



THE UNIVERSITY OF ARIZONA
GLOBAL CAMPUS

“Transition” Title IX

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General Precepts: Response & Prevention

- 2020 Amendments: Specific, legally binding steps that a school **MUST** take in response to notice of alleged sexual harassment
- **BUT** a school is permitted to take steps in response to reports of sexual harassment that go beyond required steps...
- **AND** Title IX law goes beyond the area of sexual harassment!
 - **DISCUSS** 1) other sexual misconduct, 2) other discrimination regarding sex/gender, and 3) other misbehavior under code of conduct...did OCR misspeak? What does that mean for us?
- 2020 Amendments addressed **RESPONSE** but 2021 Guidance also emphasizes **PREVENTION**



Sexual Harassment: What...

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- (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
- (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\(a\)\(30\)](#).



...and Alleged Sexual Harassment

- Must address sexual harassment that is alleged
- That which could constitute sexual harassment
 - Ask: If the alleged facts were true...



...and Whether?

- Who can describe the “effective denial” test under the “unwelcome conduct” prong of the sexual harassment definition 😊?
- Effective denial of right to equal access to educational program or activity...means what?
- Examples
- Me: Ignore! Don’t limit complaints because of this.
- Why?
 - Doesn’t have to have happened yet; no concrete injury; does not need to deny total (or any particular percentage of) educational access



...and Where?

- 2020 Amendments apply to reports of sexual harassment in educational programs and activities in the US, including buildings and remote learning platforms/online/etc.
- “Off- campus” if there is “substantial control”: Don’t confuse with Clery, Clery geography, and the fact that we are currently “exempt” from Clery!
- Substantial control over Respondent *and* context
- YOU must be able to accurately identify situations that require a response – it says this in the Guidance.
- Employees as well as students!
- Fact specific; examples; questions



Notice: Who “Hears” for the School?

- School must respond when notice is received by:
 - Title IX Coordinator
 - Another official who has authority to institute corrective measures
- NOT all of those required to report are such officials
- This is fact specific and OCR gives no examples
- OCR encourages schools to:
 - Expressly designate specific employees as such officials
 - Inform students of that designation
- Notice must be “actual”, but can be through any means



More on Response

- General Principle: School must respond promptly in a manner that is not deliberately indifferent
- Specifically:
 - Title IX Coordinator (note this!) must promptly contact Complainant to:
 - Discuss availability of supportive measures
 - Explain process for filing formal complaint
 - If formal complaint is filed by Complainant or Coordinator, school must:
 - Offer supportive measures
 - Follow IX Grievance Procedure



BONUS Question!

What is the main difference between supportive measures and post-finding remedies?



Formal Complaints

Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment.

At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.

A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator and by any additional method designated by the recipient.

“Document filed by a complainant” means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.

Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party but must comply with all requirements.



More (Hard!) BONUS Questions

1. Under what circumstances would a school be required to accept a formal complaint from a non-student Complainant?
2. Under what circumstances would a Title IX Coordinator file a formal complaint? When may they and when must they?
3. Under what circumstances may a school address reports of sexual misconduct involving a non-student Complainant, using its code of conduct?
4. Under what circumstances must a school take action when a Respondent is no longer a student?
5. Under what circumstances must a school dismiss a formal complaint from a non-student?



Supportive Measures Revisited

Supportive measures means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.

- Such measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.
- Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. [Emphasis added.]
- The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures.



And...

- The Title IX Coordinator (note!) must contact the Complainant promptly to discuss supportive measures...
- Whether or not a formal complaint is filed.
- School must consider Complainant's wishes...
- But may not unreasonably burden the other party.
- **Each case is unique and fact specific!**



Removals

- ***Emergency removal***
 - Nothing precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis
 - provided that the recipient
 - undertakes an individualized safety and risk analysis
 - determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal
 - and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal.
- ***Administrative leave***
 - Nothing precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process.
- **Must consider disability law!**



Presumptions & Timeframes

- Respondent is not responsible; Complainant is not lying
- Reasonably prompt time frames for investigation
- No open-ended time frames
- Balance with fairness and accuracy
- Must follow school's own process, including published time frames, with “good cause” delay
- Old “60 day rule” is permitted but not required



Everybody's Favorite – Hearings First, Cross-examination

- Each party's advisor must be permitted to ask other party and witnesses
 - All **relevant** questions
 - Follow-up questions
 - Those challenging credibility
- Questions not permitted
 - Regarding prior sexual behavior (except?)
 - Duplicative/repetitive
 - Regarding medical or mental health records (unless consent)
 - Regarding other privileged records (unless consent)



Advisors

- Must be advisor and not party asking questions
- School must provide advisor if needed
- Interesting: Advisors must be provided for other parts of grievance process, but at hearing only for cross-examination (me – no)
- Interesting: Party chooses advisor and may be an attorney. But, if provided, can party insist on attorney? (me – yes)



BONUS Questions

- Are parties and witnesses required to submit to cross examination or to participate in the hearing?
- Can a school determine its own rules regarding how the hearing is conducted? Including limits on evidence? Rules of decorum?
- What other privacy laws apply to the process?
- What is the “required pause”?



Evidence for the Decision Maker

- Answers to cross-examination need not recount every specific detail of an incident in sequence
- Cannot rely on statement of party or witness if there is no cross-examination
- But, also cannot draw any inference from no-participation in process or cross-examination



Bonus Questions

- May a decision maker rely on, for example, a party or witness statement within a police report?
- May a decision maker rely on a non-statement piece of evidence (for example, a video) if a party or witness does not submit to cross –examination? Texts or emails?
- What if there is a statement by multiple parties?
- What is the evidentiary difference between refusal to answer the decision maker and refusal to answer questions in cross-examination?



Last, but important!

- Informal Resolution (not...)
- Retaliation
- Amnesty



Questions?

