

## **Title IX Coordinator Training Online Course**

### **Class Two: Conducting a Title IX Investigation**

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Training Course Does Not Constitute Legal Advice

1

## **Class Overview:**



- President Biden's March 8 Executive Order
- Investigations Involving Employees
- Investigating a Formal Complaint
- Impartiality/Conflicts of Interest
- Relevance
- Violations of Other Policies

2

# March 8 Executive Order

3

## The President's Executive Order on *Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*

- Section 1. Policy. It is the policy of my Administration that all students should be guaranteed an educational environment free from discrimination on the basis of sex, including discrimination in the form of sexual harassment, which encompasses sexual violence, and including discrimination on the basis of sexual orientation or gender identity. For students attending schools and other educational institutions that receive Federal financial assistance, this guarantee is codified, in part, in Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 et seq., which prohibits discrimination on the basis of sex in education programs or activities receiving Federal financial assistance.

Biden will begin undoing Trump's changes to Title IX, including how colleges investigate sexual assault.



4

The screenshot shows an NPR news article. The headline is "Biden Begins Process To Undo Trump Administration's Title IX Rules". Below the headline, it says "Updated March 10, 2021, 5:27 PM ET" and "Heard on All Things Considered". The author is listed as "TOVIA SMITH". There is a video player showing Joe Biden speaking at a podium with the American flag in the background.

- The order requires the Department to review and reconsider all existing regulations and guidance, and issue new guidance as needed to carry out this policy and Title IX's commitment.
- Within 100 days of the date of this order, the Secretary of Education, in consultation with the Attorney General, shall review all existing regulations, orders, guidance documents, policies, and any other similar agency actions (collectively, agency actions) that are or may be inconsistent with the policy set forth in section 1 of this order, and provide the findings of this review to the Director of the Office of Management and Budget.
- As soon as practicable, and as appropriate and consistent with applicable law, the Secretary of Education shall review existing guidance and issue new guidance as needed on the implementation of the rule described in subsection (a)(i) of this section, for consistency with governing law, including Title IX, and with the policy set forth in section 1 of this order.
- The Secretary of Education shall consider suspending, revising, or rescinding — or publishing for notice and comment proposed rules suspending, revising, or rescinding — those agency actions that are inconsistent with the policy set forth in section 1 of this order as soon as practicable and as appropriate and consistent with applicable law, and may issue such requests for information as would facilitate doing so.

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5

The graphic features the NACUA logo in the top right corner. The main text, "Investigations Involving Employees", is written in a large, bold, dark red font. The background consists of a white area on the left and a red, wavy, abstract pattern on the right.

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**Investigations  
Involving  
Employees**

6

## The Basics:

- Remember that the regulations also apply to employees – both as those allegedly subject to Title IX sexual harassment and as those accused of engaging in Title IX sexual harassment.
- Investigations of formal complaints of conduct potentially constituting Title IX sexual harassment involving employees must comply with the regulations.
- Institutions must use the same procedures for employee and student allegations of Title IX sexual harassment.



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7

## However:

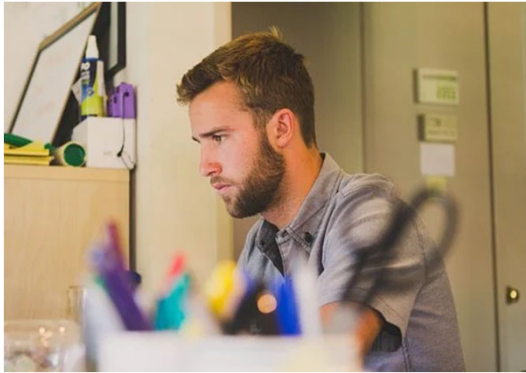
- Title VII also applies.
- Collective bargaining and other contractual obligations might also apply.
- OCR expects institutions to comply with *all* requirements.



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8

## Title VII Requirements



- Standards
  - Submission becomes a term or condition
  - Unreasonably interferes with work performance or creates a hostile environment
  - Employer knew or should have known
- Immediate and appropriate corrective action
  - End the harassment and prevent recurrence

## Special Considerations

- Collective bargaining rights
  - Administrative leave
  - “Reasonably prompt timelines”
- vs.
- “Immediate and appropriate corrective action”



# Investigating a Formal Complaint

11

## Conducting an Investigation



- Investigator must be free from bias and conflict of interest.
- Don't restrict the ability of either party to discuss allegations or gather evidence.
- Provide parties written notice sufficient to prepare.
- Allow parties an equal opportunity to identify witnesses, and other inculpatory and exculpatory evidence.
- Allow parties to have advisors.
- Don't access, consider, disclose or otherwise use a party's records prepared by a professional in a treatment capacity without voluntary, written consent.

12

## Interviewing



Consider in advance whether interviews will be:

- Recorded or not recorded.
- followed with written statements or summaries.

In interviewing, the investigator must:

- Be prepared.
- Be objective and unbiased, free from stereotypes.
- Be free of conflict of interest.
- Avoid any prejudging of the parties or responsibility.
- Demonstrate respect.
- Take the lead in seeking evidence (inculpatory and exculpatory) – it is not the parties' responsibility to investigate.
- Be alert to non-verbal communications.

## Review of Evidence

# 10

- Parties must have equal opportunity to inspect and review *all* evidence directly related to the allegations.
- Provide access to evidence to both parties and their advisors.
- Ten days prior to completion of the investigative report
- Consider parties' written response before completing report.

## Investigative Report



- Complete an Investigative Report that fairly summarizes relevant evidence.
- Provide to parties and their advisors for review and response at least 10 days before hearing.

## Impartiality & Conflicts of Interest



# Impartiality, Bias, Prejudgment & Conflict of Interest



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17

# Impartiality, Bias, Prejudgment & Conflict of Interest

## **Impartiality**

basing a conclusion or decision on the facts rather than on a preference for one party over another; unbiased.

## **Bias**

a pre-disposition or pre-conceived opinion that prevents one from impartially evaluating facts

## **Conflict of Interest**

demonstrating bias or inability to be impartial because it will be to one's own personal benefit or other competing interest

## **Prejudgment**

reaching a conclusion before considering all relevant evidence

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18

# Understanding Relevance

19

## How is Relevance Defined?



- September 4, 2020 Guidance
- Title IX Rule does not adopt the Federal Rules of Evidence for hearings conducted under Title IX.
- “The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied.”
- A school may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence.
- A school may adopt rules of order or decorum to forbid badgering a witness, and may fairly deem repetition of the same question to be irrelevant.

20

# Relevant Evidence



- Evidence is relevant if:
  - It has any tendency to make a fact more or less probable than it would be without the evidence; *and*
  - The fact is of consequence in proving or disproving the allegations.
- Does the evidence tend to prove or disprove the allegations?
- A determination regarding relevancy can rely on logic, experience or science.

FED. R. EVID. (401), Legal Information Institute, Cornell Law School, [https://www.law.cornell.edu/rules/fre/rule\\_401](https://www.law.cornell.edu/rules/fre/rule_401)



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21

## Admission vs. Weight, Credibility, or Persuasiveness

- There is a difference between the admission of relevant evidence, and the weight, credibility, or persuasiveness of particular evidence.
- Because § 106.45 does not address how relevant evidence must be evaluated for weight or credibility by a decision-maker, an IHE can adopt and apply its own rules so long as:
  - The rules do not conflict with § 106.45; and
  - The rules apply equally to both parties.
- For example:
  - An IHE may, e.g., adopt a rule regarding the weight or credibility (but not the admissibility) that a decision-maker should assign to evidence of a party's prior bad acts, so long as its rule applies equally to the prior bad acts of complainants and the prior bad acts of respondents.
- **REMEMBER:** An IHE's investigators and decision-makers must be trained specifically with respect to "issues of relevance" and any relevance rules adopted by the IHE should be addressed in the IHE's publicly available training materials.



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22

## What Is NOT Relevant?



- **September 4, 2020 Guidance**
- The Regs direct schools to exclude the following evidence and information:
  - a party's treatment records, without the party's prior written consent [§ 106.45(b)(5)(i)];
  - information protected by a legally recognized privilege [§ 106.45(b)(1)(x)];
  - questions or evidence about a complainant's sexual predisposition, and questions or evidence about a complainant's prior sexual behavior unless it meets one of two limited exceptions [§ 106.45(b)(6)(i)-(ii)]; and,
  - a decision-maker is not permitted to rely on the statements of a party or witness who does not submit to cross-examination [§ 106.45(b)(6)(i)].



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23

## Defining Relevance in Policy



- **September 4, 2020 Guidance**
- “An IHE may **not** adopt rules excluding certain types of relevant evidence (e.g., lie detector test results, or rape kits) where the type of evidence is **not** either deemed “not relevant” (as is, for instance, evidence concerning a complainant's prior sexual history ) or otherwise barred from use under § 106.45 (as is, for instance, information protected by a legally recognized privilege).”
- Hmmm ... let's break it down.



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24

## All Relevant Information Is Not Created Equal



- May weigh evidence
- Considerations:
  - Is it corroborated?
  - Is there a reason the source might not be reliable?
  - Is it logical given other established facts?
- The Regs require the decision-maker to objectively evaluate only "relevant" evidence during the hearing and when reaching the determination regarding responsibility.
- The decision-maker must determine the relevance of each cross-examination question before a party or witness must answer.
- "Not probative of any material fact."

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25

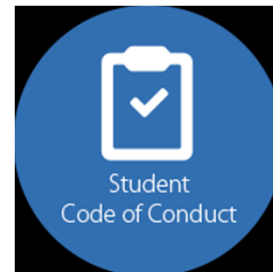
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## Violations of Other Policies

26

## Violations of Other Policies

- Knowingly making false statements or submitting false information
- Sexual Harassment not covered in the regulations but violating campus policies
  - Violations occurring in programs or at locations outside the current definition
  - Violations that don't meet the standards under the regulations
- Student Conduct violations
- Employee Conduct standards



*Update notice with later-discovered allegations.*

# Questions?

## Note

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