



Centura College, AIM, and Tidewater Tech Title IX and Clery Training

Presented by: Amber L. Resetar Grove,
Esq.

The Sexual Misconduct Landscape

The Landscape

Clery Act

- Violence Against Women Act (VAWA)

Title IX

- Dear Colleague Letters
- Case Law
- Regulations
- Resolution Agreements

Constitutional considerations

- Must provide and publish policies and procedures related to sexual misconduct
 - Clery focuses on VAWA crimes
- Requires interim accommodations
- Requires prompt, fair, and impartial proceedings conducted by trained, unbiased individuals
- Requires advisor of choice for both parties

Clery Requirements

- Due process is comprised of two pieces: substantive due process and procedural due process
- Origins: Fifth and Fourteenth Amendment of the U.S. Constitution requiring protections against the deprivation of life, liberty, or property
- Important education-related case: *Goss v. Lopez*, 419 U.S. 565 (1975).

Constitutional Due Process Requirements

OCR COVID-19 Guidance

- Q and A document issued May 12, 2020
- Listed several considerations for institutions regarding ongoing operations during the current pandemic, including:
 - Disability accommodation requirements
 - Resource provision related thereto
 - Sign language versus closed captioning
 - Continuity of Title IX cases

“Questions and Answers for Postsecondary Institutions Regarding the COVID-19 National Emergency.”

2020 DOE/OCR Regulations

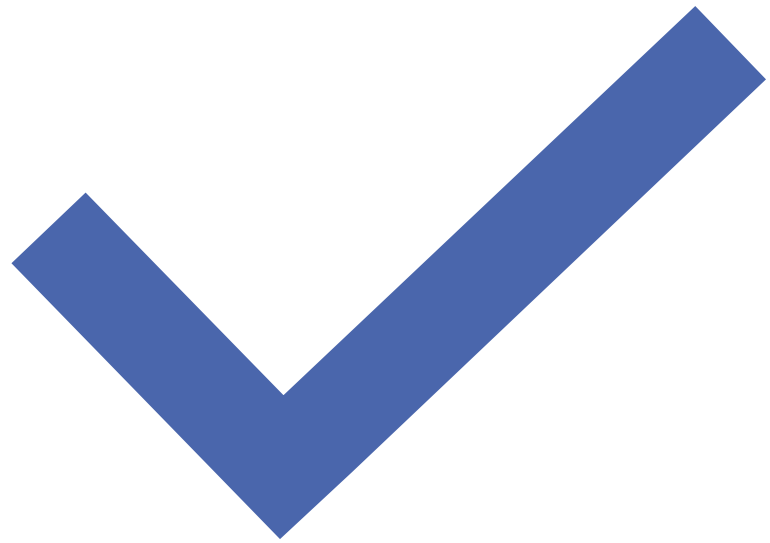
- On May 6, 2020, the Department of Education released new regulations entitled “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,” at 34 CFR Part 106.
- Implementation of these regulations was required by August 14, 2020.

“Nondiscrimination on the Basis of sex in Education Programs or Activities Receiving Federal Financial Assistance.”

2020 DOE/OCR Regulations

- The preamble provides that “the final regulations: affirm that the Department’s Office for Civil Rights (“OCR”) may require recipients to take remedial action for discriminating on the basis of sex or otherwise violating the Department’s regulations implementing Title IX, consistent with 20 U.S.C. 1682...”

“Nondiscrimination on the Basis of sex in
Education Programs or Activities
Receiving Federal Financial Assistance.”



Regulatory Requirements

Policy Definitions

- Section 106.30
 - Actual Knowledge
 - Complainant
 - Formal Complaint
 - Grievance Process
 - Respondent
 - Sexual Harassment
 - Supportive Measures

- “Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school.”

Actual Knowledge

- “Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is the respondent.”

Actual Knowledge

- “The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient. ‘Notice’ as used in this paragraph includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator as described in § 106.8(a).”

Actual Knowledge

Complainant

- “Complainant means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.”

Formal Complaint

- “Formal complaint means 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. 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.”

Formal Complaint

- “A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under § 106.8(a), and by any additional method designated by the recipient.”

Respondent

- “Respondent means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.”

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

Sexual Harassment

Sexual Harassment

- “Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:
 - ...‘Sexual assault’ as defined in 20 U.S.C. 1092(f)(6)(A)(v), ‘dating violence’ as defined in 34 U.S.C. 12291(a)(10), ‘domestic violence’ as defined in 34 U.S.C. 12291(a)(8), or ‘stalking’ as defined in 34 U.S.C. 12291(a)(30).”

Supportive Measures

- “Supportive measures means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.”

Supportive Measures

- “Such measures are designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment, or deter sexual harassment.”

Supportive Measures

- “Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.”

Supportive Measures

- “The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.”

Resource Identification

- Section 106.8 requires the designation of one (1) employee as Title IX Coordinator
 - Must be displayed on the website and in each handbook and catalog available to all applicants for admission and employment, students, parents or legal guardians of minors, employees, etc.
 - Must include name or title, office address, email address, and telephone number of the Title IX Coordinator



Resource Identification

- Section 106.8 (*continued*):
 - Must also notify applicants, students, employees, etc., that the institution “does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by Title IX and this part not to discriminate in such a manner.”
 - Inquiries related to any issues should be directed to the Title IX Coordinator or the Assistant Secretary of Education

Report Structure



Reports can be in person or with an online form (or submitted in an alternative format like email)

May be submitted by anyone



Formal complaints only may be put forth by complainant(s) or the Title IX Coordinator (*see Section 106.30*)

- Section 106.44
 - Covers all students, faculty, and staff
 - Must be:
 - Part of “education program or activity”
 - “Against a person in the U.S.”

Jurisdiction

- Section 106.45(b)(3)(i)-(iii)
 - Required dismissal:
 - If the conduct does not constitute sexual harassment
 - Did not occur in the institution's program or activity
 - Did not occur against a person in the U.S.
 - Optional dismissal:
 - Complainant withdrawal from process
 - Respondent no longer enrolled/employed
 - Insufficient evidence available to make a determination

Dismissal

- 106.45(b)(1)(vii) and 106.45(b)(7)(i):
 - The standard of evidence must be publicized. Institutions may select between preponderance and clear and convincing.
 - In so choosing, the institution must “apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment.”

Standard of Evidence

Formal Grievance Procedure

106.45(b)(1)(i): Equitable Treatment of Complainants and Respondents

106.45(b)(1)(ii): Objective Evaluation of All Relevant Evidence

106.45(b)(1)(iv): Presumption of Non-Responsibility

106.45(b)(1)(v): Reasonably Prompt Time Frames

Formal Grievance Procedure

106.45(b)(1)(vi): Describe Range or List of Possible Sanctions and Remedies

106.45(b)(1)(vii): Describe Standard of Evidence

106.45(b)(1)(viii): Procedures and Bases for Appeal

106.45(b)(1)(ix): Describe Range of Supportive Measures

106.45(b)(1)(x): Privileged Information

- Privileged information not permitted unless disclosed by individual holding the privilege
- Evidence may also be restricted based on rape shield-type policy or based on relevance
- No evidence (specifically statements) permitted to be considered if an individual does not present for cross-examination

Evidence



Preponderance of Evidence

- The Legal Information Institute more simply defines preponderance as the burden of proof that “is met when the party with the burden convinces the fact finder that there is a greater than 50% chance that the claim is true.”

Initiation of Grievance Procedure

- Section 106.45(b)(2): Written Notice of Allegations. Must include:
 - Details of the grievance process, including informal resolution
 - Allegations of sexual harassment including “sufficient details known at the time and with sufficient time to prepare a response before any initial interview.”
 - Including party identity, conduct, date and location of the incident

Initiation of Grievance Procedure

- Section 106.45(b)(2) (*continued*):
 - Statement indicating Respondent is presumed not responsible and determination regarding responsibility does not occur until the conclusion of the grievance process
 - Information regarding advisor of choice
 - Statement about the relevant section of the code of conduct that prohibits knowingly making false statements/submitting false information

Investigation

- The single investigator model is now prohibited (106.45(b)(7)(i)).
 - There must be autonomy between the Title IX Coordinator, the investigator(s), the adjudicator(s), appellate decision-maker(s), and facilitator(s) of informal resolution.

Investigation

- Burden of proof and evidence collection is placed upon the institution (106.45(b)(5)(i)).
- All parties must have an equal opportunity to present witnesses and other evidence (exculpatory and inculpatory) (106.45(b)(5)(ii)).
- No gag orders permitted (106.45(b)(5)(iii)).

Investigation

- Advisors of choice must be permitted. Participation in the process can be controlled by the institution, but must be done fairly (106.45(b)(5)(iv)).
- Written notice of all hearings, meetings, and interviews must be given with adequate time for the individual to prepare (106.45(b)(5)(v)).

Investigation Report

- The investigation report is required to “fairly” summarize “relevant” evidence (106.45(b)(5)(vii)).
- Parties must be given an opportunity to review and inspect all evidence.
- Additionally, parties must be given ten (10) days to review and comment upon the investigative report prior to finalization.

Hearings

Live hearings required (*see 106.45(b)(6)(i)*)

Facilitating technology permitted

No barriers to sight/sound permitted



Cross-examination required

All cross-examination must be conducted by advisor (either of choice or supplied by the institution)

Relevance determinations must be made prior to any question being answered and decisions to exclude must be placed on record in real time.

- 106.45(b)(7)(ii): Written Determination Regarding Responsibility Must Include Certain Details
 - Identification of the allegations
 - Description of the procedural steps from the initiation of the process onward
 - Includes determination of responsibility, notifications to parties, interviews with parties and witnesses, site visits, methods to gather evidence, and hearings

Determination of Responsibility

- 106.45(b)(7)(ii) (*continued*):
 - Findings of fact supporting the determination of responsibility
 - Application of the code of conduct to the facts
 - A statement of the result of each allegation and rationale
 - Includes determination of responsibility, sanctions, remedies provided to complainant
 - Notice of appellate process and procedure

Determination of Responsibility

Appeals

- 106.45(b)(1)(viii) and 106.45(b)(8) require that both/all parties must be offered the opportunity to appeal from a determination of responsibility or from a dismissal of a formal complaint (in its entirety or in parts) on the following grounds:
 - Procedural irregularity that impacted the outcome
 - New evidence that was not reasonably available
 - Staff/facilitator bias for/against complainants or respondents generally or the parties in the case

Retaliation

- Section 106.71: “No recipient 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 or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part.”

Retaliation

- Retaliation includes: intimidation, threats, coercion, discrimination, “charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances” for the “purpose of interfering with any right or privilege secured by title IX.”

- All individuals involved with the Title IX process (Title IX Coordinator, investigator(s), adjudicator(s), appellate decision-maker(s)) must be impartial and must receive mandatory training.
 - Must be posted on website
 - Must include information regarding relevancy determination and anti-bias

Training Requirements

Record Retention

- An institution must maintain records for seven (7) years, including:
 - Sexual harassment investigation including determination regarding responsibility
 - Sanctions imposed
 - Remedies issued
 - Appeals, including results
 - Informal resolutions, including results
 - Training materials

Compliant Process Considerations

- Oxford Languages defines bias as “prejudice in favor of or against one thing, person, or group compared with another, usually in a way considered to be unfair.”
- The regulations hone in on both generalized bias against parties and specific bias against a particular, named party.

Bias

Documentation

All reports should be formal and, when relevant, written in the third person.



Neutrality is critical in all documentation.

Policy

Notice of investigation

Email correspondence

Investigator inquiries

Adjudicator
questions/interactions

- Establish clear guidelines on language to be used. It is advisable to use the language set forth in the regulations, particularly “complainant” and “respondent.”

Documentation

Title IX/Sexual
Misconduct Policy
Discussion



Journey of a Complaint

- Formal complaint filed with Campus Executive Director
- Notification of Regional Director and Corporate Director of Student Affairs
- Review of complaint
- Initiation of formal investigation
 - Supportive measures
 - Evidence gathering
 - Report preparation
 - Report review
 - Report finalization
 - Hearing (when applicable)

Clery Compliance



Overview

- Institutions have ongoing crime reporting obligations.
- As part of that obligation, the ASR typically must be distributed by October 1 each year. That includes statements of policy related to safety and security as well as crime statistics.

Geography



On Campus Property: Any building or property owned or controlled by an institution within the same reasonably contiguous geographic area and used by the institution in direct support of, or in a manner related to, the institution's educational purposes including residence halls.



Residential Facilities: Any student housing facility that is owned or controlled by the institution.

Geography



Non-Campus Property: Any building or property owned or controlled by an institution that is used in direct support of, or in relation to, the institution's educational purposes, is frequently used by students, and is not within the same reasonably contiguous geographic area of the institution.



Public Property: All public property, including thoroughfares, streets, sidewalks, and parking facilities, that is within the campus, or immediately adjacent to and accessible from the campus.

Reportable Crimes: Criminal Offenses

- Criminal Homicide
 - Murder
 - Non-negligent manslaughter
 - Manslaughter by negligence
- Sexual Assault
 - Rape
 - Fondling
 - Incest
 - Statutory Rape
- Robbery
- Aggravated Assault
- Burglary
- Motor Vehicle Theft
- Arson

Reportable Crimes: Hate Crimes

Any of the First-Tier Criminal
Offenses

Larceny-Theft

Simple Assault

Intimidation

Destruction/Damage/Vandalism
of Property

- Domestic Violence
- Dating Violence
- Stalking

Reportable Crimes: VAWA Offenses

- Weapon Law Violations
 - Manufacture
 - Sale
 - Purchase
 - Possession
- Drug Law Violations
 - Possession
 - Sale
 - Use
 - Manufacture/growing
- Liquor Law Violations
 - Manufacture
 - Sale
 - Purchase
 - Transportation

Reportable Crimes: Arrests and Referrals for Disciplinary Actions

Resources and References

Resources and References

“Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.” 34 CFR Part 106. Department of Education. 05.06.2020.
<https://s3.amazonaws.com/public-inspection.federalregister.gov/2020-07057.pdf>

“Questions and Answers for Postsecondary Institutions Regarding the COVID-19 National Emergency.” Office for Civil Rights. 05/12/2020. [*Questions and Answers for Postsecondary Institutions Regarding the COVID-19 National Emergency*](#)

Resources and References

[Clery Act Appendix for FSA Handbook](#) (October 2020).

The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, [34 CFR 668.46](#).