Title IX Regulations:
Informal Resolution Facilitator,
Investigator, and Anti-Bias Training

August 17, 2021
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Illinois Institute of Technology

Anti-Bias
### Title IX Requirements

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<th>01</th>
<th>02</th>
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<tbody>
<tr>
<td>Training on bias, conflict of interest, prejudgment required</td>
<td>Bias, conflict of interest, prejudgment prohibited</td>
<td>Appeal can be based on improper, biased/conflicted investigator</td>
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### What is Bias?

(noun) prejudice in favor of or against one thing, person, or group compared with another, usually in a way considered to be unfair

(verb) cause to feel or show inclination or prejudice for or against someone or something
Bias as a Shortcut

What is Implicit/Unconscious Bias?

(noun) bias that affects our understanding, actions, and decision in an unconscious, involuntary manner, often without awareness or control
Bias Myths Busted

It is possible to get rid of all implicit and explicit bias in oneself

- False
- True
Our implicit biases align with our declared beliefs

True  False

False  True

One cannot have implicit biases against their own "ingroup"

True  False

False  True
Implicit biases are malleable

True  False

False  True

Bias Exercise

<table>
<thead>
<tr>
<th>Race/Color/National Origin</th>
<th>Native Language/Accent</th>
<th>Gender/Gender Identity</th>
<th>Religion</th>
<th>Education Level</th>
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<tr>
<td>Best Friend</td>
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<td>Religious/Spiritual Leader or Mentor</td>
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<tr>
<td>Physician</td>
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<tr>
<td>Dentist</td>
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<tr>
<td>Professional Mentor</td>
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<tr>
<td>Educational Teacher or Mentor</td>
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## Bias in Title IX

Sexual Harassment
Scenario – Charlie and Alex

Scenario – Blair and Taylor
Scenario – Reese and Alex

Title IX Bias Risks

- Selective enforcement
- Ignoring impacts for members of special populations (race, culture, disability, LGBTQ+, etc.)
- Rush to judgment
Bias Reduction and Mitigation

• SPACE2
  S low down
  P erspective shift
  A sk yourself questions
  C ultural intelligence
  E xemplar identification
  E xpand your circle

Who Should Serve as an IRF?

• Trained Facilitator
• Neutral Party/Impartial/Unbiased
• No prejudgment of case
• Per Illinois Tech policy:
  ➢ IRF cannot be involved in the investigation
  ➢ IRF can be employee or third party contractor
Who Should Serve as an Investigator?

• Trained, unbiased
  ➢ No actual or perceived conflict of interest
  ➢ Check “institutional interests”
  ➢ No presumption for or against any party
• Appeal: bias and conflict of interest that affected the outcome of the matter

Standard

• Declined to define “bias,” “conflict of interest,” “prejudge”
• The Department encourages recipients 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, exercising caution not to apply generalizations that might unreasonably conclude that bias exists....
Bias

The Title IX Team Member must not have a conflict of interest or bias for or against Complainants or Respondents generally or for or against any individual Complainant or Respondent. And that they not prejudge any matter before them.

Conflict of Interest

- Flexibility to choose informal resolution facilitator
- Can use a school employee
- Can use an individual with a history of working in certain fields
- Caution against using generalizations to identify conflict of interest
Pre-Judgment

Tips for avoiding pre-judgment of facts:
• Each case is fact-specific
• Keep an open mind
• Listen to facts presented
• You are not an advocate for either party

Sex Stereotypes

• Must not rely on sex stereotypes such as:
  ➢ Women are “asking for it” based on actions or clothing
  ➢ Men cannot be sexually assaulted
  ➢ Women only decide they were assaulted after the fact due to regret or embarrassment
  ➢ Men are more likely to be sexual aggressors
• Consider intersection of sex stereotypes with race, ability, sexuality, and gender identity
You signed the Formal Complaint as Title IX Coordinator or designee. Is that a conflict of interest?

Yes  No

You and Respondent's mother went to college together. Is that a conflict of interest?

Yes  No
You have a history of working as a defense attorney. Is that a conflict of interest?

Yes  No

You are the ADA compliance officer. Is that a conflict of interest?

Yes  No
What Might be Bias, Conflict, Prejudgment?

- Discouraging a party from submitting certain evidence
- Using terms like “victim” (even if used in Clery)
- Permitting credibility inferences or conclusions based on party status
What Might be Bias, Conflict, Prejudgment?

• Using sex stereotypes
• Placing the burden of proof on one party
• Unauthorized interim suspensions or other penalties before conclusion of grievance process

What Likely Is Not...

• Deciding an allegation warrants an investigation
• Being an employee (and even attorney)
• Finding in favor of one party over another
Informal Resolution
What is Informal Resolution?

- Informal method to settle formal complaints of Title IX Sexual Harassment
- Can be offered
- Must be offered consistently

When Can IR be Offered?

- Can only be used when formal complaint has been filed
- Cannot be used in cases of employee-on-student harassment
- Can only be used if each party has given informed, written consent (cannot ever be required, indirectly or directly)
WHY ALLOW IR?

When is IR most useful? No Competing Factual Narratives
Robin’s Report

• Report from an RA
• Robin, a freshman, rooms with Cameron, another freshman. Cameron told Robin that another student, a senior, Parker, had been sending inappropriate email messages to Cameron.

Robin’s Report

• Robin encouraged Cameron to report, but Cameron refused
• Robin was talking to another student, Peyton, at a party last weekend. Peyton reported also receiving inappropriate messages from Parker.
Robin’s Report

- Because this seemed like a pattern, Robin felt the need to report.
- The emails began with requests for dates but evolved into name calling (slut, skank), rambling comments about the recipient’s “obvious” desire for Parker, and incessant requests for connection.
- Cameron and Peyton are not interested in filing a formal complaint.
Types of Informal Resolution

- Restorative Justice
- Mediation
- Consider: Face to Face?

Required & Recommended Notices

- Notice of allegations + existence of IR process (by Investigator w/in 7 calendar days per policy)
- Offer of informal resolution (with impacts of participation)
- Notice of end of informal resolution without agreement
- Notice of successful informal resolution
Forms/Notices

Informal Resolution Process

- Offer of Title IX Informal Resolution Process (Franczek Notice 5(a))
- Notice of Closure of Title IX Informal Resolution Process (Franczek Notice 5(b))

Notice of Impacts of Participation in IR Process

- Can withdraw and return to investigation process before resolution
- Neither party can ask for investigation to resume after resolution
- Records will be maintained for 7 years
- Other impacts of participation
Other Impacts of IR Process

- Can IR Facilitator testify against the parties at a later hearing?
- Can facts be used against the parties at a later hearing?

The Mediation Process

- Introductions
- Information Collection
- Problem Identification
- Brainstorming Solutions
- Brokering the Deal
- Agreement
Emotions

- Silence is ok
- Sympathy is ok (within reason/neutral) – “I can tell this is hard” “I’m sorry this is difficult”
- Allow breaks
- Remember the importance of an even-handed process
Illinois Tech IR Process

- Meet with each party separately
- Describe process
- Gain understanding of feelings, positions, wishes
- Gather necessary information
- Then, separate or join meetings
Critique an Introduction

Critique a Mediation: Introduction Content

Good

Not Good
Critique a Mediation: Delivery of Introduction

Good  Not Good

Brainstorming Solutions
Brainstorming Ideas

• Don’t shut down ideas
• Write down all ideas
• Suggest, but don’t advocate
• Discuss pros/cons and possibility of solution working

Brainstorming Ideas

• “What solution would allow you to feel comfortable settling the complaint?”
• “If the other party were to offer x, would you be willing to offer anything in return?”
• If a party refuses to make further offers, ask questions to understand why
What types of solutions might you brainstorm for Cameron and Parker?
Illinois Tech Policy Examples

- Participation in educational programming;
- Changes in academic, work, and living arrangements;
- Assistance with requesting academic allowances and extensions;
- Writing an impact statement;
- Writing a statement acknowledging harm caused; and
- Restrictions of contact between the parties.

Length of Informal Resolution

- Will vary depending on complexity
- Per Illinois Tech Policy:
  - 30 calendar days, but extensions will be warranted in many cases
  - Obtain written agreement to extensions from all parties
- Keep the Title IX Coordinator apprised of progress
Cameron and Parker reach an agreement in informal resolution. Can the Title IX process ever recommenced?

Yes, if Parker fails to comply with the terms

Yes, but only for allegations not resolved in informal resolution

No, because you can only recommence an investigation before a resolution is reached
Role of Institution If Agreement Reached

• Agreement is between the parties; institution is not a party
• IR Facilitator can:
  - Act as intermediary
  - Make suggestions, evaluations
  - Help with drafting document

Recordkeeping
QUESTIONS
Investigations

Agenda

- Investigator Responsibilities
- Investigation Requirements & Best Practices
- Sharing Evidence and the Investigative Report
- Understanding “Relevant Evidence”
- Recordkeeping
Investigator Responsibilities

- Identify and interview parties and witnesses
- Gather and assess evidence
- Share evidence with parties and provide for written response
- Draft and transmit investigative report

Example Report
Robin’s Report

• Report from an RA
• Robin, a freshman, rooms with Cameron, another freshman. Cameron told Robin that another student, a senior, Parker, had been sending inappropriate email messages to Cameron.

Robin’s Report

• Robin encouraged Cameron to report, but Cameron refused
• Robin was talking to another student, Peyton, at a party last weekend. Peyton reported also receiving inappropriate messages from Parker.
Robin’s Report

• Because this seemed like a pattern, Robin felt the need to report.
• When asked for details about the types of messages, they began with requests for dates but evolved into name calling (slut, skank), rambling comments about the recipient’s “obvious” desire for Parker, and incessant requests for connection.
Title IX Sexual Harassment

- Employee quid pro quo
- Hostile environment (newly defined)
- Clery/VAWA “Big 4”

VAWA “Big Four”

- Domestic Violence 34 U.S.C. 12291(a)(8)
- Dating Violence 34 U.S.C. 12291(a)(10)
- Stalking 34 U.S.C. 12291(a)(30)
Don’t Forget – TIX Quid Pro Quo

**Definition:** An employee of the recipient conditioning an aid, service, or benefit of the recipient on an individual’s participation in unwelcome sexual conduct

**New:** Only an employee (not a volunteer, another student, etc.)

**Codified:** Severity and harm presumed

You think it's TIX SH.... What do you do next?

- Contact Robin to obtain more information
- Contact Robin to offer an opportunity to file a formal complaint and supportive measures
- Contact Cameron to offer an opportunity to file a formal complaint and supportive measures

100%
Meeting with Cameron

• Cameron confirms all of the allegations
• Cameron wants a No Contact Order against Parker
• Cameron does not want to be named to Parker

Can you honor Cameron's confidentiality request?

No, names must always be provided to the Respondent when a Complainant reports Title IX Sexual Harassment

No, because this situation warrants "signing" a formal complaint and Cameron must therefore be named

Yes, because respecting the autonomy and wishes of the Complainant is paramount under the new regulations

None of the above
Can you honor the request for a No Contact Order

- Yes, even if it's unilateral
- Yes, but only if it's mutual

Forms/Notices

Initial Contact and Meeting with the CP

- Notice to Complainant of Report of Title IX Sexual Harassment (Franczek Notice 1(a))
- Summary of Supportive Measures Meeting with the Title IX Complainant (Franczek Notice 1(b))
- Title IX Formal Complaint (Franczek Form A)
Forms/Notices

Informal Resolution Process

- Offer of Title IX Informal Resolution Process (Franczek Notice 5(a))
- Notice of Closure of Title IX Informal Resolution Process (Franczek Notice 5(b))

Formal Complaint – Next Steps

- Written notice to all known parties
  - Grievance process
  - Allegations
  - Respondent presumed not responsible
  - Right to advisor
  - Right to inspect/review evidence
  - Notice of provision on false statements
NEW: Cameron’s Formal Complaint

- Cameron, a freshman, claims that another student, a senior, Parker, sexually assaulted Cameron in on-campus housing two weeks ago
- You receive the formal complaint and the written notices of Title IX allegations to the parties
Investigation Requirements & Best Practices

Investigation

- Must contain specific elements
- Must treat parties equally
- Must end in a report, followed by a hearing with live cross, a written decision from the decisionmaker, and the opportunity to appeal
Investigation
34 C.F.R.
106.45(b)(5)

• Burden of proof on school
• Certain treatment records cannot be obtained without voluntary, written consent
• No restriction of rights of parties to discuss allegations or gather or present evidence
• Same opportunities for others present during interviews or related proceedings (e.g., attorney or non-attorney advisor)
• Written notice to parties of date, time, participants, purpose, and location of each investigative interview with sufficient time to prepare
• All evidence provided to parties and their advisors with 10 days to respond before report
• Written investigative report “fairly summarizes the relevant evidence” provided to parties and advisors at least 10 days before hearing or other determination of responsibility
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The Investigation Plan

- Witness List
- Order of Interviews
- Questions for Witnesses
- Physical Evidence Needed, e.g., records, documents, reports, photos, and letters

Cameron’s Formal Complaint

- Cameron reports that the sexual assault occurred after a party. Bobbie and Ali, both students and were at the party.
- After the party, Cameron told Robin, Cameron’s roommate, what happened. Cameron also talked to a professor, Dr. Smith.
- Cameron submitted to a police interview and SANE exam shortly after the incident.
Concurrent Law Enforcement

- Police plan to release evidence on a specific timeframe that is material to investigation
- Only “temporary” or “limited” allowed
- Not “more than briefly” beyond timeframes
- Not required

What must you do while delaying for law enforcement reasons?

- Indefinitely suspend Parker because of the violent nature of the alleged offense
- Provide equal supportive measures to the parties
- Comply with timelines in other laws, if applicable
- Require Parker to sit for an interview
- None of the above
What is your order of interviews?

Outcry Witness/Student - Robin
Outcry Witness/Employee - Mr. Smith
Complainant - Cameron
Direct Witnesses/Students - Ali and Bobbie
Respondent - Parker
Police Witness
Medical Witness
Before Party Interviews

Communicate in Writing:
• Date, time, location, participants, purpose
• With sufficient time to prepare
Recommend same for witnesses (not required)

Forms/Notices

Notice of Interview

Notice of Title IX Interview or Meeting with Title IX Party (Franczek Notice 6(a))

Notice of Title IX Interview or Meeting with Non-Party Witness (Franczek Notice 6(b))
Forms/Notices

Notice to Advisors

Advisor Conduct Expectations

Prefaces for Parties

- Your Identity and Role as a Neutral
- Notes and Records
- Allegations
- Process

- Role of Advisor
- Confidentiality
- Retaliation
- Rapport Building
Prefaces for Witnesses

- Your Identity and Role as a Neutral
- Notes and Records
- Allegations (if necessary)
- Role of Advisor (if allowed)
- Confidentiality
- Retaliation
- Rapport Building

Questions

- Relationships
- Identities of Parties
- Details of Conduct Between the Parties
- Effect of Alleged Conduct on the Parties
- Outcry/Reports
- Other Responses of Parties
- Documentary and Other Evidence
- Identities of Witnesses
Avoid

• Discussing theories or assessment of the evidence
• Suggesting agreement or outcome
• Pressuring for more information on irrelevant incidents
• Body language or words suggesting judgement

Closing

• Anything else?
• Any questions?
• Advisor questions (if allowed)
• Encourage follow-up
• Process (again for parties)
Potential Trauma for CP and RP

Practical Tips – Trauma

- Ask open ended questions
- Do not demand starting at the beginning & providing every detail
- Acknowledge pain/difficult situation

"It's ok if you can’t remember every detail. We will just focus on what you can recall." “I can tell this is difficult for you, I can give you a little time”
AVOID
Victim blaming
Accusing
Judging

Emotions

- Silence is ok
- Sympathy is ok (within reason/neutral) – ”I can tell this is hard” “I’m sorry this is difficult”
- Allow breaks
- Remember equality not equity is goal for processes
Retaliation and Gag Orders

- Gag order not allowed
- Warn of risks from speaking about the complaint
- Notify all parties and witnesses of retaliation rights and encourage follow up

Cardinal Sins of Interviewing

- Questions that are evaluative
- Long, confusing questions
- Sticking blindly to a script
- Using undefined terms (witness can define)
- Interrupting and rushing
In your own words, what happened?

What did you witness?

Did you respond? If so, how?

For all: where, when, who present?

How did the conduct affect you?

Parties: What would you like to see as an outcome? (avoid making any promises)
Consider whether appropriate to ask for more incidents than offered

Perhaps instead, focus on repeating “Is there anything else you’d like to tell me or for me to look into?”

After Interviews

- Follow up in writing to summarize any points that might need confirmation
- Clean up notes
- Document less formal interactions
- Send links/copies to policies if relevant
- REASSESS allegations, investigation plan, and supportive measures

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Scope of the Investigation

Must be “thorough,” but not required to review all potential sources of evidence parties or witnesses identify.
Sharing Evidence and the Investigative Report

So the investigation is done….

• Must share evidence directly related to the allegations with both parties and advisors simultaneously with 10 days to respond before writing the report
  ➢ Review/consider responses
  ➢ Share responses with the other side
Forms/Notices

Sharing of Evidence

- Notice of Directly Related Evidence (Franczek Letter 7(a))
- Notice of Other Party’s Written Response to Evidence (Franczek Letter 7(b))

Which of these is NOT directly related evidence in Cameron's Formal Complaint?

- Email messages from Cameron to Parker earlier in the school year in which Cameron and Parker seemed to be flirting
- Draft interview notes from interviews with parties and witnesses (a final version was created)
- Text messages from Parker to another female student with similar conduct
- Facebook messages between Cameron and another student with raunchy sexual language
- Rumors from a witness of something another witness (not available to interview) said about Parker engaging in similar conduct with the unavailable witness
Investigation Report

- Applicable policies and procedures
- Timeline of investigation
- Description of allegations
- Unbiased summary of evidence gathered, including interviews
- Credibility assessment(s)

Forms/Notices

Investigative Report

- Title IX Investigative Report Template (Franczek Form B)
- Notice of Investigative Report (Franczek Notice 8(a))
- Notice of Other Party’s Written Response (Franczek Notice 8(b))
- Transmittal Cover Letter to Decision-maker at Conclusion of Investigation (Franczek Letter 8(c))
Investigation Report

- Must **fairly summarize relevant evidence**
- Relevant evidence is different from evidence “directly related to the allegations”

Hearing and Decision

- Notice of Hearing
- Written determination (Franczek Form C - Written Determination Template)
Appeal Notice

- Upon receipt of an appeal, the Title IX Coordinator must notify the other party/parties of the appeal
- Both parties must be given an opportunity to submit a written statement for or against the appeal

(Franczek Notices 11(a) and (b))

Understanding Relevant Evidence
Determining Relevance

- Evidence is generally considered relevant if it has value in proving or disproving a fact at issue
- Exceptions
  - Sexual behavior (except in limited situations)
  - Legal privilege
  - Treatment records

Rape Shield Law

- Exclude evidence of Complainant’s prior sexual behavior or predisposition
- Two narrow exceptions
  - Someone other than RP committed conduct
  - Past conduct between CP & RP to show consent
- Does not apply to Respondent
**Treatment Records**

- Can’t access, consider, disclose, or use records
- Made by a physician, psychologist, or other recognized professional
- Which are made and maintained in connection with the provision of treatment,
- Unless the party gives voluntary, written consent

**Legally Privileged Information**

- Cannot use questions or evidence that seek disclosure of legally privileged information, unless waived
- Consider:
  - Attorney-client communication
  - Privilege against self-incrimination
  - Confessions to a clergy member or religious figure
  - Spousal privilege
  - Confidentiality and trade secrets
Recordkeeping

Investigation File

• What should be in the investigation file?
  ➢ Complaint
  ➢ Applicable Policies
  ➢ Investigation Plan (can be a living document)
  ➢ Records of Communications
  ➢ Interview Notes
  ➢ Evidence Collected
  ➢ Report
Interview Notes

- Include: Facts + Statements (consider quotes)
- Don’t Include: Conclusions + Judgements
- Label: Name of Witness, Date, Time, Interviewer, Location, Method, Those Present

Recordkeeping Essentials

- Overview of Required Recordkeeping
- File Checklist
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