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COOPER GALE



Sonoran Desert Institute Title IX Training

Title IX Training

PRESENTED BY **Brandon Sherman**

SEPTEMBER 21, 2023

Agenda

- 1) Title IX Background
- 2) Definitions
- 3) Reporting Harassment
- 4) Response Obligations
- 5) Investigations
- 6) Hearings & Appeals
- 7) NPRM
- 8) Q&A



Non-Discrimination Policy

- Does not discriminate on the basis of sex, including in admissions and employment, and is committed to providing an educational and workplace environment that is free from sex-based discrimination, harassment, and retaliation;
- Prohibits discrimination on the basis of sex in its educational programs and activities, as required by law;
- Is committed to promoting fairness and equity in all aspects its operations; and
- Values and promotes the equal dignity of all community members and is committed to the pursuit of just resolutions with respect the rights of all parties involved.

Title IX Background

- Title IX of the Education Amendments of 1972 (“Title IX”) prohibits discrimination based on sex in education programs and activities that receive federal financial assistance.
- U.S. Department of Education (“Department” or “ED”) implementation regulations are found in 34 C.F.R. Part 106.
- Title IX is enforced by the U.S. Department of Education’s Office for Civil Rights (“OCR”).
- Failure to comply with Title IX can result in termination from participation in Title IV programs authorized under the Higher Education Act.



OCR Investigations

- Evaluation
- Investigation
- Early Resolution Agreement
- Determination
- Resolution Agreement
- Monitoring
- Enforcement



Definitions

- **Complainant:** An individual who is alleged to be the victim of conduct that could constitute sexual harassment.
- **Respondent:** An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.
- **Title IX Personnel:** Individuals collectively tasked with the implementation of this Policy and Grievance Process, including specifically the Title IX Coordinator and Investigator or any Decision-maker.
- **Recipient:** An institution participating in Title IV programs.

Education Program or Activity

- The Title IX statute and existing regulations contain broad definitions of a school’s **“education program or activity.”**
- Title IX applies to all institutional education programs or activities, whether such programs or activities are on or off campus.
- In order to be considered a potential Title IX violation, the sexual harassment **must have occurred in the United States.**
- **Education program or activity includes** locations, events, or circumstances over which the institution exercises substantial control over both the complainant and the respondent and the context in which the harassment occurred.
 - **“Includes remote learning platforms”** (OCR Q&A July 2021 at 8)

Education Program or Activity

- Applicability to online platforms:
 - “The operations of a school may certainly include **computer and internet networks, digital platforms, and computer hardware or software** owned or operated by, or used in the operations of, the school.”
 - “The factual circumstances of online harassment must be analyzed to determine if it occurred in an education program or activity.”
 - “The definition of education program or activity’ in the 2020 [Final Rule] **does not create a distinction** between sexual harassment occurring in person versus online.”

85 FR 30026

Sexual Harassment

- Includes any of three types of misconduct **on the basis of sex**:
 - Any **unwelcome conduct** that a reasonable person would find **so severe, pervasive, and objectively offensive** that it denies a person equal educational access;
 - Any instance of a **quid pro quo** harassment by a school's employee; and
 - Any instance of **sexual assault, dating violence, domestic violence, or stalking** (as defined in the Clery Act).

Title IX & Employees

- Title IX doesn't just apply to students, it also **covers employees**.
- Title VII also prohibits sexual harassment directed at employees.
- The standards applied by courts to judge claims of sexual harassment under Title VII and Title IX are generally the same.
 - However, Title VII Harassment is unwelcome conduct that is based on **race, color, religion, sex** (including sexual orientation, gender identity, or pregnancy), **national origin, older age** (beginning at age 40), **disability, or genetic information** (including family medical history).

Title VII Harassment

- Harassment becomes unlawful where 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider **intimidating, hostile, or abusive**.
- SDI maintains a strict policy that prohibits sexual harassment, which **includes unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature**.

See SDI's Non-Discrimination and Non-Harassment Policy

Reporting Sexual Harassment

- **Any person** may report sex discrimination.
- Report or complaint may be filed with the Title IX Coordinator (or other mandatory reporters) in person, by mail, or by electronic mail at any time (including during non-business hours).

Reporting Sexual Harassment

Teresa Speicher
Title IX Coordinator
1555 W University Dr.
Suite 103
Tempe, AZ 85281
Tel.: (480) 378-6848
Email: TitleIX@sdi.edu

Other mandatory reporters: Traci Lee, President; Chris Caraway, Chief Operating Officer, Jeff Lagasse, Chief Financial Officer; Jarred McNeely, Chief Academic Officer

Formal Complaint

- A formal complaint is an **official document alleging sexual harassment**.
- An institution **must investigate every formal complaint** (which may be filed by a complainant or by a school's Title IX Coordinator).
- It's filed by the student or in some cases the Title IX Coordinator.
- In cases where an alleged victim doesn't file a formal complaint, a Title IX Coordinator may initiate grievance procedures where discipline is appropriate.
- At the time of filing a formal complaint, a **complainant must be participating in or attempting to participate** in the education program or activity of the recipient with which the formal complaint is filed.

Response Obligations

- An institution **must respond promptly** to Title IX **sexual harassment** in a manner that is **not deliberately indifferent** when:
 - The institution **has actual knowledge** of sexual harassment;
 - That the harassment **occurred within the institution's education program** or activity; and
 - Against a person in the **United States**.

Response Obligations

- The Title IX Coordinator must promptly contact the complainant confidentially to discuss:
 - The availability of supportive measures;
 - The right to file a complaint; and
 - How to file a complaint.
- Students may choose to confide to employees to whom notice does not trigger the recipient's response obligations.
- An institution violates Title IX when its response to sexual harassment is **clearly unreasonable** in light of the known circumstances.

Notice of Allegations

- The **notice will include:**
 - A meaningful summary of all allegations
 - The identity of the parties (if known)
 - The precise misconduct being alleged
 - The date and location of the alleged incident(s) (if known),
 - The specific policies alleged to have been violated
 - A description of the applicable procedures
 - A statement of the potential sanctions that could result
 - A statement that Respondent is presumed not responsible for the reported misconduct unless and until a Final Determination has been rendered

Supportive Measures

- Supportive measures are **free, individualized services** designed to restore or preserve equal access to education, protect safety, or deter sexual harassment.
- Supportive measures support a student, and they are **not disciplinary or punitive** with respect to another student.
- There does not need to be a formal complaint for the person alleges to be the victim to receive supportive measures.
- Examples of supportive measures include counseling, extension of deadlines, modifications of class schedules, leaves of absence, and mutual restrictions on contact between individuals.



Emergency Removal

- Title IX does not preclude a recipient from removing a respondent from the recipient's education program or activity on an **emergency basis**:
 - The school must recipient undertake an individualized safety and risk analysis;
 - Determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal; and
 - Provides the respondent with notice and an opportunity to challenge the decision immediately following the removal.”
- Nothing in Title IX “precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45.”

Investigations

- The burden of gathering evidence and **burden of proof must remain on the school**, not on the parties.
- The school must provide equal opportunity for the parties to present fact and expert witnesses and other inculpatory and exculpatory evidence.
- The school must **not restrict the ability of the parties to discuss** the allegations or gather evidence (e.g., no “gag orders”).

Timeline

- Timeline:
 - The grievance process must include reasonably prompt timeframes for resolving formal complaints of sexual harassment.
 - SDI will make a good faith effort to complete investigations as **promptly** as circumstances permit and will communicate regularly with the parties to update them on the progress and timing of the investigation.
 - Temporary delays can **only be granted for good cause**.

Employee Responsibilities

- Witnesses who are SDI employees are **expected to cooperate with and participate** in SDI's investigation and resolution process.
- Failure of such witnesses to cooperate with and/or participate in the investigation or resolution process constitutes a Policy violation and **may warrant discipline**.

Dismissals

- **Mandatory dismissals:**
 - An institution **must dismiss allegations** of conduct that do not meet the definition of sexual harassment (under Title IX) or did not occur in an institution's education program or activity against a person in the U.S.
 - However, an institution may address allegations through the code of conduct process.

Dismissals

- **Discretionary dismissals:**
 - An institution **may dismiss the formal complaint or any allegations** in the formal complaint, if, at any time during the investigation or hearing:
 - The complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any specific allegations in the formal complaint;
 - The respondent is no longer enrolled or employed by the institution; or
 - The specific circumstances prevent the institution from gathering evidence sufficient to reach a determination as to the formal complaint or allegations in the formal complaint.
 - Either party can appeal an institution's decision to dismiss a complaint.

Informal Resolution

- At any time prior to reaching a determination, an institution may choose to offer and facilitate an informal resolution, such as mediation or restorative justice.
- An institution, however, may not:
 - Require a student or employee to waive the right to an investigation and adjudication of a formal complaint;
 - Offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.
 - Require the parties to participate in any informal resolution process; or
 - Offer an informal resolution process unless a formal complaint has been filed.

Informal Resolution

- **Required disclosures:**
 - The allegations;
 - The requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations;
 - At any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint; and
 - Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.

34 C.F.R. § 106.45(b)(9)(i)

Preliminary Report

- Upon **conclusion of the investigation**, the investigator will provide the parties with a preliminary report which will include:
 - The complainant's statement,
 - The respondent's statement,
 - Each witness statement, and
 - Either a copy or written summary of any other information the investigator deems relevant.
- Parties have an opportunity to review the report and provide a written response.

Final Report

- **After consideration of the parties' final responses** to the preliminary report, the investigator will prepare and send to the parties and to their advisors a final investigative report that fairly summarizes relevant evidence and that includes the parties' written feedback, if any.
- The parties will have at least 10 calendar days after receipt of the final investigative **report to prepare for the scheduled live hearing.**

Hearings

- Upon conclusion of the investigation and distribution of the investigative report to the parties, the matter will proceed to the hearing stage of the Grievance Process.
- The school **may conduct the hearing virtually** at their discretion or upon request of a party.
- **At the request of either party**, the recipient must provide for the entire live hearing (including cross-examination) to occur with the parties located in separate rooms with technology enabling the parties to see and hear each other.
- The parties' may be accompanied by an **advisor of choice**.
- If a party does not have an advisor present at the live hearing, the institution must provide, without fee or charge to that party, an advisor of the school's choice who may be, but is not required to be.

Hearings

- Only relevant questions, testimony, and evidence may be proffered at the hearing.
- Parties may not conduct cross-examination.
 - **Advisors only will conduct cross-exam** on a party's behalf.
- Parties, Advisors, witnesses, and all participating individuals are expected to behave respectfully during the hearing.
- Schools must create an **audio or audiovisual recording, or transcript**, of any live hearing.



Standard of Proof

- The school’s grievance process must state whether the standard of evidence to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard.
- Under SDI’s Title IX Policy the “Decision-maker will deliberate privately and will render a finding as to each allegation in the complaint by applying ***clear and convincing evidence standard***” (whether there is a high probability that the respondent violated the Policy as alleged).
- Institutions must apply the **same standard of evidence** for all formal complaints of sexual harassment **whether the respondent is a student or an employee.**

Determination Regarding Responsibility

- The decision-maker must issue a **written determination regarding**:
 - Responsibility with findings of fact, conclusions about whether the alleged conduct occurred, the rationale for the result as to each allegation;
 - Any disciplinary sanctions imposed on the respondent; and
 - Whether remedies will be provided to the complainant.
- The written determination must be sent simultaneously to the parties along with information about how to file an appeal.

34 C.F.R. §106.45(b)(7)

Sanctions and Remedies

- The **remedies** for the complainant must be designed to preserve or restore equal access to the institution's education program or activity.
- Sanctions are the possible consequences of a determination that a respondent is responsible for Title IX sexual harassment
 - Unlike supportive measures in place prior to a determination, a complainant's remedies can be **punitive or disciplinary** against the respondent.

Sanctions

Students	Employees
Written warning	Counseling
Removal from course	Required training
Probation	Suspension
Suspension or Expulsion	Termination

Remedies

- Remedies **may include:**
 - Referral to counseling and health services
 - Referral to the Employee Assistance Program
 - Education to the individual and/or the community
 - Alteration of work arrangements for employees
 - Implementation of long-term contact limitations between the parties
 - Adjustments to academic deadlines, course schedules, etc.

Appeals

- Any party may appeal the **Dismissal of a Formal Complaint or the Final Determination of the Grievance Process** on the following grounds:
- Appeals must be submitted in writing to the Title IX Coordinator within five days of the delivery of the notice of an appealable action.
- After the expiration of the appeal window, all decisions will be considered final, and any applicable sanctions will be imposed.



Appeals

- Appeals may be made on the following bases:
 - **Procedural irregularity** that affected the outcome of the matter;
 - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
 - The Title IX Coordinator, Investigator(s), or Decision-maker(s) had a **conflict of interest or bias** for or against Complainants or Respondents generally or the specific Complainant or Respondent that affected the outcome of the matter.

Sonoran Desert Institute Title IX Non-Discrimination & Grievance Process Policy

Title IX Coordinator

- “Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the ‘Title IX Coordinator.’”
- The Title IX Coordinator must be the recipient’s “employee.”
- The Title IX Coordinator must serve without bias or conflicts of interest and receive the training specified in that provision.

Retaliation

- Title IX regulations expressly provide that no school or other person may **intimidate, threaten, coerce, or discriminate** against any individual for the purpose of interfering with any right or privilege secured by Title IX.
- Alleged retaliation should be reported immediately to the Title IX Coordinator and will be promptly investigated.
- Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a Title IX grievance proceeding does not constitute retaliation.

Required Policies and Procedures

- Institutions must promptly display the Title IX Coordinator contact information and grievance policy on its website.
- **Written grievance procedures**
 - Must include procedures for dealing with sexual harassment;
 - The grievance procedures themselves can't discriminate on the basis of sex, and any additional procedures that a school adds must apply to both complainants and respondents equally; and
 - Written grievance procedures must include 10 other specific items.

Training

- Training of **Title IX personnel** must include training on:
 - The definition of sexual harassment
 - The scope of the school's education program or activity
 - How to conduct an investigation and grievance process
 - Including hearings, appeals, and informal resolution processes
 - How to serve impartially
 - Including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias

Training

- An institution must ensure that **decision-makers** receive training:
 - On any technology to be used at a live hearing; and
 - On issues of relevance, including how to apply the rape shield protections provided for complainant.
- The training materials cannot rely on sex stereotypes, must promote impartial investigations and adjudications, and most be posted on each institution's website.

Conflicts of Interest

- Title IX requires Title IX personnel be free from conflicts of interest or bias against complainants and respondents generally or against an individual complainant or respondent.
- The Department relies on recipient's discretion to decide how best to implement the prohibition on conflicts of interest and bias.
- Title IX requires recipients to allow both parties the equal right to appeal on the basis that the Title IX Coordinator, investigator, or decisionmaker had a conflict of interest or bias that affected the outcome.

34 C.F.R. § 106.45(b)

Required Records

- Schools must maintain all of the following records for a period of seven years:
 - Each sexual harassment investigation, including any determination regarding responsibility and any audio or audiovisual recording or transcript required under [Section 106.45(b)(6)(i)], any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant;
 - Any appeal and the result therefrom; and
 - Any informal resolution and the result therefrom.

34 C.F.R. § 106.45(b)(10)(i)

Required Records

- Schools must maintain and disclose its **Title IX training materials**:
 - Maintain all materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process for seven years.
 - Institutions must make these training materials publicly available on its website.
 - Institutions must create an audio or audiovisual recording, or transcript, of any live hearing.

Confidentiality

- The school shall undertake reasonable efforts to preserve the confidentiality of reports and complaints.
- The school shall not disclose any report or complaint except as provided herein and as necessary to effectuate this Policy, FERPA, or as required under applicable law.
- Certain professionals have a legal and/or ethical responsibility to maintain communications made in the scope of their professional roles in strict confidence.

Title IX NPRM

- On June 23, 2022, the U.S. Department of Education issued an NPRM on Title IX.
- “The proposed amendments will restore crucial protections for students who are victims of sexual harassment, assault, and sex-based discrimination – a critical safety net for survivors that was weakened under previous regulations.” (Press Release)
- The final rule is expected this winter.

Title IX Proposals

- Prohibited discrimination
 - Prohibit discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.
- Definition of sex-based harassment
 - Quid pro quo
 - Cleary Act crime
 - Hostile environment
 - “Unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person’s ability to participate in or benefit from the recipient’s education program or activity (i.e., creates a hostile environment).”

Title IX Proposals

- **Reporting**
 - Employees who can implement corrective action
 - Student and employee: must notify the Title IX Coordinator
 - Administrative leadership, teaching or advising employees
 - Student: must notify Title IX Coordinator
 - Employee: notify Title IX Coordinator OR provide contact information and how to report sex discrimination
 - All other employees (not confidential)
 - Student and employee: notify Title IX Coordinator OR provide contact information and how to report sex discrimination

Title IX Proposals

- **Adjudication procedures** would include:
 - Permit, but not require, a live hearing
 - A process to assess the credibility of parties and witnesses
 - Equitable access to relevant and not otherwise impermissible evidence or to a written report summarizing the evidence.
- **Grievance procedures**
 - The decisionmaker may be the same person as the Title IX Coordinator or investigator (single investigator).
 - Dismissals are permitted in certain circumstances, but not required.

Title IX Proposals

- Require institution Title IX Coordinator to **monitor for barriers to reporting** information about conduct that may constitute sex discrimination under Title IX
- Require **training for all employees**

Best Practices/Takeaways

- Thoroughly **review the school’s sexual misconduct policy and procedures** – every school is different and policies can change year-to-year.
- Consider sending a “**Litigation Hold Notice.**”
- Consider **consulting legal counsel** when a complaint is filed.
- Ensure students get **accommodation if ADA applies.**
- The regulations require it to be thorough, not just barebones.
- Gather electronic records (e.g. texts, Facebook, Instagram).
- Redact prior sexual history, history of complaints, and accused student and character evidence.



Resources

- [Sonoran Desert Institute Title IX Non-Discrimination & Grievance Process Policy](#) (March 2023)
- [Title IX Final Rule](#) (May 19, 2020)
- [Questions and Answers on the Title IX Regulations on Sexual Harassment](#) (July 28, 2022)
- [Guidance on Discrimination Based on Pregnancy and Related Conditions](#) (October 2022)
- [Title IX NPRM](#) (July 12, 2022)

Questions?



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