How the New Rule Changes — and Doesn’t Change — the Process of Investigation
Disclaimer

This training video provides general legal advice about certain topics related to the U.S. Department of Education’s regulation and enforcement of Title IX of the Education Amendments Act of 1972 and specifically with respect to the Title IX regulatory changes released on May 6, 2020 and effective on August 14, 2020. This is a quickly-evolving area, and substantial changes to applicable law, rules, regulations, and enforcement policies in the near term seem likely. We assume no responsibility to update this training video notwithstanding changes in the law. Please note that this presentation does not address state or local laws, rules, or regulations which may be material in evaluating the subject matter of this training video. Finally, this presentation offers general guidance about its topic and does not offer specific legal advice about any particular circumstance, investigation, hearing, or matter.

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Session Agenda

I. Where we are: Context and Framework

II. A Shrinking Scope: What’s In and What’s Out
   - Break -

III. Top Ten Things to Know about Investigations under the New Rule
   - Break -

IV. Investigation Nuts & Bolts
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 education program or activity receiving Federal financial assistance.
Title IX’s Purpose

- Prohibitions or Limitations on Participation Based on Sex
- Unequal Funding of Men’s and Women’s Athletics
- Pregnancy Discrimination
- Sexual Harassment
  - Sexual Assault
  - Stalking
  - Domestic/Dating Violence
  - Verbal/expressive
Focused attention and resources on the problem of sexual harassment

Raised concerns that Respondents were being treated unfairly

It did not change the law.
The Final Rule is More than Guidance

- The Title IX process is now legally mandated.
- A Final Rule is not easily made or unmade.

Final Rule released: May 6, 2020

Compliance deadline: August 14, 2020
Overarching Goals of Final Rule

1. Narrow the scope of incidents that fall within the law

2. Recalibrate the procedural balance between complainants and respondents
GRIEVANCE INITIATION: A SHRINKING SCOPE

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Mandatory Response to a Report

The Title IX Coordinator must promptly:

1. Contact the Complainant to discuss the availability of supportive measures,

2. Inform the Complainant that supportive measures are available whether they file a complaint or not,

3. Consider the Complainant’s wishes with respect to supportive measures, and

4. Explain the process for filing a formal complaint, the grievance process, and any informal resolution options.
IF A FORMAL COMPLAINT IS FILED...
TIME FOR A DISMISSAL ANALYSIS

1. **Who** is the complainant?
   Was the complainant “a person in the United States?”

2. **Where** did the incident(s) take place?

3. **What** type of conduct occurred?
TWO BUCKETS

Title IX Sexual Harassment (TIXSH)
Forms of harassment on the basis of sex that fall within the Final Rule’s definition of sexual harassment and jurisdictional scope. These cases must be handled in accordance with the Final Rule.

Other Sexual Harassment (OSH)
Forms of harassment on the basis of sex that do not fall within the Final Rule’s definition of sexual harassment and/or jurisdictional scope.

Schools may decide for themselves how to handle OSH cases.
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 education program or activity receiving Federal financial assistance.
MANDATORY DISMISSAL

If the complainant was not “a person in the United States” at the time of the incident, the incident is not Title IX Sexual Harassment (TIXSH), and the school must dismiss the formal complaint as a Title IX matter.
DISMISSAL ANALYSIS

WHO (person in the US)
THRESHOLD QUESTION 2: WHERE DID THE INCIDENT(S) TAKE PLACE?

- Programs/Activities
- On Campus
- Anywhere if impact results

Obama Era
THRESHOLD QUESTION 2:
WHERE DID THE INCIDENT(S) TAKE PLACE?

New Rule
Substantial Control over Context *(Where)*

**Locations**
- Residence halls
- Classrooms
- Campus grounds
- Greek houses

**Events**
- School sporting events
- School festivals

**Circumstances**
- Athletics
- Extracurriculars
- Clinics/Internships

**Everything Else**
- Private off-campus housing
- Off-campus bars or restaurants
- Off-campus parties
- Personal travel
Where do e-interactions take place?

- Physical Location of Parties
- Hardware
- Platform/Network
- Event/Activity
E–INTERACTIONS POP

• Working from home on a school–issued laptop, a professor sends pornography to colleague

  * Hardware * Platform/Network

• Students are listening to a Zoom lecture from home on personal devices. One sends another a harassing note in the private chat.

  * Platform/Network * Event/Activity

• A student uses an iPhone to send nude photos of their ex to three friends. One of the friends is on campus.

  * Physical location
Did this e-interaction take place in our education program or activity?

One student keeps texting another explicit messages despite being asked to stop.

Physical Location of Parties?
Both off campus

Hardware?
Both using personal cell phones

Platform/Network?
Both on cellular or home networks

Event/Activity?
Always happens late at night
MANDATORY DISMISSAL

If the incident did not take place within the school’s program or activity, the incident is not Title IX Sexual Harassment (TIXSH), and the school must dismiss the formal complaint as a Title IX matter.
DISMISSAL ANALYSIS

WHO (person in the US)

WHERE (in school program)
THRESHOLD QUESTION 3: WHAT TYPE OF CONDUCT OCCURRED?

1. Sexual Assault
   Dating and Domestic Violence
   Stalking

2. A school employee conditioning the provision of an aid, benefit, or service on participation in unwelcome sexual conduct

3. Unwelcome conduct (Expressive: verbal, written, body language)*

   * determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school’s education program or activity
What constitutes sexual harassment?

“Unwelcome conduct of a sexual nature,” that includes “unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.”

“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 school’s education program or activity”
New Definition of Sexual Harassment

- Sending a highly explicit pornographic image on a single occasion (not pervasive)
- Sending swimsuit pictures on a daily basis (not severe)
- Sending highly explicit pornographic images on a daily basis
MANDATORY DISMISSAL

The school must dismiss the formal complaint with regard to that conduct* for purposes of sexual harassment under Title IX.

* Complaint could be dismissed in part
DISMISSAL ANALYSIS

WHO (person in the US) → WHERE (in school program) → WHAT (clery, qpq, level 4)

Investigation
MANDATORY DISMISSAL POP QUIZ

• Complainant sexually assaulted by fellow student at his off-campus apartment. DISMISS

• Complainant propositioned by professor and offered higher grade at University’s study abroad program in Luxembourg DISMISS

• Student in clinical nursing program sexually harassed by patient at hospital KEEP

• Student pushed to the ground on athletic field by angry boyfriend – just one occasion KEEP

• Professor tells student that he is her type and she could give him the climax of his life DISMISS
Top Ten Things to Know about Investigations under the New Rule
The Top Ten

1. Impartiality is important.
2. The investigator does not adjudicate.
3. Parties are entitled to notice of all interviews.
4. An advisor may be present at all meetings.
5. The school has the burden of collecting evidence.
6. Parties may freely gather and present evidence.
7. Parties may freely discuss the allegations.
8. Parties may inspect and review evidence.
10. Investigators may be questioned.
The Importance of Impartiality

- Conflict of Interest
- Bias
- Pre-judgment
- Training
Conflict of Interest

Could the outcome of this case impact me one way or another? (i.e. Do I have a dog in this fight?)

Relationship – party or witness

Reputation

Interest – financial, programmatic
“Believe Women”

“When you’ve taught as long as I have, you know students lie.”

“Athletes have been given a sense of entitlement to do whatever they want.”

“Typical fraternity house atmosphere.”
Pre-judgment

Classic “two drunk kids” case.

“I had one almost exactly like this last year.”

Respondent presumed not responsible.

Be open to the possibility of alternative explanations (The Warehouse Door)
No “single investigator” model

Fair Investigation + Fair Adjudication → Fair Determination
Minimize Determinations

Raul showed us texts and time-stamped photos that were consistent with his account of what happened. Paul gave a different timeline every time we spoke to him and said he had accidentally deleted all his texts. Raul’s account is more credible.

The parties most likely had sex prior to going out for pizza. Connor was confident that they had sex prior to leaving the apartment. Julia wasn’t sure about that, but said her memory wasn’t very clear.
3 Adequate Notice

- Initial Notice: Identity of parties involved
  Alleged conduct at issue
  Date and location

- Meeting Notices: Date, time, location
  Participants
  Purpose

I

In writing. Sufficient time to prepare to participate. Duty to supplement initial notice.
# An Advisor May Be Present

<table>
<thead>
<tr>
<th>You Must…</th>
<th>You May…</th>
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<tbody>
<tr>
<td>Allow each party to use their advisor of choice</td>
<td>Limit each party to one advisor</td>
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<td>Allow the advisor to be present at all meetings, interviews, etc.</td>
<td>Place limits on the advisor’s role</td>
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<tr>
<td>Have the advisors conduct the live questioning at the hearing</td>
<td>Require that questions be relevant, respectful, and non-abusive</td>
</tr>
<tr>
<td>Ensure that each party has an advisor at the hearing</td>
<td>Provide an advisor of your choice</td>
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The School has the burden of collecting evidence.

Party: I guess there must be a police report, because I called the police that night.

Investigator: Great. If you can get a copy, we will definitely include it in the report.

Investigator: Great. We would like to get that. Do you remember the name of the officer?
The School has the burden of collecting evidence, but...

The school (including you the investigator) cannot

Access

Consider

Disclose

Or otherwise use

a party’s records that are made by a physician, psychiatrist, psychologist, etc. without voluntary written consent to do so for the grievance process.
Parties may freely gather and present evidence.

Party: Here – I asked all my friends who were there to write down what they saw and sign the statement.

Investigator: We need to be the ones to collect evidence. If you think someone is a witness, just give his or her name, and we’ll take it from there.

Investigator: Thanks. Do you have phone numbers for these people?
Parties may freely discuss the allegations.

Party: I’m going to get together with my friend to compare our memories of that night.

Investigator: Don’t do that. It could interfere with your independent recollections. Don’t talk to your friend about the investigation at all.

Investigator: You’re free to do that if you choose. Just be aware that you and your friend could each be asked if you discussed your testimony in advance.
Parties may review the evidence.

- Relevant
- Directly Related
- Not Directly Related

Prior to finalizing the investigative report:

Ten days to submit a written response

Investigators Gather

Parties Review

• Relevant
• Directly Related

Investigators Write

• Summary of all relevant evidence
The Investigative Report

The report fairly summarizes the relevant evidence.

At least 10 days prior to the hearing, send the report to each party (and advisor)

** Check with coordinator re uniquely sensitive information
Investigators May Be Questioned

- Hearings may be virtual, but they must be live, i.e. everyone can see and hear one another in real time.
- Investigators must attend.
- The decision maker(s) may ask questions of the investigators.
- The parties’ advisors may ask questions of the investigators.
• The complainant gave you a list of 10 possible witnesses. Why did you only interview 5 of them?

• Did you check university security cameras for footage related to the incident?

• How long did you spend interviewing the complainant and how long did you spend interviewing the respondent?

• Why didn’t you include the parties’ texts of March 15 in the investigative report?

• Why did you include the parties’ texts of March 15 in the investigative report?
Parties may review the evidence.

- Relevant
- Directly Related
- Not Directly Related

Investigators Gather

Parties Review

- Relevant
- Directly Related

Investigators Write

• Summary of all relevant evidence

Prior to finalizing the investigative report

Ten days to submit a written response

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Sorting Information

All Information Gathered

Not Directly Related

Directly Related

Relevant

In the Review

In the Review

In the Report
General Principles of Information Sorting

Intent of the rule is to provide the parties with access to information. Philosophy:

Increased Access = Increased Fairness

Bad outcome 1: Party is surprised at hearing by information not shared with them previously.

Bad outcome 2: Party never had a chance to see information that could have impacted the outcome of the case if they had only had a chance to explain its relevance.
Avoiding Bad Outcomes

• Be as thorough as possible in the investigation and interviews.

• Ask “exhausting” questions: *Is there anything else? Have you looked carefully on your phone for additional information? Please notify us right away if anything else comes to you.*

• Error on the side of including information in the review of “directly related” material.
What do those terms mean? Good question…

**Relevant**
Evidence, whether inculpatory or exculpatory, on which the school will rely in reaching a determination regarding responsibility.

**Directly Related**
Information or evidence that has a clear relationship to the allegations at issue but is not necessary to reach a determination regarding responsibility.

**Not Directly Related**
Information or evidence that has no readily apparent relationship to the allegations at issue.
Complainant: When Kai was touching me, I said, “I don’t think we should do this.”

Respondent: When I was touching Rush, Rush said, “that feels amazing.”

Respondent: This is even more stressful because my mother is being treated for breast cancer right now.

Parties’ Lyft ride receipts for the night.

Complainant’s therapy records (made by counselor employed by school but complainant has not consented to their release).

Text messages between complainant and respondent on the day following the incident.
Rape Shield Rules

Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant

1. Offered to prove that someone other than respondent committed the conduct
2. Concern specific incidents of prior sexual behavior with respondent and offered to prove consent

Questions/evidence about respondent’s sexual predisposition or prior sexual behavior may be relevant
The Investigation Plan and Process
To Be a Successful Investigator…

Focus on learning, refrain from assuming

Active listening

Assess credibility

Search for corroboration

Gather and organize the most robust set of facts

Create reliable documentation
Typical Investigator Responsibilities

- Frame/plan investigation
- Gather evidence
- Create report
- Provide conclusions and/or recommendations on responsibility and/or sanctions (as applicable)
- Provide subsequent testimony (as applicable)
Make order out of chaos and painting as clear a picture as possible.
The 3 Stages of Investigation

Stage 1: Orienting
- Refresh on P&P/values
- Draft investigation plan

Stage 2: Gathering
- Interview
- Collect

Stage 3: Organizing
- Create report
Stage 1: Orienting

- **Refresh on P&P/values**
- **Draft investigation plan**

⇒ Re-sensitize yourself to the issues of objectivity, trauma, etc.

⇒ Review key aspects of P&P such as definitions

**get your investigator hat on**
Define (Initial) Scope

- Single or multiple incidents?
- Single or multiple perpetrators?
- Single or multiple forms of misconduct?
- Post-assault harassment or retaliatory conduct?
- Relevant prohibited conduct and definitions?
Critical Importance of Prohibited Conduct Definitions

Policy violation determination central to investigation and adjudication

Relevant definitions must be studied and referred to often and must guide investigator/adjudicator actions
1. Start With the Official Definition

“Offensive Sexual Touching” is the intentional sexual touching, without consent, of another person’s intimate parts (including, but not limited to, genitalia, groin, breast, buttocks, or mouth), whether clothed or unclothed, or the intentional sexual touching, without consent, of another person with one’s intimate parts, or for purposes of sexual gratification, using force to cause another person to touch his/her own or another person’s intimate parts. Offensive Sexual Touching may be committed using one’s own body, a part thereof, or an object.

Stage 1: Orienting
2. Identify the Elements

1. ☐ Intentional touching

2. ☐ Without consent

3. ☐ Of another person’s intimate parts
   (intimate part: ________________________)

   or

3. ☐ With respondent’s intimate parts
   (intimate part: ________________________)

   or

3. ☐ For purposes of sexual gratification
   ☐ Using force
   ☐ To cause another person to touch their own or another person’s intimate parts
   (intimate part: ________________________)

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3. Determine Whether Each Required Element is Present

1. □ Intentional touching
2. ☑ Without consent
3. ☑ Of another person’s intimate parts
   (intimate part: breasts
   
   or

3. □ With respondent’s intimate parts
   (intimate part: _________________________)

   or

3. □ For purposes of sexual gratification
   □ Using force
   □ To cause another person to touch their own or another person’s intimate parts
   (intimate part: _________________________)
Investigation Timeline

Stage 1: Orienting

- Establish a preliminary timeline for the investigation
  - Interviewing parties
  - Interviewing witnesses
  - Drafting statements
  - Verifying statements
  - Gathering/obtaining documentation
  - Drafting a report
Investigation Timeline

Log

- Log the receipt of information, evidence, and other materials as it is obtained in the course of the investigation
- Log unsuccessful searches for evidence
- Log delays
- Log communications with witnesses
- Log procedural communications with administrators, attorneys, etc.
Stage 2: Gathering

Forms of Evidence

- Testimonial
- Documentary
- Physical
The Importance of Corroboration

Corroboration = confirmation from another source

What information/source could confirm or rebut each aspect of a party’s statement?
Other Forms of Evidence

- Police reports
- Campus security reports
- Hospital/medical reports
- Security video tapes
- Social media posts
- University records
- Building entry/exit logs
- Photographs & videos
- Diary/journal entries
- Character evidence
- Texts, voicemails, & emails
Stage 2: Gathering

Interviewing
Interviewing Basics: Pre-Interview

- Keep private (not just content, but occurrence)
- Hold in-person
- Allow presence of advisor
- Consider a partner if possible
- Draft an outline
Interviewing Basics: Setting the Tone

- Develop rapport to put the individual at ease
- Explain your role – neutral, no conclusions have been reached
- Be sensitive to fears, embarrassment & confusion
- Be objective, straightforward and matter-of-fact
- Be prepared to answer questions about confidentiality/privacy/information security (or refer them to the Title IX Coordinator!)
Meeting with a Complainant
Issue Spotting: The Complainant’s Monologue

• Option to withdraw complaint in writing
• Advisor options
• Mediation
• Adjudication/questioning
• Expulsion for lying in investigation
• Confidentiality
  • w/r/t Respondent
  • w/r/t parents
  • w/r/t others
• Retaliation
Meeting with a Respondent
Issue Spotting: The Respondent’s Monologue

• Participation – mandatory or voluntary
• Requested delay
• Confidentiality
  • Coach
  • Parents
• Protection of sibling
• Friends being dragged in
• Retention of/need for a lawyer
• Potential threats of retaliation
Interviewing Best Practices

- Considerations
  - Partner/Assistant
  - Recording
  - Write-up of interview immediately afterwards
  - Reviewing interview write-up with interviewee

- Accuracy is key in your notes
  - Demarcate exact quotes
  - Do not include analysis/conclusions
  - Note areas of agreement/disagreement

- Remember
  - Potentially for an external audience
The Interview Funnel

Broad collection of data

Careful clarification of answers

= Information you need
The Interview

- Allow time for the interview to wander

- Don’t take charge immediately. Allow the witness to narrate without interruption. Clarify what you need to when their narration is complete. If the flow is interrupted, use open-ended questions to get it restarted.

- Use specific, precise, closed questions to get a precise answer when one is needed.

- Do not be accusatory or judgmental. Minimize negative reaction cues.
Useful Open Questions

- Would you be willing to tell me more about…?
- How did you feel about…?
- What did you do after…?
- What happened then?
- What did you mean when you said…?
- Can you tell me more about that?
- How did you become involved in…?
- What is your understanding of…?
How to Ask Questions

Avoid: Compound Questions

Legal Terms

Examples:

- Did you give a clear answer or did you just leave it open ended?
- Have you ever been through an adversarial adjudication process before?
How to Ask Questions

Do: Ask how interviewee is defining words. Push beyond euphemisms. Exhaust, i.e. “anything else?”

Examples:

- You said he acted “crazy.” In what sense?
- When you said she “wanted to get with you,” what did you mean by that?
- Is there anything we haven’t covered about the time in the park that you think would be helpful for me to know?
How Not to Ask Questions

Stage 2: Gathering

Do not:
- Editorialize
- Comment

Examples:

- Ugh – you must have been disgusted.
- This is so typical of Kappa Alphas.
- Something similar happened to me when I was about your age…
How to Ask Questions

Stage 2: Gathering

Do: Think about the elements of definitions. Ask key questions directly.

Examples:

- Did you intentionally touch her breasts?
- How many text messages did you send?
- What signals did you get which indicated your conduct was welcomed?
Helpful Questions to Include

- Who else should we talk to?
- Have you spoken/texted with anyone about this or posted anything about this online?
- How have you been affected by this?
- How did you communicate what you wanted to responding party?
- How did you know your actions were ok with the reporting party?
- What motive would others have to accuse/lie?
Key Info/Reminders

- At the **beginning** of EVERY interview:
  - Brief explanation of investigatory process/purpose
  - Objective and unbiased
  - Collecting information; not making decision
  - Explain that information will be shared

- At the **end** of EVERY interview:
  - Ask for documents
  - “Is there anything else you want me to know?”
  - Invite follow-up
  - No retaliation (against you/by you)

Stage 2: Gathering
Assessing Credibility

- General demeanor
- Opportunity/capacity to observe event
- Consistency with other evidence (including prior statements)
- Willingness to lie/be truthful about other things
- Stake in the outcome/motive to lie
- Plausibility/Improbability of account
- Specificity v. vagueness
- Willingness to share texts, etc.
- Corroborating evidence
- Effects of trauma

Stage 2: Gathering
Credibility Determinations: Inconsistencies

- Individual is inconsistent in own report
  - Trauma or fear?
  - Lying?
  - Ask!

- Individual is inconsistent with other evidence
  - Outlier?
  - Coached testimony?
  - Ask!

Stage 2: Gathering
Credibility Determinations: Motive

- What is the relationship with each party and with other witnesses?

- Consider:
  - Witness with an axe to grind?
  - Witness who wants to protect?
  - Witness who loves the spotlight?
  - Witness who doesn’t want to be involved?
  - Witness who has a ideological bias?
Post-Interview Tasks

- Create a witness statement that includes all relevant information and leaves out information that is privileged or not directly related.

- Consider sharing the statement with the witness for confirmation.

- Consider following up with other key witnesses to ask for response.

- Determine what key facts are in dispute. Consider whether another source of information could shed light on those facts.
Stage 3: Organizing

- Start with deep understanding of institution-specific report procedure, practices, and guidance

- Don’t reinvent the wheel! (best of samples & templates)
Investigative Report Table of Contents

- Executive Summary
- Allegations/Response (jurisdictional exclusions)
- Applicable policies/definitions
- Investigative Process
- Statements and credibility context
- Description of other evidence (attach) and how it corroborates or undercuts parties’ statements
Tips for Drafting

- Go back to your investigation plan
- Make use of timelines/other graphics
- Remember what you are investigating – the specific conduct prohibited by Title IX
- Carefully review the elements of each definition – Make sure each one is addressed by the content of the report
- Write for someone who knows NOTHING about the parties, the issues and the situation
- Proofread – no typos, spelling errors, assumptions, unexplained jargon
- Ultimately writing for a reader later in the process
Not in the Investigation Report

- Legal jargon
- References to legal consultation
- Physical descriptions of the parties (unless directly relevant)
- Personal opinions/value judgments
- Conclusions that should be made by the adjudicators
Your Parker Poe Title IX Team

For Title IX assistance, contact Team Lead Josh Whitlock at joshwhitlock@parkerpoe.com or 704-335-6622