

# Midland College Title IX Team Training

August 4-5, 2020

# Title IX

Federal Law – Final Ruling of the new Title IX Regulations – May 6, 2020

Effective August 14, 2020

On May 6, 2020 the DOE-OCR “dropped” the new Title IX regulations. For the first time in the history of Title IX, the regulations now recognize that sexual harassment, including sexual assault, is unlawful sex discrimination and has the full force and effect of the law. It is also expected by the DOE-OCR that all institutions, including K-12 be in compliance by August 14, 2020.

Formerly, institutions were given definitions and guidance on how to respond to complaints of sexual harassment, including sexual assault. This guidance was “victim” formatted and did not discuss due process of either accused or victim. The new regulations final rule offer both parties due process and are centered both reporting parties and responding parties.

The final rule has included employees in the Title IX process and has the full force and effect of the law.

# The TIX Final Rule States Institutions:

- Provide clarity and transparency of how they respond to sexual harassment complaints
- Ensures that every complaint receives appropriate support
- Respondents are treated with equity, given due process without punitive measures and are informed that they are “not responsible” until the decision is handed from the Hearing Panel/Decision Maker
- Give supportive measures (without punitive implications) to both Complainant and Respondent
- Complainants and Respondents are provided with fundamental fairness
- School officials aka TIX Team serve either party with impartiality and without bias

# SUPPORTIVE MEASURES

Institutions are required to provide free supportive measures that are individualized services to restore or preserve equal access to education, protect the student and/or employee's safety, or deter sexual harassment.

## FOR THE COMPLAINANT

- Full autonomy over case
- Offered during initial intake process
- Allows whether or not to proceed with a formal complaint
- Offered regardless if investigation requested
- Individualized Supportive Measures

## FOR THE RESPONDENT

- Informed at the intake interview they will be allowed due process
- Will not be considered "guilty" or "Responsible" until determination given at hearing
- Individualized Supportive Measures
- Will receive a fair and impartial grievance process

The final rule ensures that the 1<sup>st</sup>, 5<sup>th</sup>, and 14<sup>th</sup> Amendments are upheld during the TIX process.

- 1<sup>st</sup> – Freedom of speech, no gag orders allowed on any party of the complaint
- 5<sup>th</sup> – Due process of law
- 14<sup>th</sup> – Equal rights under the law

Old guidance was very complainant centered and had no due process rights for respondents.

# Definition of Sexual Harassment

Any of the following conduct on the basis of sex constitutes sexual harassment:

- A school employee conditioning an educational benefit or service upon a person's participation in unwelcome sexual conduct (quid pro quo sexual harassment, applies to employee/employee or employee/student only. The DOE-OCR did not agree that a student could hold power over another student)
- Unwelcome conduct to be determined by a reasonable person to be so severe, pervasive, and objectively offensive (SPOO) that it effectively denies a person equal access to the school's educational program or activity (this includes the work space)
- Sexual assault, dating violence, domestic violence, or stalking (The Big 4)

# Response of an Institution after receiving “Actual Knowledge”

Prior, employees were required to report if it was “known or should have known” about any type of sexual harassment. This was also called “Constructive Notice”.

The Constructive Notice reporting guidance has been rescinded and is now called “Actual Knowledge” that is law.

*Actual Knowledge is* when a report is made to the Title IX Coordinator or designee by any official with authority (Deputy TIXC, TIX Team, Dean of Student Life, VPSS, Dean, Security, MCPD, Coaches, Athletic Director) by **ANY** person via mail, email, phone, or in person. ANYONE can make a report.



## An institution must respond when:

- 1) The school has actual knowledge of sexual harassment;
- 2) Sexual harassment has occurred within an educational program or activity (includes employee's work space);
- 3) Sexual harassment happened against the person in the United States

Educational program or activity includes situations over which the school exercised substantial control; also buildings owned or controlled by student organizations officially recognized by the institution such as fraternity/sorority houses.

Any sexual harassment that happens outside of the U.S. is not considered a TIX matter, but an institutional conduct policy matter.

# FAIR GRIEVANCE PROCESS

Institutions are required to investigate and adjudicate formal complaints of sexual harassment using a grievance process built using these top 3 areas

- Incorporate due process principles
- Treat all parties fairly
- Reach reliable responsibility determinations

# The Grievance Process Must Include:

- Written notice to both parties of allegations
- Equal opportunity to select an advisor of their choice (may be an attorney but not required)
- Equal opportunity to submit and review evidence throughout the investigation
- Use trained TIX personnel to objectively evaluate all relevant evidence without prejudice and are free from conflicts of interest or bias for or against either party
- Protect parties privacy (FERPA) specifically in the event medical, psychological or other similar treatment records are needed from a particular party. Must have written consent from individual to retrieve these documents.
- Apply presumption that the Respondent is not responsible during the grievance process (presumption of innocence) so the institution bears the burden of proof and that standard of evidence is applied correctly.

- Use of one standard of evidence and use of the SAME standard of evidence for all formal complaints. Regs allow of these standards:
  - Preponderance of the Evidence (POTE)
  - Clear and Convincing (C&C)
- Institutions are not allowed to bounce between standards. MC will use the POTE standard in all cases.
- The Decision Maker is not the same person as the investigator or the TIXC.
- Required to use 2 Investigator model.
- Hold a live hearing and allow cross-examination by Party Advisors ONLY; the parties are NEVER allowed to personally cross-examine.
- Protect all complainants from inappropriately being asked about prior sexual history (aka rape shield law).

- Send both parties written documentation regarding responsibility determination explaining how and why the Decision-Maker(s) reached the conclusion.
- Offer parties an equal opportunity to appeal.
- Protect any individual involved with the complaint from retaliation (reporting, participating/refusing to participate, accidental retaliation, third party retaliation) during the grievance process.
- Discrimination based on sex and other protected characteristics follows the same grievance process whether student or employee
- Make all materials used to train the Title IX personnel publicly available on the institutions website.

# Reporting Sexual Harassment

There are two exceptions for reporting an incident of sexual harassment:

- 1) A disclosure of the incident was made at an awareness event;
- 2) A disclosure is made to an individual who holds a licensure and is legally bound to confidential requirement unless required by law. As long as the disclosure is made while the individual is working in the capacity of the license. However, if the disclosure is made under confidence of the license, the incident itself needs to be reported to MCPD specifically if it happened on any property the campus owns or operates. This is so it can be included with the Annual Safety Report required by the Clery Act. No personally identifiable information needs to be reported; only the where, when and what of the incident.

Anonymous reporting is allowed, however, if there is no name of the victim/complainant, the TIXC will be very limited as to what can be done for supportive measures and is required to drop under the new regs. The insi

Prior guidance required to pursue an investigation regardless.

However, this complaint will be kept on record in the event another complaint comes in with more information OR a new complaint is filed by a different individual against the same respondent and we have good information.

# FORMAL COMPLAINT

A report of sexual harassment will be considered a formal complaint when:

- Report is filed by anyone via in person, mail, email, online form, or by phone (this does not necessarily mean that the victim is the complainant);
- At the time of the filing of the formal complaint, the complainant/victim must be participating in or attempting to participate in the college's educational program or activity (includes employee);
- A formal complaint **MUST** be submitted to the TIXC or designee and must be signed by the complainant (person filing report);
- The TIXC may sign the formal complaint, for the victim/complainant, if it is requested the report not be pursued.
- There are two reasons why the TIXC may sign a complaint and pursue the report:
  - 1) The Responding Party is a threat to others on campus; or
  - 2) The Responding Party has more than one complaint of sexual harassment



The formal complaint must allege sexual harassment as defined by the TIX regs and a request for an investigation was made by the complainant/victim.

If no investigation is requested and no threat to the college community, the TIXC or designee will provide supportive measures to the complainant/victim with the opportunity to come back and request an investigation as long as the college has jurisdiction over the responding party.

Under the rescinded guidance, an investigation into allegations was required regardless of whether or not the complainant wanted one. The complainant/victim now has full control over what happens after an incident of sexual harassment.

Lastly the new regs final rule they state specifically - that an institution is in violation of Title IX when it's response to sexual harassment is deliberately indifferent or clearly unreasonable in light of the known circumstances.

# TEXAS

S.B 212 and H.B. 1735 - Acts added to Texas Education Code 51 Subchapter 2, Sec. 51.251 and Subchapter 3, Sec. 51.281

Effective September 1, 2019

By the 86<sup>th</sup> Texas Legislature

S.B. 212 Acts added to subchapter 2, Sec. 51.251 Reporting incidents of sexual harassment, sexual assault, dating violence and stalking. This area is directed to employees of higher education.

## Definitions

Employee – “Employee of a postsecondary educational institution” does not include a student enrolled at the institution (student worker);

Sexual Harassment – Unwelcome, sex-based verbal or physical conduct that:

- A. In the employment context, unreasonably interferes with a person’s work performance or creates an intimidating, hostile, or offensive work environment; or
- B. In the education context, is sufficiently severe, persistent, or pervasive that the conduct interferes with a student’s ability to participate in or benefit from educational programs or activities;

# REPORTING

An employee of a postsecondary institution who, in the course and scope of employment, witnesses or receives information regarding the occurrence of an incident that the employee reasonably believes constitutes sexual harassment, sexual assault, dating violence, or stalking and is alleged to have been committed by or against a person who was a student enrolled at or an employee of the institution at the time of the incident shall promptly report the incident to the institutions Title IX Coordinator or Deputy Title IX Coordinator.

**\*\*The exceptions to reporting are the same as under the new regs.\*\***

A person commits an offense if the person:

- ❖ Is required to make a report of sexual harassment, sexual assault, dating violence, or stalking and knowingly fails to make the report; or
- ❖ With intent to harm or deceive, knowingly makes a report of sexual harassment, sexual assault, dating violence, or stalking that is false;
- ❖ An offense is a Class B misdemeanor unless it is shown on the trial of offense that the actor intended to conceal the incident that the actor was required to report. The offense then becomes a Class A misdemeanor;
- ❖ A postsecondary institution shall terminate the employment of an employee whom the institution determines in accordance with the institution's disciplinary procedure to have committed an offense;

## IMMUNITIES of a Reporter:

A person acting in good faith who reports or assists in the investigation of a reported incident of sexual harassment, sexual assault, dating violence, or stalking or who testifies or otherwise participates in the disciplinary process or judicial proceeding arising from a report:

- ✓ is immune from civil liability, and from criminal liability for offenses punishable by fine only, that might otherwise be incurred or imposed as a result of those actions; and
- ✓ may not be subjected to any disciplinary action by the postsecondary institution at which the person is enrolled or employed for the code of conduct reasonably related to the incident for which suspension or expulsion from the institution is not a possible punishment.

These immunities do not apply to a person who perpetrates or assists in the perpetration of the incident reported.

# INVESTIGATOR/INVESTIGATION

Responsibilities of an Investigator

The Processes of an Investigation

# INVESTIGATORS

- Investigators are individuals designated by an institution to conduct reliable, prompt, fair, and impartial investigations of sex- and gender-based discrimination and misconduct reports;
- Interview parties and witnesses;
- Identify, organize, and compile relevant information about incident;
- Maintain accurate and thorough investigation records and notes;
- Writing clear, concise and comprehensive investigation reports;
- Investigators are fact finders only, not decision makers;



- Investigators provide equal opportunities for the parties to provide witnesses and evidence;
- Are free from conflicts of interest or bias for/against either party;
- Will provide the parties the same opportunity to review all of the evidence gathered during the course of the investigation;
- Upon completion of an investigation, the investigator(s) shall produce an investigative report that fairly summarizes relevant information to the TIXC for completeness and clarity prior to being shared with the parties;

# INVESTIGATION PROCESSES

- REVIEW OF PROCESS I FLOW CHART – TIX Investigation Process
- REVIEW OF PROCESS II FLOW CHART – MC Policy/Procedure Investigation Process

# TIX ADVISORS

Can be anyone

Guides Parties through the processes

No Advisor for Witnesses

# TIX ADVISORS

- An Advisor is an individual selected by any party to assist them throughout the institution's resolution process from start to finish;
- Institutions cannot restrict who an individual selects as their Advisor;
- Institutions CAN restrict the Advisor's role in the process. Such as they may advise the party during the process, but not speak for the party or provide evidence for the party;
- An Advisor can be mom, dad, brother, sister, friend, aunt, uncle, lawyer, or anyone the party feels comfortable with hearing their complaint;
- If a party chooses a lawyer as an Advisor, the college is not required to provide the other party with a lawyer. They are allowed a TIX trained Advisor;

- Advisors are allowed to speak during the Hearing to question/cross-examine the other party and witnesses;
- The party is not allowed to question/cross-examine directly, only the Advisor;
- Even if the party already has a chosen Advisor (not a TIX Advisor), Midland College will automatically assign a TIX Advisor to stay abreast of the process in the event that the party's chosen Advisor quits or can not make scheduled event such as an interview or hearing;
- TIX Advisors are considered confidential for the limited purpose of advising a specific individual for a specific case unless they have knowledge that their client is providing false or misleading information to the institution.