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Title IX Regulations: Revisions

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Responding to and Documenting Allegations: OCR Requirements, Confidentiality, Etc.

Notice to the Institution

Institutional Notice: Old Standard

Case Law

- Actual notice: principal, assistant principal or higher-level administrator

OCR

- Constructive: employee harassing student
- Knew or reasonably should have known: student or non-employee harassing another student or

Institutional Notice: New Standard

- Adoption of Supreme Court standard for notice
 - Case law standard of “actual notice” will be the standard for OCR complaints as well (proposed regulations generally state “actual knowledge”)
 - No more constructive notice or respondent superior

Institutional Notice: New Standard

- Actual knowledge notice slightly redefined:
 - the Title IX Coordinator, or
 - any official who has authority to institute corrective measures (principal, assistant principal, higher-level administrator)
 - or a teacher in the PK-12 setting)

Notice: The Complaint

- Institutions will only be responsible for investigating a formal complaint, which is a written document
 - (1) signed by either the complainant (definition limited to the alleged victim) or Title IX coordinator,
 - (2) alleging sexual harassment against a respondent, and
 - Requesting an investigation.

Notice: The Complaint

- If actual notice of multiple reports involving same responding party, Title IX coordinator must file a formal complaint on behalf of reporting parties

Actual Notice - Obligations

- actual notice, even if no formal complaint, creates obligation to offer supportive measures (previously called “interim measures”) to the alleged victim and explain to she/he how to file a formal complaint.
- if no formal complaint, may investigate the allegations pursuant to other provisions of its code of conduct (if applicable), such as an anti-bullying policy, and/or provide supportive measures, which will be discussed below.

Title IX Applicability & Institutional Jurisdiction

- Upon receipt of a formal complaint, the Title IX Coordinator or other administrator investigating the complaint (hereinafter called “the investigator”) must:
 - determine whether the facts as alleged could violate one of the definitions of sexual harassment provided in 106.30(a).
 - If the allegations, even if proven true, would not violate one of those definitions, then the complaint must be dismissed—at least from a sexual harassment perspective.

Jurisdiction

- must also be dismissed if it did not occur in the institution's *program or activity or against a person in the United States.*

Jurisdiction – Off-campus

- limits previous guidance that required institutions to investigate any off-campus occurrence of sexual harassment if it could be effecting the educational environment.
- Only investigate under Title IX if the allegation occurred in a situation over which it exercised “substantial control” (i.e., on campus, in school-owned facilities, or at school-related events).

IF JURISDICTION

- PRIOR TO ANY ACTIONS, MUST PROVIDE PROPER NOTICE TO PARTIES
 - NO MORE INFORMAL, QUICK INTERVIEWS

Notice to Parties: Old Standard

- Initial verbal notice followed by written notice of the allegation and investigation
- Written notice often provided after an initial discussion

Notice to Parties: New Standard

- Written notice to parties prior to any discussions or interviews
- Provide sufficient time to prepare response

Notice to Parties: New Standard

- Written notice must include:
 - citations to relevant grievance procedures;
 - allegations with sufficient details (identity of parties, conduct alleged to constitute sexual harassment, date, location, implicated policies);
 - a statement indicating the responding party is “presumed not responsible” until a determination is made;
 - notice of the right to an advisor of their choice, who may be an attorney;
 - notice that parties may request to inspect and review relevant evidence; and
 - a reminder of the institution’s policy not to make false statements or intentionally submit false information

Notice to Parties: New Standard

- Must also provide notice of
 - any reasonable delay “for good cause”
 - any additional allegations to be investigated that were not in the original complaint

Grievance Procedures – In General

- Treat the complainant and respondent equitably, including providing supportive measures to both parties, if necessary;
- Include an objective evaluation of all evidence “-both inculpatory and exculpatory evidence-,” prior to making a determination;
- The Title IX Coordinator, investigator or person making the decision must be free of bias against the complainant or respondent, and appropriately trained on the definition of sexual harassment and how to conduct an investigation;
- Have “reasonably prompt timeframes” for the completion of the investigation 106.45(b)(1)(ii).

Timeframes

- Previous OCR guidance provided a 60-day timeframe for completing a sexual harassment investigation.
- New regulation = no specific
 - must include “reasonably prompt time frames for conclusion of the grievance process.”
 - All aspects of the investigation must also be resolved in a prompt manner.

Standard of Proof: Current

- Institutions may use either “preponderance of the evidence” or “clear and convincing evidence”

Standard of Proof: Proposed

- May use “preponderance of the evidence” or “clear and convincing evidence,” *however*, can only use preponderance of the evidence if that standard is used for other violations in the code of conduct with the same maximum penalty.
- Must use same standard for employees and students

Informal Resolution

- School and parties will determine if appropriate.
- Allowed at any time prior to a final determination.
- Must obtain voluntary, written consent.
- Cannot be used if allegation of employee harassing student.

Informal Resolution

- Must provide detailed notice to parties of:
 - Allegations
 - Requirements of the process
 - Circumstances which would preclude formal resolution
 - Consequences of participation

Interim or Supportive Measures

- Terms “supportive measures” in the proposed regulations.
- May be offered before, after, or in lieu of a formal complaint.
- To restore or preserve access to program without unreasonably burdening other party.

Emergency Removal

- Before emergency removal of a student, district must:
 - Perform individualized risk analysis;
 - Determine that an immediate threat to the health or safety of students or employees justifies removal; and
 - Provide respondent with notice and an opportunity to challenge the decision immediately following removal.

During the Investigation

*Investigating Allegations of
Sexual Harassment*

Safe Harbor

- If the institution follows OCR's procedures, then it will not be found "deliberately indifferent"

General Principals During Investigation

- the burden of gathering evidence is on the institution;
- equal opportunity to present witnesses and evidence;
- no restrictions on discussing allegations or gathering and presenting evidence;
- equal opportunities to have others present during the grievance process

- Preliminary Steps – Strategy, Law Enforcement & Child Protective Services Reports

Strategize Investigation

- who should be interviewed,
- what evidence should be gathered,
- a timeline for the completion of all steps.
- If not already completed, whether the allegations require a report to child protective services or law enforcement.

Delays or Extensions

- Temporary delays in the investigation will only be allowed for “good cause
- Provide notice to parties explaining reasons for action.

Law Enforcement Report

- Must be
 - reasonably short – preferably no longer than two (2) weeks – and
 - only for the time it takes law enforcement to quickly complete necessary interviewing and evidence gathering.
- Also, when such a delay occurs, the institution must provide written notice to the parties of the delay and the reasons for it.

- Interviews & Evidence Gathering (Including the "Opportunity to Inspect")

Interviews, Meetings and Hearings

- The institution must provide written notice to the interviewee 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.

Advisors

- Cannot restrict either party's ability to have an advisor present at all proceedings
- The advisor can be anyone chosen by the party

Conduct during investigation

- Conduct in a manner designed to obtain and document all information necessary to determine whether the allegations are true.

Evidence gathering

- Be deliberate about gathering any possible evidence that could help in making a determination.

Evidence Gathering - Searches

- Searching personal electronics devices or other belongings:
 - only after establishing and documenting reasonable suspicion for the search, and
 - should comply with any state law or local policy limitations on such searches.

Opportunity to Inspect

- Prior to the completion of the report, must provide both parties:
 - an equal opportunity to inspect all evidence directly related to the allegations, even if the institution does not intend to rely on the evidence, and
 - an opportunity to “meaningfully respond” to the evidence after inspection.

Opportunity to Inspect

- Must be provided “in electronic format or hard copy” *prior to* the completion of the investigatory report
- parties must have at least ten (10) days to submit written responses to the evidence, which must be considered prior to completion of the final report

Investigative Report

- The regulations also require the creation of a written investigatory report that
 - “fairly summarizes relevant evidence”, and
 - the submission of the report to the parties and their advisors at least ten (10) days before a decision is made.
- The parties shall be able to review and submit written responses.

Live Hearing

- K-12 (optional) – postsecondary (mandatory)
 - Administrative decision-maker may ask each party/witness relevant follow-up questions submitted by either party. (Hearing officer cannot be Title IX coordinator or investigator.)

K-12 – Prior to Final Report

With or without a live hearing, the decision-maker must ask each party and any witnesses any relevant questions and follow-up questions, including those challenging credibility, that a party wants asked of any party or witnesses.

K-12 – Prior to Final Report

If no hearing is held, the decision-maker must

- afford each party the opportunity to submit written questions,
- provide each party with the answers, and
- allow for additional, limited follow-up questions from each party.

K-12 – Prior to Final Report

- With or without a hearing, all questioning must exclude evidence of the complainant's sexual behavior or predisposition, except in limited circumstances.

Specifics of Investigative Report/Determination

Written Report/Determination

- School must issue written determination that includes the following:
 - A list of the allegations;
 - A description of the procedural steps taken from the receipt of the formal complaint through the determination (notices, interviews, methods of evidence gathering, hearings, etc.);
 - Findings of fact supporting the determination;
 - Conclusions;
 - The rationale for the determination regarding each allegation, which should include the disciplinary sanctions imposed and remedies to be provided, if any;
 - Rights of Appeal.

Appeals

- Opportunity for appeal must be offered to either party on, at the least, the following bases:
 - A procedural irregularity
 - New evidence that was not reasonably available at the time the determination was made and that could affect the outcome;
 - The Title IX Coordinator, investigator or decision-maker had a conflict of interest or bias against one of the parties that affected the outcome

School's Obligations for Title IX Training, Education, and Prevention

Training

- Specifically, Title IX Coordinators, investigators and decision-makers, and any individual that facilitates an informal resolution process, must receive training on the following:
 - The definition of sexual harassment;
 - All activities included in the institution's programs or activities;
 - How to properly conduct an investigation pursuant to the grievance process listed in the regulation, including appeals and informal resolution processes;
 - Investigating allegations impartially, conflicts of interest, etc.;

Training

- Technology that may be used to conduct a live hearing (in the institution conducts live hearings);
- Issues of relevance with regard to questions, including being able to determine when questions about the reporting parties' sexual predisposition or prior sexual behavior are irrelevant; and
- How to create a report that "fairly summarizes the relevant evidence"

Training Materials – Publicly Available

- The regulation also requires that all materials used to implement the trainings above must be made available on the institution's website or upon request "for inspection by members of the public."

Retaliation

- The new regulation prohibits retaliation for filing complaints or otherwise participating, or refusing to participate, in the investigation of an allegation of sexual harassment

- The regulation also indicates that it is not considered retaliation for an institution to provide disciplinary consequences when an individual makes “a materially false statement in bad faith in the course of a grievance proceeding.”
 - *Must have evidence that false and made in bad faith (in other words, knew it was false).*

Record Keeping

Record Keeping

- The following must be created and maintained for three (3) years:
 - Investigation documents including written finding, disciplinary sanctions and remedies implemented
 - Appeal and related results
 - Informal resolution implemented
 - Supportive measures implemented

Questions?

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