



EducationAdminWebAdvisor
Online Training for Educational Professionals

Title IX Boot Camp for Higher Education (With Updates)

**Session 4: Considering Other Issues Related
to Title IX Sexual Harassment, Including
Appeals of Decisions**

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Overview



Grievance Process

- Appeal
- Recordkeeping



Retaliation



Training Required



Other Issues



Conclusion



Grievance Process



Grievance process components

- Basic requirements
- Notice of allegations
- Dismissal of formal complaint
- Consolidation
- Informal resolution
- Investigation
- Hearing
- Determination regarding responsibility
- Appeals
- Recordkeeping



Grievance Process- Determination



»» Written determination must include:

- Allegations
- Procedural steps
- Findings of fact
- Conclusions
- Statement on result
- Appeal rights



Appeal

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



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 additional 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 must:

- Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
- Issue a written decision describing the result of the appeal and the rationale for the result; **and**
- Provide the written decision simultaneously to both parties.

Recordkeeping Requirements



An institution must maintain the following records for a period of seven years.

- Each sexual harassment investigation including (1) any determination regarding responsibility and any audio or audiovisual recording or transcript, (2) any disciplinary sanctions imposed on the respondent, and (3) any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity;
- Any appeal and the result therefrom;
- Any informal resolution and the result therefrom



Recordkeeping Requirements



For each response for an allegation of sexual harassment, an institution must create, and maintain for a period of seven years, the following records.

- Records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment
- The institution must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the education program or activity.



Recordkeeping Requirements



For each response for an allegation of sexual harassment, an institution must create, and maintain for a period of seven years, the following records.

- If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances.
- The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.



Recordkeeping Requirements



An institution must maintain for a period of seven years the following records.

- All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process
- An institution must make these training materials publicly available on its website.



Retaliation/Confidentiality



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



Intimidation, threats, coercion, or discrimination (including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sexual discrimination, or a report or formal complaint of sexual harassment), for the purpose of interfering with any right or privilege secured by Title IX, constitutes retaliation.

Retaliation/Confidentiality



»» An institution must keep confidential the identity of any individual who made a report or complaint of sex discrimination (including any individual who has made a report or filed a formal complaint of sexual harassment), any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness.

»» This confidentiality applies except as may be permitted by FERPA, or as required by law, or to carry out the purposes of Title IX (including the conduct of any investigation, hearing, or judicial proceeding arising thereunder).

Retaliation/Confidentiality



- »» Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under Title IX.
- »» The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under this section.

- »» Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding does not constitute retaliation (provided however that a determination regarding responsibility, alone, is not sufficient to conclude that a party made a materially false statement in bad faith).

Training Required

»» An institution must ensure that **Title IX Coordinators, investigators, decision-makers, and anyone who facilitates an informal resolution process must receive training on:**

- The definition of sexual harassment
- The scope of the institution's education program or activity
- How to conduct investigations and the grievance process, including hearings, appeals and informal resolution processes
- How to serve impartially, including avoiding prejudgment of the facts at issue, conflicts of interest, and bias



Training Required



»»» **An institution must ensure that decision-makers receive training on:**

- Issues of relevance of questions and evidence, including when questions and evidence of the complainant's sexual predisposition or prior sexual behavior are not relevant
- Any technology to be used at a live hearing

»»» **An institution must ensure that investigators receiving training on:**

- Issues of relevance to create an investigative report that fairly summarizes evidence

»»» **Any materials must not rely on sex stereotypes and must promote impartial investigations and adjudications.**



Title IX Complaints



»» Other options

- File a complaint with OCR.
- Send a letter to OCR enforcement officer.
- Not required to use the institution's grievance process before filing a complaint
- File a lawsuit in court claiming a violation; there is no need to file with OCR before filing a suit in court.



First Amendment



»» Consider First Amendment issues.

- In cases of alleged harassment, the First Amendment must be considered if issues of speech or expression are involved.
- First Amendment rights may apply to the rights of complainants, respondents, or third parties.



FERPA



»» Consider student records issues.

- There will need to be a balance between confidentiality of student records and due process considerations.
- Institutions may need to disclose evidence as part of the process which may bring concerns with disclosure of confidential student records.



Interplay with Other Laws



Policies for consideration

- Interaction when claims also involve other protected classes (race, disability, etc.)
- Interaction with other state laws
- Interaction with overlapping federal laws (Title VII, Clery Act, VAWA)
- Interaction with student code of conduct



Changes to Policies



»» Revisions to various policies

- Non-discrimination policy
- Grievance procedure
- Grievance process
 - Incorporate statutory provisions for grievance process
 - Incorporate investigation procedures
 - Incorporate decision procedures (responsibility and appeal)



Changes to Policies



Revisions to various policies

- Make sure revisions are not inconsistent with laws.
- Make sure revisions do not hinder investigations or create liability.
- Can incorporate other important components, such as anti-retaliation or other issues



Changes to Policies



Possible creation of forms

- Form for responding to reports
- Form for responding to formal complaint
- Form for investigation report
- Form for decision on responsibility
- Form for decision on appeal






Conclusion





Conclusion



-  Need to consider appeal processes for formal complaints
-  Need to maintain and create records as necessary
-  Need to consider other requirements, including retaliation and First Amendment

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