

Gettysburg College Title IX Training

Fall 2021

Outline

- Overview of Current Title IX Final Rule
- Definitions
- College's Response to Sexual Harassment
- Title IX Grievance Process
- Due Process
- Hearings
- Informal Resolution
- Records Retention
- Bias
- Technology

Overview of Current Final Title IX Rule

What is Title IX?

- Title IX is part of the Educational Amendments Act of 1972
- Anti- Discrimination law, that requires equal gender representation in academics and programs
- Requires that institutions fully investigate all incidents of sexual harassment, discrimination, sexual misconduct, sexual assault, domestic violence, dating violence and stalking- if deemed discriminatory

How we got here

1972: “Don’t discriminate.”

1997: “Don’t discriminate and here is what to do and not do.”

2001: “Seriously, we mean it. Don’t discriminate and handle discrimination when it happens.”

2011: “Are you kidding us!? Really, stop discriminating!”

2013: “Oh, and we mean it about retaliation.”

2017: “**There’s a new Sheriff in town!**”

2020: New regulations are provided to be implemented by August 14, 2020.

2021: Live hearings held by the DOE and Q&A document provided

2022: ???

Requirements under the Final Rule

- Designation of Title IX Coordinator
 - Who that person is
 - Their contact information
 - How to report incidents of sexual harassment and misconduct
- Dissemination of the College's Policy
 - Non-discrimination notice
 - Title IX Coordinator's Contact information
 - What the Grievance Procedure is
- Adoption of Grievance Process
 - Must be prompt and equitable
 - Outline how to report and file a formal complaint
 - How the College will respond to reports received

Definitions

Actual Knowledge

- Notice of sexual harassment or allegations of sexual harassment to the College's Title IX Coordinator or any official of the College 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. The standard is not met when the only official of the College with actual knowledge is the respondent.

Complainant

- An individual who is alleged to have been the target of conduct that could constitute sexual harassment or sexual misconduct.

Respondent

- An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment or sexual misconduct.

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 College investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the educational program or activity of the College with which the formal complaint is filed. A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail. A document filed by the complainant, means a document or electronic submission that contains the complaint's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.

Jurisdiction of Title IX

- The Title IX Grievance process applies to all faculty, staff and students whenever the College has actual knowledge of the misconduct and the misconduct occurs:
 - Against a party who is participating in or attempting to participate in the College's education program or activity in the United States;
 - On Gettysburg College property, or;
 - Off Gettysburg College property and within an education program or activity including locations, events, or circumstances over which the College exercises substantial control over both the respondent and the context in which the alleged sexual harassment occurs, or;
 - Any building owned or controlled by a student organization that is officially recognized by the College irrespective of whether the building is on campus or off campus.

Sexual Harassment under Title IX

- Conduct on the basis of sex that satisfies one or more of the following:
 - An employee of the College conditioning the provision of an aid, benefit, or service of the College on an individual's participation in unwelcome sexual conduct;
 - Unwelcome conduct determined by a reasonable person to be so severe, pervasive and objectively offensive that it effectively denies a person equal access to the College's educational program or activity;
 - "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

Sexual Harassment

- Consider:
 - The nature of the pervasiveness and severity of the conduct
 - Was the conduct reasonably physically threatening
 - Was the conduct objectively and subjectively humiliating
 - What was the impact on the Complainant's mental or emotional state
 - Was there a denial of education or employment access
 - Was the conduct something that is sex-based?
- If the statement was only discourtesy or rude, it may not rise to current definition of Sexual Harassment.
- If the speech or conduct is protected by academic freedom or the First Amendment, then it is not sexual harassment.

Consent Is...

- Informed, knowing, and voluntary (freely given)
- Active- in the moment, past consent does not provide consent in the moment
- Mutually understood by both parties to engage in the conditions of sexual or intimate activity.
- Consent cannot be obtained if there is use of physical force, threats, intimidating behavior, or coercion
- Cannot be given by someone known to be- or should known to be- mentally or physically incapacitated.

When determining if consent was present

- Was force used by the respondent to obtain sexual access?
- Was the complainant incapacitated?
 - Did the respondent know or should they have known that the complainant was incapacitated?
- What clear words or actions by the complainant gave the respondent permission to engage in the sexual activity that took place with the complainant?

Capacity

- Incapacitation is a state where someone cannot make rational, reasonable decisions because they lack the capacity to knowingly provide consent
- Blackouts vs Brownouts
- Incapacitation is not drunk, intoxicated or under the influence. It is an extreme form of intoxication

Assessing Capacity

- Was the complainant incapacitated at the time of the incident?
 - Were they able to make rational, reasonable decisions?
- Did the Respondent know of the incapacity? Or should they have known from the circumstances?
- Behavioral cues- think of these while reading the investigative reports
 - Slurred speech, smell of alcohol on the breath, stumbling, unusual behavior, passing out, throwing up, disoriented

Other points to consider with capacity and consent

- Was the complainant acting out of the norm?
- Did the respondent know the complainant previously and if so, was the complainant acting differently in the eyes of the respondent?
- Did the respondent provide any alcohol to the complainant?

A few more points on consent

- Did the complainant provide clear words or actions that gave the respondent permission with each sexual act that took place?
 - If there was, then no sexual assault.
 - If it was more likely than not that there were not clear words or actions then there was no consent, and a finding of sexual assault occurring.

Supportive Measures

- Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the College's educational program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the College's educational environment or deter sexual harassment. Supportive measures may include:
 - Counseling;
 - Extensions of deadlines or other course-related adjustments;
 - Modifications of work or class schedules;
 - Campus escort services;
 - Mutual restrictions on contact between the parties;
 - Changes in work or housing locations;
 - Leaves of absence;
 - Increased security and monitoring of certain areas of the campus; and
 - Other similar measures.
- The college maintains confidentiality, to the highest extent possible, for the complainant or the respondent when it comes to the requested supportive measures by either party. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

Response to Sexual Harassment

Reports

- The College can receive reports through the online “Report a Concern” page, directly to the Title IX Coordinator, or directly to the Department of Public Safety.
- When any Responsible Reporter or CSA receives a report of possible sexual harassment, notification to the Title IX Coordinator must take place and the outreach to the affected party happens promptly.
- The College cannot act in deliberately indifferent manner

Reports, continued

- For the Title IX Grievance Process to begin the incident had to occur within the educational program or activity of the College. Otherwise the report will be dismissed under the Title IX Grievance Process and move to the Sexual Misconduct Grievance Process

Contacting the complainant

- Once the report is received, the Title IX Coordinator will promptly reach out to the affected party to discuss supportive measures, procedural options available to them, including the process for filing a formal complaint.

Consolidation of formal complaint

- Consolidation of formal complaints can occur when:
 - There are multiple respondents
 - There are multiple complainants against one or more respondents
 - One party against the other party (counter complaint)

Title IX Grievance Process

- Once there is a signed formal complaint by the complainant and the Title IX Coordinator, the Grievance Process begins.
- Investigation
 - Notice is provided to the respondent, where it is noted that the respondent is presumed to be not responsible, and it must include the detailed allegation, the possible charges, and the range of possible sanctions
 - Investigator meets with parties to collect statements and evidence and creates a draft report that fairly summarizes all relevant evidence and includes all evidence and statements collected during the investigation
 - Both parties and their advisors are provided a copy of the report and have at least 10 days to provide a written response to the Investigator
 - Investigator finalizes the report and then sends back to both parties where they have another 10 days to review the document before a hearing would take place.

Title IX Grievance Process, continued

- Dismissal of a formal complaint
 - Must Dismiss if;
 - If conduct would not constitute sexual harassment
 - Conduct did not occur within the educational program or activity
 - Did not occur in the US
 - May Dismiss if;
 - Complainant notifies Title IX Coordinator in writing that they would like to withdraw the formal complaint
 - The accused is no longer enrolled or employed by the school
 - There are circumstances that prevent the school from gathering sufficient evidence to determine responsibility.
- Can still refer to the College's Sexual Misconduct Grievance Process if it does not reach the above requirements for Title IX

Title IX Grievance Process, continued

- The investigator and the hearing must be equitable to both parties
- There must be an objective evaluation of the information provided in the report and that is provided during the hearing
- Investigators and Decision-Maker(s) must be impartial and trained on how to serve impartially- including avoiding prejudgments of the facts at hand, conflicts of interest and bias
- The investigation and the hearing must take place within a prompt time frame and document any reasons for delays

Title IX Grievance Process, continued

- Standard of Evidence
 - The college uses the preponderance of the evidence for all sexual misconduct and Title IX related processes for both students and employees
- Appeals
 - Both parties have the ability to appeal a decision from the hearing on the basis of:
 - New Evidence
 - Conflict or bias
 - Procedural Error
- Supportive Measures
 - Provided to both the complainant and the respondent throughout the Title IX Grievance Process

Due Process

Due Process

- For Public Institutions: Federal and state constitutional and legal protections ensuring that no public entity deprives someone of education or employment without substantive and procedural fairness.
- For Private Institutions: Fundamental Fairness- the institution will abide substantially by its policies and procedures. Outcomes are not arbitrary or capricious and related to facts and evidence.

Due Process outlines in the regulations

- Right to
 - Present witnesses, including fact and expert witnesses
 - Present evidence that could be inculpatory or exculpatory
 - Discuss the allegations without any restrictions (no “gag orders”)
 - Advisor of choice, who may be, but is not required to be, an attorney
 - Written notice of allegations- including date, time, location, participants, purpose of interviews, with enough time to prepare
 - Inspect and review all evidence and draft investigative report before it is finalized and provided to a hearing panel
 - Argue for inclusion of directly related evidence at the hearing
 - Ask questions of the other party and witnesses through an advisor of choice during the hearing.

Hearings

In advance of the hearing

- Review the hearing packet that is provided- general overview
- Review the policy that is alleged to have been violated (included in the notice of hearing letter)
- Review the materials again- note areas that are consistent- these areas would not need additional verification or questions at the hearing
- Review the materials again for inconsistencies- this is where you can develop your questions.

Hearings

- Both parties must have an advisor of their choice at the hearing
 - If a party does not come to the hearing with an advisor of their choice then the College must provide one to them
- Direct Cross-Examination
 - The party's advisor will question the party during the hearing, but the decision-maker(s) must approve the question prior to the party responding to the question.
 - Only relevant questions will be allowed and if it is not allowed then the decision-maker(s) must provide a reason why the question would not be allowed.
 - There is rape shield protections for the complainant- meaning that questions and evidence about the complainant's prior sexual behavior is not allowed to be asked or considered unless offered to prove that someone other than the respondent committed the alleged sexual misconduct or offered to prove consent.

Hearings, continued

- ~~If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however that the decision-maker(s) cannot draw inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer questions.~~
- Hearings must be live and may be conducted with both parties in the same location, or the hearing can be conducted virtually if requested.
- Hearing must be recorded and maintained as part of the records retention.

Hearing Panel Questions

- Consider:
 - Is the answer to your question already in the report?
 - Using open ended questions
 - Tell us... who... what... how..
 - Tell me more, walk me through, help me understand, etc.
 - Avoid using closed questions
 - Avoid compound questions
 - Avoid suggesting an answer in your question
 - Restate/summarize what was said, this allows for you to validate that you are listening and ensure you heard the response.

Cross Examination by Advisor of Choice

- Advisor of choice has the right to ask any cross examination questions of the parties participating in the hearing.
- They will ask the question and BEFORE the question is answered by the party, the hearing panel chair MUST approve the question.
- If they do not approve the question they MUST provide the reason they are not approving the question to be asked.
- You may ask an advisor why they think the question is relevant or would lead to a relevant answer.

Cross Examination by Advisor of Choice

- If the advisor is asking a question that is already answered in the report the question should be permitted if relevant.
- If the question has already been answered by a party during the hearing then it may be denied as “irrelevant because it has already been answered” or the advisor may be asked why they are posing the question again is expected to lead in relevant evidence.
- Relevant Questions: Ask whether the facts material to the allegations under investigation are more or less likely to be true.
- Irrelevant Questions: Are generally not directly related to the allegations. Things may be interesting or surprising but not be relevant.

Questions that are irrelevant under the Final Rules

- Question about Complainant's Prior Sexual Behavior or Sexual Predisposition
 - Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless:
 - Such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
 - If the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. 34 C.F.R. § 106.45(6)(i).

Questions that are irrelevant under the Final Rules

- Question regarding Privileged Information
 - Questions that constitute, or seek disclosure of, information protected under a legally recognized privilege are irrelevant. 34 C.F.R. § 106.45(1)(x). This can include medical providers (physician, dentist, podiatrist, chiropractor, nurse), psychologists, clergy, rape crisis counselors, and social workers.

Questions that are irrelevant under the Final Rules

- Question about Undisclosed Medical Records
 - Questions that call for information about any party's medical, psychological, and similar records are irrelevant unless the party has given voluntary, written consent. 85 Fed. Reg. 30026, 30294 (May 19, 2020).

Making a determination

- At the conclusion of the hearing, the panel will deliberate on if the respondent was responsible or not responsible for a violation of campus policy(ies) indicated in the Notice of Hearing Letter.
- Consider all relevant evidence that was included in the investigative report and presented at the hearing.
- The Decision Makers are ultimately deciding if the credibility of statements and evidence.
 - Remember memory gaps and evasion can occur.
 - Do not focus on the irrelevant inconsistencies
 - Credibility is not determined by someone status as a complainant, respondent, or witness.
 - Are they factual, opinion-based, or circumstantial?
- Your determination should focus on what facts and evidence support your conclusion and provide a detailed rationale.

Making a determination

- Do not record any deliberations
- Decision Maker should provide rational for and the evidence supporting the conclusions of responsible or not responsible, based on the preponderance of the evidence (more likely than not)
- Look to the elements in the policy to determine if the evidence and statements support a responsible finding for each listed possible policy.
- Finding: Responsible or Not Responsible
- Sanctions

Remember...

- Title IX requires the institution to stop the conduct, prevent it's reoccurrence, and address the affects.
- Consider this during any discussions surrounding sanctions

Sanctions

- Warning
- Probation
- Loss of Privileges
- Counseling
- No Contact Order
- Residence Hall Relocation
- Alcohol and Drug Assessment
- Suspension
- Expulsion
- Educational Sanctions

Hearings, continued

- When the decision-maker(s) provides notice of the determination of responsibility the letter must contain:
 - The Allegations
 - All procedural steps taken through the Title IX Grievance Process
 - Findings of the facts
 - Conclusion
 - Rationale for decision
 - Appeals procedural
 - Sanctions/remedies that were put in place

Informal Resoultion

Informal Resolution

- A formal complainant from the complainant must still be provided
- Notice still is required to be sent to the respondent
- The informal resolution must be voluntary and both parties must agree to the informal resolution
- Not allowed in student and employee cases

Records

Records

- All records from the investigation and the hearings must be maintained for 7 years by the institution
- The College is also require to publish all training materials used to train Title IX Personnel

Bias

Bias

- Regulations state that Title IX Personnel must be impartial, avoid prejudgment, conflicts of interest and bias.
- Decision makers and those who facilitate informal resolution, cannot have conflict of interest or bias for or against complainants or respondents.
- Title IX Proceedings should not rely on sex stereotypes and investigations and adjudications of formal complaints of harassment must be impartial.

Definitions

- Conflict of Interest

- a conflict between the private interests and the official or professional responsibilities of a person in a position of trust or
- a conflict between competing duties. See <https://www.merriam-webster.com/dictionary/conflict%20of%20interest>.

- Bias

- an inclination of temperament or outlook; especially, a personal and sometimes unreasoned judgment. See <https://www.merriam-webster.com/dictionary/bias>.

- Partial

- inclined to favor one party more than the other. See <https://www.merriam-webster.com/dictionary/partial>.

To avoid bias and conflicts of interests implications

- Treat complainants and respondents equitably under the regulations. The regulations require IHEs to offer complainants supportive measures with or without a formal complaint. The regulations also require IHEs to provide a presumption of non-responsibility to a respondent until a decision is rendered in the grievance process. §106.45(b)(1)(iv).
- Treat each person as individual, not as a member of a class. The obligation under Title IX is to treat each person as an individual, not as a member of a class subject to prejudgment and prejudice on the basis of sex. Prohibited bias may also be based on race, color, or national origin.
- Objectively examine relevant evidence before reaching determination: Title IX personnel should objectively examine relevant evidence, and avoid prejudgment of facts, before reaching a determination on responsibility.
- Give both parties equal opportunity to present witnesses and evidence. Continue to evaluate issues of bias and conflicts of interest throughout the grievance process: For instance, if an individual's involvement with the emergency removal process results in bias or conflict of interest for or against the complainant or respondent, § 106.45(b)(1)(iii), such bias would preclude such personnel from serving in a role during a grievance process.
- Example of potential conduct exhibiting bias: If a Title IX Coordinator restricts a party from providing evidence, then the Title IX Coordinator would be violating these final regulations and may even have a conflict of interest or bias, as described in § 106.45(b)(1)(iii).

Technology