



**Career**Learning

**Title IX Coordinator  
Certification K-12**

Session 2: Developing Policies and Conducting Investigations

Presented by: Richard F. Verstegen



**Policies**

**Career**Learning

**Title IX Coordinator Certification K-12**

**Session 2: Developing Policies and Conducting Investigations**

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2/14/23

1:30-3:00

# Overview

I

## Policies and Procedures

- Grievance Procedure
- Grievance Process

II

## Investigations

- Reports
- Formal Complaints
- Investigation
- Determination
- Appeal

III

## Conclusion

# Policies and Procedures

**POLICIES**

**PROCEDURES**

## Title IX Complaints

- Policies need to consider
  - Interaction when claims also involve other protected classes (race, disability, etc.)
  - Interaction with other state laws
  - Interaction with overlapping federal laws (Title VII)
  - Interaction with student code of conduct



## Grievance Procedure

- **Important elements**
  - Notice to students and employees of the grievance procedures, including where they may be filed
  - Application of the grievance procedure to complaints filed by students or on the alleged sexual violence carried out by employees, other students, or third parties
  - Provisions for adequate, reliable, and impartial investigations of complaints
  - Written notice to the complainant and alleged perpetrator of the outcome of the process
  - Assurance that the institution will take steps to prevent the recurrence of any sexual violence and remedy discriminatory effects on the complainant and others, if appropriate
  - Designated and reasonably prompt time frames for the major stages of the grievance process

# Grievance Procedure

- **April 2014 Guidance (rescinded)**

- The April 2014 Guidance (now rescinded) included additional suggestions for grievance procedures.
- No longer suggested, but may be included:
  1. A statement of the school's jurisdiction over Title IX complaints
  2. Adequate definitions of sexual discrimination;
  3. Reporting policies and protocols, including provisions for confidential reporting

# Grievance Procedure

- **April 2014 Guidance (rescinded)**

4. Identification of the employee or employees responsible for evaluating confidentiality;
5. Notice that Title IX prohibits retaliation;
6. Notice of a student's right to file a criminal complaint and a Title IX complaint simultaneously;
7. Notice of available interim measures that may be taken to protect the educational setting;
8. The evidentiary standard that must be used in resolving a complaint;
9. Notice of potential remedies for students;
10. Notice of potential sanctions against perpetrators; **and**
11. Sources of counseling, advocacy, and support.



## Grievance Process

- **Grievance process components**
  - Basic requirements
  - Notice of allegations
  - Dismissal of formal complaint
  - Consolidation
  - Informal resolution
  - Investigation
  - Hearing (not required in K-12 sch
  - Determination regarding respons
  - Appeals
  - Recordkeeping



## Reports and Investigations of Sexual Harassment

## Poll Question

- **How many sexual harassment cases have you addressed since August 2020?**
  - Around 0 to 5
  - Around 6 to 10
  - Around 11-20
  - More than 20



## Responding to Sexual Harassment Allegations

- Absence of formal complaint, must still respond in a manner that is not deliberately indifferent. No investigation is required, but the institution must do something.
- Schools must treat complainants and respondents equitably by providing supportive measures to a complainant and by following a grievance process under 106.45 before the imposition of any disciplinary sanctions or other actions against a respondent.

## Definitions – Recognizing Sexual Harassment

- **Sexual harassment**

- An employee of the institution **conditioning** the provision of an aid, benefit, or service of the institution on an individual's participation in unwelcome sexual conduct (quid pro quo);
- Unwelcome conduct determined by a reasonable person to be so **pervasive, and objectively offensive** that it effectively denies a person equal access to the institution's education program or activity; **or**
- Sexual assault, dating violence, domestic violence, or stalking (as defined by law).



## Responding to Sexual Harassment

- An institution with **actual knowledge** of sexual harassment in an educational program or activity of the institution against a **person in the U.S.** must **respond** promptly in a manner that is not deliberately indifferent.
- A recipient is deliberately indifferent if its response to sexual harassment is clearly unreasonable in light of the circumstances.

## Obligation to Respond – Actual Knowledge

- **Notice of sexual harassment or allegations of sexual harassment to:**
  - Title IX Coordinator
  - Any official of the institution who has the authority to institute corrective measures on behalf of the institution
  - Any employee of an elementary or secondary school
- **Imputation of knowledge-based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge.**



## Obligations for Response Within the Education Program or Activity

- **Within the education program or activity**
  - Includes locations, events, and circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurred

## Definitions – Parties

- **Complainant**

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

- **Respondent**

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

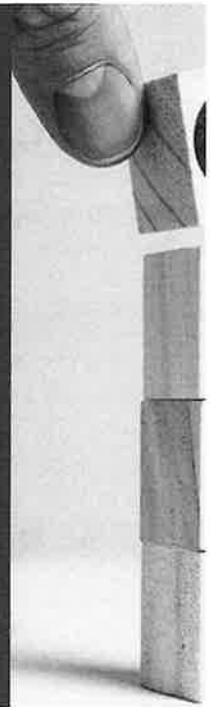
## Responding to Sexual Harassment Allegations

- **Title IX Coordinator must promptly:**
- Contact the complainant to discuss the availability of supportive measures,
- Consider the complainant's wishes with respect to supportive measures,
- Inform the complainant of the availability of support measures, **and**
- Explain to the complainant the process for filing a formal complaint.



# Responding to Sexual Harassment Allegations

- **Supportive measures**
  - Means non-disciplinary, non-punitive individualized services offered as appropriate, as 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
  - Are designed to restore or preserve equal access to the institution's education program or activity without unreasonably burdening the other party



## Responding to Sexual Harassment Allegations

- **Supportive measures**
  - Includes measures designed to protect the safety of all parties in the institution's environment or deter sexual harassment
  - May include counseling, extensions of deadlines or course adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and similar measures

# Response to Sexual Harassment Allegations

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

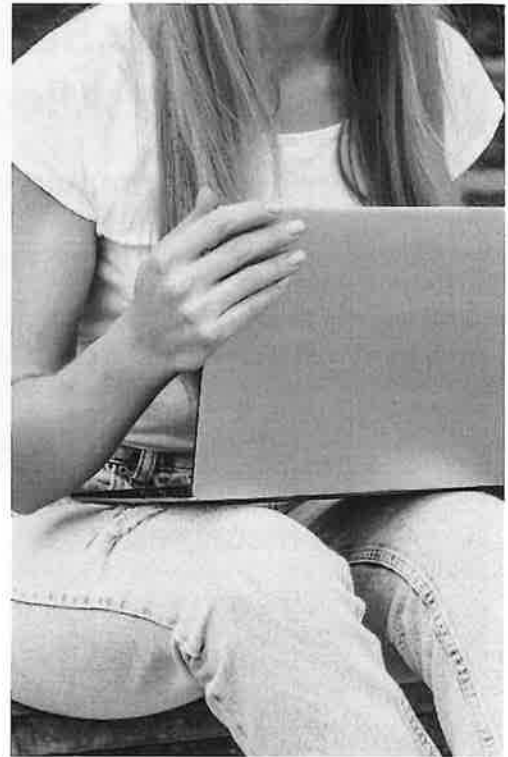


## Response to Sexual Harassment Allegations – Emergency Removal

- **Nothing precludes the institution from removing a respondent from education program or activity on an emergency basis.**
  - The institution must undertake an individualized safety and risk assessment to determine that immediate threat to health or safety of any student individual arising from the allegations of sexual harassment justifies removal, and provide the respondent with notice and opportunity to challenge following the removal.
  - This provision may not be construed to modify any rights under Title IX, Section 504, and ADA.

## Response to Sexual Harassment Allegations – Administrative Leave

- Nothing precludes the institution from placing a non-student employee respondent on administrative leave during the pendency of a grievance process.
- These provisions may not be construed to modify any rights under Section 504 or the ADA.



## Formal Complaints

- **Formal complaint**
  - A document filed by the complainant signed by the Title IX Coordinator alleging sexual harassment against a respondent and (2) requesting the institution investigate the alleged sexual harassment
  - A document filed by the complainant means a document or electronic submission that contains the physical or digital signature, and indicates that the complainant is the person filing the formal complaint

# Formal Complaints

- **Formal complaint**

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



## Grievance Process – Dismissal

- **Dismissal of complaint**
  - If conduct, if proved, would not constitute sexual harassment
  - If conduct did not occur in the education program or activity
  - If conduct did not occur against a person in the U.S.
  - Institution must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under Title IX or this
  - Such a dismissal does not preclude action under another provision of the recipient's code of conduct.
- **Upon dismissal, the institution must promptly send written notice of the dismissal and reasons for dismissal.**

## Grievance Process – Dismissal

- **Dismissal of complaint**
  - The institution may dismiss the formal complaint or any allegations the any time during the investigation or hearing:
    - A complainant notifies the Title IX Coordinator in writing that the cc would like to withdraw the formal complaint or any allegations ther
    - The respondent is no longer enrolled or employed by the institution
    - Specific circumstances prevent the institution from gathering evide sufficient to reach a determination as to the formal complaint or all therein.
- **Upon dismissal, the institution must promptly send written notice of dismissal and reasons for dismissal.**

## Grievance Process – Informal Resolution

- An institution may not require (as a condition of enrollment, employment, or another right) a waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section.
- An institution may not require the parties to participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed.



## Grievance Process – Informal Resolution

- At any time, prior to reaching a determination regarding response, the institution may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication.
- Informal resolution requires an institution to follow certain requirements including (1) providing the parties a written notice disclosing certain information (described below); (2) obtaining the parties' voluntary written consent to the informal resolution process; and (3) ensuring it does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

## Grievance Process – Informal Resolution

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

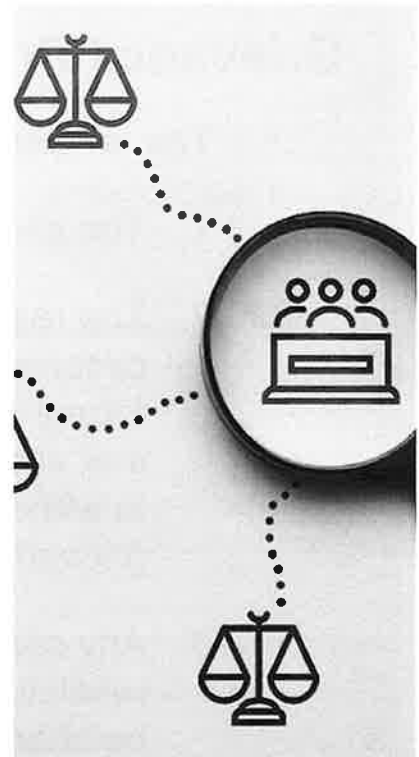
## Poll Question

- Have you used any informal resolution process in your sexual harassment cases?
  - Yes for both students and employees
  - Yes, for students only
  - Yes, for employees only
  - No



## Grievance Process – Consolidation

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





## Grievance Process – Investigations

- Upon receipt of a formal complaint, the institution must provide written notice to the parties who are known.
- Written notice must include:
  - Notice of recipient's grievance
  - Notice of allegations of sexual harassment, including sufficient detail known at that time (i.e., identify the parties involved in the incident, the conduct allegedly constituting harassment and the date and location of the alleged incident)

## Grievance Process – Investigations

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



## Grievance Process - Investigations

- Written notice must be provided sufficient time to prepare a response before any initial interview.
- If other allegations are investigated later, notice must be provided for additional allegations to those whose identities are known.

## Grievance Process – Investigations

- **An institution must:**
  - Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the institution and not on the parties.
  - The institution cannot access, consider, disclose, or otherwise use a party's records that are made and maintained by a physician, psychologist, or other recognized professional or paraprofessional in the professional's or paraprofessional's capacity or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains the voluntary, written consent to do so for the grievance process.

# Grievance Process – Investigations

- **An institution must:**

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

# Grievance Process – Investigations

- **An institution must:**

- Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate
- Create an investigation report that fairly summarizes relevant evidence.
- Investigator must be able to assess credibility and identify relevant evidence.
- Relevant evidence is evidence and testimony that directly relates to the issues disputed or discussed.





## Grievance Process – Investig

- **An institution must:**
  - Prior to the completion of the inve report, the recipient must send to and the party's advisor, the eviden to review and inspection in an ele format or a hard copy.
  - The parties must have 10 days to written response, which the inves consider prior to completing the ir report.

## Grievance Process – Investigations

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



## Grievance Process – Investigations

- **Possible investigation report contents**
  - Summary of the complainant's allegations and response of the a
  - Summary of the persons interviewed and a statement about their credibility
  - Presentation of the findings of fact.
  - Summary of relevant standards and other statements concerning
  - Careful consideration should be given concerning whether the re should include conclusions about the allegations and recommen disciplinary or other corrective action.



## Responsibility Decision-Maker

- Not Title IX Coordinat Investigator
- Must issue written determination regarding responsibility
- Determination must a evidence standard.

## Poll Question

- Who do you use as responsibility decision-makers?
  - School employees
  - Outside legal counsel
  - Outside administrators



## Grievance Process – No Live Hearing

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

## Grievance Process – No Live Hearing

- The decision-maker must explain to the party proposing the questions any decision to exclude a question as not relevant.
- With or without a hearing, questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless (1) 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 (2) 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.

## Grievance Process – Live Hearings

- **Post-secondary institutions must provide a live hearing.**
  - The decision-maker must permit each party's advisor to ask the questions and any witnesses all relevant questions and follow-up questions that challenge credibility.
  - Such cross-examination at the live hearing must be conducted orally, and in real time by the party's advisor of choice and never personally (notwithstanding the discretion of the institution to otherwise restrict the extent to which advisors may participate in the process).
  - At the request of either party, the institution must provide for the hearing to occur with the parties located in separate rooms with a one-way mirror enabling the decision-maker and parties to simultaneously see and hear the party or the witness answer questions.

## Grievance Process – Live Hearings

- **Post-secondary institutions must provide a live hearing.**
  - Only relevant cross-examination and other questions may be asked of a party or witness.
  - Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.
  - If a party does not have an advisor present at the live hearing, the institution must provide without fee or charge to that party, at the party's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.

## Grievance Process – Live Hearings

- **Post-secondary institutions must provide a live hearing.**
  - If a party or witness does not submit to cross-examination at a live hearing, the decision-maker must not rely on any statement made by that party or witness in reaching a determination regarding responsibility (provided however that the decision-maker cannot draw an inference about the determination regarding responsibility based solely on the party's or witnesses absence from the live hearing or refusal to answer cross-examination or other questions).

## Grievance Process – Live Hearings

- **Post-secondary institutions must provide a live hearing.**
  - Live hearings pursuant to this paragraph may be conducted with parties physically present in the same geographic location or, at the institution's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other.
  - Recipients must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

## Determination

### Written determination must include:

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





## Determination

### Written determination must include

- A statement of, and rationale result as to each allegation, i determination regarding resp any disciplinary sanctions the imposes on the respondent, whether remedies designed or preserve equal access to education program or activity provided by the institution to complainant; **and**
- The institution's procedures, permissible bases for the con and respondent to appeal.

## Determination

- **Written determination**
  - The institution must provide the written determination to the parties simultaneously.
  - The Title IX Coordinator is responsible for the effective implementation of any remedies.





## Appeal

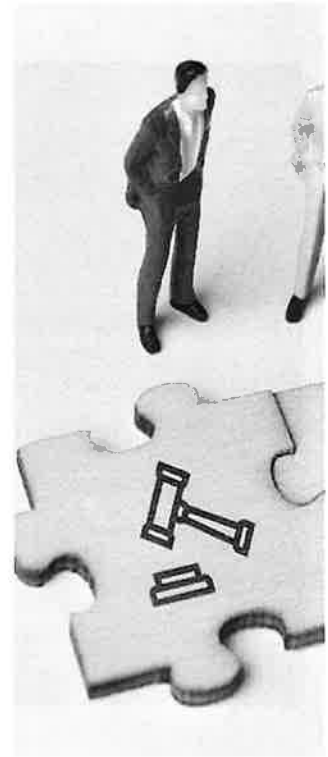
- An institution must offer both an appeal from a determination of responsibility, and from an institution's dismissal of a formal complaint or allegations contained therein.
- If appeal, the decision is final on appeal.
- If no appeal, then the decision is final on the date on which an appeal is not filed and no longer be considered time

## Appeal

- **The appeal must be on the following bases:**
  - Procedural irregularity that affected the outcome of the matter;
  - New evidence that was not reasonably available at the time of the determination regarding responsibility or dismissal that could affect the outcome of the matter;
  - The Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias for or against the complainants or respondents that affected the outcome of the matter;
- **The institution may offer an appeal equally to both parties on all of the above bases.**

# Appeal

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



# Appeal

- **For any appeal, the institution**
  - Give both parties a reasonable 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 basis for the result.
  - Provide the written decision simultaneously to both parties.



## Conclusion

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## Title IX Proposed Regulations

- **June 23, 2022 Proposed Regulations**
  - Sex discrimination applies to sexual orientation, gender identity characteristics.
  - New definition of sex-based harassment, including hostile environment that looks at “sufficiently severe or pervasive” conduct.
  - New definition of confidential employees.
  - New response requirements, including eliminating the definition of knowledge and deliberately indifferent.

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## **Title IX Proposed Regulations**

- **June 23, 2022 Proposed Regulations**
  - Requires institutions to address off-campus conduct
  - Expands the definition of complainant
  - Requires institutions to provide supportive measures to students and employees in instances involving any sex discrimination
  - Sets forth additional training requirements
  - Combining grievance procedures for sex discrimination and sex harassment complaints in certain instances

## **Title IX Proposed Regulations**

- **June 23, 2022 Proposed Regulations**
  - Sets forth additional requirements for sex-based harassment complaints involving a post-secondary student
  - Revised informal resolution procedures
  - New regulations relate to protecting students from discrimination based on pregnancy, including providing reasonable modifications for students, reasonable break time for employees for lactation, and lactation space for students and employees
  - Revised retaliation provisions



## Conclusion

- Need to review policies
- Need to include a grievance process in your policies
- Need to identify different individuals to serve as investigators and follow the process

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# What was your key takeaway?

Please let us know in the Q&A.

We will use your response with your first name and last initial on our website so others



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## Questions?



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