



# TITLE IX

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Session 1: Title IX New Regulations, Becoming a Team, UMS Policy Overview

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# Agenda & Learning Outcomes

- New Regulations Overview
- UMS Policy Overview
- Becoming a Team
- Understand Title IX Regulations (08/14/2020)
- Learn the ins and outs of the new UMS Policy
- Ability to utilize colleagues across the system as a Title IX Pool Team
- Explore ways we can proactively discuss these changes with out colleagues and students

# Regulations Changes - Summary of Major Provisions

- Notice to the School
- Definition of Sexual Harassment for Title IX Purposes
- Sexual Harassment Occurring in a School's Education Program or Activity
- Accessible Reporting to the Title IX Coordinator
- Mandatory Reporting Response Obligations
- Mandatory Reporting Response Obligations Definitions
- Grievance Process
- Institutional List of Musts
- Investigations
- Dismissing Cases
- Hearings
- Standard of Evidence & Written Determination
- Appeals
- Informal Resolution
- Prohibited Retaliation

# Notice to the School

- Final rule allows institutions to choose whether they wanted to have mandated reporting for all employees or to designate some employees to be confidential resources – that would not trigger a report to the Title IX office.
- UMS *will continue* to have all faculty and staff be mandated reporter's on all issues of interpersonal violence & harassment based on sex/gender.
- Notice to a Title IX Coordinator, or to an Official with Authority to institute corrective measures on the institutions behalf, trigger an institution to respond.

# Definition of Sexual Harassment for Title IX Purposes

- The final rule defines three types of sexual harassment misconduct on the basis of sex:
  1. Any instance of *quid pro quo* harassment by a school employee\*
  2. Any instance of sexual assault (defined by Clery), dating violence, domestic violence, or stalking (defined by VAWA)\*
  3. Unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it denies a person equal educational access (*Davis* Definition)

\*The final rule notes that incidents of *quid pro quo* harassment and the Clery/VAWA offense ***do not*** have to be evaluated for severity, pervasiveness, offensiveness, or denial of equal education access, because such misconduct sufficiently deprives a person of equal access.

# Sexual Harassment for Title IX Purposes

- Supreme Court's *Davis* definition: offensive conduct that is severe & pervasive & objectively offensive.
- Schools must balance this with First Amendment and Academic Freedom rights when the unwelcome sex-based harassment consists of speech or expressive conduct.
- Under Title VII – workplace standard is severe or pervasive conduct creating a hostile environment.
- First Amendment concerns differ in educational and workplace environments. Title IX provides protections for appropriate educational institutions where students are learning and employees are teaching.
- Free speech and academic protections apply to students, teachers, faculty, and others, even when the speech or expression is offensive.

# Sexual Harassment Occurring in a School's Education Program or Activity

- Applies to persons in the United States and Federally funded education programs or activities.
- Schools must respond to sexual harassment when it occurs in the United States and in the school's education program or activity.
- Education program or activity includes locations, events, or circumstances over which the school exercised substantial control over both the respondent and the content in which the sexual harassment occurred. Includes any building owned or controlled by an officially recognized student organization (ex: Greek Life)
- If these criteria are not met – then we follow our traditional SCC and EOCP

# Accessible Reporting to the Title IX Coordinator

- Expands institutions obligation to ensure community knows how to report to the Title IX Coordinator
- Must have a designated Title IX Coordinator to comply with Title IX responsibilities
- In addition to notifying students and employees of the contact information for the Title IX Coordinator institutions must also notify applicants for admission and employment, and unions. Must also provide name or title, office address, email address, & telephone number for Title IX Coordinator
- Institution must prominently display require Title IX Coordinator contact information on their website. (UMS TIX website coming soon)



# Accessible Reporting to the Title IX Coordinator Cont'd

- Any person may report sex discrimination, including sexual harassment (even if they are not the victim of the alleged conduct)
- They must be able to report, using the contact for the Title IX Coordinator and the report must be received by the Title IX Coordinator
  - ✓ in person
  - ✓ by telephone
  - ✓ by email
  - ✓ by mail
  - ✓ at anytime 24/7 and by any other means available

# Mandatory Reporting Response Obligations

- Institutions must respond promptly, in a manner that is not deliberately indifferent
- Title IX Coordinator must promptly contact the complainant confidentially to discuss:
  - Supportive measures
  - Availability of supportive measures even if they don't want to file a complaint
  - Explain the process of filing a formal complaint
- A complaint (grievance) process must be followed before imposing any disciplinary sanctions or other actions that are not supportive measures against the respondent
- Requires investigation of in any formal Title IX complaint (can be filed by the complainant or Title IX Coordinator)
- Complainant's wishes to pursue a formal complaint must be respected unless the Title IX Coordinator determines it necessary

# Mandatory Reporting Response Obligations Cont'd

- Institutions may not restrict the rights protected under the U.S. Constitution, including the First, Fifth, and Fourteenth Amendments, when complying with Title IX
- An institution **must dismiss allegations for the purpose of Title IX** if:
  - The complaint does not meet the definition of sexual harassment
  - Did not occur in the school's education program or activity
  - Did not occur in the United States

# Mandatory Reporting Response Obligations

## Definitions



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

# Mandatory Reporting Response Obligations Definitions Cont'd

- **Formal Complaint** – document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting an investigation of the allegation of sexual harassment



# Formal Complaint Cont'd

- At time of filing a formal complaint – complainant must be participating in or attempting to participate in the educational program or activity of the school
- “Document filed by a complainant” means a paper document or electronic submission that contains the complainant’s physical or digital signature or otherwise indicates that the complainant wishes to file a formal complaint
- When the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or a party during the grievance process – must remain free from bias and conflicts

# Mandatory Reporting Response Obligations Definitions Cont'd

- **Supportive Measures** – are individualized services reasonable available that are non-punitive, non-disciplinary, and not unreasonable burdensome to the other party while allowing for equal educational access, safety protections, and/or to deter sexual harassment
- Supportive measures and remedies are based on what is reasonable in light of circumstances, is not used to second guess the institution's disciplinary decisions, but requires the institution to offer supportive measures, and provide remedies to a complainant whenever a respondent is found responsible

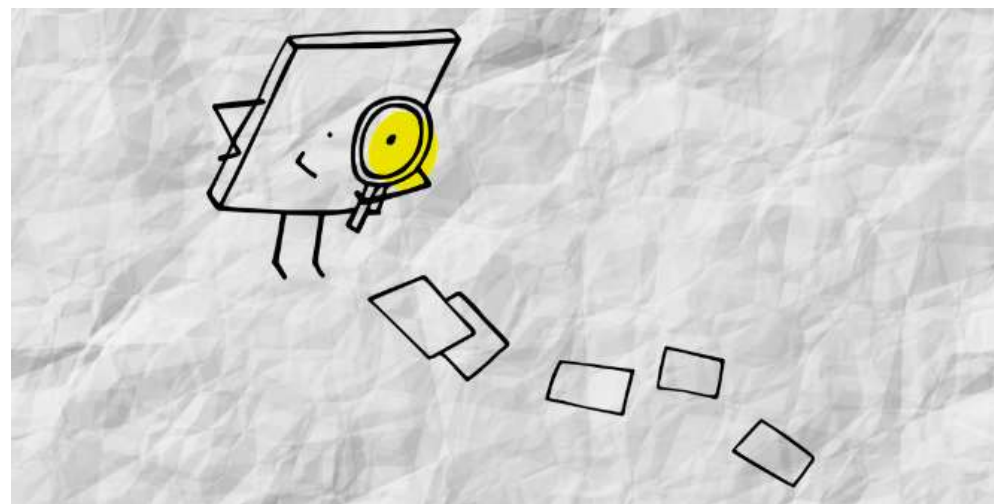
# Grievance Process

- Must be consistent and transparent for resolving formal complaints of sexual harassment
- Equal treatment of both parties – not imposing disciplinary sanctions without following the grievance process
- Remedies are required to be provided to the complainant when a respondent is found responsible, must provide equal access to education and may include same/continued supportive measures
- However, remedies don't need to be non-disciplinary or non-punitive and need not avoid burdening the respondent
- Presumption that a respondent is not responsible for the alleged conduct until a determination is made at the conclusion of the grievance process



# Grievance Process Cont'd

- Requires objective evaluation of all relevant evidence, inculpatory and exculpatory, and avoid credibility determination based on a person's status as a complainant, respondent, or witness
- Example of Inculpatory evidence
- Example of Exculpatory evidence
- Grievance Process must not use, rely on, or seek disclosure of information protected under a legally recognized privilege, unless person holding the privilege, has waived their right



# Investigations



- Institution has the burden of gathering evidence, not the parties
- Must provide equal opportunity for parties to present facts and expert witnesses (other inculpatory and exculpatory evidence)
- Must not restrict parties for discussing allegations or gathering evidence
- Same opportunity to select an Advisor of their choice, can be an attorney

# Investigations Cont'd

- Must send written notice of investigative interviews, meetings, or hearings
- Must send parties, advisors, evidence directly related to allegations in electronic or hard copy format – provide at least 10 days for inspection, review, and respond to evidence
- May consolidate formal complaints where the allegations arise out of the same fact
- Must protect the privacy of a party's medical, psychological (or other similar) records by stating that the school cannot use the records unless the party's voluntarily gives written consent to do so



# Dismissing Cases

- **Must dismiss** allegations if:
  - Conduct does not meet the Title IX Sexual Harassment definition(s)
  - Did not occur in a school's education program or activity
  - Did not occur against a person in the United States
- Schools may, at their discretion, dismiss a formal complaint or allegation if the complainant informs the Title IX Coordinator, in writing, that they wish to withdraw the formal complaint allegations therein, if the respondent is no longer enrolled or employed by the institution, or if specific circumstances prevent the school from gathering sufficient evidence to reach a determination
- Must give parties written notice of a dismissal (mandatory or discretionary) and the reason(s) for the dismissal

# It's Time for a Comfort Break!



# Hearings

- Requires a live hearing with “cross examination”
- Decision-maker must permit each party’s advisor to ask the other party and any witnesses all relevant questions, follow-up questions, including challenging credibility
- Questions must be conducted directly, orally, and in real time by the party’s advisor of choice (NEVER by the party personally)
- Allow for entire hearing to be conducted with technology enabling the parties to see and hear each other; parties can be located in separate rooms; live hearings can also be conducted with all parties physically present in the same geographic location
- Only relevant cross-examination questions and other questions may be asked of a party or witness

# Hearings Cont'd

- Prior to the party answering the question the decision-maker **MUST** first determine:
  - Whether the question is relevant
  - Then explain to the party's advisor asking the questions any decision to exclude a question as not relevant
- If a party does not have an advisor present at the live hearing, the school must provide, without fee or charge to that party and advisor of the school's choice (can be, but is not required to be an attorney) to conduct cross-examination on behalf of that party

# Hearings Cont'd

- If a party or witness does not submit to cross-examination at the live hearing, the decision-maker cannot:
  - Rely on any statement of that party or witness in reaching a determination regarding responsibility
  - Provided, however that the decision-makers(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions
- Institution's must create an audio or audiovisual recording, transcript, of any live hearing



# Standard of Evidence & Written Determination

- Decision-maker can't be the same person as the Title IX Coordinator or the Investigator
- They must issue a written determination regarding responsibility with
  - Findings of fact
  - Conclusions about whether the alleged conduct occurred
  - Rationale for the result as to each allegation
  - Any disciplinary sanctions imposed on the respondent
  - Whether remedies will be provided to the complainant
- The written determination must be sent simultaneously to the parties along with how to file an appeal



# Appeals

- Must offer both parties an appeal from a determination of responsibility
- Must offer in situations in which a school's dismissal of a formal complaint or any allegations therein, on the following basis:
  - ✓ Procedural irregularity that affected the outcome of the case
  - ✓ Newly discovered evidence that could affect the outcome of the matter
  - ✓ Title IX Team member had a conflict of interest or bias that affected the outcome of the matter
- May offer an appeal equally to both parties on additional bases

# Informal Resolution



- Allowable at the institutions discretion
- Facilitators conducting informal resolutions must be well trained
- Ability to offer and facilitate informal resolution options, such as mediation, or restorative justice, so long as:
  - Both parties give voluntary, informed, written consent to attempt informal resolution

# Informal Resolution Cont'd

- Institutions may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right, to a formal investigation and adjudication of formal complaints of sexual harassment.
- **An informal resolution can only be offered once a formal complaint is filed.**
- At anytime prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to a formal complaint
- **Institutions must not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.**

# Retaliation Prohibited

- Charging an individual with code of conduct violations that do not involve sexual harassment, but arise out of the same facts or circumstances as a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX constitutes retaliation
- Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a Title IX grievance proceeding does not constitute retaliation; however, a determination regarding responsibility, alone, is not sufficient to conclude that any party made a bad faith materially false statement



# Retaliation Prohibited Cont'd

- Institution must keep confidential the identity of complainants, respondents, and witnesses, except as may be permitted by FERPA, as required by law, or as necessary to carry out Title IX proceedings
- Complainants alleging retaliation may be filed according to the institutions prompt and equitable grievance procedures
- The exercise of rights protected under the First Amendment does not constitute retaliation

# Institutional List of Musts

- Must post materials used to train Title IX personnel on their websites (UMS website coming soon – will link to every campus)
- Describe a range, or list or possible remedies a school may provide a complainant and disciplinary sanctions a school might impose if a finding of responsibility is issued
- Statement that the institution used the Preponderance of the evidence standard for all formal complaints of sexual harassment (including cases against employees and faculty)
- Any other provisions, rules, or practices other than those required under the new regulations, as part of its grievance process for handling formal complaints of sexual harassment, must be applied equally to both parties

# Becoming a TEAM/OWA (Officials with Authority)

## For Students

- Title IX Coordinator
- Equal Opportunity Director
- Deputy Title IX Coordinators
- Investigators
- Advocates
- Decision Makers
- Chairs
- Student Conduct Code Committee
- Hearing Host

## For Staff, Faculty, Etc.

- Title IX Coordinator
- Equal Opportunity Director
- Deputy Title IX Coordinators
- Equal Opportunity Officers
- Investigators
- Advocates
- Human Resources
- Responsible Administrators
- Hearing Host



# TEAM Training Required

- Must be free from conflicts of interest or bias for or against either parties
- Must know the definitions in the final rule (just covered them in previous slides)
- Know how to conduct an investigation and the grievance process including hearings, appeals, and information resolution processes, as applicable, and how to serve impartially, including avoidance of prejudgment
- Training on Zoom or other technology used during live hearing
- Training on issues of relevance, including how to apply the rape shield protections provided for complainants only
- All time frames for conclusion of the grievance process, including appeals and informal resolutions, with allowance for short-term, good cause delays or extensions

# It's Time for a Comfort Break!



# UMS Policy Overview