

# Title IX Training

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# Objectives

- Review Title IX Regulations
- Review Title IX Framework/Jurisdictional and preliminary matters
- Define Key Terms
- Review Advisor Role in the Grievance Process

## Title IX 20 U.S.C. § 1681

**No person in the United States shall, on the basis of sex. . .**

- be excluded from participation in,
- be denied the benefits of, or
- be subjected to discrimination
- under any education program or activity receiving Federal financial assistance.

Mission: **Reduce or eliminate barriers to educational opportunity caused by sex discrimination** in institutions that receive federal funding

- On May 6, 2020 , the DOE OCR released final rulemaking with effective date of August 14, 2020.

# What is Required on the new Regulations: Jurisdictional and Preliminary Matters

- **The Framework:**

- “A recipient with *actual knowledge* of *sexual harassment* in an *education program or activity of the recipient* against a person *in the United States*, must respond promptly in a manner that is *not deliberately indifferent*.” Section 106.44(a).
- To avoid “Deliberate Indifference,” an institution must offer **supportive measures** and the option for a **Formal Complaint**
- Terminology: “*recipient*,” a term used throughout the regulations, means a school receiving federal funds—including through financial aid

- **For complaint process, school *must* dismiss complaint:**

- if the conduct alleged in the formal complaint, even if proven, would not constitute sexual harassment as defined in § 106.30,
- did not occur in the recipient’s education program or activity, or
- did not occur against a person in the United States

- **May dismiss if:**

- written request from Complainant seeking withdrawal;
- respondent is no longer enrolled or employed; or
- specific circumstance prevents gathering of evidence necessary to reach a determination.

- **Can address under other code of conduct or other procedures, even if dismissed under Title IX.**

# Key Definitions

- *Actual Knowledge* – “Means notice of sexual harassment or allegations of sexual harassment to the College’s Title IX Coordinator, official who has authority to institute corrective measures, on behalf of the College. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge.” (Section 106.30(a)).
- **What does this mean for Responsible Employees and Confidential reporters?**
  - Mandated Reporters
  - Confidential Resources
  - Difference between Official with Authority vs. Responsible Employee

# Compliance

- **Once an official with authority has actual notice of sexual harassment/sexual misconduct, the institution is on notice and must:**
  - Take immediate and appropriate steps to investigate what occurred
    - The obligation to investigate is absolute, even if just an initial assessment
  - Take prompt and effective action:
    - Stop the harassment
    - Prevent the recurrence
    - Remedy the effects
- Note: This is regardless of whether the complainant makes a formal complaint or asks the school to take action.

# Title IX Jurisdiction

- **College's Educational program or activity in the United States**
  - Institution property
  - Institution sponsored or affiliated events [substantial control is key]
  - Buildings owned or controlled by officially recognized student organizations
  - Off-Campus Conduct that has Effects in Education Program or Activity

# When does Title IX Apply?

- **Title IX applies when:**

- The institution has control over the harasser AND control over the context of the harassment
- Education program or activity
  - Location, event, circumstance under substantial control
  - Any building owned or controlled by an officially recognized student organization
- At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the college's program or activity.
  - Only the complainant or Title IX Coordinator can file a formal complaint.



# Title IX Sexual Harassment §106.30

- **Conduct on the basis of sex that satisfies one or more of the following:**
  - (i) An employee conditioning education benefits on participation in unwelcome sexual conduct (i.e., quid pro quo); or
  - (ii) Unwelcome conduct that a reasonable person would determine is **so severe, pervasive, AND objectively offensive** that it effectively denies a person equal access to the school's education program or activity; or
  - (iii) Sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in VAWA

# Scope of Title IX

- Title IX obligations are:
  - recruitment, admissions, and counseling; financial assistance; athletics; sex-based harassment, which encompasses sexual assault and other forms of sexual violence; treatment of pregnant and parenting students; treatment of LGBTQI+ students; discipline; single-sex education; and employment.

# Key Definitions - Sexual Assault

- **Any sexual act directed against another person, without the consent of the Complainant including instances where the Complainant is incapable of giving consent.**
  - Rape
  - Sodomy
  - Sexual Assault with an Object
  - Fondling
  - Incest
  - Statutory Rape

# Dating Violence

- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the Complainant.

# Domestic Violence

- “Domestic violence” means an act or threatened act of violence against a person with whom the offender is involved or has been involved in a dating relationship, or an act or threatened act of violence against a family or household member by a family or household member.
- The parties involved must be current, former spouses or have an intimate relationship.

# Stalking

- **Engaging in a course of conduct directed at a specific person that would cause a reasonable person to**
  - Fear for the person's safety or the safety of others
  - Suffer substantial emotional distress
- **Course of Conduct – two or more acts**
- **Reasonable Person – a person under similar circumstances**
- **Substantial emotional distress – significant mental suffering or anguish**

# Supportive Measures

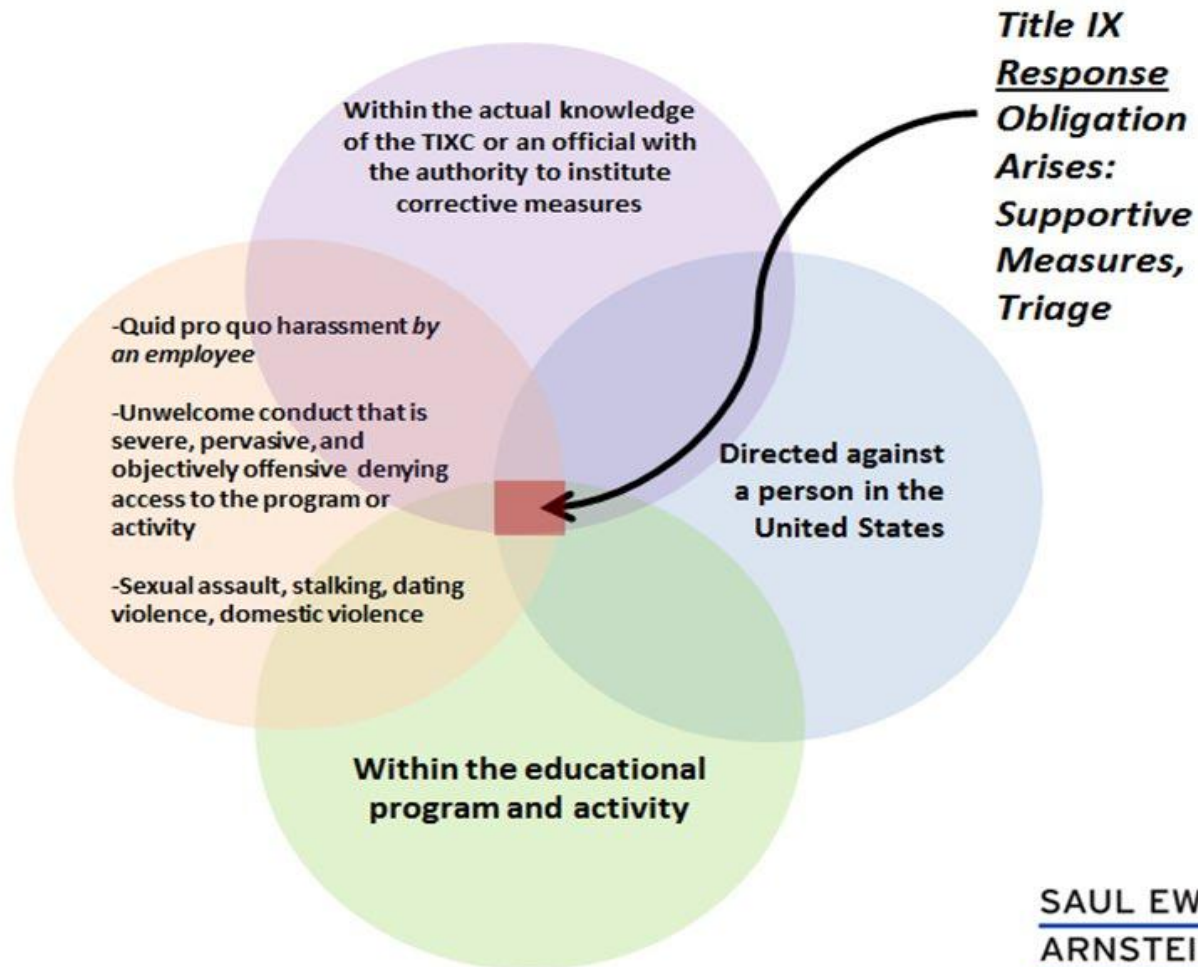
- Individualized services reasonably available that are nonpunitive, non-disciplinary, and not unreasonably burdensome to the other party while designed to preserve and restore equal education access, protect safety, or deter sexual harassment.
- Examples: referral to counseling, escort service, mutual no contact orders, alternative assignments or changes in class or work schedule, etc.
- Provided regardless of whether a formal complaint has been filed or not. (§106.30)
- The College will treat complainants and respondents equitably, meaning that for a complainant, the College will offer supportive measures, and for a respondent, the College will follow the adjudication process before imposing disciplinary sanctions.

# Formal Complaint

- **A document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment.**
  - A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by email
  - 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 school with which the formal complaint is filed.



# Title IX Response



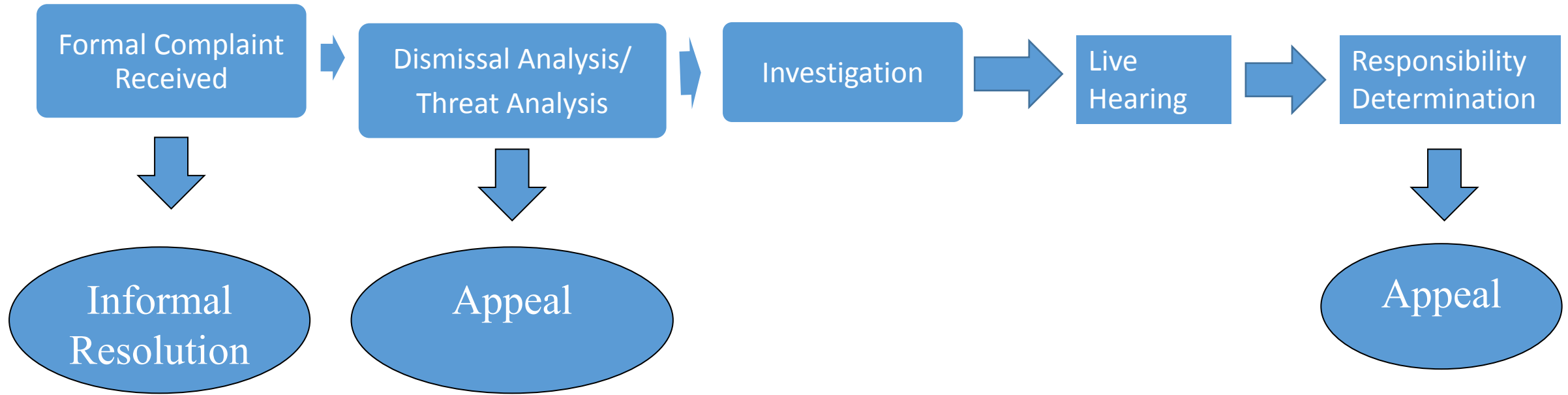
***Title IX  
Response  
Obligation  
Arises:  
Supportive  
Measures,  
Triage***

**SAUL EWING  
ARNSTEIN  
& LEHR <sup>LLP</sup>**

# Initial Response upon notice

- **Title IX Assessment Conducted by the Title IX Coordinator:**
  - Must contact complainant about supportive measures
  - Must consider complainant's wishes
  - Must explain supportive measures are available whether a formal complaint is filed or not
  - Must explain the options and process for filing a formal complaint
  - May have an advisor and support person present
  - Document that all of this was done

# Investigation Process



# Live Hearing Requirement

- **The Final Rule mandates a bifurcated process**
- **Final determinations of responsibility and sanctions are made by Hearing Officer/Decision-Maker**
- **New due process considerations**
  - Cross examination by a party's advisor
  - Relevancy determinations
- **Institutions must provide an advisor if a party does not have one**

# Advisors at Title IX Hearings

- Provide advice, counsel, and support to a party
- Students or employees
  - (Complainants or Respondents)
- Perform cross examination of the other party and any witnesses
- Institutional advisors may need to be assigned at the hearing stage

# Advisor Training – What do I do?

- Accompany a Complainant or Respondent to meetings with investigators
- Review evidence and investigation reports
- Cross examine the opposing party during a live hearing

# Advisor Training – What shouldn't do

- Act as legal counsel
- Speak on behalf of the Complainant or Respondent
- Ask cross examination questions not requested by the Complainant or Respondent
- Determine a finding of responsibility for any other college policy

# Conflict of Interest

- Everyone involved in a Title IX hearing must support an objective evaluation of the evidence.
- Objectivity includes the absence of any personal or professional interest that affects your ability to be fair and impartial to all parties in the proceeding and that actually affects the outcome of the proceeding.
- Before you serve as a Title IX Advisor, you must ensure that you do not have a Conflict of Interest.



# Things that MAY be a conflict of interest

- A family relationship with the parties, their advisors, or anyone who may serve as a witness in the proceeding.
- A personal relationship with a party, an advisor, or a witness that leads you to give that individual advantage or disadvantage in the proceeding.
- A business relationship with the parties, their advisors, or anyone who may serve as a witness in the proceeding.

# Things that MAY be a conflict of interest

- Giving any financial assistance or gifts to a party or a witness in the proceeding.
- Receipt of any financial assistance or gifts to a party or witness in the proceeding.
- Prior knowledge about a party outside of what is learned in the proceeding that bears on your decision of responsibility.

# Things that are not a conflict of interest

- Having a prior relationship with Frederick Community College
- Having served as a Title IX Advisor in a prior case
- Identifying as a certain sex or gender
- Having legal knowledge or training
- If you are an attorney, merely having represented clients in sex-based harassment cases in the past

# Conflict of Interest

- If you think you may have a conflict of interest, advise the Title IX Coordinator immediately
- Parties may raise conflicts of interest as a basis for appealing final decisions

# General Ethical Considerations

- Beyond conflicts of interest, as an impartial decision-maker a Title IX Advisor must approach their service impartially and without any prejudgment
- You must set aside impressions or biases you have from movies, TV, news, other cases in which you have been involved, and personal opinions
- Title IX Advisors should act in the best interest of their advisee and at their request and should not pursue their own agenda

# Ethical Considerations

- DO NOT: Rely on sex stereotypes
- “Women are manipulative and they lie.”
- “Real men are aggressive.”
- “A lady wouldn’t put herself in that position.”

# Ethical Considerations

- DO NOT: Make credibility determinations based solely on the sex or gender of a party
- “I’m going to believe the woman because women have been ignored for too long in other cases and we need to balance things.”
- “He was a boy scout so he is a man of honor, even though her version of events seems plausible.”

# Ethical Considerations

- DO NOT: Make credibility determinations based solely on a person's status as a reporting or responding party in a matter
- “Anyone who would file a complaint about something like this is crazy.”
- “If this woman would go so far as to file a formal complaint, then he must have done it.”



# Ethical Considerations

- DO: Approach the investigation and proceeding with an open mind and without any preconceived notions
- Look at every decision you make as an objective evaluation of the facts and policies
- Treat every participant and witness with respect

# Live Hearing Requirement

- May be virtual or on campus.
  - Ensure you know how to use the technology as well
- If on campus, parties may request to be in different rooms with AV equipment.
- All directly related information will be available
- All hearings must be recorded

# Cross Examination

- The Title IX Rule, at § 106.45(b)(6)(i), requires postsecondary institutions to hold a live hearing with the opportunity for each party's advisor to conduct cross-examination of parties and witnesses.
- Because party and witness statements so often raise credibility questions in the context of sexual harassment allegations, *the decision-maker must consider only those statements that have benefited from the truth-seeking function of cross-examination.* (page 1179 of the Preamble to the Rule,)

# Cross Examination

- Evidence gathered during investigation that is directly related to the allegations is inspected and reviewed by the parties, and to the extent they are relevant, summarized in the investigative report. The hearing is the parties' first opportunity to argue to the decision-maker about the credibility and implications of such evidence. Probing the credibility and reliability of *statements* asserted by witnesses contained in such evidence requires the parties to have the opportunity to cross-examine the witnesses making the statements. (Questions and Answers regarding the Department's final Title IX Rule, September 4, 2020, [https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-20200904.pdf?utm\\_content=&utm\\_medium=email&utm\\_name=&utm\\_source=govdelivery&utm\\_term=](https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-20200904.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=))

# Cross Examination

- Questions raised to an opposing party or witness called by the opposing party
- Used to advance claims or defenses of a party
- Used to assess the credibility of an individual
- Questions are provided by Complainant or Respondent
- The Title IX Advisor is not responsible for developing the questions asked during a live hearing

# Cross Examination

- The burden of proof AND burden of gathering evidence is on the institution
- Parties are permitted to present evidence and call witnesses to advance their claims and defenses
  - In Title IX Hearings that may include fact or expert witnesses
  - The college is permitted to establish the weight given to certain types of evidence

# Changes to Live Hearing (Suppression Clause)

- U.S. Department of Education Issues Letter Regarding Court Ruling Vacating Title IX Regulation Restricting Postsecondary Schools' Use of Statements by Parties and Witnesses
  - August 24, 2021
  - The U.S. Department of Education's Office for Civil Rights issued a letter to students, educators, and other stakeholders explaining that, pursuant to a court order, postsecondary institutions are no longer subject to the part of 34 C.F.R. § 106.45(b)(6)(i) that prohibits decision-makers in Title IX proceedings from considering any statement from a person who did not submit to cross-examination.

# Relevancy

- Prior to any question being answered, relevancy will be determined by the Hearing Officer
- The Hearing Officer will provide the reason for excluding the question or evidence
- Rebuttals may not be permitted



# Relevancy

- Relevant

- Relevant information relates to the incident at issue
- Relevant information provides sufficient value in making the overall determination

- Irrelevant

- Questions and information regarding the Complainant's sexual history or sexual predisposition unless to prove
  - Someone else other than the Respondent committed the alleged misconduct
  - Consent between the parties

# Evidentiary Exclusions

- Legally privileged information is protected
- A party's treatment records cannot be used without their voluntary, written consent
- Duplicative evidence may be deemed irrelevant

# Standard of Evidence

- Decisions regarding student and employee alleged misconduct are based on a preponderance of the evidence, more likely than not.

# Determining Responsibility and the Written Decision

- Provided to both parties simultaneously and must include:
  - The allegations
  - The procedural steps from the complaint through determination
  - Findings of fact supporting the determination
  - Determinations regarding responsibility, sanctions (and remedies) along with the supporting evidence and rationale
  - Information on the appeals process

# Policies

- [Title IX Policy](#)
- [Online Reporting Form](#)
- [Title IX Website](#)

Experience  
Something

more

 Frederick Community College



**Frederick Community College**

Frederick Community College prohibits discrimination against any person on the basis of age, ancestry, citizenship status, color, creed, ethnicity, gender identity and expression, genetic information, marital status, mental or physical disability, national origin, race, religious affiliation, sex, sexual orientation, or veteran status in its activities, admissions, educational programs, and employment.