

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

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

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Training Course Does Not Constitute Legal Advice

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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 collage features three news snippets. On the left, an MSNBC article titled "Biden wants to scrap Betsy DeVos' rules on sexual assault in schools. It won't be easy." includes a sub-headline "Biden said he wants to undo DeVos' Title IX rule. How would he replace it?" and a photo of Joe Biden speaking. On the right, a Harvard Crimson article titled "Biden Administration Expected to Reverse DeVos's Title IX Regulations, Legal Experts Say" includes a sub-headline "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?" and a photo of a Harvard building with a "Title IX" sign.

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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

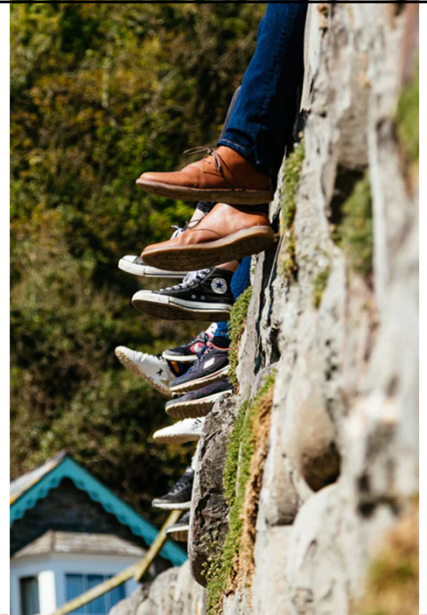
- Conditioning provision of an aid, benefit or service on participation in unwelcome sexual conduct
- Carried out by an employee



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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



## 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



# 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 Compliant

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## Filing a Formal Complaint

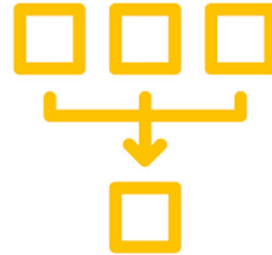
- Filed by the Complainant or signed by the Title IX Coordinator.
- Requests that the IHE investigate the allegations of sexual harassment.
- In person, by mail, email or approved method with Complainant's signature.
- Complainant must be participating in or attempting to participate in the IHE's education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

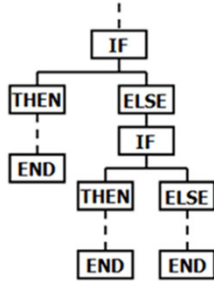
Provide updated notice with any later discovered additional allegations.



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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



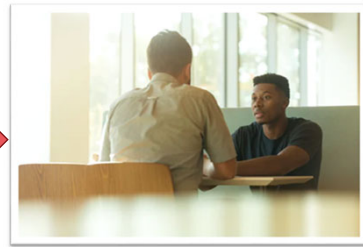
If a formal complaint is dismissed:

- 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.



## Note

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