

GRAND RIVER | SOLUTIONS

Title IX in a Post Regulatory World

Day One

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Meet Your Facilitators



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Chantelle Cleary is a nationally-recognized subject-matter expert in Title IX and related fields. She has more than 10 years of experience in the investigation and adjudication of sexual and interpersonal violence. She lectures extensively at universities and conferences throughout the U.S. on Title IX, VAWA, harassment, and implementation of best and emerging practices. Prior to joining Grand River Solutions, Chantelle served as the Director for Institutional Equity and Title IX at Cornell University, and before that as the Assistant Vice President for Equity and Compliance and Title IX Coordinator at the University at Albany. In these roles, she provided direct, hands-on experience in the fields of Title IX, civil rights, employment law, and workplace and academic investigations. Her responsibilities included focusing on diversity efforts, sexual assault prevention and training, affirmative action, and protecting minors on campus.



About Us

Grand River Solutions provides Title IX, equity, and Clery Act consulting services. Together, our experts have decades of direct, on-campus experience at both small and large, public and private institutions. This practical expertise derived from years of hands-on experience enables our team to offer customized solutions unique to your educational institution's needs. Grand River has a suite of creative, cost-effective and compliant solutions to help schools meet their needs in innovative ways.

Today's Agenda

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A Whole New Word: The Post
Regulatory Application of Title IX

05

Conducting the Investigation

02

Reports of Misconduct and
the Post-Regulatory
Requirements for Response

06

Evidence

03

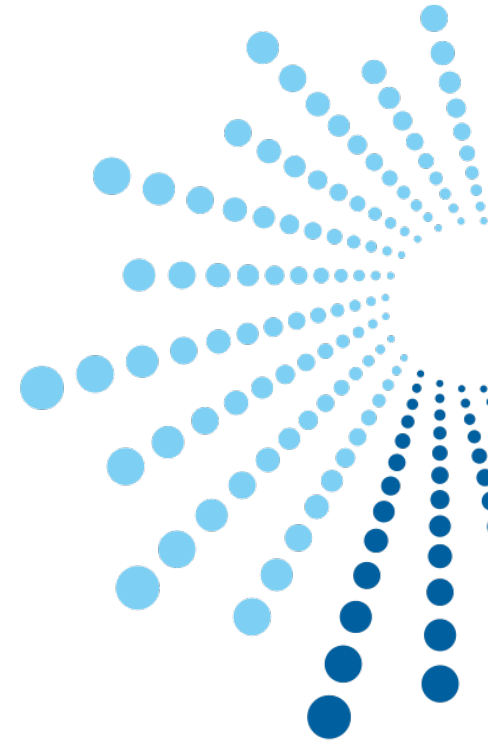
Investigations Post
Regulations

07

The Investigation Report

04

The Investigator



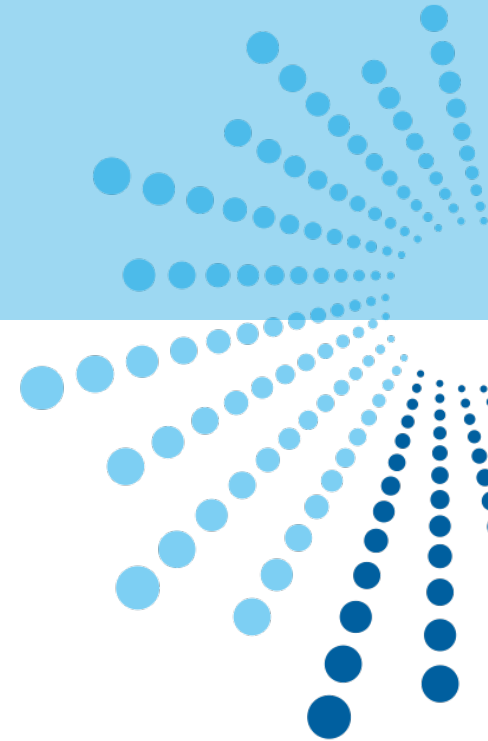


A Whole New Word: The Post Regulatory Application of Title IX

Narrowed jurisdiction and expansive procedural requirements

01

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Title IX of the Education Amendments Act of 1972

"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."

Title IX Applies to All Forms of Sex Discrimination

- Sexual Harassment
- Achievement Awards
- Athletics
- Benefits
- Financial Aid
- Leaves of absence and re-entry policies
- Opportunities to join groups
- Pay rates
- Recruitment
- Retention Rates
- Safety
- Screening Exams
- Sign-on Bonuses
- Student and Employee Benefits
- Thesis Approvals
- Vocational or College Counseling
- Research opportunities

The May 2020 Title IX Regulations Cover A Narrow Scope of Title IX

- Sexual Harassment
- Achievement Awards
- Athletics
- Benefits
- Financial Aid
- Leaves of absence and re-entry policies
- Opportunities to join groups
- Pay rates
- Recruitment

**Conduct Constituting
Sexual Harassment
as Defined in
Section 106.30**

Section 106.30: Sexual Harassment

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).

Title IX Application Post May 2020 Regulations

**All Forms of Sex
Discrimination, Retaliation**

106.30 Sexual Harassment:

- Hostile Environment
- Quid Pro Quo
- Sexual Assault
- Dating/Domestic Violence
- Stalking

Title IX Application Post May 2020 Regulations

- Hostile Environment Sexual Harassment
- Quid Pro Quo
- Sexual Assault
- Dating/Domestic Violence
- Stalking



- Campus Program, Activity, Building, and
- In the United States, and
- Complainant is a member of the community, and
- Control over Respondent



Required Response:
Section 106.45
Procedures

First Question

What Happened?

Does the Complaint Allege:

1. sexual harassment in which the harassment was so severe and pervasive that it denied the complainant equal access to an educational program or activity, or denied the employee the equal ability to continue their work;
2. Dating Violence, Domestic Violence, Stalking, or Sexual Assault;
3. A complaint of quid pro quo sexual harassment by an employee respondent against a student.



Second Question

Where Did the Conduct
Occur?

Did the conduct occur:

1. The incident(s) occurred at school, within the United States;
2. The incident(s) occurred as part of a recognized program in a building under the school's control, and within the United States;
3. The incident(s) was part of one of the school's programs or activities, such as part of a field trip or team athletic event, and within the United States.



Third Question

Who Experienced the
Conduct?

Is the Complainant:

1. a student (whether applicant, admitted, or currently enrolled); or
2. An employee (applicant, hired but not yet working, or employed),
3. Or someone who is otherwise still accessing or attempting to access a university program or activity, within the United States.



Fourth Question

Is the Respondent:

1. A student (whether applicant, admitted, or currently enrolled), or
2. An employee (applicant, hired but not yet working, or employed).
3. Someone else that the institution may have control over (ie, a contractor, an alum, or a vendor)

Who is the Accused?





Apply the 106.45
Procedures

**What do we do
about misconduct
that does not fall
within this narrow
scope?**

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**Apply other applicable
institutional policy or
procedures.**

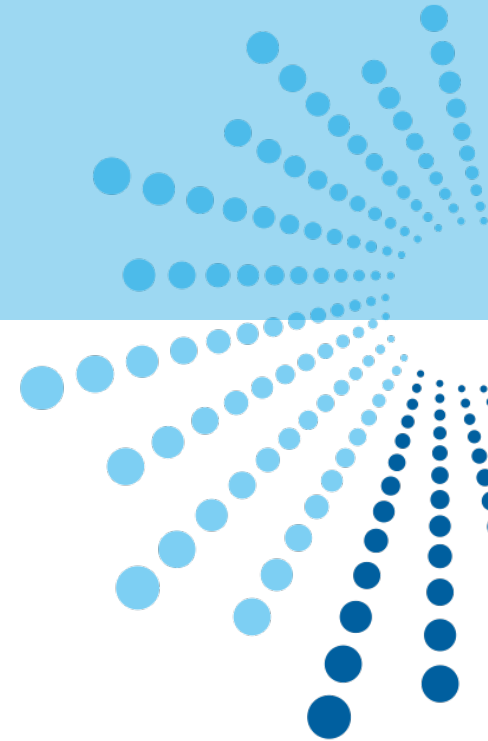


Reports of Misconduct and the Post-Regulatory Requirements for Response

Actual Knowledge, Report Response, Initial Assessments, and Supportive Measures

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First
Thing's
First...

Notice to College/University

Outreach/Response from Title IX Coordinator

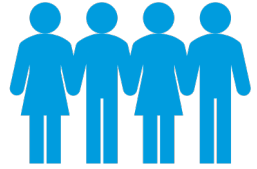
Support Measures, whether or not Formal Complaint is
filed

How to File

Options

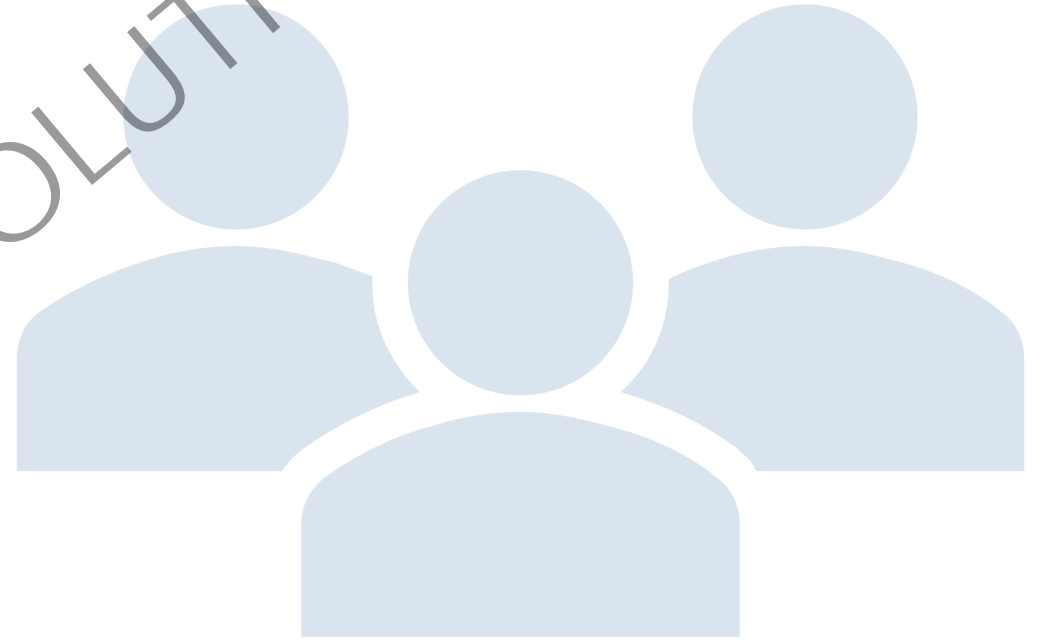
Actual Notice: A Narrowed Scope of Institutional Responsibility

- Institution **must** respond when it has:
 - “Actual knowledge”
 - When “an official of the recipient who has authority to institute corrective measures” has notice, e.g., Title IX Coordinator
 - of “sexual harassment” (as newly defined)
 - that occurred within the school’s “education program or activity”
 - “includes locations, events, or circumstances over which the recipient exercised substantial control” over the respondent and the context in which the sexual harassment occurred
 - Fact specific inquiry focused on control, sponsorship, applicable rules, etc.
 - against a “person in the United States” (so, not in study abroad context)



Responsible Employees

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Mandatory Response

1. Discuss support measures

2. Explain that support measures are available without filing formal complaint

3. Explain options for resolution and how to file

How to Proceed?



Supportive Measures

Interim, not
forever

Interim also
includes “before
investigation”

Equitable ≠
Equal



Not Punitive?

- No default, always case-by-case
- Right to challenge

Emergency Removal of Student

- High threshold
- Not a determination of responsibility
- Whether or not grievance is underway
- Individualized
- Immediate threat (physical)
- Opportunity to challenge



Mandatory Investigation

- Complaint filed, SIGNED, requests investigation
- Coordinator files, SIGNS, starts investigation



But Do You **START** the Investigation?

Does it meet the
elements? If not,
DISMISS

Trying to do some
pre-investigation
to identify
respondent

Dismissing complaints

MANDATORY

- Not sexual harassment
- Did not occur in program or activity
- Not against person in the U.S.

DISCRETIONARY

- Complainant withdraws complaint
- Respondent no longer enrolled/employed
- School unable to collect sufficient info

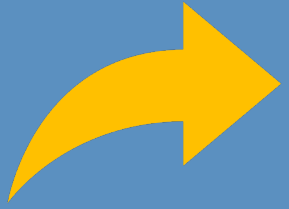
Complaint Resolution

Informal Resolution

- Formal Complaint Required
- Parties must agree
- Can withdraw from process
- Alternate Resolution/Mediation
 - Be mindful of Maryland Law
- No appeal

Formal Resolution

- Investigation and Adjudication process in compliance with Section 106.45



Investigations Post Regulations

03

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Procedural requirements for Investigations

Notice to both parties

Equal opportunity to
present evidence

An advisor of choice

Written notification of
meetings, etc., and
sufficient time to
prepare

all evidence, and 10
days to submit a
written response to
the evidence prior to
completion of the

Report summarizing
relevant evidence and
10 day review of
report prior to hearing



Notice Requirements

- Notice of the allegations, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include:
 - the identities of the parties involved in the incident, if known,
 - the conduct allegedly constituting sexual harassment under § 106.30,
 - and the date and location of the alleged incident, if known.
- The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.
- The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section.
- The written notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process



Advisor of Choice

- The advisor can be anyone, including an attorney;
- Institutions cannot place restrictions on who can serve
- No training required
- Institution must provide advisor for the purposes of cross examination, only.



Written Notification Meetings and Sufficient Time to Prepare

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Equal Opportunity to Present Evidence

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Evidence Review

- Parties must have equal opportunity to inspect and review evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint
- 10 days to provide a written response

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Investigative Report and Review

- After reviewing and considering the comments on the evidence, the investigator will generate a report that summarizes the relevant evidence.
- That report will be shared with the parties and they will have 10 more days to comment

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“Directly Related” and “Relevant Evidence”

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Directly Related Evidence

- Regulations do not define “Directly Related” Evidence
- Preamble states it should be interpreted using its plain and ordinary meaning.
- Term is broader than:
 - “all relevant evidence” as otherwise used in Title IX regulations, and
 - “any information that will be used during informal and formal disciplinary meetings and hearings” as used in Clery Act
- Includes evidence upon which the school does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source

“Relevant” Evidence

- The Department declines to define “relevant”, indicating that term “should be interpreted using [its] plain and ordinary meaning.”
- See, e.g., Federal Rule of Evidence 401 Test for Relevant Evidence:
 - “Evidence is relevant if:
 - (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
 - (b) the fact is of consequence in determining the action.”

Evidence That is Not “Relevant”

- “Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant,
 - unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
 - if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.”
- “require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.”
- Physical and mental health records and attorney-client privileged communications would fit within scope of this prohibition

Who Decides?

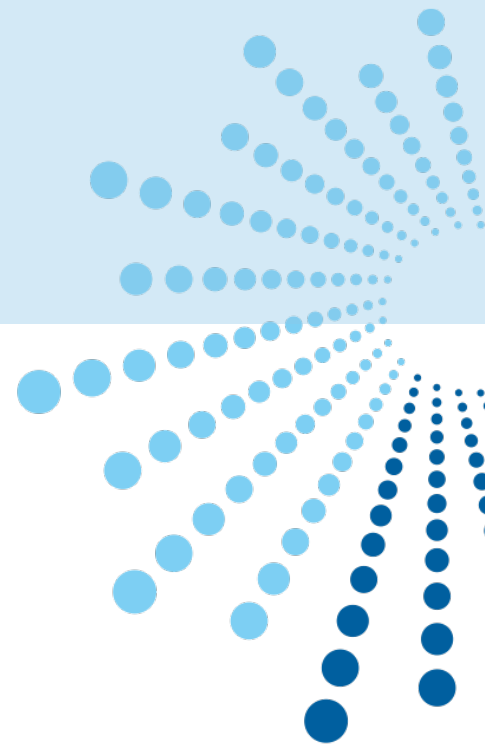
- Department emphasizes repeatedly in Preamble that investigators have discretion to determine relevance
 - Subject to parties' right to argue upon review of "directly related" evidence that certain information not included in investigative report is relevant and should be given more weight
- Investigators will have to balance discretionary decisions not to summarize certain evidence in report against:
 - Each party's right to argue their case, and
 - Fact that decisions regarding responsibility will be made at hearing, not investigation stage



The Investigator

04

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The Investigator



Can be the Title IX Coordinator, although that is disfavored



Must be trained in accordance with the requirements in the regulations



Must conduct the investigation in an impartial manner, avoiding bias/pre-judgment, and conflicts of interest

Impartiality: Avoiding Prejudgment and Bias

“The Department’s interest in ensuring impartial Title IX proceedings that avoid prejudgment of the facts at issue necessitates a broad prohibition on sex stereotypes so that decisions are made on the basis of individualized facts and not on stereotypical notions of what “men” or “women” do or do not do.”

Impartiality: Avoiding Prejudgment and Bias

- Practical application of these concepts in investigations:
 - Do not rely on cultural “rape myths” that essentially blame complainants
 - Do not rely on cultural stereotypes about how men or women purportedly behave
 - Do not rely on gender-specific research data or theories to decide or make inferences of relevance or credibility in particular cases
 - Recognize that anyone, regardless of sex, gender, gender identity or sexual orientation, can be a victim or perpetrator of sexual assault or other violence
 - Avoid any perception of bias in favor of or against complainants or respondents generally
 - Employ interview and investigation approaches that demonstrate a commitment to impartiality

Impartiality: Avoiding Bias

- Department also rejected commenters' arguments that individuals should be disqualified from serving as investigators because of past personal or professional experience
- "Department encourages [schools] to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased" WHILE
- "exercising caution not to apply generalizations that might unreasonably conclude that bias exists (for example, assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents"

Impartiality: Avoiding Conflicts of Interest

- Commenters argued that investigators and hearing officers employed by schools have an “inherent conflict of interest” because of their affiliation with the school, so Department should require investigations and hearings to be conducted by external contractors
- Department noted that some of those commenters argued that this resulted in bias against complainants, and some argued that this resulted in bias against respondents
- Department’s response:
 - Department’s authority is over schools, not individual investigators and other personnel, so Department will focus on holding school’s responsible for impartial end result of process, without labeling certain administrative relationships as per se involving conflicts of interest

Impartiality: Avoiding Prejudgment, Bias, and Conflicts of Interest

Bottom line:

- Follow facts of every individual case
- Investigate in manner that will not allow even a perception of prejudice or bias for or against any party