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Legal Hot Topics: Title IX & Breaking News *with Jim Keith* Webinar



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The New Title IX Regulations

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What Is Title IX?

- An anti-discrimination law that states
 - No Person in the United States
 - On the basis of sex
 - Shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination
 - Under any educational program or activity
 - Receiving Federal financial assistance

Why Are We Discussing A Law That Was Enacted In 1972?

- New regulations regarding sexual harassment guidance were issued on May 6, 2020
- New regulations define sexual harassment
- Establish procedures for how educational institutions must respond to allegations of sexual harassment
- Effective date: August 14, 2020

Definition of Sexual Harassment

- Conduct on the basis of sex that meets one or more of the following:
 1. An employee of the recipient (educational institution) conditioning the provision of an aid, benefit or service of the educational institution on an individual's participation in unwelcome sexual conduct (*quid pro quo* sexual harassment);

Definition of Sexual Harassment (cont'd)

- Conduct on the basis of sex that meets one or more of the following:
 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 educational institution's education program or activity; or

Definition of Sexual Harassment (cont'd)

- Conduct on the basis of sex that meets one or more of the following:
 3. “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)

Education Program or Activity

Includes any location, event or circumstance over which the educational institution exhibits substantial control over both the alleged harasser and the context in which the harassment occurred. 34 C.F.R. § 106.44(a).

Can involve the use of email, social media or other technologies.

Title IX Coordinator

- Requires that the educational institution appoint an employee to serve as “Title IX Coordinator”
- Must be authorized to coordinate the educational institution’s compliance efforts
- Can combine the job with other assigned duties
- Must have sufficient authority and time to carry out Title IX duties

Notice Requirements

- Educational institution must provide notice of its nondiscrimination policy and grievance procedures
- Must report how to file or report sexual harassment and how the educational institution will respond to:
 1. Applicants for admission and employment
 2. Students
 3. Parents or legal guardians
- Must also provide notice to the same groups the Title IX Coordinator's name or title, email address, office address and telephone number
- Must publish notice and the Title IX Coordinator's contact information on educational institution's website and any handbook that is provided to the group above (e.g. school handbooks)

Who Can Report Allegations of Sexual Harassment?

- Any person may report sex discrimination or sexual harassment regardless of whether the person is the alleged victim
- Can report in person, by mail, by telephone or email to the Title IX Coordinator, or by any other means that results in receipt by the Title IX Coordinator
- For K-12 educational institutions, actual notice of sexual harassment is notice of sexual harassment or allegations sexual harassment to any employee
- Young children cannot be expected to report to a specific employee

Complainant

- Person who is alleged to be the victim of sexual harassment
- Complainant may file a formal complaint with the Title IX Coordinator by any method made available by the educational institution
- At the time of filing, complainant must be participating in or attempting to participate in the educational program or activity of the educational institution
- Title IX Coordinator may also sign a complaint but this does not make the Title IX Coordinator a party in the grievance process
- A third party reporter cannot file a formal complaint

Complainant (cont'd)

- The Title IX Coordinator may sign a complaint which would trigger an investigation, protecting the educational institution from a charge of deliberate indifference
- A formal grievance procedure in some cases may need to be implemented over the complainant's objection
- Even if complainant is not a willing participant in the investigation, complainant must be informed of supportive measures and must be provided written notice of steps in the grievance procedure

Respondent

- Respondent is the individual who has been reported to be the perpetrator of the sexual harassment

Educational Institution's Response

- Requirements for responding to notice of sexual harassment
- Procedure for responding to a **formal** complaint of sexual harassment
 - Defined as a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the educational institution investigate the allegations

General Response

- An educational institution must respond promptly to actual knowledge of sexual harassment in an education program or activity in a manner that is not deliberately indifferent
- An educational institution is deliberately indifferent if its response is clearly unreasonable in light of known circumstances

General Response (cont'd)

- An educational institution must treat complainants and respondents equitably by
 - Offering supportive measures to a complainant, and
 - Following a grievance process before imposing any disciplinary sanctions on a respondent
- Supportive measures are non-disciplinary, non-punitive, individualized services offered as appropriate and without charge to a complainant or a respondent before or after the filing of a formal complaint or where a complaint has not been filed

General Response (cont'd)

- Examples of supportive measures include counseling, course modifications, schedule changes, increased monitoring or supervision, etc.
- Supportive measures should be designed to restore or preserve equal access to the educational program or activity without unreasonably burdening the other party
 - For example, a supportive measure that completely removes the respondent from an activity could be considered punitive

General Response (cont'd)

- Title IX Coordinator is required to contact the complainant promptly (even if a formal complaint has not been filed) to
 1. discuss the availability of supportive measures
 2. consider the complainant's wishes regarding supportive measures
 3. inform the complainant of the availability of supportive measures with or without the filing of a formal complaint
 4. explain the process for filing a formal complaint

Immediate Removal of Respondent

- Title IX regulations permit the educational institution to immediately remove a respondent from the education program or activity on an emergency basis if
 1. The educational institution conducts an individualized safety and risk analysis, and
 2. Determines that an emergency removal is necessary to protect a student or other individual from an immediate threat to physical health or safety
 3. The educational institution must provide respondent with notice and an opportunity to challenge the decision immediately after removal

Immediate Removal of Respondent

- Example: If a respondent reacts to being accused of sexual harassment by threatening physical self-harm, an immediate threat to respondent's physical safety may arise from the allegations of sexual harassment and could justify an emergency removal
- Must be careful when individuals with disability rights under the IDEA, § 504 of the Rehabilitation Act or the ADA are involved

Formal Complaint Process

Basic Elements of Grievance Procedure

34 C.F.R. § 106.45(b)(1)

- Equitable treatment of parties
 1. Providing remedies to a complainant after a determination of responsibility against a respondent, and
 2. Following a grievance process before imposing any disciplinary sanctions or other actions that are not supportive measures
 3. Remedies may include supportive measures but may also include punishing respondent
- Objective evaluation of all available evidence without making credibility determinations based on a party's status as complainant, respondent or witness

Formal Complaint Process

Basic Elements of Grievance Procedure(cont'd)

34 C.F.R. § 106.45(b)(1)

- No conflict of interest against complainant or respondent by the Title IX Coordinator, investigator, decision-maker or any person designated to facilitate an informal process
- Training for these individuals on definition of sexual harassment, scope of the educational institution's program or activity, how to conduct an investigation and grievance process, hearings, appeals and informal processes
- Investigators must be trained on how to prepare an investigation report
- Decision-makers must be trained on issues of evidence and questioning

Formal Complaint Process

Basic Elements of Grievance Procedure(cont'd)

34 C.F.R. § 106.45(b)(1)

- A presumption that the respondent is not responsible for the alleged conduct until a determination has been made at the conclusion of the grievance process
- Reasonably prompt time frames for completing the grievance process, including a process for delays such as law enforcement involvement, absence of a witness, party, etc. with written notice to both parties explaining the reasons for the delay
- Possible disciplinary outcomes and remedies that may be implemented
- Statement whether the educational institution uses a preponderance of evidence or clear and convincing evidence standard to determine responsibility

Formal Complaint Process

Basic Elements of Grievance Procedure(cont'd)

34 C.F.R. § 106.45(b)(1)

- Procedures and permissible reasons for appeal by a respondent or a complainant
- A description of the range of supportive measures available to complainants and respondents
- Disallowance of evidence or questions that constitute or seek legally privileged information, unless the privilege is waived

Formal Complaint Process

Written Notice

34 C.F.R. § 106.45(b)(2)

- An educational institution must provide written notice to all known parties upon receipt of a formal complaint in sufficient time to give the respondent time to prepare a response before an initial interview
- Notice must include the following:
 - Notice of the grievance process, including any informal resolution process
 - Notice of the allegations with sufficient detail to allow the respondent to prepare a response (names, dates, conduct, location, etc.)
 - A statement that the respondent is presumed not responsible for the conduct and responsibility will be determined at conclusion of grievance process
 - Notice of the parties' right to have an advisor (may be an attorney) and to inspect and review evidence
 - Notice of any provision in the code of conduct that prohibits knowingly making false statements or providing false information in the grievance process

Formal Complaint Process

Dismissal

34 C.F.R. § 106.45(b)(3)

- Complaint must be dismissed if the allegations do not constitute sexual harassment as defined, did not occur in the educational institution's program or activity or did not occur against a person in the United States
- Complaint may be dismissed if complainant notifies the Title IX Coordinator at any time that he/she wishes to withdraw the complaint or an allegation, if the respondent's enrollment or employment ends, or if specific circumstances prevent the educational institution from gathering evidence (e.g. passage of several years between complaint and alleged conduct, non-cooperation of complainant, etc.)
- Notice of dismissal must be provided to both parties, including the reasons for dismissal

Formal Complaint Process

Consolidation

34 C.F.R. § 106.45(b)(4)

- Where allegations arise out of the same facts or circumstances, formal complaints can be consolidated against more than one respondent, by more than one complainant against one of more respondents, or by one party against another party

Formal Complaint Process

Investigation

34 C.F.R. § 106.45(b)(5)

An educational institution must:

1. Ensure that the burden of proof and gathering evidence rests on the educational institution rather than the parties (note: certain treatment records cannot be obtained with voluntary, written consent)
2. Provide an equal opportunity for the parties to present witnesses and evidence
3. Not restrict either party's ability to discuss the allegations or gather and present evidence
4. Provide the same opportunity to have others present during interviews or other proceedings, including an advisor (who may be an attorney)

Formal Complaint Process

Investigation (cont'd)
34 C.F.R. § 106.45(b)(5)

An educational institution must:

5. Provide written notice, to a party who is invited or expected to attend, the date, time, participants, purpose, and location of any investigative interview or other meeting with enough time to allow the party to prepare to participate
6. Provide both parties and their advisors, if any, an equal opportunity to review all evidence that is directly related to the allegations in the formal complaint, including evidence on which the educational institution does not intend to rely and any exculpatory or inculpatory evidence from any source; must be provided prior to the completion of the final investigative report and in time to give the parties at least 10 days to prepare a written response, which investigator must consider before completing the investigation report
7. Prepare a written investigation report that fairly summarizes the relevant evidence and provide the report to the parties and their advisors at least 10 days before a determination of responsibility

Formal Complaint Process

Hearings

34 C.F.R. § 106.45(b)(6)

No hearing is required in K-12 educational institutions.

School officials may determine that hearings will be held in certain circumstances.

With or without a hearing, the educational institution must provide each party the opportunity to submit, after completion of the investigative report, written, relevant questions that the party wants asked of another party or witness, provide each party with the answers and provide for limited follow-up questions.

Formal Complaint Process

Determination of Responsibility

34 C.F.R. § 106.45(b)(7)

The decision-maker cannot be the investigator or the Title IX Coordinator

The decision-maker must issue a written determination of responsibility that:

1. Identifies the allegations that potentially constitute sexual harassment
2. Describes the educational institution's procedural steps taken from the receipt of the complaint to the determination
3. Includes findings of fact supporting the determination
4. Includes conclusions regarding application of the code of conduct to the facts
5. Includes a statement of, and a rationale for, the result as to each allegation, including a determination of responsibility, any disciplinary sanctions, and whether remedies to restore or preserve equal access to the educational institution's program or activity will be provided to the complainant, and
6. Includes procedures for appeals

Formal Complaint Process

Appeals

34 C.F.R. § 106.45(b)(8)

Educational institutions must offer both parties the right to appeal a determination of responsibility and the educational institutions dismissal of a complaint or any allegations for the following:

1. A procedural irregularity that affected the outcome
2. New evidence that was not reasonably available at the time of the determination and could affect the outcome, or
3. Conflict of interest on the part of the Title IX Coordinator, investigator, or decision-maker that affected the outcome

Formal Complaint Process

Appeals (cont'd)

34 C.F.R. § 106.45(b)(8)

- Educational institutions must ensure that written notice is provided to both parties of the appeal and provide both parties an equal opportunity to submit a written statement in support of, or challenging, the determination
- A written decision of the appeal must be provided to both parties simultaneously
- The decision-maker for the appeal cannot be the Title IX Coordinator, the investigator or the initial decision-maker
- For K-12, typical for school boards to decide grievance appeals
- Given unique training requirements and prohibitions on conflicts of interest, will be necessary to determine feasibility of school board serving as decision-maker for appeals

Formal Complaint Process

Informal Resolution
34 C.F.R. § 106.45(b)(9)

- Cannot offer to facilitate an informal resolution process unless a formal complaint has been filed
- At any point during the formal complaint process, an educational institution may offer to facilitate an informal process that does not require a full investigation as long as both parties receive written notice of their rights and the parties provide written, voluntary consent
- Cannot offer informal resolution in the context of a complaint alleging that an employee harassed a student

Formal Complaint Process

Recordkeeping

34 C.F.R. § 106.45(b)(10)

- Must keep records related to reports of sexual harassment for a minimum of seven (7) years, including investigation records, disciplinary sanctions, remedies, appeals and records of any action taken, including supportive measures
- Records should reflect that the educational institution's response was not deliberately indifferent and that measures were taken to restore or preserve equal access to the education program or activity
- If the educational institution does not offer supportive measures, the records should document why the response was not clearly unreasonable under the known circumstances

Formal Complaint Process

Recordkeeping (cont'd)

34 C.F.R. § 106.45(b)(10)

- Must also retain for seven (7) years any materials used to train Title IX Coordinators, investigators, decision-makers and any employee designated to facilitate an informal process
- Training materials must be posted on district website

Retaliation

34 C.F.R. § 106.71

- Retaliation is prohibited against any person for the purpose of interfering with Title IX rights or because the person participated, or refused to participate, in any manner in a proceeding under Title IX regulations
- Retaliation may be addressed under the Title IX grievance process
- An educational institution must keep confidential the identity of a person who complains of or reports sexual harassment, including parties and witnesses, except as permitted by law to carry out the purpose of the regulations



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