

Title IX Coordinator Training Online Course: Fundamentals of the August 2020 Regulatory Requirements

Module 1: Jurisdiction and Other Threshold Topics

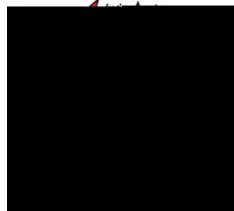
Amy C. Foerster, Partner, Troutman Pepper Hamilton
Sanders LLP
Melinda Grier, Melinda Grier Consulting PC
Janet P.

Course Overview

- Jurisdiction and Other Threshold Topics
- Formal Complaints, Investigations, and Grievance Procedures
- Policy and Training Obligations

Title IX Final Regulation

- Effective August 14, 2020
- Where to Begin
 - Inventory
 - Implementation Plan



PLAN



CLERY DEFINITIONS

- Sexual Assault – a forcible or non forcible sex offense under the FBI UCRS (as defined by the Clery statute)
 - Rape, attempted rape, sodomy, fondling, statutory rape
- 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 other or suffer substantial emotional distress

COMPARE TO

- Institution Conduct Code
- Court standards
- Title VII
- State law

WHO?

**IN ADDITION TO STUDENTS...APPLIES TO
EMPLOYEES**

§106.51 Employment

- “No person shall, on the basis of sex, be excluded from participation in, or denied benefits of, or be subjected to discrimination in employment...”
- Remains unchanged by current amendments



TITLE VII – SEXUAL HARASSMENT DEFINITION

- Conduct
 - Unwelcome sexual advances
 - Requests for sexual favors
 - Other verbal or physical conduct of a sexual nature
- Viewed by a reasonable person in the Complainant's position

WHEN...

- Submission becomes a term or condition of employment
- Rejection is used as the basis for an employment decision
- The conduct unreasonably interferes with work performance or creates a hostile, intimidating *or* offensive environment

EMPLOYEE EMPLOYEE HARASSMENT

- Employer's knowledge
 - Knew or should have known
- Immediate and appropriate corrective action
 - Reasonably calculated to end the harassment and prevent recurrence

SUPERVISOR LIABILITY

- Tangible Employment Action
 - Strict liability
- No tangible employment action
 - Employer takes reasonable care to prevent and correct promptly
 - and*
 - Employee unreasonably failed to use employer's preventive or corrective options

INSTITUTIONAL REQUIREMENTS

- Contractual Obligations
 - Collective bargaining agreements
 - Employee handbooks
 - Individual employee contracts



OTHER LEGAL REQUIREMENTS

- Conflicting state requirements
 - State laws
 - State administrative rules and regulations
- Choice of IHE to accept federal funding

OTHER ISSUES

- Procedures
 - Serial or parallel
 - Clearly identify what applies to employees
- Student employees
- Clergy obligations to employees
- Notification to all employees and applicants (§106.8)

WHERE?

JURISDICTION

- No distinction between on or off campus
 - If in a location, at an event, or in circumstances that meet the definition
- Only in the United States
 - Harassment must occur against a person *in the United States*
 - Study abroad & foreign employment

BUT DON'T FORGET...

- May apply other institutional conduct standards and procedures
- Clery applies to students and employees regardless of location.
- Title VII applies to U.S. citizens working for U.S. corporations abroad.

EDUCATION PROGRAM OR ACTIVITY

- §106.44(a): Locations, events, or circumstances over which IHE exercises substantial control over *both* the respondent and the context in which the sexual harassment occurred
- Any building owned or controlled by a recognized student organization
- Training on the scope of the institution program or activity

WHEN?

ACTUAL KNOWLEDGE

- §106.30 (a): Notice to Title IX Coordinator or *any official who has authority to institute corrective measures*
- Sexual harassment or allegations of sexual harassment
- No vicarious liability, constructive notice or "should have known"

OFFICIAL WITH

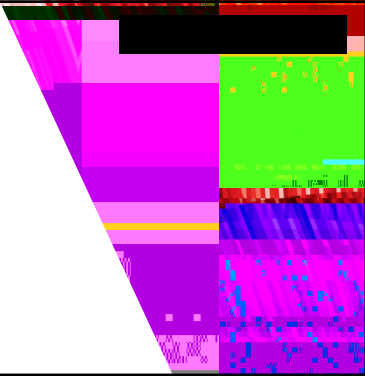
RETALIATION §106.71(a)

- No retaliation by any person to interfere with any right "secured by Title IX"
- No retaliation for
 - Making a report or complaint
 - Participating or refusing to participate
- Filing charges regarding conduct that arises out of the "same facts or circumstances" but does not involve sex discrimination

CONFIDENTIALITY

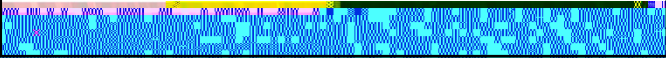
- IHEs must keep confidential the identity of any individual
 - Who has made a report or filed a complaint
 - Who has been reported as a perpetrator
 - Who has been a witness
- Exceptions
 - FERPA
 - Legal obligations
 - Carry out duties that have been

HOW?



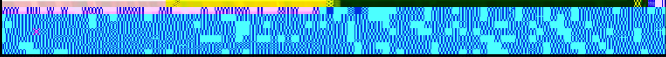
THE INITIAL REPORT

- Anyone may report
 - Not automatically a formal complaint
- Institution response to notice
 - Offer of supportive measures
 - Explanation of formal complaint process
 - Compare to Clery



MAKING REPORTS

- Who
 - Any individual
 - alleged to be the victim of conduct that could be sexual harassment
 - Distinguish from Formal Complaint
- Against Whom
 - Any individual
 - Reported as perpetrator of conduct that could be sexual harassment
 - Distinguish from Formal Complaint



INSTITUTION RESPONSE

- Promptly contact the Complainant to discuss the availability of supportive measures
 - Consider complainant's wishes
 - Make clear available with or without formal complaint
- Explain the process for filing a formal complaint
- Treat complainants and respondents equitably
- Consider Clery obligations

SUPPORTIVE MEASURES §106.30(a)

- Non disciplinary, non punitive individualized services
 - Impose actions that are disciplinary sanction or not supportive measure only *after* a grievance process
- Appropriate, reasonably available, free to complainant or respondent
- Restore equal access without unreasonably burdening the other party
- Confidential, if possible

EMERGENCY REMOVALS §106.44(c)

May remove respondent from *education program or activity* if:

- Conduct an individualized safety and risk analysis,
- Determine that respondent poses an immediate [imminent] threat to the *physical* health or safety of *anyone* justifying removal,
- The threat arises from the allegations of sexual harassment, and
- Provide opportunity for respondent to challenge removal immediately thereafter.
