



# REFRESHER TRAINING ON TITLE IX REGULATIONS

September 23, 2021

Rebecca Leitman Veidlinger



# Before we begin

- Copyright Notice: This presentation is protected by U.S. and International copyright laws. Reproduction, distribution, or use of the presentation without written permission of Rebecca Leitman Veidlinger is prohibited.
- Limited permission is granted for institutions that have registered for this training to post the slides on institutional websites pursuant to 34 C.F.R. § 106.45(b)(10)(D).
- The contents of this presentation and the related discussion are for informational purposes only and do not constitute legal or regulatory advice. No party should act or refrain from acting on the basis of any statements made today without seeking individualized, professional counsel as appropriate.

# Our goals today

- Refresh our knowledge and familiarity with key components of the Title IX regulations
- Discuss lessons learned and continuing challenges
- Learn about case law involving the regulations and its impact on your institutions

REFRESHER:

SCOPE,  
JURISDICTION,  
AND  
IMPORTANT  
DEFINITIONS



# Mandatory jurisdiction to respond

- Actual knowledge
- Sexual harassment
- Education program or activity
- Person in the United States



# Respond promptly in a manner that is not deliberately indifferent

- Promptly contact complainant to discuss availability of supportive measures regardless of whether complaint is filed and explain process for filing complaint
- Supportive measures for complainants
- Supportive measures for respondents (when the time is right)
- Keep records of supportive measures for seven years

## Emergency removal of student

- Not a determination of responsibility
- Must conduct an individualized safety and risk analysis
- For immediate threats to anyone's physical health or safety
- Respondent must have an opportunity to challenge the decision immediately following the removal
- Whether or not grievance process is underway

## Administrative leave of employee

- May place employee respondent on administrative leave during the pendency of a grievance process that complies with Title IX regulations



# Mandatory jurisdiction to investigate Formal complaint filed by a complainant

- What is a formal complaint?
- How to file it/where is it?
- What does it need to say?





# Mandatory jurisdiction to investigate Formal complaint filed by Title IX coordinator

Based on what you have seen this year, under what circumstances do you think a Title IX Coordinator might choose to file a complaint?



# Definition of Sexual Harassment

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- 1) 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;
- 2) 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
- 3) "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).

# Definition of Sexual Harassment

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- 1) 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;
- 2) 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
- 3) "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).

# Definition of Sexual Harassment

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- 1) 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;
- 2) 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
- 3) "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).

# Areas of continuing challenge

## Definition of Sexual Harassment

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- 1) 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;
- 2) 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
- 3) "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).

Copyright © 2021 Rebecca Leitman Veidlinger, Esq., PLLC. All rights reserved.

- Sexual assault definition confusion
- Title IX and non-Title IX definition confusion
- Others?

# Formal complaint is filed ... what now?

- Grievance process
- Allegations, including sufficient details
- Statement of presumption of non-responsibility
- Right to an advisor/attorney
- Right to inspect evidence
- Any provision in code that prohibits making false statements during process



# Areas of continuing challenge

Formal complaint is filed  
... what now?

- Grievance process
- Allegations, including sufficient details
- Statement of presumption of non-responsibility
- Right to an advisor/attorney
- Right to inspect evidence
- Any provision in code that prohibits making false statements during process

Copyright © 2021 Rebecca Leitman Veidlinger, Esq., PLLC. All rights reserved.



- Lack of clarity regarding specific category of prohibited conduct
- Lack of clarity regarding the alleged conduct

# Dismissing complaints

## MANDATORY

- Not sexual harassment
- Did not occur in program or activity
- Not against person in the U.S.

## DISCRETIONARY

- Complainant withdraws complaint
- Respondent no longer enrolled/employed
- School unable to collect sufficient info



# Bad behavior that must be dismissed pursuant to regulations

- Why might we want to address this conduct?
- Are we prohibited from addressing it?



# Given the stricter definitions and more narrow jurisdiction, what are institutions doing to address non-Title IX sexual misconduct?

- Nothing
- Using one umbrella sexual misconduct policy that includes all definitions, with different sets of procedures (set forth in appendices, etc.)
- Using one umbrella sexual misconduct policy that includes non-Title IX definitions, and all matters go through Title IX regulations-compliant investigations and hearings
- Using two different substantive policies (one Title IX, one non-Title IX) each with its own set of procedures
- Others?

# Stretch Break



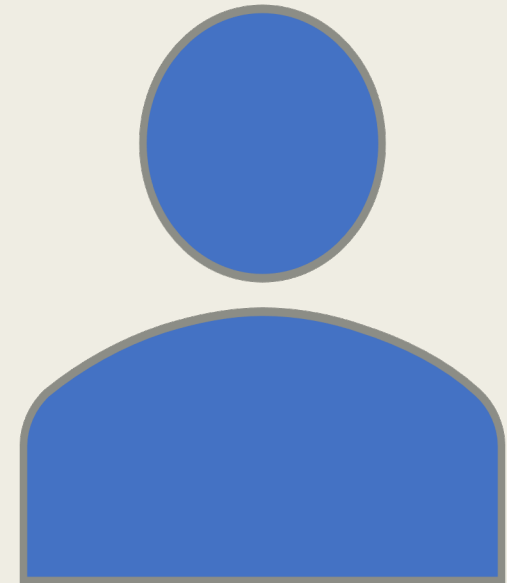


REFRESHER:

MORE KEY  
CONCEPTS FROM  
THE  
REGULATIONS

- Title IX Coordinator
- Investigator
- Decisionmaker
- Appeals officer
- Facilitator of informal resolution
- Party advisor

## Title IX Roles





# How to serve impartially

- Avoid pre-judgment of the facts
- Bias
- Conflict of interest

# Informal resolution

- Can only be offered after formal complaint has been filed
- May include arbitration, mediation, or restorative justice
- Facilitators must be trained in informal resolution

# Areas of continuing challenge

## Informal resolution

- Can only be offered after formal complaint has been filed
- May include arbitration, mediation, or restorative justice
- Facilitators must be trained in informal resolution

Copyright © 2021 Rebecca Leitman Veidlinger, Esq., PLLC. All rights reserved.

- Lack of trained personnel who can conduct informal resolution processes
- Undeveloped informal resolution processes



# Steps of investigation

---

Trained investigator collects information

---

Investigator shares evidence “directly related” to allegations with parties

---

Parties have 10 days to respond

---

Investigator creates summary of “relevant” evidence (investigation report) and shares with parties

---

Parties have 10 days to respond prior to hearing

# Areas of continuing challenge

## Steps of investigation

---

Trained investigator collects information

---

Investigator shares evidence “directly related” to allegations with parties

---

Parties have 10 days to respond

---

Investigator creates summary of “relevant” evidence (investigation report) and shares with parties

---

Parties have 10 days to respond prior to hearing

- Distinguishing the steps of the investigation
- What is a “day”?
- Timeframes, and what happens when parties submit additional evidence
- Including too much information in investigation reports

Copyright © 2021 Rebecca Leitman Veidlinger, Esq., PLLC. All rights reserved.

# Understanding relevance

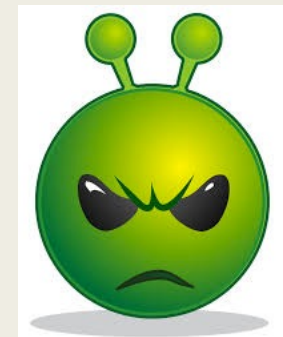
## Relevance IS

- Tends to make a fact more or less probable than it would be without that evidence
- Logical connection between the evidence and facts at issue
- Assists in coming to the conclusion – it is “of consequence”



## Relevance IS NOT

- Strength of the evidence
- Believability of the evidence
- Based on type of evidence: circumstantial v. direct
- Based on complicated rules of court





# HEARINGS



# Pre-hearing work

- Confirm advisors for each party; appoint if necessary; consider having back-ups available
- Figure out who will be requested to attend
- Explain to the parties what to expect
- Establish ground rules and structure of hearing
- Consider convening a pre-hearing conference
- Make logistical and technology decisions (including recording, having info available for parties, and remote access)

# Areas of continuing challenge

## Pre-hearing work

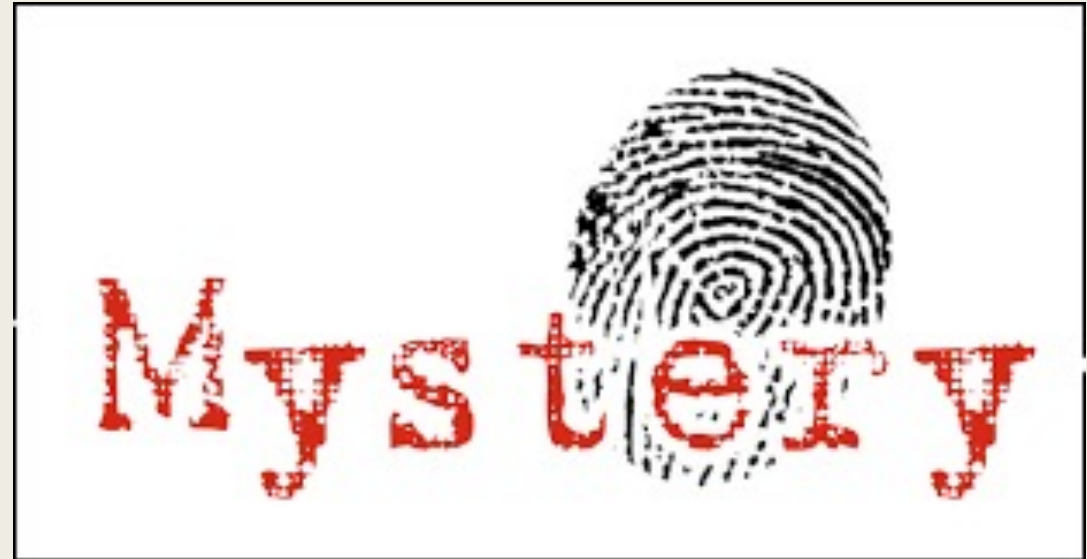
- Confirm advisors for each party; appoint if necessary; consider having back-ups available
- Figure out who will be requested to attend
- Explain to the parties what to expect
- Establish ground rules and structure of hearing
- Consider convening a pre-hearing conference
- Make logistical and technology decisions (including recording, having info available for parties, and remote access)

Copyright © 2021 Rebecca Leitman Veidlinger, Esq., PLLC. All rights reserved.

- Pre-hearing conferences and advisors
- Timing
- What the hearing officer needs before the pre-hearing conference
- Perfecting the ground rules/rules of decorum
- New evidence introduced at the hearing

# Dealing with cross examination

- Rule from regulations
- VRLC v. Cardona ruling
- Reminder: Doe v. Baum
- What this means for your institution





## Refresher: Special categories of evidence that are off-limits

- **IRRELEVANT:** Complainant's prior sexual predisposition or prior sexual history (with two exceptions)
- **IRRELEVANT:** Information protected under a legally-recognized privilege
- **CAN'T USE:** Medical, psychological and similar records without written consent of party



# Areas of continuing challenge



Refresher:  
Special categories of  
evidence that are off-limits

- IRRELEVANT: Complainant's prior sexual predisposition or prior sexual history (with two exceptions)
- IRRELEVANT: Information protected under a legally-recognized privilege
- CAN'T USE: Medical, psychological and similar records without written consent of party

- Misunderstanding the rape shield rule
- Waivers and partial waivers of privilege

Copyright © 2021 Rebecca Leitman Veidlinger, Esq., PLLC. All rights reserved.

## Decision and written determination

- Use disciplined, unbiased evaluation of relevant evidence
- Include specific elements required by regulations



# Required elements in written determination

- Description of procedural steps from complaint through determination
- Findings of fact
- Conclusions regarding application of policy to facts
- Rationale for each result of each allegations
- Sanctions/remedies
- Appeal options (must permit appeal)

# Grounds for appeals

- 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
- Title IX coordinator, investigator, or decisionmaker had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter
- Any other grounds, as long as offered equally to both parties

# QUESTIONS?

[rebecca@veidlinger.com](mailto:rebecca@veidlinger.com)

