

What Title IX Coordinators, Investigators, Decision-Makers and Informal Resolution Facilitators Need to Know About Their Obligations Under 2020 Title IX Regulations

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Topics for Discussion 9/21/20 (Whole Group)

- Pertinent Regulatory Background
- Overview of Penn State Framework, Employee Reporting Obligations and Confidential Resources
- Focusing on Conduct, Not Gender
- Definitions of Title IX Sexual Harassment
 - Comparison to Non-Title IX Sexual Harassment
- Scope of University's Education Programs and Activities
- Serving Impartially, Including by Avoiding:
 - Prejudgment of the Facts at Issue
 - Conflicts of Interest, and
 - Bias
- Ensuring that Witness-Centered Investigation and Adjudication Approaches are Applied in a Manner that is Demonstrably Impartial, Thorough, and Fair to All Parties

Topics for Discussion 9/22/20

- Discussion with Investigators
 - “Directly Related” and “Relevance” Concepts
 - Special Evidentiary Issues
 - Preliminary and Final Investigative Reports
 - Fair, Equitable, Witness-Centered Interview Approaches
- Discussion with Decision-Makers:
 - “Directly Related” and “Relevance” Concepts
 - Special Evidentiary Issues
 - Fair, Equitable, Witness-Centered Questioning Approaches
 - Conducting Hearings

Pertinent Regulatory Background

The Long Road to the New Regulations...

- **September 7, 2017:** Department of Education Secretary Betsy DeVos announces notice and comment process
- **September 22, 2017:** OCR issued:
 - Dear Colleague Letter (“2017 DCL”) withdrawing 2011 DCL and 2014 Q&A
 - Q&A on Campus Sexual Misconduct (“2017 Q&A”)
- **November 16, 2018:** Proposed Regulations Posted
 - Officially published in Federal Register later in November, 2018
 - Fact Sheet and Summary also posted

The Long Road to the New Regulations...

- Approximately 125,000 public comments were submitted
- **May 6, 2020:** Final Regulations Posted
 - Officially published in Federal Register May 19, 2020
- **August 14, 2020:** Final Regulations Effective



NACUA NOTES

J. Nolan, “Promoting Fairness in Trauma-Informed Investigation Training”

- National Association of College and University Attorneys (“NACUA”) NACUANOTE, February 8, 2018, Vol. 16 No. 5
 - cited once in Title IX regulations Preamble

Updated Holland & Knight white paper version available at:

<https://www.hklaw.com/en/insights/publications/2019/07/fair-equitable-trauma-informed-investigation-training>

- cited 8 times in Title IX regulations Preamble

Scope of Institutional Responsibility

- Institution must respond when it has:
 - “Actual knowledge”
 - When “an official of the recipient who has authority to institute corrective measures” has notice, e.g., Title IX Coordinator
 - of “sexual harassment” (as newly defined)
 - that occurred within the school’s “education program or activity”
 - “includes locations, events, or circumstances over which the recipient exercised substantial control” over the respondent and the context in which the sexual harassment occurred
 - Fact specific inquiry focused on control, sponsorship, applicable rules, etc.
 - against a “person in the United States” (so, not in study abroad context)

Selected Procedural Changes

- Must investigate “formal complaints”
- Must satisfy certain notice and ongoing notice requirements
- Must produce investigation report with certain elements
- Must give parties and advisors opportunity to review all information “directly related to allegations”
 - Broader than:
 - “all relevant evidence” as otherwise used in Title IX regulations, and
 - “any information that will be used during informal and formal disciplinary meetings and hearings” as used in Clery Act

Selected Procedural Changes

- New procedures require that schools:
 - Ensure that burden of proof and burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the school and not on the parties
 - Provide equal opportunity for parties to present witnesses and other inculpatory and exculpatory evidence;

Selected Procedural Changes

- New procedural regulations require that schools:
 - Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence
 - Essentially, follow many aspects of Sixth Circuit's *Doe v. Baum* decision in student and employee cases involving alleged Title IX Sexual Harassment
- Many other changes will be discussed as they are applied in context of new University procedures

Overview of Penn State University Framework
Employee Reporting Obligations
Confidential Resources

Penn State University Framework

- University Policy AD85 Title IX Sexual Harassment
- University Policy AD91 Discrimination and Harassment and Related Inappropriate Conduct

Employee Reporting Obligations

Confidential Resources

Focus on Conduct, Not Gender

Focus on Conduct, Not Gender

- » Majority of reported incidents and investigations in university context involve cisgender heterosexual women as complainants and cisgender heterosexual men as respondents, but:
 - The gender, gender identity and/or sexual orientation of any party to an investigation should have no bearing on how colleges and universities will investigate

CDC National Intimate Partner and Sexual Violence Survey, Summary Report (2011)

- » 16,507 survey respondents
- » Found that men and women had similar prevalence of nonconsensual sex in the previous 12 months
- » Estimated 1.270 million women raped and 1.267 million men “made to penetrate”

http://www.cdc.gov/ViolencePrevention/pdf/NISVS_Report2010-a.pdf

Focus on Conduct, Not Gender

- » See *Nungesser v. Columbia Univ.*, 169 F.Supp.3d 353, 365 n.8 (S.D.N.Y. 2016) (citing Lara Stemple and Ilan H. Meyer, *The Sexual Victimization of Men in America: New Data Challenge Old Assumptions*, 104 Am. J. Of Public Health, e19 (June 2014)
 - (“noting that although the idea of female perpetrators sexually assaulting male victims is ‘politically unpalatable,’ studies have found that up to 46% of male victims report a female perpetrator”)) (parenthetical note in *Nungesser*)
- » *Sexual Victimization of Men* article is available here:
 - https://www.researchgate.net/publication/262306031_The_Sexual_Victimization_of_Men_in_America_New_Data_Challenge_Old_Assumptions

Focus on Conduct, Not Gender

Sexual Victimization of Men article observes in part (with citations):

- » Portraying male victimization as aberrant or harmless adds to the stigmatization of men who face sexual victimization
- » Fallacies described as “rape myths” in context of female victimization have been discredited in American society (to some extent), but this discourse has not been developed in the context of male victims
- » Myths regarding sexual assault of men pose obstacles to men coping with victimization

Focus on Conduct, Not Gender

- » See also Jessica A. Turchik, *Sexual Victimization Among Male College Students: Assault Severity, Sexual Functioning, and Health Risk Behaviors*, *Psych. of Men & Masculinity*, Vol. 13, No. 3, 243-255 (2012) (available at: https://www.researchgate.net/publication/232425813_Sexual_Victimization_Among_Male_College_Students_Assault_Severity_Sexual_Functioning_and_Health_Risk_Behaviors/link/09e41510807d975c0a000000/download)
- » 299 male college students asked whether they had experienced at least one sexual victimization experience since age 16:
 - 21.7% reported unwanted sexual contact, 12.4% reported sexual coercion, and 17.1% reported completed rape
 - 48.4% of these experiences involved female perpetrators

Court Decisions Focused on Conduct, Not Gender

- » *Nungesser v. Columbia University*, No. 1:15-cv-3216-GHW (S.D.N.Y. March 11, 2016)
- » Court granted University's motion to dismiss "successful" respondent's claim that University failed to appropriately address public statements and activism by complainant in his case because, e.g.:
 - Plaintiff's claim was based on the "logical fallacy" that because the allegations against him concerned a sexual act, that everything that follows from it is "sex-based" for Title IX purposes
 - Personal animus by complainant against him was based on their belief that he raped them, not per se because he is male
 - Persons of any gender may be perpetrators or victims of sexual assault

Court Decisions Focused on Conduct, Not Gender

- » *Doe v. University of Chicago*, No. 16 C 08298 (N.D.Ill. September 20, 2017)
- » “Successful” plaintiff/respondent claimed that University’s response to public statements about him by complainant was so inadequate as to violate Title IX
 - Court rejected claim for the most part, holding, among other things:
 - Personal animus expressed toward someone because they are believed to have engaged in sexual assault is not per se discrimination because of sex for Title IX purposes

Court Decisions Focused on Conduct, Not Gender

John Doe v. Columbia College Chicago, 2017 WL 4804982 (N.D.Ill. Oct. 25, 2017):

- » “As in *University of Chicago*, any harassment that Doe suffered at the hands of Roe and her friends—including the alleged physical assault, the verbal comments made to Doe, and the social media comments and text messages—was ‘because they believed he had committed sexual assault or because of personal—not gender—animus.’”
- » “Doe’s own allegations make clear that he was harassed because of his relationship with Roe and because of his status as a person accused of sexual assault, not because of his gender.”

Court Decisions Focused on Conduct, Not Gender

John Doe v. Columbia College Chicago, 2017 WL 4804982:

- » “Roe and her followers’ social media statements about Doe, for example, labeled him a “predator,” a “rapist,” and a “danger” to CCC’s students. Even viewed in the light most favorable to Plaintiff, these statements are not gender-based harassment because they derive solely from Doe’s status as a person who Roe and her friends believed committed a sexual assault, not from Doe’s status as a male.”
- » As the court in *Nungesser* explained, calling someone a rapist is not “inherently gendered.”

Recognize Potential for Retaliation

- » It should be noted that these court decisions focused on whether respondent/plaintiff was subjected to sex discrimination for purposes of Title IX
- » It should be recognized that adverse actions taken against respondents could implicate:
 - prohibitions against Retaliation (discussed below) and/or
 - other University conduct policies

Colleges and Universities are “Anti-SA, Anti-IPV, Anti-Stalking”

- » Universities are opposed to prohibited misconduct that is established by the evidence in a particular case
- » They are not opposed to anyone on the basis of their gender
- » *Gomes v. Univ. of Maine Sys.* (D. Me. 2005): “There is not exactly a constituency in favor of sexual assault, and it is difficult to imagine a proper member of the Hearing Committee not firmly against it. It is another matter altogether to assert that, because someone is against sexual assault, she would be unable to be a fair and neutral judge as to whether a sexual assault had happened in the first place.”

Definitions of Title IX Sexual Harassment
and
Discrimination and Harassment and
Related Inappropriate Conduct

Scope of Penn State University's Education Program or Activity

University's "education program or activity"

- A University 'Program or Activity' includes:
 - (1) any location, event, or circumstance where the University exercises substantial control over both the Respondent and the context in which the conduct occurs;
 - (2) any building owned or controlled by a Student organization recognized by the University; and
 - (3) a University campus

Decision Point: School's "education program or activity"

- “[N]othing in the final regulations prevents recipients from initiating a student conduct proceeding or offering supportive measures to students affected by sexual harassment that occurs outside the recipient’s education program or activity.”
- Given this change, universities **had to decide** whether to prohibit and investigate sexual misconduct that occurs outside more narrowly-defined “education program or activity”

Education Programs and Activities at Penn State

- » Discussion of:
 - Examples, and
 - Scenarios

Impartiality:
Avoiding Prejudgment,
Conflicts of Interest, and Bias

Impartiality: Avoiding Prejudgment of Facts at Issue

From Title IX 2020 Regulation Preamble:

» “the Department’s interest in ensuring impartial Title IX proceedings that avoid prejudgment of the facts at issue necessitates a broad prohibition on sex stereotypes so that decisions are made on the basis of individualized facts and not on stereotypical notions of what ‘men’ or ‘women’ do or do not do.”

Impartiality: Avoiding Prejudgment and Bias

From Title IX Regulation Preamble:

- » “Contrary to the concerns of some commenters, a prohibition against reliance on sex stereotypes does not forbid training content that references evidence-based information or peer-reviewed scientific research into sexual violence dynamics, including the impact of trauma on sexual assault victims.”

- » “Rather, § 106.45(b)(1)(iii) cautions recipients not to use training materials that ‘rely’ on sex stereotypes in training Title IX personnel on how to serve in those roles
 - impartially and without prejudgment of the facts at issue,
 - meaning that research and data concerning sexual violence dynamics may be valuable and useful,
 - but cannot be relied on to apply generalizations to particular allegations of sexual harassment.”

Impartiality: Avoiding Prejudgment and Bias

» Analogous regulatory language:

- Regulations’ “presumption of non-responsibility” requires schools to investigate and resolve complaints: “without drawing inferences about credibility based on a party’s status as a complainant or respondent.”
- Hearing officers must not have “bias for or against complainants or respondents generally or for an individual complainant or respondent”

Impartiality: Avoiding Prejudgment and Bias

- » Preamble repeatedly warns against risk of “sex-based bias” in decision-making
- » Preamble:
 - “To the extent that commenters accurately describe negative stereotypes applied against students with disabilities, and particularly against students with disabilities who are also students of color or LGBTQ students, the final regulations expressly require recipients to interact with every complainant and every respondent impartially and without bias.”
 - “A recipient that ignores, blames, or punishes a student due to stereotypes about the student violates the final regulations.”

Impartiality: Avoiding Prejudgment and Bias

» Practical application of these concepts in investigations:

- Do not rely on cultural “rape myths” that essentially blame complainants
- Do not rely on cultural stereotypes about how men or women purportedly behave
- Do not rely on gender-specific research data or theories to decide or make inferences of relevance or credibility in particular cases

Impartiality: Avoiding Prejudgment and Bias

- » Practical application of these concepts in investigations and adjudications:
 - Recognize that anyone, regardless of sex, gender, gender identity or sexual orientation, can be a victim or perpetrator of sexual assault or other violence
 - Avoid any perception of bias in favor of or against complainants or respondents generally
 - Employ interview and investigation approaches that demonstrate a commitment to impartiality

Impartiality: Avoiding Conflicts of Interest

- » Commenters argued that investigators and hearing officers employed by schools have an “inherent conflict of interest” because of their affiliation with the school, so Department should require investigations and hearings to be conducted by external contractors
- » Department noted that some of those commenters argued that this resulted in bias against complainants, and some argued that this resulted in bias against respondents

Impartiality: Avoiding Conflicts of Interest

- » Department's response:
 - Department's authority is over schools, not individual investigators and other personnel,
 - so Department will focus on holding school's responsible for impartial end result of process,
 - without labeling certain administrative relationships as per se involving conflicts of interest

Impartiality: Avoiding Conflicts of Interest

- » Department also rejected commenters' arguments that individuals should be disqualified from serving as investigators because of past personal or professional experience
 - “Department encourages [schools] 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” WHILE
 - “exercising caution not to apply generalizations that might unreasonably conclude that bias exists (for example, assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents”

Impartiality: Avoiding Conflicts of Interest

» Discussion:

- University procedures for identifying and addressing potential conflicts of interest
- Addressing potential conflicts that arise during investigation or resolution process

Impartiality: Avoiding Prejudgment, Bias, and Conflicts of Interest

» Bottom line:

- Focus on facts of every individual case
- Strive to conduct investigations, formal proceedings and adaptive resolution processes in manner that will not allow even a perception of prejudgment or bias
 - for or against any party, or
 - for against complainants or respondents generally

Ensuring that Witness-Centered Investigation and Adjudication Approaches are Applied in a Manner that is Demonstrably Impartial, Thorough, and Fair to All Parties



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Interviewing and Questioning for Clarification

- Following witness-centered approaches may yield better information, but:
 - It is crucial to interview and question witnesses for clarification
- Promotes accuracy and fairness
- If done appropriately, should not alienate witnesses
- Examples of how to present evidence, statements of other witnesses to parties

Fair, Witness-Centered Approach

Investigators should seek clarification on crucial points, but starting with a more open-ended, witness-centered approach can:

- Yield more, and more accurate, information
- Better encourage witness participation
- Be less likely to interfere with authentic memory

Fair, Witness-Centered Approach

- Even witnesses who do not appear to have experienced trauma (e.g., many respondents), may be experiencing substantial stress due to investigation and interview setting
- Same open-ended questioning approach is just as effective when used with respondents
 - And should be used if used with complainants, to promote neutrality
- As with complainants, should not rely unduly on “presentation as evidence”

Fair, Witness-Centered Approach

- Like complainants, respondents can be provided opportunity for open-ended narrative
- Sensory information can be gathered from respondents
- Avoiding leading questions, yes/no questions, paraphrasing, etc. is important for respondent questioning as well
- Neutral, open-ended questioning approach may be used with both parties

Thank You!



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