Investigating Misconduct Under the Department of Education’s Federal Title IX Regulations
After this module

> Investigators will be able to understand and articulate the requirements of new federal Title IX regulations as they pertain to investigations

> Investigators will be able to implement strategies for conducting fair and impartial investigations
Reasons for these regulations

> Department of Education issued new regulations, effective August 14, 2020
  - Apply to formal complaints made on/after August 14, 2020
  - Apply to sexual harassment alleged to have occurred on/after August 14, 2020

> Replaced prior guidance regarding management of Title IX regulations
Process changes

> If a case falls under federal Title IX regulations

> If the complainant submits a formal complaint
Definitions & Jurisdiction under Federal Title IX Regulations
EDFR sexual harassment

Sexual harassment, as defined by the federal regulations, is conduct on the basis of sex that includes:

- EDFR quid pro quo sexual harassment: An employee conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct
- EDFR hostile environment sexual harassment: 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 recipient’s education program or activity
- And/or: sexual assault, dating violence, domestic violence, stalking (each of which are defined on subsequent slides)
EDFR sexual assault

EDFR sexual assault is a sex offense under the uniform crime reporting system of the Federal Bureau of Investigation. Specifically, EDFR sexual assault includes several specific types of conduct...
EDFR dating violence

EDFR dating violence is an act or acts of violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the complainant. The existence of such a relationship will be determined based on the length and type of relationship as well as the frequency of interaction between the individuals involved in the relationship.
EDFR domestic violence

EDFR domestic violence is an act or acts of violence committed by a current or former intimate partner of the complainant, by a person with whom the complainant shares a child in common, or by a person who is cohabitating with or has cohabitated with the complainant as an intimate partner.
EDFR stalking is engaging in a course of conduct directed at a complainant that would cause a reasonable person to fear for the complainant’s safety or the safety of others, including the safety of the respondent, or would cause a reasonable person to suffer substantial emotional distress.
EDFR jurisdictional criteria

> Alleged conduct occurred in the United States

> Alleged conduct occurred within a university education program or activity or on property owned by recognized student organization
  - May include off-campus conduct such as program/event hosted by a staff or student organization
  - May include conduct alleged to have occurred during an off-campus conference, training, or program to which UW sends students/employees

> The individual who alleged the conduct (i.e. the complainant) must be participating in or attempting to participate in a university program or activity (i.e. student, employee, or applicant)
When is an investigation required?

> Upon receipt of a formal, written, signed complaint

> When the Title IX Coordinator deems an investigation is warranted (and signs the formal written complaint)
  
  – Once a formal complaint is filed, the duty to investigate is absolute
Investigator Obligations
Remain impartial

> Apply a presumption that the respondent is not responsible during the investigation (and adjudication) process, so that the school bears the burden of proof and the standard of evidence is applied correctly
>  – UW applies the preponderance of evidence standard

> Ensure the final decision-maker is not the same person as the investigator or the Title IX Coordinator (i.e., no “single investigator models”)
Avoid bias

> Three Types of Unconscious Bias in Investigations
> Three relevant ways in which unconscious bias may manifest during investigations:
  – confirmation bias;
  – stereotype bias;
  – and priming.
Avoiding bias

> 1. Confirmation bias

– Confirmation bias refers to an individual’s natural tendency to give more weight to information that tends to confirm his or her preconceived notion (or, conversely, to give less value to information or evidence that contradicts an existing belief)
2. Stereotype Bias

Stereotype bias occurs when the investigator tends to favor information received from witnesses who are, in some respect, “like” the investigator. This affinity might be based on similar backgrounds, positions in the company, or interests.
Avoiding bias

> 3. Priming

– Finally, priming refers to a phenomenon in which our reactions to stimulus are affected by our exposure to another stimulus.
Avoiding bias

> Being aware of these biases and working to ensure they do not influence your investigations is critical while conducting your impartial investigation
Avoid conflicts of interest

> Investigators should not investigate matters in which a prior relationship or interest aligning with a party of the investigation will materially impact the investigator’s ability to remain neutral and impartial.

> Examples of conflicts of interest include:
  – Familial or romantic relationships
  – Business relationships/interests
  – Other involvement (e.g. as an advisor to a party) in the same investigation
Investigatory Requirements under the Federal Title IX Regulations
Respond to all formal complaints

> The federal regulations require schools to investigate and adjudicate formal complaints of sexual harassment using a grievance process that incorporates due process principles, treats all parties fairly, and reaches reliable determinations.
Ensure supportive measures made available

> Regulations require supportive measures offered anytime a report is made
  – Notify Office of the Title IX Coordinator by emailing titleix@uw.edu to ensure supportive measures have been offered each time sexual harassment may be a part of a inquiry or intake
Provide notice

> Give both parties written notice of the allegations, an equal opportunity to select an advisor of the party’s choice (who may be, but does not need to be, an attorney), and an equal opportunity to submit and review evidence throughout the investigation.
Determine whether formal complaint must be or may be dismissed

> Mandatory dismissal of formal complaint
  - Alleged conduct does not constitute EDFR sexual harassment
  - Alleged conduct did not occur in US
  - Alleged conduct did not occur in university program/activity
  - Complainant not participating in or attempting to participate in university program/activity

> Discretionary dismissal of formal complaint
  - Complainant requests, in writing, to withdraw formal complaint
  - Respondent no longer enrolled at or employed by UW
  - Circumstances prevent investigation from continuing
Conduct interviews & gather documents

> Give both parties the opportunity to share who they would like to be interviewed during the investigation

> Ask each party and every witness interviewed to provide relevant information

> Remember: each party may discuss the allegations under investigation
  – To receive support
  – To gather relevant evidence
Federal regulations require that each party (and any advisor they have at that point) receive the opportunity to inspect and review evidence obtained.

Parties must be given an opportunity to respond, in writing, to evidence related to the allegations.
Issue investigative report

- Investigator will write investigative report fairly summarizing the relevant evidence gathered in relation to the allegations outlined in the notice
  - Report synthesizes and analyzes evidence
- Report must be issued at least ten days prior to hearing
Follow investigation with hearing

> Ensure the decision-maker is not the same person as the investigator or the Title IX Coordinator (i.e., no “single investigator models”)

> After a hearing, the parties will simultaneously receive a written determination regarding responsibility explaining how and why the decision maker reached conclusion
Overarching Reminders during Investigations
Evaluate evidence fairly

- Use trained Title IX personnel to objectively evaluate all relevant evidence without prejudgment of the facts at issue and free from conflicts of interest or bias for or against either party.
- Relevant evidence is evidence which helps determine whether an important fact is more or less likely to be true.
Evidentiary considerations

- Prior sexual history
  - Restrict questions/inquiries about complainants’ prior sexual history are not relevant, except under two limited circumstances

- Privileged records
  - Protect parties’ privacy by requiring written consent before using a party’s medical, psychological, or similar treatment records during an investigation
Consider parties’ desire for informal resolution

> Obtain the parties’ voluntary, written consent before using any kind of “informal resolution” process

> Do not use an informal process where an employee allegedly sexually harassed a student
Maintain presumption of respondent’s non-responsibility

> Apply a presumption that the respondent is not responsible through the investigation and adjudication
Apply the appropriate standard of evidence

- Use the preponderance of the evidence standard for all investigations regarding both formal complaints against students and employees.
Remind all witnesses of policies regarding retaliation

- Remind all witnesses that UW Executive Orders and the Student Conduct Code prevent retaliation.
- Retaliation policies protect any individual—including complainants, respondents, and witnesses—from retaliation for reporting sexual harassment, making a formal complaint, or participating (or refusing to participate) in any university investigation or adjudication process.
Refine your skills and knowledge

> Seek outside training by third party trainers
  – May include ATIXA, NACUA, TIX Education Specialists

> Review additional UW-provided trainings
  – Training for decision makers includes additional information about evidentiary considerations