



Online Training for Title IX Professionals



VAN DERMYDEN MAKUS
Investigations Law Firm

The New Title IX Regulations: Navigating Staff,
Faculty, and Student Complaints


Presented by Liz DeChellis Paris
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Learning Objectives

- Understanding of the impact of the new regulations on staff and faculty cases.
- Exposure to the interactions of Title IX cases with Collective Bargaining Agreements and other contracts
- Potential pitfalls to avoid
- Knowledge on how to gather and analyze evidence in the “he said/she said” sexual harassment context
- How to navigate the hearing process
- How to communicate with your campus constituents


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First let's lay our foundation


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What about the new Biden regulations?


- There are no new Biden regulations!
- The proposed regulations are just that – proposed
- Where are we in the process?
 - Internal Review (completed)
 - Notice of Proposed Rulemaking (completed)
 - Public Comment Period (completed)
 - Comment Review (in process)
 - Final Rule (unlikely before Fall 2023)

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2020 “New” Regulations


- Effective: August 14, 2020
- Applicable to **conduct** occurring on/after August 14, 2020
- Applicable to students, staff, and faculty
- July 2021 Q&A also still in effect



Sexual Harassment per the New Regulations

Conduct on the **basis of sex** that satisfies one or more of the following:

- Quid pro quo (employee Respondents only);
- Unwelcome conduct; or
- Specific defined acts



Sexual Harassment: Unwelcome Conduct

Conduct on the **basis of sex** that is determined by a **reasonable person** to be so:

- Severe;
- Pervasive; **and**
- Objectively offensive

That it effectively denies a person equal access



Sexual Harassment: Specific Acts

Conduct on the **basis of sex** that constitutes one or more of the following:

- Sexual Assault**, as defined by Clery Act;
- Dating Violence**, as defined by VAWA;
- Domestic Violence**, as defined by VAWA; or
- Stalking**, as defined by VAWA



Grievance Process per the New Regulations

- Presumption that Respondent is not responsible
- Standard of Evidence
- Evidence Review process
- Live Hearings required



Who Does This Apply To?

- Students
- Staff
- Faculty


TL/DR: **EVERYONE**

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It is 3:45 on Friday afternoon,
and you get a visitor...

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Player One: Complainant Sophia



- **Who is she?**
 - A 17-year-old high school student taking classes independently at your school
 - Enrolled in a Music Expression course with Professor Frank Becker
- **What does she tell you?**
 - Frank (as he asks his students to call him) has made her uncomfortable “a few times.”
 - He once “ghosted” her after committing to helping her with a demo tape for an application to a music school.
 - This was after she made plans to meet with him at his studio and mentioned she was bringing a friend.
 - This morning he invited her to Jamba Juice to talk about her future plans. During the walk, he made a “joke” about her rape whistle.
 - Sophia would like this investigated.

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What Are Our First Steps?

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Meet Your "Helper" – Dean Dan



- **Who is he?**
 - The Dean of Student Affairs
 - Someone who is super knowledgeable in all things Title IX
- **What does he tell you?**
 - He knows Frank well and is confident this can be resolved "informally."
 - He's happy to talk to Frank on your behalf.
 - He thinks Frank and the student "just need to talk out this misunderstanding."
 - Music teachers are hard to find and Ron is very popular with his students.
 - Everyone is "tightening their belts" so hopefully we don't have to hire one of those "overpriced useless attorneys who never give us a straight answer."


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Managing the Stakeholders


- Who are the stakeholders?
- What is their sophistication level with these types of allegations?
- What education (if any) needs to occur?
- Who investigates?
- Who is the internal point of contact for the parties?
- What supportive measures might be needed? Admin leave?
- Law enforcement involvement?
- Union and/or attorney involvement for the parties?

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The Investigation Begins


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The Investigative Process

- Complainant contacts
 - Clarify the process(repeatedly)
 - Set realistic timing expectations
 - Be as transparent as possible about the process
 - Think about the ideal interview setting
- Respondent contacts
 - Reach out sooner rather than later
 - Set realistic timing expectations
 - Articulate the administrative v. legal process


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Responsibilities of the Investigator

- Define the scope of the investigation based on Complainant interview/policy
- Gather evidence
- Identify and interview witnesses
- Document all steps taken
- Coordinate Evidence Review Process with parties
- Testify in Hearing (potentially)


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Elements of a Trauma-Informed Grievance Process

- Safety and security
- Giving the interviewee a sense of control
- Listening. Listening. And more listening.
- Tone: curious and non-judgmental
- Asking the hard questions, but asking them in a non-threatening way
- Allowing an advisor/support person to be present


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Tone

- Empathetic
- Kind
- Professional
- Curious
- Non-judgmental

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Questions to Add to Your Toolbox

- Open-ended: I understand something happened Wednesday evening. Can you take me through your memories of that night?
- Use their words: You said you felt frozen. Tell me about feeling frozen.
- Sensory: Are there any sounds you remember? Any smells?

Don't push for unnecessary details (i.e. number of fingers, exact timing, etc.)

Non-linear: You put the puzzle pieces together at the end


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Asking the Hard Questions

- “Trauma-informed” does not mean we do not ask the hard questions
- It means we ask the hard questions in a manner that gets us better, more accurate answers


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So How Do We Do That?

- “Help me understand...”
- “What were you experiencing when...”
- “What are you able to tell me about...”
- “What were some of your thoughts when...”
- “Take your time.”

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Who Does This Apply To?

- Complainants
- Respondents
- Witnesses

• TL/DR: **EVERYONE**


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Don't "Should" on Your Parties


- "I would have..."
- "Why didn't they..."
- "Anyone in that position would have..."
- "That would never happen to me because..."
- "That doesn't make any sense."

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The Plot Thickens (of course)

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Player Two: Witness (?) Erika



- **Who is she?**
 - An 8-year employee
 - A Coordinator working in the Arts Department
- **What does she tell the investigator?**
 - She was really nervous about the interview because she thought it was about her and Frank.
 - Frank makes comments that have made her "uncomfortable." She vented to a coworker last week which is why she thought the investigator reached out.
 - Frank sometimes looks at her in a way that makes her feel "objectified."
 - Frank has made comments since he joined the department two years ago, including:
 - "Why didn't I meet you before you started dating that boyfriend of yours?"
 - "I bet you're wild when you get a few drinks in you."
 - "Seeing that face of yours is the highlight of my day."
 - "Are you sure Lover Boy is treating you right? I know how to treat a woman."

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What do you do?

- Expand the investigation scope?
- How do you manage two “unrelated” Complainants?
- Could it meet the Title IX definition of sexual harassment?
- How do you manage Erika’s fears of retaliation?
- What if Erika refuses to participate further?

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Guess who is back?

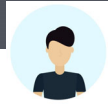


- He heard about the new “complaint” and the expansion investigation.
- He is disgusted by Frank and “all of his nonsense.”
- He assures you he is going to resolve this issue by firing Frank immediately.
- Plus, this will save the College money on those “overpriced useless attorneys who never give us a straight answer.”

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Player Three: Respondent Frank



- **Who is he?**
 - A 2-year employee
 - An Instructor working in the Arts Department
 - A very cool guy
- **What does he tell the investigator?**
 - What investigator?! He’s not meeting with ANYONE!
 - You and the school are trampling his contract rights.
 - He wants a copy of Sophia’s complaint, as well as the interview notes of Sophia and Erika before he agrees to an interview.
 - Also, this is a kangaroo court and you are the worst.


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Investigator Request


- The investigator asks for copies of Frank's student evaluations.
- Frank's union rep demands the College not provide those, citing Frank's rights and FERPA.
- Frank's union rep threatens to file for an injunction if you attempt to provide the investigator with the evaluations.
- Also, Frank thinks you are the worst.

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The interviews are done.
Now what?


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Evidence Review Process


- Both parties must have an equal opportunity to inspect, review, and respond to any evidence gathered that is directly related to the allegations, even if there is no intent to rely on it in making a determination
- This must occur *prior* to the conclusion of an investigation
- Parties have an equal opportunity to refer to this evidence during the hearing

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Live Hearing Process

- Required by the 2020 Rule for higher ed
- Each party’s advisor must be permitted to ask the other party and any witnesses relevant questions, including challenges to their credibility
- Questions must be conducted “directly, orally, and in real time”
- Adjudicator can determine questions are not relevant and cannot be asked, but must provide an explanation
- Parties may choose their advisor, but must have one; School must provide an advisor if needed




Player One: Complainant Sophia

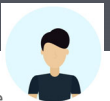


- Sophia is unsure if she is going to testify.
- She asks if you can ensure Frank does not see her and that she does not have to see Frank.
- Sophia heard there is someone else involved and asks to see a copy of that Investigation Report.
- She asks if the Arts Department Chair can serve as her Advisor.

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Player Three: Respondent Frank

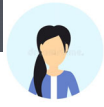


- Frank’s Advisor argues Frank needs to make a 40-minute opening statement. Delivered by Frank’s Advisor.
- Frank provides an accommodation request asking for “breaks as needed” during the hearing.
- Frank argues the investigation has taken longer than the 60-day timeline set forth in policy.
- Frank requests a postponement of the hearing until January 2023 due to “medical limitations” because of the allegations.

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Player Two: Complainant Erika

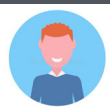


- Erika argues she should be present during all testimony.
- Erika requests the College provide her with an attorney Advisor since Frank's Advisor is an attorney.
- Erika wants an Advisor and two Support People with her at the hearing.
- She would like to conduct the hearing in-person, but also does not want to see Frank or be in the same room as him.
- Also, she now thinks you are the worst as well.

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Dean Dan is here to help!



- Dan offers to serve as the Advisor for one of the Complainants. No need to spend money on "overpriced useless attorneys who never give us a straight answer."
- Dan would also like to know why this process is not over yet: "But once we have the hearing, we're done. Right? Right?"
- Dan requests you take on the Interim Admissions Director role in addition to your Title IX Coordinator role because "we don't have that many Title IX cases. It's mainly sports stuff, anyway."

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Responsibilities of the Adjudicator


- First and foremost – manage the participants!
- Adjudicator can rely on Investigation Report
- Ensure the hearing is conducted in accordance with school policy
- Make credibility assessments
 - Look for inconsistency in statements, etc.
- Make a determination regarding responsibility




The final decision has been issued.

The appeal process is complete.

And you thought you were done??




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An article in the College newspaper comes out

- It contains an exclusive interview with Frank, “the most popular instructor on campus.”
- Frank is quoted as saying “the process is guilty until proven innocent,” and notes he was “found guilty without a shred of evidence.”
- The students sign a petition demanding “immediate changes” to the Title IX process.
- Dan started crying in your office and asks you to “make it all just stop.”



Managing Your Campus Community

Court of public opinion plays a larger part in our cases:

- Limited confidentiality
- Potential to influence perspectives
- Impact on parties before and after process
- “Twitter justice” has real impact on people’s lives regardless of investigation/hearing findings
- Shaping of student expectations for institutional handling of public allegations



Questions?

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