

## **Title IX Coordinator Training Online Course**

### **Class One: Definitions, Jurisdiction and Preliminary Matters**

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## **Class Overview**

- The New Administration: What to Expect?
- Definitions
- Jurisdiction
- Formal Complaints
- Supportive Measures
- Dismissals
- Informal Resolution



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## What's Next?

### What is going to happen to the DeVos Title IX Rules under President Biden?

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The screenshot displays two news articles side-by-side. On the left is a snippet from CNN NEWS, dated 10/08/2020, with the headline "Biden wants to scrap Betsy DeVos' rules on sexual assault in schools. It won't be easy." Below this is a sub-headline "Biden said he wants to undo DeVos' Title IX rule. How would he replace it?" and a sub-text "Revoking the regulation would not be easy, and colleges would need guidance for addressing campus sexual assault in the interim." A photo of Joe Biden speaking is visible. On the right is an article from The Harvard Crimson, dated 8 hours ago, with the headline "Biden Administration Expected to Reverse DeVos's Title IX Regulations, Legal Experts Say." The sub-text reads: "In early May 2020, former Secretary of Education Betsy D. DeVos released a controversial Title IX rule that drummed up controversy, criticism, and confusion at Harvard and beyond. How will the incoming Biden administration deal with the rule?" The author is listed as "BY JESSICA LEE AND CHRISTINA T. PHAM". A photo of a Harvard building with a "HARVARD Title IX" sign is shown at the bottom of the article.

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## Litigation Challenges

- Know Your IX, et al. v. DeVos filed May 14, 2020 in D. Md.
- New York v. U.S. Department of Education, filed June 4 in S.D.N.Y.
  - Motion for Preliminary Injunction (June 25, Denied); Stipulated Dismissal without Prejudice (November 4)
- Pennsylvania, et al. v. DeVos, filed June 4 in D.D.C.
  - Motion for Preliminary Injunction (June 23, Denied)
- Victim Rights Law Center, et al. v. DeVos, filed June 10 in D. Mass.
  - Currently on trial before Judge William G. Young, leave to file amended complaint granted.

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### Biden vows 'quick end' to DeVos' sexual misconduct rule

Biden disavowed Education Secretary Betsy DeVos' Title IX rule.



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- Courts unlikely to find DeVos rules “**arbitrary and capricious.**”
- **Biden Administration** will likely seek to roll back regulations. But, to do so it will need to go through same time-consuming process ED just completed.
- **Repeal? Repeal and Replace?**
  - Estimated two years
  - Repeal and replace
    - Single change in rules would require only one change and would be less challenging to institutions
    - Relatively longer effectiveness of existing rules
  - Repeal; replace later
    - Quicker; presumably could implement very quickly
    - Would involve at least two more changes to regulations
    - What rules apply in the interim?
- What will **enforcement** look like in Biden’s OCR?
- **In the meantime, the rules are the law, and any college receiving federal funds must obey them.**

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## Where Might We Go? No Crystal Ball

- How might changes play out? What controversial features will be kept?  
Abandoned?
  - Will the response obligations be significantly changed?
    - Formal complaint requirement?
    - Live hearing requirement?
    - Cross-examination and exclusionary rules?
    - Role of advisors?
  - Will the scope of what constitutes “sexual harassment” and requires a prescribed response be expanded?
    - Severe and/or pervasive and objectively offensive?
    - Participating in programs and activities at the time of the formal complaint?
    - Application to employees?



## Definitions

# Definition of Sexual Harassment

Sexual Harassment includes one or more of the following:

1. Quid Pro Quo
2. Hostile Environment
3. Clery Definitions

§106.30(a)



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# Quid Pro Quo

- Conditioning provision of an aid, benefit or service on participation in unwelcome sexual conduct
- Carried out by an employee



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## Hostile Environment

- Unwelcome sexual conduct
- “So severe, pervasive, *and* objectively offensive”
- “Effectively denies equal access”
- “Determined by a reasonable person”
  - “[S]tanding in the shoes of the complainant.” (Preamble, p. 514)



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## Clery Definitions

- **Sexual Assault** – a forcible or non-forcible sex offense under the FBI UCRS (as defined by the Clery statute)
  - FBI UCRS/SRS definitions or NIBRS Sex Offenses definitions
  - Focus on proscribed actions rather than terms
- **Dating Violence** – violence by a person who is or has been in a romantic or intimate relationship (Clery statute)
- **Domestic Violence** – violence by a current or former spouse or intimate partner, co-parent, living partner, youth or other under state law
- **Stalking** – fear for safety or safety of other or suffer substantial emotional distress



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## Complainant & Respondent

- Complainant – an individual who is alleged to be the victim of conduct that could be sexual harassment
- Respondent – an individual who has been reported to be the perpetrator of conduct that could be sexual harassment



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## Actual Knowledge

- Institution has actual notice of sexual harassment or allegations when reported to the:
  - Title IX Coordinator(s)
  - Official With Authority to Take Corrective Actions (OWA)
- Not a respondent
- Not others who may or must report



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# Jurisdiction

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## Education Program or Activity



- Locations, events, or circumstances over which IHE exercises substantial control over *both* the respondent and the context in which the sexual harassment occurred, *or*
- Any building owned or controlled by a recognized student organization, *and*
- Against a person in the United States

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# Filing a Formal Complaint

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## Filing a Formal Complaint

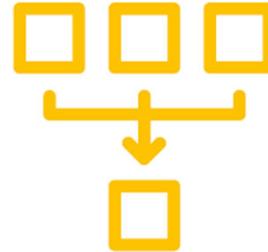
- Filed by the Complainant or signed by the Title IX Coordinator.
- Requests that the IHE investigate the allegations of sexual harassment.
- In person, by mail, email or approved method with Complainant's signature.
- Complainant must be participating in or attempting to participate in the IHE's education program or activity.



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## The Formal Complaint: More Than One Respondent

- *May* consolidate formal complaints against more than one respondent, or by one party against the other party
  - Allegations arise out of the same facts or circumstances.
- Complaints may be filed and sanction imposed *only* against individuals, not groups



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## Written Notice of Allegations

- Notice of the grievance process.
- Notice of the allegations, including sufficient details and time to prepare a response *before* the initial interview.
- Statement that the respondent is presumed not responsible.
- Right to advisor of choice.
- Right to inspect and review evidence.
- Any prohibition of false statements or information.

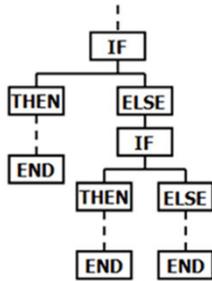
Provide updated notice with any later discovered additional allegations.



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# Dismissals



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## Mandatory/Discretionary Dismissals

### Mandatory if Conduct Alleged:

- Would not constitute sexual harassment even if proved;
- Did not occur in the IHE's education program or activity; or
- Did not occur in the United States.

### Discretionary If:

- Complainant notifies the Title IX Coordinator in writing of a wish to withdraw complaint or any allegations in it;
- Respondent is no longer enrolled or employed; or
- Specific circumstances prevent sufficient gathering of evidence to reach a determination.

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## Dismissal Results



If a formal complaint is dismissed:

- Provide written notice of dismissal and reasons to both parties.
- Provide an appeal process.
- The matter *may* proceed under another provision, policy or code.

## Supportive Measures

## Response to a Report

- Offer *supportive measures* promptly to the Complainant. 
- Explain the process for filing a formal complaint.
- Consider the Complainant's wishes as to supportive measures. 
- Follow a grievance process that complies with the regulations *before* imposing any disciplinary sanctions or other actions that are not supportive measures against the Respondent.



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## Supportive Measures



- Available to complainant and respondent
- Non-disciplinary and non-punitive
- Treat complainant and respondent equitably
- No fee or charge to complainant or respondent
- Restore or preserve equal access without *unreasonably* burdening the other party
- Confidential to the extent possible



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# Informal Resolution

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## Informal Resolution Requirements



- Only *after* a formal complaint is filed
  - At any point in the process
  - May return to formal process if informal resolution does not resolve the matter
- All forms of sexual harassment
  - *NOT* – Allegations of employee against student harassment
  - *ONLY* – When the institution deems it appropriate
- Process is facilitated by trained individuals with no conflict of interest or bias
- Written, voluntary consent by the parties, which requires ...

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## Informal Resolution Process

- Parties must be given written notice of:
  - The allegations and the requirements of the informal resolution process;
  - The right to withdraw from the informal procedure at any time prior to agreeing to a resolution;
  - The circumstances precluding parties from resuming the formal complaint arising from the same allegations; and
  - Any consequences associated with informal resolution, including records that will be maintained or could be shared.



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