Title IX In a Post Regulatory World

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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

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

02 Reports of Misconduct and the Post-Regulatory Requirements for Response

03 Investigations Post Regulations

04 Hearings Post Regulations

05 Appeals

06 Infrastructure for Compliance
A Whole New Word: The Post Regulatory Application of Title IX

Narrowed jurisdiction and expansive procedural requirements
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
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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

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

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

Place of Conduct
- Campus Program, Activity, Building, and
- In the United States

Identity of Parties
- Complainant is a member of the community, and
- Control over Respondent

Required Response:
Apply 106.45 Procedures
Section 106.45 Procedures
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

Who is the Accused?

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 (i.e., a contractor, an alum, or a vendor)
Apply the 106.45 Procedures
What do we do about misconduct that does not fall within this narrow scope?
Apply other applicable institutional procedures.
Reports of Misconduct and the Post-Regulatory Requirements for Response

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

- **Remedies-based**
  - No formal process

- **Alternative/Informal**
  - Signed agreement
  - Voluntary
  - What records?

- **Investigation/Hearing**
  - All requirements of 106.45
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

Informal Resolution

Formal Resolution
Investigations Post Regulations
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
- Opportunity to review all evidence, and 10 days to submit a written response to the evidence prior to completion of the report
- 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.
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.
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.
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
Hearings in a Post Regulatory World

Procedural Requirements, Practical Requirements, and so much more
# Procedural Requirements for Hearings

- Must be live, but can be conducted remotely
- No Compelling participation
- Standard of proof used may be preponderance of the evidence or clear and convincing; standard must be the same for student and employee matters
- Cross examination must be permitted and must be conducted by advisor of choice or provided by the institution
- Decision maker determines relevancy of questions and evidence offered
- Exclusion of Evidence if no cross examination
- Written decision must be issued that includes finding and sanction
What do we need to do all of this?

- Space
- Technology
- Clear & Comprehensive Procedures
- Staff
- Expertise and Confidence
Purpose of the Hearing

Why are we doing all of this?

1. Review and Assess Facts
2. Make Findings of Fact
3. Determine Responsibility/Findings of Responsibility
4. Determine Sanction and Remedy
Written Decision

- 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
Appeals

What should be done in advance of the hearing
Appeals: 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.
Other Grounds for Appeal?
Infrastructure for Compliance
The Essential Elements of the Process

- Clear Procedures
- Due/Fair Process
- Fair, Equitable, and Neutral
- Consistency
- Trauma Informed
- Well Trained Personnel
Staffing

- Title IX Coordinator
- Investigator
- Decision Maker
- Appeal Officer
- Support Staff
- Advisors
**Required Training**

- Title IX Coordinator
- Investigator
- Decision Maker
- Appeals Officers
- Facilitators of Informal Resolution

- The scope of the institution’s education program or activity (i.e., its Title IX “jurisdiction”)
- How to conduct the grievance process
- How to serve impartially
- The technology to be used at a live hearing
- Issues of relevance of questions and evidence
- Rape shield protections; and,
- Issues of relevance in creating an investigative report.
Advisors for the Purpose of Cross Examination

The College must provide an advisor when a party does not have one, or when the party or their advisor does not appear at the hearing.
Questions?

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