

# Title IX Investigation and Adjudicator Training

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University of Maine System

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# Agenda: What We Will Cover

- Title IX: New Regulations and Guidance
- How to conduct an investigation and grievance process, including a live hearing with advisor-led cross-examination.
- How to serve impartially, including avoiding prejudgments of facts, conflicts of interest and bias.
- How to evaluate relevance and create an investigation report that fairly summarizes relevant evidence.
- How to make rulings on relevance, reliably assess credibility and weigh evidence, and write a final determination letter.
- How to conduct and review appeals.

# Title IX- New Regulations and Guidance

- Final Title IX Regulations went into effect on August 14, 2020
  - Not retroactive
  - Prior OCR Guidance rescinded
- U.S. Department of Education Office of Civil Rights Blog
- U.S. Department of Education Title IX Website
- September 4, 2020 OPEN Center Q&A Regarding the Department's Final Title IX Rule
- Court Jurisprudence

# Defining Sexual Harassment Under Title IX

Conduct on the basis of sex that satisfies one or more of the following:

- 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 (Quid Pro Quo);
- 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
- Sexual assault, dating violence, domestic violence, stalking and retaliation:
  - Penetration without consent
  - Fondling (touching of genitals, breasts, buttocks) for sexual gratification purposes

# Jurisdictional Scope Under Title IX

- Requirement to adopt a grievance procedure applies only to sex discrimination occurring against a person in the United States.
- **Education program or activity** includes locations, events, or circumstances over which the institution exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by an institution.

# Mandatory/Discretionary Dismissal Under Title IX

- Under the Final Rule, if alleged conduct would not constitute “sexual harassment,” did not occur within the University’s program or activity or did not occur in the United States the school **must** terminate its Title IX grievance process but can still proceed under the SCC/EO process.
- Under the Final Rule, the University *may* dismiss the complaint if the Complainant withdraws their formal complaint, the Respondent is no longer enrolled or employed by the University, or the circumstances would prevent the school from gathering sufficient evidence to reach a determination on the merits.

# Formal Complaints → Investigation

- Report v. “formal complaint.”
- Detailed written notice must be provided to parties sufficiently in advance of interview.
- Cross complaints.
- Consolidation of complaints.
- Title IX Coordinator signed complaints.
- Amended complaints & amended notice of allegations.

# Guiding Principles for Title IX Investigations and Grievance Processes

- If University has “actual knowledge” of sexual harassment, it must respond promptly in a manner that is not deliberately indifferent.
- Equitable treatment & process for parties.
- Burden of gathering evidence and burden of proof is on University, not parties.
- Equal opportunity to present witnesses, including experts, and provide inculpatory and exculpatory evidence.
- No “gag orders” on parties.



# Guiding Principles for Title IX Investigations and Grievance Processes

- Presumption that Respondent is not responsible until final determination is reached following a hearing.
- Conduct objective evaluation of all relevant evidence.
- Coordinators, investigators and decisionmakers cannot have a conflict of interest or bias.
- Promptly conduct investigations and grievance processes and document reasons for delay.
- Comply with confidentiality and privacy laws in conducting investigations and grievance proceedings.

# Guiding Principles for Title IX Investigations and Grievance Processes

- Parties and witnesses must receive timely notices sufficiently in advance of meetings and hearings.
- Parties have opportunity to review, respond to, and reference evidence that is “directly related” to the allegations even if not relied upon by investigator/decisionmaker.
- Parties may be accompanied to any meeting/hearing by advisor of choice and will be appointed an advisor for cross-examination if they do not have one.

# Guiding Principles for Title IX Investigations and Grievance Processes

- Investigators will not seek information or records protected by a legally held privilege (attorney/client, medical, or psychological records) without express, written consent of the party holding the privilege.
- Complainant's prior sexual history will not be explored except under limited exceptions.
- Credibility assessments will not be based on a person's status as a Complainant, Respondent or Witness.

# Advisor of Choice

- All parties have the right to an advisor of choice:
  - May be present at all meetings, interviews and proceedings, but cannot speak on behalf of the party except for at hearing.
  - Any restrictions on advisor participation must be applied equally to all parties.
  - Advisors receive copy of evidence and investigation report but are required to sign non-disclosure agreement.
  - During live hearing, advisor of choice or University-appointed advisor will conduct cross-examination of opposing parties.
  - Advisors will be required to follow rules of decorum.

# Conflict of Interest or Bias

- Parties have opportunity to challenge assignment of investigators/decision-makers for conflict of interest and bias.
- Investigators/decision-makers should recuse themselves if they cannot be impartial in a given case.
- Whether there is a conflict of interest or bias will be judged on an objective standard of whether a reasonable person would believe that conflict/bias exists.
- Bias/conflict of interest is a grounds for appeal.

# Conflict of Interest or Bias

- Investigators/decision-makers must not pre-judge the facts or hold a bias in favor/against complainants and respondents generally or in a particular case.
- Decisions must be based on evidence and the individual facts and circumstances presented in each particular case, not stereotypes, generalizations, or assumptions.
- Being a University employee, being a particular gender, past advocacy work in the field of sexual violence, statistical outcomes, filing a complaint in capacity as Title IX Coordinator does not necessarily establish bias or a conflict of interest.

# Conflicts of Interest or Bias

- Conflict of interest may be shown by relationship to parties or knowledge of particular facts that would pose conflict.
- Bias may be shown by:
  - Engaging in sex stereotyping attitudes and judgments such as that all complainants should be presumptively believed, that respondents are generally guilty, that only women experience sexual harassment, and that only men commit sexual harassment.
  - Inequitable treatment of parties in procedural rights afforded.
  - Failure to seek and analyze both inculpatory and exculpatory evidence.
    - Recall that regulations require a presumption of non-responsibility on the part of a Respondent.
    - Recall that it is the University's burden to prove and collect sufficient evidence to establish a violation, not the parties.

# How to Avoid Bias

- Recognize that anyone (regardless of sex, gender identity or expression, sexual orientation, race, color, religion, national origin, age, disability status) can be a Complainant or a Respondent.
- Do not make assumptions- seek clarification and try to understand the parties' perspectives.
- Use the parties' and the witnesses' words, not your own.
- Use inclusive language in your interviews and communications
- Be aware of your biases, known or implicit, and educate yourself to check against them and gain cultural competency.
- Beware of confirmation bias – rigorous search for evidence and open-minded exploration of motives and theories.
- Consider any plausible explanations of behaviors fairly and objectively with other evidence.



# Understanding Relevance

- Investigator has discretion to determine the relevance of evidence received. Decisionmaker has the discretion to determine the credibility and weight of relevant evidence.
- Evidence is relevant if it tends to prove or disprove an issue in the complaint:
  - Makes a material fact more or less probable than it would be without the evidence.
- Relevant evidence includes both “inculpatory and exculpatory” evidence.
- Evidence may be relevant even if it is sensitive, embarrassing or “prejudicial.”

# Understanding Relevance

## Evidence that *may* be relevant:

- Past sexual history between parties to prove consent.
- Past sexual history of Complainant to prove that a person other than the Respondent committed the alleged conduct.
- SANE exams, medical records if express, written consent is provided.
- Prior bad acts/ evidence of similar misconduct.
- Evidence of motive/ bias.
- Evidence that explores the credibility of a party/witness.

# Understanding Relevance

## Evidence that *may not* be relevant:

- Complainant's past sexual history unless limited exceptions met.
- Medical, psychological records/information unless valid written consent obtained.
- Information protected by a legally recognized privilege (attorney/client; psychologist, rape counselor) unless valid written consent obtained.
- Duplicative cross-examination questions.
- Evidence that does not tend to prove or disprove a material fact at issue.

# Privileged/ Health Records

- Ensure that the investigator does not access, consider, disclose, or otherwise use a party's records that are made or maintained by a health or mental health professional unless the investigator obtains voluntary, written consent to do so.
- Ensure that the investigator does not seek information that is protected by a legally recognized privilege unless the party waives the privilege.

# “Rape Shield” Exclusion

- Evidence of Complainant’s prior sexual behavior is not relevant unless:
  - Offered to prove that someone other than the respondent committed the alleged misconduct or;
  - Offered to prove consent from prior sexual behavior between the complainant and respondent.
- For example, prior sexual behavior may be relevant to explain:
  - Presence of a physical injury.
  - Pattern of communication/behavior between parties regarding consent.
- Prior sexual behavior is not relevant to explain:
  - General predisposition toward engaging in sexual activity.

# Consent

- Consider prior/post relationship history to understand total context and how consent communicated between parties.
- Consider both verbal and nonverbal means of communication in determining whether consent was given for particular sexual activity.
- Review sexual activity as a whole to understand total context.
- May be sufficient evidence of lack of consent to some acts, and not others.
- Consider objective circumstances of the sexual activity as well as the parties' subjective feelings about it.
- Consider circumstances of decision to disclose/report.
- Consent cannot be obtained by force, intimidation or coercion.



**Key inquiry:** What would reasonable person in Respondent's position have understood from other party's express words and actions as to whether valid consent was given?

# Effect of Alcohol

- Alcohol can interfere with the creation of memory, but not necessarily render a person incapacitated.
  - **“Blackouts”**
- Differing perceptions about alcohol consumption.
- To determine intoxication v. incapacitation issues, investigators and adjudicators must seek/understand detailed information about:
  - Alcohol consumption
  - Food/water consumption
  - Tolerance levels
  - Observations by others, if possible
  - Other evidence of incapacity (texts, video, etc.)

# Intoxication vs. Incapacitation

- Incapacitation is a state far beyond drunkenness or intoxication.
- Signs of intoxication include, but are not limited to:
  - Slurred speech
  - Weaving or stumbling while walking
  - Impaired fine/gross motor skills
  - Exaggerated emotions
- Signs of incapacitation include, but are not limited to:
  - Inability to speak coherently
  - Confusion of basic facts (day of week, birthdate, etc.)
  - Inability to walk unassisted
  - Unconsciousness