

## Title IX Investigator Training

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- Curriculum developer and faculty member of Virginia-funded program on fair, trauma-informed investigations
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## NACUA NOTES

### **J. Nolan, “Promoting Fairness in Trauma-Informed Investigation Training”**

- National Association of College and University Attorneys (“NACUA”) NACUANOTE, February 8, 2018, Vol. 16 No. 5
  - cited once in Title IX regulations Preamble

Updated Holland & Knight white paper version available at:

<https://www.hklaw.com/en/insights/publications/2019/07/fair-equitable-trauma-informed-investigation-training>

- cited 8 times in Title IX regulations Preamble

## Topics for Discussion

- New Title IX regulations: most pertinent background and definitions
- Focusing on conduct, not gender
- Conducting Investigations:
  - Impartiality: avoiding prejudice, conflicts of interest, bias
  - “Directly related” and “relevance” concepts
  - Creating investigation reports
  - Potential impacts of trauma on memory
  - Introduction to witness-centered interview concepts
  - Ensuring that witness-centered investigation approaches are applied in a manner that is demonstrably balanced, thorough, and fair to all parties

## Introduction to New Title IX Regulations

## The Long Road to the New Regulations...

- **September 7, 2017:** Department of Education Secretary Betsy DeVos announces notice and comment process
- **September 22, 2017:** OCR issued:
  - Dear Colleague Letter (“2017 DCL”) withdrawing 2011 DCL and 2014 Q&A
  - Q&A on Campus Sexual Misconduct (“2017 Q&A”)
- **November 16, 2018:** Proposed Regulations Posted
  - Officially published in Federal Register later in November, 2018
  - Fact Sheet and Summary also posted
- **May 6, 2020:** Final Regulations Posted
  - Officially published in Federal Register May 19, 2020
- **August 14, 2020:** Final Regulations Effective

## Scope of Institutional Responsibility

- Institution must respond when it has:
  - “Actual knowledge”
    - When “an official of the recipient who has authority to institute corrective measures” has notice, e.g., Title IX Coordinator
  - of “sexual harassment” (as newly defined)
  - that occurred within the school’s “education program or activity”
    - “includes locations, events, or circumstances over which the recipient exercised substantial control” over the respondent and the context in which the sexual harassment occurred
    - Fact specific inquiry focused on control, sponsorship, applicable rules, etc.
  - against a “person in the United States” (so, not in study abroad context)

## School’s “education program or activity”

- School’s “education program or activity”:
  - “includes locations, events, or circumstances over which the recipient exercised substantial control” over the respondent and the context in which the sexual harassment occurred.
  - Not a simple artificial bright-line on/off campus distinction
  - Does not simply depend on geographic location of activity

## School's "education program or activity"

- Examples: Did conduct occur in location/context where school:
  - Owned premises (or officially recognized student organization that owned or controlled the premises): including fraternities
  - Exercised oversight, supervision or discipline, or
  - Funded, sponsored, promoted or endorsed event

## Decision Point: School's "education program or activity"

- "[N]othing in the final regulations prevents recipients from initiating a student conduct proceeding or offering supportive measures to students affected by sexual harassment that occurs outside the recipient's education program or activity."
- Given this change, schools **will have to decide** whether to prohibit and investigate sexual misconduct that occurs outside more narrowly-defined "education program or activity"

## Title IX Sexual Harassment

- Prohibited “sexual harassment” means conduct on the basis of sex that constitutes one or more of the following:
  - An employee conditioning the provision of an aid, benefit, or service on an individual’s participation in unwelcome sexual conduct (i.e., quid pro quo);
  - Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to an education program or activity (i.e., hostile environment); or

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## Title IX Sexual Harassment

- Prohibited “sexual harassment” means conduct on the basis of sex that constitutes one or more of the following:
  - Sexual assault (as defined in Clery Act)
    - FBI/UCR SRS or NIBRS until January 2021, thereafter just NIBRS
  - Or “dating violence,” “domestic violence,” and “stalking” (as defined in Clery Act/Violence Against Women Act).

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## Procedural Changes

- Must investigate “formal complaints”
- Must satisfy certain notice and ongoing notice requirements
- Must produce investigation report with certain elements
- Must give parties and advisors opportunity to review all information “directly related to allegations”
  - Broader than:
    - “all relevant evidence” as otherwise used in Title IX regulations, and
    - “any information that will be used during informal and formal disciplinary meetings and hearings” as used in Clery Act

## Procedural Changes

- New procedures require that schools:
  - Ensure that burden of proof and burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the school and not on the parties
  - Provide equal opportunity for parties to present witnesses and other inculpatory and exculpatory evidence;
  - Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence

## Procedural Changes

- New procedures require that schools:
  - Give the parties an equal opportunity to select an advisor of the party's choice (who may be, but does not need to be, an attorney)
  - Provide written notice when a party's participation is invited or expected for an interview, meeting, or hearing;
  - Provide both parties an equal opportunity to review and respond to the evidence gathered during the investigation; and
  - Send both parties the investigator's investigative report summarizing the relevant evidence, prior to reaching a determination regarding responsibility

Focus on Conduct, Not Gender

## Focus on Conduct, Not Gender

- » Majority of reported incidents and investigations in university context involve cisgender heterosexual women as complainants and cisgender heterosexual men as respondents, but:
  - The gender, gender identity and/or sexual orientation of any party to an investigation should have no bearing on how colleges and universities will investigate

## CDC National Intimate Partner and Sexual Violence Survey, Summary Report (2011)

- » 16,507 survey respondents
- » Found that men and women had similar prevalence of nonconsensual sex in the previous 12 months
- » Estimated 1.270 million women raped and 1.267 million men “made to penetrate”

[http://www.cdc.gov/ViolencePrevention/pdf/NISVS\\_Report2010-a.pdf](http://www.cdc.gov/ViolencePrevention/pdf/NISVS_Report2010-a.pdf)

## Conducting Investigations

## Impartiality: Avoiding Prejudgment, Conflicts of Interest, and Bias

## Impartiality: Avoiding Prejudgment and Bias

From Title IX Regulation Preamble:

» “the Department’s interest in ensuring impartial Title IX proceedings that avoid prejudgment of the facts at issue necessitates a broad prohibition on sex stereotypes so that decisions are made on the basis of individualized facts and not on stereotypical notions of what “men” or “women” do or do not do.”

## Impartiality: Avoiding Prejudgment and Bias

From Title IX Regulation Preamble:

» Contrary to the concerns of some commenters, a prohibition against reliance on sex stereotypes does not forbid training content that references evidence-based information or peer-reviewed scientific research into sexual violence dynamics, including the impact of trauma on sexual assault victims.”

» Rather, § 106.45(b)(1)(iii) cautions recipients not to use training materials that “rely” on sex stereotypes in training Title IX personnel on how to serve in those roles impartially and without prejudgment of the facts at issue, meaning that research and data concerning sexual violence dynamics may be valuable and useful, but cannot be relied on to apply generalizations to particular allegations of sexual harassment.”

## Impartiality: Avoiding Prejudgment and Bias

### » Analogous regulatory language:

- Regulations' "presumption of non-responsibility" requires schools to investigate and resolve complaints: "without drawing inferences about credibility based on a party's status as a complainant or respondent."
- Hearing officers must not have "bias for or against complainants or respondents generally or for an individual complainant or respondent"

## Impartiality: Avoiding Prejudgment and Bias

- » Preamble repeatedly warns against risk of "sex-based bias" in decision-making
- » Preamble:
  - "To the extent that commenters accurately describe negative stereotypes applied against students with disabilities, and particularly against students with disabilities who are also students of color or LGBTQ students, the final regulations expressly require recipients to interact with every complainant and every respondent impartially and without bias."
  - "A recipient that ignores, blames, or punishes a student due to stereotypes about the student violates the final regulations."

## Impartiality: Avoiding Prejudgment and Bias

- » Practical application of these concepts in investigations:
  - Do not rely on cultural “rape myths” that essentially blame complainants
  - Do not rely on cultural stereotypes about how men or women purportedly behave
  - Do not rely on gender-specific research data or theories to decide or make inferences of relevance or credibility in particular cases

## Impartiality: Avoiding Prejudgment and Bias

- » Practical application of these concepts in investigations:
  - Recognize that anyone, regardless of sex, gender, gender identity or sexual orientation, can be a victim or perpetrator of sexual assault or other violence
  - Avoid any perception of bias in favor of or against complainants or respondents generally
  - Employ interview and investigation approaches that demonstrate a commitment to impartiality

## Impartiality: Avoiding Conflicts of Interest

- » Commenters argued that investigators and hearing officers employed by schools have an “inherent conflict of interest” because of their affiliation with the school, so Department should require investigations and hearings to be conducted by external contractors
- » Department noted that some of those commenters argued that this resulted in bias against complainants, and some argued that this resulted in bias against respondents
- » Department’s response:
  - Department’s authority is over schools, not individual investigators and other personnel, so Department will focus on holding school’s responsible for impartial end result of process, without labeling certain administrative relationships as per se involving conflicts of interest

## Impartiality: Avoiding Conflicts of Interest

- » Department also rejected commenters’ arguments that individuals should be disqualified from serving as investigators because of past personal or professional experience
- » “Department encourages [schools] 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” WHILE
- » “exercising caution not to apply generalizations that might unreasonably conclude that bias exists (for example, assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents”

## Impartiality: Avoiding Prejudgment, Bias, and Conflicts of Interest

### » Bottom line:

- Follow facts of every individual case
- Investigate in manner that will not allow even a perception of prejudgment or bias for or against any party

## “Directly Related” and “Relevance” Concepts

## “Directly Related” Evidence

### Regulation:

- » Parties must have equal opportunity to inspect and review evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint
- » Including evidence upon which the school does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source
- » So that each party can meaningfully respond to the evidence prior to the conclusion of the investigation

## “Directly Related” Evidence

- » In Preamble, Department declines to define “directly related” further, indicating that it “should be interpreted using [its] plain and ordinary meaning.”
- » Department notes that term aligns with (similarly undefined) term in Family Educational Rights and Privacy Act (“FERPA”), which defines covered education records in part as documents that are:
  - “directly related to a student; and
  - Maintained by an educational agency or institution . . . .”
- » Department ties parties’ right to review directly related information under Title IX regulations with Department’s prior position that students may review FERPA-protected information about other students if necessary to preserve their due process rights

## “Directly Related” Evidence

- » Term is broader than:
  - “all relevant evidence” as otherwise used in Title IX regulations, and
  - “any information that will be used during informal and formal disciplinary meetings and hearings” as used in Clery Act
- » Point of information-sharing provision is to promote transparency and allow parties to object to investigator’s conclusion that certain evidence is not relevant, and argue why certain evidence should be given more weight
- » Cautious approach:
  - Read term broadly, withholding or redacting information only where explicitly irrelevant under regulations (see below), or where not related to allegations

## “Relevant” Evidence

- » Investigative reports must “summarize relevant evidence”
- » The Department declines to define “relevant”, indicating that term “should be interpreted using [its] plain and ordinary meaning.”
- » See, e.g., Federal Rule of Evidence 401 Test for Relevant Evidence:
  - “Evidence is relevant if:
    - (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
    - (b) the fact is of consequence in determining the action.”

## “Relevant” Evidence

- » Department emphasizes repeatedly in Preamble that investigators have discretion to determine relevance
  - Subject to parties’ right to argue upon review of “directly related” evidence that certain information not included in investigative report is relevant and should be given more weight
- » Investigators will have to balance discretionary decisions not to summarize certain evidence in report against:
  - Each party’s right to argue their case, and
  - Fact that decisions regarding responsibility will be made at hearing, not investigation stage

## Evidence That is Not “Relevant”

- » Hearing-related regulation provides:
  - “Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant,
  - unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
  - if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.”

## Evidence That is Not “Relevant”

- » Regulations provide that schools will not:
  - “require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.”
- » Physical and mental health records and attorney-client privileged communications would fit within scope of this prohibition

## Creating Investigative Reports

## Summarizing “Relevant” Evidence

- » Again, Department emphasizes repeatedly in Preamble that investigators have discretion to determine relevance
  - Subject to parties’ right to argue upon review of “directly related” evidence that certain information not included in investigative report is relevant and should be given more weight
- » Investigators will have to balance discretionary decisions not to summarize certain evidence in report against:
  - Each party’s right to argue their case, and
  - Fact that decisions regarding responsibility will be made at hearing, not investigation stage

## Investigative Reports

- » Regulation:
  - “Prior to completion of the investigative report, the [school] must send to each party and the party’s advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and
  - the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report.”

## Investigative Reports

- » Regulation:
  - Investigative reports must “fairly summarize relevant evidence”
  - “at least 10 days prior to a hearing . . . send to each party and the party’s advisor, if any, the
  - investigative report in an electronic format or a hard copy, for their review and written response.”
- » Investigator does not need to revise investigative report in light of this written response from parties

## Recommendations Regarding Responsibility?

- » In addition to summarizing relevant evidence, investigative reports MAY include a recommendation regarding responsibility and related analysis
- » Recommendation option is not specifically required or prohibited by regulations or Preamble
- » Whether to include recommendations or not may be decided by each institution at its discretion
- » Obviously, decision-makers must make independent decisions based on
  - Investigative report and related evidence, and
  - Information presented at hearing, including information resulting from cross-examination

## Introduction to Witness-Centered Interview Concepts

## Traditional Interview Techniques

- Often focus on “who, what, when, where, why”
- Often focus on what questioner thinks they need, e.g.:
  - Developing a chronology
  - Fitting facts into policy violation elements framework
- Questioner’s determinations and (worse yet) pre-determinations of what is relevant, and what is not, can be controlling
  - Questioner often interrupts witness to seek immediate clarification
- Common questioning techniques:
  - Leading questions
  - Yes/no or choice questions
  - Paraphrasing for “clarification”
- “Why did you/why didn’t you” questions that can discourage participation

## Potential Effects of Trauma on Memory

- Memories for traumatic incident are no more or less likely to be inaccurate than memories for a non-traumatic event
- Central details may be remembered very well, but peripheral details less so

## Potential Effects of Trauma on Memory

- Be very thoughtful about how much, if any, weight to place on witness's affect and other presentation given potential effects of trauma, stress, alcohol, cultural factors, etc.
  - Recognize that presentation may not necessarily be “evidence”

## Potential Effects of Trauma on Memory

- Generally in interviews we expect to hear information generated by the cerebral cortex – organized, chronological.
- With individual who has experienced trauma, the information recalled regarding traumatic incidents may not be organized and/or chronological.
- Shouldn't prejudge by assuming that disorganized reporting is necessarily evidence of EITHER:
  - false reporting, or
  - existence of trauma

## Interviewing for Clarification

- It is crucial to interview and question witnesses for clarification (sometimes in initial, and definitely in follow up, interviews)
  - Promotes accuracy and fairness
  - If done appropriately, should not alienate witnesses
- Examples of how to present evidence, statements of other witnesses to parties

## Fair, Witness-Centered Approach

Investigators should seek clarification on crucial points, but starting with a more open-ended, witness-centered approach can:

- Yield more, and more accurate, information
- Better encourage witness participation
- Be less likely to interfere with authentic memory

## Fair, Witness-Centered Approach

- Even witnesses who do not appear to have experienced trauma (e.g., many respondents), may be experiencing substantial stress due to investigation and interview setting
- Same open-ended questioning approach is just as effective when used with respondents
  - And should be used if used with complainants, to promote neutrality
- As with complainants, should not rely unduly on “presentation as evidence”

## Fair, Witness-Centered Approach

- Like complainants, respondents can be provided opportunity for open-ended narrative
- Similar cues can be used
- Sensory information can be gathered from respondents
- Avoiding leading questions, yes/no questions, paraphrasing, etc. is important for respondent questioning as well
- Goal: Neutral, open-ended questioning approach should be used with both parties

## Summary and Questions

Thank You!



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