

TITLE IX NEW REGULATIONS – INITIAL REVIEW

PRESENTATION FOR SEXUAL HARASSMENT TASK FORCE
JUNE 25, 2020

TITLE IX NEW REGULATIONS

INTRODUCTION

- **New Title IX Process for Sexual Harassment**
 - Effective Date: August 14, 2020
 - UMass joined the AG's Declaration for Injunctive Relief (may extend effective date)
 - Application: Students & Employees (including Faculty)
- **EOO & Student Conduct Processes for other Sexual Misconduct**
 - Employees - Other sexual misconduct would be addressed following the university's Equal Opportunity Concerns / Complaint Procedure
 - Students - Other sexual misconduct would be addressed following the university's Student Code of Conduct
- ***Both areas of sexual conduct are governed by the university's Non-Discrimination Guidelines***

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- Preemption: New Regulations preempt any conflicting state & federal laws (sexual harassment) and FERPA
- Discrimination: The institution treatment of both the complainant and the respondent could constitute sex discrimination under Title IX
- Actual knowledge: Only actual knowledge by the Title IX Coordinator or an official with the authority to institute corrective measures triggers a response obligation by the institution

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- Jurisdiction: The regulations narrow the institution's jurisdiction
- Reporting: Title IX Coordinator / Official with authority to institute corrective measures
- Notice of Complaint: Signed Formal Complaint to Title IX or Official with Authority to institute corrective measures
- Supportive Measures: Available to **both parties**
Not punitive or disciplinary in nature
- Dismissal of Complaint: Respondent no longer in the Institution;
Complainant must be participating in a school program or event at the time of the complaint

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- Institution must dismiss a matter under the Title IX process if:
 - Conduct does not meet the regulations’ definition of sexual harassment
 - Incident did not occur in the institution’s education program or activity, or,
 - Did not occur in the United States
- Standard of Proof: Institution must select between preponderance of the evidence or clear and convincing evidence
Same standard or proof **must apply** to students & employees (including faculty)

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- Right to Discuss Investigation & Provide Evidence:
 - All parties have the right to discuss the allegations under investigation and to gather and provide relevant evidence (interpreted broadly)
- Advisors:
 - Institution must provide the parties with the same opportunities to have an advisor **of their choice** during any related meetings, the hearing or other proceeding. Institutions can restrict their participation during the investigation and other proceeding, except for cross-examination. Only Advisors can ask questions during cross-examination. Institutions must provide advisors if the party does not select one.

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- Live Hearing & Cross Examination for both Students and Employees (including Faculty)
 - All cross-examination must be handled live in real time and orally by an advisor in front of a fact-finder (hearing officer), who must make real-time evidentiary decisions as to the appropriateness of questioning
 - Either party can select to undergo the live-hearing and cross-examination in separate room (**both parties must be able to see each other**)
 - All relevant questions must be allowed; the only questions that may be excluded are those protected by rape-shield protections, health information, and privileges in law

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- The hearing officer must “first determine whether the question is relevant and explain any decision to exclude a question as not relevant.”
- No “**out of hearing**” statement by **any person** (whether a party or witness) may be considered by the factfinder unless the person who made the statement submits to cross examination; no adverse inference permitted by failure to appear. A party may have expert witnesses.
- **Recording or transcript** of the hearing **is required**, and must be made available to parties for inspection.

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- Mandatory Appeals
 - procedural irregularity;
 - newly-discovered evidence previously unavailable; or
 - bias that affected the outcome of the matter
- Obligations of the Institution upon receipt of a Formal Complaint
 - Respond in a reasonable period of time depending on the circumstances
 - Title IX Coordinator must contact the complainant and explain the process for filing a formal complaint & discuss supportive measures

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- Institution Obligations...
 - Include a statement that the respondent is presumed not responsible until a determination is made and that such determination is made at the conclusion of the grievance process.
- Anonymous Reporting and Anonymous Filing of formal complaint:
 - An anonymous complaint "triggers" the institution's obligation to respond in a manner that is not clearly unreasonable in light of the known circumstances. Where the complainant is anonymous, a **formal complaint** initiated by the complainant **cannot** be filed.

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- Informal Grievance Process:
 - An institution may not require the parties to participate in informal resolution and may not offer informal resolution **unless a formal complaint is filed.**
 - An institution **must not** offer or facilitate an informal resolution process to resolve allegations that **an employee sexually harassed a student.**
 - An institution must obtain voluntary, **written consent and provide the parties with written notice.**

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- Training:
 - Ensure that training on sexual harassment, the scope of the institution’s education program activity, and how to conduct an investigation and grievance process is provided to all coordinators, investigators, hearing officers, decision-makers and any person who participates in the grievance process or facilitates an informal resolution—including hearings, appeals, and informal resolution processes
 - Training materials must be made available for inspection either in-person or on the institutions website
- Final Determination after the Hearing:
 - Hearing Officer must provide the determination in writing and, if applicable, must include any sanctions.

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- Removal from Institution:
 - The institution may remove a respondent from its education program or activities on an emergency basis provided the institution performs an individualized safety and risk analysis, determines that **an immediate threat to the physical health or safety** of students or employees justifies removal and **provide the respondent with notice and an opportunity to challenge the decision** immediately following the removal.
- Recordkeeping:
 - The institution must maintain the documentation for seven years.

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New Regulations Terms & Definitions:

- **Complainant:** an individual who is alleged to be the victim of conduct that could constitute sexual harassment. (NOTE: Parents and guardians who have a legal right to act on behalf of parties may do so, including filing a formal complaint).
- **Respondent:** an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

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- **Supportive measures:** non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant **or** the respondent before **or** after the filing of a formal complaint **or** where no formal complaint has been filed.
 - Designed to restore or preserve equal access to the institution’s education program or activity without unreasonably burdening the other party, including measures designed to protect the physical safety of all parties or the institution’s educational environment, or deter sexual harassment.
 - Disciplinary Action Against Respondent. Discipline may not be imposed on a respondent without first complying with the grievance process, which includes providing a party with written notice of the date, time, location, participants, and purpose of all investigative interviews with a party with sufficient time for the party to prepare and participate.

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- **Formal Complaint:**
 - A document filed by a complainant (the alleged victim's parent or guardian on the alleged victim's behalf or signed by the Title IX Coordinator) alleging sexual harassment against a respondent and requesting that the institution investigate the allegations of sexual harassment. *(Please note that if the actual recipient is not participating and there is no other evidence of the conduct the formal Title IX complaint can not be filed.)*

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- **Formal Complaint continued:**
 - The Title IX Coordinator is not a complainant or otherwise a party during the grievance process and the Title IX Coordinator must still serve free from bias or conflict of interest for or against a party. The formal complaint may be a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the institution) that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.

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- **Actual knowledge** is notice of sexual harassment or allegations of sexual harassment provided
 - To an official of an institution who has authority to institute corrective measures on behalf of the institution.
 - Title IX Coordinators are always deemed to be officials with authority to take corrective action.
 - *Note:* Constructive knowledge, imputation of knowledge, knowledge only by the respondent (as the accused person), and knowledge by any official other than those mentioned above, **are insufficient.**

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- **Sexual Harassment** means conduct on the basis of sex that satisfies one or more of the following:
 - An employee of the institution conditioning the provision of an aid, benefit, or service of the institution on an individual’s participation in unwelcome sexual conduct; (*quid pro quo*)
 - 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 institution’s education program or activity; or
 - “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).

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- **Education program or activity:** includes locations, events, or circumstances over which the institution exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by an institution
- **Deliberately Indifferent:** An institution is “deliberately indifferent” if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

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Do not investigate as a Title IX Formal Complaint if the alleged conduct

- (1) does not meet the regulations' definition of sexual harassment or
- (2) did not occur within the institution's program or activity (*whether the conduct occurred in a location or in a context where the institution owned the premises; exercise oversight, supervision, or discipline or funded, sponsored, promoted or endorsed the event or circumstances*), or
- (3) did not occur against a person in the U.S.

In these circumstances the Title IX grievance process is dismissed and the matter will be referred to EOO or Student Conduct for their review.

- **Next Steps**
 - Weekly meetings with Office of the General Counsel & the other UMass Campuses Title IX leaders to continue the review of the new regulations, and to determine system-wide and campus specific changes to the policies, procedures, training, resources, etc.
 - Implement necessary changes & training before August 14, 2020