



TO: The Gustavus Community
FROM: Patty Dawson, Title IX & Sexual Misconduct Prevention Coordinator
SUBJECT: Title IX Updates
DATE: July 10, 2020

Greetings from the Office of Title IX,

As many of you may be aware, on May 6, 2020 the U.S. Department of Education's Office for Civil Rights released new regulations regarding Title IX, the law that prohibits sex-based discrimination and harassment at schools, colleges and universities. You can find the new regulations here: [U.S. Department of Education Releases Final Title IX Rule](#)

Institutions of higher education are legally required to review and make updates and changes to their sexual harassment/misconduct policies and procedures to align with these new regulations. I, along with a working group of members of our community, have been working on implementing the changes and updates to our current policy in order to comply with the federal regulations. Additionally, the College has enlisted the expert help of a law firm that specializes in Title IX to assist us in the policy work. We are confident that our revised policies and procedures will not only put us in compliance with Title IX but will also reflect Gustavus' commitment to actively responding to, and ultimately preventing, sexual misconduct throughout our community. Members of the working group are as follows:

JoNes VanHecke, Vice President for Student Life
Elizabeth Kubek, Associate Provost
Tommy Valentini, Deputy Title IX Coordinator
Martin Lang, Faculty
Megan Ruble, Assistant Vice President for Student Life
Andrew Coston, Executive Director, Center for Career Development
Danny Sandberg, Assistant Director, Residential Life
Amanda Braun, Student
Daisy Hernandez-Barguiarena, Student
Ben Menke, Student
Paige Patterson, Student

There is still much work to be done in order to get the policy and procedures to align with the federal regulations by the deadline of August 14, 2020. Please see the FAQ document attached to this email, which will hopefully answer some key questions regarding the required upcoming changes. If you have additional questions regarding the new federal regulations, please feel free to reach out to me via email at pdawson@gustavus.edu

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Patty Dawson, Title IX Coordinator

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The information below is meant to provide you an overview of the major changes that will be required by the new Title IX regulations. Please know that this is not an exhaustive list of the required changes, but rather the changes that will have the greatest impact on the Gustavus policy and procedures. The regulations require that policies be updated and changes implemented at institutions by August 14, 2020.

What aspects of the current Title IX policy and procedures are changing, and which ones are staying relatively the same?

The intake and reporting process are remaining relatively unchanged; reporting parties will still have access to the same resources, accommodations, and supportive measures as before, and the choice about whether to proceed with an investigation will still be in the hands of the reporting party. The new process will now include additional procedural elements, including a live hearing with an opportunity for the parties' advisers to ask questions on their behalf of other parties and witnesses. Under the new regulations the investigation process is referred to as the *Grievance Process*.

Do these regulations apply to students only, or are faculty and staff covered as well?

The regulations clearly state that they apply to students and employees, including both faculty and staff. This is not a change from our current policy.

How is sexual harassment defined under the new regulations and is this a change?

The new regulations limit the scope of sexual harassment to conduct of a sexual nature that is "severe, pervasive, and objectively offensive." The conduct must also have occurred in the institution's program or activity and within the United States. This definition follows how the courts have defined sexual harassment. Allegations of sexual assault, dating violence, domestic violence, and stalking will fall within the definition of sexual harassment under Title IX.

While Title IX is more limited in scope, the College will still respond to all incidents of unwanted conduct of a sexual nature, sexual assault, dating violence, domestic violence, and stalking. We will continue to direct members of our community to report any type of sexual misconduct, regardless of where it occurred or whether it happened in the context of a Gustavus "program or activity" to the Title IX Coordinator. All reporting parties will receive access to resources, accommodations, supportive measures, and, when available, the option to utilize the Gustavus Adolphus College Grievance Process.

What constitutes a school's "program or activity"?

The new regulations clarify that Title IX applies when sexual harassment occurs within the institutions "program or activity." A "program or activity" includes locations, events, or circumstances over which the College exercises substantial control over both the responding party (i.e., the accused individual) and the context in which the sexual harassment occurred.

While Gustavus participates in many College activities off campus (i.g., athletics, music tours), there are also many activities where students gather off campus that are not Gustavus programs or activities (e.g., a social gathering at a student's off-campus residence). While Title IX regulations do not require the

College to apply its policy unless the event relates to a Gustavus program or activity, other laws such as the Violence Against Women Reauthorization Act may still apply. Because sexual misconduct can severely affect a person's living and learning environment, regardless of whether it occurs in the context of the institutions program or activity, the College will still respond to allegations that are brought to our attention. We do not anticipate the new regulations limiting our current approach.

While The regulations also indicate that Title IX's application does not extend to study-abroad programs outside of the United States, Gustavus will continue our practice of applying our policy to address circumstances involving sexual harassment, dating violence, domestic violence, and stalking in off-campus study programs occurring outside of the United States.

How will the regulations affect the College's reporting process?

The regulations will have minor impacts on the reporting process. While the regulations alter the legal standard for when a school can be deemed to be "on notice" of sexual harassment, we will not change our approach of encouraging reporting of all known or suspected occurrences of sexual violence and other forms of sexual harassment. We will continue to have a policy expecting all employees, including student employees, who are not "confidential resources" to report incidents so that individuals who experience sexual assault, dating violence, domestic violence or stalking can receive access to support services, accommodations, and information about their rights to seek recourse through on- and off-campus resources.

How will the regulations affect the College's intake process with the Title IX Coordinator?

The reporting/intake process with the Title IX Coordinator will remain mostly the same. Our primary focus when we receive a report of sexual misconduct is to provide access to services and to educate individuals about their options. Our goal is to provide this information so that individuals who report incidents are better equipped to make their own decisions about how they wish to proceed.

The regulations state that institutions must provide reporting parties with a choice about whether they want to proceed with the Grievance Process (i.e., an investigation and hearing process) or not. This regulation is in line with our current policy and process. Therefore, reporting sexual misconduct does not and will not automatically result in an investigation/hearing by the College. During the intake discussion, we will continue to leave it up to the reporting party to decide whether to initiate the Grievance Process. The regulations clearly state that institutions must honor a reporting party's preference about whether to proceed with the Grievance Process and can only take additional action when the College believes further action is legally required. If a reporting party is not interested in pursuing the Grievance Process at the time of reporting, their option to pursue the Grievance Process remains available to them into the future.

All reports to the Title IX Coordinator and any subsequent actions will still be kept private. Only College personnel who have a "need to know" the information will be informed. Typically, this does not include anyone outside of the Title IX Coordinator and deputies and when applicable, personnel involved in investigating and adjudicating matters under the College's Grievance Process.

What type of supportive measures will be offered?

The new regulations require that the Title IX Coordinator promptly contact a complainant to discuss the availability of “supportive measures,” with or without the filing of a formal complaint. Supportive measures are free, non-punitive services to protect safety, deter sexual harassment, and restore or preserve equal access to the education program or activity without unreasonably burdening the responding party. Examples of supportive measures are counseling, course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, and increased campus security. Institutions may also offer supportive measures to respondents to assist them in navigating the grievance process and to ensure equitable treatment during the grievance process.

Gustavus will offer these supportive measures to *all* reporting parties, regardless of whether their reported incident officially falls under the new scope of Title IX or not and regardless of whether the reporting party chooses to move forward with the Grievance Process.

What about the informal resolution process?

The new regulations include the option to pursue an informal resolution process. Both parties must agree to participate in the informal resolution process. The informal process is not successful if either party declines to participate during the process. The informal resolution process will require both parties’ written consent prior to initiating the process. The regulations also state that the informal resolution process cannot be used if the responding party is a faculty or staff member.

What will the new Grievance Process (i.e., investigation/hearing process) look like for Title IX incidents?

The new regulations make it clear that all reporting parties have autonomy over when they want to initiate the Grievance Process. Gustavus was already providing this choice to reporting parties, so this aspect of our policy and process will not change. As was also our policy previously, the regulations provide that schools cannot impose disciplinary sanctions on accused individuals without first following their Grievance Process.

In order to initiate the Grievance Process, the reporting party will need to submit what the regulations call a “Formal Complaint” requesting that the institution investigate and adjudicate the allegations. Once a Formal Complaint has been submitted, either an investigation will begin or, if requested by the parties, the College will proceed with the informal resolution process.

If the parties choose not to use the informal process, or the matter is not resolved at that stage, the College will proceed with an investigation and hearing process. The investigation part of this process will look like the investigation phase of our current process. Both parties will still be offered support measures and are still able to have an advisor of their choice with them throughout the investigation. The College will continue its practice of retaining outside investigators trained to conduct these investigations. The investigator will collect evidence and conduct interviews regarding the allegations.

The investigator will provide an investigative report that the parties and the College will use in the hearing phase of the process.

How does the hearing process work?

The hearing required under the new regulations is an additional phase and will be a change to our current process. The live hearing provides the parties an opportunity to ask questions of each other and the witnesses. The questions cannot be asked directly by the parties themselves but will be asked through their advisor in real time. The regulations require that an advisor does the cross examination of parties and witnesses during the live hearing. If a party does not have an advisor, the college will provide one. The hearing will be conducted live online so that all parties have an opportunity to see and hear the proceedings without needing to be in the same room with one another. A hearing panel will moderate the hearing and will determine whether any questions are not relevant to the allegations under consideration.

After the hearing is over, the hearing panel will review the evidence and determine whether the evidence establishes that the responding party is responsible for the alleged misconduct. If the hearing panel finds the responding party responsible, the panel will also determine sanctions and other actions to be taken.

Will there be an appeal process as part of the Grievance Process?

Yes. The regulations state that either party may appeal the hearing panel's determination of responsibility for any of the following reasons:

- procedural irregularity that affected the outcome of the matter;
- new evidence that was not reasonably available at the time a determination of responsibility or dismissal was made;
- and/or Title IX Coordinator, investigator or decision maker(s) had a conflict of interest or bias for or against either party that affected the outcome of the matter.

Once an appeal is submitted, the non-appealing party will have an opportunity to review the appeal and submit a response. As with our current process, the person(s) presiding over the appeal will not have been previously involved in the matter as a hearing panel member, investigator, or in any other capacity. Any sanctions imposed by the hearing panel will not go into effect unless and until the hearing panel's decision is upheld on appeal or the deadline for appeal has expired.

Who will serve as hearing panel members, appeal officers, and Informal Resolution facilitators?

The regulations provide flexibility to institutions regarding who serves as a hearing panel member and how many hearing panel members we have during a hearing. We are still working on identifying who exactly will serve in these roles. We are also anticipating having three hearing panel members present for each hearing. The regulations specifically require training for the above-mentioned roles.

How will the proposed regulations affect the standard of evidence that the College uses in making its decisions about responsibility during the Grievance Process?

Currently the College uses a “preponderance of evidence” standard when making the determination as to whether an accused student is responsible for violating College policy. Under this standard, the College looks to whether it is more likely than not that the accused party committed the alleged misconduct (at least 51% likely that the accused party violated policy). We are permitted to and will continue with this evidentiary standard under the new regulations.

Do these new regulations apply retroactively? In other words, would cases that have already been through Gustavus’ previous investigation and adjudication process be subject to additional review under these new regulations?

No. Cases that have already been investigated and adjudicated are officially closed and are not subject to further review. These regulations are only applicable for matters initiated under our Grievance Process after August 14, 2020.

When will these changes take effect?

All institutions are legally required to incorporate these changes by August 14, 2020. We are currently working to update our policy and process, and we will train and educate the community about our new policy and process for the fall of 2020.

Is it possible that these regulations will get challenged in court so that schools do not have to implement them?

It is likely that there will be legal challenges to these regulations. It is also possible that future lawmakers may change the regulations. Until the regulations are changed by either the Department of Education or the courts, the College must treat them as legally binding and must have a Title IX policy that complies with these requirements.

If you have additional questions regarding the new regulations please reach out to Title IX Coordinator
Patty Dawson at pdawson@gustavus.edu