

A blurred background image showing a person's hand typing on a laptop keyboard. The scene is dimly lit, suggesting an office or study environment. The laptop is silver and the keyboard is visible. The background is out of focus, showing a desk and some plants.

Overview of the Title IX Regulations for Investigators

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Introduction

- Effective date for compliance: August 14, 2020
- Treat both parties equitably and equally
- “Prompt & equitable” grievance procedures
- Sexual harassment actionable when it “denies a person equal access to education”
- Schools may decide how to best implement the prohibition on conflicts of interest and bias
- Flexibility to outsource Title IX investigation & adjudication functions



Practice Point

At the beginning of a Title IX investigation, investigators should:

- Review the allegations
- Review relevant policies, including:
 - Title IX harassment policies
 - Sexual misconduct policies (may be called “non-Title IX sexual harassment”)
 - Title VII policy, if applicable
- Determine which policy or policies may apply
- Review procedures for investigation and grievance process under appropriate policy
- Confirm with Title IX Coordinator

Definitions of "Sexual Harassment"

Sexual harassment is defined as conduct on the basis of sex that satisfies one or more of the three types of behavior:

Definitions of "Sexual Harassment"

1. A school's employee conditioning provision of an aid, benefit or service of the school on an individual's participation in unwelcome sexual conduct ("quid pro quo" harassment;
2. 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 school's education program or activity; or
3. Sexual assault, dating violence, domestic violence, or stalking, as defined in the referenced statutes

Definitions of "Sexual Harassment"

- "Quid pro quo" harassment
 - May be express or implied
 - Need not be "severe" or "pervasive" as a single incident is inherently "offensive" and jeopardizes equal educational access

Definitions of "Sexual Harassment"

- Sexual Assault includes forcible and non-forcible sex offenses
 - Rape, sodomy, sexual assault with an object, forcible fondling
 - Incest, statutory rape
- Dating Violence
- Domestic Violence
- Stalking

* Important to consider the definition of consent

Definitions of "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 school's education program or activity

Recipient's General Response - Threshold Criteria

- Four threshold criteria
 - Incident constitutes "sexual harassment" under Title IX
 - School has "actual knowledge"
 - Conduct occurred within school's own "education program or activity"
 - Alleged harassment occurred within the United States

Recipient's General Response - Threshold Criteria

Actual Knowledge

- Notice of sexual harassment or allegations of sexual harassment to the school's Title IX Coordinator or any official of the school who has the authority to institute corrective measures (or to any employee of an elementary or secondary school)

Practice Point

If report of the alleged incident was initially received by someone other than the Title IX Coordinator, investigators may consider:

1. Reviewing that individual's report or notes about initial contact with the Complainant; and
2. Interviewing that individual during the investigation.

Recipient's General Response - Threshold Criteria

Actual Knowledge continued:

- Notice may be written or oral, by observation, via newspaper article, or other means
- Reporting of sexual harassment to Title IX
Coordinator always constitutes "actual knowledge"
- Mandated reporters are optional

Recipient's General Response - Threshold Criteria

Education Program or Activity

- Locations, events, or circumstances over which the school exercises 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
- Incidents that occur outside of the school's education program or activity may still be subject to the school's code of conduct, and the school may still offer supportive measures

Recipient's General Response - Threshold Criteria

Incidents outside of the United States

- Includes study abroad programs
- Although not subject to the Title IX regulations, incidents may be addressed via the school's code of conduct or other relevant policies
- Supportive measures may still be offered

Practice Point

In some cases, the investigator may need to consider the “jurisdictional issues” as part of the investigation.

Questions regarding jurisdiction may be discussed with the Title IX Coordinator.

Recipient's Response – Deliberately Indifferent

School will be held liable for violating its obligations under Title IX if it is found that a school is “deliberately indifferent,” which is defined as “clearly unreasonable in light of the known circumstances.”

Only alleged incidents meeting the threshold criteria require a response by the institution.

Recipient's Response to Qualifying Incidents of Sexual Harassment

- A school has a duty to respond if an incident meets the four threshold criteria
- Schools must treat complainants and respondents equitably
- Schools must follow their grievance process
- If no formal complaint is filed, the school must offer the complainant supportive measures

Recipient's Response to Qualifying Incidents of Sexual Harassment

Supportive measures

- Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or respondent before or after the filing of a formal complaint or where no formal complaint has been filed.
- Designed to restore or preserve equal access to the school's education program or activity without unreasonably burdening the other party
 - Includes measures designed to protect the safety of all parties or the school's educational environment, or deter sexual harassment

Recipient's Response to Qualifying Incidents of Sexual Harassment

Supportive measures

- May include counseling, extensions of deadlines or other course-related adjustments, modifications to work or class schedules, campus escort services, mutual restrictions on contact between parties, changes in work or housing locations, leaves of absence, increased security of certain areas on campus, etc.

Practice Point

Investigators should be familiar with supportive measures available to the parties and in effect during the grievance process.

Investigators should respect and follow those supportive measures during investigation.

Recipient's Response – Emergency Removal

Title IX does not prohibit a school from removing a respondent from the school's education program or activity on an emergency basis, provided that the school:

- Undertakes an individualized safety & risk analysis;
- Determines that an immediate threat to the physical health or safety of any student or individual arising from the allegations of sexual harassment justifies removal; and
- Provides respondent with notice & an opportunity to challenge the decision immediately following removal.

Recipient's Response – Administrative Leave

Title IX does not prohibit a school from placing a non-student employee respondent on administrative leave during the pendency of a Title IX grievance process.

Grievance Process - Formal Complaint

Formal Complaint

- Filed by a complainant or signed by the Title IX Coordinator
- Alleges sexual harassment against a respondent
- Requests the school investigate the alleged incident of sexual harassment
- Must be filed with the Title IX Coordinator in person, by mail, or by email
- No time limit on a complainant's filing of a formal complaint
- School must respond to a formal complaint (i.e., follow the Title IX grievance process and investigate the allegations)

Grievance Process - Formal Complaint

Dismissal of a Formal Complaint

- MUST dismiss a formal complaint if the alleged incident:
 - Would not constitute sexual harassment under Title IX, even if proved;
 - Did not occur in the school's education program or activity; or
 - Did not occur against a person in the United States.

Grievance Process - Formal Complaint

Dismissal of a Formal Complaint

- MAY dismiss a formal complaint (or any allegations within) 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 allegations within;
 - The respondent is no longer enrolled or employed by the school; or
 - Specific circumstances prevent the school from gathering sufficient evidence to reach a determination as to the formal complaint or allegations within.

Practice Point

If a situation involving dismissal arises during an investigation, an investigator should immediately discuss with the Title IX Coordinator.

Grievance Process - Formal Complaint

Dismissal of a Formal Complaint

- Dismissal does not preclude action under another relevant school policy (i.e., Code of Conduct)
- Upon dismissal, the school must promptly notify the parties

Grievance Process - Formal Complaint

Consolidation of Formal Complaints

- A school 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 - Process for Formal Complaints

A school's grievance process must:

- Treat complainants and respondents equally
- Require objective evaluation of relevant evidence, including inculpatory and exculpatory evidence, and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness
- Require that any individual designated by the school as a Title IX Coordinator, investigator, investigator, decision-maker, or informal resolution facilitator not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent

Grievance Process - Process for Formal Complaints

A school's grievance process must:

- Ensure Title IX Coordinators, investigators, decision-makers, and informal resolution facilitators receive training
- Include a presumption that the respondent is not responsible for the alleged conduct until a determination is made at the conclusion of the grievance process
- Include reasonably prompt time frames for conclusion of the grievance process
- Include a process that allows for temporary delay of the grievance process or the limited extension of time frames with good cause and written notice

Grievance Process - Process for Formal Complaints

A school's grievance process must:

- Describe the range or list of possible disciplinary sanctions and remedies
- State the standard of evidence
- Include procedures and permissible bases for appeals
- Describe range of supportive measures
- Not require, allow, rely upon or otherwise use privileged information without permission



Practice Point

While it is presumed that a respondent is not responsible for the alleged misconduct until a determination is reached at the conclusion of the grievance process, this does not lead to an assumption that the complainant is lying or that the alleged harassment did not occur.

Investigators and decision-makers must remain impartial and not prejudge that the respondent is responsible.

Investigators should carefully and conscientiously understand and follow this “presumption” guideline.

Grievance Process - Notice

In response to a formal complaint, a school must give written notice of the allegations to the parties.

Notice includes:

- Notice of school's grievance process
- Sufficient details of allegations known at the time, including:
 - Identities of the parties involved, conduct constituting sexual harassment, and date and location of the alleged incident
- Sufficient time period for parties to prepare a response before an initial interview

Grievance Process - Notice

Notice requirements continued:

- Statement that respondent is presumed not responsible until final determination is made
- Statement that the determination of responsibility will be made at the conclusion of the grievance process
- Right to an advisor of their choice
- Right to inspect and review all evidence gathered during the investigation
- Reference school policy that prohibits knowingly making false statements or submitting false information

 Practice Point

Before beginning an investigation, investigators should be familiar with the school's entire Title IX policy and understand the expectations of an investigator.

Grievance Process - Investigation of Formal Complaints

- Schools must investigate formal complaints
- Title IX Coordinator may serve as the investigator
- Burden of proof and gathering of evidence is on the school

Practice Point

Note that the burden is on the school to develop facts and meet the burden of proof.

Grievance Process - Investigation of Formal Complaints

- Medical and similar privileged records are not available unless the party or parent gives written consent
- Both parties must be given the equal opportunity to present fact and expert witnesses and evidence during the grievance process

Grievance Process - Investigation of Formal Complaints

- Neither party may be restricted in their ability to discuss the allegations or gather and present relevant evidence
- Both parties have the right to an advisor
 - School may establish restrictions on the advisor's participation in the grievance process, provided the restrictions are equally applied

Practice Point

Investigators should be familiar with the school's guidelines for advisors participating in Title IX cases.

Grievance Process - Investigation of Formal Complaints

- School must provide written notice of any interview, meeting or hearing at which a party is expected to participate
 - Include date, time, location & purpose of meeting with sufficient time to prepare
- All parties and advisors must have equal access to inspect and review all evidence gathered during the investigation that is directly related to the allegations

Practice Point

Note that the full investigation file, which includes evidence that is directly related to the allegations, must be provided to both parties.

Grievance Process - Investigation of Formal Complaints

- The parties have at least 10 days to respond in writing to the investigation evidence and (preliminary) investigative report
- The investigator must consider those responses prior to finalizing the investigative report
- School may require parties to submit any additional evidence prior to finalization of the investigative report or after the report and prior to the hearing

Grievance Process - Investigation of Formal Complaints

- Evidence provided to the parties must be available at the hearing for reference or use in cross-examination
- Investigative report fairly summaries relevant evidence
- Investigative report must be completed at least 10 days prior to the hearing
- Copies of the investigative report must be provided to the parties and their advisors for review and written response
- Investigators MAY include recommended findings or conclusions in the report, but the decision-maker must objectively evaluate the relevant evidence to make a determination

Practice Point

Investigators should carefully review the section of the Title IX policy referencing investigative reports.

The policy may expressly state that the investigator will or will not include recommendations or conclusions in the investigative report.

Adhere to the school's policy.

Grievance Process - Hearings

- The decision-maker cannot be the Title IX Coordinator
- A postsecondary school must provide a live hearing.
- Hearings may be conducted with all parties physically present or virtually
- If a party does not have an advisor at the live hearing, the recipient must provide an advisor of the party's choice, without charge to the party
- A parent or guardian may act on behalf of party

Grievance Process - Hearings

- Each party must be given opportunity for relevant questions and cross-examination
 - Cross-examination is conducted directly, orally, and in real time only by the party's advisor
- Only relevant questions may be asked during cross-examination
 - Before a question is answered, the decision-maker will rule on relevance and explain any decision to exclude a question as not relevant

Grievance Process - Hearings

Not relevant under Title IX:

- Questions and evidence about a complainant's sexual predisposition
- Questions and evidence about a complainant's prior sexual behavior, except when:
 - Questions & evidence are offered to prove someone other than the Respondent committed the alleged conduct; or
 - Questions & evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent & are offered to prove consent.
- Medical and similar privileged records unless the party has provided written consent

Grievance Process - Hearings

Cross-examination

- May 2020 Regulations: If a party or witness does not submit to or participate in cross-examination, the decision-maker(s) **must not rely** on any statement of that party or witness in reaching a determination
- August 2021 Letter from the DOE: Rescinded the statement regarding the prohibition against statements not subject to cross-examination, and schools are no longer required to include the above provision in the policy.
- However, the 2021 change has not been reflected in all policies. Consult with your Title IX Coordinator about the school's approach to cross-examination.

Grievance Process - Determinations

- Decision-maker applies the standard of evidence adopted by the school to make and issue a written determination, which includes:
 - Identification of allegations
 - Description of procedural steps during the Title IX process
 - Findings of facts supporting the determination
 - Conclusions regarding application of code of conduct to the facts
 - Statement of, and rationale for, the result as to each allegation, including a determination of responsibility, any disciplinary sanctions, and whether remedies will be provided
 - Procedures and permissible bases for appeal

Practice Point

The investigator's organization of the investigation file and investigative report will be useful as the decision-maker drafts a description of the procedural steps.

Grievance Process - Standard of Evidence

- Preponderance of the evidence (“more likely than not”)
- Clear and convincing evidence (“highly probable”)
- Same standard must be used for formal complaints against students as is used for formal complaints against employees
- Same standard must be applied to all formal complaints of sexual harassment

Grievance Process - Appeals

- An appeal process must be offered to both parties
- Parties may appeal on several bases:
 - Procedural irregularity that affected the outcome
 - New evidence that was not reasonably available at the time of the determination or dismissal that could affect the outcome of the matter
 - Title IX Coordinator, investigator or decision-maker had a conflict of interest or bias that affected the outcome
- Appeal decision-maker issues a written determination

Grievance Process – Informal Resolution

- Mediation, restorative justice, other forms of alternative dispute resolution may be available to the parties after a formal complaint is filed
- Must be voluntary and parties must consent in writing to the process
- Cannot be offered or facilitated by a school in a case involving an employee's sexual harassment of a student

Training for Title IX Coordinators, Investigators & Decision-Makers

- Title IX Coordinators, investigators, decision-makers and informal resolution facilitators must receive training on:
 - Definition of sexual harassment under Title IX
 - Scope of the school's education program or activity
 - How to conduct an investigation and grievance process
 - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
 - Investigators must receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence
- Training materials must be maintained for 7 years and made publicly available on the school's website

Miscellaneous

- Recordkeeping
- Remedial Action
- Dissemination of Policy & Grievance Procedures
- Retaliation and Amnesty
 - Retaliation is prohibited under Title IX
 - Investigators should understand the school's amnesty provisions
- Confidentiality
- Exemption for educational institutions controlled by religious organizations

Thank you!

Send questions or comments to

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