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**CHIEF STUDENT SERVICES  
OFFICERS (CSSO) ANNUAL  
STUDENT SERVICES  
CONFERENCE**

**Addressing Student Sexual  
Misconduct Under Title IX**

*9/16/2021*

*PRESENTED BY:*

**Pilar Morin & Monica M. Espejo**

# Addressing Student Sexual Misconduct under Title IX

Chief Student Services Officers (CSSO) Annual Student Services Conference | September 16, 2021

Presented By: Pilar Morin & Monica M. Espejo



## Addressing Sexual Misconduct Under Title IX

Chief Student Services Officers (CSSO)  
Annual Student Services Conferences  
September 16, 2021

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### Agenda

- Status of Regulations
- Assessing Initial Obligations
- Triggering the Grievance Process
- Supportive Measures
- Informal Resolution and Investigation
- Hearing and Determination
- Dismissals and Appeals
- Questions?



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## Future Changes to Title IX

- April 2021: OCR announced comprehensive review
- June 2021: OCR
  - Conducted virtual public hearings and collected written comments
  - Issued Notice of Interpretation
  - Proposed Title IX regulations in May 2022
- July 2021: OCR issued Q&A on regulations

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## Institutions Can Rely on Statements Not Subject to Cross-Examination

- August 24, 2021, OCR issued new guidance: will no longer enforce part of 34 C.F.R. § 106.45(b)(6)(i) that prohibits decision-makers from considering statements not subject to cross-examination
- Follows July 28, 2021 U.S. District Court for the District of Massachusetts' decision holding provision to be arbitrary and capricious
  - Court issued a second order clarifying that it had vacated and remanded the provision and that its ruling applied nationwide

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## Institutions Can Rely on Statements Not Subject to Cross-Examination

CCD decision makers can now consider statements even if the parties or witnesses do not submit to cross-examination at the live hearing, including:

- Statements made by the parties and witnesses during the investigation
- Emails or text messages between the parties
- Statements in Sexual Assault Nurse Examiner (SANE) reports, police reports, medical reports and other documents

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## What is Title IX?

**Title IX prohibits discrimination that is:**

- On the basis of sex
- In education programs or activities
- Receiving federal financial assistance

20 U.S.C. § 1681 *et seq.*

34 C.F.R. § 106 *et seq.*

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## Title IX Protections

- Title IX protects **all** students and employees from sexual harassment committed by:
  - Students
  - District employees
  - Third-parties

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## Assessing Reports of Sexual Harassment & Determining Title IX Obligations



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## Overall Requirement

If the district has actual knowledge of sexual harassment in its education program or activity against a person in the United States:

Must respond in a manner that is not deliberately indifferent.

34 CFR § 106.44(a)

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## Polling Question: Case Study: Actual Knowledge

James is the Vice President of Business Services. Connie, a student who works in his office confides in him that she has been sexually assaulted by a her boyfriend, Robert, who is an athlete at the college. The district's policy says that all supervisors have a duty to report sexual harassment in the workplace.

***Does the district now have actual notice of a potential Title IX matter?***

**Yes, No, or Maybe**

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## Actual Notice

Notice of sexual harassment or allegations of sexual harassment to a Title IX Coordinator or any **official with authority** to institute corrective measures.

34 CFR § 106.30

An **official with authority** has the power to institute corrective measures on behalf of the institution.

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## Sexual Harassment: Three Categories

- Quid pro quo: An *employee* conditioning an aid, benefit, or service on complainant's participation in unwelcome sexual conduct
- Unwelcome conduct so severe, pervasive, **and** objectively offensive that it effectively denies a person equal access to education program or activity; or
- Sexual assault, dating violence, domestic violence, or stalking

34 CFR § 106.30

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## Polling Question

Connie reports to the Title IX Officer that Robert sexually assaulted her during a trip they took to Mexico during spring break.

*Is this complaint covered by Title IX?*

Yes, No, Maybe

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## Education Program or Activity

- Locations, events, or circumstances over which the district exercised substantial control over respondent and context
- Any building owned or controlled by a student organization
- Must occur against the complainant **in the United States**
  - Title IX not triggered by incidents outside the U.S.

34 CFR § 106.44(a)

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## Supportive Measures

- Individualized services offered as appropriate and reasonably available without charge
- Non-disciplinary and non-punitive
- Before, after or without formal complaint
- Available to complainant and respondent

34 CFR § 106.30(a)

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## Examples of Supportive Measures

- Medical/mental health services (or referral)
- Extensions of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Campus escort services
- Mutual no-contact orders
- Transportation accommodations
- Changes in work/housing locations
- Leaves of absence
- Increased security

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## Triggering the Grievance Process



## Grievance Procedures

- Grievance process must:
  - Provide remedies on finding of Title IX violation
  - Presume respondent is not responsible
  - Require objective evaluation of all relevant evidence
  - Avoid credibility determinations based on a person's status as a complainant, respondent, or witness
    - Such as, "complainants should react like this.." or "respondents tend to be dishonest"

34 CFR § 106.45(b)(1)



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## Grievance Procedures

- Grievance process must: (cont'd)
  - Require Title IX personnel to receive training
  - Be free from conflicts of interest or bias
  - Include reasonably prompt time frames
  - Describe the range of possible remedies and disciplinary sanctions
  - Identify the evidentiary standard
  - Not use privileged info (unless waived)

34 CFR § 106.45(b)(1)

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## Grievance Procedures: Triggers

- A recipient must follow procedures consistent with section § 106.45 in response to a **formal complaint**

34 CFR § 106.44(b)(1)

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## Formal Complaint

- Document filed by the **complainant** OR signed by the Title IX Coordinator
- Alleging sexual harassment AND requesting investigation

34 CFR §106.30(a)

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## Complainant

- The alleged *victim* of sexual harassment
  - Must be participating in or attempting to participate in the district's education program or activity
  - 3<sup>rd</sup> parties can report, but no 3<sup>rd</sup> party complaints
    - Except if complainant is a minor or under conservatorship

34 CFR 106.30(a)

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## The Grievance Process – Issues Before the Investigation



### Notice of Allegations

Must provide written notice to the parties:

- Notice of the grievance process
- Presumption that respondent is not responsible
- Statement that determination occurs at end of grievance process
- Notice of the allegations (date, location if known)
- Sufficient time to prepare before interview
- Right to advisor
- Right to evidence review
- Code of conduct provisions re: false statements and false information

34 CFR § 106.45(b)(2)(i)



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## Role of Advisors Before Hearing

- Respondent has right to advisor
  - Attend investigative interview(s), participate in evidence review, help party prepare response to investigative report
- District not required to provide one before hearing
- May not obstruct interview or disrupt grievance process
- District may require confidentiality agreement

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## The Grievance Process – Informal Resolution and Formal Investigation



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## Informal Resolution

- Does not involve a full investigation and adjudication
- Possible at any time prior to determination regarding responsibility
- Cannot use for student complaint against employee

34 CFR § 106.45(b)(9)



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## Informal Resolution

- Only after formal complaint
- Not required, totally voluntary
  - May not be appropriate for all formal complaints
  - Title IX Coordinator should determine if informal resolution is appropriate
  - Requires both parties' voluntary, written consent
- Title IX Coordinator should not be facilitator
- Understand pros and cons



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## Polling Question- Case Study: Informal Resolution

Carlos reports to the Title IX Coordinator that he broke up with Rudy last semester. At the time of the breakup, Rudy was a student at the district, but he is no longer enrolled. Carlos recently realized Rudy was stalking him on campus and filed a formal complaint. Rudy, an experienced mechanic, is now an adjunct employee at the district. Carlos has filed a complaint.

***Can the district offer the parties informal resolution?***

**Yes, No, or Maybe**

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## The Investigator

The investigator must:

- Be free of biases and conflicts of interest
- Conduct the investigation – gather inculpatory and exculpatory evidence
- Be trained on issues of relevance to create an investigative report that fairly summarizes relevant evidence
- Write the report

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## Standard of Evidence

- Title IX regulations require “preponderance of the evidence” or “clear and convincing evidence standard” 34 CFR § 106.45(b)(7)(i)
- California law requires “preponderance of the evidence” Ed. Code, § 67386
  - It is more likely than not that the fact occurred

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## Evidence Review

### Complainant and respondent:

- At least 10 days time
- Right to inspect and review evidence *directly related to the allegations*
- Right to submit written response to evidence
- Investigator must consider response before completing report

34 CFR §106.45 (b)(5)(vi)

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## Polling Question- Case Study: Witnesses

After reviewing the evidence, a respondent's advisor, who is a lawyer, requests that the investigator interview a medical doctor as an expert who will provide his opinion that medication taken by the complainant affects memory.

***Are parties allowed to produce expert witnesses to provide evidence?***

**Yes, No, or Maybe**

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## Investigative Report

- Must provide final investigative report to parties at least 10 days prior to hearing
- Parties must have opportunity to review and provide written response

34 CFR §106.45 (b)(5)(vi) and (vii)

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## The Grievance Process – The Hearing and Determination Regarding Responsibility



### Hearing

- Opportunity for parties to respond to the evidence gathered before a decision-maker
- Neither party may waive the right to a live hearing
  - Can choose whether to participate in the hearing and whether to answer cross-examination questions
- Must presume respondent is not responsible for alleged conduct



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## Hearing Procedures

- Live cross examination by party's advisor
  - If party doesn't have advisor, district must provide one
  - Decision-maker must explain why question excluded
- Can cross examine virtually

34 CFR 106.45(b)(6)(i)

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## Determination Regarding Responsibility

### To both parties simultaneously:

- Identify allegations;
- Procedural steps;
- Findings of fact;
- Conclusions;
- Statement and rationale for each determination regarding responsibility;
- Statement regarding whether district will provide remedies for complainant;
- Appeal procedures for complainants and respondents.

34 CFR § 106.45 (b)(7)(ii)

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## The Grievance Process – Dismissals and Appeals



### Mandatory Dismissal

#### Mandatory dismissal when:

- Conduct would not constitute sexual harassment;
- Conduct did not occur within the education program or activity; or
- Conduct did not occur against a person in the United States.

34 CFR § 106.45(b)(3)(i)



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## Discretionary Dismissal

### Discretionary dismissal when:

- Complainant withdraws complaint
- Respondent no longer enrolled or employed or
- Specific circumstances prevent district from gathering sufficient evidence to reach a determination

34 CFR § 106.45(b)(3)(ii)

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## Notice of Dismissal

### Must provide prompt:

- Simultaneous notice of dismissal to the parties
- Include reasons for dismissal and
- Appeal process

34 CFR §§ 106.45(b)(3)(iii),  
106.45(b)(8)(i)

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## Appeals

- Must offer both parties an appeal from dismissal of a formal complaint/allegations based on:
  - Procedural irregularity
  - Newly discovered evidence or
  - A conflict of interest or bias by Title IX personnel
- May offer appeal to both parties on additional bases

34 CFR §106.45 (b)(8)(i) and (ii)

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## Related Issues



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## Retaliation

- Protects everyone who participates from retaliation
  - Such as intimidation, threats, coercion, or discrimination
- Cannot take action against anyone for refusing to participate
  - No threats of discipline for insubordination
- No additional charges for code of conduct violations that arise out of the same circumstances as Title IX report or complaint

34 CFR § 106.71

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## Record Retention

### Retain for at least 7 years:

- Report or complaint
- Actions taken in response
- Investigative report including all evidence and responses from the parties
- Determination regarding responsibility
- Recording or transcript from hearing
- Records of sanctions and remedies
- Any appeal and result
- Any informal resolution and result
- Materials used to train Title IX personnel

34 CFR §106.45(c)(10)

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Questions?



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