

TITLE IX & UPDATED GUIDANCE FROM DOE/OCR

TITLE IX TRAINING FOR INVESTIGATORS AND HEARING PANEL

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THIS POSTERWORK IS NOT
COURTESY POSTER

WHAT IT IS & ITS HISTORY

- Title IX is also a civil rights law; is also designed to ensure “equity” and “equal access”
- Originally passed in 1972 and prohibits sex-based discrimination; initially understood in the context of equity (in opportunity and support) for Men’s and Women’s athletics due to the Tower Amendment (which sought to exempt athletics departments)
- It was meant as plugging a hole (like the ADA) in the Civil Rights Act of 1964 which covered race, color and national origin, but failed to cover discrimination based on sex
- Throughout the 80’s and 90’s SCOTUS issued numerous decisions making it clear that the core provision of Title IX was about sexual harassment and assault

RELEVANT DEFINITIONS AND KEY TERMS

Disparate Treatment – treating like issues differently based on gender differences and/or sexual orientation.

Disparate Impact – addresses consequences of a sex-neutral policy or practice; intent is not relevant (as in disparate treatment) as the “neutral” policy or procedure has different impact or consequences on the party based on their sex.

Retaliation – action to “intimidate, threaten, coerce or discriminate against any individual for the purpose of interfering” with seeking right, privilege or redress offered by Title IX.

Supportive Measures – similar to “accommodation” in ADA; they are designed to remediate some of the harm and mitigate likelihood/opportunity for additional trauma.

THE 2011 “DEAR COLLEAGUE LETTER” AS LANDMARK GUIDANCE FOR TITLE IX

- In 2011, under the Obama Administration, a “Dear Colleague Letter” was issued providing “guidance” which made it explicitly clear the intent of Title IX was to address sexual harassment (and especially sexual assaults).
- The Dear Colleague Letter was ground breaking since it also included provisions which clarified that Title IX provided protections for the LGBTQI+ community, subsequent guidance also covered pregnant and parenting parents.
- The guidance was also reinforced and expanded under subsequent provisions within VAWA and the Campus SAVES Act.
- There has been significant rollback of these provisions under the Trump Administration; new guidance under the Biden Administration is expected this Spring

ADDITIONAL INFORMATION

- Title IX has requirements for addressing and fostering a healthy climate around sexual harassment; must address hostile environments including remedying the current situation and preventing re-occurrence. That latter can include direct remediation along with additional and specific programming or education.
- Institutional response must be “prompt and equitable” especially to violence.
- Institutions are required to engage in on-going training and development.
- Note that Title IX not only has implications for fines for the school; there is also the opportunity to seek monetary damages from individuals
- There is a large degree of overlap between Title IX and Title VII, but Title IX is involved any time students are involved.
- Actionable behavior can occur – F2F, 3rd party, via social media or during classroom activities

HOW TITLE IX IMPACTS YOU!

- Northern employees are considered by NNMC as “mandated reporter” except our college counselors who are hired as counselors (as opposed to faculty who teach counseling).
 - New Guidance changed the definition of who is a responsible employee, but Northern requires its employees to report any instance of of sexual harassment (that meets the current definition) and ALL sexual assaults directly to the Title IX Coordinator.
- Sexual assaults are not just about penetration; any unwelcome physical contact may constitute sexual assault (including non-forcible contact).
- Always advise the student that you are required to report this to TIX Coordinator; such action does not always mean that there will be a formal conduct hearing as a result (the victim/survivor has input into determining the process).

DEVOS ADMINISTRATION: NEW EXPECTATIONS & NEW REQUIREMENTS

- Definitions
- Jurisdiction
- Formal Complaints
- Supportive Measures
- Dismissals
- Informal Resolution

BIDEN ADMINISTRATION EXPECTED TO CHANGE KEY ASPECTS OF THE ESTABLISHED UNDER TRUMP

- Notice of Formal Rulemaking
- Anticipated in June 23, 2021 letter regarding Title IX 49th Anniversary
- Confirmation that Title IX prohibits discrimination on the basis of sexual orientation and gender identity
- Enforcement Approach

IN THE MEANTIME:

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

DEFINITIONS: 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

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)

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

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

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

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

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.

Please note: The Title IX Coordinator may file even if the Complainant is not associated in any way to protect other students.

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

WRITTEN NOTICE

- 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.

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.

**Note: if the alleged behavior does not meet the definition of sexual harassment under Title IX, the Student Code of Conduct may have jurisdiction

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.

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.

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

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 ...

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.

THANK YOU!!

QUESTIONS??