

**YOUNG
CONAWAY**

Title IX Training

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What is Title IX?

Title IX, 20 U.S.C. § 1681

- Prohibits discrimination “on the basis of sex”
- Applies to education programs and federally funded schools (“Recipients”)
- Protects students, employees, applicants and all other persons
- Applies to teacher-on-student and student-on-student sexual harassment/assault

New Regulations – Major Changes

- ❖ Definitions and Jurisdictional Requirements – including Permissive and Mandatory Dismissals
- ❖ “Actual Knowledge” Standard on Who has to Report
- ❖ Investigation and Reports Timelines and Procedures
- ❖ Formal Resolution Procedures – Live Hearings/Written Report both with Cross-Examination
- ❖ Scope – Covers employee-on-employee situations
- ❖ Mandatory Appeals on Certain Criteria
- ❖ Recordkeeping and Retention Requirements
- ❖ Training Requirements

Training

Recipients must require training for anyone designated as

- Title IX Coordinator
- Investigator
- Decision-Maker (including Appeals Decision-Maker)
- Any person designated to facilitate an informal resolution
- All employees of elementary and secondary schools (reporting obligation)

Training Materials

- Must not rely on sex stereotypes
- Must promote impartial investigations and adjudications of formal complaints

Enforcement of Title IX

Standard is “Deliberate Indifference”

School must respond to allegations of sexual harassment in an education program or activity promptly in a manner that is not deliberately indifferent

Plaintiff must prove:

➤ School had “actual knowledge”

AND

➤ Harassment was so severe, pervasive and objectively offensive it barred the victim from access to their education

Response is deliberately indifferent only if it is clearly unreasonable in light of the known circumstances

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DEFINITIONS

What does “sex” mean?

Discrimination on
the basis of “sex:

- ❖ Biological sex
- ❖ Gender
- ❖ Sex stereotyping
- ❖ Sexual orientation and gender identity
- ❖ “Sex” as a verb

Parties

COMPLAINANT

RESPONDENT

Alleged
Victim

Alleged
Perpetrator

Recipient

Recipients of Federal financial assistance covered by Title IX, includes elementary and secondary schools

New Definition of Sexual Harassment

“Sexual Harassment” is conduct on the basis of sex that satisfies one of the following:

- ❑ Quid Pro Quo Harassment, or
 - ❑ Hostile Environment, or
 - ❑ Harassment under the Violence Against Women Act

Quid Pro Quo Harassment

- ❖ An employee conditioning an education benefit or service upon a person's participation in unwelcome sexual conduct
- ❖ Does not need to be evaluated for “severity, pervasiveness, and objective offensiveness”
- ❖ Can be express or implied

Hostile Environment

- ❖ Unwelcome conduct on the basis of sex
- ❖ That to a reasonable person
- ❖ Is so severe, pervasive and objectively offensive
- ❖ That it effectively denies a person equal access to the education program or activity

Harassment Under Violence Against Women Act

Dating Violence

Violence by a person who is or has been in a social relationship of a romantic or intimate nature with the victim

Domestic Violence

Crimes of violence committed by current or former spouse/partner/parent against a victim who is protected under the domestic or family violence laws

Stalking

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others; or suffer substantial emotional distress

Sexual Assault

An offense classified as a forcible or non-forcible sex offense by the FBI's uniform crime reporting system:

- Rape;
- Fondling;
- Incest; or
- Statutory rape.

Actual Knowledge

When does a Recipient have notice of a complaint?

- Actual knowledge = notice of sexual harassment or notice of allegations of sexual harassment to Recipient's
 - Title IX Coordinator; or
 - Any official who has authority to institute corrective measures; or
 - **ANY EMPLOYEE OF AN ELEMENTARY OR SECONDARY SCHOOL**

Educational Program or Activity

Conduct must occur in “educational program or activity”

- ❖ Does not mean geography – no on/off campus bright-line rule
- ❖ Includes locations, events, or circumstances over which the Recipient exercised substantial control over both the respondent and the context in which the harassment occurs

Conduct must be against a person in the United States

- ❖ Does not apply to study abroad

Remember – Recipient’s Obligation

A Recipient with actual knowledge of sexual harassment in an educational program or activity against a person in the United States, must respond promptly in a manner that it is not deliberately indifferent. The Recipient is only deliberately indifferent if its response to sexual harassment is unreasonable in light of known circumstances.

Title IX Coordinator

Identification Requirements

- **Must identify at least one employee as Title IX Coordinator**
 - **May also have one or more deputy coordinator**
 - **May have separate coordinators for complaints involving employees and complaints involving students**
- **Must be referred to as “Title IX Coordinator”**
- **May also serve as Investigator (but not Decision-Maker)**

Must notify applicants, employees, students, parents/guardians and officially recognized unions/professional organizations of

- Name
- Title
- Email Address
- Phone Number

Name/title and contact information must be prominently displayed on website and in each handbook or catalogue made available to applicants, employees, students, parents/guardians, and any recognized employee union/professional organization

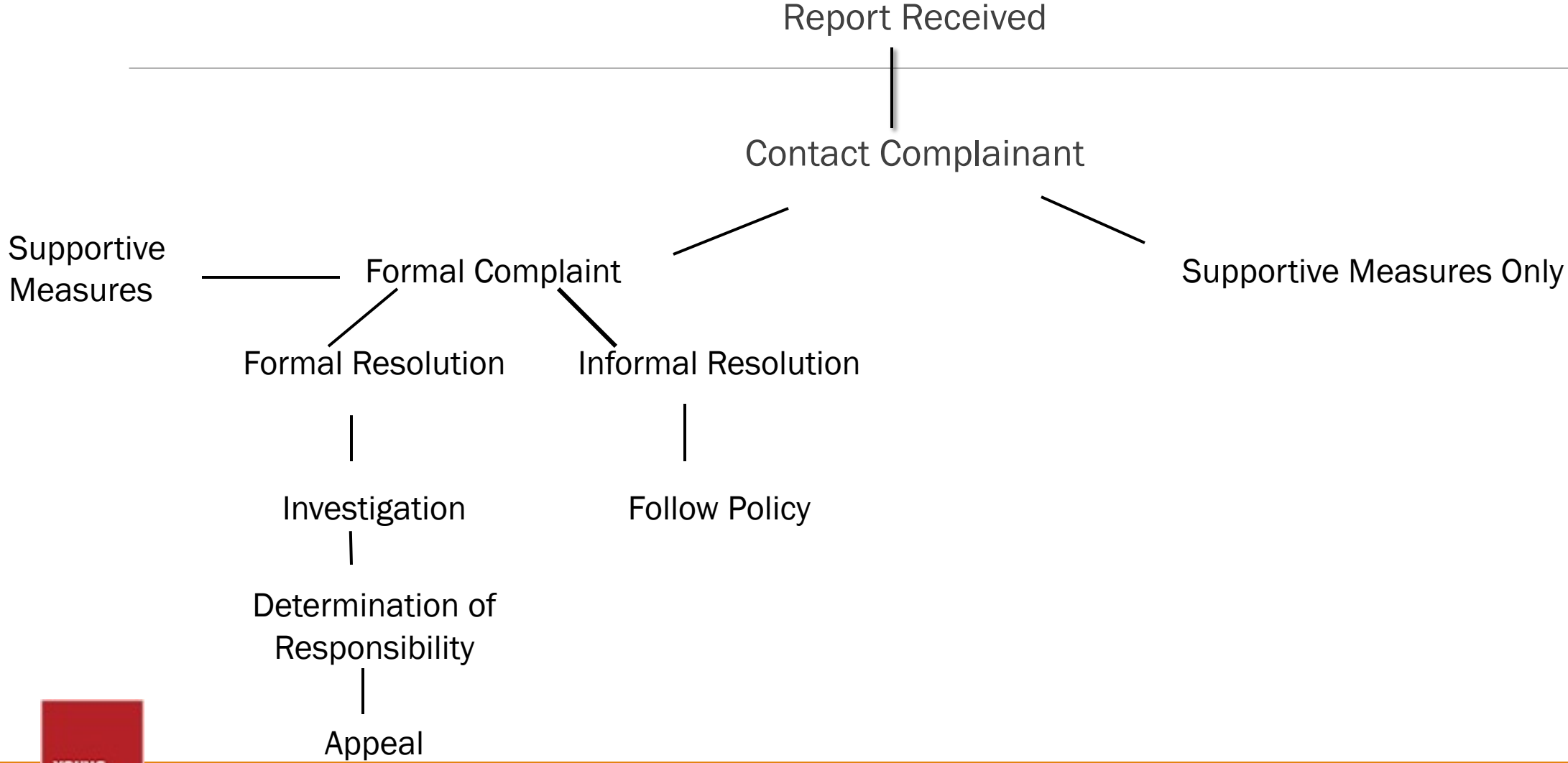
Other Responsibilities

- ❖ Title IX Coordinator should review or be involved in the review of any policies relating to Recipient's Title IX obligations
 - ❖ This may include ensuring consistency between non-Title IX policies and handbook provisions
 - ❖ Student conduct and discipline
 - ❖ Employee conduct and discipline
 - ❖ Other grievance procedures

Reporting

- ❖ Any person may report sex discrimination, including sexual harassment, to the Title IX Coordinator, regardless of whether the person reporting is alleged to be the target of the conduct
 - ❖ Remember “actual knowledge” includes notice of harassment or allegations of harassment to Title IX Coordinator, a school official who has authority to institute corrective measures, or any employee of an elementary or secondary school
- ❖ Reports may be made at any time (including during non-business hours) by telephone, email or mail

Overview of Process



SUPPORTIVE MEASURES

OFFERED PROMPTLY AFTER REPORT RECEIVED OR
ACTUAL KNOWLEDGE OF HARASSMENT EXISTS

Notice to Complainant

- Title IX Coordinator must promptly contact complainant to:
 - Discuss availability of supportive measures
 - Consider complainant's wishes with respect to supportive measures
 - Inform complainant of the availability of supportive measures with or without the filing of a formal complaint; and
 - Explain the process for filing a formal complaint

Supportive Measures

- Non-disciplinary, non-punitive individualized services
- Offered as appropriate, reasonably available and without fee or charge to complainant or respondent
- Before or after filing formal complaint, or where no formal complaint has been filed
- Designed to restore or preserve equal access to educational program or activity
- Continue through the conclusion of the grievance process when applicable
- Can be continued even after a finding of non-responsibility
- Provided without unreasonably burdening the other party
- Designed to protect the safety of all parties or the educational environment, or to deter sexual harassment

What is “Unreasonably Burdensome”?

- ❖ No specific definition – consider unique circumstances
- ❖ Does not depend solely on continued access to academic programs
- ❖ Must take into account nature of the educational programs, activities, opportunities and benefits – not solely those programs that are “academic” in nature
- ❖ Grievance process should be conducted in reasonably timely manner to avoid supportive measures imposed pending the outcome of the grievance process being unreasonably burdensome

Examples of Supportive Measures

- Counseling
- Extension of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Campus escort services
- Mutual restrictions on contact between the parties
- Leaves of absence
- Increased security and monitoring
- Sending student to principal's office
- Educational conversations
- Changing student seating
- Changing class assignments

Emergency Removal

Student

- ❖ May remove a Respondent from an education program or activity after:
 - ❖ Undertaking individualized safety and risk analysis
 - ❖ Determining an immediate threat to physical health or safety of any student or individual arising from the allegations justifies removal
- ❖ Must provide Respondent with notice and an opportunity to challenge the decision immediately following the removal

Emergency Removal

Employee

- ❖ Non-student employee may be placed on administrative leave during the pendency of grievance process
- ❖ Employees must be placed on administrative leave under certain circumstances (e.g., complaint of abuse of student by school employee)

Interaction with Other Laws

- Students are still entitled to applicable provisions of IDEA, Section 504 and ADA (including employees)
- For students
 - Consider whether a manifestation determination is necessary for students with IEP or Section 504 Plan (10 days of disciplinary removal)
 - Consider provisions of an IEP or Section 504 Plan in designing interim supportive measures
- For employees
 - Consider whether interactive dialogue is necessary to discuss reasonable accommodations due to a known disability

Coordinator's Responsibility

- Title IX Coordinator is responsible for overseeing the implementation of supportive measures for the Recipient
 - Coordinate with other employees on a need-to-know basis and check in with parties
 - Burden of arranging and enforcing supportive measures must remain on Recipient, not on any party
 - Any supportive measures taken must be recorded; and if supportive measures are not part of response, must specify why

FORMAL COMPLAINT

MAY OR MAY NOT BE FILED AFTER REPORT RECEIVED OR
ACTUAL KNOWLEDGE OF HARASSMENT

Formal Complaint

- ❖ Formal complaints may be filed with the Coordinator in person, by email, by mail or by any other method designated by the school
 - Ex. online reporting system
- ❖ “Formal Complaint” = any document filed by a complainant or signed by Title IX Coordinator that alleges sexual harassment against a respondent requesting that the Recipient investigate the allegation of sexual harassment

Formal Complaint

By Complainant
or Parent

- ❖ May be filed with the Title IX Coordinator in person, by email, by mail or their listed contact information
- ❖ Complainant must be participating in the education program or activity at the time of filing
- ❖ Parents and legal guardians have right to act on behalf of their child with respect to Title IX rights (whether complainant or respondent)
- ❖ Child remains the “Complainant”

Formal Complaint

By Coordinator

- ❖ Title IX Coordinator may sign a formal complaint to initiate a grievance process to investigate and adjudicate allegations
- ❖ May happen over the alleged victim's objections
- ❖ Coordinator does not become "Complainant"

Notice

If formal complaint is first time Recipient is receiving notice of a report of sexual harassment, Title IX Coordinator must promptly contact complainant to:

- ❑ Discuss availability of supportive measures
- ❑ Consider complainant's wishes with respect to supportive measures

Unbiased Process

Provides both parties with equivalent rights to:

- Written notes and documents
- Access to Recipient's resources
- Introduce witnesses and evidence
- Review and respond to other party's evidence
- Participate in grievance procedures
- An objective determination based on all facts

INVESTIGATION

Essential Elements of Investigation

- Process Recipient uses to resolve complaints of sexual harassment
- Investigator is the initial fact-finder (may be Title IX Coordinator)
 - CANNOT be the individual who makes a determination regarding responsibility, including sanctions
- Must be:
 - Adequate
 - Reliable
 - Unbiased
 - Impartial
 - Prompt
 - Provide equal opportunity for both parties to present witnesses and other evidence

Factors

Specific steps in Title IX investigation will vary depending on:

- Nature of the allegation
- Age of student(s) involved
- Size and structure of school
- Any applicable state or local requirements
- What school has learned from past experiences

Key Procedural Elements

Written Notice

- ❖ Written notice of investigation sent to parties
 - ❖ Notice of Recipient's grievance process, including informal resolution process
 - ❖ Identities of parties involved in the incident
 - ❖ Conduct alleged
 - ❖ Date and location of incident
 - ❖ Respondent's entitlement to presumption of innocence
 - ❖ Parties' right to an advisor of their choice, at party's expense, who may be an attorney
 - ❖ Parties' right to review and comment on evidence
- ❖ If new allegations are added, must issue new written notice

Key Procedural Elements

Prior Written Notice of Interviews

Prior written notice of interviews to be provided to parties and witnesses with sufficient advance time to prepare:

- Date
- Time
- Location
- Participants
- Purpose

Key Procedural Elements

Burden of Proof

Burden of proof and evidence gathering is on the Recipient, not parties

Evidence
Gathering

*Respondent is entitled to
presumption of innocence*

Key Procedural Elements

Gag Orders

No “gag orders” restricting parties from discussing allegations or gathering and producing relevant evidence

Recipient must also protect against retaliation and intimidation of parties and witnesses

Schools can require parties and advisors to sign confidentiality/non-disclosure agreement to ensure that evidence is not used for any purpose other than participation in Title IX proceedings

Additional Considerations

- ❖ Are there any other ongoing school or criminal investigations of the incident?
 - ❖ If so, determine the scope of each investigator's role
- ❖ May information be shared among investigators?
- ❖ If forensic evidence is involved, should law enforcement or a forensic expert be consulted to ensure evidence is correctly interpreted?

Conducting Interviews

Investigator should develop a general investigation plan

- ❖ Gather and review any relevant documents, policies or other evidence
- ❖ Determine where interviews will take place (neutral, private, convenient)
- ❖ Prepare pre-interview points; consider providing in writing
- ❖ Determine order of interviews
- ❖ Develop list of questions for each that will help you determine whether more likely than not that the complaint is founded under Title IX and school policy

Basic Interview Questions

- Who committed alleged act?
- Who else was around?
- What exactly occurred or was said? Include details.
- When did it occur? Was it a one-time event? Repeated, ongoing event?
- Where did it occur?
- How did you react? Did it affect you?
- Are there other individuals who might have relevant information?
- Did you tell anyone about it?
- Ask for any available evidence (including social media content)
- Probe for hidden agendas

Other Interview Tips

- Consider personality, tone, and psychological dynamics
- Focus on facts avoid spending too much time discussing “why?” questions
- Avoid prejudging evidence
- Consider all possibilities
- Be an active listener
- Take notes or record
- Control emotions, be investigative rather than an advocate

Obtaining Witness Statements

- Written in first person
- Focus on facts, not conclusions (may include how the incident affected the individual)
- If the investigator writes the statement for the witness, get confirmation of accuracy

Handling Evidence

- ❖ Be aware of “chain of custody” issues
- ❖ Maintain investigation file containing:
 - ❖ Investigator’s notes (running record of actions taken; interviews conducted)
 - ❖ Written statements
 - ❖ Paper and electronic records
 - ❖ Photographs, videos and audio recordings
 - ❖ Any other evidence received, both inculpatory and exculpatory

Credibility Determinations

- Give testimony and information of each party or witness the degree of importance you reasonably believe it is entitled to receive
- Avoid making credibility determinations based on an individual's gender, sexual orientation, gender identity or other protected characteristic
- Avoid making credibility determinations based on an individual's status as a complainant, respondent or witness

Credibility Assessments

Give statements and information the degree of importance you reasonably believe it is entitled to receive

- Do not rely on “demeanor” alone – can be inaccurate, especially in traumatic situations
- Take trauma into account
- Other factors for credibility
 - Consistency
 - Plausibility
 - Reliability
 - Motive
 - Bias?

RELEVANCE

What is
“relevant”
evidence?

- ❖ Evidence that is of consequence to the outcome of the investigation
- ❖ Evidence that makes any fact more or less probable than it would be without the evidence

RELEVANCE

- Does not exist in a vacuum – the relevance of any particular piece of evidence is determined in relation to what is required to make a determination regarding responsibility
- Determining relevance is different than determining how much weight to give the evidence
 - Irrelevant evidence – Exclude from consideration
 - Relevant evidence – Include for consideration
 - Determine how much weight to be given compared to other evidence

RELEVANCE

Prior sexual
behavior or sexual
predisposition

Questions about a complainant's prior sexual behavior or sexual predisposition are *NOT* relevant EXCEPT to the limited extent they are offered:

- *to prove that someone other than respondent committed the conduct; or*
- *as related to specific incidents between the complainant and respondent to prove consent*

Bias and Impartiality

Investigator must be unbiased, impartial and free from conflicts of interest

Investigator's goal is to help decision-maker reach a determination of responsibility based on reliable, relevant evidence

- Goal is NOT to achieve any particular outcome
- Avoid becoming emotionally invested or slipping into advocacy

Determination of Responsibility

CANNOT BE MADE BY INVESTIGATOR OR TITLE IX COORDINATOR

What is Decision Maker's Role?

- ❖ Act as neutral
- ❖ Determine what questions are relevant to the case
- ❖ Objectively evaluate all relevant evidence both inculpatory and exculpatory
- ❖ Reach determination regarding responsibility without giving any deference to the investigative report
- ❖ Mandatorily dismiss complaint:
 - ❖ That do not rise to level of “Sexual harassment”; or
 - ❖ Did not occur in education program or activity; or
 - ❖ Did not occur against a person in the US

Sanctions and Remedies

- Range of possible sanctions must be described in policy
- Focus not just on discipline, but also on restorative remedies to prevent recurrence
- Don't forget about other legal obligations

Sanctions

Examples

- ❖ Written Warning
- ❖ Suspension
- ❖ Expulsion
- ❖ Demotion
- ❖ Termination

Remedies

- ❖ Title IX Coordinator responsible for implementing remedies
- ❖ May be the same or similar to interim supportive measures
- ❖ Must be designed to restore or preserve equal access to education programs or activities
- ❖ Need not be non-disciplinary or non-punitive and need not avoid burdening the respondent
- ❖ Range of possible remedies must be included in policy
- ❖ Evaluated by DOE under “deliberate indifference” standard

Remedies

Examples

- Counseling modifications
- Accommodations to class schedules or school work
- Restrictions on contact between the parties
- Increased Monitoring