

Title IX Advisor Training

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Office of Compliance, Risk, and Ethics;

Title IX Compliance team:

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Objectives

- Review Title IX Regulations
- Review Title IX Framework/Jurisdictional and preliminary matters
- Define Key Terms
- Review Sexual Misconduct/Title IX Grievance Process
- Review Advisor Role in the Grievance Process
- Review Conflict of Interest and Ethical Considerations

Title IX

20 U.S.C. § 1681

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.

Mission: **Reduce or eliminate barriers to educational opportunity caused by sex discrimination** in institutions that receive federal funding

- On May 6, 2020 , the DOE OCR released final rulemaking with effective date of August 14, 2020.

What is Required on the new Regulations: Jurisdictional and Preliminary Matters

- The Framework:
 - “A recipient with **actual knowledge** of **sexual harassment** in an **education program or activity of the recipient** against a person **in the United States**, must respond promptly in a manner that is **not deliberately indifferent**.” Section 106.44(a).
 - To avoid “Deliberate Indifference,” an institution must offer **supportive measures** and the option for a **Formal Complaint**
 - Terminology: “*recipient*,” a term used throughout the regulations, means a school receiving federal funds—including through financial aid
- For complaint process, school **must** dismiss complaint:
 - if the conduct alleged in the formal complaint, even if proven, would not constitute sexual harassment as defined in § 106.30,
 - did not occur in the recipient’s education program or activity, or
 - did not occur against a person in the United States
- **May** dismiss if:
 - written request from Complainant seeking withdrawal;
 - respondent is no longer enrolled or employed; or
 - specific circumstance prevents gathering of evidence necessary to reach a determination.
- Can address under other code of conduct or other procedures, even if dismissed under Title IX.

Key Definitions

- **Actual Knowledge** – *“Means notice of sexual harassment or allegations of sexual harassment to the College’s Title IX Coordinator, official who has authority to institute corrective measures, on behalf of the College. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge.” (Section 106.30(a)).*
- What does this mean for Responsible Employees and Confidential reporters?
 - Mandated Reporters
 - Confidential Resources

Title IX Jurisdiction

- College's Educational program or activity in the United States
 - Institution property
 - Institution sponsored or affiliated events [substantial control is key]
 - Buildings owned or controlled by officially recognized student organizations
 - Off-Campus Conduct that has Effects in Education Program or Activity:

Title IX Sexual Harassment §106.30

- Conduct on the basis of sex that satisfies one or more of the following:
 - (i) An employee conditioning education benefits on participation in unwelcome sexual conduct (i.e. quid pro quo); or
 - (ii) Unwelcome conduct that a reasonable person would determine is so severe, pervasive, AND objectively offensive that it effectively denies a person equal access to the school's education program or activity; or
 - (iii) Sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in VAWA

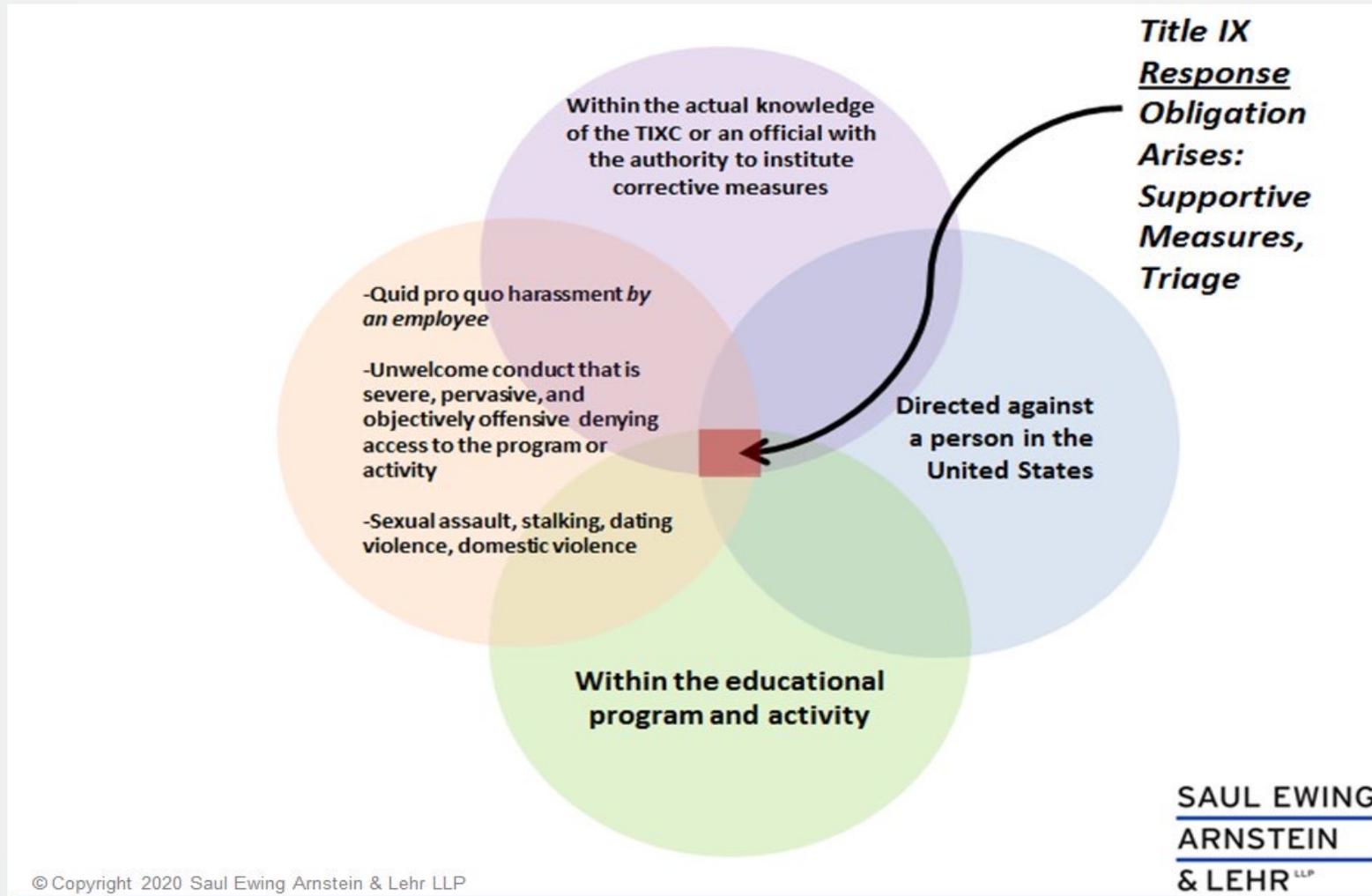
Supportive Measures

- Individualized services reasonably available that are nonpunitive, non-disciplinary, and not unreasonably burdensome to the other party while designed to preserve and restore equal education access, protect safety, or deter sexual harassment.
- Examples: referral to counseling, escort service, mutual no contact orders, alternative assignments or changes in class or work schedule, etc.
- Provided regardless of whether a formal complaint has been filed or not. (§106.30)
- The College will treat complainants and respondents equitably, meaning that for a complainant, the College will offer supportive measures, and for a respondent, the College will follow the adjudication process before imposing disciplinary sanctions.

Formal Complaint

- A document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment.
 - A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by email, and through (Online Incident Report form and Formal Complaint form)
 - 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 school with which the formal complaint is filed.

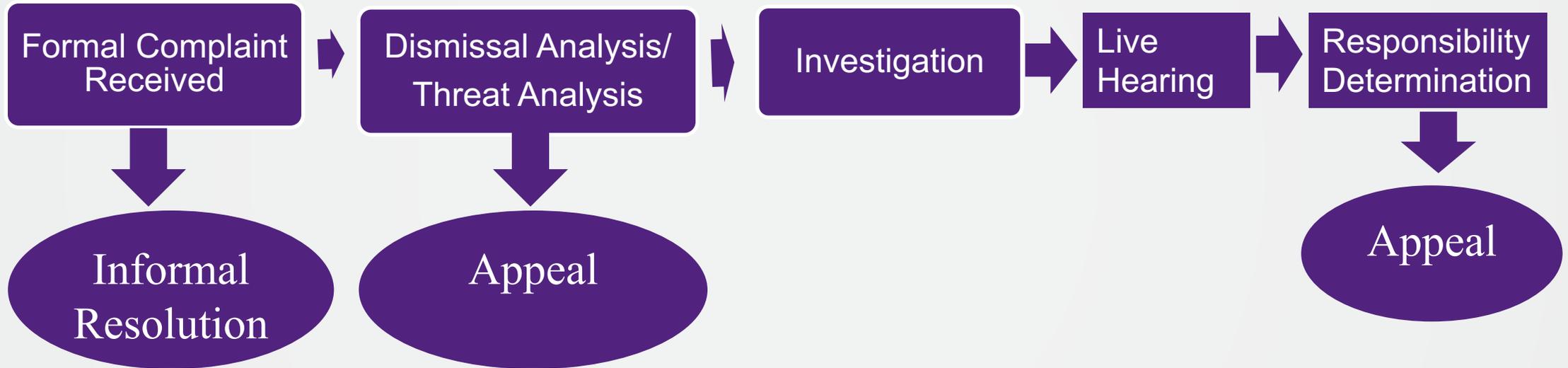
Title IX Response



Initial Response upon notice

- Title IX Assessment Conducted by the Title IX Coordinator:
 - Must contact complainant about supportive measures
 - Must consider complainant's wishes
 - Must explain supportive measures are available whether a formal complaint is filed or not
 - Must explain the options and process for filing a formal complaint
 - May have an advisor and support person present
 - Document that all of this was done

Formal Title IX Grievance Process



Informal Resolution



- Both parties must voluntarily agree in writing to participate.
- Either party may exit the process prior to agreeing to a resolution.
- Involves mediation or restorative justice
- Any resolution is by mutual agreement.
- Informal resolution not permissible for student allegations against an employee

Investigation



- Unbiased and fair
- Presumption of Innocence (Respondent)
- Interview scheduled in advance
- Advisor and support person of choice
- Advisor may not disrupt or answer in place of the party

What does the presumption of innocence mean for the respondent?

- “The presumption does not imply that the alleged harassment did not occur; the presumption ensures that recipients do not take action against a respondent as though the harassment occurred prior to the allegations being proved, and the final regulations require a recipient’s Title IX personnel to interact with both the complainant and respondent in an impartial manner throughout the grievance process without prejudgment of the facts at issue, and without drawing inferences about credibility based on a party’s status as a complainant or respondent.” (85 Fed. Reg. 30259 (May 19, 2020))

Investigation



- The investigator collects evidence.
- Each party may present evidence to the investigator.
- Parties have the right to propose questions for the investigator to ask of the other party.
- The parties must have an equal opportunity to inspect, review, and respond to evidence directly related to the allegations (see § 106.45(b)(5)(vi)),
- and an equal opportunity to review and respond to the recipient's investigative report (see § 106.45(b)(5)(vii))

Advisor Role if assigned at Investigation phase

- accompany a Complainant or Respondent to any administrative meeting or conversation related to an investigation including interviews with the investigator;
- assist a Complainant or Respondent in understanding and navigating the investigation process;
- seek clarification regarding the investigation process;
- ask procedural or process questions;
- review Draft investigation report with Party, and help clarify any discrepancies
- support the Complainant or Respondent during the process; and,
- alert the investigator or Title IX Officer to acts of retaliation.

An Advisor May not...

- speak or act on behalf of a Complainant or Respondent, including answering questions for or on behalf of a Complainant or Respondent;
- stand in for, or represent a Complainant or Respondent;
- disseminate by any medium or form any information shared or learned throughout the investigation process with anyone other than the Complainant or Respondent for whom they serve as an advisor, the investigator, or the Title IX Officer;
- act as or represent themselves or another as an investigator for the Title IX process during the investigation process;
- contact a witness or other party participating in the investigation process; or,
- impede the investigation process or act in a manner that obstructs the investigator or disrupts the investigation process.

The Live Hearing Requirement §106.45(b)(6)



- The Final Rule mandates a bifurcated process
- Final determinations of responsibility and sanctions are made by Hearing Officer/Decision-Maker
- New due process considerations
 - Cross examination by a party's advisor
 - Relevancy determinations
 - ~~Impact of party or witness refusal to submit to cross-examination~~
- Institutions must provide an advisor if a party does not have one

The Live Hearing Logistics



- May be virtual or on campus.
 - Ensure you know how to use the technology as well
- If on campus, parties may request to be in different rooms with AV equipment.
- All directly related information will be available
- All hearings must be recorded

Typical Order of a Hearing

- Opening by Decision Maker
- Presentation of Investigation report by Investigator
- Opening statements by both parties
- Questioning of the Complainant
 - By the decision maker
 - By other party (through their advisor)
- Questioning of the Respondent
 - By the decision maker
 - By other party (through their advisor)
- Questioning of any Witnesses
 - By the decision maker
 - By the parties (through their advisor)
- Closing statements by both parties
- Closing by Decision Maker

Advisors at Title IX Hearings §106.45(b)(6)



- Provide advice, counsel, and support to a party
- Students or employees
 - (Complainants or Respondents)
- Perform cross examination of the other party and any witnesses
- Institutional advisors may need to be assigned at the hearing stage

What is the purpose of Cross Examination?

- The Title IX Rule, at § 106.45(b)(6)(i), requires postsecondary institutions to hold a live hearing with the opportunity for each party's advisor to conduct cross-examination of parties and witnesses.
- Because party and witness statements so often raise credibility questions in the context of sexual harassment allegations, *the decision-maker must consider only those statements that have benefited from the truth-seeking function of cross-examination.* (page 1179 of the Preamble to the Rule,)
- Evidence gathered during investigation that is directly related to the allegations is inspected and reviewed by the parties, and to the extent they are relevant, summarized in the investigative report. The hearing is the parties' first opportunity to argue to the decision-maker about the credibility and implications of such evidence. Probing the credibility and reliability of *statements* asserted by witnesses contained in such evidence requires the parties to have the opportunity to cross-examine the witnesses making the statements. (Questions and Answers regarding the Departments final Title IX Rule, September 4, 2020,

Why Advisors Cross examine?

- “...the Department does not believe that the benefits of adversarial cross-examination can be achieved when conducted by a person ostensibly designated as a “neutral” official. This is because the function of cross-examination is precisely not to be neutral but rather to point out in front of the neutral decision-maker each party’s unique perspective about relevant evidence and desire regarding the outcome of the case.” 85 Fed. Reg. 30335 (May 19, 2020).

What is Cross Examination?

- Questions raised to an opposing party or witness called by the opposing party
- Used to advance claims or defenses of a party
- Used to assess the credibility of an individual
- Questions are provided by Complainant or Respondent
- The Title IX Advisor is not responsible for developing the questions asked during a live hearing

Evidentiary Considerations

- The burden of proof AND burden of gathering evidence is on the institution
- Parties are permitted to present evidence and call witnesses to advance their claims and defenses
 - In Title IX Hearings that may include fact or expert witnesses
 - The recipient is permitted to establish the weight given to certain types of evidence

Relevancy Determinations During Title IX Hearings



- Prior to any question being answered, relevancy will be determined by the Hearing Officer
- The Hearing Officer will provide the reason for excluding the question or evidence
- Rebuttals may not be permitted

Assessing Relevancy

■ Relevant

- Evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true.
- Relevant information relates to the incident at issue
- Relevant information provides sufficient value in making the overall determination

Adopted from University System Georgia, 2020

■ Irrelevant

- Repetition of the same question or duplicative evidence
- Questions and information regarding the Complainant's sexual history or sexual predisposition unless to prove
 - Someone else other than the Respondent committed the alleged misconduct
 - Consent between the parties

Other Evidentiary Exclusions

- Legally privileged information is protected
- A party's treatment records cannot be used without their voluntary, written consent
- Duplicative evidence may be deemed irrelevant
- If an individual does not submit to cross examination, at a Title IX hearing, their statements cannot be relied upon

Refusing Cross-Examination

- ~~If a party or witness does not submit to cross-examination at the live hearing, the adjudicator must not rely on any statement of that party or witness in reaching a determination regarding responsibility.~~
- However, the adjudicator 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.(34 CFR 106.45(b)(6) (August 14, 2020).

Standard of Evidence



- Decisions regarding student and employee alleged misconduct are based on a preponderance of the evidence, more likely than not.

Determining Responsibility and The Written Decision §106.45(b)(7)

- Provided to both parties simultaneously and must include:
 - The allegations
 - The procedural steps from the complaint through determination
 - Findings of fact supporting the determination
 - Determinations regarding responsibility, sanctions (and remedies) along with the supporting evidence and rationale
 - Information on the appeals process

What Does a Title IX Advisor Do?

- Accompany a Complainant or Respondent to meetings with investigators
- Review evidence and investigation reports
- Cross examine the opposing party and witnesses during a live hearing

What a Title IX Advisor **Doesn't** Do?

- Act as legal counsel
- Speak on behalf of the Complainant or Respondent
- Ask cross examination questions not requested by the Complainant or Respondent
- Determine a finding of responsibility for any other college policy

Conflict of Interest

- Before you serve as a Title IX Advisor, you must ensure that you do not have a disqualifying Conflict of Interest
- A conflict of interest, for a Title IX Advisor, is any interest or relationship the advisor has that may compromise or inhibit the advisor's ability to fully and effectively assist their advisee in presenting the advisee's case
- A family relationship with the opposing party, their advisor, or anyone who may serve as a witness in the proceeding
- A personal relationship with the opposing party, their advisor, or a witness that influences your ability to unreservedly advance the interest of your advisee
- A business relationship with the parties, their advisors, or anyone who may serve as a witness in the proceeding

Conflict of Interest

- Giving any financial assistance or gifts to an administrative officer (investigator(s) or the decision maker), a party, or a witness in the case
- Receipt of any financial assistance or gifts from an administrative officer, a party, or witness in the case
- Having served in a role where you have issued discipline or other corrective measures (e.g., for a Student Code of Conduct violation) to either party in the case

Things That Are Not A Conflict of Interest

- Having a prior relationship with Montgomery College
- Having served as a Title IX Advisor in a prior, unrelated Title IX case
- Identifying as a certain sex or gender
- Having legal knowledge or training
- If you are an attorney, merely having represented clients in sex-based harassment cases in the past

Conflict of Interest

- If you think you may have a conflict of interest, advise the Title IX Coordinator immediately.
- Parties may raise conflicts of interest as a basis for appealing final decisions. If a conflict of interest is discovered after the hearing has been completed, the outcome of the hearing may be thrown out.
- Better to disclose a potential conflict of interest at the outset, before the emotional strain of participating in the hearing has been endured by both of the parties—so as not to jeopardize the outcome of the proceeding and necessitate that everyone go through it a second time following an appeal.
- Where a conflict of interest situation is disclosed early on, the Title IX Coordinator can, if needed, remove the conflicted advisor from the case, and assign a new advisor to assist the party.

General Ethical Considerations

- Beyond conflicts of interest, a Title IX Advisor must act in the best interest of their advisee and at the advisee's request; the advisor should not pursue their own agenda
- You must set aside impressions or biases you have from movies, TV, news, other cases in which you have been involved, and personal opinions that might diminish your ability to wholeheartedly pursue the interests of your advisee

Ethical Considerations

- DO NOT: Rely on sex stereotypes
- “Women are manipulative and they lie.”
- “Real men are aggressive.”
- “A lady wouldn’t put herself in that position.”

Ethical Considerations

- DO NOT: Make credibility determinations based solely on the sex or gender of a party
- “I’m going to believe the woman because women have been ignored for too long in other cases and we need to balance things.”
- “He was a boy scout so he is a man of honor, even though her version of events seems plausible.”

Ethical Considerations

- DO NOT: Make credibility determinations based solely on a person's status as a reporting or responding party in a matter
- “Anyone who would file a complaint about something like this is crazy.”
- “If this woman would go so far as to file a formal complaint, then he must have done it.”

Ethical Considerations

- DO: Approach the investigation and proceeding with an open mind and without any preconceived notions
- Look at every decision you make as an objective evaluation of the facts and policies
- Treat every participant and witness with respect



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