Title IX
Foundation Training

October 2, 2020
Roadmap

• Where are we today?
• Title IX Scope & Jurisdiction
• Response Obligations
• Serving without bias or conflicts of interest
The statute, the final rule, what it all means

WHERE ARE WE TODAY?
The Statute

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.

20 U.S.C. § 1681
The Final Regulations

• Final rule released by ED informally on its website on May 6, 2020

• Published in the Federal Register on May 19, 2020 (34 CFR Part 106)

• Effective date: August 14, 2020
The Foundation: Principle #1

If you have **actual knowledge** of **sexual harassment** that occurred in your **education program or activity** against a person in the **United States**, then you must respond promptly in a manner that is not **deliberately indifferent**.
Within the actual knowledge of the TIXC or an official with the authority to institute corrective measures

- Quid pro quo harassment by an employee
- Unwelcome conduct that is severe, pervasive, and objectively offensive denying access to the program or activity
- Sexual assault, stalking, dating violence, domestic violence

Directed against a person in the United States

Within the educational program or activity

Title IX Response Obligation Arises: Supportive Measures, Triage
The Foundation: Principle #2

If you receive a **formal complaint** of **sexual harassment** signed by a **complainant** who is participating in or attempting to participate in your **education program or activity**, then you must follow a grievance process that complies with **Section 106.45**.
Scope and Jurisdiction

TITLE IX COVERED CONDUCT
Directed against a person in the United States
-Quid pro quo harassment by an employee

-Unwelcome conduct that is severe, pervasive, and objectively offensive denying access to the program or activity

-Sexual assault, stalking, dating violence, domestic violence

Directed against a person in the United States
Scope: Sexual Harassment

**Sexual Harassment** means: conduct *on the basis of sex* that satisfies one or more of the following –

(i) 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;

(ii) 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


§ 106.30
Sexual Harassment

**Sexual assault.** Sexual assault means any sexual act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent. This includes the following:

- Rape
- Sodomy
- Sexual Assault with an Object
- Fondling
- Incest
- Statutory Rape
Sexual Harassment

**Rape:** The carnal knowledge of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

**Sodomy:** Oral or anal sexual intercourse with another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.
Sexual Harassment

**Sexual Assault with an Object:** To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

**Fondling:** The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.
Sexual Harassment

**Incest:** Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

**Statutory Rape:** Sexual intercourse with a person who is under the statutory age of consent.
Sexual Harassment

Dating violence. Dating violence means any act of violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim and where the existence of such a relationship is determined based on a consideration of the length, type, and frequency of interactions between the persons involved in the relationship.
Sexual Harassment

**Domestic violence.** Domestic violence means a felony or misdemeanor crime 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’s acts under the domestic or family violence laws of the jurisdiction.
Sexual Harassment

**Stalking.** Stalking means engaging in a course of conduct directed at a specific person that would cause a *reasonable person to fear for his or her safety or the safety of others* or *suffer substantial emotional distress.*
- Quid pro quo harassment by an employee
- Unwelcome conduct that is severe, pervasive, and objectively offensive denying access to the program or activity
- Sexual assault, stalking, dating violence, domestic violence

Directed against a person in the United States

Within the educational program or activity
Jurisdiction

Education program or activity includes:

- Locations, events, or circumstances
- Whether on campus or off campus
- Over which the institution exercised \textit{substantial control} over both the respondent and the context in which the sexual harassment occurs.

It also includes:

- Any building
- Owned or controlled by
- An officially recognized student org., e.g., fraternity or sorority houses

\textsection{106.44(a)}
Actual Knowledge & Deliberate Indifference

RESPONSE OBLIGATIONS
Within the actual knowledge of the TIXC or an official with the authority to institute corrective measures

- Quid pro quo harassment by an employee

- Unwelcome conduct that is severe, pervasive, and objectively offensive denying access to the program or activity

- Sexual assault, stalking, dating violence, domestic violence

Directed against a person in the United States

Within the educational program or activity
Actual Knowledge

“Actual Knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has the authority to institute corrective measures on behalf of the recipient...”

§ 106.30
What Constitutes Notice?

• “Notice results whenever . . . any Title IX Coordinator, or any official with authority: Witnesses sexual harassment; hears about sexual harassment or sexual harassment allegations from a complainant . . . or third party; receives a written or verbal complaint about sexual harassment or sexual harassment allegations; or by any other means.” 85 FR 30040

• “‘Notice’ . . . includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator” § 106.30(a)
Within the actual knowledge of the TIXC or an official with the authority to institute corrective measures

- *Quid pro quo harassment by an employee*

- *Unwelcome conduct that is severe, pervasive, and objectively offensive denying access to the program or activity*

- *Sexual assault, stalking, dating violence, domestic violence*

Directed against a person in the United States

Within the educational program or activity

**Title IX Response Obligation Arises:** Supportive Measures, Triage
Response Obligations

Actual Knowledge -- What now?

To a report:
• *Offer of supportive measures*
• *Explain formal complaint process*

To a formal complaint:
• *Investigation followed by*
• *Live hearing/compliant grievance process*

*Unless facts require or permit dismissal*
Once the institution has **actual knowledge** the Title IX Coordinator **must**:

1. promptly contact the complainant to discuss the availability of supportive measures
2. consider the complainant’s wishes with respect to supportive measures,
3. inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and
4. explain to the complainant the process for filing a formal complaint.

§ 106.44(a)
Supportive Measures

• Non-disciplinary, non-punitive individualized services, offered as appropriate, as reasonably available, and without fee or charge,
• to the complainant or the respondent,
• including as designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment, or deter sexual harassment.

§ 106.45(a)(3)
Response Obligations

Supportive measures may include:

- Counseling
- Extension of deadlines or other course-related adjustments
- Modification of work or class schedules
- Campus escort services
- Mutual restrictions on contact between the parties
- Changes in work or housing locations
- Leaves of absence
- Increased security and monitoring of certain areas of the campus
Response Obligations

• A recipient may employ an emergency removal process if there is an immediate threat to the physical health or safety of any students or other individuals arising from the allegations of sexual harassment.

• A recipient may place a non-student on administrative leave during the pendency of a grievance process.

§ 106.44(c), (d)
Response Obligations, Part 2

(a/k/a The Foundation: Principle #2)

If you receive a formal complaint of sexual harassment signed by a complainant who is participating in or attempting to participate in your education program or activity, then you must follow a grievance process that complies with Section 106.45.
Formal Complaint

What is 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 recipient investigate the allegation of sexual harassment.”

§ 106.30
Formal Complaint

Who can file?

- Complainant may file Formal Complaint by signing document; or
  - University *must* investigate when Complainant desires the action

- Title IX Coordinator may sign Formal Complaint
  - If the Title IX Coordinator has determined on behalf of the University that an investigation is needed

§ 106.30; 85 FR 30131 n. 580
§106.45

Grievance Process Obligations Arise

Complainant is participating in, or attempting to participate in, your Programs or Activities at time of Formal Complaint from Complainant or TIXC
Dismissal

Mandatory Dismissal
If the conduct alleged in the Formal Complaint:

- would not constitute sexual harassment even if proved,
- did not occur within the recipient’s program or activity, or
- did not occur against a person in the United States,

the recipient must terminate its grievance process with regard to that conduct for the purposes of sexual harassment under Title IX.

Discretionary Dismissal
If one (or more) of the following conditions is not met, the Title IX Coordinator may dismiss the Formal Complaint for Title IX purposes:

- Complainant withdraws Formal Complaint or allegations in writing;
- Respondent is no longer enrolled or employed by the University; or
- Specific circumstances prevent the University from gathering evidence sufficient to reach a determination regarding responsibility.

Dismissal does not preclude action under another provision of the recipient’s code of conduct.

§ 106.45(b)(3)
The Grievance Process

- Formal Complaint Filed
- Investigation (or Informal Resolution)
- Hearing*
- Written Determination
- Appeal

*If no informal resolution is reached
Training, serving without bias or conflicts of interest

EXPECTATIONS
Expectations: Training

• **Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process** receive training on:
  
  ▪ Definition of sexual harassment in § 106.30,
  ▪ The scope of the recipient’s education program or activity,
  ▪ How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and
  ▪ **How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.**

*(Note: additional training requirements exist for investigators and decision-makers)*
Expectations: Bias & Conflicts

• Any individual designated as a Title IX Coordinator, investigator, decision-maker, or to facilitate an informal resolution process, must "not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent." §106.45(b)(1)(iii)
A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient’s dismissal of a formal complaint or any allegations therein, on the following bases:

(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.

§106.45(b)(8)(i)
But not advisors. . .

The final regulations impose no prohibition of conflict of interest or bias for advisors

85 FR 30254 n.1041
Serving Impartially

Avoid prejudgment of the facts at issue, conflicts of interest, and bias
Bias: what does it mean?

“Whether bias exists requires examination of the particular facts of a situation . . .

. . . and the Department encourages recipients to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased[.]

85 FR 30248.
Impermissible Bias

Making a decision based on the characteristics of the parties, rather than based on the facts
Bias: what does it mean?

“Treating a party differently on the basis of the party’s sex or stereotypes about how men or women behave with respect to sexual violence constitutes impermissible bias.”

85 FR 30238-40

A “recipient that ignores, blames, or punishes a student due to stereotypes about the student violates the final regulations[.]”

85 FR 30496

All protected classes

“The Department’s conception of bias is broad and includes bias against an individual’s sex, race, ethnicity, sexual orientation, gender identity, disability or immigration status, financial ability, socioeconomic status, or other characteristic.

85 FR 30084
What **is not** defined as bias?

1. Outcomes of the grievance procedure

The Department cautions parties and recipients from concluding bias based **solely on the outcome of the grievance procedure**.

“[T]he mere fact that a certain number of outcomes result in determinations of responsibility, or non-responsibility, does not necessarily indicate or imply bias on the part of Title IX personnel.”

85 FR 30252
What is not defined as bias?

2. Title IX Coordinator Signs Formal Complaint

When a Title IX Coordinator signs a formal complaint, it does not render the Coordinator biased or pose a conflict of interest.

The Department has clarified that this does not place the Title IX Coordinator in a position adverse to the respondent because the decision is made on behalf of the recipient and not in support of the complainant or in opposition of the respondent.

85 FR 30372
What **is not** defined as bias?

3. Professional experiences or affiliations

The **prior professional experience** of a person whom a recipient would like to have in a Title IX role **need not disqualify the person** from obtaining the requisite training to **serve impartially** in a Title IX role.

85 FR 30252
What **is not** defined as bias?

3. Professional/Personal Experiences or affiliations

Not *per se* bias; exercise caution not to apply “generalizations that might unreasonably conclude that bias exists”:

- All “self-professed feminists” or “self-described survivors” as biased against men
  - A male is incapable of being sensitive to women
  - History of working in a field of sexual violence
- Prior work as a victim advocate = biased against respondents
- Prior work as a defense attorney = biased in favor of respondents
  - Solely being a male or female
  - Supporting women’s or men’s rights
- Having a personal or negative experience with men or women
But consider . . .

Whether a Title IX personnel has a bias and/or conflict of interest is determined on a case-by-case basis, and any combination of the experiences or affiliations on the prior slide may constitute bias and/or conflict of interest, depending on the circumstances.
Conflicts of Interest

The Department also declines to define conflict of interest and instead, leaves it in the discretion of the recipient.
It is not a conflict of interest for...

A recipient to fill Title IX personnel positions with its own employees

- Recipients are not required to use outside, unaffiliated Title IX personnel. 85 FR 30252.

- Any recipient, irrespective of size, may use existing employees to fill Title IX roles, “as long as these employees do not have a conflict of interest or bias and receive the requisite training[.]” 85 FR 30491-92.

- Even a student leader of the recipient may serve in a Title IX role. 85 FR 30253.
It is not a conflict of interest for...

A recipient to have a co-worker from the same office as the hearing officer serve as an investigator

- Recipients may have different individuals from the same office serve separate Title IX roles
Conflict of Interest: Who can serve which function?

Title IX Coordinator ...
- Investigator ✔
- Informal resolution facilitator ✔
- Decision-maker or appeal decision-maker ❌

Investigator ...
- Title IX Coordinator ✔
- Informal resolution facilitator ✔
- Decision-maker or appeal decision-maker ❌
Conflict of Interest: Who can serve which function?

- Hearing decision-maker...
  - Investigator ✗
  - Title IX Coordinator ✗
  - Appeal decision-maker ✗

- Appeal decision-maker ...
  - Investigator ✗
  - Title IX Coordinator ✗
  - Hearing decision-maker ✗
Self-Disclosure of Potential Bias or Conflict of Interest

Transparency is key!
Serving Impartially: Avoid Prejudgment of the Facts

- Cannot **pass judgment** on the allegations presented by either party or witnesses.

- Cannot **jump to any conclusions** without fully investigating the allegations and gathering all of the relevant facts and evidence from all parties involved.

- Necessitates a broad prohibition on **sex stereotypes** -- decisions **must** be based on individualized facts, and not on stereotypical notions of what “men” and “women” do or not do.
Avoiding Prejudgment of the Facts at Issue

Title IX Coordinators and other personnel should not apply a “start by believing” approach.

Doing so would violate the requirement to “serve impartially.” 85 FR 30254.

“The credibility of any party, as well as ultimate conclusions about responsibility for sexual harassment must not be prejudged and must be based on objective evaluation of the relevant evidence.” 85 FR 30254.
Avoiding Prejudgment of the Facts at Issue

• The Department permits institutions to apply trauma-informed practices, so long as doing so does not violate the requirement to serve impartiality and without bias.

• It is possible, “albeit challenging,” to apply trauma-informed practices in an impartial, non-biased manner.

• Any trauma-informed techniques must be applied equally to all genders.

85 FR 30256, 30323
Serving Impartially

• Any and all stereotypes must be checked at the Title IX door.
  
  • Leave behind any prior experiences, whether that be from past Title IX proceedings or personal experiences.

• Approach the allegations (of both parties) with neutrality at the outset.

• Treat both parties equally and provide an equal opportunity to present evidence, witnesses, and their versions of the story.