Association of Title IX Administrators

February 2021

Title IX Training: Roles, Responsibilities and Regulations

Stockton University

February 12 & 19, 2021

TITLE IX

20 U.S.C§ 1681 & 34 C.F.R. Part 106 (1972)

"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 educational program or activity receiving federal financial assistance."

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TITLE IX COORDINATOR & TITLE IX TEAM

THE TITLE IX COORDINATOR

- Recipients are required to designate at least one employee as the "Title IXCoordinator."
- Administrator with significant authority and wide-ranging responsibilities.
- Affects change across many departments, including Human Resources, Academic Affairs, Athletics, and Student Conduct.
- Some institutions will allocate part-time responsibilities to the Coordinator while others will dedicate a full-time position.
- Title IXCoordinator has become a profession within the field of civil rights compliance.

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TITLE IX COORDINATOR: ROLES AND RESPONSIBILITIES

- Create & Implement Appropriate Policy & Procedures
- Navigate First Amendment Protections
- Point Person for Reports & Complaints
- Contact for Government Inquiries
- Oversight of Prompt & Equitable Grievance Procedures
- Coordinate Overlap of Various Student & Employee Grievance Processes
- Oversight of Informal Resolution Processes
- Supervise Investigations

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TITLE IX COORDINATOR: ROLES AND RESPONSIBILITIES (CONT.)

- Ensure Compliance with Final Sanctions &Remedies
- Coordinate Appeals Process
- General Title IXCompliance Oversight
- Compliance with Requirements to Stop, Prevent, and Remedy
- Training Oversight
- Oversight of Athletics Gender Equity (if applicable)
- Section 504 Disabilities Compliance Oversight (if applicable)

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WHO'S WHO IN THE TITLE IX PROCESS?

- **Title IX Coordinator** – an official responsible for the Recipient's compliance with Title IX
  - Not a substantive Decision-maker on whether policy was violated
  - May have a role in emergency removals, supportive measures, informal resolution, and/or dismissal decisions
  - May serve as an Investigator
- **Deputy Title IX Coordinator(s)** – administrators who assist and support the Title IX Coordinator in achieving Title IX compliance
- **Investigator(s)** – employees/contractors who gather evidence and compile an investigation report

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WHO'S WHO IN THE TITLE IX PROCESS? (CONT.)

- **Decision-maker(s)** – a single administrator/contractor or a panel (usually 3; including a voting Chair) who renders a finding/determination and determines any sanctions and any recommended remedies.
- **Hearing Facilitator or Case Manager** – an administrator who runs the logistics of the hearing (recording, technology, witness timing, copying/distributing materials, etc.)
  - May be the Title IX Coordinator, a Deputy, or another individual otherwise not affiliated with the matter
- **Appeal Decision-maker** – a single administrator/contractor or a panel (usually 3, including a voting Chair) who renders a decision regarding an appeal of a decision or a dismissal

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WHO'S WHO IN THE TITLE IX PROCESS? (CONT.)

- **Advisors**– an individual chosen by a party or appointed by an institution to provide advice and support for a party and conduct cross-examination on behalf of the party during any live hearing.
  - Each party is allowed an Advisor. Witnesses are typically not allowed to have Advisors
- **Title IX Team**– a pool of individuals who may serve in the roles identified above

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TIXC AS SUPERVISOR OF THE INVESTIGATION STRUCTURE

- The Title IXCoordinator is responsible for:
  - The appointment/engagement of investigators
  - Training Investigators and Decision-makers
  - Supervision of Investigators and investigations
  - Helping investigators develop investigation strategy
  - Coordinating supportive measures
  - Timeline compliance
  - Communication and coordination of investigation teams
  - Providing institutional memory to investigators
  - Retaining a record of all activities
- The Title IXCoordinator may serve as an Investigator but may not be a Decision-maker.

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TIXC AS SUPERVISOR OF THE INVESTIGATION PROCESS

- The Title IXCoordinator or designee is responsible for:
  - Documenting complaint
  - Initial assessment
  - Determining extent/footing/nature of investigation
  - Notice of allegations and investigation
  - Notice of hearing (if applicable)
  - Reviewing/transmitting the written determination of the Decision-maker
  - Coordinating any duty to warn
  - Assurance of supportive measures and/or remedies
  - Recordkeeping of all activities

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ROLE OF THE INVESTIGATOR

- Conduct reliable, prompt, fair, and impartial investigations
  - Work with TIXC to develop strategy for investigation
  - Identify and interview parties and witnesses
  - Identify, organize, and compile relevant information
  - Maintain accurate and thorough investigation records and notes
  - Share the evidence with the parties and their advisors
  - Provide notices to the parties (may be done in conjunction with TIXC)
- Create an investigation report that fairly summarizes relevant evidence

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JURISDICTION & INITIAL ACTIONS

- Under the new Regs
- Notice, Response and Investigation Requirements
- Implications for the University

NOTICE/ACTUAL KNOWLEDGE – 2020 REGS

Actual knowledge

- Notice of sexual harassment or allegations
- In an education program or activity
- Against a person in the US
- To: a Title IX Coordinator OR any **official with authority** to institute corrective measures on behalf of the university;

- Once Actual Knowledge has been received, the university must contact the complainant to offer supportive measures.
- However, the university must receive a Formal Complaint to begin an investigation

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FORMAL COMPLAINT – 2020 REGS

Formal Complaint

- Document or electronic submission
- Filed by Complainant or signed by TIXCoordinator
  - TIXC does not become a party to the complaint
- Alleging Sexual Harassment
- Requesting an investigation
- Complainant must be participating or attempting to participate in the recipient's education program or activity at the time of filing
- Initiates mandatory grievance process (investigation and hearing)

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SCHOOL/INSTITUTION RESPONSE TO A REPORT OF SEXUAL HARASSMENT

- Upon receipt of Actual Knowledge, the Title IX Coordinator must promptly contact the Complainant to discuss the availability of supportive measures
  - Consider the Complainant's wishes with respect to supportive measures
  - Inform the Complainant of the availability of supportive measures with or without the filing of a formal complaint
  - Explain to the Complainant the process for filing a formal complaint

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SCHOOL/INSTITUTION RESPONSE TO A REPORT OF SEXUAL HARASSMENT

- Must respond promptly to actual knowledge of sexual harassment in an education program or activity of the Recipient against a person in the United States in a manner that is not deliberately indifferent

- **Education program or activity** means locations, events, or circumstances over which the Recipient exercises substantial control over both the Respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution

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INITIAL ASSESSMENT IN SUMMARY

- Upon receipt of a report or complaint, the TIXC should conduct an initial assessment to determine the following:
  - Has there been a formal complaint?
  - Does the TIXC need to sign/initiate a formal complaint?
  - Does the alleged conduct meet the required definitions?
  - Does jurisdiction exist?
  - Is informal resolution an option?
- If the TIXC determines that the complaint will proceed under Title IX, the TIXC will:
  - Establish basis of investigation:
    - Incident or pattern, and/or climate/culture
  - Establish a preliminary timeline for the investigation
  - Assign the complaint for investigation

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SUPPORTIVE MEASURES

- The Title IXCoordinator is responsible for coordinating the effective implementation of supportive measures
- Should remain as confidential as possible
- Throughout process:
  - Provided to Complainant and Respondent
  - Non-disciplinary, non-punitive
  - Individualized
  - Restore or preserve equal access
  - Without unreasonably burdening other party
  - Protect safety of parties or environment, or deter sexual harassment

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COMMON SUPPORTIVE MEASURES

- Referral to counseling, medical and/or other health services
- Referral to the Employee Assistance Program
- Visa and immigration assistance
- Education to the community or community subgroup
- Altering housing situation (if applicable)
- Altering work arrangements for employees
- Safety planning
- Providing school safety escorts

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COMMON SUPPORTIVE MEASURES (CONT.)

- Transportation accommodations
- Implementing contact limitations (no contact orders) between the parties
- Academic support, extensions of deadlines, or other course-related adjustments
- Trespass or Be on the Lookout (BOLO) orders
- Emergency notifications
- Increased security and monitoring of certain areas of school
- Other tailored measures appropriate to the circumstances

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EMERGENCY REMOVAL

A Recipient may remove a student Respondent from the education program or activity on an emergency basis, only after:

1. Undertaking an individualized safety and risk analysis
2. Determining if an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal
3. Providing the Respondent with notice and an opportunity to challenge the decision immediately following the removal while respecting all rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act, as applicable.

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EMPLOYEE ADMINISTRATIVE LEAVE

- ARecipient may place a non-student employee Respondent on administrative leave during the pendency of a grievance process under existing procedures, without modifying any rights provided under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act

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INFORMAL RESOLUTION

The Title IXregulations include a provision that encourages informal resolution, and it is a worthy practice, when voluntary

- Following formal complaint
- Allowed at any time prior to a final determination at discretion of TIXC
- Voluntary, written consent of the parties and their parent/guardian
- Regulations preclude informal resolution of allegations that an employee harassed a student

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INVESTIGATION UNDER THE NEW REGS

RIGHTS OF THE PARTIES DURING THE INVESTIGATION – TIX REGULATIONS

- Right to present witnesses, including fact and expert witnesses
- Right to present inculpatory and exculpatory evidence
- Right to discuss the allegations under investigation without restriction
- Right to gather and present relevant evidence without restriction
- Right to be accompanied to any related meeting or proceeding by Advisor of their choice, who may be, but is not required to be, an attorney

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RIGHTS OF THE PARTIES DURING THE INVESTIGATION–TIX REGULATIONS (CONT.)

- Right to written notice of the
  - Date
  - Time
  - Location
  - Participants, and
  - Purpose of investigation interviews or other meetings, with sufficient time to prepare
- Right to inspect and review directly related evidence and investigation report

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MANDATORY DISMISSAL—FOUR GROUNDS

The Title IX Coordinator MUST dismiss a complaint at any time during the investigation or hearing:

1. If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in the Title IX regulations even if proved, and/or
2. If the conduct did not occur in the Recipient's education program or activity*, or
3. If the conduct did not occur against a person in the United States, or
4. If at the time of filing a formal complaint, a Complainant is not participating in or attempting to participate in the education program or activity of the Recipient.

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DISCRETIONARY OR PERMISSIVE DISMISSAL

The Title IX Coordinator MAY dismiss a complaint if at any time during the investigation or hearing:

- If a Complainant notifies the Title IXCoordinator in writing that the Complainant would like to withdraw the formal complaint or any allegations; and/or
- If the Respondent is no longer enrolled or employed by the Recipient; and/or
- If specific circumstances prevent the Recipient from gathering evidence sufficient to reach a determination as to the formal complaint or any allegations.

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NOTICE OF DISMISSAL

- Upon a mandatory or permissive dismissal, the Title IX Coordinator should promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties
  - Dismissal is appealable
  - May reinstate the complaint under another provision of the Recipient's code of conduct or other applicable resolution procedures

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INITIAL NOTICE TO THE PARTIES – TITLE IX REGULATIONS

Upon receipt of a formal complaint, a recipient must provide written notice to the parties who are known:

- Notice of the grievance process, including any informal resolution process
- Notice of the allegations with sufficient time to prepare a response before any initial interview and sufficient details known at the time, including:
  - Identities of the parties involved in the incident, if known
  - Description of conduct
  - Date and location, if known

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INITIAL NOTICE TO THE PARTIES – TITLE IX REGULATIONS (CONT.)

- Respondent is presumed not responsible and a determination regarding responsibility is made at the conclusion of the grievance process
- Parties may have an advisor of their choice, who may be an attorney
- Parties may inspect and review evidence prior to the completion of the investigation report
- Any provision from code of conduct that prohibits knowingly making false statements or knowingly submitting false information (if any)
- Update notice if additional allegations will be added/investigated

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10 STEPS OF AN INVESTIGATION

1. Establish basis for investigation (Incident, Pattern, and/or Culture/Climate)
2. Notice of Investigation/Notice of Formal Allegation(s) to Parties (NOIA)
3. Establish investigation strategy
4. Formal comprehensive investigation
   - Witness interviews
   - Evidence gathering
5. Draft investigation report
   - Gather evidence
   - Assess credibility and evidence
   - Synthesize areas of dispute/agreement and all questions asked

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10 STEPS OF AN INVESTIGATION

6. Meet with Title IX Coordinator (and/or legal counsel) to review draft report and evidence
7. Provide all evidence directly related to the allegations to parties and their Advisors for inspection and review with 10 days for response
8. Revise (as needed) and finalize investigation report
   - Gather, assess, and synthesize relevant evidence
9. Meet with Title IX Coordinator (and/or legal counsel) to review final investigation report
10. Send final report to Decision-maker and parties/Advisors for review and written response at least 10 days prior to Decision-maker making their determination of responsibility

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FAIRNESS AND DUE PROCESS

- The burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the Recipient and not on the parties
- Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence
- Cannot restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence
  - This has interesting implications for gag orders…

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INVESTIGATION—ADDITIONAL ELEMENTS

- **TRANSPARENCY**
- Strategize the Investigation
- Timelines
  - Good faith effort
  - Extensions/delays
- Role of law enforcement/concurrent investigations
- Interviewing
  - Who?
  - When?
  - Where?
- Note-taking/Recording

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OVERVIEW: ADVISOR RIGHTS & ROLE IN TITLE IX PROCEEDINGS

- Advisor of Choice Provision
- Advisor Types, Roles, Expectations, and Limitations
- Considerations for Being an Advisor

ADVISOR OF CHOICE

- Parties must have the same opportunities to have others present during any proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the Advisor of their choice, who may be, but is not required to be, an attorney
- May not limit the choice or presence of Advisor for either the Complainant or Respondent
  - Don't have to provide an attorney or equivalently educated/trained Advisor to one party just because the other party has one
- Can regulate the extent to which Advisors may participate in the proceedings, if restrictions apply equally to all parties

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ADVISOR OF CHOICE (CONT.)

- The Title IXregulations overlap with similar provisions in VAWASection 304*
  - VAWAapplies to sexual assault, dating violence, domestic violence, and stalking
  - Title IXapplies to all four of the above **PLUS** sexual harassment

*Violence Against Women Reauthorization Act of 2013

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ADVISOR OF CHOICE (CONT.)

- The Title IX process essentially systematizes two types of Advisors:
  - The Advisor of Choice
    - May be present for every meeting, interview, hearing
  - The Institution-Appointed Advisor
    - Requirement applies only to higher education
    - This Advisor may accompany the party throughout the entire resolution process, but the institution may limit this Advisor to participating in the hearing only and will usually only appoint this Advisor if the party has not chosen one by the time of the hearing

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INSTITUTIONAL APPOINTED ADVISOR

- Advisee isn't the Advisor's "client"
- Conversations unlikely to governed by any "privilege" regardless of role
- If Advisor is also an institutionally-mandated reporter, what happens if employer asks Advisor to disclose information that has been shared by an advisee?
- What if an advisee asks an Advisor to do something they consider unethical, such as mislead or conceal evidence?
- What if an Advisor knows their advisee is knowingly providing false or misleading information?
- Advisors need an ethical code or strong personal/professional integrity to guide them

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INSTITUTIONAL APPOINTED ADVISOR (CONT.)

- An Advisor could be called by the other party as a witness and asked about what they know (at Recipient's discretion)
  - Unless an institutional rule prohibits this or confers "confidentiality" on the Advisor
- Advisors may not like or believe an advisee
- An advisee may not like or trust their Advisor
- Advisors are not required to be aligned with their advisee, but if not, friction can result

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WHO CAN SERVE AS AN ADVISOR?

- Friends, family, roommates, faculty, college or school staff members, attorneys, etc.
- Institutional rules will determine if a party may have more than one Advisor
  - Union representation cases
  - When a party wants an Advisor and an emotional support person
  - In K-12, the parties may have an Advisor and parents/guardians also are entitled to participate
- If more than one Advisor is not permitted, the advisee can rotate Advisors during the process, or the advisee can have one Advisor outside the meeting, and one inside with them

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WHO CAN SERVE AS AN ADVISOR? (CONT.

- An individual can't advise both a Complainant and Respondent in the same matter
- Must be eligible and available, meaning that institutional or school employees can refuse to serve as an Advisor for any reason, and should do so if it would place them in the position of a conflict of interest or commitment
- If an individual serves as both an Advisor and has a role as a witness in the matter, they may wind up limiting the efficacy of their testimony as a witness because the Decision-maker may discount their credibility based on their dual roles

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ROLE OF THE ADVISOR

Depending upon institutional policy and advisee requests, and Advisor may:

- Accompany their advisee through all phases of the resolution process and explain the process
- Help their advisee decide whether to file a formal complaint and navigate other strategic issues such as whether to participate in informal resolution
- Prepare their advisee to respond to questions during the investigation, even rehearsing beforehand, and determine what evidence to share during an interview

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ROLE OF THE ADVISOR (CONT.)

- Help the advisee access supportive measures, community resources, and advocacy services
- Help the advisee to review and comment on the investigation report
- Help the advisee to advocate for the inclusion or exclusion of evidence from the process
- Help the advisee prepare for the hearing (documentation, opening statements, closing statements, impact statements, etc.), and **must** conduct any cross-examination at the hearing
- Help the advisee to frame the appeal and prepare appeal documentation

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Questions?

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