

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

Presented by
Edward Cramp & Jessica High
Higher Education Practice Group
September 1, 2020



Edward M. Cramp

Partner

EMCramp@duanemorris.com

(619) 744 2223



Jessica S. High

Associate

JHigh@duanemorris.com

(619) 744 2214

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

- 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 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 3rd 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



Thank You!

©2020 Duane Morris LLP. All Rights Reserved. Duane Morris is a registered service mark of Duane Morris LLP.
Duane Morris – Firm Offices | New York | London | Singapore | Philadelphia | Chicago | Washington, D.C. | San Francisco | Silicon Valley | San Diego | Los Angeles | Taiwan | Boston | Houston | Austin | Hanoi |
Ho Chi Minh City | Shanghai | Atlanta | Baltimore | Wilmington | Miami | Boca Raton | Pittsburgh | Newark | Las Vegas | Cherry Hill | Lake Tahoe | Myanmar | Oman | Duane Morris – Affiliate Offices | Mexico City | Sri Lanka |
Duane Morris LLP – A Delaware limited liability partnership