

# **Commonwealth of Massachusetts: The Community Colleges of Massachusetts**



## **“New Title IX Regulations – DRAFT Amendments to the PAA Process”**

by Evan C. Bjorklund, *Associate General Counsel*

**August 5, 2020**



# Definitions



## **Decision Maker:**

*“An individual who is not the same person as the Title IX Coordinator (or designee), chosen by the Title IX Coordinator to reach a determination regarding responsibility by applying the standard of evidence the College has designated in the College’s grievance process for use in all Formal Complaints of Title IX Sexual Harassment.”*

- Consider experience conducting hearings and investigations (e.g.-student grievance officer; student code of conduct officer, etc.)

## **Formal Complaint:**

*“Formal Complaint means a document signed by a Complainant or signed by the Title IX Coordinator alleging sexual harassment against a Respondent about conduct within [the College’s] education program or activity and requesting initiation of the [College’s] grievance procedures, [including an investigation of] the allegation of sexual harassment. At the time of filing a Formal Complaint, a Complainant must be participating in or attempting to participate in the education program or activity of the College with which the Formal Complaint is filed...”*

## **Title IX Sexual Harassment:**

*“Formal Complaints of Title IX Sexual Harassment will be subject to review in accordance with the Title IX Sexual Harassment Complaint Process. Notwithstanding, where a Formal Complaint of sexual harassment is not filed, the College reserves the right to address such other complaints under the existing Complaint Process and using the definitions of sexual assault, dating violence, domestic violence or stalking as provided herein under paragraph 5 (3.)(A-D) or the sexual harassment definition as provided herein under paragraph 6.”*

- Title IX Coordinator advised to handle all discrimination claims based on sex (regardless of complaint process initiated).

## **Advisor:**

*“The advisor can be anyone, including an attorney (but only Title IX Sexual Harassment cases)”*

- No training required (for advisors chosen by students, even if they are employees).
- Colleges must provide advisor for the purposes of cross examination, only.
- No advisor will be able to actively speak, except during cross examination/question asking during hearing.

## **Removed/altered definitions and terms:**

**Discussion:** Title IX Offenses, (old) formal complaint, interim protective measures, and interim action (emergency removal).



# Scope of Investigations: Title IX vs. Title VII (et al)



## **Title IX Sexual Harassment Complaint process followed for all sexual misconduct if:**

- 1) Formal Complaint *must*\* have:
  - a) Signed written complaint requesting action on behalf of College
  - b) Conduct occurred in College's education program or activity
  - c) In the United States
- 2) Facts alleged plausibly meet definition of Title IX Sexual Harassment

## **If neither exist, or other exclusions\* apply:**

- May be addressed under typical Complaint Process (no hearing)
- Would utilize old definition of sexual harassments (para #6) or definitions of sexual assault, dating violence, domestic violence or stalking (paragraph 5 (3.)(A-D)).

*\*“The College may dismiss any Formal Complaint for the purposes of Title IX Sexual Harassment if: 1) A Complainant withdraws the Formal Complaint or any allegations therein; 2) The Respondent is no longer enrolled at or employed by the College; or 3) Specific circumstances prevent the College from gathering evidence sufficient to reach a determination as to the Formal Complaint or allegations therein.”*



# Complaint Procedure = 2 Complaint Processes



## Complaint Process:

- Informal resolution possible
- Follows typical (previous) process
- College has discretion to utilize when Title IX Formal Complaint requirements are not met.

## Title IX Sexual Harassment Complaint Process:

- Informal resolution possible
- Follows new process  
Investigative Report, Hearing,  
Appeal
- If previously mentioned requirements met, this process must be used.



# Title IX Sexual Harassment Complaint Process



**Formal Complaint required:** May be consolidated

**Jurisdiction of the College:** *Must* dismiss vs. *May* dismiss

## **Step 1 - Investigation:**

- Discuss supportive measures with parties and notify them of the formal complaint (*5 days*). Respondent may respond (*5 days*).
- Conduct investigation by gathering evidence [relevant or not...exculpatory or inculpatory]; send to parties (*15 days*). Parties may respond (*10 days*).
- Draft Investigative Report that fairly summarizes the relevant evidence; send to parties (*10 days*). Parties may respond (*10 days*).
- Draft final Investigative Report that fairly summarizes the relevant evidence and responses [includes section on evidence deemed irrelevant by Title IX Coordinator]; send to parties and schedule hearing within 10 days (*10 days*).

## **Step 2 - Hearing:**

- Title IX Coordinator coordinates the hearing process. Decision Maker conducts the hearing.
- *“In general, hearings will proceed as follows:*
  - a. The Decision Maker shall summarize the Hearing Policy and allow the Title IX Coordinator the opportunity to briefly state the allegations and summarize the investigative report.*
  - b. Each party’s advisor will be given the opportunity to question the other party and any witnesses by presenting questions through the Decision Maker (including questions on credibility). If the Decision Maker determines a question is relevant, the other party will be asked to respond.*
  - c. The Decision Maker shall have a final opportunity to question the parties.*
  - d. The Decision Maker will conclude the hearing by informing the parties that they will issue a decision to the parties and their advisors within ten (10) days, and that it will be based upon a Preponderance of the Evidence standard (i.e.; more likely than not).”*



# Title IX Sexual Harassment Complaint Process (cont.)



## Hearing Policy:

- Questions and evidence about a Complainant's prior sexual behavior will be deemed irrelevant unless offered to prove that someone other than the Respondent committed the alleged misconduct or offered to prove consent.
- Upon request, College will appoint an Advisor for cross examination/questioning.
- Technology may be used; generally hearings will be live and private (no other recordings allowed).
- Decision Maker determines relevance; no reliance on statements made not subject to cross examination.

## Step 3 – Review and Decision by the Decision Maker:

- A written decision (10 days): *“Identification of the allegations potentially constituting sexual harassment; A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held; Findings of fact supporting the determination; Conclusions regarding the application of the College’s code of conduct to the facts; A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the College imposes on the Respondent, and whether remedies designed to restore or preserve equal access to the College’s education program or activity will be provided by the College to the Complainant; and The College’s procedures and permissible bases for the Complainant and Respondent to appeal.”*
- Title IX Coordinator implements
- Cross Examination limitations?

## Step 4 – Appeal to the President:

- *“A party who is not satisfied with the Title IX Coordinator’s decision to implement an emergency removal or dismiss a Formal Complaint; or, the Decision Maker’s written decision may file an appeal with the President within five (5) days of receiving said decision, respectively. Where practicable, within five (5) days of receiving the appeal, the President shall issue a written decision simultaneously to all parties, accepting, rejecting or modifying the decision, describing the result of the appeal and the rationale for the result. The President’s decision is final provided that any corrective action and/or discipline imposed are subject to applicable collective bargaining agreements. If the President is the Respondent, then the Chair of the College’s Board of Trustees shall consider the appeal and issue the written decision.”*



# Relevance



## Relevance Explained:

- Logical connection between the evidence and facts at issue
- Assists in coming to the conclusion – it is “of consequence”
- Tends to make a fact more or less probable than it would be without that evidence
- Both inculpatory and exculpatory

## Questions/Exceptions:

- Relevance requirement = for all questions asked by Advisors
- Questions that are *not relevant* consist of...
  - I. Duplicative questions (questions already addressed previously during the investigation or earlier in the hearing)
  - II. Questions that attempt to elicit information about
    - a) Complainant’s prior sexual history (exceptions)
    - b) Medical or legally privileged information
    - c) Health related (unless offered by that party previously during the course of the investigation)



# Cross Examination



## Cross Examination at Hearings:

- **Discussion:** Purpose of cross examination.

## Decision Maker's Role in the Process:

- Decision Maker determines relevance (“gatekeeper”) at hearing
- Decision Maker explanation only required where question not permitted
- **Discussion:** Decision Maker/Title IX Coordinator relevance not aligned?

## Impact of not Appearing/Submitting to Cross Examination:

- Exclusion of statements that make a factual assertion
- **Discussion:** If party appears but only answers certain questions?





# Cross Examination (cont.)



- *If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions. **§106.45(b)(6)(i)***
- **§106.45(b)(6)(i)** does not apply to evidence that does not constitute a person's intent to make a factual assertion: The prohibition on reliance on "statements" applies not only to statements made during the hearing, but also to any statement of the party or witness who does not submit to cross-examination. "*Statements*" has its ordinary meaning, but would not include evidence (such as videos) that do not constitute a person's intent to make factual assertions, or to the extent that such evidence does not contain a person's statements. [Page 1181 of the Preamble to the Rule](#)
- For example, where a complainant alleges that the respondent said to the complainant: "If you go on a date with me, I'll give you a higher grade in my class," and at the postsecondary institution's live hearing, the respondent does not submit to cross-examination, then § 106.45(b)(6)(i) does *not* preclude the decision-maker from relying on *the complainant's testimony* that the respondent said those words to the complainant. The words described by the complainant, allegedly attributed to the respondent, are themselves the misconduct that constitutes sexual harassment under § 106.30 (i.e., a recipient's employee conditioning an educational benefit on participation in unwelcome sexual conduct, often referred to as *quid pro quo* harassment) and are not the respondent's "statement" (i.e., the respondent's intent to make a factual assertion). [Office for Civil Rights Blog – 20200522 \(5/22/20\)](#)
- **Discussion:** Witness statements.



# Next Steps



- Generally choose individuals to serve in the outlined roles.
- ***Discussion:*** Use of external 3<sup>rd</sup> parties to serve roles (Hearings, advisors, etc.)?
- Update online training.
- Ensure that general notice requirements are met.



# Questions!