

Title IX Training WILSON COLLEGE

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**Kimberly M. Colonna
McNees Wallace & Nurick LLC**

Topics for Today

Scope of Title IX

Key Definitions

Institutional Response

Grievance Procedures

- Investigation
- Informal Resolution
- Hearings
 - Standard of Proof + Presumption
 - Relevant Evidence
 - Cross Examination
 - Decorum
 - Technology
- Written Decision
- Appeals

Record-keeping

Retaliation

What is regulated by Title IX?

In order to be regulated by Title IX, the conduct must:

- 1. occur within an education program or activity offered by a recipient of federal funds; and**
- 2. occur against a person in the United States.**
 - **definition of Education Program or Activity**
 - **conduct that occurs in a building owned or controlled by a student organization that is officially recognized by the institution IS included**
 - **conduct that occurs in a study abroad program is NOT regulated by Title IX**

What is regulated by Title IX?

The 3 kinds of sexual harassment are:

1. **Quid pro quo harassment by an employee;**
2. **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 education program or activity; or**
3. **Sexual assault, dating violence, domestic violence, or stalking.**

Definitions:

- **Complainant – person alleged to have experienced conduct that could constitute sexual harassment**
- **Respondent - person reported to be the perpetrator of conduct that could constitute sexual harassment**
- **Supportive Measures – Non-disciplinary and non-punitive services offered to restore or preserve access to education program/activity without undue burden to a party**

Definitions:

- **Decision-Maker** - unbiased person who conducts hearing and decides whether violation has occurred and, if so, the remedies and sanctions
- **Witness** – person who has knowledge or information relevant to an alleged policy violation
- **Remedies** – measures to restore or preserve equal access to education program/activity
- **Sanction** – disciplinary measure imposed after finding a party responsible for a violation

Institutional Response

An institution with “actual knowledge” must respond promptly in a manner that is not “deliberately indifferent.”

Deliberate indifference occurs only if the response is “clearly unreasonable in light of the known circumstances.”

- **MUST offer supportive measures**
- **MUST use a compliant grievance process before imposing a sanction or remedy**

Institutional Response

Title IX Coordinator's Role:

- **promptly contact the complainant to discuss supportive measures and consider complainant's wishes with respect to supportive measures**
- **explain the process for filing a formal complaint and the grievance procedures**
- **offer individualized supportive measures to both parties**
- **coordinate all steps of the grievance procedures, but not serve as a decision-maker**

Institutional Response: Grievance Process

The grievance process is triggered by formal complaint.

The grievance process consists of:

1. Investigation

2. Resolution

- Informal resolution; or**
- Resolution through formal hearing process**
 - live hearing**
 - written decision**
 - appeal**

Grievance Process: General Requirements

An institution can adopt additional rules and practices, but they must apply equally to both parties.

The grievance process must provide remedies to a complainant where there is a determination that the respondent is responsible for sexual harassment.

- **Remedies must be designed to restore or preserve equal access to the educational program or activity.**

Grievance Process: General Requirements

- **investigate the allegations of a formal complaint**
- **treat complainants and respondents equally**
- **evaluate all relevant evidence objectively**
 - not seek disclosure of privileged information
- **prohibit bias or conflicts of interest by TIX Coordinator, investigators, decision-makers, and facilitators of informal resolutions**
- **train personnel who are involved in TIX grievance process**
- **presume that a respondent is not responsible unless determined otherwise by grievance process**

Grievance Process: Training

Who: TIX Coordinators, investigators, decision-makers, and any person who facilitates informal resolutions

Topics: Definition of sexual harassment, scope of the institution's education program or activity, how to conduct investigations and grievance processes (hearings, appeals, and informal resolutions), how to serve impartially, conflicts of interest, and bias.

Investigators also must be trained on issues of relevance.

Decision-makers also must be trained on relevance of questions and evidence and on any technology that will be used during a hearing.

Grievance Process: Investigations

- **The institution (not the parties) bears the burden of gathering evidence sufficient to reach a determination.**
- **The investigator must be free of bias, conflict of interest, or any other inability to be fair and impartial.**
- **A party's advisor may accompany the party to all meetings/interviews/proceedings.**
- **Notice of meetings and interviews must be provided "with sufficient time for the party to prepare."**
- **No restrictions on a party's ability to discuss the allegations can be imposed.**

Grievance Process: Investigations

Investigation:

- **must be thorough and impartial**
- **must presume the respondent is not responsible**
- **must provide for reliable gathering of information**
- **typically includes interviews of parties and witnesses and gathering of relevant physical evidence**
 - medical/mental health treatment records can NOT be accessed by the investigator unless the party voluntarily consents in writing.

Grievance Process: Investigations

Before investigation report is completed, the institution must send the evidence to the parties and their advisors and allow them at least 10 days to submit a written response.

The investigation report must fairly summarize the relevant evidence and may include information about credibility.

- Credibility determinations generally

The investigation report does NOT make a determination of responsibility, remedy, or sanction.

The investigation report is sent to both parties, and they have an opportunity to respond to it.

Grievance Process: After Investigation

The TIX Coordinator determines whether to issue a Notice of Charge

based upon whether facts asserted, if proved, would constitute sexual harassment as defined by TIX.

Notice of Charge is issued between 5-10 business days after final investigation report is issued to the parties.

If Notice of Charge is issued, the case will proceed to a live hearing, unless the parties agree to an informal resolution.

The investigation report must be provided to the parties at least 10 days prior to the hearing for their review and written response.

Informal Resolution

Facilitated, informal resolution is permitted for any alleged violation, except sexual harassment by an employee against a student.

Parties must give **voluntary**, written consent to informal resolution.

Window of opportunity for informal resolution is only:

AFTER a formal complaint is filed; and

BEFORE a determination of responsibility is reached via the grievance process.

A party may abandon the informal resolution process at any time before an agreement is reached.

Informal resolution cannot be used where a student alleges that an employee violated the policy.

Informal Resolution

Facilitator oversees the informal resolution process

- **determines process and procedures**
 - i.e. separate meetings with parties, exchange of correspondence, sharing of parties' requests
- **treats the parties fairly and equitably**
- **may share information from investigation process**
- **shall not require the parties to meet together, in person, unless both parties agree to do so**
- **creates a written agreement that lists the terms the parties agree to**

After signing an informal resolution agreement, parties have 48 hours to withdraw their agreement.

Grievance Process: Hearings

A live hearing must occur

- **where parties can see and hear each other**
 - upon request of either party, the hearing must occur via technology with parties in separate rooms.
- **the hearing must be recorded (audio or audio/visual, or transcript) and the recording must be made available to the parties for inspection and review.**

Grievance Process: Hearings

A Hearing Board serves as the decision-maker at the hearing level.

- can be 1 or more persons
- the investigator and TIX Coordinator cannot serve on the hearing board
- The TIX Coordinator will convene the hearing and advise on process and policy questions but **cannot** make decisions that are reserved to the hearing board.

The Hearing Board must review the investigation report prior to the hearing. The parties and hearing board will all have the same information.

Grievance Process: Hearings

The Hearing Board should focus on areas where it needs clarification or more information.

it has the right and responsibility to ask questions and elicit information to aid it in making a decision

it must objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence.

The Hearing Board makes its own credibility decisions.

not based upon a party's role, but based upon demeanor, detail, corroborating evidence, motive, plausibility, etc.

Order of the Live Hearing

Standard of Proof

The presumption must be that the respondent is not responsible, unless the standard of proof is met.

Preponderance of Evidence Standard

The standard is satisfied when the evidence demonstrates that the facts to be proven are more probable than not.

“50%, plus a feather”

Distinguishing other standards of proof

Relevant Evidence

Relevant Evidence = evidence that has the potential to help to prove or disprove a question that is of consequence.

- tends to make the existence of a fact more or less probable
- is applicable to the issue under consideration

Irrelevant Evidence

Direct Evidence – perceived with senses

Circumstantial Evidence – based upon inference

Relevant Evidence

Kinds of Evidence

Verbal – oral or written statements of parties and witnesses

Hearsay is not excluded

Physical evidence – emails, text messages, medical reports

Demonstrative evidence – photographs, security recordings, drawings

Cross-examination

Advisors must be allowed to cross examine the other party and witnesses by relevant questions and follow-up questions, including questions challenging credibility.

- cross-examination must be direct, oral, and in real time
- parties can NOT question each other
- if a party has no advisor, the institution must appoint one of its choosing

Before a party has to answer a cross-examination question, the decision-maker must determine if the question is relevant.

If a question is deemed irrelevant, the decision-maker must explain why.

Cross-examination

Refusal (or Unavailability) for cross-examination

Important policy edit based upon nationwide injunction!

If a party or witness does not participate in the hearing or does not answer any/all cross-examination questions, no negative inference must be drawn by their refusal to participate.

The decision-maker also cannot draw any inference from a party's or witness's absence or refusal to answer cross-examination questions.

The decision must be based upon the relevant evidence presented.

Decorum & Technology

The Hearing Board should ensure that the parties, advisors, and witnesses act appropriately.

- no abusive language or conduct
- following the hearing procedures
- permitting breaks when needed
- limiting scope to the allegations addressed in the Notice of Charges

The Hearing Board should ensure that Advisors remain in their appropriate role.

Competency in Hearing Technology

Written Decision

Decision-maker must issue a written determination, including:

- **the allegations potentially constituting sexual harassment**
- **a description of the procedural steps taken (notice, interviews, steps to gather evidence)**
- **findings of fact supporting the determination**
- **application of policy/code of conduct to the facts**
- **result as to each allegation**
- **rationale for each result**
- **disciplinary sanction and remedies**
- **appeal rights**

The written determination must be provided simultaneously to the parties.

Grievance Process: Appeals

A process for appeals must be provided equally to the parties.

Must allow appeals based upon:

- **procedural irregularity that affected the outcome**
- **new evidence that was not reasonably available at the time of the determination and that could affect the outcome**
- **a conflict of interest or bias that affected the outcome**

Appeals must go to a new decision-maker, who cannot be the investigator or the Title IX Coordinator.

7 Year Recordkeeping Requirement

- each sexual harassment investigation
- any determination of responsibility
- recording of hearing
- sanctions and remedies
- appeals and result
- informal resolution and results
- training materials
- supportive measures (or, if none, why not)
- the basis for the institution's conclusion that its response to sexual harassment was not deliberately indifferent.

Retaliation

Retaliation by the institution or any other person is prohibited.

Retaliate = intimidate, threaten, coerce, or discriminate for the purpose of interfering with any Title IX right or privilege, or because the person has participated in any manner in a proceeding.

- includes a TIX proceeding or proceeding arising from same facts or circumstances as an allegation of sexual harassment

The identity of anyone who reports sexual harassment, anyone alleged to have perpetrated sexual harassment, complainants, respondents, and witnesses must be kept confidential, except as necessary to comply with TIX or as required by FERPA.

Questions?

Scenarios for Practice of Skills