TITLE IX COMPLIANCE

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Reminders

- Safety of Students, Employees, and others (i.e. visitors, independent contractors) – Most Important
- Communication / Reporting
- Asking questions
  - With attorneys – we are here to help

What is Title IX?

- Title IX of the Education Amendments of 1972
- Title IX protects people from discrimination based on sex in education programs or activities that receive federal financial assistance.
- Title IX states:
  - 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

Title IX Sexual Harassment

Schools must respond to these complaints in accordance with the Title IX regulations, which includes a specific grievance process (2020 regulations)

Sexual Discrimination

Sex*

Sexual Orientation*

Gender Identity/ Expression*

Pregnancy*

Schools must respond to these complaints using the "prompt and equitable" grievance procedures that schools have been required to adopt and publish since 1975, when the original Title IX regulations were issued.

*alleged facts may constitute sexual harassment and warrant grievance process

Definition of Sexual Harassment

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

(1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;

(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 recipient's education program or activity; or

(3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

Highlights

- Prior guidance held educational entities responsible for incidents they "reasonably should" have been aware of. The new guidance requires educational entities to respond when they have "actual knowledge" of a complaint of sexual harassment, <u>which can include a report to any employee of an elementary or secondary school</u>.

Highlights

- Educational entities are required to respond when sexual harassment occurs “in the [entity]’s education program or activity.” The definition of “program or activity” is expanded to include "locations, events, or circumstances over which the [educational entity] exercised substantial control over both the respondent and the context in which the sexual harassment occurs."

Highlights

- Parents/Guardians of K-12 students are permitted to file complaints on their behalf and are required to be given notification of complaints against their children.

- Elementary and secondary educational entities are not required to hold hearings on student complaints (unlike colleges and universities).

Highlights

- Educational entities are required to provide "supportive measures" to students, with or without a formal complaint (i.e. counseling, schedule changes, leave of absence, etc.)

Remedial Action

- Ordered if discrimination found by USDOE
- Possible lawsuit by target

Section 106.3

Constitutional Protections / Restriction of Other Rights

- Protects:
  - 1st Amendment rights
  - Due process rights
- Other restrictions:
  - FERPA does not preempt
  - State and local law do not preempt
  - Title VII not preempted
  - Parents/Guardians have right to file complaints

Section 106.6

So what is to be done – Title IX Coordinator

- Designate a Title IX Coordinator

Section 106.8

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So what is to be done – Identifying and Training Key Personnel

- Identify key personnel
  - Title IX Coordinator
  - Investigators
  - Decision makers
  - Any person who facilitates an informal resolution process

- Train key personnel

Dissemination of Grievance Procedures

- Must adopt and publish grievance procedures
  - Prompt and equitable resolution of student and employee complaints,
    - Including employee complaints alleging sexual harassment by a student
  - Contains grievance process
  - Notice of above to groups

Grievance Process

- Must comply with Section 106.45 of new regulations
  - Anything additional must apply equally to complainants and respondents

Basic Requirements

- Treat complainants and respondents equitably
- Require objective evaluation of evidence
- Ensure no conflicts
- Proper training
- Presumption of respondent innocence
- Prompt time frames

Basic Requirements

- Transparency as to:
  - Disciplinary sanctions and remedies
  - Standard of evidence
  - Appeal rights
  - Range of supportive measures
- Respect for lawfully asserted privileges

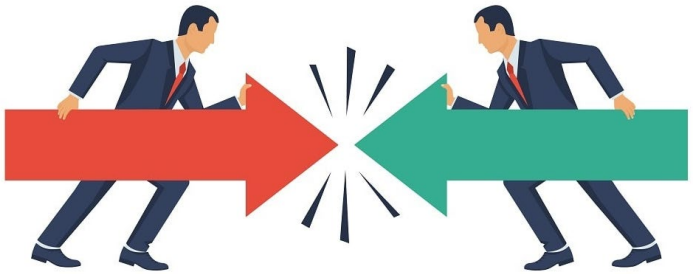
Equitable Treatment

- Remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent
  - Designed to restore or preserve equal access to the educational entity's education program or activity.
  - May include supportive measures
  - May be disciplinary, punitive and burden the respondent;
    - Must follow a grievance process that complies with the new regulations before the imposition of any disciplinary sanctions or other actions that are not supportive measures against a respondent.

Objective Evaluation of All Relevant Evidence

- Including both inculpatory and exculpatory evidence
- Credibility determinations may not be based on a person's status as a complainant, respondent, or witness

No Conflict



- Require that any individual designated by the educational entity as a Title IX Coordinator, investigator, decision-maker, or any person designated by the educational entity to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

Training

- The educational entity must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on:
  - The definition of sexual harassment
  - The scope of the educational entity's education program or activity
  - How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable
  - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
  - Any technology to be used at a live hearing
  - Issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant
  - Issues of relevance to create an investigative report that fairly summarizes relevant evidence.

Materials

- Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment

Presumption of Non-Responsibility

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

Prompt Time Frames

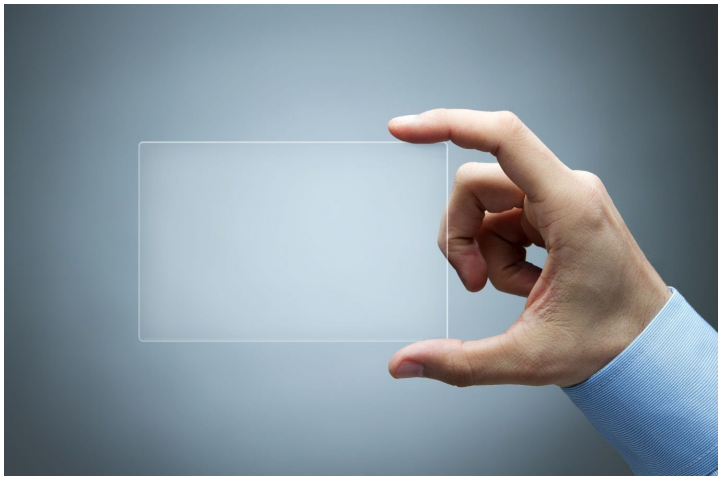
- Must have reasonably prompt time frames for conclusion of the grievance process, including:
  - Reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the educational entity offers informal resolution processes.
  - A process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action.

Good Cause for Extension

- Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities

Transparency - Remedies

- Describe the range of possible disciplinary sanctions and remedies, or list the possible disciplinary sanctions and remedies that the educational entity may implement following any determination of responsibility



Transparency – Standard of Evidence

- State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard:
  - Apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty
  - Apply the same standard of evidence to all formal complaints of sexual harassment

Appeal

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

Respecting Legal Privileges

- May not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege

Formal Complaint

- Document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the educational entity investigate the allegation of sexual harassment.

Formal Complaint

- At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the educational entity with which the formal complaint is filed.

Formal Complaints

- Includes locations, event and circumstances over which the educational entity exercises substantial control over both respondent and context in which sexual harassment occurs.

Formal Complaint

- A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator and by any additional method designated by the educational entity.
- Where the Title IX Coordinator signs a formal complaint:
  - Cannot be complainant, respondent or fact witness
  - Cannot have conflict of interest

Responding to Complaints

- Actual knowledge required
  - Notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school.
    - The mere ability or obligation to report sexual harassment or to inform a complainant about how to report sexual harassment, or having been trained to do so, does not qualify
  - Imputation of knowledge based solely on vicarious liability or constructive notice insufficient.
  - This standard is not met when the only official of the educational entity with actual knowledge is the respondent (alleged perpetrator).

Responding to Complaints

- Must respond:
  - Promptly and
  - Not deliberately indifferent –
    - i.e. clearly unreasonable in light of known circumstances
    - OCR won't equate deliberate indifference with disagreement over determination

Supportive Measures

- Describe the range of supportive measures available to complainants and respondent

Supportive Measures

- Supportive measures must be provided to complainant:
  - Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably 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.
  - Such measures are designed to restore or preserve equal access to the educational entity's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the educational entity's educational environment, or deter sexual harassment.
  - Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, mutual restrictions on contact between the parties, changes in work locations, leaves of absence, increased security and monitoring and other similar measures.
  - 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 educational entity to provide the supportive measures.

Supportive Measures

- The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.
  - Must promptly contact complainant to discuss availability
  - Consider complainant's wishes
  - Inform of availability irrespective of filing formal complaint

Emergency Removal

- Requires:
  - Individualized safety and risk analysis
  - An immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment
  - Respondent has notice and an opportunity to challenge the decision immediately following the removal
  - Must comply with IDEA, Section 504 and the Americans with Disabilities Act

Administrative Leave

- Applies only to non-student employees
- Still must comply with ADA

Dismissal of Formal Complaint

- Dismissal warranted if:
  - Allegations do not constitute sexual harassment even if true
  - Allegations did not occur in education program or activity
- May still be a violation of other provision of code of conduct

Dismissal of Formal Complaint

- Dismissal may occur at any point
  - If complainant notified Title IX Coordinator of desire to withdraw
  - Respondent no longer employed/enrolled
  - Specific circumstances prevent the educational entity from gathering evidence sufficient to reach determination

Consolidation of Formal Complaints

- May consolidate 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.

Investigation

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

- The educational entity cannot access, consider, disclose, or otherwise use a party's medical records made and maintained in connection with the provision of treatment to the party, unless the educational entity obtains that party's voluntary, written consent to do so.

Witnesses

- Must provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence

No Requirement of Confidentiality for Parties

- May not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence

Other Persons

- Must provide the parties with the same opportunities to have others present during any grievance proceeding, including advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the educational entity may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties

Inspection and Review of Evidence

- Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint
  - Including the evidence upon which the educational entity does **not** intend to rely in reaching a determination regarding responsibility and
  - Inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.

Investigator Disclosure of Evidence

- Prior to completion of the investigative report, the educational entity must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report.

Investigator Disclosure of Evidence

- The educational entity must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination

Report

- Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing, if one is held, or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.

Hearings

- Grievance process may, but need not, provide for a hearing.
- With or without a hearing, after the educational entity has sent the investigative report to the parties and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.

Hearings

- With or without a 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 prove consent.
- The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.

Determination Regarding Responsibility

- The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility.
- To reach this determination, the educational entity must apply whichever standard of evidence it chooses:
  - Preponderance of evidence
  - Clear and convincing evidence.

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 through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
  - Findings of fact supporting the determination;
  - Conclusions regarding the application of the educational entity's code of conduct to the facts;
  - A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the educational entity imposes on the respondent, and whether remedies designed to restore or preserve equal access to the educational entity's education program or activity will be provided by the educational entity to the complainant; and
  - The educational entity's procedures and permissible bases for the complainant and respondent to appeal.

Written Determination

- The educational entity must provide the written determination to the parties simultaneously.
- The determination regarding responsibility becomes final either on the date that the educational entity provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

Implementation of Remedies

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

Appeals

- The educational entity must offer both parties an appeal from a determination regarding responsibility, and from the educational entity's dismissal of a formal complaint or any allegations limited to the following bases:
  - Procedural irregularity that affected the outcome of the matter;
  - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
  - The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

Appeals

- The educational entity may offer an appeal equally to both parties on additional bases.

Notification of Appeal

- As to all appeals, the educational entity must:
  - Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
  - Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;
  - Ensure that the decision-maker(s) for the appeal is trained and has no conflict of interest;
  - 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.

Informal Resolution

- The educational entity may not:
  - Require waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this grievance process.
  - Require the parties to participate in an informal resolution process
  - Offer an informal resolution process unless a formal complaint is filed.

Informal Resolution

- However, at any time prior to reaching a determination regarding responsibility the educational entity may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the educational entity –
  - Provides to the parties a written notice disclosing:
    - The allegations
    - 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
    - Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared

Informal Resolution

- The educational entity must also obtain the parties' voluntary, written consent to the informal resolution process;
- The educational entity may **not** offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

Recordkeeping

The educational entity must maintain for a period of seven years records of:

- Each sexual harassment investigation including any determination regarding responsibility, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the educational entity's education program or activity
- Any appeal and the result therefrom
- Any informal resolution and the result therefrom

Recordkeeping – Training Materials

- The educational entity must maintain for 7 years:
  - All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.
  - The educational entity must make these training materials publicly available on its website, or if the educational entity does not maintain a website the educational entity must make these materials available upon request for inspection by members of the public.

Recordkeeping

- The educational entity must create and maintain for a period of seven years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment.
- In each instance, the educational entity 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 educational entity's education program or activity.
- If the educational entity does not provide a complainant with supportive measures, then the educational entity 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 educational entity in the future from providing additional explanations or detailing additional measures taken.

Retaliation Prohibited

- The educational entity may not intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this part, 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 under this part.
- 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 sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX or this part, constitutes retaliation.
- Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).

Confidentiality

- Except as may be permitted by FERPA, the educational entity must keep confidential the identity of any individual who has 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
  - Any witness

Specific Circumstances

- The exercise of rights protected under the First Amendment does not constitute retaliation
- 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 under this part does not constitute retaliation
  - Provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

QUESTIONS?