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Title IX Coordinators and the New Title IX Grievance Process

City College of San Francisco

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Agenda

- Review New Title IX Regulations: Scope and Definitions
- Roles of New Title IX Team
- Intake Process for Reports of Sexual Harassment
- Practical Application
- Title IX Grievance Process
- Retaliation
- Practical Application

NEW TITLE IX SCOPE AND DEFINITIONS

Federal Law - Title IX:

No person in the United States 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 of the Education Amendments of 1972 (20 U.S.C. Section 1681 et seq.) and related regulations (34 C.F.R. Part 106).)

New Title IX Regulations

1. **Regulations and Guidance**
   - Text of regulations contained in ***34 CFR Part 106*** have the full force and effect of law
2. **Overall Intent of Changes**
   - Strengthen/Clarify Title IX protections for Complainants & provide due process protections facing accusations of sexual misconduct
3. **New Scope Under Title IX Regulations**
   - Amended sexual harassment definitions, clarified jurisdiction, & provided grievance process
4. **Live Hearing Required for Post-Secondary Institutions**
   - A live hearing in Title IX grievance process complies with 2019 California decision ***Doe v. Kegan Allee,*** (30 Cal. App. 5th 1036), which requires fair hearing and opportunity for direct or indirect cross-examination before a neutral adjudicator who has independent power to find facts and make credibility assessments.

New Title IX Regulations

5. Additional Resources for Understanding Title IX Grievance Process

- Part I: Questions and Answers Regarding the Department's Title IX Regulations
- Part II: Questions and Answers Regarding the Department's Title IX Regulations
- Questions & Answers on the Title IX Regulations on Sexual Harassment
- OCR's Enforcement of Title IX in light of:
    + *Bostock v. Clayton County, GA,* 590 U.S. __, 2020
    + *Victims Rights Law Center, et al. v. Cardona, et al.,* 2021 WL 3185743 (D. Mass. July 28, 2021
    + See also, OCR Dear Colleague Letters, dated June 23, 2021 and August 24, 2021

6. California Education Code §§ 66262.5 definitions and 66281.8 procedures

- Sex Equity in Education, new grievance procedures implemented by January 1, 2022

Davis v. Monroe County Board of Education 526 U.S. 629 (1999)

- Ruling: For student-on-student sexual harassment, the educational institution will be liable for damages when:
  - The institution has ***"actual notice"*** of the harassment; and
  - The institution responded to the harassment with "deliberate indifference."
  - Harassment must be ***"severe, pervasive, and objectively offensive,"*** and the institution's indifference was "systemic" so that the victim is deprived of educational opportunities or services.
  - ***Deliberate indifference*** defined as a response that is ***"clearly unreasonable in light of the known circumstances."***
- The New Regulations apply the *Davis* standard for OCR compliance reviews ***and*** for finding institutional liability

Response to Sexual Harassment

According to **34 CFR §106.44(a):** A recipient with **actual knowledge** of sexual harassment in an education program or activity of the recipient against a person in the United States must **respond promptly in a manner that is not deliberately indifferent** (e.g.; clearly unreasonable in light of the known circumstances.)

Actual Knowledge

- In **Post-Secondary Institutions,** per **§106.30, *actual knowledge*** occurs when:
  - The ***Title IX Coordinator*** or any ***official*** of the recipient who has ***authority to institute corrective measures*** on behalf of the recipient has notice of sexual harassment or notice of allegations of sexual harassment
- The Institution must identify who those officials are in the organization and notify them of their status as an Official With Authority or "OWA"
- See also Ed. Code §66281.8(a)(2) for definition of Responsible Employees and their duties

Actual Knowledge, continued

The Institution should:

- Provide ***written*** notice and guidelines to OWAs
- ***Train*** all OWAs in their responsibilities, such as:
  - Promptly providing a verbal, written or electronic report to the Title IX Coordinator, likely within 1-2 business days
  - Prohibited from filing anonymous reports to the Title IX Coordinator
  - Provide the Title IX Coordinator all known information
  - Not required to evaluate the complaint or information received unless the OWA is the Title IX Coordinator

Education Program or Activity

- Per **§ 106.44(a):** An 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, and also includes any ***building owned or controlled by a student organization that is officially recognized*** by a postsecondary institution.
- At time of filing the formal complaint, the Complainant must be ***participating or attempting to participate*** in recipient's education program or activity.

Sexual Harassment Defined

According to **§ 106.30,** Sexual Harassment means conduct on the ***basis of sex*** under one or more of following:

1. Quid Pro Quo Harassment

- **Employee** conditions the provision of an aid, benefit, or service of the recipient on the Complainant's participation in unwelcome sexual conduct

2. Hostile Environment Sexual Harassment

- Unwelcome conduct determined by a reasonable person to be **so severe, pervasive *and* objectively offensive** that it effectively denies Complainant equal access to the recipient's education program or activity

Sexual Harassment Defined, Cont.

Conduct on the ***basis of sex*** under one of following:

3. Other Sexual Acts

- **Sexual assault** per 20 U.S.C. 1092(f)(6)(A)(v): Includes Forcible and Nonforcible Sex Offenses
- **Dating violence** per 34 U.S.C. 12291(a)(10)
- **Domestic violence** per 34 U.S.C. 12291(a)(8)
- **Stalking** per 34 U.S.C. 12291(a)(30)

Other Sexual Acts as Sexual Harassment under Title IX

1. Sexual Assault

- **Forcible:**
  - Any sexual act directed against Complainant, forcibly, against Complainant's will, or without consent, including rape, sodomy, sexual assault with an object, and fondling
- **Nonforcible:**
  - Offenses that do not involve force where the Complainant is incapable of giving consent, including statutory rape and incest

NOTE: Under Education Code §67386 a Complainant is ***unable to consent if the Complainant was incapacitated*** due to the influence of drugs, alcohol, or medication, so that the Complainant could not understand the fact, nature, or extent of the sexual activity.

Other Sexual Acts

2. Dating Violence (34 U.S.C. 12291(a)(10))

- Violence (on the basis of sex) committed by Respondent:
  - who is or has been in a social relationship of a romantic or intimate nature with the Complainant
  - The existence of such a relationship shall be determined based on a consideration of the following factors:
    - (i) The length of the relationship
    - (ii) The type of relationship
    - (iii) The frequency of interaction between the persons involved in the relationship

Other Sexual Acts

3. Domestic Violence (34 U.S.C. 12291(a)(8))

Felony or misdemeanor crimes of violence (on the basis of sex) committed by:

- A current or former spouse or intimate partner of the Complainant
- A person with whom the Complainant shares a child in common
- A person who is cohabitating with or has cohabitated with the Complainant as a spouse or intimate partner
- A person similarly situated to a spouse of the Complainant under the domestic or family violence laws of the jurisdiction receiving grant monies, or
- Any other person against an adult or youth Complainant who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.

Other Sexual Acts

4. Stalking (34 U.S.C. 12291(a)(30))

The term “stalking” means engaging in a course of conduct (on the basis of sex) directed at Complainant that would cause a reasonable person to:

- **Fear** for their safety or the safety of others; or
- Suffer substantial **emotional distress**

ROLES OF THE NEW TITLE IX TEAM

Who's on the New Title IX Team?

1. Title IX Coordinator, per §106.8(a)
2. Investigator(s)
3. Decision Maker(s)
4. Appeal Officer Decision Maker(s)
5. Informal Resolution Process Facilitator(s)

- ***All team members must be impartial, unbiased, and free from conflicts.***
- ***All team members must be trained in the new Title IX Regulations.***
- ***The Title IX Coordinator must be an employee.***

Title IX Team: Title IX Coordinator

Title IX Coordinator Duties:

- Coordinates Title IX compliance and training
- Conducts Intake meeting with Complainant
- Offers supportive measures to Complainant & Respondent
- Explains grievance process, accepts formal complaint & determines mandatory dismissal
- If no formal complaint, considers filing formal complaint for institution
- Evaluates emergency removal
- Evaluates use of informal resolution process
- Assigns unbiased investigator free from conflicts

Title IX Team: Title IX Coordinator

Title IX Coordinator duties, continued:

- Sends notices (e.g., Notice of Allegations)
- Considers permissive dismissal of complaint
- Reviews investigative reports, written decision, & appeal decision, but ***does not make a decision*** about responsibility
- Drafts letter of outcome after written decision issued
- *Likely does* ***not*** determine sanctions
- If applicable, ensures effective implementation of remedies for Complainant, sanctions for Respondent, and overall corrective plan
- *May* investigate when needed
- *May* act as facilitator of an informal resolution process

Title IX Team: Investigator

Investigator Role:

- Trained and Knowledgeable
- Impartial, unbiased, & free from general or specific conflicts of interest
- Investigates formal complaint
  - Reviews complaint and relevant policies
  - Interviews parties and witnesses
  - Gathers, reviews, weighs, and synthesizes evidence
  - Assesses relevance and credibility
- Coordinates two 10-day review processes for parties and assesses responses
- Prepares a written investigative report about the evidence
- Investigator does ***not*** make decision about whether the Respondent is "responsible" for violation of sexual harassment policy

Title IX Team: Decision Maker

Decision Maker Role:

- Reviews Final Investigative Report with "fresh eyes" to see if information is missing or incomplete
- May be a hearing officer or a hearing panel
- Facilitates "live cross-examination" for parties through the parties' advisors
- Makes conclusions about whether alleged conduct occurred and the decision about responsibility for a policy violation
- Prepares written determination with findings of fact, conclusions, and rationale for the result as to each allegation
- If applicable, recommends sanctions for Respondent and remedies for Complainant

Title IX Team: Appeal Officer

Appeal Officer Role:

- Provides written notice to both parties about the right to appeal based on three grounds for appeal
- If an appeal is filed, the Appeal Officer evaluates the appeal request(s) to determine if within the scope of appeal
- Provides a written Notice of Appeal to both parties
- Reviews both written statements and arguments from the parties
- Renders written decision on appeal and explains rationale for the result
- Provides the written decision to parties at same time

Title IX Team: Informal Resolution Process Facilitator

Informal Resolution Process Facilitator Role:

- Cannot require the parties to participate in informal process or to waive the right to an investigation
- Obtains voluntary, written consent of the parties to resolve the matter anytime *after* formal complaint filed and *before* a determination of responsibility
- Process does not involve full investigation or adjudication, but includes a written notice to the parties disclosing the allegations, the requirements of the process, and notice that the parties can withdraw and resume the grievance process
- May consider the use of a trained mediator or trained restorative justice facilitator, if requested and appropriate
- Process cannot be used where an employee is alleged to have sexually harassed a student

INTAKE PROCESS FOR REPORTS OF SEXUAL HARASSMENT

Intake Meeting with Complainant

The Title IX Coordinator:

- Promptly schedules a meeting with Complainant and listens to allegations and concerns
- If Complainant describes sexual harassment allegations within District's jurisdiction, the Title IX Coordinator explains the Title IX grievance process
- Informs Complainant of the right to file or ***not*** to file a formal complaint ***and*** the right to supportive measures even if a formal complaint is not filed
- If ***no*** formal complaint is filed, the Title IX Coordinator informs Complainant of right to file a formal complaint at a later time. The Title IX Coordinator also assesses, despite Complainant's decision, whether to independently initiate a formal complaint if the failure to initiate an investigation would be clearly unreasonable considering the circumstances (e.g. significant safety threat)

Intake Meeting with Complainant

The Title IX Coordinator:

- If a formal complaint is filed, Title IX Coordinator gathers the signature of Complainant, parent/guardian and/or Title IX Coordinator
- Title IX Coordinator offers, as appropriate, supportive measures to Respondent
- Informs Complainant of right to request an informal resolution process after submission of a formal complaint and the right to exit informal resolution process at any time
- If a formal complaint is filed, Title IX Coordinator determines if the complaint falls within the scope of mandatory dismissal and informs Complainant and Respondent
- Best practice to create and/or provide a written summary of the intake meeting

Supportive Measures

1. Requirement to Offer Supportive Measures per §106.30 & §106.44

– Must be offered to Complainant as soon as CCD has notice of possible Title IX issue and to Respondent after formal complaint filed

2. Avoid Burden on Parties

– Supportive Measures must be non-punitive, non-disciplinary, and not unreasonably burdensome to the other party

3. Individualized

– Supportive Measures must ensure equal educational access, protect safety, and/or deter sexual harassment

4. Examples of Supportive Measures

– Counseling, course-related adjustments, modify schedule, extend deadlines, campus escort, increased security and monitoring, and/or mutual restrictions on contact between the parties

Discuss Advisor of Choice

- The Title IX regulations provide the Complainant and Respondent with the same opportunities to have "others present" during any grievance proceeding
  - An advisor of choice may be a parent, family member, attorney, or other person
  - The advisor may be present with their party for any meeting, interview, hearing, and may inspect & review evidence obtained in the investigation
  - The advisor ***shall*** ask the cross-examination questions in the live hearing process
    - If a party does not have an advisor to conduct cross-examination at a live hearing, the institution must provide one to the party free of charge
  - The institution may establish restrictions on the extent of an advisor's participation, if restrictions apply equally to both parties
    - Advisors will have access to inspect & review pupil, employee and/or other confidential documents; consider having advisor(s) sign an agreement not to release evidence or records outside of grievance process

Emergency Removal Option for Students

1. Institution may remove a student Respondent per §106.44(c)
2. Institution must undertake individualized safety & risk analysis re Respondent

   -The analysis determines if there is an ***immediate threat to the physical health or safety*** of any student or other individual arising from the allegations to justify removal
3. Notice to Respondent of Emergency Removal
4. Opportunity for Respondent to challenge decision immediately following the removal
5. Process ***cannot*** modify Respondent rights under Section 504 or ADA

Administrative Leave Option

1. Institution may place a non-student employee Respondent on administrative leave, per §106.44(d) during the pendency of a grievance process that complies with §106.45
2. This administrative leave option cannot be construed to modify any rights under Section 504 or the Americans with Disabilities Act.
3. Note: California Education Code §87623 sets forth additional requirements for involuntary paid or unpaid administrative leave for academic employees

PRACTICAL APPLICATION

Hypotheticals 1-3

1. **Student A offers Student B a spot on the debate team if Student B hooks-up with Student A.**
   - Is this sexual harassment under Title IX?
2. **A Professor offers a Student extra credit if the Student buys the Professor groceries**
   - Is this sexual harassment under Title IX?
3. **A Coach who teaches weights and nutrition recommends a Student athlete wear tight clothes to on-campus classes and at practice because it will "help with the Student's future athletic opportunities"**
   - Is this sexual harassment under Title IX?

Hypothetical 1 - Discussion

1. **Student A offers Student B a spot on the debate team if Student B hooks-up with Student A.**
   - Is this sexual harassment under Title IX?
     - Not Quid Pro Quo. Does not qualify as "quid pro quo" harassment under Title IX because the condition must be offered by ***an employee***.
     - However, this may be some evidence of hostile environment sexual harassment and warrants more questions to determine if there is other sex-based behavior from Student A towards Student B.
     - Even if this action does not rise to the level of Title IX's definition of sexual harassment, this action *may* be a violation of code of conduct or BP/APs prohibiting sexual harassment under Education Code and/or Title 5 regulations.
     - PRACTICE TIP: The Title IX Coordinator fielding the allegation must ask questions to understand the full context of the matter.

Hypothetical 2 - Discussion

2. A Professor offers a Student extra credit if Student buys the Professor groceries

– Is this sexual harassment under Title IX?

- No. Under these facts alone, this is not enough to demonstrate "quid pro quo" sexual harassment because this alleged behavior is not "on the basis of sex." (But ask more questions to confirm)
- Similarly, this behavior, by itself, is not enough to demonstrate a hostile environment because it is not based on sex, it is not conduct of a sexual nature, and it is not severe, pervasive & objectively offensive.
- The Professor's behavior may be addressed as unprofessional and/or inappropriate conduct based on the circumstances and campus expectations for faculty.
- PRACTICE TIP: The Title IX Coordinator fielding this allegation must ask questions to understand the full context of the matter.

Hypothetical 3 - Discussion

3. A Coach who teaches weights and nutrition recommends a Student athlete wear tight clothes to on-campus classes and at practice because it will "help with the Student's future athletic opportunities"

- Is this sexual harassment under Title IX?

  - This may be an example of "quid pro quo" harassment if based on sex. The conditioning behavior need not be explicit. The conditioning behavior can be implied.
  - If significant additional allegations of a sexual nature, this could be a part of hostile environment harassment. This may also be unprofessional or inappropriate conduct.
  - Query: Must the evidence demonstrate the conditioning behavior is "unwelcome" to the Complainant?
    - The Title IX definition describes an employee who "conditions" the provision of an aid, benefit, or service of the recipient on an individual's participation in the ***unwelcome*** sexual conduct. Prior legal analysis of "quid pro quo" indicates that "going along" with the condition does not necessarily mean it was welcome. Fact-specific analysis.

TITLE IX
GRIEVANCE PROCESS

Grievance Process

1. Basic Requirements
2. Notice of Allegations
3. Dismissal of Formal Complaint
4. Consolidation
5. Investigation
6. Hearing/Cross-Examination
7. Determination of Responsibility
8. Appeals
9. Informal Resolution
10. Recordkeeping

See 34 CFR §106.45(b)

Basic Requirements

1. Per §106.45(b)(1)(i), treat Complainant and Respondent equitably in the grievance process and related to remedies and sanctions, if any
2. Require objective evaluation of all relevant evidence, including inculpatory and exculpatory evidence
3. Cannot make credibility decisions based on a person's status as Complainant, Respondent, or witness
4. Presume that Respondent is not responsible until a determination is made
5. Follow prompt time frames (estimate 60-90 days)
6. State a standard of evidence (preponderance or clear and convincing).
   – Most CCDs use preponderance of evidence, (e.g., Ed Code §67386(a)(3).)

Notice of Allegations

- **Title IX Coordinator Provides Notice of Allegations to Each Party per §106.45(b)(2)**
  - **Notice of allegations with sufficient details, including:**
    - Identification of the parties
    - Description of alleged conduct which may constitute sexual harassment, date and location of alleged incident(s)
  - **Notice of District's grievance process and informal resolution process**
    - Identify relevant Board Policies & Administrative Procedures re Title IX grievance process and informal resolution process
    - Identify standard of evidence
    - Explain right to inspect and review evidence
  - **Review Sample Notice of Allegations**

Notice of Allegations

- **Provide Notice of Allegations to Each Party, continued**
  - **Additional Items in Notice of Allegations**:
    - Identification of potential policy violations (not just Title IX)
    - Identification of the range of possible disciplinary sanctions and remedies
    - Statement that Respondent is presumed not responsible
    - Notification that a determination of responsibility will be made at the conclusion of the grievance process
    - Notification that each party may have an advisor of choice, who may be an attorney
    - Prohibition against parties knowingly making false statements or knowingly submitting false information

Other Written Notices

- **If additional allegations are discovered, provide written Notice of *Additional* Allegations**
- **Provide written notice of any changes in the process, including:**
  - Delays/Extension of timelines
  - Meetings
  - Interviews
  - Hearings
  - Appeals
  - Decisions
  - Other

Dismissal of Formal Complaint

- **Required Dismissal per §106.45(b)(3)**
  - **Recipient must dismiss the formal complaint *if* the conduct alleged:**
    - Would not constitute sexual harassment as defined in §106.30 even if proved
    - Did not occur in the District's education program or activity
    - Did not occur against a person in the United States
  - The dismissal does **not** preclude investigation or action under Code of Conduct, Board Policy/Administrative Procedure, or California law
  - **All dismissals require written notice & reasons delivered to the parties at the same time**

Dismissal of Formal Complaint

- **Permissive Dismissal per §106.45(b)(3)**
  - **Recipient may dismiss the formal complaint or allegations any time during the investigation or hearing, *if* :**
    - The Complainant notifies the Title IX Coordinator in writing to withdraw the complaint
    - The Respondent is no longer enrolled or employed
    - Special circumstances prevent the recipient from gathering evidence in order to reach a determination
  - **All dismissals require written notice & reasons delivered to the parties at the same time**

Consolidation of Formal Complaints

- **A recipient may consolidate formal complaints as to allegations of sexual harassment where the allegations arise out of the *same facts or circumstances***
  - Against more than one Respondent;
  - By more than one complainant against one or more respondents; or
  - By one party against the other party (cross-claims)

- ***Note***: This grievance process does not apply to Title IX allegations of sex discrimination in the educational setting.

Investigation

1. Trained Investigators

- Additional training may include how to conduct a thorough and impartial interview, what types of questions to avoid, how to weigh evidence, and how to prepare witness summaries

2. Presumption

– The institution must presume Respondent is *not responsible* for the alleged conduct

3. Evidence Gathering

– Investigator has the burden to gather sufficient evidence; the burden to gather evidence is not on the Complainant or Respondent

– Investigator cannot gather privileged information without voluntary, written consent (e.g., physician or psychiatrist records, confidential counseling records, etc.)

4. Written Notice with Time to Prepare

– Provide written ***notice for interviews*** with sufficient time for the person to prepare to participate

Investigation, continued

5. Equal Opportunity for Parties

- To present witnesses, including fact & expert witnesses and other inculpatory and exculpatory evidence
- To have an advisor present for any meeting, interview or hearing
  - The advisor should not answer questions or interrupt the party's answers
  - The advisor can ask for a break in between questions

6. No "Gag" Orders or Directives

- Cannot restrict the ability of the Complainant or Respondent free speech rights to discuss the allegations under investigation or to gather and present relevant evidence
- Likely can direct parties and witnesses not to tamper with evidence

Investigation, continued

7. Equal Opportunity to Inspect and Review Evidence

- Provide parties with opportunity to meaningfully respond to the evidence *before* the conclusion of the investigation.
- Parties may review evidence that is directly related to the allegations, including evidence which the investigator does *not* intend to rely upon as well as inculpatory and exculpatory evidence regardless of where it was obtained
  - *Practice tip*: The investigator can receive, review, and place any irrelevant or unrelated evidence into a separate exhibit of the file or report in order to demonstrate the information was reviewed and set aside as having no weight

Investigation, continued

8. Prepare and Share Draft Report of Evidence

- Before completing the Investigative Report, provide a ***Draft*** **Report of Evidence and Attachments** to both parties and their advisors, if any, via electronic format or a hard copy.
- Provide the parties and advisors, if any, with at least ***10 days to review the Draft Report of Evidence and Attachments*** & submit written responses
- Share any new evidence with the parties and continue the investigation related to new information, if needed
- Review and incorporate new information and responses in the ***Final Investigative Report***
- Again, consider written agreement with advisors who inspect and review other pupil, employee, health, and/or other private records

Investigation, continued

9. Investigator Prepares Final Investigative Report

- The report must fairly summarize relevant evidence
- Relevant evidence may include credibility assessments in order to indicate the weight of the evidence or a discussion of disputed/undisputed evidence

10. Provide Final Investigative Report to Parties

- ***At least 10 days prior to a hearing*** or other time of determination regarding responsibility, send the Final Investigative Report to each party and the party's advisor, if any, in an electronic format or a hard copy, for their review and written response
- Review written responses and attach all written responses to the Final Investigative Report

Pre-Hearing and Hearing Procedures

The Post-Secondary Institution must provide a "live hearing" with cross-examination of the parties and witnesses by the parties' advisors in compliance with **§106.45(b)(6).** In general, the Institution must create Pre-Hearing, Live Hearing, and Post-Hearing Procedures that provide adequate notice, equitable participation, and a fair process. Procedures must address:

1. **Dates, location, recording, and other logistics by Hearing Coordinator**
2. **Appointing Decision-Maker (Hearing officer or Panel) & Conflict process**
3. **Notice of Hearing with rights, responsibilities, timeline, & process**
4. **In-Person or Virtual Hearing Options**
   - At the request of either party, the entire live hearing may be conducted with parties located in separate rooms with technology enabling the decision maker(s) and parties to simultaneously see and hear the party or witness answering questions.

Live Hearing with Cross-Examination

Cross-Examination and Other Questions

- Cross-Examination must be conducted directly, orally, and in real time by the party's advisor of choice and "never" by a party personally.
- Before a party or witness answers the cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant.
  - *Rape Shield Protections:* Evidence about Complainant's sexual predisposition or prior sexual behavior are ***not relevant*** unless offered to prove someone else committed the alleged conduct or if prior sexual behavior with respondent offered to prove consent
- Decision-maker(s) must be trained to rule on relevance of questions and repetitive questions
- Decision-Maker(s) must explain any decision to exclude a question as not relevant

Live Hearing with Cross-Examination

Cross-Examination and Other Questions, continued:

- Submission to cross-examination:
  - ***Regulations:*** If a party or witness does not submit to cross-examination at the live hearing, the Decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility
  - ***Court Ruling and OCR Adoption***: This part of the Title IX Regulations was overruled by ***Cordona*** case and the court's decision adopted by OCR via August 24, 2021 Dear Colleague Letter
- The Decision-maker(s) cannot draw an inference about responsibility based ***solely*** on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.
- Institution must create an audio or audiovisual recording or transcript and make it available to parties for inspection and review

Determination of Responsibility- After Hearing

Decision-Maker Determines Responsibility per §106.45(b)(7):

- Decision-maker(s) must be trained to apply the standard of evidence and to understand what evidence may not be relied upon after a failure to submit to cross-examination.
- Decision-maker(s) must issue a written determination of responsibility
- Reminder: The Title IX Coordinator or investigator cannot determine responsibility

Determination of Responsibility- After Hearing

Written Decision per §106.45(b)(7) must include:

- The allegations potentially constituting sexual harassment
- A description of procedural steps from receipt through determination, including notifications, interviews, evidence gathering & hearings
- Findings of fact supporting the determination;
- Conclusions regarding the application of the code of conduct to the facts;
- Statement of, and rationale for, the result as to each allegation, including determination regarding responsibility, any disciplinary sanctions, and whether remedies will be provided to complainant to restore equal access to education
- Procedures and permissible bases for parties to appeal
- The written decision must be provided to the parties simultaneously

Appeals

1. Equal Opportunity for Appeal under §106.45(b)(8)

- Both parties must have opportunity to appeal
  - the determination of responsibility, or
  - the dismissal of a formal complaint or allegations

2. Bases for Appeal

- Procedural irregularity that affected the outcome;
- New evidence that was not reasonably available & could have affected outcome; or
- Conflict of interest or bias generally or specifically by Title IX Coordinator, investigator, and/or decision-maker which affected the outcome

Institution may include other bases for appeal if both parties have equal right to use

Informal Resolution Process

1. **Optional Process per §106.45(b)(9)**
   - May use informal resolution process on a case-by-case basis after formal complaint is filed
2. **Informed, Mutual Consent**
   - Both parties must give voluntary, informed, and written consent but cannot be required as a condition of enrollment/employment
3. **Right to Withdraw from Informal Process**
   - Either party can withdraw from informal process at any time and resume formal process
4. **Not Suitable for Student vs. Employee Matters**
   - No informal process for allegations that an ***employee*** harassed a student

Recordkeeping

1. **A recipient must maintain records for 7 years, including records of:**
   - Each sexual harassment investigation, including:
     - Determination regarding responsibility
     - Audio or audiovisual recording or transcript
     - Any disciplinary sanctions imposed on Respondent, if applicable
     - Any remedies provided to Complainant, if applicable

Recordkeeping

2. **A recipient must maintain records for 7 years, including records of:**
   - Any appeal and the result of the appeal
   - Any informal resolution and the result of the informal process
   - All materials used to train Title IX Coordinators, investigators, decision-makers, appeal officers, and any person who facilitates an informal resolution process
     - These training materials must be publicly available on the institution's website
     - If no website, training materials must be available upon request for inspection by the public

Recordkeeping

3. **For each response required under §106.44, a recipient must create and maintain records for 7 years, including records of:**
   - Any actions, including supportive measures, taken in response to a report or formal complaint of sexual harassment.
     - If the recipient did not provide supportive measures, it must document why that decision was not clearly unreasonable in light of the known circumstances
   - In each instance, recipient must document
     - Why its response was not deliberately indifferent
     - The measures taken which were designed to restore or preserve equal access to the education program or activity

RETALIATION

Retaliation

1. Section 106.71(a) – Retaliation Prohibited

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

2. Avoiding the Title IX Process May Be Retaliation

– If the alleged behavior falls under Section 106.30 definitions, a recipient cannot use the student conduct process as a way to avoid the rigorous Title IX grievance process; such a decision may constitute retaliation.

3. Retaliation Complaints Filed Under Additional Process

– Retaliation complaints must be filed under the Section 106.8 grievance process.

Retaliation, Continued

4. Confidentiality Required by Recipient

- Recipient must keep identity of Complainant, Respondent, and witness(es) confidential unless required by law "or as necessary to carry out Title IX proceeding"
- Regulations imply that the improper release of this confidential information could be retaliation

5. First Amendment Rights

- Complainant or Respondent exercising their 1st Amendment rights does not constitute retaliation under Section 106.71(a)

6. False Statement Charge

- Recipient charging an individual with making a false statement in bad faith during Title IX process is ***not*** retaliation
- A responsibility determination (or no responsibility determination) is not sufficient evidence in and of itself to conclude there was a bad faith false statement

PRACTICAL APPLICATION

Hypotheticals 4-6

4. **Student A enters your office and tells you that Student B touched Student A's buttocks, which made Student A uncomfortable.**
   - What do you need to know?
   - What should you do?
5. **Student A enters your office and tells you that a Professor touched their buttocks in the classroom and made a kissing sound, which embarrassed and frightened Student A.**
   - What do you need to know?
   - What should you do?
6. **Investigator seeks your advice because Respondent requested investigation and evidence about Complainant's prior sexual partners**
   -- What do you need to know? How do you advise?

Hypothetical 4 - Discussion

- **Student A enters your office and tells you that Student B touched Student A's buttocks, which made Student A uncomfortable.**
  - What do you need to know?
    - Where did it happen? On campus or in a location where recipient exercised substantial control over Student B (Respondent) *and* the context in which the sexual harassment occurred? Was it in an off-campus building owned or controlled by a student organization recognized by the District?
    - Was the conduct based on sex? What was the nature of the touch?
    - Was the conduct against Student A's will or without consent? Intent of touching?
  - What should you do?
    - Explain Title IX grievance process and how to file a formal complaint
    - Offer Supportive Measures to Complainant with or without a formal complaint
    - If formal complaint filed, evaluate mandatory dismissal provision and offer supportive measures to Respondent. If no dismissal, evaluate emergency removal option
    - Assign investigator and provide parties with a Notice of Allegations; oversee process

Hypotheticals 5 - Discussion

5. Student A enters your office and tells you that a Professor touched Student A's buttocks in the classroom and made a kissing sound, which embarrassed and frightened Student A.

- What do you need to know?
  - Gather additional information about whether the Professor's actions were based on sex or of a sexual nature, did Professor offer something to student, determine if any other allegations
- What should you do?
  - Explain Title IX grievance process and how to file a formal complaint
  - Offer Supportive Measures to Complainant with or without a formal complaint
  - If formal complaint filed, evaluate mandatory dismissal provision, offer supportive measures to Respondent. Consider administrative leave for Respondent per EC 87623
  - Assign investigator and provide parties with a Notice of Allegations; oversee process
  - If student is a minor, consider notifying parents and filing CPS or police report. If police investigation, may need to coordinate cooperation between entities

Hypotheticals 6 - Discussion

6. Investigator seeks your advice because Respondent requested investigation and evidence about Complainant's prior sexual partners

- What do you need to know?
  - Gather additional information from investigator about of this request.
    - Is Respondent claiming false identification for the allegations? May be relevant. (E.g., Respondent knows their is a resemblance with a prior sexual partner.)
    - Is Respondent claiming Complainant has a similar pattern of sexual behavior with ***another*** sexual partner? Not likely relevant.
  - Is Respondent claiming a pattern of prior sexual behavior between Complainant and Respondent which may indicate consent? May be relevant.
- What should you do?
  - Advise investigator whether appropriate to investigate this information.
  - Seek guidance from legal counsel if you have concerns about scope of the request.

Question & Answer Session

Disclaimer

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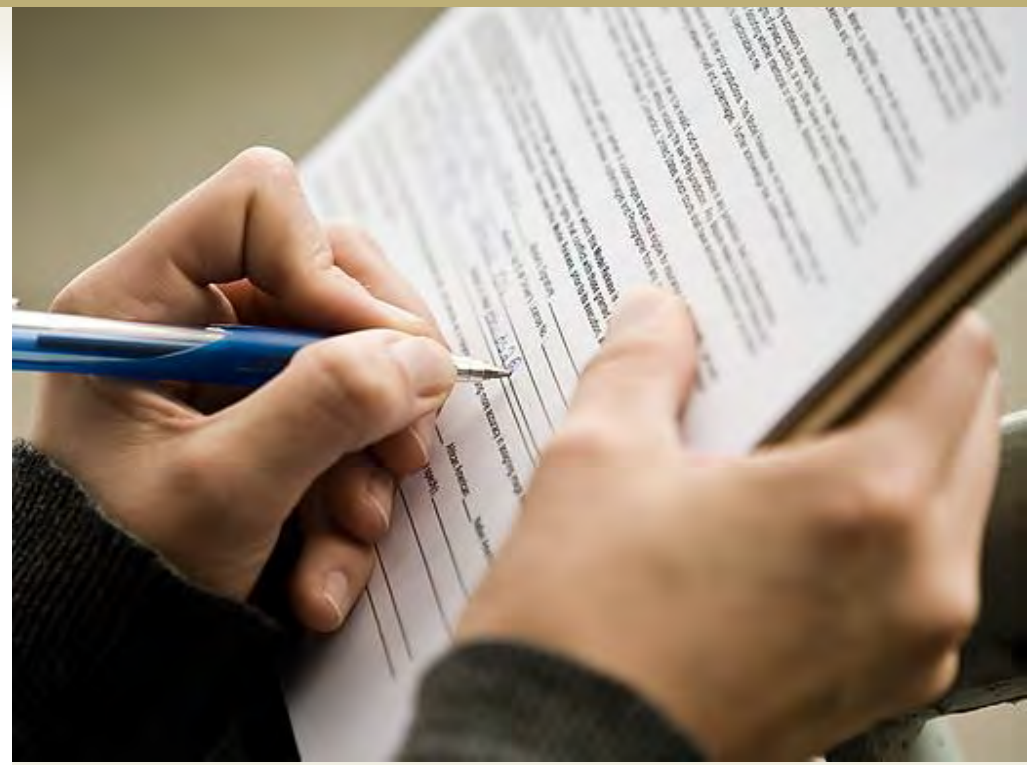

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