YOUNG CONAWAY

Title IX Training

Coordinator, Investigator, Decision-Maker

September 23, 2025

BY: JENNIFER M. KINKUS, ESQ.

What is Title IX?

Title IX, 20 U.S.C. § 1681

- Prohibits discrimination "on the basis of sex"
- Applies to education programs and federally funded schools ("Recipients")
- Protects students, employees, and applicants
- Applies to teacher-on-student and student-on-student (peer-on-peer) sexual harassment/assault

Implementing Regulations

- Require designation of Title IX Coordinator to coordinate school's responsibilities
- Require posting of information on school website
  - Title IX Policy
  - Title IX Coordinator Contact Information
  - Title IX Training Materials
- Set out grievance and complaint procedures

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Enforcement of Title IX

Standard is "Deliberate Indifference"

School must respond to allegations of sexual harassment in an education program or activity promptly in a manner that is not deliberately indifferent

Plaintiff must prove:

- School had "actual knowledge"

AND

- *Response is deliberately indifferent (clearly unreasonable in light of known circumstances)*

YOUNG
CONAWAY

DEFINITIONS

What does “sex” mean?

Discrimination on the basis of “sex:

- Biological sex
- Gender
- Sex stereotyping
- Sexual orientation and gender identity
- “Sex” as a verb

Parties

COMPLAINANT	RESPONDENT
Alleged Victim	Alleged Perpetrator

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Recipient

Recipients of Federal financial assistance covered by Title IX, includes elementary and secondary schools

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Definition of Sexual Harassment

"Sexual Harassment" is conduct on the basis of sex that satisfies one of the following:

- Quid Pro Quo Harassment, or
- Hostile Environment, or
- Harassment under the Violence Against Women Act

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Quid Pro Quo Harassment

- An employee conditioning an education benefit or service upon a person's participation in unwelcome sexual conduct
- Does not need to be evaluated for "severity, pervasiveness, and objective offensiveness"
- Can be express or implied

Hostile Environment Harassment

- Unwelcome conduct on the basis of sex
- That to a reasonable person
- Is so severe, pervasive <u>and</u> objectively offensive
- That it effectively denies a person equal access to the education program or activity

Harassment Under Violence Against Women Act

Dating Violence

Violence by a person who is or has been in a social relationship of a romantic or intimate nature with the victim

Domestic Violence

Crimes of violence committed by current or former spouse/partner/parent against a victim who is protected under the domestic or family violence laws

Stalking

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others; or suffer substantial emotional distress

Sexual Assault

An offense classified as a forcible or non-forcible sex offense by the FBI's uniform crime reporting system:

- Rape;
- Fondling;
- Incest; or
- Statutory rape.

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Actual Knowledge

When does a Recipient have notice of sexual harassment?

- Actual knowledge = notice of sexual harassment or notice of allegations of sexual harassment to Recipient's
  - Title IX Coordinator; or
  - Any official who has authority to institute corrective measures; or
  - **ANY EMPLOYEE OF AN ELEMENTARY OR SECONDARY SCHOOL**

Educational Program or Activity

Conduct must occur in "educational program or activity" for Title IX for apply

- Does not mean geography – no on/off campus bright-line rule
- Includes locations, events, or circumstances over which the Recipient exercised substantial control over both the respondent and the context in which the harassment occurs

Conduct must be against a person in the United States

- Does not apply to study abroad

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Remember – Recipient's Obligation

A Recipient with **actual knowledge** of **sexual harassment** in an **educational program or activity** against a person in the United States, must respond promptly in a manner that it is not **deliberately indifferent**. The Recipient is only deliberately indifferent if its response to sexual harassment is unreasonable in light of known circumstances.

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Title IX Coordinator

Identification Requirements

- Must identify at least one employee as Title IX Coordinator
  - May also have one or more deputy coordinator
  - May have separate coordinators for complaints involving employees and complaints involving students
- Must be referred to as “Title IX Coordinator”
- May also serve as Investigator (but not Decision-Maker)

Must notify applicants, employees, students, parents/guardians and officially recognized unions/professional organizations of

- Name
- Title
- Email Address
- Phone Number

Name/title and contact information must be prominently displayed on website and in each handbook or catalogue made available to applicants, employees, students, parents/guardians, and any recognized employee union/professional organization

Requirements

- Must not have a conflict of interest
- Must not have a bias for or against complainants or respondents generally or a specific individual
- Need not be a stand-alone position but should have adequate time to devote to Coordinator responsibilities
- Must have required training

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Other Responsibilities

- Coordinator must ensure adequate training of:
  - Investigators
  - Decision-Makers
  - All Employees

- All training materials must be published on Recipient's website

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Training

- Investigators
- Decision-Makers
- Appeal Decision-Makers

- Definition of “sexual harassment”
- Scope Recipient’s education program or activity
- How to conduct an investigation and grievance process (including hearings, appeals and informal resolution processes)
- How to serve impartially (including avoiding prejudgment, bias and conflicts of interest)
- Must not rely on sex stereotypes
- Must promote impartial investigations and adjudications of formal complaints

Additional Training for Investigators

- Training on issues of relevance to create investigative report that fairly summarizes the evidence

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Additional Training for Decision-Makers

- Training on technology to be used at live hearing (if applicable)
- Issues of relevance
- Questions of evidence (including relevance of questions about complainant's sexual predisposition or prior sexual behavior)

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Overview of Grievance Process

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Coordinator Role In Reporting

- Any person may report sex discrimination, including sexual harassment, to the Title IX Coordinator, regardless of whether the person reporting is alleged to be the target of the conduct
  - Remember "actual knowledge" includes notice of harassment or allegations of harassment to Title IX Coordinator, a school official who has authority to institute corrective measures, or <u>any employee of an elementary or secondary school</u>
- Reports may be made at any time (including during non-business hours) by telephone, email or mail

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

SUPPORTIVE MEASURES

OFFERED PROMPTLY AFTER REPORT RECEIVED OR ACTUAL KNOWLEDGE OF HARASSMENT EXISTS

Notice to Complainant

- Title IX Coordinator must promptly contact complainant to:
  - Discuss availability of supportive measures
  - Consider complainant's wishes with respect to supportive measures
  - Inform complainant of the availability of supportive measures with or without the filing of a formal complaint; and
  - Explain the process for filing a formal complaint

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

General Response Time for Supportive Measures

- Promptly
- In a way that is not “deliberately indifferent”

“Deliberately Indifferent” = clearly unreasonable in light of the known circumstances

Supportive Measures

- Non-disciplinary, non-punitive individualized services
- Offered as appropriate, reasonably available and without fee or charge to complainant or respondent
- Before or after filing formal complaint, or where no formal complaint has been filed
- Designed to restore or preserve equal access to educational program or activity
- Continue through the conclusion of the grievance process when applicable
- Can be continued even after a finding of non-responsibility
- Provided without unreasonably burdening the other party (non-disciplinary, non-punitive)
- Designed to protect the safety of all parties or the educational environment, or to deter sexual harassment

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

What is "Unreasonably Burdensome"?

- No specific definition – consider unique circumstances
- Does not depend solely on continued to access to academic programs
- Must take into account nature of the educational programs, activities, opportunities and benefits – not solely those programs that are "academic" in nature
- Grievance process should be conducted in reasonably timely manner to avoid supportive measures imposed pending the outcome of the grievance process becoming unreasonably burdensome

Examples of Supportive Measures

- Counseling
- Extension of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Campus escort services
- Mutual restrictions on contact between the parties
- Leaves of absence
- Increased security and monitoring
- Sending student to principal's office
- Educational conversations
- Changing student seating
- Changing class assignments

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Caution!

Must go through grievance process

Disciplinary sanctions should NOT be used as supportive measures.

Suspension, expulsion and termination of employment are inherently disciplinary

Emergency Removal

Student

- May remove a Respondent from an education program or activity after:
  - Undertaking individualized safety and risk analysis
  - Determining that an immediate threat to the physical health or safety of any student or individual arising from the allegations justifies removal
- Must provide Respondent with notice and an opportunity to challenge the decision immediately following the removal
- Any decision to remove a student for more then 10 school days requires a Board hearing

Emergency Removal

Employee

- Non-student employee may be placed on administrative leave during the pendency of grievance process
- Employees <u>must</u> be placed on administrative leave under certain circumstances (e.g., complaint of abuse of student by school employee)

Interaction with Other Laws

- Students and employees are still entitled to applicable provisions of IDEA, Section 504 and ADA
- For students
  - Consider whether a manifestation determination is necessary for students with IEP or Section 504 Plan (10 days of disciplinary removal)
  - Consider provisions of an IEP or Section 504 Plan in designing interim supportive measures
- For employees
  - Consider whether interactive dialogue is necessary to discuss reasonable accommodations due to a known disability

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Coordinator's Responsibility

- Title IX Coordinator is responsible for overseeing the implementation of supportive measures for the Recipient
  - Coordinate with other employees on a need-to-know basis and check in with parties
  - Burden of arranging and enforcing supportive measures must remain on Recipient, not on any party
  - Any supportive measures taken must be recorded; and if supportive measures are not part of response, must specify why

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

FORMAL COMPLAINT

MAY OR MAY NOT BE FILED AFTER REPORT RECEIVED OR ACTUAL KNOWLEDGE OF HARASSMENT

Formal Complaint

- Formal complaints may be filed with the Coordinator in person, by email, by mail or by any other method designated by the school
  - Ex. online reporting system

- "Formal Complaint" = any document filed by a complainant or signed by Title IX Coordinator that ***alleges sexual harassment*** against a respondent ***requesting that the Recipient investigate*** the allegation of sexual harassment (does not need to be in a specific form or format)

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Formal Complaint

By Complainant or Parent

- May be filed with the Title IX Coordinator in person, by email, by mail or their listed contact information
- Complainant must be participating in the education program or activity at the time of filing
- Parents and legal guardians have right to act on behalf of their child with respect to Title IX rights (whether complainant or respondent)
- Child remains the “Complainant”

Formal Complaint

By Coordinator

- Title IX Coordinator may sign a formal complaint to initiate a grievance process to investigate and adjudicate allegations
- May happen over the alleged victim's objections
- Student remains the Complainant. Coordinator does not become "Complainant"

Notice

If formal complaint is first time Recipient is receiving notice of a report of sexual harassment, Title IX Coordinator must promptly contact complainant to:

- Discuss availability of supportive measures
- Consider complainant's wishes with respect to supportive measures

Bias and Impartiality

ENTIRE TITLE IX PROCESS MUST BE IMPARTIAL AND FREE FROM BIAS AND CONFLICTS OF INTEREST

Must avoid the intentional or unintentional injection of sex-based biases and stereotypes into Title IX proceedings.

- Title IX Coordinator, Investigator, Decision-Makers are not on “anyone’s side” and must be unbiased, impartial and avoid conflicts of interest

- Title IX Coordinator’s main goal is overseeing a fair and impartial process.

- Coordinator must not have an interest in the outcome of the grievance process, but rather in ensuring that the process is followed with integrity and the rights of the parties are respected.

Examples of Bias

- Assuming that complainants or respondents generally are more likely to tell the truth
- Assuming that respondents are presumptively responsible for alleged sexual misconduct
- Assuming victim deserved what happened based on what they wore, how much they had to drink, how they were dancing, etc.

Unbiased Process

- Gives parties equal opportunities for participation at every stage
- Presumes innocence until a determination regarding responsibility is made
- Results in a determination made based on an objective review of all relevant, available evidence

Unbiased Process

Provides both parties with equivalent rights to:

- Written notes and documents
- Access to Recipient's resources
- Introduce witnesses and evidence
- Review and respond to other party's evidence
- Participate in grievance procedures
- An objective determination based on all facts

Conflicts of Interest

- A conflict of interest exists when the Coordinator, Investigator or Decision-Maker has a personal or professional interest in a case that prevents them from discharging their duties in a fair, neutral and impartial manner
- Conflicts of interest may arise due to the Coordinator's, Investigator's or Decision-Maker's relationship to a party or witness
- May also arise when Coordinator, Investigator or Decision-Maker has a stake in the outcome of the process (e.g., personnel evaluations based on increasing or reducing number of founded complaints)
- Other circumstances that negatively affect the individual's neutrality

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Formal Grievance Process

Formal Complaint Filed – What's Next

Formal grievance process with investigation and determination of responsibility

OR

Complainant may opt for informal resolution

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Mandatory Dismissal

Title IX Coordinator must ensure dismissal of formal complaint where:

No Title IX Jurisdiction

- Conduct alleged does not constitute sexual harassment;
- Conduct alleged did not occur in education program or activity; or
- Conduct alleged did not occur in United States

Must be dismissed at any time during the process once it is determined that Title IX jurisdiction does not exist

Permissive Dismissal

Title IX Coordinator should also evaluate the grounds for permissive dismissals:

- Complainant notifies Coordinator in writing that they wish to withdraw formal complaint or any allegations therein;
- Respondent is no longer enrolled or employed by Recipient; or
- Specific circumstances prevent Recipient from gathering evidence to reach determination

Investigators and Decision-Makers – Title IX Coordinator's Responsibilities

- Must be appointed
- Must receive or have required training
- Are unbiased and impartial
- Do not have a conflict of interest in the case
- Understand and comply with the Recipient's process for investigating and resolving complaints

Title IX Coordinator must assign an alternate investigator or decision-maker as needed.

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

INVESTIGATION

Essential Elements of Investigation

- Process Recipient uses to resolve complaints of sexual harassment
- Investigator is the initial fact-finder (may be Title IX Coordinator)
  - CANNOT be the individual who makes a determination regarding responsibility, including sanctions
- Must be:
  - Adequate
  - Reliable
  - Unbiased
  - Impartial
  - Prompt
  - Provide equal opportunity for both parties to present witnesses and other evidence

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Investigator

- Cannot be decision-maker or appeal decision-maker (may be Title IX Coordinator)
- Can be internal or external
- Must be impartial and unbiased in general and in the specific case
- Should be recused if there is a conflict of interest

Factors

Specific steps in Title IX investigation will vary depending on:

- Nature of the allegation
- Age of student(s) involved
- Size and structure of school
- Any applicable state or local requirements
- What school has learned from past experiences

Key Procedural Elements

Written Notice

- Written notice of investigation promptly sent to parties
  - Notice of Recipient's grievance process, including informal resolution process
  - Identities of parties involved in the incident
  - Conduct alleged
  - Date and location of incident
  - Respondent's entitlement to presumption of innocence
  - Parties' right to an advisor of their choice, at party's expense, who may be an attorney
  - Parties' right to review and comment on evidence
- If new allegations are added, must issue new written notice

Key Procedural Elements

Prior Written Notice of Interviews

Prior written notice of interviews to be provided to parties and witnesses with sufficient advance time to prepare:

- Date
- Time
- Location
- Participants
- Purpose

Key Procedural Elements

Burden of Proof

Evidence Gathering

Burden of proof and evidence gathering is on the Recipient, not parties

Respondent is entitled to presumption of innocence

Key Procedural Elements

Gag Orders

No “gag orders” restricting parties from discussing allegations or gathering and producing relevant evidence

Recipient must also protect against retaliation and intimidation of parties and witnesses

Schools can require parties and advisors to sign confidentiality/non-disclosure agreement to ensure that evidence is not used for any purpose other than participation in Title IX proceedings

Additional Considerations

- Are there any other ongoing school or criminal investigations of the incident?
  - If so, determine the scope of each investigator's role
- May information be shared among investigators?
- If forensic evidence is involved, should law enforcement or a forensic expert be consulted to ensure evidence is correctly interpreted?

Confidentiality

- Recipient must keep confidential the identity of any individual who has made a report or complaint of sexual harassment, or has been identified as the perpetrator or respondent to any such report or complaint, or is a witness to any complaint or investigation ***except as required to carry out the purposes of Title IX*** (including the conduct of any complaint resolution process), applicable law, or as permitted by FERPA
- All information must be maintained in a secure manner
- Do not over-promise confidentiality – due process and other considerations may require disclosure of information obtained through investigation
- Notify complainant of the information that will be disclosed, to whom it will be disclosed and why

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Conducting Interviews

Investigator should develop a general investigation plan

- Gather and review any relevant documents, policies or other evidence
- Determine where interviews will take place (neutral, private, convenient)
- Can be via Zoom or Teams
- Prepare pre-interview points; consider providing in writing
- Determine order of interviews
- Develop list of questions for each that will help you determine whether it is more likely than not that the complaint is founded under Title IX and school policy

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Interviews

Points to review with complainant, respondent and witnesses:

- Explain process
- Expectation of honest cooperation, and result (if any) of refusal to honestly cooperate
- Request or state any expectation of confidentiality/discretion as appropriate
- Explain policy on non-retaliation and how to report retaliation
- Explain Recipient's position on confidentiality

Basic Interview Questions

- Who committed alleged act?
- Who else was around?
- What exactly occurred or was said? Include details.
- When did it occur? Was it a one-time event? Repeated, ongoing event?
- Where did it occur?
- How did you react? Did it affect you?
- Are there other individuals who might have relevant information?
- Did you tell anyone about it?
- Ask for any available evidence (including social media content)
- Probe for hidden agendas

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Other Interview Tips

- Consider personality, tone, and psychological dynamics
- Focus on facts (avoid spending too much time discussing “why?” questions)
- Avoid pre-judging evidence
- Consider all possibilities
- Be an active listener
- Take notes or record
- Control emotions, be investigative rather than an advocate

Obtaining Witness Statements

- Written in first person
- Focus on facts, not conclusions (may include how the incident affected the individual)
- If the investigator writes the statement for the witness, get confirmation of accuracy
- Consider having it notarized or including statement, “based upon my personal knowledge, the above facts are true and correct”

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Handling Evidence

- Be aware of “chain of custody” issues
- Maintain investigation file containing:
  - Investigator’s notes (running record of actions taken; interviews conducted)
  - Written statements
  - Paper and electronic records
  - Photographs, videos and audio recordings
  - Any other evidence received, both inculpatory and exculpatory

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

RELEVANCE

What is "relevant" evidence?

- Evidence that is of consequence to the outcome of the investigation
- Evidence that makes any fact more or less probable than it would be without the evidence

RELEVANCE

- Does not exist in a vacuum – the relevance of any particular piece of evidence is determined in relation to what is required to make a determination regarding responsibility
- Determining relevance is different than determining how much weight to give the evidence
  - Irrelevant evidence – Exclude from consideration
  - Relevant evidence – Include for consideration
    - Determine how much weight to be given compared to other evidence

RELEVANCE

Prior sexual behavior or sexual predisposition

Questions about a complainant's prior sexual behavior or sexual predisposition are *NOT* relevant EXCEPT to the limited extent they are offered*:*

- *to prove that someone other than respondent committed the conduct; or*
- *as related to specific incidents between the complainant and respondent to prove consent*

Prior Sexual Behavior or Sexual Predisposition – When Relevant?

<u>When a third party is suspected of the misconduct</u>

- Scenario: A student reports being sexually harassed and stalked through threatening, sexually explicit notes left in their locker. The respondent offers evidence that the complainant's ex-partner has a history of stalking and leaving similar graphic notes, suggesting the ex-partner is the perpetrator, not the respondent.
  - Why it's relevant: The complainant's specific sexual history with the ex-partner is admissible because it tends to prove that someone other than the respondent committed the conduct alleged.

<u>To explain the communication of consent within a dating relationship</u>

- Scenario: A complainant alleges they were sexually harassed by their partner through sexually explicit text messages. The respondent provides sexually explicit messages they previously exchanged with the complainant, arguing that the complainant's past behavior establishes consent.
  - Why it's relevant: The history of how the parties communicated consent in prior sexual relations with each other can be relevant to the specific incident.

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Prior Sexual Behavior or Sexual Predisposition – When NOT Relevant?

To establish a general sexual predisposition (Federal regulations explicitly state that questions and evidence about a complainant's "sexual predisposition" are never relevant and are protected by "rape shield" laws.)

- Scenario: The respondent claims that the complainant has a reputation for "sleeping around" or being "easy" to suggest that the encounter was consensual.
  - Why it's not relevant: This type of information relies on a harmful sexual stereotype and is explicitly barred from consideration.

To suggest the complainant's character or general promiscuity

- Scenario: The respondent attempts to introduce evidence that the complainant has had multiple sexual partners or has engaged in certain sexual acts with other people.
  s
  - Why it's not relevant: A complainant's sexual relationships with other individuals cannot be used to prove that they consented to sexual acts with the respondent.

To attack the complainant's credibility

- Scenario: The respondent or their advisor asks the complainant questions during cross-examination about past consensual relationships to suggest that they are not trustworthy.
  - Why it's not relevant: This tactic is prohibited. The relevance of a question must be determined based on whether it seeks information that will help in determining responsibility, not on who asked it or their possible motives.

Important note: The mere existence of a prior sexual relationship between the parties is never sufficient on its own to prove consent in the incident under investigation.

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

The Written Investigative Report

- Must ask questions and sort through evidence to produce a summary of relevant evidence
- Prior to the completion of the written report, each party must be provided with copies of evidence directly related to the allegations in the complaint (this often takes the form of a draft report)
  - Each party must have 10 days to submit a written response to the Investigator
  - Investigator must "consider" the written responses prior to completing the written report.
- Written report must fairly summarize **relevant** evidence
- Final written report must be provided to each party and the parties' advisors (if any) at least 10 days prior to the decision-maker making a determination regarding responsibility
  - Parties must be given opportunity to review and provide a written response to the written report
- Beware of record-keeping requirements – Investigation materials must be maintained for 7 years.

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Bias and Impartiality

Investigator must be unbiased, impartial and free from conflicts of interest

Investigator's goal is to help decision-maker reach a determination of responsibility based on reliable, relevant evidence

- Goal is NOT to achieve any particular outcome
- Avoid becoming emotionally invested or slipping into advocacy

Determination of Responsibility

CANNOT BE MADE BY INVESTIGATOR OR TITLE IX COORDINATOR

Who Should Decision-Maker Be?

- Cannot be same as Title IX Coordinator or Investigator for that case
- Cannot be the same as Appeal Decision-Maker
- May be one person or a multi-member panel
- Must be unbiased, impartial and free from conflicts of interest

What is Decision Maker's Role?

- Act as neutral
- Determine what questions are relevant to the case
- Objectively evaluate all relevant evidence both inculpatory and exculpatory
- Reach determination regarding responsibility
- Mandatorily dismiss complaint:
  - That do not rise to level of "Sexual harassment"; or
  - Did not occur in education program or activity; or
  - Did not occur against a person in the US

Decision-Making Process

Written

Live Hearing

K-12 is not required to hold live hearings and little structure is provided for by regulations regarding live hearings at K-12 level.

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Cross Examination

- Must occur in some form in both the written and live hearing options
- DOE determined it is necessary for due process
- DOE presumes Decision-Maker will control advisors and advocates to ensure no party is abused by cross-examination process

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Cross-Examination Procedure in Written Option

Each party's advisor will <u>submit</u> questions for cross-examination

- Decision-Maker's Role
  - Decide if questions are relevant and:
    - Ask the question if relevant; or
    - Decline to ask an irrelevant questions, and explain why the question is irrelevant to the asking party in writing
  - Provide parties with opportunity for follow-up questions

Relevance

Only RELEVANT evidence may be considered by the decision-maker when determining responsibility.

Evidence having any tendency to make the existence of any fact more or less probable than it would be without the evidence

Determining relevance is different than determining how much weight (strength) to give evidence

- Irrelevant evidence – Excluded
- Relevant, but not much weight – Included for consideration

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Relevance – Privileged Information

- Any party's medical, psychological, and similar records are not relevant unless voluntarily provided by that party
- Any information protected by a legally recognized privilege (ex. attorney-client privilege) is not relevant
  - Ex. Cannot ask: "What did your attorney tell you about whether these actions were consensual?"

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Questions Prohibited

In either live hearing or written option, questions about the complainant's sexual predisposition or prior sexual behavior are NOT relevant and may not be asked unless:

- Offered to prove someone other than respondent committed the conduct alleged; or
- Incidences concern prior sexual behavior with the respondent and are offered to prove consent

Credibility Assessments

Give testimony and information of each party or witness the degree of importance you reasonably believe it is entitled to receive

- Do not rely on “demeanor” alone – can be inaccurate, especially in traumatic situations
- Take trauma into account
- Other factors for credibility
  - Consistency
  - Plausibility
  - Reliability
  - Motive
  - Bias

Determining Responsibility

Following live hearing or written exchange of questions, decision-maker must determine responsibility

- Keep an open mind until all relevant evidence has been heard and don't come to any judgment or conclusion until reviewing all permissible and relevant evidence
  - May not consider anything other than relevant evidence
- Make sound reasoned decision
  - Determine the facts based on the information presented
  - Determine what evidence to believe, the importance of the evidence and the conclusions to draw therefrom

Evidence Standard

PREPONDERANCE OF THE EVIDENCE

- More likely than not (50.1%)
- What is more plausible?

CLEAR AND CONVINCING

- Highly probable; highly and more substantially likely to be true

Same standard of evidence applied to all formal complaints of sexual harassment

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Analyzing the Elements of Prohibited Conduct

- To find a violation, there must be evidence, using preponderance of the evidence or clear and convincing standard, that every element of the violation has been met
- How?
  - Review definition
  - Break down definition into elements
  - Sort evidence according to elements

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Quid Pro Quo

- Conduct on the basis of sex
- By an employee
- That conduct conditions the provisions of an aid, benefit, or service on an individual's participation in sexual conduct
- That sexual conduct is unwelcome

Hostile Environment

- Conduct on the basis of sex
- That is unwelcome
- That a reasonable person has determined is so severe, pervasive <u>and</u> objectively offensive …
- That it effectively denies a person equal access to education program or activity

Remember – Scope of Education Program/Activity

Behavior addressed must occur in school's education program or activity

- All operations of school
- Locations, events and circumstances over which Recipient exercised substantial control over both respondent and the context in which sexual harassment occurs

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Written Decision

- Identification of Allegations
- Procedural Steps
- Findings of Fact
- Application of Facts to Code of Conduct
- Statement of Results and Rationale for Each Allegation
- Sanctions and Remedies
- Appeal Procedures

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Written Decision

- Ensure Title IX Coordinator receives a copy of the decision and any other documents involved in the process for required 7-year retention
- Must be provided to parties simultaneously
- Determination is not FINAL until:
  - Date of written determination following appeal; or, if no appeal is taken
  - Date the appeal deadline expires

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Sanctions and Remedies

- Range of possible sanctions must be described in policy
- Focus not just on discipline, but also on restorative remedies to prevent recurrence
- Don’t forget about other legal obligations

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Sanctions

Examples

- Written Warning
- Suspension
- Expulsion
- Demotion
- Termination

Other Legal Obligations

- Student Conduct Policies
- Suspension/Expulsion beyond 10 days
- IDEA/504 Students
- Employee Due Process Procedures

Remedies

- Title IX Coordinator responsible for implementing remedies
- May be the same or similar to interim supportive measures
- Must be designed to restore or preserve equal access to education programs or activities
- Range of possible remedies must be included in policy

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Remedies

Examples

- Counseling modifications
- Accommodations to class schedules or schoolwork
- Restrictions on contact between the parties
- Increased monitoring

Appeal Process

Appeal Procedures

- Either Party may the Determination of Responsibility or dismissal of a Formal Complaint within 10 calendar days of receipt
- Recipient must notify other party in writing when appeal is filed
- Give both parties a reasonable, equal opportunity to submit a written statement
- Issue a written decision describing the result of the appeal and rationale
- Provide written decision simultaneously to both parties

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Appeal Decision-Maker

- Must not be Title IX Coordinator, Investigator or Initial Decision-Maker
- Can be individual or multi-member panel
- Not the full School Board
- Avoid conflict of interest and bias

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Mandatory Appeals (appeal must be allowed to proceed)

- Procedural irregularity that affected the outcome of the matter
- New evidence not reasonably available at the time of the determination regarding responsibility or dismissal
  - Evidence could affect outcome
- Title IX Coordinator, Investigator or Decision-Maker had a conflict of interest or bias for or against either party that affected the outcome

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Permissive Appeals

- May offer an appeal on any other basis, as long as the opportunity is offered to both parties equally
- Examples
  - Whether the evidence met the identified standard of proof
  - Whether the sanction is proportional to the policy violation

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Impartiality, Bias and Conflict of Interest

DECISION-MAKERS AND APPEAL DECISION-MAKERS

Impartiality

- Avoid stereotypes or generalizations about groups of people (ex. “victim-blaming” or “believe all women”)
- Decision-Makers must endeavor NOT to develop a personal relationship with one party over another, including based on whether parties are remote for live hearing

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Conflicts of Interest

- Decision-Makers may have to recuse themselves from certain cases if conflict of interest exists
- Disclose and recognize conflicts of interest
  - Familiarity or connection to party?
  - Stake in the outcome?

Confidentiality

- Must keep confidential the identity of any individual who has made a report or complaint, any respondent and any witness except as:
  - May be permitted under FERPA;
  - As required by law; or
  - To carry out the investigation and hearing procedures
- Keep identities and information confidential to the hearing and resolution process – only talk to school officials who "need to know"

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Informal Resolution

"DEFAULT" IS THAT FORMAL COMPLAINT MUST BE INVESTIGATED AND ADJUDICATED. HOWEVER, A RECIPIENT MAY CHOOSE TO OFFER PARTIES AN INFORMAL PROCESS TO RESOLVE THE COMPLAINT AFTER A FORMAL COMPLAINT HAS BEEN FILED.

EXAMPLES

- Mediation
- Arbitration
- Restorative Justice
  - Requires Respondent to admit wrongdoing

Requirements

- May not be required in lieu of formal grievance process
- May be initiated any time prior to reaching determination regarding responsibility
- Any party may withdraw from informal resolution process at any time prior to finalizing
- Must have reasonably prompt time frames
- Written notice of allegations should alert the parties to the availability of any Informal Resolution Recipient has made available
- Must obtain parties voluntary, written consent

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Employee-to-Student Sexual Harassment

Cannot offer or facilitate informal resolution to resolve allegations that an employee sexually harassed a student.

Facilitators

- Must be free from conflicts of interest, bias and trained to serve impartially
- Training
  - Definition of sexual harassment
  - Scope of Recipient's education program or activity
  - How to conduct informal resolution process
  - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest and bias

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

OUTCOMES

- Written agreement between parties
- May include provisions similar to Interim Supportive Measures
- May include disciplinary measures
- Provide finality for parties

Recordkeeping and Retention

The following must be maintained for SEVEN years

- Each sexual harassment investigation, including determinations, audio or visual recordings, disciplinary sanctions, and any remedies provided to the complainant;
- Any appeal and the result therefrom;
- Informal resolution, if any; and
- All material used to train Coordinators, Investigators, Decision-Makers, and those who facilitate Informal Resolution

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

The following must be created and kept for SEVEN years

- Any actions, including supportive measures, taken in response to a report or formal complaint of sexual harassment
- Document the basis for the conclusion that the response was not deliberately indifferent
- Document that measures have been taken that were designed to restore or preserve access to the educational program or activity
- If no supportive measures are given to complainant, document why it was not clearly unreasonable

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

Prohibition on Retaliation

- Retaliation against ANY individual, including Complainants, Respondents, and witnesses for reporting sexual harassment or participating (or refusing to participate) in any Title IX grievance process is prohibited.
- If any individual feels that they have been retaliated against, they should report the retaliation to the Title IX Coordinator and the Coordinator will ensure a prompt and equitable resolution of the complaint.
- It is NOT retaliation for the District to punish an individual for making a bad faith, materially false statement during a Title IX grievance process.

YOUNG CONAWAY

Copyright © 2019 Young Conaway Stargatt & Taylor, LLP All rights reserved.

QUESTIONS???

Policy 2.32

Training Materials on Website

Title IX Coordinators

Dr. Gina Moody

GINA.MOODY@christina.k12.de.us

Ledonnis Hernandez

LEDONNIS.HERNANDEZ@christina.k12.de.us