May 2020 Title IX Final Regulations

Jody Shipper
Jody Shipper is a nationally-recognized subject-matter expert with more than 20 years of experience in Title IX and related fields. She is known for her insight into best-in-class programming, policies, and community outreach aimed at addressing sexual misconduct on campus. She lectures extensively at universities and conferences throughout the U.S. on Title IX, VAWA, harassment, and implementation of best and emerging practices. Jody received her J.D. from the University of California, Hastings College of Law and her bachelor’s degree from Georgetown University’s School of Foreign Service.
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.
Agenda

01 Regulatory Overview

02 The Investigator, Coordinator, Hearing Officer & Appeals Officer

03 Someone Made A Complaint

04 The Procedural Requirements of an Informal/Alternative Resolution

05 Formal Resolution

06 Hearings
Regulations
What is Covered?
The May 2020 Title IX Regulations Cover A Narrow Scope of Title IX

- Sex Discrimination
- Gender Discrimination
- Athletics opportunities
- Retaliation

Conduct Constituting Sexual Harassment as Defined in § 106.30
What (Mis)Conduct is Covered by the New Regulations?

- Sexual Harassment
  - Hostile Environment
- Quid Pro Quo (by an employee)
- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking
NOT defined in regulations

Defined in regulations

Only THESE get the new processes
BUT WAIT, THERE’S MORE!

I. Definition:
   Does this meet the definition?
     If yes, continue. If no, not IX

2. Location:
   On campus, within the United States;
   In building owned/controlled by a recognized student org., in the U.S.;
   Part of a program or activity, and within the United States.
     If yes to one of the above, continue. If no, not IX

3. The institution has substantial control over the respondent
   If yes, continue. If no, not IX

4. Complainant is accessing or attempting to access a university program
   or activity, in the U.S.
     If yes, use New Title IX Process
Title IX Application May 2020
Regulations

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

Place of Conduct
- On campus, building owned/controlled, or program/activity and
- In the United States

Proper Persons
- Complainant is a member of the community, or attempting to access program/activity and
- Control over Respondent

Apply 106.45 Procedures
Required Response:
Section 106.45 Procedures
What are the § 106.30 Definitions?
Definition of 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

Definition of Sexual Harassment

Quid Pro Quo

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;

Meaning: You do this for me, I’ll do that for you. Quid Pro Quo

Not covered here: A student leader tells another student, “If you won’t go out with me, I’ll make sure you never get into the glee club.”
Definition of Sexual Harassment

Hostile Environment

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.

Comments, emails, posters, actions, gestures, physical contact, images, anything that might create a hostile environment.
What is Severe and Pervasive?

Severe: How much does it take?

Pervasive: How many times?
Objectively Offensive

Sexual harassment has an objective, and a subjective, element

**OBJECTIVELY**, a reasonable person in a similar position would agree that it is offensive

**OBJECTIVELY**, a reasonable person in a similar position would agree that it is severe and pervasive

**SUBJECTIVELY**, the complainant found it to be unwelcome
Effectively Denies *Equal Access to a Program or Activity*

- It was harder to feel really comfortable there
- I found it really annoying
- Their mere presence upset me too much to study
- I no longer felt safe enough to go to class
Sexual Assault Definitions


• Sex Offenses Forcible and Non-Forcible
  • Forcible:
    • Rape, Sodomy, Sexual Assault with an Object, Non-Consensual Fondling
  • Non-Forcible: Incest, Statutory Rape
Domestic Violence, On the Basis of Sex

Includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person.
Dating Violence

Violence committed by a person (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (B) where the existence of such a relationship shall be determined based on a consideration of the following factors: (i) The length of the relationship. (ii) The type of relationship (iii) The frequency of interaction between the persons involved in the relationship.
Stalking, On the Basis of Sex

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to (A) fear for his or her safety or the safety of others; or (B) suffer substantial emotional distress.
The Investigator, Coordinator, Hearing Officer, Appeals Officer
All Who Carry Out a Role

- 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
Avoiding Prejudgment

Practical application of these concepts in investigations...

- Do not rely on cultural “rape myths”
- Do not rely on cultural stereotypes about how men or women purportedly behave
- Do not rely on gender-specific research data or theories
- 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
Impartiality and Bias

- Past personal or professional experience
- Common sense approach to evaluating whether a particular person is biased
- No generalizations
Impartiality
Avoiding Prejudgment, Bias, and Conflicts of Interest

Bottom line:
- Follow facts of every individual case
- Investigate in a consistent manner
- Must allow challenges for conflict of interest
Someone Made A Complaint!

Information Comes In, What Do You Do?
Mandatory Response to Each Report

• All reports, or those within scope of the Regs?
• What about responsible employees?
Title IX Coordinator Must Discuss:

- Discuss/Implement support measures
- Can have support without filing formal complaint
- Options for resolution and how to file
Mandatory Response Under VAWA
Not the Same

- The importance of preserving evidence
- Right to notify law enforcement or decline
- Information about existing counseling, health, mental health, victim advocacy, legal assistance, visa and immigration assistance, student financial aid, and other services available for victims
- Options for, available assistance in, and how to request changes to academic, living, transportation, and working situations or protective measures.

- An explanation of the procedures for disciplinary action
- The standard of evidence that will be used
- Possible sanctions and protective measures
- Procedures will be implemented by college or university officials who have received training
- Right to an advisor of their choice
- Simultaneous notification in writing of the outcome and any appeals
Not Punitive

- No default
- Case by case
- Document the connection to preserving equal access
- Document reason for any requested measures not implemented
Emergency Removal of Student

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

- Remedies-based
  - No formal process

- Alternative/Informal
  - Signed agreement
  - Voluntary

- Title IX Process
  - Investigation/Hearing
    - All requirements of 106.45

- Not Title IX Process
  - Investigation
  - Hearing?
What do we do about misconduct that does not fall within this narrow scope, Jody?
Apply other applicable institutional policy or procedures.
Supportive Measures
Interim Support

Interim, not forever

Interim also includes “before investigation”

Equal access
Interim Support for a Complainant

To restore or preserve EQUAL access

Confidential to extent possible

Upon filing of report (notice)

No fee

Non-disciplinary/not punitive

Individualized
Interim Support for a Respondent

After complaint is filed

- Non-disciplinary
- Non-punitive
- Individualized
Emergency Removal of Student

- High threshold
- Not a determination of responsibility
- Whether or not grievance is underway
- Individualized
- Immediate threat (physical)
- Opportunity to challenge
The Procedural Requirements of an Informal/Alternative Resolution
Notice Requirements

• The specific allegation and the specific conduct that is alleged to have occurred.
• The requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations.
• Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.
• A statement indicating that the decision to accept a complaint does not presume that the conduct at issue has occurred, and that the Respondent is presumed not responsible, unless and until, at the conclusion of the formal investigation and adjudication processes, there is a determination of responsibility.

An explanation that each party may be accompanied by an Advisor (add any others who may accompany, such as support person) of their choice, who may be a parent, friend, or attorney.

• The date and time of the initial meeting with the Title IX Coordinator, with a minimum of (how many days) notice
Informal Resolution

- Request in writing
- Title IX Coordinator may determine not appropriate
- At any time before conclusion of hearing
- Voluntary
- Completes the process – cannot have a do-over
WHAT TO DO IF:
* Complainant has Supportive Measures, wants nothing more?
* Complainant wants resolution, but not Informal Resolution
So Do We Have to Investigate Now?
Formal Resolution

The Investigation
Formal Complaint Required
Mandatory Investigation

Complaint filed, SIGNED, requests investigation

Coordinator SIGNS, starts investigation

If Coordinator signs, institution is not the Complainant
But Do You START the Investigation?

- Does it meet the elements? If not, can you DISMISS?
- Can you decline to accept a Formal Complaint?
- Possible pre-investigation to identify respondent
- No investigation without formal notice
Overview of Formal Resolution Process
Overview of Investigation

• Notice
• Trained investigator collects information
  • Investigator shares evidence “directly related” to allegations with parties
  • Parties have 10 days to respond
  • Investigator creates summary of “relevant” evidence and shares with parties
  • Parties have 10 days to respond
## Dismissing Complaints

<table>
<thead>
<tr>
<th>MANDATORY</th>
<th>DISCRETIONARY</th>
</tr>
</thead>
<tbody>
<tr>
<td>● Not sexual harassment</td>
<td>● Complainant withdraws complaint</td>
</tr>
<tr>
<td>● Did not occur in program or activity</td>
<td>● Respondent no longer enrolled/employed</td>
</tr>
<tr>
<td>● Not against person in the U.S.</td>
<td>● School unable to collect sufficient info</td>
</tr>
</tbody>
</table>
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.
Equal Opportunity to Present Evidence
Written Notification of Meetings and Sufficient Time to Prepare
• 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
“Directly Related” and “Relevant Evidence”
Can You Have a General Rule About Evidence In Title IX Investigations? NO
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
Logical connection between the evidence and facts at issue

Assists in coming to the conclusion – it is "of consequence"

Tends to make a fact more or less probable than it would be without that evidence
Evidence That Will Not Be Considered

- Rape Shield Protections
- Privileged Information
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 advisor and they will have 10 days to comment.
Hearings!
Purpose of the Hearing

- Review and Assess Facts
- Make Findings of Fact
- Determine Responsibility / Findings of Responsibility
- Determine Sanction and Remedy
The Essential Elements of All Hearings

- Clear Procedures
- Due/Fair Process
- Fair, Equitable, and Neutral
- Consistency
- Trauma Informed
- Well Trained Personnel
##Procedural Requirements for Hearings

<table>
<thead>
<tr>
<th>Requirement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Must be live, but can be conducted remotely</td>
</tr>
<tr>
<td>No Compelling participation</td>
</tr>
<tr>
<td>Standard of proof used may be preponderance of the evidence or clear and convincing; standard must be the same for student and employee matters</td>
</tr>
<tr>
<td>Cross examination must be permitted and must be conducted by advisor of choice or provided by the institution</td>
</tr>
<tr>
<td>Decision maker determines relevancy of questions and evidence offered</td>
</tr>
<tr>
<td>Exclusion of Evidence if no cross examination</td>
</tr>
<tr>
<td>Written decision must be issued that includes finding and sanction</td>
</tr>
</tbody>
</table>
You Need to Determine:

The Process
- Pre-hearing process, submission of evidence, opening statements, other statements, closing statements, findings, impact statements, etc.

The Players
- The roles of all participants

The Evidence
- Relevancy, exclusions, timing of submission, how to submit, and WHO DECIDES?

The Outcome
- Deliberations; Notice; manner and method communicated.
Other Considerations
A Panel?

- Number of panelists?
- Can you have a panel of one?
- Must finding be unanimous?
- Internal, external, or some combination?
The Players
Advisor/Support Folks

- Roles
- Participations
- Communicating their role
- Enforcing their role
Other Decisions

- Will you include Opening, Closing, or Impact Statements? NOT required, but you need to decide.
- How will questioning take place?
- How will questions be submitted?
- Will there be any restrictions on questions that can be asked, such as due to relevancy, already asked and answered, unduly harassing?
- If done remotely, how will the technology be set up?
- If in person, room set-up and who is in the room?
Cross Examination
Who does It?

- Must be conducted by the advisor
- If party does not appear or does not participate, advisor can appear and cross
- If party does not have an advisor, institution must provide one
Cross Examination
Permissible Questions

• Questions must be relevant
• Not relevant
  • Duplicative questions
  • Questions that attempt to elicit information about
    • Complainants prior sexual history
    • Privileged information
Decorum at the Hearing

- A recipient may adopt rules of order or decorum to forbid badgering a witness, and may fairly deem repetition of the same question to be irrelevant.
- A postsecondary institution recipient may adopt reasonable rules of order and decorum to govern the conduct of live hearings.
- Schools “retain flexibility to adopt rules of decorum that prohibit any party advisor or decision-maker from questioning witnesses in an abusive, intimidating, or disrespectful manner.”
Cross Examination
Impact of Not Appearing

Exclusion of all statements of that party

Exception- DOE Blog

What if a party or witness appears, but does not answer all questions
What Determinations?

- Factual Determinations

- Analyze whether the conduct that happened constitutes a violation of the school’s policies
Understanding Relevance & Understanding Special Categories of Evidence
Types of Evidence

- Online information
- Gut instinct
- Direct vs. circumstantial
- Hearsay
- Relevance
- Common sense
Evidentiary Issues

- Character evidence
- Impact statements
- Credibility
- Medical information
- Past conduct of complainant, respondent
- Past sexual activity between complainant and respondent
- Dating or domestic violence – past history
Logical connection between the evidence and facts at issue

Assists in coming to the conclusion – it is “of consequence”

Tends to make a fact more or less probable than it would be without that evidence
Relevance Is Not . . .

- Strength of the evidence
- Believability of the evidence
- Based on type of evidence: circumstantial, direct
- Based on complicated rules of court
Is This Relevant?

- Transcript
  - Letter from aunt that the complainant or respondent has always been nice kid
- Polygraph exam
- Photos of respondent making crude gestures
- Photos of complainant drinking alcohol at a party
What is “Character” evidence?
Weighing Evidence & Making A Determination
Affinity Bias
Confirmation Bias

Objective Facts

What You See

Facts Confirming Your Belief
Other Forms of Bias

- Adultification Bias
- The Halo Effect / Horns Effect
- Beauty Bias
- Height = Leadership, Strength
- Stereotype threat
- Inattentional Bias / Examiner’s Bias
Credible, or Reliable?

You can trust it

It is convincing
# Credibility Versus Reliability

## Reliable Evidence:
- I can trust the consistency of the person’s account of their truth.
- It is probably true and I can rely on it.

## Credibility:
- I trust their account based on their tone and reliability.
- They are honest and believable.
- It might not be true, but it is worthy of belief.
- It is convincingly true.
- The witness is sincere and speaking their real truth.
Being Convinced
It Is True, or Biased Conclusion?

A credible witness may give unreliable testimony
I Just *KNOW* They Are Not Telling the Truth

- Bias
- Can you really spot a liar?
- Understanding clues that are culturally different from your own

HOW TO SPOT A LIAR
Required Content of Report
Final Report

- The allegations
- Description of all procedural steps
- Findings of fact
- Conclusion of application of facts to the policy
- Rationale for each allegation
- Sanctions and Remedies
- Procedure for appeal
Applying Preponderance of the Evidence

- More likely than not
- Does not mean 100% true or accurate
- A finding = There was sufficient reliable, credible evidence to support a factual finding, by a preponderance of the evidence
Policy Analysis

- Break down the policy into elements
- Organize the facts by the element to which they relate
- Apply standard of proof
Elements of this definition of sexual harassment

1) Unwelcome conduct
2) Severe
3) Pervasive
4) Objectively offensive
5) Effective denial of equal access to school’s education program or activity
Is there evidence that Complainant was incapacitated, and that Respondent knew that, or that we believe Respondent should have known that? If yes, answer the following questions:

• Does the evidence support that Complainant consumed alcohol/drugs prior to or during the incident under investigation? If yes, continue.

• Does the evidence support that Complainant showed any of the following signs of incapacitation (not exclusive)
  • Slurring words, stumbling, passing out, blacking out, delayed response time, falling, etc. If yes, continue.
  • What facts suggest impaired capacity to consent: list of symptoms alone not sufficient
  • Discussion: Blackouts – whether a blackout, alone, is evidence of lack of capacity to consent

• Does the evidence show that the Respondent, knew—as a fact—that the Complainant was experiencing this incapacity?
  • If yes, you may find a policy violation. If not, ask the next question.

• Would a reasonable person, in the position of the Respondent, have known of the Complainant’s incapacity? If so, you should be done with your analysis and may find the Respondent in violation of policy. If not, move on to the third question.
Communicate Findings

With sanctions (if any). One communication to parties, not two
Applies:
Mandatory Grounds

(A) Procedural irregularity that affected the outcome of the matter;

(B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and/or

(C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.
Appealing sanctions?

Other grounds for appeal?
Your discretion
Questions?

Email Us
Jody@grandriversolutions.com
info@grandriversolutions.com

Follow Us
@GrandRiverSols
Grand River Solutions
©Grand River Solutions, Inc., 2020. Copyrighted material. Express permission to post training materials for those who attended a training provided by Grand River Solutions is granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). These training materials are intended for use by licensees only. Use of this material for any other reason without permission is prohibited.