

November 6<sup>th</sup>, 2020

The Salon Professional Academy  
13125 HWY 107  
Sherwood Arkansas 72120

Memo: Completion of Title IX Training

This letter certifies that Lawrence Wilson and Andrea Wilson have completed Title IX compliance training provided by Duane Morris Institute on November 6<sup>th</sup>, 2020.

Copies of the training materials along with this memo shall be posted on the institutes website to show compliance with Title IX.

Please direct all questions regarding Title IX to Lawrence Wilson at 501-753-2400.

*Lawrence P. Wilson*

Lawrence Wilson  
The Salon Professional Academy

# Title IX For Career, Technical & Trade Schools: The New Role of the Title IX Coordinator

Presented by  
Edward Cramp & Jessica High  
Higher Education Practice Group  
August 27, 2020



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# Today's Presentation

- Recap and Overview of Title IX Sexual Harassment Complaint Process
- Definition of Sexual Harassment
- Implementing a revised Title IX Program
- The Title IX Coordinator's role

# RECAP AND OVERVIEW OF TITLE IX COMPLAINT PROCESS

# Recap

- Final Rule published 5-19-2020 (85 Fed Reg 30026)
- Effective August 14, 2020
- Amends 34 CFR Part 106

# Prohibits Sex Discrimination

No person in the United States shall on the basis of **sex**, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance

# WHAT IS SEXUAL HARASSMENT?



# Sexual Harassment

- Conduct on the basis of sex that falls into one or more of the following 3 categories:

# 1. Quid Pro Quo

- An employee of the school conditioning the provision of an aid, benefit, or service of the school on an individual's participation in unwelcome sexual conduct;

## 2. Hostile Environment

- 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 Violence

- “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)

# Sexual Violence

- **Sexual Assault:** As defined in 20 U.S.C. 1092(f)(6)(A)(v), means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.
- **Dating Violence:** As defined in 34 U.S.C. 12291(a)(10), means violence committed by a person (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (B) where the existence of such a relationship shall be determined based on a consideration of the following factors: the length of the relationship; the type of relationship; and, the frequency of interaction between the persons involved in the relationship.

# Sexual Violence

- **Domestic Violence:** As defined in 34 U.S.C. 12291(a)(8), includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.
- **Stalking:** As defined in 34 U.S.C. 12291(a)(30), means engaging in a course of conduct directed at a specific person that would cause a reasonable person to: (A) fear for his or her safety or the safety of others; or (B) suffer substantial emotional distress.

# Title IX Complaint Process Overview

- Formal Complaint Received by Title IX Coordinator
- Optional Informal Resolution Process
- Investigation
- Live Hearing
- Decision and Remedial Measures
- Appeals



# TITLE IX POLICY IMPLEMENTATION



## Title IX Coordinator Visibility

- Contact information must be posted on website and in each handbook or catalog provided to prospective/current students and employees
  - Name or title, office address, email address, and telephone number
- Anyone can report sex discrimination (including sexual harassment) even if they are not the victim by mail, telephone email or in person

# Implementing a Title IX Policy

- Title IX Coordinator responsibility
  - At least one employee
- Published on the website, student catalog, employee handbook:
  - Notice of Non-discrimination based on sex
  - Training materials for Title IX personnel
  - Title IX Coordinator contact information
- Publish Prompt and Equitable Grievance Procedure applicable to students and employees

# Policy Considerations

- Standard of proof
- Reporters
- Definition of consent
- Informal resolution
- Hearing format and protocols
- Discretionary dismissal
- Process for non-Title IX misconduct



# TITLE IX COORDINATOR ROLE

# Overall Responsibilities

- Develop compliant policies and procedures for reporting and resolving
- Conduct training for students and Title IX personnel
- Evaluate reports, apply policies and procedures
- Implement supportive measures
- Guide timeline
- Assign investigators and monitor investigative process
- Assign Decision-Makers and monitor grievance process
- Maintain records

## How is this Different than the Former Role?

- No longer required to serve roles of administrator, investigator and decision-maker.
  - These roles are now separate in an attempt to provide a fair process and to avoid conflicts of interest
- Must be neutral, fair to both sides, and avoid conflicts of interest
- Only Formal Complaints move forward

# Responsibilities with a Formal Complaint

- Title IX Coordinator or designee responsible for:
  - Document the complaint
  - Providing Supportive Measures
  - Assessment – Title IX applies?
  - Notice of allegations and investigation
  - Notice of hearing
  - Transmitting Written Determination
  - Remedies
  - Recordkeeping

# Notice

- Title IX Coordinator must ensure that the school responds when:
  - Actual knowledge of sexual harassment
    - Title IX Coordinator or Official with Authority
  - Within the education program or activity
    - Substantial control
  - In the United States
- School violates Title IX when its response to sexual harassment is clearly unreasonable in light of the known circumstances (deliberate indifference)



## Requests for Confidentiality

- Defer to Complainant's wishes as to whether to pursue an investigation
- So long as doing so does not prevent the school from effectively preventing the harassment of other students of the Complainant

# Response to Requests for Confidentiality

- Explain to the Complainant:
  - Responsive action/Remedies are limited based on level of confidentiality requested
  - Only those with a need to know will be informed
  - No retaliation

## May Need to Investigate

- Threat
- Violence/Weapon
- Minors (always reported to proper authorities)
- Pattern
- If schools proceeds, notify Complainant and utilize Supportive Measures

## Without a Formal Complaint

- Where no formal complaint is filed triggering the Title IX grievance procedure, but the school has actual knowledge of sexual harassment, the school must still respond without deliberate indifference
- Provide supportive measures

## Supportive Measures

- Title IX Coordinator must promptly and confidentially contact Complainant and offer supportive measures.
- Offered regardless of whether or not Complainant has filed a Formal Complaint
- Consider Complainant's wishes
- Title IX Coordinator must explain the process of filing a formal complaint.
- Title IX Coordinator responsible for implementation

## Supportive Measures

- Required in all cases (formal complaint not needed)
- Individualized, appropriate and reasonably available
- Designed to preserve or restore equal access
- Provided without charge
- Non-disciplinary and non-punitive
- Available to Complainant and Respondent, as applicable
- Confidential

# Supportive Measures

- Designed to:
  - Restore or preserve access to the school's education program or activity
  - Without unreasonably burdening the other party
  - Protect the safety of all parties and the school's educational environment, and
  - Deter sexual harassment

# Examples of Supportive Measures

- Counseling
- Extensions of deadlines or other course-related 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



# Emergency Removal

- Can remove a student Respondent from education Program or Activity or place an employee Respondent on administrative leave
- Undertake and individualized safety and risk assessment
- Need justification for removal
- Provide Respondent with notice and an opportunity to immediately challenge the removal
- Clery Act timely warning

# Complaint Dismissal

- School *must* dismiss a Formal Complaint if:
  - Allegations do not meet the definition of sexual harassment
  - Did not occur in the school's education program or activity against a person in the United States
- School *may* dismiss a Formal Complaint if:
  - Complainant informs the Title IX Coordinator in writing that the complainant desires to withdraw the formal complaint or allegations therein
  - Respondent is no longer enrolled or employed by the school
  - If specific circumstances prevent the school from gathering sufficient evidence to reach a determination.

## Complaint Dismissal

- If a complaint is dismissed, the school must give the parties written notice of a dismissal (mandatory or discretionary) and include the reason for dismissal.
- School may still address the allegations under another policy
  - Conduct Policy

# Advisors

- Parties have the right to select an advisor during an investigation and hearing
- Can be an attorney, but does not have to be
- If the Complaint goes to a live hearing, the parties must have an advisor
- If the party does not have an advisor, the school must provide, without charge, an advisor of the school's choice
- An school-appointed advisor is not required to be an attorney
- Only advisors may conduct cross-examination of witnesses

# Retaliation

- Title IX Coordinator must ensure that the school's policy effectively prohibits retaliation
- Policy must prohibit intimidation, threats, coercion, or discrimination for making a complaint or participating in process
- Retaliation does not have to be on the basis of sex or involve sexual harassment

# Retaliation

- Retaliation complaints may use the same grievance process as sexual harassment complaints
- School must keep identities of complainant, respondent, and witnesses confidential except as permitted by FERPA
- The following do not constitute retaliation:
  - First Amendment free speech
  - Charging a person with a code of conduct violation for making a false statement



# TRAINING

# Training Title IX Personnel

- Title IX Coordinator must ensure that Title IX personnel are trained on:
  - Definition of sexual harassment in the Final Rule
  - Scope of school's education program or activity
  - Conducting an investigation and grievance process including hearings, appeals, and informal resolution processes
  - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias



# Training Officials with Authority

- Background and overview of Title IX
- Applies to students, employees and third parties
- Notice
- Education program or activity
- When and how to report to Title IX Coordinator
  - All relevant details (names and facts)

# Training Students and Employees

- Review school policy
- What is Sexual Harassment
- Title IX Coordinator contact information
- Discuss how to report
  - Reporting resources
  - How to make a Formal Complaint
  - Confidentiality
- Supportive Measures
- Clery/VAWA sexual violence training

# IMPARTIALITY, CONFLICTS OF INTEREST & BIAS

## Fair and Impartial

- § 106.45 requires recipients to adopt a grievance process where Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions are free from conflicts of interest and bias and are trained to serve impartially without prejudging the facts at issue

# Fair Grievance Process

- All persons involved in grievance process
  - Must be free from conflicts of interest or bias against Complainant and Respondent
  - Must receive training on:
    - Definition of sexual harassment
    - How to conduct an investigation and the grievance process
    - How to serve impartially
    - How to make relevancy determinations

# Impartiality

- Cannot have a conflict of interest or bias for or against Complainants or Respondents generally or an individual Complainant or Respondent

# Conflict of Interest

- When an individual has competing interests or loyalties
- Potential to reap personal gain from decisions, actions or inaction
- Inclination to filter decisions through lens of self-interest

# Bias

- Prejudice in favor of or against an individual or situation
- Disproportionate weight in favor or against certain facts that prevents objectivity
- Insensitivity to facts that otherwise would be significant
- Avoid inferences based on whether someone is a Complainant or Respondent





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# Thank You!

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# Title IX For Career, Technical & Trade Schools

Presented by  
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Higher Education Practice Group

August 24, 2020



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# Today's Presentation

- What's new?
- History of Title IX
- Enforcement
- Definition of Sexual Harassment
- Grievance Procedure Overview



# WHAT'S NEW?

## What's New

- No more single investigator/decision maker role for Title IX Coordinator
  - Roles split into Coordinator, Investigator, Decision Maker, Appellate Authority
- Emphasis on fairness and equal treatment
  - No more assumptions of guilt
  - Equal access to information and assistance
- Informal resolution

## What's New

- Live Hearing process
  - Emphasis on fairness and due process
- School can designate which officials are charged with reporting
- Mandatory and discretionary dismissals
- & more



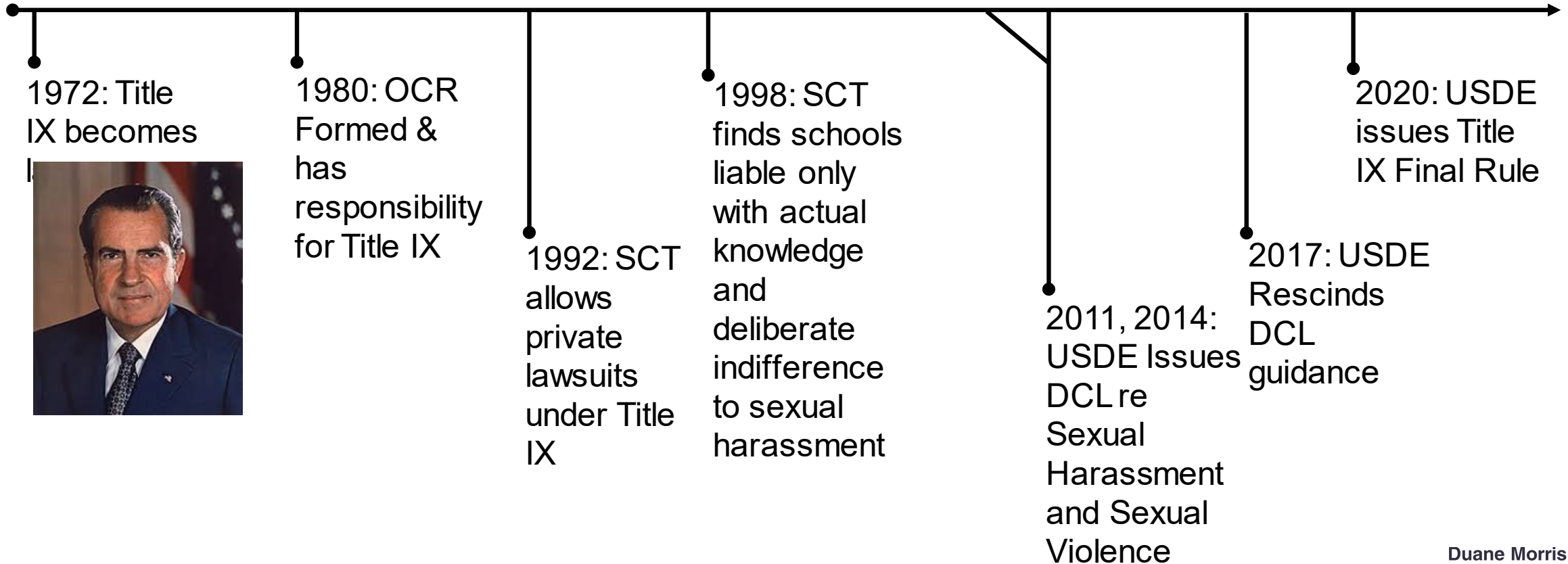
# HISTORY OF TITLE IX



# Title IX Prohibits Sex Discrimination

No person in the United States shall on the basis of **sex**, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance

# Title IX Timeline



## 2020 Final Rule

- Effective August 14, 2020
- Amends 34 CFR Part 106
- 2011 Q&A and 2001 OCR guidance remain good to the extent consistent with Final Rule

## 2020 Final Rule

- Over time courts have interpreted Title IX to include sexual harassment as a form of sex discrimination, but regulations have never explicitly addressed the issue until now
- Title IX final rule is a “floor, not ceiling”
- Schools have the flexibility to offer increased or other procedures so long as mandated Title IX legal requirements are met

## Recent Title IX Litigation

- James Haidak v. University of Massachusetts at Amherst
  - Expelled after ex-girlfriend accused him of physical assault while studying abroad
- John Doe v. Boston College
  - Attending an event on a cruise ship for college newspaper and accused of sexual assault
- John Doe v. Rhodes College
  - Fraternity member and football player expelled for raping another student

# Enforcement

- Office of Civil Rights (OCR) investigates and resolves complaints
- Based on an investigation, OCR enters into resolution agreements with schools that require the school to make changes to certain policies and procedures and to take other actions to improve the campus climate
- Title IX contains a private right of action authorizing individuals who have been harmed by a school's failure to provide Title IX protections to file a Title IX lawsuit for damages in federal court against the school

# OCR Resources

- Webinar: Title IX Regulations Addressing Sexual Harassment
- OCR Blog
- Email OCR OPEN Center with questions ([T9questions@ed.gov](mailto:T9questions@ed.gov))

# WHAT IS SEXUAL HARASSMENT?



# Sexual Harassment

- Conduct on the basis of sex that falls into one or more of the following 3 categories:

# 1. Quid Pro Quo

- An employee of the school conditioning the provision of an aid, benefit, or service of the school on an individual's participation in unwelcome sexual conduct;

## 2. Hostile Environment

- 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 Violence

- “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)

# Sexual Violence

- **Sexual Assault:** As defined in 20 U.S.C. 1092(f)(6)(A)(v), means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.
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- **Stalking:** As defined in 34 U.S.C. 12291(a)(30), means engaging in a course of conduct directed at a specific person that would cause a reasonable person to: (A) fear for his or her safety or the safety of others; or (B) suffer substantial emotional distress.

# Sexual Violence and Clery/VAWA

- Violence Against Women Reauthorization Act of 2013 (“VAWA”) requires inclusion of state definitions for Sexual Assault, Dating Violence, Domestic Violence, Stalking and Consent are contained in the Annual Safety and Security Report (“ASR”)
- Clery (Jeanne Clery Disclosure of Campus Security Policy and Crime Statistics Act) Crime Statistics are reported based on federal definitions

# OTHER KEY DEFINITIONS



## Complainant

- Must be alleged victim unless parent or legal guardian has a legal right to act on behalf
- Note that any person may report sex discrimination, including sexual harassment to the Title IX Coordinator
- Person reporting does not have to be the victim of conduct that could constitute sex discrimination or sexual harassment (other grievance procedures)
- Only a complainant may file a formal complaint that initiates a Title IX grievance procedure

# Respondent

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

# Formal Complaint

- Signed by a Complainant or Title IX Coordinator alleging sexual harassment against a Respondent, requesting an investigation
- Complainant must be a current or prospective student or employee
- Defer to Complainant's wishes as to whether to pursue an investigation
- Title IX Coordinator can sign a complaint to initiate an investigation if they determine that not pursuing would be deliberately indifferent or that not pursuing a claim would be harmful to the campus community

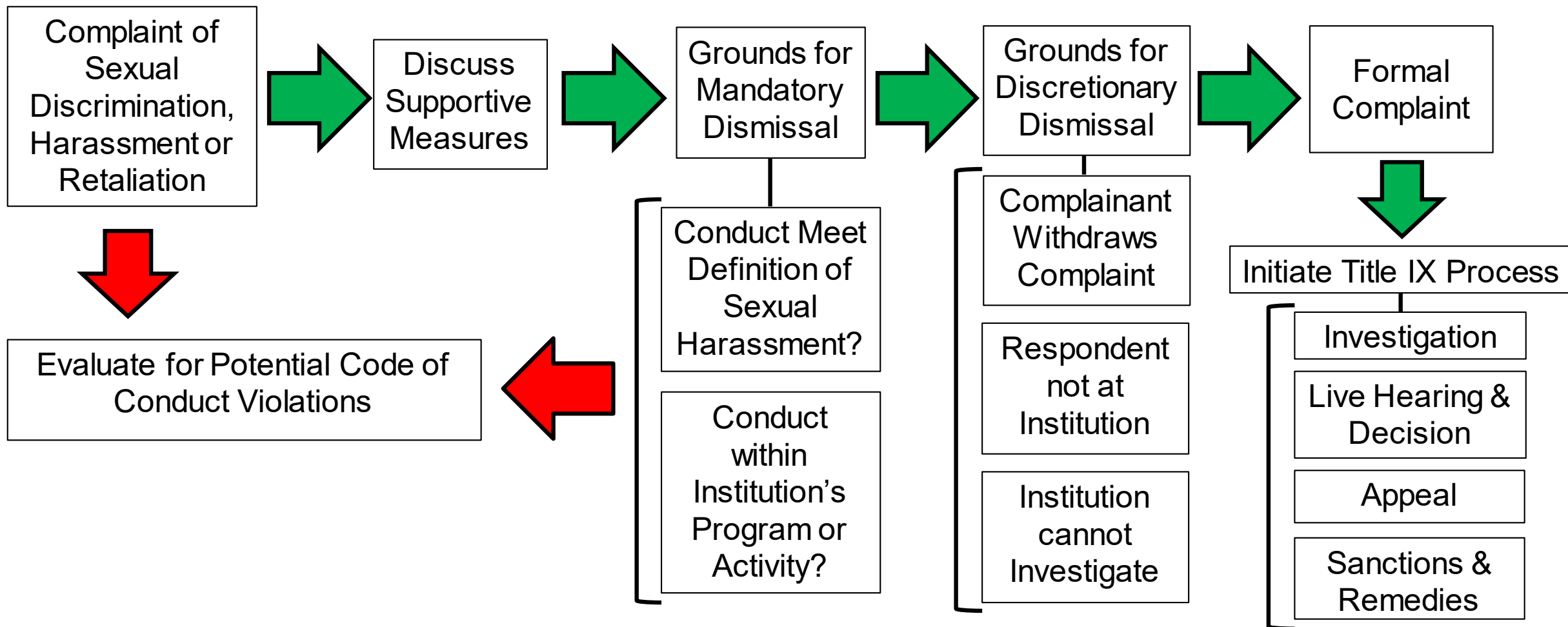


# GRIEVANCE PROCESS OVERVIEW

# Title IX Complaint Process Overview

- Formal Complaint Received by Title IX Coordinator
- Optional Informal Resolution Process
- Investigation
- Live Hearing
- Decision and Remedial Measures
- Appeals

# Grievance Process Flow Chart



# Publication and Dissemination

- Title IX Coordinator information and nondiscrimination policy must be posted on website and in each handbook or catalog provided to prospective/current students and employees
- Copy of grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the school will respond, must be distributed to all prospective/current students and employees
- All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process must be posted to the website

## Title IX Coordinator Visibility

- Name or title, office address, email address, and telephone number
- Prospective/Current students and employees are notified of Title IX Coordinator contact information
- Anyone can report sex discrimination (including sexual harassment) even if they are not the victim by mail, telephone email or in person



# Response

- School responds when:
  - 1. Actual knowledge of Sexual Harassment
  - 2. That occurred within the school's education program or activity
  - 3. Against a person in the United States
- School violates Title IX when its response to sexual harassment is clearly unreasonable in light of the known circumstances (deliberate indifference)

# 1. Actual Knowledge

- A school's Title IX response obligation is based on “actual knowledge” of sexual harassment
  - Notice of sexual harassment or allegations of same to the Title IX Coordinator or any official of the school who has authority to institute corrective measures on behalf of the school (“designated official”)
  - Constructive notice “should have known” standard eliminated

## Reporters

- Identify which employees must, may or must only with Complainant's consent report to the Title IX Coordinator
- Triggers notice

## 2. Education Program or Activity

- Includes locations, events, or circumstances over which the school exercises substantial control over both the Respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by the school
- Clery Geography map

### 3. Within the United States

- A school's response obligations, including Title IX grievance process requirements, only "apply only to sex discrimination occurring against a person in the United States"

# Complaint Dismissal

- School *must* dismiss a Formal Complaint if:
  - Allegations do not meet the definition of sexual harassment
  - Did not occur in the education program or activity against a person in the United States
- The institution *may* dismiss a Formal Complaint if:
  - Complainant informs the Title IX Coordinator in writing that the complainant desires to withdraw the formal complaint or allegations therein
  - Respondent is no longer enrolled or employed by the institution
  - If specific circumstances prevent the institution from gathering sufficient evidence to reach a determination.

## Complaint Dismissal

- If a complaint is dismissed, school give the parties written notice of a dismissal (mandatory or discretionary) and include the reason for dismissal.
- School may still address the allegations under another policy
  - Code of Conduct?

## Informal Resolution

- Discretionary—can be used so long as both parties give voluntary, informed, written consent to attempt informal resolution
- Any person who facilitates an informal resolution must be trained
- An institution may not require IR as a condition of enrollment, employment, or enjoyment of any other right
- Must have a Formal Complaint
- Parties can withdraw
- Cannot be used with allegations that an employee sexually harassed a student



# Investigations

- Impartial, fair and objective
- Burden on the school
- No gag-orders
- Right to an advisor
- Written notice with sufficient time to prepare
- Opportunity to inspect and respond to evidence
- Investigative report

# Advisors

- Parties have the right to select an advisor during an investigation and hearing
- Can be an attorney, but does not have to be
- If the Complaint goes to a live hearing, the parties must have an advisor
- If the party does not have an advisor, school must provide one
- Only advisors may conduct cross-examination of witnesses

# Live Hearings

- Must provide a live hearing
- Requirements for a live hearing include:
  - Opportunity for parties' advisors to examine and cross-examine witnesses, including challenging the credibility of witnesses
  - Examinations must be direct, oral, and in real time
  - Parties may be required to stay in separate rooms with a live video+audio connection
  - Only relevant questions may be asked; prior sexual conduct is not relevant

# Appeals

- Policy must provide for appeals for both parties
- The bases for an appeal must include:
  - procedural irregularity affected the outcome of the matter
  - newly discovered evidence that could affect the outcome of the matter
  - Title IX personnel had a conflict of interest or bias, that affected the outcome of the matter

## Record Keeping

- Seven years
- Records of any actions, including any supportive measures, taken in response to a report or Formal Complaint of sexual harassment
- Includes basis for conclusion, response was not deliberately indifferent, and measures taken to restore or preserve equal access to the education program or activity
- If supportive measures are not provided, documentation of the reasons why a response was not clearly unreasonable in light of the known circumstances

# Retaliation

- Policy must effectively prohibits retaliation
  - Including intimidation, threats, coercion, or discrimination for making a complaint or participating in process
- Retaliation does not have to be on the basis of sex or involve sexual harassment

# Roles

Title	Responsibilities	Training	Status
Title IX Coordinator	Intake reports and Formal Complaints, provide supportive measures	Sexual harassment definition, scope of education program, how to conduct an investigation, grievance procedure (hearing, appeals, informal resolution), impartiality	Must be school employee Cannot serve as decision-maker
Investigator	Conduct a fair, objective and impartial investigation	Impartiality, how to conduct an investigation, issues of relevance, rape shield, report writing	Employee or 3 <sup>rd</sup> party Cannot serve as decision-maker
Decision-Maker	Evaluate evidence, determine relevancy during hearing, make and issue determination	Sexual harassment definition, hearing process, technology to be used in hearing, issues of relevance, evidence, rape shield	Employee or 3 <sup>rd</sup> party Cannot serve in any other capacity
Advisor(s)	Question opposing party and witnesses during hearing	None required	Party provided Employee or 3 <sup>rd</sup> party
Informal Resolution Facilitator	Conduct informal resolution process	Informal resolution process	Employee or 3 <sup>rd</sup> party



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# Thank You!

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# Title IX For Career, Technical & Trade Schools: Informal Resolution and Investigations

Presented by  
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Higher Education Practice Group  
September 1, 2020



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# Today's Presentation

- Recap and Overview of Title IX Sexual Harassment Complaint Process and Definition of Sexual Harassment
- Recap of Title IX Coordinator's Role
- Informal Resolution
- Investigation
- Impartiality, Conflicts of Interest and Bias



# RECAP AND OVERVIEW OF TITLE IX COMPLAINT PROCESS

# Recap

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# RECAP TITLE IX COORDINATOR'S ROLE

# Recap - Title IX Coordinator

- Visibility
- Develop compliant policies and procedures for reporting and resolving
- Conduct training for students and Title IX personnel
- Implement supportive measures
- Guide timeline
- Assign Title IX personnel
- Maintain records





# INFORMAL RESOLUTION

# Informal Resolution Facilitator

- School employee or 3<sup>rd</sup> party
  - Ensure no bias or potential conflicts of interest
- Must be trained on the informal resolution process

## Informal Resolution

- Can only be utilized when there is a Formal Complaint
- Discretionary—can be used so long as both parties give voluntary, informed, written consent to attempt informal resolution
- School may not require a waiver of the right to a formal investigation and adjudication of Formal Complaints of Sexual Harassment as a condition of enrollment, employment, or enjoyment of any other right
- At any time before resolution, a party can withdraw from the informal resolution process and resume the grievance process

## Informal Resolution Considerations

- Cannot be used to resolve allegations that an employee sexually harassed a student
- Cautiously consider using informal resolution in severe situations or violent incidents
- Title IX Coordinator determines if informal resolution should be utilized

# Informal Resolution Considerations

- Can create ground rules – provide in writing
  - Maximize potential for resolution
- Can be technology facilitated
- Can result in an agreement between the parties
  - Supportive Measures
  - Voluntary acceptance of disciplinary action

# Pros and Cons

- Pros:
  - Simplified process – potentially no live hearing
  - Quicker
  - Complainant and Respondent are involved in the outcome
- Cons:
  - Less safeguards
  - Can delay the grievance process if unsuccessful

## Best Practices

- Goal is to help the Complainant and Respondent reach an agreement on their terms
  - Discuss potential resolution terms
- Be compassionate and neutral
  - Do not take sides
  - Do not make assumptions



# INVESTIGATION



# Selecting an Investigator

- Single investigator model eliminated
- Title IX Coordinator
- Other school employee (if trained)
- Third party
- Cannot serve as Decision-Maker

# Investigation

- Impartial, fair and objective
- Burden on the institution
- No gag-orders
- Right to an advisor
- Written notice with sufficient time to prepare
- Equal opportunity for the parties to present fact and expert witnesses and other evidence
- Investigative report

# Investigation Notice

- Send notice to parties of the allegations upon receipt of a Formal Complaint with sufficient details of the allegations
- Discussion of the grievance process
- Any option for informal resolution
- Statement that the Respondent is presumed innocent and that a determination of responsibility is made at the conclusion of the grievance process
- Right to an advisor
- Reminder against making false statements or submitting false information

## Additional Notice

- Provide additional notice if investigating additional allegations
- Send notice of any investigative interviews, meetings or hearings
- Include date, time, location, participants and the purpose of the hearing/interview/or other meeting
- Key is providing sufficient time to prepare

# Consolidation

- Complaints against multiple respondents or by multiple complainants may be consolidated
- May consolidate investigations where the complaints arise out of the same facts or circumstances

# Dismissal

- School must dismiss any complaint that:
  - Does not constitute sexual harassment;
  - Did not occur in the program or activity; or,
  - Did not occur against a person in the United States.
- School may dismiss a complaint if:
  - Complainant withdraws the complaint
  - Respondent is no longer enrolled or employed
  - Circumstances prevent institution from investigating
- Dismissal does not prevent action under code of conduct

# Conducting an Investigation

- Select an investigator carefully
- Begin promptly
- Prepare before interviews - review Formal Complaint, school policies, etc.
- Conduct a thorough investigation – when, where, what, who – cover the same questions with all interviewees
- Gather relevant evidence
- Document, document, document

# Considerations

- Who needs to be interviewed?
  - Complainant, Respondent and witnesses
- When and in what order?
- What information should be obtained?
- When and how is evidence shared with the parties?
  - Both parties must be given an equal opportunity to review and inspect evidence that:
    - Was obtained as part of the investigation; and
    - Is directly related to the allegations



# Questions

- Goal is to learn the facts
- Ask about the allegations, the evidence and policy elements
- Discuss conflicting evidence
- Get timelines and details
- Understand difference between what is believed and what was witnessed
- Ask if there are other witnesses you should speak to

# Questions

- Avoid blaming, biased and leading questions
- Know what you need to know and why you need to know it – questions need to be relevant
- Avoid making questions too long or confusing
- Listen carefully and address any necessary follow-up questions
- Know your role (neutral fact-finder)

# Investigative Report

- Once the investigation has concluded, draft an investigative report that fairly summarizes relevant evidence
- Goals:
  - Do not reach any conclusions
  - Demonstrate how the school responded appropriately to the allegations
  - Put decision-maker in best possible position to understand relevant evidence for the live hearing
  - Must be maintained for 7 years

# Opportunity to Inspect and Respond

- Prior to issuing investigative report
  - Send the parties (and advisors) evidence directly related to the allegations with at least 10 days to review and submit a written response
- Prior to Live Hearing or other determination
  - Send the parties (and advisors) the investigative report that fairly summarizes relevant evidence at least 10 days prior to a hearing for review and written response

# IMPARTIALITY, CONFLICTS OF INTEREST & BIAS

## Fair and Impartial

- § 106.45 requires recipients to adopt a grievance process where Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions are free from conflicts of interest and bias and are trained to serve impartially without prejudging the facts at issue

# Fair Grievance Process

- All persons involved in grievance process
  - Must be free from conflicts of interest or bias against Complainant and Respondent
  - Must receive training on:
    - Definition of sexual harassment
    - How to conduct an investigation and the grievance process
    - How to serve impartially
    - How to make relevancy determinations

# Impartiality

- Cannot have a conflict of interest or bias for or against Complainants or Respondents generally or an individual Complainant or Respondent



# Conflict of Interest

- When an individual has competing interests or loyalties
- Potential to reap personal gain from decisions, actions or inaction
- Inclination to filter decisions through lens of self-interest

# Bias

- Prejudice in favor of or against an individual or situation
- Disproportionate weight in favor or against certain facts that prevents objectivity
- Insensitivity to facts that otherwise would be significant
- Avoid inferences based on whether someone is a Complainant or Respondent



# QUESTIONS AND DISCUSSION



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# Thank You!

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# Title IX For Career, Technical & Trade Schools: Advisor and Decision Maker

Presented by  
Edward Cramp & Jessica High  
Higher Education Practice Group  
September 3, 2020

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# Today's Presentation

- Recap and Overview of Title IX Sexual Harassment Complaint Process and Definition of Sexual Harassment
- Recap of Informal Resolution and Investigation
- Role of Advisor
- Role of Decision Maker
- Live Hearing
- Impartiality, Conflicts of Interest and Bias



# RECAP AND OVERVIEW OF TITLE IX COMPLAINT PROCESS



# Recap

- Final Rule published 5-19-2020 (85 Fed Reg 30026)
- Effective August 14, 2020
- Amends 34 CFR Part 106

# Prohibits Sex Discrimination

No person in the United States shall on the basis of **sex**, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance

# WHAT IS SEXUAL HARASSMENT?

# Sexual Harassment

- Conduct on the basis of sex that falls into one or more of the following 3 categories:

# 1. Quid Pro Quo

- An employee of the school conditioning the provision of an aid, benefit, or service of the school on an individual's participation in unwelcome sexual conduct;

## 2. Hostile Environment

- 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 Violence

- “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)

# Sexual Violence

- **Sexual Assault:** As defined in 20 U.S.C. 1092(f)(6)(A)(v), means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.
- **Dating Violence:** As defined in 34 U.S.C. 12291(a)(10), means violence committed by a person (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (B) where the existence of such a relationship shall be determined based on a consideration of the following factors: the length of the relationship; the type of relationship; and, the frequency of interaction between the persons involved in the relationship.



# Sexual Violence

- **Domestic Violence:** As defined in 34 U.S.C. 12291(a)(8), includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.
- **Stalking:** As defined in 34 U.S.C. 12291(a)(30), means engaging in a course of conduct directed at a specific person that would cause a reasonable person to: (A) fear for his or her safety or the safety of others; or (B) suffer substantial emotional distress.

# Title IX Complaint Process Overview

- Formal Complaint Received by Title IX Coordinator
- Optional Informal Resolution Process
- Investigation
- **Live Hearing**
- **Decision and Remedial Measures**
- Appeals



# RECAP INFORMAL RESOLUTION

## Recap - Informal Resolution

- School employee or 3<sup>rd</sup> party (must be trained)
- Must have a Formal Complaint
- Title IX Coordinator determines if appropriate
- Discretionary
- Parties can withdraw
- Cannot be used when employee is Respondent
- Complainant and Respondent involved in the outcome



# RECAP INVESTIGATION

## Recap - Investigation

- Title IX Coordinator, other employee, 3<sup>rd</sup> party
- Impartial, fair and objective
- Burden on the school
- No gag-orders
- Right to an advisor
- Written notice with sufficient time to prepare
- Equal opportunity for the parties
- Prepare before interviews
- Investigative report



# ADVISORS

# Advisors

- Parties have the right to select an advisor of their choice
  - Can be but does not have to be an attorney
- Only required at live hearing
  - Cross-examination must be conducted by an advisor and not by the parties directly
- If the party does not have an advisor, the school must provide, without charge, an advisor of the school's choice



# Selecting an Advisor

- Party provided
  - Family member
  - Friend
  - Attorney
  - School employee
- If school-selected can be
  - Other school employee
  - Third party

# Advisor Training

- None required by Title IX Final Rule
- Advisors do not need to be free from conflicts of interest or bias to give parties the flexibility to pick an advisor
- Up to the school to determine what training will be provided for school-appointed advisors

# Advisor Policies

- School can implement policies regarding advisor conduct, which should be clearly explained at the outset of each interview, hearing, etc.
- Require all participants behave in an orderly manner
- Schools can require advisors to use evidence received for inspection and review as well as the investigative report only for purposes of the grievance process

# Advisor Limitations

- Parties are expected to ask and respond to questions on their own behalf during investigation
- Advisors cannot disrupt proceedings
- Maintain privacy of records shared - prohibited from sharing with third parties or disclosed publicly



# DECISION MAKERS

# Selecting a Decision Maker

- School employee or 3<sup>rd</sup> party
- Can be more than one person - panel
  - If there is a panel, appoint a Decision Chair
- Cannot be the Title IX Coordinator
- Must be trained

# Decision Maker Training

- School's policies and procedures including technology
  - Presumption of innocence
- Definition of Sexual Harassment
- Relevance
- Impartiality, bias and conflicts of interest
- How to analyze evidence in relation to legal standard
- Determination of responsibility
- Documentation requirements



# LIVE HEARING



# Elements and Order of a Live Hearing

- Give notice of a date and time for the hearing
- Opening Statements
  - Complainant, Respondent, Complainant Reply (Optional)
- Pre-Hearing Motions
- Presentation of Cases
  - Complainant, Respondent, Rebuttal and Surrebuttal
  - Objections & Motions
- Closing Argument
  - Complainant, Respondent, Complainant Rebuttal

# Considerations

- Opening and Closing
  - Consider time limits
  - Can vary based on the complexity of the case
- Motions
  - Listen to arguments
  - Rule on the spot or consider ruling later
  - Ok to accept written motions
- Evidence
  - Consider relevance, but be careful be overly restrictive

## Keeping Good Order

- Explain your role as the Hearing Officer- neutral, factfinder, decision maker
- Set expectations for professional behavior
- Set reasonable time limits on opening, closing, arguments of motions, and possibly presentation of evidence
- Be sure that both sides feel they were fairly heard
- Maintain a "game face" during the hearing
- Provide regular breaks

## Separating the Parties

- At the request of either party, the school will provide for the entire live hearing (including cross-examination) to occur with parties located in separate room
  - Technology enabled so parties can see and hear each other
- At the school's discretion, live hearing can be conducted virtually

## Refusing Cross-Examination

- If a party does not submit to cross-examination at a live hearing, the Decision Maker cannot rely on that party's statements in reaching a determination
- Decision Maker also cannot draw an inference regarding responsibility based solely on that party's absence from live hearing

# Relevance

- Determined by Decision Maker (with explanation)
- Evidence is relevant if it is pertinent to proving whether facts material to the allegations are more or less likely to be true
  - Repetition of the same question is irrelevant
- A Complainant's sexual predisposition or prior sexual behavior is not relevant, unless:
  - Offered to provide that someone other than the Respondent committed the alleged conduct; or
  - To prove consent

# Evidence

- Types:
  - Direct
  - Circumstantial
  - Character Evidence
  - Inculpatory
  - Exculpatory
- Limitations – cannot rely on or seek information protected under a legally recognized privilege (unless waived)

# Making a Determination

- Review the school policy
- Review the evidence
- Assess credibility of evidence and witness statements
  - Credibility = assessing the extent to which you can rely on the statement
- Assess consistency of the story
- Evaluate evidence in light of standard of evidence



## Written Determination

- Use published standard of evidence
- Identify the allegations constituting Sexual Harassment
- Describe procedure from formal complaint through hearing
- Make findings of fact and conclusions
- Provide a rationale for the outcome on each allegation and imposition of any sanctions
- State the procedures and allowable bases for any appeal
- Be provided simultaneously to both parties

# Sanctions

- Determined by Decision Maker
- Imposed on the Respondent
- Reasonable based on the severity of the behavior
- May be educational
- Determine what is appropriate based on the case specifics
- Examples: warning, suspension, termination, no contact, additional training

# Remedies

- Title IX Coordinator is responsible for implementation
- Required to be provided to a Complainant when a Respondent is found responsible
- Must be designed to maintain Complainant's equal access to education and may include supportive measures
- Remedies do not need to be non-disciplinary or non-punitive and do not need avoid burdening the respondent

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- Potential to reap personal gain from decisions, actions or inaction
- Inclination to filter decisions through lens of self-interest



# Bias

- Prejudice in favor of or against an individual or situation
- Disproportionate weight in favor or against certain facts that prevents objectivity
- Insensitivity to facts that otherwise would be significant
- Bias can represent any variable that improperly influences a finding or sanction

# Roles

Title	Responsibilities	Training	Status
Title IX Coordinator	Intake reports and Formal Complaints, provide supportive measures	Sexual harassment definition, scope of education program, how to conduct an investigation, grievance procedure (hearing, appeals, informal resolution), impartiality	Must be school employee Cannot serve as decision-maker
Investigator	Conduct a fair, objective and impartial investigation	Impartiality, how to conduct an investigation, issues of relevance, rape shield, report writing	Employee or 3 <sup>rd</sup> party Cannot serve as decision-maker
Decision-Maker	Evaluate evidence, determine relevancy during hearing, make and issue determination	Sexual harassment definition, hearing process, technology to be used in hearing, issues of relevance, evidence, rape shield	Employee or 3 <sup>rd</sup> party Cannot serve in any other capacity
Advisor(s)	Question opposing party and witnesses during hearing	None required	Party provided Employee or 3 <sup>rd</sup> party
Informal Resolution Facilitator	Conduct informal resolution process	Informal resolution process	Employee or 3 <sup>rd</sup> party

# QUESTIONS AND DISCUSSION



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# Thank You!

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