

Title IX Coordinator Training Online Course

Class One: Definitions, Jurisdiction and Preliminary Matters

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Training Course Does Not Constitute Legal Advice

Class Overview

- The New Administration:
What to Expect?
- Definitions
- Jurisdiction
- Formal Complaints
- Supportive Measures
- Dismissals
- Informal Resolution



What's Next?

When?

Biden Administration Steps

- April 6, 2021 – OCR letter to stakeholders announcing a comprehensive review of ED's existing Title IX regulations, orders, guidance, policies, etc.
- May 20, 2021 – Notice of virtual public hearing June 7–11, 2021
- July 20, 2021 – Questions and Answers on the Title IX Regulations on Sexual Harassment, including policy examples
- August 24, 2021 – ED announces it will no longer enforce the requirement that “prohibits a decisionmaker from relying on statements that are not subject to cross examination.”

What Comes Next from ED

- December 2021
 - The Department anticipates issuing the Title IX notice of proposed rulemaking by April 2022
- February 2022
 - The Department sent its draft of the proposed amendments to the Title IX regulations to Office of Information and Regulatory Affairs (OIRA), the agency within OMB that coordinates review.
- Currently
 - OIRA is scheduling meetings with any who request. Currently scheduled through April.



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What's In the New Rules?

- Despite unofficial reports, we don't know

“New Title IX rules set to assert rights of transgender students”

Washington Post
March 30, 2022



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Litigation Challenges to Current Rules

- Know Your IX, et al. v. DeVos filed May 14, 2020 in D. Md.
 - Dismissed with prejudice due to plaintiff's lack of standing
- New York v. U.S. Department of Education, filed June 4 in S.D.N.Y.
 - Motion for Preliminary Injunction (June 25, 2020, Denied); Stipulated Dismissal without Prejudice (November 4, 2020)
- Pennsylvania, et al. v. DeVos, filed June 4 in D.D.C.
 - Motion for Preliminary Injunction (June 23, 2020, Denied)
- Victim Rights Law Center, et al. v. DeVos, filed June 10 in D. Mass.
 - Court vacated the provision prohibiting use of testimony from persons who did not submit to cross-examination but upheld all other challenged provisions of the rule.
 - Dept. of Education announced it would not enforce the provision the Court vacated. August 2021

EDUCATION

Biden vows 'quick end' to DeVos' sexual misconduct rule

Biden disavowed Education Secretary Betsy DeVos' Title IX rule.



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In the meantime,

The remaining rules are the law, and any college receiving federal funds must obey them.



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Definitions

Definition of Sexual Harassment

Sexual Harassment includes one or more of the following:

1. Quid Pro Quo
2. Hostile Environment
3. Clery Definitions

§106.30(a)



Quid Pro Quo

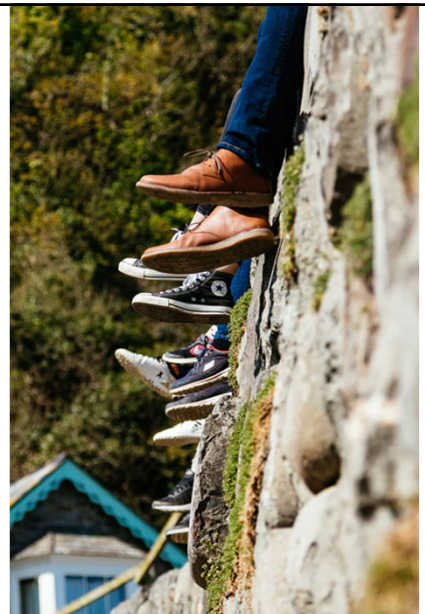
- Conditioning provision of an aid, benefit or service on participation in unwelcome sexual conduct
- Carried out by an employee



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Hostile Environment

- Unwelcome sexual conduct
- “So severe, pervasive, *and* objectively offensive”
- “Effectively denies equal access”
- “Determined by a reasonable person”
 - “[S]tanding in the shoes of the complainant.” (Preamble, p. 514)



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Clery Definitions

- **Sexual Assault** – a forcible or non-forcible sex offense under the FBI UCRS (as defined by the Clery statute) including NIBRS
 - Forcible -- Any sexual act “directed against another person without the consent of the victim including if the victim is incapable of giving consent.”
 - Focus on proscribed actions rather than terms
- **Dating Violence** – violence by a person who is or has been in a romantic or intimate relationship (Clery statute)
- **Domestic Violence** – violence by a current or former spouse or intimate partner, co-parent, living partner, youth or other under state law
- **Stalking** – fear for safety or safety of others or suffer substantial emotional distress



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Complainant & Respondent

- **Complainant** – an individual who is alleged to be the victim of conduct that could be sexual harassment
- **Respondent** – an individual who has been reported to be the perpetrator of conduct that could be sexual harassment



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Actual Knowledge

- Institution has actual notice of sexual harassment or allegations when reported to the:
 - Title IX Coordinator(s)
 - Official With Authority to Take Corrective Actions (OWA)
- Not a respondent
- Not others who may or must report



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Jurisdiction

Education Program or Activity



- Locations, events, or circumstances over which IHE exercises substantial control over *both* the respondent and the context in which the sexual harassment occurred, **or**
- Any building owned or controlled by a recognized student organization, **and**
- Against a person in the United States



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NACUA

Filing a Formal Compliant

Filing a Formal Complaint

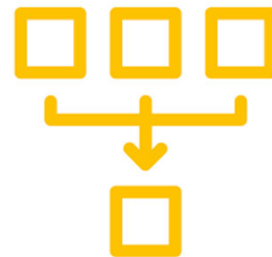
- Filed by the Complainant or signed by the Title IX Coordinator.
- Requests that the IHE investigate the allegations of sexual harassment.
- In person, by mail, email or approved method with Complainant's signature.
- Complainant must be participating in or attempting to participate in the IHE's education program or activity. Title IX Coordinator may file even if the Complainant is not associated in any way to protect other students.



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The Formal Complaint: More Than One Respondent

- *May* consolidate formal complaints against more than one respondent, or by one party against the other party
 - Allegations arise out of the same facts or circumstances.
- Complaints may be filed and sanction imposed *only* against individuals, not groups



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Written Notice of Allegations

- Notice of the grievance process.
- Notice of the allegations, including sufficient details and time to prepare a response *before* the initial interview.
- Statement that the respondent is presumed not responsible.
- Right to advisor of choice.
- Right to inspect and review evidence.
- Any prohibition of false statements or information.

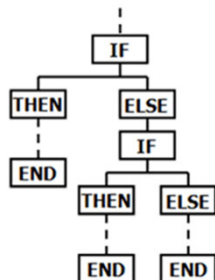
Provide updated notice with any later discovered additional allegations.



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Dismissals



Mandatory/Discretionary Dismissals

Mandatory if Conduct Alleged:

- Would not constitute sexual harassment even if proved;
- Did not occur in the IHE's education program or activity; or
- Did not occur in the United States.

Discretionary If:

- Complainant notifies the Title IX Coordinator in writing of a wish to withdraw complaint or any allegations in it;
- Respondent is no longer enrolled or employed; or
- Specific circumstances prevent sufficient gathering of evidence to reach a determination.



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Dismissal Results



If a formal complaint is dismissed:

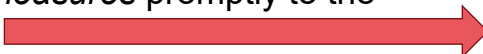
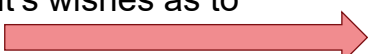
- Provide written notice of dismissal and reasons to both parties.
- Provide an appeal process.
- The matter *may* proceed under another provision, policy or code.

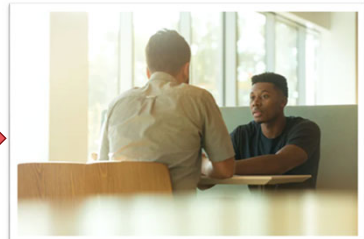


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Supportive Measures

Response to a Report

- Offer *supportive measures* promptly to the Complainant. 
- Explain the process for filing a formal complaint.
- Consider the Complainant's wishes as to supportive measures. 
- Follow a grievance process that complies with the regulations *before* imposing any disciplinary sanctions or other actions that are not supportive measures against the Respondent.



Supportive Measures



- Available to complainant and respondent
- Non-disciplinary and non-punitive
- Treat complainant and respondent equitably
- No fee or charge to complainant or respondent
- Restore or preserve equal access without *unreasonably* burdening the other party
- Confidential to the extent possible



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Informal Resolution

Informal Resolution Requirements



- Only *after* a formal complaint is filed
 - At any point in the process
 - May return to formal process if informal resolution does not resolve the matter
- All forms of sexual harassment
 - *NOT* – Allegations of employee against student harassment
 - *ONLY* – When the institution deems it appropriate
- Process is facilitated by trained individuals with no conflict of interest or bias
- Written, voluntary consent by the parties, which requires ...



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Informal Resolution Process

- Parties must be given written notice of:
 - The allegations and the requirements of the informal resolution process;
 - The right to withdraw from the informal procedure at any time prior to agreeing to a resolution;
 - The circumstances precluding parties from resuming the formal complaint arising from the same allegations; and
 - Any consequences associated with informal resolution, including records that will be maintained or could be shared.



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Case Study

Anna Smith,
the Title IX Coordinator
at NACUA University,
woke to the following
email in her inbox :

To: TitleIX@nacua.edu
From: Prof. Henry Cho, Dean, College of Arts & Sciences
Date: Wednesday, October 21, 2020

This morning, a student named Jordan Jones told me that it wasn't possible to finish a paper in one of their classes in time because the student is dealing with the ramifications of being sexually assaulted over the weekend. Jordan gave me permission to share this information with you. I honestly don't understand why your office continues to let this happen.

Ms. Smith reaches out to Jordan by email, hoping to set up a time to talk.



What should Ms. Smith mention in the email?

- a. The availability of supportive measures.
- b. That she wants to hold the respondent accountable, but needs Jordan's help to do so.
- c. That the University won't move forward with an investigation unless Jordan agrees.



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Ms. Smith receives the following that same day:

To: TitleIX@nacua.edu
From: Jordan Jones
Date: October 21, 2020

Thank you for reaching out. After a party downtown Saturday night, I went with Riley Krill to his room at the ABC Fraternity house. I didn't want to hook up, but he just wouldn't let up. He raped me. I can meet tomorrow, at the time you suggested. At this point, I really just want Riley to have to meet with you and me, so that I can tell him what he did was wrong. If he apologizes, I don't want to take this any further.



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Ms. Smith confirms that she'll meet with Jordan on Thursday, October 22.

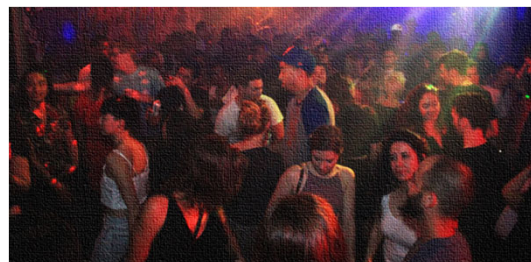


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Jordan's Narrative:

I was at a party at a house downtown Saturday night. I wasn't going to go, but my friend, Mark, asked me to meet him there. He's been having trouble with another student who just won't leave him alone, so he's pretty much been going to class and just hanging out in his room since the semester started. I needed to get him out of there.

Anyway, the party was pretty sloppy. A huge group of us were dancing in the basement and drinking. Riley came over at some point – we had hooked up once last year, but I hadn't run into him yet this year.



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Jordan's Narrative (con't):

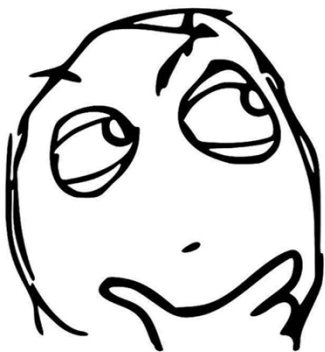


I was feeling pretty buzzed and decided to leave around midnight. Mark was finally having a good time, so he didn't want to leave. Riley said he'd walk me back to my room. His fraternity's house was on the way. We stopped there so I could see it, but I told him I didn't want to hook up. I felt a bit dizzy, so I laid down on Riley's bed and he laid down next to me. We made out for awhile, but then I needed to use the bathroom, so he showed me where it was. When I was done, I told him I should probably get going, but he wanted to lay back down for a bit. I had my back toward him, but Riley rolled me over. At that point, I was scared of what he'd do if I tried to leave. He raped me. I fell asleep after, but then woke up around 3 a.m. and left.

Riley is dangerous. He's going to do this to someone else. The University has to do something.



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Is this a formal complaint, triggering an investigation under your policy?

- a. Yes
- b. No
- c. Unsure



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Jordan files a formal complaint with Ms. Smith.

Before calling Riley in for an interview, Ms. Smith needs to send both Riley and Jordan a Notice of Allegations, including:

NOTICE

- Access to the Title IX-mandated policy.
- Notice of the allegations that may constitute the prohibited conduct, with sufficient detail for Riley to prepare a response before any initial interview.
- Notice of the Parties' entitlement to an Advisor of choice.
- The identity of the Investigator – Jean McDonald.
- Notice that the Parties may inspect and review evidence gathered during the investigation.
- Notice that the University's policies prohibit knowingly making false statements or knowingly submitting false information.



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What else, if anything?

- An explanation that the matter will be referred to the police.**
- An explanation of any rules of decorum that will govern the University hearing.**
- The presumption that Riley is not responsible unless or until there is a determination following the University hearing.**



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The day after she issues the notice of allegations, Ms. Smith receives the following email:

To: TitleIX@nacua.edu
From: Amanda Law
Date: October 24, 2020

I am an attorney representing Riley Krill. Mr. Krill is being falsely accused of rape. Mr. Krill's parents and I will not permit his education to be disrupted by a college student with an ulterior motive. Jordan Jones is bitter because Mr. Krill didn't reciprocate Jordan's feelings after they had a fully consensual sexual encounter. If the University insists on pursuing this matter, the Krills will take all legal measures available to them.



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Questions?



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