

Agenda: July 29, 2020

- 9:00 am Introductions and Agenda - Jennifer Childress-White
- 9:45 am PLU Context for Title IX Work - Dr. Joanna Royce-Davis
- 10:15 am Break
- 10:30 am **New Regulations - Jennifer Childress-White / Dr. Eva Frey****
- 12:00 am Lunch break
- 1:00 pm Evidence Standards - Valarie Zeeck, PLU Legal Counsel
- 1:45 pm Break
- 2:00 pm Review Meetings 101 - Jennifer Childress-White / Dr. Eva Frey
- 3:00 pm Dismiss

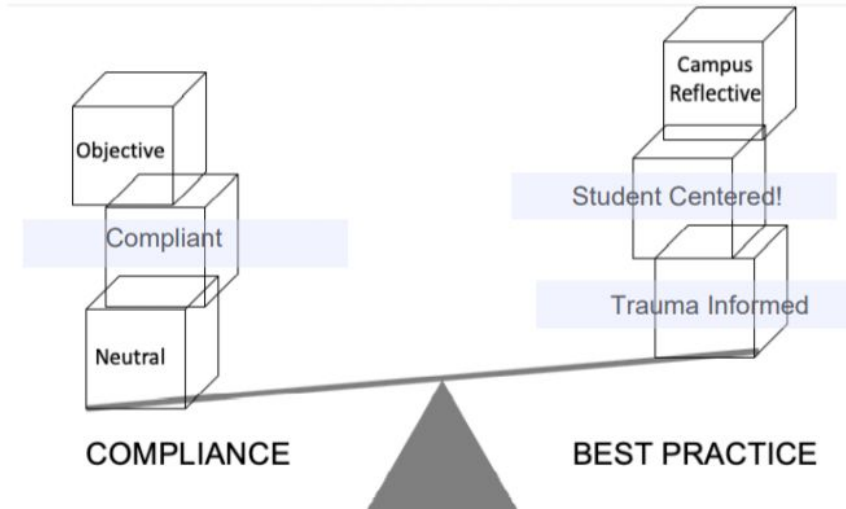
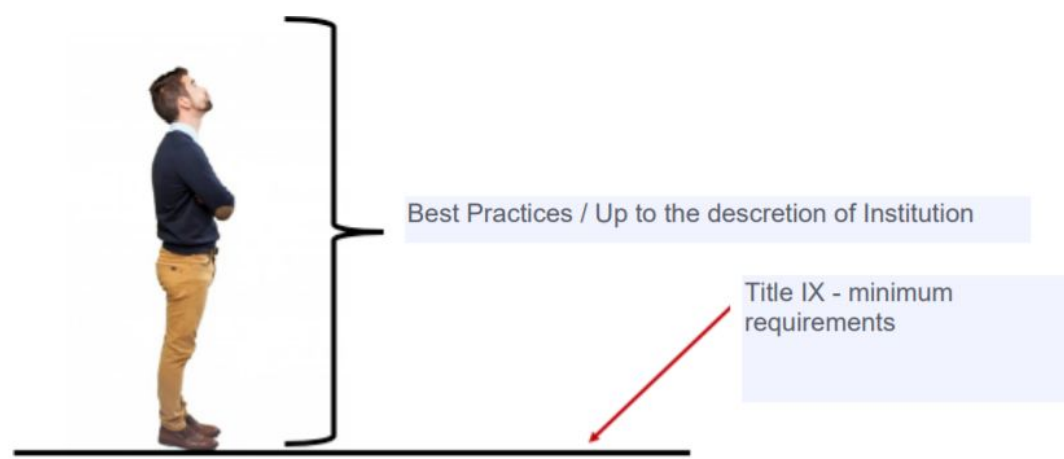
Title IX

Final Rule Regulations

Department of Education

Effective August 14, 2020
Pacific Lutheran University Training
Title IX Personnel

DOE's Title IX regulations
are the floor - not the ceiling.



Definition of Sexual Harassment for Title IX Purposes

The Final Rule defines sexual harassment broadly to include any of **three types** of misconduct on the basis of sex, all of which jeopardize the equal access to education that Title IX is designed to protect:

1. Any instance of **quid pro quo** harassment by a school's employee;
2. Any **unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive** that it denies a person equal educational access;
3. **Any instance of sexual assault** (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA).

Scope of Sexual Harassment

- The Title IX statute applies to persons in the United States with respect to education programs or activities that receive Federal financial assistance. Schools **MUST** respond when sexual harassment occurs in the **school's education program or activity**, against a **person in the U.S.**

- Title IX applies to all of a school's education programs or activities, whether such programs or activities occur on-campus or off-campus. A school may address sexual harassment affecting its students or employees that falls outside Title IX's jurisdiction in any manner the school chooses, including providing supportive measures or pursuing discipline.

Accessible Reporting to the Title IX Coordinator

Schools **MUST NOTIFY** applicants for admission/employment, students/faculty/staff, and all unions of the Title IX Coordinator contact information. Schools must prominently display on their websites the required contact information for the Title IX Coordinator.

Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by e-mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report.

Such a report may be made at any time, including during non-business hours, by using the telephone number or e-mail address, or by mail to the office address, listed for the Title IX Coordinator.

The Title IX Final Rule

- Institutions can choose who is a mandatory reporter. **PLU will continue to have all employees AND all resident assistants and Campus Safety student employees designated as mandatory reporters.**
- Notice to a Title IX Coordinator or an official with authority institute corrective measures on the recipient's behalf, charges a school with **actual knowledge** and triggers the school's obligation to respond.

Mandatory Response Obligations: The Deliberate Indifference Standard

- Schools must offer **supportive measure** to the person alleged to be the victim
- Schools must follow a **grievance process** that complies with the Final Rule BEFORE the imposition of any disciplinary sanctions against a respondent
- The Final Rule requires a school to investigate sexual harassment allegations in any **‘formal complaint’**
- The Final Rule affirms that a complainant’s wishes with respect to the whether the school investigates should be respected UNLESS the Title IX Coordinator determines that formal investigation is not clearly unreasonable in light of known circumstances
- **If the allegations in a formal complaint do not meet the definition of sexual harassment in the Final Rule, or did not occur in the school’s education program or activity against a person in the United States, the Final Rule clarifies that the school must dismiss such allegations for purposes of Title IX but may still address the allegations in any manner the school deems appropriate under the school’s own code of conduct.**

DISCLOSURE



**Does it meet Title IX
definition, & jurisdiction?**

YES



New Title IX Process

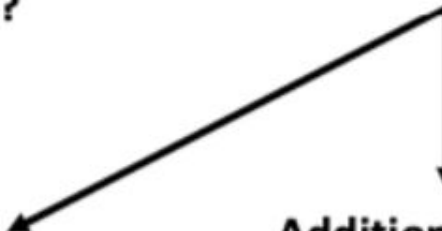
NO



Conduct Code



Additional Process



PLU's Mandatory Response Obligations: Defining Complainant, Respondent, Formal Complaint, Grievance, and Supportive Measures

COMPLAINANT: individual who is **alleged to be the victim** of conduct that could constitute sexual harassment

This clarifies that any third party as well as the complainant may report sexual harassment.

- **While parents and guardians do not become complainants (or respondents), the Final Rule expressly recognizes the legal rights of parents and guardians to act on behalf of parties (including by filing formal complaints) in Title IX matters.**

Final Rule: Respondent Definition

The Final Rule defines “**respondent**” as an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

Final Rule: Formal Complaint Definition

A **“formal complaint”** is a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment and states: “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 school with which the formal complaint is filed. “

A “formal complaint” must meet the Final Rule definition of sexual harassment.

Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or a party during a grievance process, and must comply with requirements for Title IX personnel to be free from conflicts and bias

Grievance Process: General Requirements

The Final Rule prescribes a consistent, transparent grievance process for resolving formal complaints of sexual harassment. The Final Rule states that a school's grievance process must:

- Equitable treatment of both complainant and respondent
- Remedies are required to be provided to a complainant when a respondent is found responsible
- Objective evaluation of all relevant evidence & avoid credibility determinations based on a person's status in the process
- Reasonably prompt time frames
- Clear and Convincing standard for all formal complaints of sexual harassment
- Appeal process with available supportive measures
- Grievance process must not use, rely on, or seek disclosure of information protected under a legally recognized privilege- unless person has waived privilege
- Any rules/practice/provisions other than those required by the Final Rule that a school adopts must be available to both parties

Final Rule: Supportive Measures Definitions

The Final Rule defines “**supportive measures**” as individualized services reasonably available that are nonpunitive, non-disciplinary, and not unreasonably burdensome to the other party while designed to ensure equal educational access, protect safety, or deter sexual harassment.

Supportive Measures are for all students involved in a formal complaint.

The Final Rule evaluates a school’s selection of supportive measures and remedies based on what is not clearly unreasonable in light of the known circumstances, and does not second guess a school’s disciplinary decisions, but requires the school to offer supportive measures, and provide remedies to a complainant whenever a respondent is found responsible

Title IX Personnel Training Requirements:

- Require Title IX personnel to be free from conflicts of interest or bias for or against complainants or respondents.
- Training of Title IX personnel must include training on the definition of sexual harassment in the Final Rule, 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, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. - -
- A school must ensure that decision-makers receive training on any technology to be used at a live hearing.
- A school's decision-makers and investigators must receive training on issues of relevance, including how to apply the rape shield protections provided only for complainants.
- Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.
- Recipients must post materials used to train Title IX personnel on their websites, if any, or make materials available for members of the public to inspect.

Investigations

During the grievance process and when investigating:

- The burden of gathering evidence and burden of proof must remain on schools, not on the parties.
- Schools must provide equal opportunity for the parties to present fact and expert witnesses and other inculpatory and exculpatory evidence.
- Schools must not restrict the ability of the parties to discuss the allegations or gather evidence (e.g., **no “gag orders”**).
- Parties must have the same opportunity to **select an advisor** of the party’s choice who may be, but need not be, an attorney.
- Schools must send written notice of any investigative interviews, meetings, or hearings.
- Schools must send the parties, and their advisors, evidence directly related to the allegations, in electronic format or hard copy, with at **least 10 days for the parties to inspect, review, and respond to the evidence in a summarized investigative report** prior to finalizing the report.
- Schools must send the parties, and their advisors, a **FINAL** investigative report that documenting relevant evidence, in electronic format or hard copy, with at **least 10 days for the parties to respond** prior to the set hearing date.

Investigations- continued

- Schools must dismiss allegations of conduct that do not meet the Final Rule's definition of sexual harassment or did not occur in a school's education program or activity against a person in the U.S. Such dismissal is only for Title IX purposes and does not preclude the school from addressing the conduct in any manner the school deems appropriate.

- Schools may, in their discretion, dismiss a formal complaint or allegations therein if the complainant informs the Title IX Coordinator in writing that the complainant desires to withdraw the formal complaint or allegations therein, if the respondent is no longer enrolled or employed by the school, or if specific circumstances prevent the school from gathering sufficient evidence to reach a determination.

- Schools must give the parties written notice of a dismissal (mandatory or discretionary) and the reasons for the dismissal.

- Schools may, in their discretion, consolidate formal complaints where the allegations arise out of the same facts.

- The Final Rule protects the privacy of a party's medical, psychological, and similar treatment records by stating that schools cannot access or use such records unless the school obtains the party's voluntary, written consent to do so.

Hearings

The Final Rule adds provisions to the “**live hearing with cross-examination**” requirement for post secondary institutions.

- At the live hearing, the decision-maker(s) must permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.
 - Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party’s advisor of choice and never by a party personally.
- 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.
- Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker must first determine whether the question is relevant and explain to the party’s advisor asking cross-examination questions any decision to exclude a question as not relevant.

Hearings- continued

- If a party does not have an advisor present at the live hearing, the school 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, an attorney to conduct cross-examination on behalf of that party.
- If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.
- Live hearings may be conducted with all parties physically present in the same geographic location or, at the school's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually.
- Schools must create an audio or audiovisual recording, or transcript, of any live hearing.

Rape Shield Protections for Complainants

The Final Rule provides rape shield protections for complainants (as to all recipients whether postsecondary institutions, K-12 schools, or others), **deeming irrelevant questions and evidence about a complainant's prior sexual behavior** unless offered to prove that someone other than the respondent committed the alleged misconduct or offered to prove consent.

Standard of Evidence & Written Determination

The Final Rule requires the school's grievance process to state the standard of evidence. **PLU will be using "CLEAR AND CONVINCING."**

- The decision-maker (who cannot be the same person as the Title IX Coordinator or the investigator) must issue a written determination regarding responsibility with findings of fact, conclusions about whether the alleged conduct occurred, 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

Appeals

The Final Rule states that a school must offer both parties an appeal from a determination regarding responsibility, and from a school's dismissal of a formal complaint or any allegations therein, on the following bases: procedural irregularity that affected the outcome of the matter, newly discovered evidence that could affect the outcome of the matter, and/or Title IX personnel had a conflict of interest or bias, that affected the outcome of the matter.

- A school may offer an appeal equally to both parties on additional bases.
- The Vice President for Student Life serves as the Appeal Officer for Title IX cases

Informal Resolution

The Final Rule allows a school, in its discretion, to choose to offer and facilitate informal resolution options, such as mediation or restorative justice, so long as both parties give voluntary, informed, written consent to attempt informal resolution.

Any person who facilitates an informal resolution must be well trained.

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Informal Resolution: continued

The Final Rule adds: - A school may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to a formal investigation and adjudication of formal complaints of sexual harassment. Similarly, a school may not require the parties to participate in an informal resolution process and may not offer an informal resolution process unless a formal complaint is filed.

- 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.

- Schools must not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

Retaliation Prohibited

The Final Rule expressly prohibits retaliation. Schools cannot move students into informal resolution of conduct AFTER a formal Title IX process.

- The school must keep confidential the identity of complainants, respondents, and witnesses, except as may be permitted by FERPA, as required by law, or as necessary to carry out a Title IX proceeding.
- Complaints alleging retaliation may be filed according to a school's prompt and equitable grievance procedures.
- The exercise of rights protected under the First Amendment does not constitute retaliation.
- 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; however, a determination regarding responsibility, alone, is not sufficient to conclude that any party made a bad faith materially false statement.