

# TITLE IX GRIEVANCE POLICY & PROCEDURE OVERVIEW

To introduce new Policy and Procedures in compliance with the Title IX regulations that are in effect as of August 14, 2020

# OVERVIEW

- Applicable laws, regulations, and federal regulatory guidance
- The scope of the University's Equal Opportunity, Harassment, and Nondiscrimination Policy and Procedures
- Reporting, confidentiality, and privacy requirements

# 2020 TITLE IX REGULATIONS

- Issued May 6, 2020
- Effective and Enforceable August 14, 2020
  - Amend the Code of Federal Regulations and have force and effect of law
  - Some provisions already mandated by case law in some jurisdictions
  - Intervening variables may impact enforcement going forward (lawsuits, election, etc.)
- The Regulations
  - Significant, legalistic, prescriptive, and due process heavy
  - Enforceable by OCR

# CURRENT STATE OF SUB-REGULATORY GUIDANCE

- Withdrawn:
  - 2011 Dear Colleague Letter (DCL)
  - 2014 Q&A on Title IX and Sexual Violence
  - 2016 DCL on Transgender Students
- Still in effect:
  - 1975 Regs, as amended
  - 2001 OCR Revised Sexual Harassment Guidance
  - 2003 DCL on Title IX and Free Speech
  - 2010 DCL on Harassment and Bullying
  - 2013 DCL on Pregnant and Parenting Students
  - 2015 DCL on the role of Title IX Coordinators
  - 2017 Q&A on Campus Sexual Misconduct issued as interim guidance, still in place

## DOE V. UNIVERSITY OF SCIENCES

- May 29, 2020
- Third Circuit case that covers Pennsylvania
- The Court held that Usciences' contractual promises of 'fair' and 'equitable' treatment to those accused of sexual misconduct require at least a real, live, and adversarial hearing and the opportunity for the accused or their representative to cross-examine witnesses—including the accuser(s).
- Applies to private universities

## ITEMS TO NOTE

- Floor v. Ceiling
- Policy needs to be updated by August 14, 2020
- Live Cross Examination
- Decision Maker Role
- Advisor Role
- Training materials on our website

## TERMS

- Recipient
- Grievance Process
- Definitions that must be adopted:
  - OCR Definition of Sexual Harassment
  - Clery Definition of Sexual Assault
  - VAWA definitions of Dating and Domestic Violence and Stalking

# PARTICIPANTS

- Complainant                      Respondent
- Title IX Coordinator            Deputy Coordinators
- Investigators
- Decision-makers
  - Hearing Panel/Chair
- Appellate Decision-makers (UJC)
- Advisors
- Hearing Facilitators
- Officials with Authority        Mandated Reporters

## STANDARDS FOR NOTICE

- Regulations do not require a Title IX investigation unless the institution receives **actual notice through a formal complaint**
  - Actual notice = written, signed complaint of sexual harassment to TIXC or appropriate official who has authority to implement corrective measures (OWA)
  - Constructive notice/respondeat superior – insufficient to hold institution responsible
- Formal complaints are needed even for informal resolutions under regs
- All forms of notice to TIXC requires appropriate supportive measures

# EQUAL OPPORTUNITY, HARASSMENT, AND NONDISCRIMINATION POLICY

- One policy to address all civil rights-based offenses on campus;
- Applies to students, faculty and staff;
- Addresses Title IX; other sexual misconduct; and all other protected classes;
- Two Processes – one that complies with new Title IX regulations “Process A” (i.e. live hearing and cross-examination); the other addresses all other protected class discrimination and harassment “Process B” (robust investigation)

# PROCESS A PROCEDURES

- Expands due process per OCR
- Must state a presumption that Respondent is not responsible until determination reached in Notice of Investigation
- Continue to use preponderance of evidence standard
- Jurisdiction for Title IX cases limited to:
  - Incident occurred in the United States
  - Must have control of the “harasser” and the context of the harassment
    - Incident must have occurred in program or activity of the institution
  - Complainant is participating in or attempting to participate in University activity
  - Must meet definition of Sexual Harassment
- Must “dismiss” under Title IX if doesn’t meet these requirements (“the floor”)
- However, due to the USciences decision and our own campus practices – we are further extending jurisdiction for Process A to off campus conduct that affects a substantial University interest and we are including hostile environment sexual harassment and sexual exploitation

## CONFLICT OF INTEREST / BIAS

- Grievance process must treat parties “equitably”
  - Must be designed to restore or preserve access to education programs
  - Must include enhanced due process protections before disciplinary sanctions are imposed
- Prohibits conflict of interest or bias by coordinators, investigators, and decision makers against parties generally or against an individual party

# SUPPORT MEASURES

- **Must be offered to both parties; cannot be punitive in any regard.**
- Referral to counseling, medical, and/or other healthcare services;
- Referral to the Employee Assistance Program;
- Referral to community-based service providers such as the Victim Resource Center and Domestic Violence Service Center;
- Visa and immigration assistance;
- Student financial aid counseling;
- Education to the community or community subgroup(s);
- Altering campus housing assignment(s);
- Altering work arrangements for employees or student-employees;

# SUPPORT MEASURES

- Safety planning;
- Providing campus safety escorts;
- Providing transportation accommodations;
- Implementing contact limitations (no contact orders) between the parties;
- Academic support, extensions of deadlines, or other course/program-related adjustments;
- Trespass or Persona Non Grata (PNG) orders;
- Connection to local resources for help on how to obtain a Protection from Abuse or Sexual Violence Protection Order;
- Timely warnings;
- Class schedule modifications, withdrawals, or leaves of absence;
- Increased security and monitoring of certain areas of the campus;
- Any other actions deemed appropriate by the Title IX Coordinator

# INVESTIGATION

- Continue to use external investigators when we are able to;
- Parties continue to have a right to an advisor for all meetings/interviews;
- Prior to an investigation, parties may agree to an informal resolution process (must file a formal complaint first though);
- The investigation/hearing process will take 60 – 90 business days;
  - Time period extended to allow for new requirements
    - Prior to conclusion of investigation, the parties must be given 10 business days to review the draft report and respond (must be given ALL evidence to review, even if not used or determined relevant by the investigator);
    - The report is then finalized and the parties are given another 10 business days to review before a hearing is scheduled.

## HEARING

- Mandated live hearings for Higher Education
- Specific Training for Decision Makers Required
- Parties and all witnesses must attend hearing and submit to live, advisor-led cross-examination
  - Otherwise **all statements** submitted by absent party must be excluded
  - If party does not want an advisor, we still need to appoint one to conduct cross-examination on behalf of that party

# HEARING

- Hearing panel will consist of three individuals, one of which is designated the voting Hearing Chair;
- Title IX Coordinator and/or Deputy TIXC will usually serve as the hearing facilitators;
- Provisions for separate rooms, video-based hearing;
  - Must be able to clearly hear and see other parties
- **Must allow live cross-examination** to be conducted exclusively by each party's advisor
  - Verbal, direct, in real time

# HEARING LOGISTICS

- Hearings are going to be much longer given the fact that all witnesses need to be present and questioned by the panel as well as cross-examination of each party and witness;
- Time constraints taking everyone's schedule into consideration;
- Covid-related concerns for social distancing

# SANCTIONS

- The sanctioning process and range of sanctions will remain the same
- Factors to consider:
  - The nature, severity of, and circumstances surrounding the violation(s);
  - The Respondent's disciplinary history;
  - Previous allegations or allegations involving similar conduct;
  - The need for sanctions/responsive actions to bring an end to the discrimination, harassment, and/or retaliation;
  - The need for sanctions/responsive actions to prevent the future recurrence of discrimination, harassment, and/or retaliation;
  - The need to remedy the effects of the discrimination, harassment, and/or retaliation on the Complainant and the community;
  - The impact on the Parties;
  - Any other information deemed relevant by the Decision-maker(s)
- Impact statements

# APPEALS

- Must offer equitable appeal based on determination or dismissal of any allegations
- All parties receive notification of any appeal
- Opportunity for all parties to oppose outcome
- Written decision with rationale delivered simultaneously to the parties
- Appeal decision maker(s) cannot have had any other role in the investigation or resolution process
- A three-member panel chosen from the University Judicial Council will be designated to hear the appeal. This generally consists of the Dean of Students, one faculty representative and one staff representative.
  - However, this is subject to change dependent on the circumstances on a case-by-case basis.

# APPEALS

- **Grounds for Appeal**
- Appeals are limited to the following grounds:
  - Procedural irregularity that affected the outcome of the matter;
  - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
  - The Title IX Coordinator, Investigator(s), or Decision-maker(s) had a conflict of interest or bias for or against Complainants or Respondents generally or the specific Complainant or Respondent that affected the outcome of the matter.

# APPEAL CONSIDERATIONS

- Decisions on appeal are to be deferential to the original decision, making changes to the finding only when there is clear error and to the sanction(s)/responsive action(s) only if there is a compelling justification to do so.
- Appeals are not intended to provide for a full re-hearing of the allegation(s). In most cases, appeals are confined to a review of the written documentation or record of the original hearing and pertinent documentation regarding the specific grounds for appeal.
- An appeal is not an opportunity for Appeal Decision-makers to substitute their judgment for that of the original Decision-maker(s) merely because they disagree with the finding and/or sanction(s).

# APPEAL CONSIDERATIONS

- The Appeal Chair/Panel may consult with the Title IX Coordinator on questions of procedure or rationale, for clarification, if needed. Documentation of all such consultation will be maintained.
- Appeals granted based on new evidence should normally be remanded to the original Investigator(s) and/or Decision-maker(s) for reconsideration. Other appeals may be remanded at the discretion of the Title IX Coordinator or, in limited circumstances, decided on appeal.
- In rare cases where a procedural error cannot be cured by the original Decision-maker(s) (as in cases of bias), the appeal may order a new hearing with a new Decision-maker(s).
- The results of a remand to a Decision-maker(s) cannot be appealed.
- In cases in which the appeal results in reinstatement to the University or resumption of privileges, all reasonable attempts will be made to restore the Respondent to their prior status, recognizing that some opportunities lost may be irreparable in the short term.

## LONG-TERM REMEDIES

- Following the conclusion of the resolution process, and in addition to any sanctions implemented, the Title IX Coordinator may implement additional long-term remedies or actions with respect to the Parties and/or the campus community that are intended to stop the harassment, discrimination, and/or retaliation, remedy the effects, and prevent reoccurrence.
  - Counseling
  - Educational programming
  - Climate studies
  - Etc.

# REPORTING / PRIVACY

- OWA
- Mandated Reporters
- Confidential Sources
- Privacy

# QUESTIONS/DISCUSSION?

- Open Discussion