



# Title IX Investigator and Advisor

Presented by  
Edward Cramp & Jessica High

July 29, 2020

©2020 Duane Morris LLP. All Rights Reserved. Duane Morris is a registered service mark of Duane Morris LLP.  
Duane Morris – Firm Offices | New York | London | Singapore | Philadelphia | Chicago | Washington, D.C. | San Francisco | Silicon Valley | San Diego | Los Angeles | Taiwan | Boston | Houston | Austin | Hanoi |  
Ho Chi Minh City | Shanghai | Atlanta | Baltimore | Wilmington | Miami | Boca Raton | Pittsburgh | Newark | Las Vegas | Cherry Hill | Lake Tahoe | Myanmar | Oman | Duane Morris – Affiliate Offices | Mexico City | Sri Lanka |  
Duane Morris LLP – A Delaware limited liability partnership



## Edward M. Cramp

*Partner*

[EMCramp@duanemorris.com](mailto:EMCramp@duanemorris.com)

(619) 744 2223



## Jessica S. High

*Associate*

[JHigh@duanemorris.com](mailto:JHigh@duanemorris.com)

(619) 744 2214

# Today's Presentation

- Recap and Overview of Title IX Sexual Harassment Complaint Process
- Recap of Title IX Coordinator responsibilities
- Role of the Investigator
- Role of the Advisor
- Impartiality, Bias and Conflicts of Interest



# RECAP AND OVERVIEW OF TITLE IX COMPLAINT PROCESS

# Recap

- Final Rule published 5-19-2020 (85 Fed Reg 30026)
- Effective **August 14, 2020**
- Amends 34 CFR Part 106
- 2011 Q&A and 2001 OCR guidance remain good to the extent consistent with Final Rule

# Title IX Complaint Process Overview

- Formal Complaint Received by Title IX Coordinator
- Optional Informal Resolution Process
- **Investigation**
- Live Hearing
- Decision and Remedial Measures
- Appeals

# Sexual Harassment

- Under the 2020 Final Rule, Sexual Harassment is conduct on the basis of sex that falls into one or more of the following 3 categories
- Definition located in 34 CFR 106.30

# 1. Quid Pro Quo

- An employee of the school conditioning the provision of an aid, benefit, or service of the school on an individual's participation in unwelcome sexual conduct;



## 2. Hostile Environment

- 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 recipient's education program or activity; or

### 3. Sexual Violence

- “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 Violence

- **Sexual Assault:** As defined in 20 U.S.C. 1092(f)(6)(A)(v), means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.
- **Dating Violence:** As defined in 34 U.S.C. 12291(a)(10), means violence committed by a person (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (B) where the existence of such a relationship shall be determined based on a consideration of the following factors: the length of the relationship; the type of relationship; and, the frequency of interaction between the persons involved in the relationship.

# Sexual Violence

- **Domestic Violence:** As defined in 34 U.S.C. 12291(a)(8), includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.
- **Stalking:** As defined in 34 U.S.C. 12291(a)(30), means engaging in a course of conduct directed at a specific person that would cause a reasonable person to: (A) fear for his or her safety or the safety of others; or (B) suffer substantial emotional distress.

# Recap – Title IX Coordinator

- Implementing Title IX policy
- Intake reports and complaints
- Intake Formal Complaints
- Implement Supportive Measures

# Formal Complaint

- All formal complaints must be investigated
- A formal complaint is signed by a Complainant or Title IX Coordinator alleging sexual harassment against a Respondent, requesting an investigation
- Complainant must be a current or prospective student or employee
- Defer to Complainant's wishes as to whether to pursue an investigation
- Title IX Coordinator can sign a complaint to initiate an investigation if they determine that not pursuing would be deliberately indifferent or that not pursuing a claim would be harmful to the campus community



# INVESTIGATION

# Selecting an Investigator

- Title IX Coordinator
- Other school employee (if trained)
- Third party
- Cannot be the Decision-Maker



# Investigator Training

- How to conduct an investigation
- Impartiality/bias/conflicts of interest
- Issues of relevance
- Report writing

# Investigation

- Impartial, fair and objective
- Burden on the institution
- No gag-orders
- Right to an advisor
- Dismissal
- Written notice with sufficient time to prepare
- Equal opportunity for the parties to present fact and expert witnesses and other evidence
- Investigative report

# Investigation Notice

- Send notice to parties of the allegations upon receipt of a formal complaint with sufficient details of the allegations
- Discussion of the grievance process
- Any option for informal resolution
- Statement that the Respondent is present innocent and that a determination of responsibility is made at the conclusion of the grievance process
- Right to an advisor
- Reminder against making false statements or submitting false information

# Additional Notice

- Provide additional notice if investigating additional allegations
- Send notice of any investigative interviews, meetings or hearings
- Include date, time, location, participants and the purpose of the hearing/interview/or other meeting
- Key is providing sufficient time to prepare

# Consolidation

- Complaints against multiple respondents or by multiple complainants may be consolidated
- May consolidate investigations where the complaints arise out of the same facts or circumstances

# Dismissal

- School must dismiss any complaint that:
  - Does not constitute sexual harassment;
  - Did not occur in the program or activity; or,
  - Did not occur against a person in the United States.
- School may dismiss a complaint if:
  - Complainant withdraws the complaint
  - Respondent is no longer enrolled or employed
  - Circumstances prevent institution from investigating
- Dismissal does not prevent action under code of conduct

# Tips for an Investigation

- Select an investigator carefully
- Begin promptly
- Prepare before interviews - review Formal Complaint, school policies, etc.
- Conduct a thorough investigation – when, where, what, who – cover the same questions with all interviewees
- Avoid yes/no questions
- Gather evidence
- Document, document, document

# Access to Evidence

- Both parties must be given an equal opportunity to review and inspect evidence that:
  - Was obtained as part of the investigation; and
  - Is directly related to the allegations
- Includes evidence that the school does not intend to rely on in making a determination of responsibility



# Evidence Restrictions

- School cannot use, rely on or seek disclosure of information protected under legally recognized privilege unless party has waived privilege
- ex: Attorney/Client, Doctor/Patient

# Investigative Report

- Once the investigation has concluded, draft an investigative report that fairly summarizes relevant evidence

# Investigative Report Goals

- Do not reach any conclusions
- Demonstrate how the school responded appropriately to the allegations
- Put decision-maker in best possible position to understand relevant evidence for the live hearing
- Must be maintained for 7 years

# Opportunity to Inspect and Respond

- Prior to issuing investigative report
  - Send the parties evidence directly related to the allegations with at least 10 days to review and submit a written response
- Prior to Live Hearing or other determination
  - Send the parties the investigative report that fairly summarizes relevant evidence at least 10 days prior to a hearing for review and written response

# Relevance

- Evidence is relevant if it is pertinent to proving whether facts material to the allegations are more or less likely to be true
  - Repetition of the same question is irrelevant
- A Complainant's sexual predisposition or prior sexual behavior is not relevant, unless:
  - Offered to provide that someone other than the Respondent committed the alleged conduct; or
  - To prove consent

# Summarizing Relevant Evidence

- Investigative report should have have a clear outline of the steps taken during the investigation
- Consider summarizing:
  - Alleged incident with details provided
  - Complainant, Respondent and witness identified
  - Relevant evidence (objective)
  - Key factual findings

# Timeframe

- Prompt timeframe for conclusion of grievance process
- Set by school's internal timeframe
- Through appeal process

# ROLE OF THE ADVISOR



# Advisors

- Parties have the right to select an advisor during an investigation and hearing
- If the Complaint goes to a live hearing, the parties must have an advisor
- If the party does not have an advisor, the school must provide, without charge, an advisor of the school's choice
- Only advisors may conduct cross-examination of witnesses

# Selecting an Advisor

- Party provided
- If school-selected can be
  - Other school employee
  - Third party
- Can be an attorney but does not have to be

# Advisor Training

- None required by Title IX Final Rule
- Do not need to be free from conflicts of interest or bias to give parties the flexibility to pick an advisor
- Up to the school to determine what training will be provided for school-appointed advisors

# Advisor Policies

- School can implement policies regarding advisor conduct, which should be clearly explained at the outset of each interview, hearing, etc.
- Require all participants behave in an orderly manner
- Schools can require advisors to use evidence received for inspection and review as well as the investigative report only for purposes of the grievance process

# IMPARTIALITY, CONFLICTS OF INTEREST & BIAS

# Fair and Impartial Investigation

- § 106.45 requires recipients to adopt a grievance process where Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions are free from conflicts of interest and bias and are trained to serve impartially without prejudging the facts at issue

# Why Does it Matter?

- The Department sought to:
  - Improve perceptions that Title IX sexual harassment allegations are resolved fairly and reliably
  - Avoid intentional or unintentional injection of sex-based biases and stereotypes into Title IX proceedings, and
  - Promote accurate, reliable outcomes, all of which effectuate the purpose of Title IX to provide individuals with effective protection from discriminatory practices

# Impartiality

- Cannot have a conflict of interest or bias for or against Complainants or Respondents generally or an individual Complainant or Respondent
- Avoid prejudgment of the facts at issue
- No one should be automatically believed or not believed



# Impartiality

- Investigators must objectively evaluate all relevant evidence
  - Inculpatory: evidence that shows or tends to show Respondent's responsibility
  - Exculpatory: evidence that shows or tends to show the Respondent is not responsible

# Bias/Conflict of Interest

- Do not rely on sex stereotypes
- Avoid inferences based on whether someone is a Complainant or Respondent
- Encourage investigator to disclose bias/conflict of interest

# Training

- Does not have to include implicit bias (subconscious stereotyping and unconscious evaluation) training
- Nature of the training is left to the school's discretion so long as it achieves the directive that such training provide instruction on how to serve impartially and avoid:
  - Prejudgment of the facts at issue
  - Conflicts of interest
  - Bias
- Materials used in training avoid sex stereotypes



---

# Thank You!

©2020 Duane Morris LLP. All Rights Reserved. Duane Morris is a registered service mark of Duane Morris LLP.  
Duane Morris – Firm Offices | New York | London | Singapore | Philadelphia | Chicago | Washington, D.C. | San Francisco | Silicon Valley | San Diego | Los Angeles | Taiwan | Boston | Houston | Austin | Hanoi |  
Ho Chi Minh City | Shanghai | Atlanta | Baltimore | Wilmington | Miami | Boca Raton | Pittsburgh | Newark | Las Vegas | Cherry Hill | Lake Tahoe | Myanmar | Oman | Duane Morris – Affiliate Offices | Mexico City | Sri Lanka |  
Duane Morris LLP – A Delaware limited liability partnership