



# TITLE IX BOARD OF TRUSTEE TRAINING

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## WHAT IS TITLE IX OF THE EDUCATION AMENDMENTS OF 1972?

- No person in the United States shall, on the basis of sex, be excluded from participation, or denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.  
20 U.S.C. § 1681, *et seq.*



# TITLE IX'S STUDENT PROTECTIONS

- **PROTECTS ALL STUDENTS, FACULTY AND STAFF**
  - Elementary → High College → Higher Education
  - Male + female + straight + gay + lesbian + bisexual + transgender + questioning students.
  - Gender Identity claims
    - Failure to conform to stereotypical notions of “masculinity” or “femininity.”
  - “Same sex” discrimination claims must be handled with same procedures as opposite sex claims.



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# TITLE IX IS MORE THAN ATHLETICS

- **TITLE IX PROTECTS STUDENTS, FACULTY AND STAFF IN ALL:**
  - Academics and Education
  - Extracurricular and Athletic Programs
  - Other programs of the College:
    - in a College's facilities;
    - on College provided transportation and
    - at a class or training program sponsored by the College at another location, or elsewhere. (*i.e.*, hospital)

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# TITLE IX FINAL RULE

- Released on May 6, 2020 – following approximately 125,000 public comments
- Effective August 14, 2020
- Applies to ALL Higher Education Institutions
- Biden Administration - Changes to Final Rule? Stay tuned . . .

# SEXUAL HARASSMENT – WHAT CHANGED?

## OLD DEFINITION (OCR Guidance)

- Unwelcome conduct
- Determined by a reasonable person
- To be severe, pervasive, or persistent, and to interfere with or limit a student's ability to participate in or benefit from College services, activities or opportunities

## NEW DEFINITION (Final Rule)

- Unwelcome conduct
- Determined by a reasonable person
- To be so severe, pervasive, and objectively offensive that it effectively denies a person's equal access to the recipient's education program or activity

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# WHEN DOES THE COLLEGE HAVE NOTICE OF A POTENTIAL TITLE IX SITUATION?

- Once a College has actual knowledge of sexual harassment or allegations of sexual harassment, the College has to respond and take action.
- Any person, whether the alleged victim or a parent, friend, or bystander, has the right to report sexual harassment to put the College on notice.
- And sometimes College personnel will personally witness sexual harassment.

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# ACTUAL KNOWLEDGE – WHAT CHANGED?

## OLD RULE (OCR Guidance)

- A College has a responsibility to respond promptly and effectively if a College **knows or should have known** about sexual harassment

## NEW RULE (Final Rule)

- A College with **actual knowledge** of sexual harassment in a program or activity against a person in the United States must respond promptly and in a manner that is not deliberately indifferent



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## WHEN IS A COLLEGE ON NOTICE?

- **A College is on notice if a “responsible employee” knew or in the exercise of reasonable care should have known about sexual discrimination.**
  - A responsible employee includes “any employee who has the authority to take action to redress sexual violence; who has been given the duty of reporting incidents of sexual violence or any other misconduct by students to the Title IX Coordinator or other appropriate College designee, **or whom a student could reasonably believe has this authority or duty.**”

# WHEN SHOULD YOU ACT?

The Role of Trustees:

As Fiduciaries of the institutions:

Play a role in ensuring a safe  
campus climate



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## ARE YOU A “RESPONSIBLE EMPLOYEE?”

All employees of the College (including student employees), with the exception of those who are designated as Confidential Resources, are RESPONSIBLE EMPLOYEES

THIS MEANS: YOU must promptly report allegations of discrimination, harassment, or retaliation to the Title IX Coordinator, or other appropriate College designee. The College's Licensed Counselors are the only confidential employees not required to report sexual misconduct incidents to the Title IX Coordinator without Complainant permission.

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# DELIBERATE INDIFFERENCE – WHAT CHANGED?

## **OLD DEFINITION (OCR Guidance)**

- The College must take immediate action to eliminate the sexual harassment or sexual violence, prevent its recurrence, and address its effects

## **NEW DEFINITION (Final Rule)**

- Failure to respond reasonably in light of known circumstances

# NEW POLICY AND PROCEDURE REQUIREMENTS



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# WRITTEN PROCEDURES

- HFC has developed a new College Policy.
  - A link to the HFC Policy can be found on the website
  - Procedures include 10 specific items.
- Title IX Coordinator is Munira Kassim
- Employee Deputy Title IX Coordinator Mark Tade

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# REQUIREMENT 1: TREAT PARTIES EQUITABLY

- Equitable Treatment
  - What happens to the Respondent following a complaint?
  - What if I am aware of a complaint?
- Restore education program or activity.
- CAN be punitive or disciplinary against the respondent.

## REQUIREMENT 2: OBJECTIVE EVALUATION OF EVIDENCE

- The College's grievance process must ensure an objective evaluation of all relevant evidence – including inculpatory and exculpatory evidence.
- Credibility determinations can't be made on the basis of a person's status as a complainant, respondent, or witness.





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## REQUIREMENT 3: TRAINING; NO CONFLICTS OF INTEREST

- Free from bias.
- Training required.
- Different levels of the process

## REQUIREMENT 4: PRESUMPTION OF INNOCENCE

- Under the College's grievance procedures, the Respondent must be presumed not responsible, so that any finding of responsibility only comes at the conclusion of a grievance process.



## REQUIREMENT 5: REASONABLY PROMPT TIMEFRAMES

- **The grievance process must include reasonably prompt timeframes for resolving formal complaints of sexual harassment.**
  - Best practice = 60 days or less
- **Good cause for temporary delays**



## REQUIREMENT 6: DESCRIPTION OF RANGE OF OUTCOMES

- The grievance process must describe or list the range of possible remedies and disciplinary sanctions that could occur following a determination of responsibility.



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# RANGE OF OUTCOMES?

- **Possible disciplinary sanctions:**
  - Suspension up to and including permanent expulsion
  - Discipline up to and including termination
- **Possible remedies:**
  - aka: Supportive Measures
    - No Contact Order (for both parties)
    - Change in classes
    - Restorative Justice, if applicable

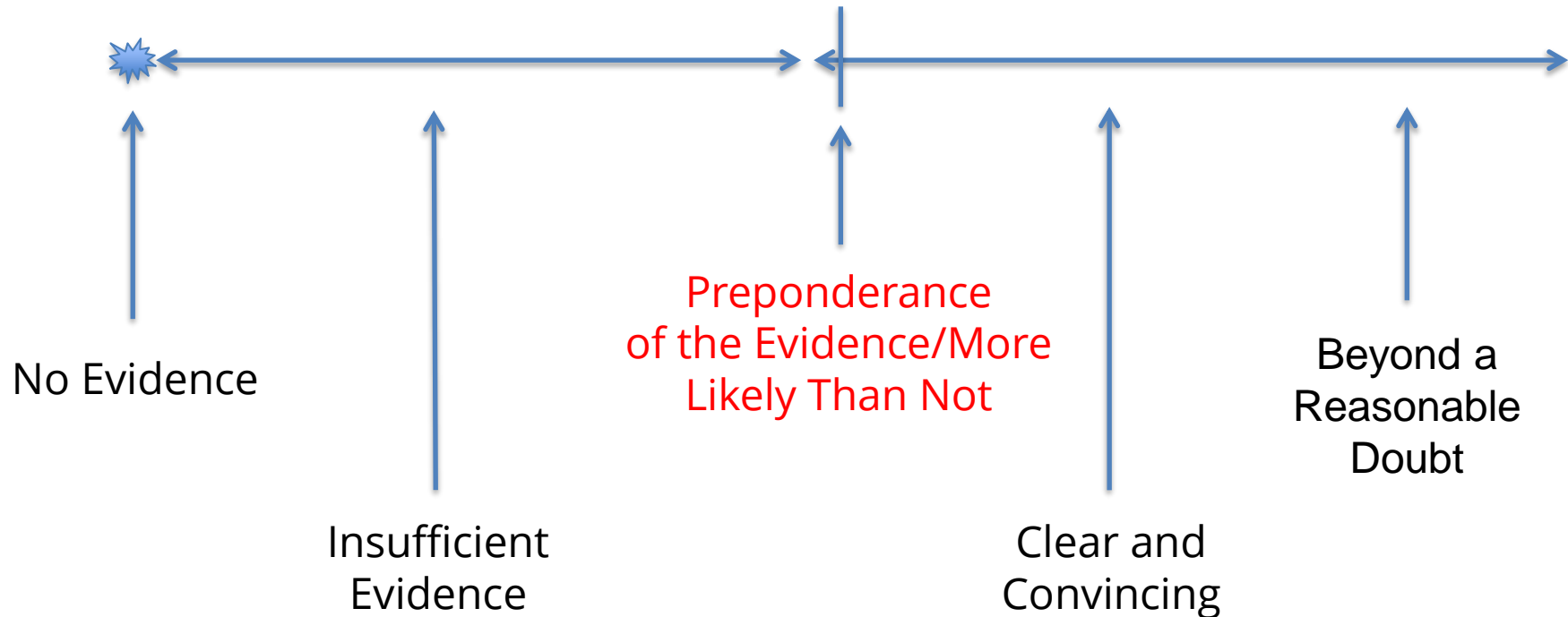
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# REQUIREMENT 7: STANDARD OF EVIDENCE

- The grievance process must state the standard of evidence.
- A College can choose the standard.
- The College must be consistent in applying standard.
- All sexual harassment proceedings must have the same standard of evidence.
- HFC: Uses Preponderance of the Evidence

# EVIDENCE THRESHOLDS

## EVIDENTIARY STANDARDS



## REQUIREMENT 8: RIGHT TO APPEAL

- The grievance procedures they have to contain the right to appeal the result of a grievance process, and information about how to invoke the right to appeal.
- A College must offer an appeal to every party on certain bases, and Universities also have the option to expand the bases on which an appeal may be taken, as long as they apply those bases equally to both parties.





# APPEALS – WHAT CHANGED?

## OLD REQUIREMENTS (OCR Guidance)

- Not required
- Must be provided equally to both parties, if provided
- No limitation on basis for appeals, if provided
- No requirement that the decisionmaker on appeal be different from investigators/ decisionmakers in other phases of the process

## NEW REQUIREMENTS (Final Rule)

- Must offer to both parties for dismissals and final determinations in the following circumstances:
  - Procedural irregularity
  - New evidence not reasonably available
  - Conflict of interest against Title IX Coordinator, investigator, decisionmaker
- Can offer for other reasons on equal terms
- Different decisionmaker

## REQUIREMENT 9: DESCRIPTION OF RANGE OF SUPPORTIVE MEASURES

- The College's grievance process must describe the range of supportive measures available to complainants and respondents.



# SUPPORTIVE MEASURES – WHAT CHANGED?

## OLD TERM (OCR Guidance)

- Used terms such as “interim measures” or “interim steps” to describe measures to help a complainant maintain equal educational access
- Implied only available during pendency of investigation, did not mandate offering them, not clear if could be punitive or disciplinary, and did not clarify if available to respondents

## NEW TERM (Final Rule)

- **Non-punitive**, individualized services, offered as appropriate and without charge to a complainant or a respondent before or after the filing of a formal complaint, or where no complaint has been filed (34 C.F.R. 106.30(a))
- Should be designed to restore or preserve equal access to the education program or activity without “unreasonably” burdening the other party

# SUPPORTIVE MEASURES

- **Examples:**

- No Contact Orders (both ways)
- Counseling
- Extensions of deadlines for assignments/tests
- Changes in classroom/lunchroom/bus assignments
- Increased Monitoring and Supervision
- Assigning a “safe” person



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# REQUIREMENT 10: PRIVILEGES

- No privilege.
- Neither a party nor the College is allowed to seek, permit questions about, or allow the introduction of evidence that is protected by a recognized privilege.
- Individuals can always opt to waive their own privileges, if they want, but they don't have to.

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# MANDATORY DISMISSALS

- **A College must dismiss a complaint:**
  - that does not describe conduct that meets the definition of sexual harassment;
  - that alleges sexual harassment that did not occur in the College's education program or activity;
  - that alleges sexual harassment that did not occur in the United States at all.
- **HFC can still address these complaints under the student code of conduct, CBA or Employment Policy even if the misconduct is not sexual harassment under Title IX.**

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# DISCRETIONARY DISMISSAL

- **A College may dismiss a complaint:**
  - if the complainant notifies the Title IX Coordinator in writing that the complainant wishes to withdraw the formal complaint or some of its allegations;
  - if the respondent is no longer enrolled or employed by the College; or
  - if specific circumstances prevent the College from gathering evidence sufficient to reach a determination about the allegations.

# DISMISSAL PROCEDURES

- Whenever a College dismisses a formal complaint, or any allegations in it, the College has to promptly send written notice of the dismissal and the reasons to the parties.
- Both parties have the right to appeal a College's dismissal decisions.





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# INFORMAL RESOLUTION

- **Colleges can offer informal resolution in appropriate cases.**
  - Exception: Where the respondent is an employee of the College.
- **Informal resolution may only be attempted if each party enters the process completely voluntarily.**
- **A College can never force, threaten, or require any party, complainant or respondent, into going into informal resolution.**
- **If informal resolution proceeds, the College must provide a facilitator who is free from conflicts of interest or bias, and who has received special training.**
- **The College still needs to provide complainants and respondents with notice of the allegations, notice of their rights, information about whether an informal process is confidential, and about withdrawing from the process.**

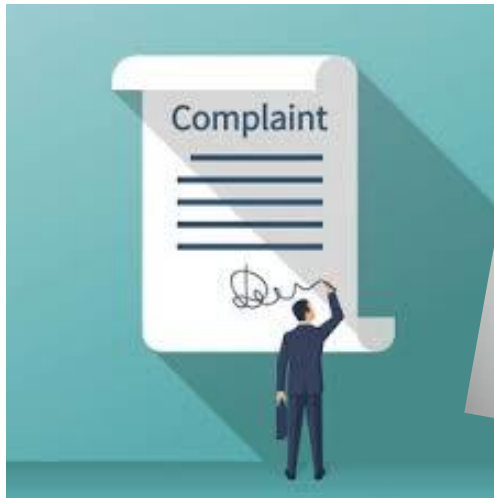
# THE FORMAL INVESTIGATION PROCESS



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# FORMAL COMPLAINT

- Defined as 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. 34 C.F.R. § 106.30(a).



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## TERMINOLOGY: COMPLAINANT, RESPONDENT

- **Apply to parties in both *reports* and *formal complaints* of sexual harassment**
- **Complainant: A person who is alleged to be the victim of conduct that could constitute sexual harassment**
  - NOT a third party who reports alleged sexual harassment perpetrated against someone else
  - NOT the Title IX Coordinator, even if the TIXC “signs” a formal complaint
- **Respondent: A person who has been reported to be the perpetrator of conduct that could constitute sexual harassment**

## **NEW: INITIAL RESPONSE**

34 C.F.R. 106.44(a), .30(a)

- **Must treat complainants and respondents equitably**
  - Offer supportive measures to both
  - Follow a grievance process before disciplining or sanctioning respondent



# EMERGENCY REMOVAL / ADMIN LEAVE

## Immediate emergency removal (34 C.F.R. 106.55(c))

- Based on an individualized safety and risk analysis
- Necessary to protect a student or other individual from **immediate threat** to **physical health or safety**
- **Notice, opportunity to challenge** provided "immediately" provided the removal
- Consider other laws, e.g., "change in placement" under IDEA

## Employee administrative leave (34 C.F.R. 106.44(d))

- Not prohibited
- Consider state law, policy, handbooks, and bargaining agreements



# WRITTEN NOTICE TO THE PARTIES

- When the College begins an investigation, it must provide the parties with written notice of certain information.
- It has to give notice to the parties of the College's grievance process, which must comply with the 10 items listed before.
- Informal resolution.



# GATHERING EVIDENCE

- The College must provide an equal opportunity for the parties to have witnesses and evidence as well as inculpatory or exculpatory evidence.
- The College can't restrict the ability of either party to discuss the allegations under investigation, or to gather and present relevant evidence. (i.e. No Gag Orders)
- The College has to provide the same opportunities to the parties to have others present during the grievance proceedings, including access to an adviser of choice for any meetings or hearings.





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# HEARINGS

- **For Post-Secondary Institutions, the College's grievance process must provide for a LIVE hearing.**
- **At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and witnesses all relevant questions and follow-up questions.**
- **Questions and evidence about a complainant's prior sexual history are not relevant, with two limited exceptions:**
  - Offered to prove that someone other than the respondent committed the alleged misconduct; or
  - Offered to prove consent.

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# AT THE LIVE HEARING . . .

- **Some Requirements to Note:**
  - Cross-examine.
  - Questions Must be relevant.
  - Separate Rooms – Zoom Conference is Acceptable
  - Can a party be forced to participate?.
  - Record.

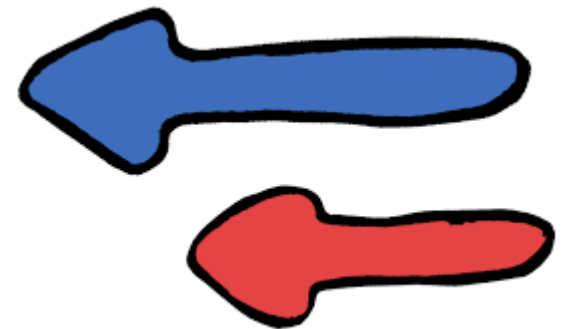
# DECISION-MAKING: AFTER THE DECISION

- The College must send the written determination to the parties simultaneously, along with information about how to appeal the determination.
- A College has discretion to set deadlines for when an appeal must be filed, bearing in mind the obligation to conclude the entire grievance process and bring resolution to the situation for both parties, within a reasonably prompt timeframe.
- The Title IX Coordinator is responsible for carrying out the remedies contained in the written decision.



# APPEALS

- **A College has to offer both parties an opportunity to appeal.**
- **Appeals can be taken from two different steps in the process.**
  - After a dismissal before the grievance process, whether mandatory or discretionary.
  - At the end of the grievance process.



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# APPELLATE PROCESSES

- The person or body who decides the appeal cannot be the same person who reached the determination regarding responsibility, or the same person as the investigator or Title IX Coordinator.
- After considering the parties' written statements, the decision-maker on appeal has to issue a written decision and send it to the parties simultaneously.
- The College's determination about whether the respondent is responsible for the sexual harassment allegations becomes **final** after appeal.

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# OTHER REQUIREMENTS: RECORDKEEPING

**This duty extends for 7 years, and includes several categories of documents:**

1. Records of a College's investigation.
2. Records of any appeal and the materials associated with an appeal.
3. Records of any informal resolution process.
4. All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution. These materials also have to be posted on a recipient's website, or made available for public inspection if the recipient doesn't have a website.
5. Records of the supportive measures that they took in response to a report or complaint of sexual harassment.

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# OTHER REQUIREMENTS: RECORDKEEPING

106.45(b)(10)

- **Records related to alleged sexual harassment must be maintained for a minimum of 7 years**
  - Investigation records
  - Disciplinary sanctions
  - Remedies
  - Appeals
  - Records of any actions taken, including supportive measures
- **Must document for every instance:**
  - Why response was not deliberately indifferent
  - That measures were taken to restore or preserve equal access to the educational program or activity
  - If no supportive measures provided, why that was not deliberately indifferent

## OTHER ISSUES: RETALIATION

- No College or person is allowed to retaliate against anyone for exercising rights under Title IX.
- Any person retaliated against can file a Complaint with the College and the College must have procedures in place for the prompt and equitable resolution of such complaints.
- The College should keep the identities of parties and witnesses confidential, unless disclosure of someone's identity is required under other laws or is necessary in order to conduct the grievance process.





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## PART II – Q&A

- This training webinar will be posted on the College website
- Please submit any written questions to Munira Kassim – Title IX Coordinator
- Part II will be scheduled at a later date TBA and all questions will be answered.

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# QUESTIONS?



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# THANK YOU!



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