence
  - “Reasonably prompt time frames”
  - Range of sanctions
  - Procedures and permissible bases to appeal
  - Range of supportive measures available to each side

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THE MODEL POLICY

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Model Policy - Definitions

A few key things to consider:

- Actual Knowledge
- Decision Maker
- Consent
- Sexual Harassment

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Actual Knowledge

Term	Definition
Actual Knowledge	Notice of Sexual Harassment or allegations of Sexual Harassment to a University's Title IX Coordinator or any official of the University who has authority to institute corrective measures on behalf of the University. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute Actual Knowledge. This standard is not met when the only official of the University with Actual Knowledge is the Respondent. The mere ability or obligation to report Sexual Harassment or to inform a Student about how to report Sexual Harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient. "Notice" includes, but is not limited to, a report of Sexual Harassment to the Title IX Coordinator. Examples of an Employee with Actual Knowledge include deans, associate deans, vice presidents, coaches, Title IX Coordinator and deputy coordinators, hall directors, resident assistants, human resources staff, campus safety officers, Administrators, and other employees as outlined Section III: Employee Duty to Report.

It is important for examples of Employees with Actual Knowledge to be consistent with what is listed in Section III: Employee Duty to Report.

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Decision Maker

Decision Maker	The administrator(s) who oversee(s) any hearing or appeal which takes place as part of the formal resolution process.

Your university may wish for the decision maker to take any number of forms, ranging from a single individual to a panel of people. You may also wish to outsource the responsibility – for example, if both parties have a lawyer, an outside attorney may be chosen to be the decision maker. This decision can also be made on a case-by-case basis and/or include the parties' preferences if desired.

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Consent

The final regulations do not require a definition of consent. As such, your university's final policy would still be compliant with Title IX if it wishes to have a more or less conservative definition of the term then this, or omit the definition altogether.

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I. SCOPE

Remember:

This policy covers sexual harassment in any medium that occurs in a University's educational program or activity and in some off campus situations. The University has a duty to respond when they have actual knowledge of a violation.

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I. SCOPE

C. Location

i. This policy applies to alleged Sexual Misconduct that takes place in a University's educational program or activity, against a person in the United States. This includes locations, events, or circumstances over which the University exercised significant control over both the Respondent and the context in which the Sexual Misconduct occurred.

You may desire to expand the scope of your policy to cover additional areas, such as complaints that occurred during study abroad programs. While these are not Title IX violations, your university may still wish to act upon them as such to discourage any such actions.

ii. This policy also applies to alleged Sexual Misconduct that occurs off-campus, including virtual spaces, in any building owned or controlled by a Student organization that is officially recognized by the University.

If your university has such spaces, which include fraternity and sorority housing, you may wish to explicitly list them.

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III. EMPLOYEES WITH AUTHORITY TO INSTITUTE CORRECTIVE MEASURES

Under the new regulations, the University's duty under Title IX is triggered when it has **Actual Knowledge** of an alleged violation. Actual Knowledge is assumed when the Title IX Coordinator or any official of the University who **has authority to institute corrective measures** on behalf of the University is made aware of an allegation. It is left up to the University to define which individuals have such authority. In order to limit liability to the University, it is recommended to keep this list narrowed to specific individuals.

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III. EMPLOYEES WITH AUTHORITY TO INSTITUTE CORRECTIVE MEASURES

Who ***could*** you include?

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III. EMPLOYEES WITH AUTHORITY TO INSTITUTE CORRECTIVE MEASURES

Who ***could*** you include?

Who ***should*** you include?

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IV. EMPLOYEE DUTY TO REPORT

Under the new regulations, employees who do NOT have authority to issue corrective action are not required to report their knowledge of alleged sexual harassment to anyone. Prior policies often contained detailed mandatory reporting provisions. If the University is interested in keeping a broad mandatory reporting requirement, consider including the provisions below, which are largely based on the prior guidance. This should be adjusted to fit the University's views on this issue.

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IV. EMPLOYEE DUTY TO REPORT

Who ***could*** you include?

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IV. EMPLOYEE DUTY TO REPORT

Who ***could*** you include?

Who ***should*** you include?

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IV. EMPLOYEE DUTY TO REPORT

Who ***could*** you include?

Who ***should*** you include?

Should anyone be ***exempt***?

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V. REPORTING ALLEGATIONS OF SEXUAL HARASSMENT

Key Points:

- *Anyone* may report
- Filing a report with law enforcement is NOT a prerequisite for reporting to the University and vice versa – a student has the right to do one and not the other

What is the difference between a "report" and a "Formal Complaint?"

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VI. CONFIDENTIALITY AND PRIVACY

Key Points:

- Complainants have a right to privacy and can request that no formal investigation or disciplinary action follow
- BUT the University can decide to proceed anyways on a case-by-case basis
  - At that point the Complainant has no obligation to proceed as part of the investigation

How confidential are witnesses' identities?

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VIII. INVESTIGATION AND RESOLUTION OPTIONS

After an initial review by the Title IX Coordinator, either informal or investigative resolution can be pursued.

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IX. REMEDIES

When the University makes a finding of a policy violation, it will take steps, *whether individual or systemic*, to stop the alleged Sexual Harassment, prevent its recurrence, and remedy the discriminatory effects on the Complainant and others, as appropriate

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Supportive Measures

D. Interim Supportive Measures

i. Supportive measures will be made available to both the Complainant and Respondent whether or not a formal complaint is filed to ensure equal access to the University's education and employment programs and activities. The Title IX Coordinator or designee will conduct an individualized assessment and will review requests from Complainant and Respondent to determine supportive measures that are appropriate and reasonably available at no cost to the Complainant or Respondent. Supportive measures may include, but are not limited to:

a. No contact directives;
b. Referral to campus and community resources for victim advocacy, counseling, health services, legal assistance, immigration assistance, disability services;
c. Academic support including extensions of time and other course-related adjustments;
d. Modification of work or class schedules;
e. Change in work or housing locations;
f. Change in reporting relationship;
g. Consideration of leave requests; and
h. Assistance with academic petitions.

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X. FALSE ALLEGATIONS

Key Points:

- False allegations must be made in BAD FAITH to be a violation
- The absence of a finding of a policy violation is not equivalent to finding that the Complainant acted in bad faith

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XI. PROCESS ABUSE

A. No member of the University Community may:

i. Obstruct, prohibit, exert improper influence over, or interfere with any individual making a report, participating in a process, or carrying out a responsibility covered by this policy;

ii. Make, in bad faith, materially false statements in or related to a process covered by this policy;

iii. Disrupt or interfere with the orderly conduct of any proceeding conducted under this policy; or

iv. Fail to comply with any directive, sanction, or corrective action issued pursuant to this policy.

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XII. TRAINING

Annual University-wide Sexual Harassment training as outlined in Section XII is not mandated by the regulations – use discretion.

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MODEL POLICY: PROCEDURE

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I. INITIAL ASSESSMENT

Key Points:

- Notify complainant of availability of *supportive measures*, right to file a formal complaint, and the process for doing so
- Title IX Coordinator needs to review and determine available options for resolution
- Notice to respondent if formal complaint is filed – specific requirements including *presumption of innocence* and *right to an advisor*

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II. DISMISSAL OF A COMPLAINT

B. The University reserves the right to dismiss the complaint and stop the investigation if:

i. The Complainant notifies the Title IX Coordinator in writing that they wish to withdraw their complaint;

ii. The Respondent is no longer enrolled in or employed by the University; or

iii. Specific circumstances prevent the school from gathering sufficient evidence to reach a determination about allegations (e.g. lack of participation in the investigative process by parties or witnesses).

Your university may wish to define what circumstances would qualify for this type of dismissal.

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III. INFORMAL RESOLUTION

III. INFORMAL RESOLUTION

A. Informal resolution may be utilized in some circumstances if a Formal Complaint is filed.

> Your university may wish to define broader or narrower conditions that would make informal resolution appropriate. In any event, it is important to remember that the limitations in (B) will always apply to whatever conditions may trigger the use of the informal resolution process. While an informal process may be appealing due to having less restrictions, it should not be used as a way to dissuade Complainants from filing a Formal Complaint and proceeding through the related Title IX investigative procedures.

B. The usage of an informal resolution process is limited in a number of ways:

   i. Informal resolution is unavailable if the Respondent is an employee of the school.

   ii. Informal resolution may only be used if any and all parties to an investigation agree to it.

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III. INFORMAL RESOLUTION

E. Informal resolution can take any form that the parties agree upon. The Title IX Coordinator or designee will work with the parties to develop a form of resolution that adequately resolves the needs of the parties. This may include:

Informal resolution can take any form that your university deems appropriate. The included informal resolution options are provided as examples that your university may choose to adopt in full or in part. Your university may also have additional forms of alternative resolution in place that you may substitute for these.

i. *Facilitated Dialogue*: A structured and facilitated conversation between two or more individuals, including, but not limited to the Complainant and the Respondent, which allows for voices to be heard and perspectives to be shared. Depending on stated interests, participants may work towards the development of a shared agreement.
ii. *Shuttle Mediation*: An indirect version of the facilitated dialogue
iii. *Circle of Accountability*: A facilitated interaction between the Respondent and University faculty and/or staff designed to provide accountability, structured support, and the creation of an educational plan.

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IV. FORMAL RESOLUTION & HEARINGS

Investigation Key Points:

- Meet with parties separately and collect information & evidence
- Neither the complainant nor respondent are required to participate in the investigation process
- Parties have an equitable right to:
  - Notice, a prompt process, equal access, advisors, and trained investigators without conflict or bias
- Investigative report cannot be finalized until *all* evidence is shared with the parties
- Investigative report to be circulated to both parties upon completion

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IV. FORMAL RESOLUTION & HEARINGS

Hearing Key Points:

- Requirement of live hearings
- Form of Decision Maker – single person/panel/other
- Role of Advisors
- Questioning by Decision Maker and cross-examination by Advisors
- Use of technology for parties in separate rooms
- Recording

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Hearings

ii. Hearings are not legal proceedings and do not follow courtroom procedure or the formal rules of evidence. During any hearings, each party must have an advisor present to ask questions to the other party. This advisor does not need to be licensed to practice law and may be a person of the party's choice or, if they do not have an advisor, the University will provide an advisor for them.

An advisor is not required to be a licensed attorney. Your university may wish to put in place a policy that outlines who these advisors are to provide potential Complainants information they would need to determine is they need to hire an outside advisors. Potential sources of advisors could be members of your Title IX department, counselors, or volunteer law students.

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Resolution

ii. The Decision Maker(s) bases all conclusions by examining all evidence from the investigation and the hearing. Their conclusion is based on the [standard of evidence] standard: If [explanation of standard], then Respondent will be found responsible for violating this policy.

The new regulations allow for a choice between two standards: "Preponderance of the Evidence" or "Clear and Convincing." Your choice will dictate how easy or hard it is to prove a case and has the ability to directly impact the outcome of any resolution. A clear and convincing standard will be harder to prove than a preponderance of the evidence standard. Insert the appropriate language in brackets below into the bracketed portion of the sentence above:

[preponderance of the evidence] standard: If [the evidence indicates that it is more likely than not that Respondent committed the alleged act(s)], then the Respondent will be found responsible for violating this policy.

[clear and convincing] standard: If [it is highly and substantially more likely to be true than untrue that Respondent committed the alleged acts(s)], then the Respondent will be found responsible for violating this policy.

Whichever standard your university chooses for use in the formal resolution process must be the same regardless of if the respondent is a student, staff, or faculty member.

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Resolution

iv. If the Respondent is found responsible for violating this policy, the Decision Maker will consult with _____ in order to determine the corrective actions and/or sanctions to resolve the case. Any such corrective actions and/or sanctions will be outlined in the Decision Maker(s)'s written decision.

You may wish your Decision Maker(s) to consult with any number of university officials, such as the Title IX Coordinator, Dean of Student Services, University President, or the respondent's supervisor. This could also be dictated by the individual circumstances, such as having it depend on if the respondent is a student or faculty/staff member. In this case, we recommend "consult with any appropriate individuals."

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V. APPEALS PROCESS

A. If either party disagrees with the outcome of the Decision Maker(s)'s determination, they may file a written appeal with the Title IX Coordinator within ten days of receiving the Decision Maker(s)'s written decision.

The time frames provided here are recommended to promptly resolve cases, however they may be extended or shortened to meet your university's expectations and standards.

B. Appeals may be filed due to:

i. A procedural irregularity that affected the outcome.

ii. New evidence being discovered that was not reasonably available at the time of the determination or dismissal.

iii. A conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter of the Investigator or investigator(s), or decision-maker(s).

These are the grounds required by the regulations. Your university may wish to expand this list to include additional grounds for appeal, provided that they apply equally to all parties.

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V. APPEALS PROCESS

C. [Identify the Appeal Decision Maker] will examine all evidence in order to determine if the appeal has merit. The [Appeal Decision Maker] will make an unbiased objective conclusion as to the appeal's merit and issue a written decision describing the result of the appeal and the rationale for the result; and will provide the written decision simultaneously to both parties.

The decision maker for the appeals process should be identified, but cannot be the Title IX Coordinator, the investigator who handled the investigation, or the Decision Maker(s).

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Presented by Don Lawless

KEY TAKEAWAYS & DISCUSSION

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Key Takeaways

- No longer a safe harbor, now required by law
- Only if actual knowledge in a controlled area in the US.
- Redefine sexual harassment (severe *and* pervasive)
- Lower evidentiary standard
- Increase due process protections for the accused.
  - Investigations—notice requirements and evidence sharing
  - Hearings—with cross-examination
- Enlarge Title IX department
  - No single investigator
  - No conflicts

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NEXT UP: INVESTIGATOR TRAINING & DECISION MAKER/ADVISOR TRAINING

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Next Up in our Title IX Compliance Program

Investigator Training and Decision Maker/Advisor Trainings

- **Description**: Training for investigators, decision makers & advisors
- **Date**: Wednesday, August 12, 2020, 9 a.m. – 4 p.m.
- **Program Details**:
  - 1. Morning Session - Training on Investigation of Title IX Complaints under the revised regulations
    - Overview of the Title IX changes
    - Train investigators on their roles under Title IX
    - Hypothetical fact scenario relating to investigating a complaint under the new regulations
  - 2. Afternoon Session – Training Session on Title IX Hearings for Decision Makers and Advisors
    - Train decision makers & advisors on their roles under Title IX
    - Further training through a mock hearing

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QUESTIONS?

Submit through the chat window!

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THANK YOU FOR ATTENDING!

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