Class Overview:

- Questions from Class One
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- Investigations
  - Impartiality/Conflicts of Interest
  - Investigations Involving Employees
  - Investigating a Formal Complaint
- Understanding Relevance
- Investigative Report
- Violations of Other Policies
- NPRM Changes
Questions from Class One

1. Defining the scope of educational program and activity has been interesting/challenging. We are a University affiliated with multiple Academic Medical Centers and place our students with various affiliated medical/physician groups. How can we decide which employees at each site are “participating/attempting to participate” in the educational program and activity?

2. Do you foresee any backlash once the Biden proposed changes are implemented?

Case Study

Part I: Reviewing Class 1 Concepts.
Anna Smith, the Title IX Coordinator at NACUA University, woke to the following email in her inbox.

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

This morning, a student named Jordan Jones told me that they were sexually assaulted over the weekend and couldn’t finish a paper in time. I spoke with Jordan at length about what happened and Jordan gave me permission to share this information with you. This isn’t the first time I’ve learned of something like this. I need to know what I’m supposed to do. Heads up – the perp is in another class of mine.

Initial Outreach to Jordan Jones
Ms. Smith receives the following that same day:

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Is this a formal complaint, triggering an investigation under your school’s Title IX policy?

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

Thank you for reaching out. On the way home from a party downtown Saturday night, I went with Riley Krill to his room at the ABC Fraternity house. That’s where he raped me. At this point, I really just want Riley to have to meet with you and me, so that we can both tell him what he did was wrong. If he apologizes, I don’t want to take this any further. I can meet tomorrow, at the time you suggested.

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Jordan meets with Ms. Smith and decides to file a formal complaint. Before calling Riley in for an interview, Ms. Smith needs to send a Notice of Allegations both Riley and Jordan. This is what it contains:

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Is anything missing?

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

What should Ms. Smith do?

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

I represent the Krill family. I have learned that Mr. Krill is being falsely accused of rape and I am writing to have the unfounded charges dismissed immediately. Mr. Krill’s parents and I will not permit Mr. Krill’s education to be disrupted by a vindictive 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.

Investigations
The Basics:

- Remember that the regulations also apply to employees – both as those allegedly subject to Title IX sexual harassment and as those accused of engaging in Title IX sexual harassment.

- Investigations of formal complaints of conduct potentially constituting Title IX sexual harassment involving employees must comply with the regulations.

- Institutions must use the same procedures for employee and student allegations of Title IX sexual harassment.
• Title VII also applies and may provide broader remedies and differs in some respects.

However:

• Collective bargaining and other contractual obligations might also apply.

• OCR expects institutions to comply with all requirements.

Title VII Requirements

• Standards
  • Submission becomes a term or condition
  • Unreasonably interferes with work performance or creates a hostile environment
  • Employer knew or should have known

• Immediate and appropriate corrective action
  • End the harassment and prevent recurrence
Special Considerations

- Administrative leave
- Title IX
  - “Reasonably prompt timelines,” and
  - Supportive measures must be non-punitive and non-disciplinary until the process is complete
- Title VII
  - “Immediate and appropriate corrective action”
Conducting an Investigation

- Don’t restrict the ability of either party to discuss allegations or gather evidence.
- Provide parties written notice sufficient to prepare.
- Allow parties an equal opportunity to identify witnesses, and other inculpatory and exculpatory evidence.
- Allow parties to have advisors.
- Don’t access, consider, disclose or otherwise use a party’s records prepared by a professional in a treatment capacity without voluntary, written consent.

Interviews

Consider whether interviews will be:
- Recorded or not recorded.
- Followed with written statements or summaries.

What does your policy say?

When interviewing, the investigator must:
- Be prepared.
- Be objective, unbiased, and free from stereotypes.
- Be free of conflicts of interest.
- Avoid prejudging parties or responsibility.
- Demonstrate respect for all parties and witnesses.
- Take the lead in seeking evidence (inculpitory and exculpatory) – it is not the parties’ responsibility to investigate.
- Be alert to/consider carefully non-verbal communications.
Review of Evidence

- Parties must have equal opportunity to inspect and review *all* evidence directly related to the allegations.
- Provide access to evidence to both parties and their advisors.
- Ten days prior to completion of the investigative report
- Consider parties' written response before completing report.

Understanding Relevance
How is Relevance Defined?

September 4, 2020 Guidance from OCR:

• Title IX Rule does not adopt the Federal Rules of Evidence for hearings conducted under Title IX.
• “The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied.”
• A school may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence.
• A school may adopt rules of order or decorum to forbid badgering a witness, and may fairly deem repetition of the same question to be irrelevant.

So What Is Relevant Evidence?

• Evidence is relevant if:
  • It has any tendency to make a fact more or less probable than it would be without the evidence; and
  • The fact is of consequence in proving or disproving the allegations.
• Does the evidence tend to prove or disprove the allegations?
• A determination regarding relevancy can rely on logic, experience or science.

FED. R. EVID. (401), Legal Information Institute, Cornell Law School, https://www.law.cornell.edu/rules/fre/rule_401
What Is NOT Relevant?

• Review the September 4, 2020 Guidance
• The Regs direct schools to exclude the following evidence and information:
  • a party’s treatment records, without the party’s prior written consent [§ 106.45(b)(5)(i)];
  • information protected by a legally recognized privilege [§ 106.45(b)(1)(x)];
  • questions or evidence about a complainant’s sexual predisposition, and questions or evidence about a complainant’s prior sexual behavior unless it meets one of two limited exceptions [§ 106.45(b)(6)(i)-(ii)]; and,
  • a decision-maker is not permitted to rely on the statements of a party or witness who does not submit to cross-examination [§ 106.45(b)(6)(i)]. Currently, not enforced by OCR but may apply under state law or law in some federal circuits.
Evidence Rules

Guidance: September 4, 2020:

- A school may **not** adopt rules excluding certain types of relevant evidence (e.g., lie detector test results, or rape kits) where the type of evidence is **not**:
  - deemed “**not** relevant” (e.g., evidence concerning a complainant’s prior sexual history) or
  - otherwise barred from use under § 106.45 (e.g., information protected by a legally recognized privilege).

All Relevant Information Is Not Created Equal

- **May** weigh evidence
- Considerations:
  - Is it corroborated?
  - Is there a reason the source might not be reliable?
  - Is it logical given other established facts?
- Decision-maker must evaluate only “relevant” evidence during the hearing and when reaching the determination regarding responsibility – and must do so “objectively”
- The decision-maker must determine the relevance of each cross-examination question before a party or witness must answer.
- Make It Easy: “Not probative of any material fact.”
There is a difference between the admission of relevant evidence, and the weight, credibility, or persuasiveness of particular evidence.

Because § 106.45 does not address how relevant evidence must be evaluated for weight or credibility by a decision-maker, a school can adopt and apply its own rules so long as:

- The rules do not conflict with § 106.45; and
- The rules apply equally to both parties.

For example: A school may adopt a rule regarding the weight or credibility (but not the admissibility) that a decision-maker should assign to evidence of a party’s prior bad acts, so long as its rule applies equally to the prior bad acts of complainants and the prior bad acts of respondents.

REMEMBER: A school’s investigators and decision-makers must be trained specifically with respect to “issues of relevance” and any relevance rules adopted by the school should be detailed in the school’s publicly available training materials.
Investigative Report

- Complete an Investigative Report that fairly summarizes relevant evidence.
- Provide the report to parties and their advisors for review and response at least 10 days before hearing.

Violations of Other Policies
Violations of Other Policies

- Knowingly making false statements or submitting false information
  - Being alert to potential claims of retaliation
- Sexual Harassment not covered in the regulations but violating campus policies
  - Violations occurring in programs or at locations outside the current definition
  - Violations that don't meet the standards under the regulations
- Student Conduct violations
- Employee Conduct standards

*Remember to update notice with later-discovered allegations.*
Proposed Changes

- Handling complaints
  - All allegations of sex discrimination, including sexual harassment, must be handled using procedures required by the regulation.
  - The single investigator model is permitted with provisions prohibiting bias or conflicts of interest in addressing all complaints of sex discrimination.
- Title IX Coordinator
  - May investigate and/or decide Title IX grievances.
  - Must monitor for barriers to reporting and take steps to address
- Investigations
  - Burden is on the institution to gather evidence
  - Relevance is defined (!!!)
  - Institutions must provide parties a description of the relevant evidence
  - Requirements that apply only to sexual harassment complaints involving students at post-secondary institutions
  - Require all, except confidential, employees to notify the Title IX Coordinator of possible sex discrimination

Questions?
Note

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