Title IX Boot Camp for Higher Education (With Updates)

Session 1: Title IX Procedural Requirements, Defining Sexual Harassment, and Obligations to Respond

Presented by
Richard F. Verstegen
Overview

Introduction
- Scope of Discussion
- Impact of Regulations

Basics of Title IX
- Legal Requirements, Enforcement

Impact of the 2016 Elections on Title IX

New Regulations – Definitions, Procedural Requirements, and Obligations to Respond

Conclusion
Introduction
Introduction

Focus on harassment

Other laws
- ADA, Section 504, Title VI, Title VII
- State Laws

Impact of new regulations
- Effective August 2020
- Institutions must review and revise policies on sexual harassment.
The Basics
The Law

Title IX

• No person in the U.S. shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.

Title IX Regulations

• 34 C.F.R. 106

Enforced by Office of Civil Rights
Application of Title IX to Sexual Harassment

Title IX prohibits sexual harassment.

- OCR Guidance, March 1997
- Davis v. Monroe County, USSC 1999
  - Actual knowledge
  - Severe, pervasive and objectively offensive
  - Deliberately indifferent
- OCR guidance, January 2001
Application of Title IX to Sexual Harassment

- Sexual harassment prohibited.
  - Quid Pro Quo and Hostile Environment

- OCR standards for harassment
  - Knows or reasonably should know
  - Sufficiently severe, persistent or pervasive
  - Stop, eliminate, and prevent harassment

- OCR guidance (2010 and 2015)
2016 Election and Department of Education
2016 Election and Office for Civil Rights

- Trump elected; DeVos confirmed
- Focus on regulations, not guidance.
- September 2017 guidance
- Proposed regulations
  - November 2018
Final Regulations
Changes to Introduction

Subpart A- Introduction

- Changes to Section 106.6
  - Constitution
  - FERPA
  - Title VII
  - Preemptive Effect
Procedural Requirements

Subpart A- Introduction

• Changes to section 106.8– Procedural requirements
  • Must designate and authorize at least one employee to coordinate its efforts to comply with responsibilities under this part
  • Employee must be referred to as the “Title IX Coordinator.”
  • Must notify certain persons of the name or title, office address, email address, and telephone number of the Title IX Coordinator
  • The persons include applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations, holding collective bargaining or professional agreements with the institution.
Procedural Requirements

Subpart A- Introduction

• Changes to Section 106.8 – Procedural Requirements
  • Must disseminate a policy of nondiscrimination.
  • Must notify same persons (1) that the institution does not discriminate on the basis of sex in the education program or activity that it operates and (2) that it is required by Title IX and this part not to discriminate in such a manner.
  • Must state in notice that this requirement not to discriminate extends to admission and employment.
  • Must state in notice that inquires about the application of Title IX and this part may be referred to the Title IX Coordinator, the Assistant Secretary, or both.
Procedural Requirements

Subpart A- Introduction

- Changes to section 106.8– procedural requirements
  - Must follow publication requirements
  - Must prominently display the contact information for the Title IX Coordinator (discussed above) and the policy (discussed above) on:
    - Its website, and
    - In each handbook or catalog that it makes available to the persons (discussed above)
  - Must not distribute publication stating that the institution treats groups differently on the basis of sex, except as permitted under Title IX
Procedural Requirements

Subpart A - Introduction

• Changes to Section 106.8 – procedural requirements
• Must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part
• Must adopt and publish a grievance process that complies with 34 CFR 106.45 for formal complaints of sexual harassment
• Must provide persons (above) notice of the grievance procedure and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond
• Applies only to sex discrimination occurring against a person in the U.S
Definitions– Recognizing Sexual Harassment

Sexual harassment

• 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, dating violence, domestic violence or stalking (as defined by law)
Harassment Scenarios—Recognizing Sexual Harassment

Student-on-student harassment
• Male student is accused of trying to kiss and grabbing the breast of a female student in a dormitory on campus. Friend of female student reports the conduct.

Employee-on-employee harassment
• Director of Admissions is accused of sending an inappropriate email to an office administrative assistant and also making suggestive comments to her. Administrative assistant reports this conduct to Title IX Coordinator.
Obligations for Responding

An institution with actual knowledge of sexual harassment in an education program or activity of the institution against a person in the U.S. must respond promptly in a manner that is not deliberately indifferent.

A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.
Obligation to Respond- Actual Knowledge

Notice of sexual harassment or allegations of sexual harassment to:

• Title IX Coordinator
• Any official of the institution who has the authority to institute corrective measures on behalf of the institution

Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge.
Obligations for Responding Within the Education Program or Activity

Within the education program or activity

- Includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs
- Includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution
Reporting Sexual Harassment

Reports of harassment

• Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment).
• Any person may report in person, by mail, by telephone, or by email, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person’s verbal or written report.
Reporting Sexual Harassment

Reports of harassment

- A person may report sex discrimination, including sexual harassment, at any time (including during non-business hours) by using the telephone number or email address or by mail to the office address listed for the Title IX Coordinator.
- Notice of sexual harassment (actual knowledge) includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator.
Definitions – Reporting Sexual Harassment

**Complainant**
- An individual who is alleged to be the victim of conduct that could constitute sexual harassment
- The complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed

**Respondent**
- An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment
Responding to Sexual Harassment Allegations

Absence of formal complaint, must still respond in manner that is not deliberately indifferent. No investigation is required, but the institution must do something.

Institutions must treat complainants and respondents equitably by offering supportive measures to a complainant and by following a grievance process under 106.45 before imposition of any disciplinary sanctions or other actions against a respondent.
Responding to Sexual Harassment Allegations

Title IX Coordinator must promptly:

- Contact the complainant to discuss the availability of supportive measures,
- Consider the complainant’s wishes with respect to supportive measures,
- Inform the complainant of the availability of support measures, **and**
- Explain to the complainant the process for filing a formal complaint
Responding to Sexual Harassment Allegations

Supportive measures

- Means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonable 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
- Are designed to restore or preserve equal access to the institution’s education program or activity without unreasonably burdening the other party
Responding to Sexual Harassment Allegations

Supportive measures

• Includes measures designed to protect the safety of all parties or the institution’s environment or deter sexual harassment
• May include counseling, extensions of deadlines or 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, increased security and monitoring of certain areas of the campus, and other similar measures
Response to Sexual Harassment Allegations

Supportive measures

- The institution must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the institution to provide the supportive measures.
- The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.
Retaliation/Confidentiality

No institution or person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right secured by Title IX, or because the individual has made a report or complaint, testified, assisted, or participated, or refused to participate in any manner in an investigation, proceeding or hearing.

An institution must generally keep confidential the identity of any individual who made a report or complaint of sex discrimination (including any individual who has made a report or filed a formal complaint of sexual harassment), any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness.
For each response for an allegation of sexual harassment, an institution must create, and maintain for a period of seven years, the following records:

- Any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment
- The basis for its conclusion that its response was not deliberately indifferent, and documentation that it has taken measures designed to restore or preserve equal access to the education program or activity
Recordkeeping Requirements

For each response for an allegation of sexual harassment, an institution must create, and maintain for a period of seven years, the following records:

• If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances.

• The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.
Conclusion
Conclusion

- Need to recognize and identify sexual harassment
- Need to know how to report sexual harassment
- Need to identify how to respond to sexual harassment allegations
Disclaimer

Our webinars are designed to be accurate and authoritative, but we do not provide legal, accounting, medical or similar professional services. Client remains solely responsible for compliance with all applicable laws, regulations, accounting standards and official health guidance. If legal, accounting, medical or other expert advice is desired, Client should retain the services of an appropriate professional.

Photocopying, distributing or using these copyrighted materials electronically without the copyright owner's express written consent is strictly prohibited. Consent is granted for the use of purchasers of webinars and then solely for the use of registered attendees of the webinars. No right or license is given to reproduce the materials in any form or format or to place the materials in any format on any website or blog or to otherwise republish it in any manner without the express written permission of the copyright holder.
Questions
Contact Us

EducationAdminWebAdvisor
Online Training for Educational Professionals

www.educationadminwebadvisor.com
1-800-944-7668
service@educationadminwebadvisor.com
Title IX Boot Camp for Higher Education (With Updates)

Session 2: Addressing and Investigating Sexual Harassment Under Title IX

Presented by
Richard F. Verstegen
Overview

- Response to Allegations
  - Supportive Measures
  - Emergency Removal
  - Administrative Leave

- Formal Complaint

- Grievance Process
  - Basic Requirements
  - Dismissal
  - Informal Resolution
  - Consolidation
  - Investigation

- Conclusion
Response to Sexual Harassment Allegations

Title IX Coordinator must promptly:

• Contact the complainant to discuss the availability of supportive measures,
• Consider the complainant’s wishes with respect to supportive measures,
• Inform the complainant of the availability of support measures, **and**
• Explain to the complainant the process for filing a formal complaint.
Response to Sexual Harassment Allegations– Emergency Removal

Nothing precludes the institution from removing a respondent from the education program or activity on an emergency basis.

- The institution must undertake an individualized safety and risk analysis, determine that immediate threat to health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provide the respondent with notice and opportunity to challenge following the removal.
- This provision may not be construed to modify any rights under Section 504 and ADA.
Response to Sexual Harassment Allegations—Administrative Leave

Nothing precludes the institution from placing a non-student employee respondent on administrative leave during the pendency of a grievance process.

These provisions may not be construed to modify any rights under Section 504 or the ADA.
Formal Complaints

Formal complaint

• A document filed by the complainant or signed by the Title IX Coordinator (1) alleging sexual harassment against a respondent and (2) requesting the institution investigate the allegation of sexual harassment
• A document filed by complainant means a document or electronic submission that contains complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.
Formal Complaint

- **Complainant**
  - An individual who is alleged to be the victim of conduct that could constitute sexual harassment
  - The complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.

- **Respondent**
  - An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment
Formal Complaints

**Formal complaint**

- Complainant must be participating or attempting to participate in the education program or activity of the institution with which the formal complaint is filed.
- Complaints may be filed with Title IX Coordinator in person, by mail, or by email, by using contact information, or by another method designated by the institution.
- Institution must follow the grievance process.
- Supportive measures must be offered as appropriate.
Grievance Process

Grievance process components

- Basic requirements
- Notice of allegations
- Dismissal of formal complaint
- Consolidation
- Informal resolution
- Investigation
- Hearing
- Determination regarding responsibility
- Appeals
- Recordkeeping
Grievance Process– Basic Requirements

Must treat complainants and respondents equitably

- Provide remedies to a complainant where a determination of responsibility has been made against the respondent.
- Follow a grievance process that complies with this part before the imposition of any disciplinary sanctions or other actions against a respondent.

Require an objective evaluation of all relevant evidence and provide that credibility determinations may not be based on person’s status.

Require that any individual designated by an institution as a Title IX Coordinator, investigator, decision-maker, or any person designated to facilitate an informal resolution process, not have a conflict of interest or bias.
Grievance Process – Basic Requirements

Includes a presumption that the respondent is not responsible for the alleged conduct until a determination of responsibility is made at the conclusion of the grievance process.

Includes reasonably prompt time frames for conclusion of the grievance process.

- Must include process that allows for temporary delay for good cause with written notice to complainant and respondent of the delay and the reasons for action.
- Good cause may include considerations such as absence of a party, a party’s advisor, or witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities.
Grievance Process– Basic Requirements

- Describe the range of (or list) possible disciplinary sanctions and remedies that the institution may implement following determination of responsibility.

- State whether the standard of evidence to be used to determine responsibility is preponderance of the evidence or clear and convincing evidence.

  - Must apply same standard for formal complaints against students as for formal complaints against employees
  - Must apply same standard to all formal complaints of sexual harassment
Grievance Process– Basic Requirements

Include the procedures and permissible bases for the complainant and the respondent to appeal.

Describe the range of supportive measures available to complainants and respondents, and

Do not require, allow, rely upon, or otherwise use questions or evidence that constitute information protected under a legally recognized privilege, unless person has waived privilege.
Dismissal of complaint

- If conduct, if proved, would not constitute sexual harassment
- If conduct did not occur in the education program or activity
- If conduct did not occur against a person in the U.S.

- Institution must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under Title IX or this part.

- Such a dismissal does not preclude action under another provision of the recipient’s code of conduct.

Upon dismissal, the institution must promptly send written notice of the dismissal and reasons for dismissal.
Grievance Process– Dismissal

Dismissal of complaint

- The institution may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing:
  - A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein;
  - The respondent is no longer enrolled or employed by the institution; or
  - Specific circumstances prevent the institution from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

Upon dismissal, the institution must promptly send written notice of the dismissal and reasons for dismissal.
Grievance Process– Informal Resolution

An institution may not require (as a condition of enrollment, employment, or another right) waiver of the right to an investigation and adjudication of a formal complaints of sexual harassment consistent with this section.

An institution may not require the parties to participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed.
Grievance Process - Informal Resolution

At any time, prior to reaching a determination regarding responsibility, the institution may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication.

Informal resolution requires an institution to follow certain requirements, including (1) providing the parties a written notice disclosing certain information (described below); (2) obtaining the parties voluntary, written consent to the informal resolution process; and (3) ensuring that it does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.
Grievance Process– Informal Resolution

The written notice to the parties must disclose: (1) the allegations; (2) the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations (provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint); and (3) any consequences resulting from participating in the informal resolution process, including records that will be maintained and could be shared.
Grievance Process—Consolidation

An institution may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances.
Grievance Process – Investigations

Upon receipt of formal complaint, an institution must provide written notice to parties who are known.

Written notice must include:

• Notice of recipient’s grievance process
• Notice of allegations of sexual harassment, including sufficient details known at that time (i.e., identities of the parties involved in the incident if known, the conduct allegedly constituting sexual harassment, and the date and location of the alleged incident)
Grievance Process—Investigations

Written notice must also:

- Include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.
- Inform the parties that they may have an advisor of their choice who may be an attorney and that they may inspect and review evidence.
- Inform the parties of any provision in the institution’s code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.
Grievance Process– Investigations

Written notice must be provided with sufficient time to prepare a response before any initial interview.

If other allegations are investigated later, notice must be provided of the additional allegations to the parties whose identities are known.
Grievance Process—Investigations

An institution must:

• Ensure that the burden of proof and burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the institution and not on the parties.

• The institution cannot access, consider, disclose, or otherwise use a party’s records that are made and maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party’s voluntary, written consent to do so for the grievance process.
Grievance Process– Investigations

An institution must:

• Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;
• Not restrict the ability of either party to discuss the allegations under investigation or gather and present relevant evidence; and
• Provide parties with the same opportunities to have others present during any grievance proceeding, including an advisor of their choice, but may establish reasonable restrictions regarding participation.
Grievance Process– Investigations

Investigation objectives

• Conduct a prompt, impartial, and thorough investigation to determine what happened.
• Steps may vary depending on the allegations.
• Identify appropriate witnesses and order of questioning.
• Consider types of questions and manner of interviews.
  • Who was involved or present?
  • What happened? Times, dates, places
  • What happened before or after?
• Request to see documentary evidence.
• Refrain from making conclusions or promising results.
Grievance Process– Investigations

Investigation objectives

• Carefully document all steps in the investigation.
• Consider credibility of witnesses, including inconsistent statements, body language, and reasons for statements.
• Warn individuals to be honest and forthcoming and that failure to do so may result in discipline.
• Written statements may be necessary for certain individuals.
Conclusion
Conclusion

- Need to change policies to include a formal complaint
- Need to include a grievance process in your policies
- Need to identify different individuals to serve as investigator and follow process
Disclaimer

Our webinars are designed to be accurate and authoritative, but we do not provide legal, accounting, medical or similar professional services. Client remains solely responsible for compliance with all applicable laws, regulations, accounting standards and official health guidance. If legal, accounting, medical or other expert advice is desired, Client should retain the services of an appropriate professional.

Photocopying, distributing or using these copyrighted materials electronically without the copyright owner's express written consent is strictly prohibited. Consent is granted for the use of purchasers of webinars and then solely for the use of registered attendees of the webinars. No right or license is given to reproduce the materials in any form or format or to place the materials in any format on any website or blog or to otherwise republish it in any manner without the express written permission of the copyright holder.
Title IX Boot Camp for Higher Education (With Updates)

Session 3: Finalizing the Investigation and Making Decisions on Responsibility Under Title IX

Presented by
Richard F. Verstegen
Overview

Grievance Process
- Investigation
- Responsibility Decision-Maker
- Live Hearing
- Written Determination

Recordkeeping Requirements

Conclusion
Harassment Scenarios

**Student-on-student harassment**
- Male student is accused of trying to kiss and grabbing the breast of a female student in a dormitory on campus. Friend of female student reports the conduct.

**Employee-on-employee harassment**
- Director of Admissions is accused of sending an inappropriate email to an office administrative assistant and also making suggestive comments to her. Administrative assistant reports this conduct to Title IX Coordinator.
Formal Complaints

Formal complaint

- Complainant must be participating or attempting to participate in the education program or activity of the institution with which the formal complaint is filed.
- Complaints may be filed with Title IX Coordinator in person, by mail, or by email, by using contact information, or by another method designated by the institution.
- Institution must follow the grievance process.
- Supportive measures must be offered as appropriate.
Grievance Process

Grievance process components

- Basic requirements
- Notice of allegations
- Dismissal of formal complaint
- Consolidation
- Informal resolution
- Investigation
- Hearing
- Determination regarding responsibility
- Appeals
- Recordkeeping
Grievance Process- Investigations

An institution must:

- Create an investigation report that fairly summarizes relevant evidence.
- Have an investigator able to assess credibility and identify relevant evidence.
- Include relevant evidence as evidence and testimony that directly relates to the issues disputed or discussed.
Grievance Process- Investigations

Institution requirements:

• Prior to the completion of the investigative report, the recipient must send to each party and the party’s advisor, the evidence subject to review and inspection in an electronic format or a hard copy.

• The parties must have 10 days to submit a written response, which the investigator must consider prior to completing the investigation report.
Grievance Process - Investigations

Institution requirements:

- At least 10 days prior to a hearing (if a hearing is required) or other time of determination regarding responsibility, send to each party and the party’s advisor the investigation report in an electronic format or hard copy, for their review and written response.
Grievance Process - Investigations

Possible investigation report contents

- Summary of the complainant’s allegations and response of the accused
- Summary of the persons interviewed and a statement about their credibility
- Presentation of the findings of fact
- Summary of relevant standards and other statements concerning process
- Careful consideration should be given concerning whether the report should include conclusions about the allegations and recommendation for disciplinary or other corrective action.
Responsibility Decision-Maker

- Not Title IX Coordinator or investigator
- Must issue written determination regarding responsibility
- Determination must apply evidence standard.
Grievance Process- Live Hearings

Post-secondary institutions must provide a live hearing.

- The decision-maker must permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.

- Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party’s advisor of choice and never by a party personally (notwithstanding the discretion of the institution to otherwise restrict the extent to which advisors may participation in the proceedings).
Grievance Process- Live Hearings

Post-secondary institutions must provide a live hearing.

- Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location, or, at the institution’s discretion, any or all parties, witnesses and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other.

- At the request of either party, the institution must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party or the witness answer questions.
Grievance Process- Live Hearings

Post-secondary institutions must provide a live hearing.

- Technology may be virtual in nature. The Department recognizes that such technology can provide both parties’ meaningful opportunity to advance their own interests in a case.

- Decisionmakers are obligated to serve impartially and thus should not endeavor to “develop a personal relationship” with one party over another regardless of whether one party is located in a separate room or not.
Grievance Process - Live Hearings

Post-secondary institutions must provide a live hearing.

- Only relevant cross-examination and other questions may be asked of a party or witness.
- Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.
Grievance Process- Live Hearings

Post-secondary institutions must provide a live hearing.

- If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient’s choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.
Grievance Process - Live Hearings

Post-secondary institutions must provide a live hearing.

• Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to provide consent.
Grievance Process- Live Hearings

Post-secondary institutions must provide a live hearing.

- If a party or witness does not submit to cross-examination at the live hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility (provided, however, that the decision-maker cannot draw an inference about the determination regarding responsibility based solely on the party’s or witnesses absence from the live hearing or refusal to answer cross-examination or other questions).
Grievance Process- Live Hearings

Post-secondary institutions must provide a live hearing.

- Recipients must create an audio recording, audiovisual recording, or transcript of any live hearing and make it available to the parties for inspection and review.
Written determination must include:

- Identification of the allegations potentially constituting sexual harassment
- A description of the procedural steps taken from the receipt of the formal complaint to the determination, including any notifications to the parties, interviews, site visits, methods used to gather other evidence, and hearings held
- Findings of fact supporting the determination
- Conclusions regarding the application of the recipient’s code of conduct to the facts
Determination

Written determination must include:

- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the institution imposes on the respondent, and whether remedies designed to restore or preserve equal access to the education program or activity will be provided by the institution to the complainant; and
- The institution’s procedures and permissible bases for the complainant and respondent to appeal.
Determination

Written determination

• The institution must provide the written determination to the parties simultaneously.

• The Title IX Coordinator is responsible for effective implementation of any remedies.
Determination

Possible sanctions include discipline, suspension, expulsion, no contact orders, or other action.

Possible remedies for any complainants include counseling, monitoring, or other action.
Recordkeeping Requirements

An institution must maintain for a period of seven years the following records.

• Each sexual harassment investigation including (1) any determination regarding responsibility and any audio or audiovisual recording or transcript, (2) any disciplinary sanctions imposed on the respondent, and (3) any remedies provided to the complainant designed to restore or preserve equal access to the recipient’s education program or activity;
• Any appeal and the result therefrom; and
• Any informal resolution and the result therefrom.
Conclusion
Conclusion

- Need to follow process for finalizing the investigation report
- Need to identify decision-maker and requirements with a hearing
- Need to ensure final written determination includes all necessary contents
Disclaimer

Our webinars are designed to be accurate and authoritative, but we do not provide legal, accounting, medical or similar professional services. Client remains solely responsible for compliance with all applicable laws, regulations, accounting standards and official health guidance. If legal, accounting, medical or other expert advice is desired, Client should retain the services of an appropriate professional.

Photocopying, distributing or using these copyrighted materials electronically without the copyright owner’s express written consent is strictly prohibited. Consent is granted for the use of purchasers of webinars and then solely for the use of registered attendees of the webinars. No right or license is given to reproduce the materials in any form or format or to place the materials in any format on any website or blog or to otherwise republish it in any manner without the express written permission of the copyright holder.
Questions
Title IX Boot Camp for Higher Education (With Updates)

Session 4: Considering Other Issues Related to Title IX Sexual Harassment, Including Appeals of Decisions

Presented by Richard F. Verstegen
Overview

- Grievance Process
  - Appeal
  - Recordkeeping

- Retaliation

- Training Required

- Other Issues

- Conclusion
Grievance Process

Grievance process components

• Basic requirements
• Notice of allegations
• Dismissal of formal complaint
• Consolidation
• Informal resolution
• Investigation
• Hearing
• Determination regarding responsibility
• Appeals
• Recordkeeping
Grievance Process - Determination

Written determination must include:

- Allegations
- Procedural steps
- Findings of fact
- Conclusions
- Statement on result
- Appeal rights
Appeal

An institution must offer both parties an appeal from a determination of responsibility and from an institution’s dismissal of a formal complaint or any allegations contained therein.

If appeal, decision is final after appeal.

If not appeal, then decision is final on the date on which an appeal would no longer be considered timely.
Appeal

The appeal must be on the following bases:

- Procedural irregularity that affected the outcome of the matter;
- New evidence that was not reasonably available at the time of the determination regarding responsibility or dismissal that could affect the outcome of the matter;
- The Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias for or against the complainants or respondents that affected the outcome of the matter.

The institution may offer an appeal equally to both parties on additional bases.
Appeal

For any appeal, the institution must:

• Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties.
• Ensure that the appeal decision-maker is not investigator, responsibility decision-maker, or Title IX Coordinator.
• Ensure that the appeal decision-maker complies with standards (no conflict of interest).
Appeal

For any appeal, the institution must:

- Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
- Issue a written decision describing the result of the appeal and the rationale for the result; and
- Provide the written decision simultaneously to both parties.
Recordkeeping Requirements

An institution must maintain the following records for a period of seven years.

• Each sexual harassment investigation including (1) any determination regarding responsibility and any audio or audiovisual recording or transcript, (2) any disciplinary sanctions imposed on the respondent, and (3) any remedies provided to the complainant designed to restore or preserve equal access to the recipient’s education program or activity;
• Any appeal and the result therefrom;
• Any informal resolution and the result therefrom
Recordkeeping Requirements

For each response for an allegation of sexual harassment, an institution must create, and maintain for a period of seven years, the following records.

- Records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment
- The institution must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the education program or activity.
Recordkeeping Requirements

For each response for an allegation of sexual harassment, an institution must create, and maintain for a period of seven years, the following records.

- If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances.
- The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.
Recordkeeping Requirements

An institution must maintain for a period of seven years the following records.

- All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process
- An institution must make these training materials publicly available on its website.
Retaliation/Confidentiality

No institution or person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right secured by Title IX, or because the individual has made a report or complaint, testified, assisted, or participated, or refused to participate in any manner, in an investigation, proceeding, or hearing.

Intimidation, threats, coercion, or discrimination (including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sexual discrimination, or a report or formal complaint of sexual harassment), for the purpose of interfering with any right or privilege secured by Title IX, constitutes retaliation.
Retaliation/Confidentiality

An institution must keep confidential the identity of any individual who made a report or complaint of sex discrimination (including any individual who has made a report or filed a formal complaint of sexual harassment), any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness.

This confidentiality applies except as may be permitted by FERPA, or as required by law, or to carry out the purposes of Title IX (including the conduct of any investigation, hearing, or judicial proceeding arising thereunder).
Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under Title IX.

The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under this section.

Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding does not constitute retaliation (provided however that a determination regarding responsibility, alone, is not sufficient to conclude that a party made a materially false statement in bad faith).
Training Required

An institution must ensure that Title IX Coordinators, investigators, decision-makers, and anyone who facilitates an informal resolution process must receive training on:

- The definition of sexual harassment
- The scope of the institution’s education program or activity
- How to conduct investigations and the grievance process, including hearings, appeals and informal resolution processes
- How to serve impartially, including avoiding prejudgment of the facts at issue, conflicts of interest, and bias
Training Required

An institution must ensure that decision-makers receive training on:

- Issues of relevance of questions and evidence, including when questions and evidence of the complainant’s sexual predisposition or prior sexual behavior are not relevant
- Any technology to be used at a live hearing

An institution must ensure that investigators receiving training on:

- Issues of relevance to create an investigative report that fairly summarizes evidence

Any materials must not rely on sex stereotypes and must promote impartial investigations and adjudications.
Title IX Complaints

Other options

• File a complaint with OCR.
• Send a letter to OCR enforcement officer.
• Not required to use the institution’s grievance process before filing a complaint
• File a lawsuit in court claiming a violation; there is no need to file with OCR before filing a suit in court.
First Amendment

Consider First Amendment issues.

- In cases of alleged harassment, the First Amendment must be considered if issues of speech or expression are involved.
- First Amendment rights may apply to the rights of complainants, respondents, or third parties.
FERPA

Consider student records issues.

- There will need to be a balance between confidentiality of student records and due process considerations.
- Institutions may need to disclose evidence as part of the process which may bring concerns with disclosure of confidential student records.
Interplay with Other Laws

Policies for consideration

• Interaction when claims also involve other protected classes (race, disability, etc.)
• Interaction with other state laws
• Interaction with overlapping federal laws (Title VII, Clery Act, VAWA)
• Interaction with student code of conduct
Changes to Policies

Revisions to various policies
- Non-discrimination policy
- Grievance procedure
- Grievance process
  - Incorporate statutory provisions for grievance process
  - Incorporate investigation procedures
  - Incorporate decision procedures (responsibility and appeal)
Changes to Policies

Revisions to various policies

- Make sure revisions are not inconsistent with laws.
- Make sure revisions do not hinder investigations or create liability.
- Can incorporate other important components, such as anti-retaliation or other issues
Changes to Policies

Possible creation of forms

- Form for responding to reports
- Form for responding to formal complaint
- Form for investigation report
- Form for decision on responsibility
- Form for decision on appeal
Conclusion
Conclusion

- Need to consider appeal processes for formal complaints
- Need to maintain and create records as necessary
- Need to consider other requirements, including retaliation and First Amendment
Disclaimer

Our webinars are designed to be accurate and authoritative, but we do not provide legal, accounting, medical or similar professional services. Client remains solely responsible for compliance with all applicable laws, regulations, accounting standards and official health guidance. If legal, accounting, medical or other expert advice is desired, Client should retain the services of an appropriate professional.

Photocopying, distributing or using these copyrighted materials electronically without the copyright owner's express written consent is strictly prohibited. Consent is granted for the use of purchasers of webinars and then solely for the use of registered attendees of the webinars. No right or license is given to reproduce the materials in any form or format or to place the materials in any format on any website or blog or to otherwise republish it in any manner without the express written permission of the copyright holder.
Questions