Illinois Institute of Technology

2020 Title IX Regulations: Basic Title IX Training

August 1, 2023
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Introductions
What is your name and title?

Ground Rules
Ask Questions

Participant
Participate!

Keep it hypothetical
Why Are We Here?

Know the Rules

New Rules?

Recognize Title IX Sexual Harassment and Related Misconduct

But not just any action, the right action for the conduct at issue!
Why is this so important?

According to a 2017 report from the Justice Department, only 23 percent of all sexual assaults are reported to the police.

Harassment and assault can have long lasting, detrimental effects on victims (Trauma).

Effects on Individuals
- Stress
- Distraction
- Acting out
- Suicide
- Disengagement
- Anger
- Absenteeism
- Anxiety
- Depression
- Poor performance in school
- Fear
- Conflict
- Lost Opportunities
- Drop-out

Effects on Teams
- Decreased focus
- Lost productivity
- Withdrawal
- Neglect
- Absenteeism
- Malingering
- Lack of trust in leadership
- Turnover
Unfair processes can have long lasting, detrimental effects on the accused.

Mattress Protest and Its Aftermath
Case of alleged rape at Columbia first yielded much sympathy for the accuser and her unusual protest, but ends with the university apologizing to the accused. The case has had a lasting impact on the discussion of sexual assault on campus.

by Jeremy Basel Rice / July 24, 2017

Harassment Is Illegal
Including Sexual Harassment

ED Office for Civil Rights (OCR)

You could be responsible.

Thumbs Up or Down
Have you been directly involved in a Title IX complaint during your time at the Institution?
What is Title IX?

What falls under Title IX?
- Recruitment, Admissions, and Counseling
- Financial Assistance
- Athletics
- Sex-Based Harassment
- Treatment of Pregnant & Parenting Students
- Discipline
- Single-Sex Education
- Employment
- Retaliation

Title IX Statute
(20 U.S.C. §§ 1681–1688)
"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

Title IX Regulations
(34 C.F.R. Part 106 – Amended as of 8/14/2020)
- Prohibit discrimination on the basis of sex
- Establish procedural requirements
  - Policy
  - Detailed Grievance procedure
  - Designation of Title IX coordinator(s)
  - Many many requirements

Other Applicable Laws
### Employment
- Illinois Human Rights Act
- Title VII
- Title IX
- Clery Act/Violence Against Women Act

### Students
- Illinois Human Rights Act
- Preventing Sexual Violence in Higher Education Act
- Title IX
- Clery Act/Violence Against Women Act

### How Does Clery/VAWA Relate to Title IX?
- Contains policy and procedural requirements for addressing complaints of domestic violence, dating violence, sexual assault, and stalking
  - Timely warnings, emergency notifications
  - Requirements following a report
  - Broader AND narrower than Title IX
- ASR and other reporting
- Prevention requirements

### What Does VAWA Require?
- Specific requirements for policies and procedures, including:
  - Description of disciplinary proceedings
  - Steps, anticipated timelines, and decision-making process
  - Standard of evidence
  - List of all possible sanctions and description of protective measures
  - Prompt, fair and impartial process
  - Conducted by individuals who receive annual training
  - Advisor of choice
  - Various written notification requirements, including:
    - Written notification about options for accommodations and protective measures
    - Simultaneous notification to parties of certain results

### Required Programming Under VAWA
- Primary prevention and awareness programs for all incoming students and new employees
- Ongoing prevention and awareness campaigns for students and employees
- Range of topics, including definitions of prohibited conduct, resolution procedures, possible sanctions and protective measures, and available resources and options

### Illinois Preventing Sexual Violence in Higher Education Act
- Comprehensive policy and procedure concerning sexual violence, domestic violence, dating violence and stalking
  - Several required components
- Written explanation of rights and options to survivors
- Confidential Advisors to survivors
- Training requirements

### Additional Requirements
- Offer students options to make reports in various ways, including anonymously
- Respond to electronic report within 12 hours
- Define consent in policy
- Participate in campus-wide or regional task force
- Annually report data
When Must the Institution Respond to Sexual Harassment?

It Depends Who [Well, Which Law] You Ask

- Illinois Human Rights Act
- Title VII
- Title IX
- Clery Act/Violence Against Women Act

Employment

Students

- Illinois Human Rights Act
- Preventing Sexual Violence in Higher Education Act
- Title IX
- Clery Act/Violence Against Women Act

When must a school respond to Title IX sexual harassment?

A recipient with actual knowledge of [Title IX] sexual harassment in an education program or activity against a person in the United States must respond promptly and in a manner that is not deliberately indifferent.

Actual Knowledge - Official with Authority

- Title IX Coordinator
- Any other officials who have been given authority to institute corrective measures on behalf of the recipient

Official with Authority – Illinois Tech Policy

- Under Illinois Tech’s Policy, “Officials with Authority” are defined to include “any official designated by Illinois Tech to have authority to institute corrective measures on behalf of the institution, specifically:
  - President
  - Provost
  - Vice Presidents and Provosts
  - The Title IX Coordinator and the Office Personnel, Academic Deans, Department Chairs
  - Student Affairs and Residential L Directors
  - Athletic Directors
  - Director and Assistant Directors of Public Safety.”

Title IX Actual Knowledge

1. Sense
2. Report
Reporting Sexual Harassment: Who, How and When?

• Any person may report sex discrimination, regardless of whether the person is the alleged victim of the reported conduct.
• Reports can be made by mail, by telephone, or by email, using the contact information listed for the Title IX Coordinator.
• Or by any means that results in the Title IX Coordinator receiving the person’s report.
• Such a report may be made at any time, including during non-business hours, by using the telephone number or electronic mail address, or by mail to the office address listed for the Title IX Coordinator.

Key Word: “Allegation”

Once a school has notice of an allegation that, if true, would constitute sexual harassment, it must respond.

“Well, we didn’t believe there was enough evidence it happened” does not get you past your responsibility to use your Title IX procedures.

What about VAWA/Clery Act?

• CSA = “campus security authority”
  ➢ Special designation under Clery Act
  ➢ Designed to facilitate crime reporting in annual report
• WHO?
  ➢ Anyone with responsibility for campus security
  ➢ Anyone to whom crimes can be reported
  ➢ Anyone with “significant responsibility for student and campus activities” (housing, discipline)
  ➢ Excludes pastoral/professional counselors
• CSA may be considered an “official with authority” under Title IX such that notice to that person constitutes actual knowledge.

Campus Security Authority

The relevant titles and capacities are:

President, Provost and those designated to serve in the role of Associate or Assistant Vice Presidents/Provosts; academic deans, directors and department chairs, including those serving in associate or assistant roles; student affairs directors; residential life personnel, including resident advisors; Greek life coordinators; athletic administrators, including directors, assistant directors, coaches, assistant coaches and trainers; student activities coordinators; faculty and staff advisors to IIT recognized student organizations; academic advisors; and Public Safety staff.

Key Roles in Responding to Reports

• Medical providers
• Law enforcement
• Community/outside agencies

Involvement of Law Enforcement

• Complainant has the option to involve law enforcement, including:
  ➢ Notifying law enforcement, including on-campus and local police
  ➢ Request assistance from campus authorities
  ➢ Decline to notify law enforcement or campus authorities
• Orders of protection, no contact orders, restraining orders
What is Sexual Harassment?

It Depends Who [Well, Which Law] You Ask

- Illinois Human Rights Act
- Title VII
- Title IX
- Clery/VAWA

Employment

- Illinois Human Rights Act
- Title IX
- Clery/VAWA

Students

- Illinois Human Rights Act
- Preventing Sexual Violence in Higher Education Act
- Title IX
- Clery/VAWA

Title IX Sexual Harassment

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

Quid Pro Quo

Quid = Something

Pro = For

Quo = Something

Title IX 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
Clery/VAWA

- 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)

Title IX – What is Sexual Harassment?

**Old Definition**
Unwelcome conduct determined by a reasonable person to be severe, pervasive, or persistent as to interfere with or limit a student’s ability to participate in or benefit from school services, activities, or opportunities

**New Definition (8/14)**
Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person’s equal access to the recipient’s education program or activity

Unwelcome Conduct

- Not Consent
- Not Participation
- Not Silence
- Age Matters
- Intoxication Matters
- Culture Matters
- Ability Matters

Unwelcome vs. Consent

- Consent under Illinois law
- Consent under your Institution’s policy
  - Article IV, Section N of Student Code of Conduct
  - Role of drugs and alcohol on ability to consent

- Severe, pervasive, and objectively offensive
- Constellation of surrounding circumstances, expectations, and relationships
- Reasonable person standard
Hostile Environment Factors

Context, Nature, Scope, Frequency, Duration, and Location of the Incidents

Identity, Number, Ages, and Relationships of the Persons involved

What about… casual or isolated comments or conduct?

Thumbs Up or Down
Is this severe, pervasive, and objectively offensive?

Title IX Sexual Harassment Must Be “In a Program or Activity”

Program or Activity: Any location, events, or circumstance over which the recipient exhibits substantial control over both the alleged harasser and the “context” in which the harassment occurred
Online & Off Campus
Substantial control over the context?

Schools need only address sex discrimination occurring against a person in the United States under Title IX.

Mandatory if conduct alleged:
- Not Title IX sexual harassment if true
- Did not occur in the school’s program or activity
- Did not occur in the United States

**Can still address under non-Title IX policy**

Permissive if:
- Complainant requests to withdraw in writing
- Respondent’s enrollment or employment ends
- Specific circumstances prevent recipient from gathering evidence sufficient to reach a determination (e.g., passage of time, lack of cooperation by complainant)

TIX DISMISSALS

Policies on Harassment
- Sexual Harassment Policy
- Title IX Grievance Procedure
- Code of Conduct
- Employee Handbooks etc.

Compare to Clery
- Clery geography
  - On campus (slightly different reporting requirements for on campus housing)
  - Public property within or immediately adjacent to campus
  - In or on non-campus buildings or property that your college owns or controls

https://www.campussafetymagazine.com/clery/clery-act-geography-definitions-clery-map-examples/

Consider whether another non-"sexual harassment" policy or procedure applies.
How Must the Institution Respond?

**Initial Response/Supportive Measures**

1. **Terminology**
   - **Title IX Complainant**: A person who is alleged to be the victim of conduct that could constitute sexual harassment
   - **Title IX Respondent**: A person who has been reported to be the perpetrator of conduct that could constitute sexual harassment
   - **Title IX Coordinator**: Must be called Title IX Coordinator
   - **Must meet with alleged victims of sexual harassment (the Title IX Complainant) covered by the Title IX regulations (can delegate)**

**Adequate Response**

1. Initial Response/Supportive Measures
2. Informal Resolution (mediation)
3. Investigation
4. Decision
5. Appeal

**Title IX Coordinator**

- Virginia Foster
- Must be called Title IX Coordinator
- Must meet with alleged victims of sexual harassment (the Title IX Complainant) covered by the Title IX regulations (can delegate)

**Title IX Coordinator must promptly, even if no Formal Complaint is filed:**

- Contact the Title IX Complainant to discuss the availability of “supportive measures”
- Consider the Title IX Complainant’s wishes with respect to supportive measures
- Inform the Title IX Complainant of the availability of supportive measures with or without the filing of a formal complaint
- Explain the process for filing a Formal Complaint
Formal Complaint
Defined as a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. 34 C.F.R. § 106.30(a).

Supportive Measures
What Changed?

OLD TERM (OCR Guidance)
• Used terms such as "interim measures" or "interim steps" to describe measures to help a complainant maintain equal educational access
• Implied only available during pendency of investigation, did not mandate offering them, not clear if could be punitive or disciplinary, and did not clarify if available to respondents

NEW TERM (Final Rule)
• Non-punitive, individualized services, offered as appropriate and without charge to a complainant or a respondent before or after the filing of a formal complaint, or where no complaint has been filed (34 C.F.R.106.30(a)).
• Should be designed to restore or preserve equal access to the education program or activity without "unreasonably" burdening the other party

Examples of Supportive Measures
• Counseling
• Course modifications
• Schedule changes
• Increased monitoring or supervision
A supportive measure that completely removes a respondent from an activity would likely be considered punitive, except for "emergency removals" for students and "administrative leaves" for employees

Clery Act Accommodations vs. Supportive Measures
• Complainant/victim must receive notification of existing and available options for available assistance in and how to request changes to:
  • Academic, living, transportation, and working situations
  • Protective measures
  • Legal and advocacy assistance
  • Visa and immigration resources

Clery/VAWA
• Notify Parties in writing of various items:
  ✓ Standard of evidence
  ✓ Steps survivors should follow after covered crime
  ✓ Available rights and options internally and externally
  ✓ How confidentiality will be preserved
  ✓ Available resources on- and off-campus
  ✓ Finding and sanctions (and rationale)
Emergency Removal/Admin Leave

Student immediate emergency removal (34 C.F.R. 106.44(c))
• Based on an individualized safety and risk analysis
• Necessary to protect a student or other individual from immediate threat to physical health or safety
• Notice, opportunity to challenge provided immediately provided the removal
• Consider other laws

Employee administrative leave (34 C.F.R. 106.44(d))
• Not prohibited
• Consider state law, board policy, handbooks, and bargaining agreements

Confidentiality

• Not required to maintain anonymity of Complainant after formal complaint is filed
• Both parties must be identified (if identity is known) in written notice of allegations
• Using party initials or withholding Complainant’s identity is insufficient

Informal Resolution (Voluntary)

INFORMAL RESOLUTION IS NOT REQUIRED
• Cannot condition enrollment, employment, or any right on waiver of right to investigation and adjudication of formal complaints under grievance procedure
• Both parties must voluntarily consent in writing

NOT ALLOWED FOR EMPLOYEE-STUDENT TIMING
• Cannot offer informal resolution process until formal complaint is filed
• Any time prior to reaching a determination, either party may request informal resolution
• Any party has a right to withdraw prior to agreement

Informal Resolution Facilitators

• We do not recommend using the Title IX Coordinator or investigator(s) or decisionmakers [complaint and appeal]

Written Notice: Required

• To both parties
• In writing
• Allegations
• Requirements of informal resolution process (including circumstances under which the party cannot resume a formal complaint arising from the allegations)
• Resulting consequences of participating (e.g., records)
Formal Complaint Response
34 C.F.R. 106.45(b)

- Requires a number of specific steps for investigating, dismissing, and determining responsibility in formal complaint
- Major shift from previous, more deferential stance toward specific policies and practices for complaint resolution

ANATOMY OF AN INVESTIGATION

- Written notice to the parties
- Choosing an investigator
- Required elements of an investigation

More Steps: Written Notice

- Written notice to known parties “upon receipt of written complaint”
- In sufficient time to allow respondent to prepare a response before any initial interview
- Must include:
  - Notice of grievance process, including any informal resolution process
  - Notice of allegations, in sufficient detail to allow respondent to prepare a response (names of known parties, conduct alleged, date and location of conduct, if known)

More Steps: Written Notice

- Must include:
  - Statement that respondent presumed not responsible and that responsibility determined at conclusion of grievance process
  - Notice of parties’ rights to have an attorney or non-attorney advisor and to inspect and review evidence
  - Notice of any provision in the code of conduct that prohibits knowingly making false statements or providing false evidence during the grievance process
- Must be supplemented if new allegations opened for investigation

Written Notice: Required

- Informal resolution notice
- Notice at start of investigation
- Dismissal notice
- Interview notices
- Report
- Written determination and notice of appeal rights
Written Notice: Recommended

- Document information to complainant at initial meeting, including supportive measures requested/provided
- Document that review of evidence provided to both parties
- Notice of party’s written response to investigative report
  Etc.

Who should investigate?

- Can be the Title IX Coordinator
- But should it?

Who should investigate?

- Trained, unbiased investigator
  - No actual or perceived conflict of interest
  - Check "institutional interests"
  - Presumption that Respondent is not responsible

Who should investigate?

- No “one size fits all” approach
- May need to designate
- Consider the perception of bias
  - Friendship or other relationship with the accused or their family
  - Sex/gender identity
  - Personal conflicts (even if just perceived)
  - Personality conflicts

Contents of an Investigation

- 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

34 C.F.R. 106.45(b)(5)
Investigation Best Practices

- Investigation plan
- Follow steps in policies closely
- Coordinate with law enforcement as required by policy and practice
- Remember that both complainants and respondents may be experiencing trauma and other strong emotions
- Consult with Title IX Coordinator and/or counsel as needed

Notice to Parties in Interviews

- What to expect about future contact (timing, updates, encourage follow-up to you)
- Written copy of policies/procedures
- Notify of retaliation rights – provide specific examples
- No “Gag” order but can warn of retaliation risks

Interviewing Best Practices

- Explain your role as a neutral
- Open-ended questions followed by more tailored follow up
- Allow ample time, don’t interrupt or rush
- Ask “Is there anything else?”
- Ask for other witnesses, evidence, incidents

Interview Notes

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

Investigation Plans Aren’t Static

Reassess plan for investigation frequently

Gathering Other Evidence
**Warning! Medical Records**

- Notice of allegations should not divulge either party’s medical information
- Prohibited from accessing or using medical, psychological, or similar records in grievance process without a party’s (or parent’s) voluntary, written consent

**Opportunity to Review Evidence**

- Before the investigatory report is completed, evidence directly related to the allegations must be sent to each party and advisor
- Includes both exculpatory and inculpatory evidence, and evidence that you do not intend to rely upon
- Parties have 10 days to provide a written response

**Investigation Report Writing**

- Fairly summarizes the relevant evidence
- Provide the report to the parties and their advisors, if any, for their review and written response, at least 10 days before a hearing or other determination of responsibility

**Live Hearing**

- Questioning
- Cross-examination
- Advisor(s)
- Virtual hearings
Relevance

- Cross-Examination
- Provide reasoning for irrelevance
- Consider all relevant evidence
- Exceptions

Relevance

- Rape shield laws
- Treatment records
- Legally privileged information
- Improper inference
- Prior statements

Decisionmaker(s) (Complaint)

- Cannot be the Title IX Coordinator or the investigator(s)
**Written Determination**

- Identify: Identify the allegations
- Describe: Describe procedural steps taken
- Cite: Cite potential policy violations
- Summarize: Fairly summarize all relevant evidence
- Provide: Provide statement of result, with rationale, for each allegation
- Appeal: Against procedures

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**Factual Findings**

- Separate findings for each alleged policy violation
- Focus on material facts (i.e., those that affect outcome)
- Can describe undisputed and disputed facts separately
- For any facts in dispute, show your work and reasoning

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**Remedies**

- Disciplinary action against perpetrator
- Counseling for perpetrator/victim
- Changes to services or policies
- Remedies for complainant and others
- Etc.!!

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**Appeal**

- Decisionmaker(s) (Appeal)
- Cannot be the Title IX Coordinator or the investigator(s) or the decisionmaker (complaint)
Appeal Process

• Available to both parties
• Three bases for appeal
• Notify party of appeal in writing
• Apply procedures equally for both parties
• Opportunity to submit written statement
• Issue written decision to both parties

Bias, Conflicts of Interest, and Other Fairness Concerns

Bias

The Title IX Coordinator, investigator, decision-maker, or informal resolution facilitator 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.

Discuss

What do these words mean to you:

- Prejudgment
- Conflict of Interest
- Bias

5 Min Guided Breakout

What steps can you take to avoid:

- Prejudgment
- Conflict of Interest
- Bias

Recordkeeping
Recordkeeping

Must maintain the following for 7 years:

- Sexual harassment investigation documents, including:
  - Determination regarding responsibility
  - Recordings or transcripts of live hearing
  - Disciplinary sanctions imposed on Respondent
  - Remedies provided to Complainant
- Appeal and result
  - Informal resolution and result
  - Actions taken in response to a report of sexual harassment
  - Actions taken in response to a formal complaint of sexual harassment

Recordkeeping

Responses to formal and informal complaints and actions taken in response should include:

- The basis for the recipient’s conclusion that its response was not deliberately indifferent
- Documentation that it has taken measures designed to restore or preserve equal access to the recipient’s education program or activity
- Supportive measures or if no supportive measures are provided, document the reasons why such a response was not clearly unreasonable in light of the known circumstances

Programming

- Primary prevention and awareness programs for all incoming students and new employees
- Ongoing prevention and awareness campaigns for students and employees
- Range of topics, including definitions of prohibited conduct, resolution procedures, possible sanctions and protective measures, and available resources and options

Questions
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 pre-judge 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

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

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

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

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)

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

- 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

- Burden of proof on school
- Certain treatment records cannot be obtained without voluntary, written consent
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Investigation
34 C.F.R. 106.45(b)(5)

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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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Written investigative report “fairly summarizes the relevant evidence” provided to parties and advisors at least 10 days before hearing or other determination of responsibility
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, 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

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

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"

Do not demand starting at the beginning & providing every detail

Ask open ended questions

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
- Send notes to witnesses for review and confirmation within timelines set forth in IIT policy
- Document less formal interactions
- Send links/copies to policies if relevant
- REASSESS allegations, investigation plan, and supportive measures

Scope of the Investigation
Must be “thorough,” but not required to review all potential sources of evidence parties or witnesses identify

Gathering Other Evidence
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

Investigative 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

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

Recordkeeping

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
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

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

### 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 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

- 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, śkańk), 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?

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
Potential Trauma for CP and RP

- 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

Emotions

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

Introductions

Critique an Introduction

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

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

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
2020 Title IX Regulations: Title IX Advisor Training

August 1, 2023
Presented by: Jennifer A. Smith & Kaitlin Atlas

Advisors – the Rules

- Parties can have advisor of choice
- Advisor can attend all interviews, hearings, and other meetings (no other party can attend hearings unless required by law)

Advisors – the Rules

- Advisor conducts live cross-examination for the advisor’s party at the hearing
- Advisor must be provided for cross-examination purposes by institution at no cost if party does not have one

Who Can Serve as an Advisor

- Can be a parent, attorney, family member, friend, even a witness
- Can be a school employee
- Best practice is to provide a pool to choose from
Advisor Notices

- The evidence subject to inspection and review in an electronic format or a hard copy with 10 days to submit a written response
- Investigative report at least 10 days prior to a hearing

Cross Examination

Important part of truth seeking partly because of live, in-the-moment nature and because conducted by someone whose purposes is to advance one side's perspective

Cross Examination Rules

- Must be conducted by the advisor
- Advisor asks questions and follow-up questions
- Directly, orally, and in real time
- May be in separate rooms (party request, institution choice)

Cross Examination

- Not for the protection only of respondents
- Both parties’ advisors may direct decisionmaker’s attention to implausibility, inconsistency, unreliability, ulterior motives, lack of credibility

Cross Examination Rules

- Advisor can appear even if party does not appear
- If advisor and party do not appear, a recipient-provided advisor must still cross-examine the other appearing parties and witnesses
Cross Examination Tips

- Leading questions – elicit a “yes” or “no” answer
- Try to only ask necessary questions
- Try to only ask questions to which you already know the answer

Leading questions
- “Isn’t it true that....”
- “....correct?”

Cross Examination Tips

- Only include one fact per question
- Including too many facts or issues can be confusing and allow the witness an “out”

Cross Examination Tips

- New, Known Facts
- Concession on Known Facts
- Errors in Direct Testimony
- Neutralizing Direct Testimony
- Impeachment
- Attack Credibility

Cross Examination Tips

- Impeachment
  - Verify the document first
  - Point out and confirm statement in document
  - Compare to previous testimony and confirm contradiction

Cross Examination Tips

- Witnesses you might not cross-examine
  - The witness did not hurt your party’s position
  - The witness is certain to just repeat the same answers as on direct
Cross Examination Plan

If you do not know where you are going, every road will get you nowhere

Henry A. Kissinger

Cross Examination Preparation

- Review all directly related evidence and party responses
- Review the investigation report
- Talk to your party about witnesses' personalities

Cross Examination Preparation

- Prepare an outline (but plan to vary if needed)
- Use documents and other evidence, especially to impeach
- Listen carefully during direct questioning

Cross Examining Experts

- Make the expert your own
- Challenge facts and conclusions
- Attack qualifications, preparation, bias
- Impeach with your expert or literature

Relevance

- Makes something more or less likely to be true
- Exceptions
  - Sexual behavior
  - Legal privilege
  - Treatment records
Rape Shield Law

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  - Confessions to a clergy member or religious figure
  - Spousal privilege
  - Confidentiality and trade secrets

Can We Talk About That?

- School not required to allow debate from advisors
- School not required to provide after-hearing explanation (but can, e.g., to revise)

Advisor Decorum

- Essential function is not to embarrass, blame, humiliate, or emotionally berate
- Essential function is to give the decisionmaker the fullest view possible of the relevant evidence
Advisor Rules

- Institution can set rules of participation, decorum (must be same for both parties)
- Review any advisor agreement carefully
- Self-control is significant

Disruptive Advisors

Skill of Advisors

QUESTIONS