



Title IX Sexual Harassment Training: The Formal Grievance Process INVESTIGATOR TRAINING

Understanding the Formal Grievance Process
for Claims Arising Under Title IX



MARICOPA
COMMUNITY COLLEGES

Quarles & Brady LLP

Road Map

- Key Concepts
- Basic Procedural Requirements
- Informal Reporting
- Formal Complaint
- Preliminary Inquiry
- Informal Resolution
- Investigation
- Live Hearing
- Determination Regarding Responsibility
- Appeals
- Retaliation
- Recordkeeping
- Questions?

What Constitutes Sex Harassment?

- One of the most important terms you must understand as part of Title IX complaint process is what constitutes ***sexual harassment*** that would give rise to an investigation and potential disciplinary action

Key Concepts

- ***Sexual harassment*** is broadly defined as any of the following:
 - *Quid pro quo* harassment
 - **Unwelcome conduct so severe, pervasive, and objectively offensive** that it effectively **denies** an individual **equal access** to the college's education program or activity
 - ***Sexual assault***, dating violence, domestic violence, or stalking

Key Concepts

- A college has jurisdiction over claims of sexual harassment when such conduct occurs in its ***education program or activity***
 - This includes all locations, events and circumstances over which the college exercised substantial control, as well as all buildings owned or controlled by student groups
- ***Actual knowledge*** of sexual harassment obligates a college to respond promptly and in a manner that is not ***deliberately indifferent***

Key Concepts

- Thus, to the extent a sexual assault is reported in the context of any college education program or activity, it will be covered by the Title IX procedures.
- If conduct is not covered under the new definition, it can be addressed under other conduct policies.
- Now, let's talk about the relevant parties to a potential Title IX grievance proceeding.

Key Concepts

- **Complainant** refers to an individual who is alleged to be the victim of sexual harassment, and **Respondent** refers to an individual who has been reported as a perpetrator of sexual harassment
- The **Title IX Coordinator** is the official who coordinates a college's efforts to comply with Title IX requirements
 - Contact information for this official must be online and published in various locations, so that individuals know where to report sexual harassment
 - The Title IX Coordinator is different from the Investigator, Decision-maker, and Appeal Officer

Basic Title IX Procedural Requirements

- The new Title IX Regulations require that all colleges:
 - Treat the Complainant **and** Respondent *equitably*;
 - Objectively evaluate all relevant evidence;
 - Title IX Coordinator, investigator(s), Decision-maker, or any person who facilitates an informal resolution process may not have a conflict of interest or bias and also must receive requisite training;
 - Presume that the Respondent is **not responsible** for the alleged conduct until a determination regarding responsibility is made (*e.g.*, avoid terms like "victim" or "survivor");
 - Conduct the grievance process according to **"reasonably prompt"** time frames;

Basic Title IX Procedural Requirements

- Inform the parties of the range of possible disciplinary sanctions, remedies, and various supportive measures;
- State whether the standard of evidence to be used for **all** formal complaints is the "preponderance of the evidence" or the "clear and convincing evidence" standard;
 - **Preponderance of the Evidence**: It is more likely than not that the conduct occurred
 - **Clear and Convincing**: It is highly probable that the conduct occurred
- Include the procedures and permissible bases for appeals; and
- Protect evidence protected under a legally recognized privilege (i.e., attorney-client privilege), unless such privilege is waived

Reporting Sex Harassment

- Now that we have an understanding of the key terms and procedural expectations of the Title IX process, let's discuss how a Title IX sex harassment grievance is initiated.
- This is done through *reporting* – and the Department of Education's new Title IX regulations recognize different types of reports (which trigger different types of required responses).

Informal Reporting

- **Anyone** can make an informal report of sexual harassment
- Informal reports can be made to the Title IX Coordinator or other college officials, who must then work with the Title IX Coordinator to respond to the report
- Informal reports can be made verbally or in writing, at any time (including during non-business hours)
- Informal reports can also be submitted anonymously

Informal Reporting

- Once a college has received an informal report of sexual harassment, the Title IX Coordinator *must* then contact the Complainant and:
 1. Offer ***supportive measures*** to the Complainant and/or Respondent
 2. Determine whether the Complainant wants to file a ***formal complaint***, and explain how to do so

Informal Reporting: Supportive Measures

- Supportive measures may include:
 - Counseling
 - Extensions of deadlines or other course-related adjustments
 - Modifications of work or class schedules
 - Campus escort service
 - Mutual restrictions on contact
 - Changes in work locations
 - Leaves of absence
 - Increased security and monitoring of certain areas of the campus
 - Other similar measures

Supportive measures cannot be punitive

Informal Reporting: Decision to Proceed with a Formal Complaint

- Complainants can choose whether or not to file a formal complaint
- Complainants **cannot** remain anonymous if they chose to file a formal complaint
 - Thus, you *cannot* assure a Complainant anonymity and should inform them that if they proceeds with a formal complaint, it will not be anonymous

Informal Reporting: Decision to Proceed with a Formal Complaint

- Even if a Complainant does not want to file a formal complaint, one may be filed by the Title IX Coordinator
- Should a Title IX Coordinator proceed with a formal complaint, a Complainant can request that the Title IX Coordinator not share his/her identity or conduct an investigation at all
 - Such a request should be evaluated against the duty to ensure campus safety, comply with federal law, and conduct the investigation with limited involvement from the Complainant

Formal Complaint

- A ***formal complaint*** of sexual harassment initiates the formal grievance process.
- A formal complaint is a document filed by a Complainant or signed by the Title IX Coordinator alleging sexual harassment against a Respondent and requesting that the college investigate.

Formal Complaint

- Complainants can file formal complaints with the Title IX Coordinator by either using a college-provided form, or by physically or digitally signing a document (typing their name on an email constitutes a digital signature)
- The college ***cannot require*** that Complainants utilized a college-provided form for a complaint to constitute a "formal complaint"

Formal Complaint

- At the time of filing a formal complaint, a Complainant ***must be participating or attempting to participate*** in a college's education program or activity
- Thus, a complaint from an alumni relating to an incident while he or she was a student would not be covered or protected under the new Title IX rules, but may be covered under other conduct policies.

Preliminary Inquiry

- Once a formal complaint is filed, the college must assign investigators to the matter
- The investigators will determine whether the college should proceed further with the formal grievance process or dismiss the formal complaint
- The Department of Education's regulations provide *mandatory* and *discretionary* grounds for dismissal

Preliminary Inquiry

- **Mandatory Grounds for Dismissal of a Formal Complaint:**

- The conduct alleged would not constitute sexual harassment under Title IX;
- The conduct alleged did not occur in the college's education program or activity; or
- The conduct alleged did not occur in the U.S.

If a complaint is dismissed under this provision, it may be referred for a conduct inquiry.

Preliminary Inquiry

- **Discretionary Grounds for Dismissal of a Formal Complaint:**
 - The Complainant notifies the Title IX Coordinator in writing that he or she would like to withdraw the formal complaint (there may be a referral for a conduct inquiry);
 - The Respondent is no longer enrolled in or employed by the college; or
 - Specific circumstances prevent the college from gathering evidence sufficient to reach a determination as to the formal complaint

Preliminary Inquiry: Appealing the Dismissal of a Formal Complaint

- Colleges must offer both parties an appeal from an investigator's dismissal of a formal complaint
- Both parties must be notified in writing of such appeal rights
- Grounds for appeal include procedural irregularities, the discovery of new evidence, and any bias or a conflict of interest detected amongst any Title IX personnel

Preliminary Inquiry: Notice to the Parties

- If the formal complaint is not dismissed, the college must send the parties a notice containing:
 - An explanation of the grievance process
 - Notice of the sexual harassment allegations
 - A statement that the Respondent is presumed not responsible for the alleged conduct
 - Notice that the parties may have an **Advisor** of their choice
 - Any provision in the college's code of conduct that prohibits knowingly making false statements or knowingly submitting false information

Preliminary Inquiry: Emergency Removals

- If the safety or well-being of anyone at the college may be jeopardized through the investigation process, temporary emergency removals may be appropriate at the outset of the investigation.
- Ensure that any such suspensions are done equitably (with the understanding that the Respondent is presumed ***not responsible*** until a determination regarding responsibility is made)

Quiz – Test Your Knowledge!

- Sam sends an email to the Title IX Coordinator at 2:00 AM reporting that he was just sexually assaulted at one of the bars near campus. Sam provides the requisite details regarding the events, requests that the college investigate these allegations, and digitally signs the email.
- Does this constitute a ***formal complaint*** of sexual harassment, why or why not?

Quiz – Test Your Knowledge!

- **Answer:** No – Sam's email does not constitute a formal complaint of sexual harassment under Title IX.
- **Reasoning:** Although the nature of Sam's allegations and the form of his report comply with the requirements for a formal complaint, the conduct reported did not take place in the college's *education program or activity*, and therefore does not constitute sexual harassment under Title IX. The complaint would be dismissed under the mandatory dismissal provision of the regulations.

Quiz – Test Your Knowledge!

- Riley stops by the Title IX Coordinator's office to discuss a situation involving Riley's Geology study partner who is involved in dating violence. Riley has noticed bruises and scrapes, and has even seen her study partner's boyfriend shove Riley in the college parking lot. Although Riley has talked to her study partner about leaving the dating situation, Riley is concerned that nobody will be able to convince her to do so.
- As a result, Riley wants to file a ***formal complaint*** of sexual harassment. Can she do so?

Quiz – Test Your Knowledge!

- **Answer:** No – Riley cannot file a formal complaint because she is not a Complainant (though she can lodge an informal complaint).
- **Reasoning:** Only Complainants may file formal complaints of sexual harassment. However, the Title IX Coordinator may file a formal complaint if he or she determines, based on the circumstances, that a formal complaint is necessary to ensure campus safety. In this situation, where violence has been observed on campus, the Title IX Coordinator may decide to do so.

Informal Resolution

- Throughout the course of an investigation, a college may choose to offer the parties an informal resolution process that could potentially resolve a formal complaint
 - Informal resolution may occur at any time prior to the college reaching a determination regarding responsibility
- Both parties must voluntarily agree in writing to attempt informal resolution
- A college **may not** offer informal resolution to resolve allegations that an employee sexually harassed a student

Informal Resolution

- If the parties do consent to informal resolution, the college must provide the parties with written notice disclosing:
 - The allegations of the complaint
 - Requirements of the informal resolution process
- At any time prior to agreeing to a resolution, either party has the right to withdraw from the informal resolution process and resume the formal grievance process

The Investigation

- As we will cover in greater detail in our investigation presentation, the "investigation" phase of the grievance procedure entails interviews, obtaining evidence, and identifying sources of information related to the complaint
- Title IX investigations must be thorough, impartial, and completed in a timely manner.
- The parties must have an ***equal opportunity*** to present witnesses and evidence during the investigation

Inspection of Records—First Review

- At the end of the investigation BUT BEFORE the investigative report is written, the investigators will send to each party and his/her Advisor the evidence collected during the investigation. This information must contain relevant and irrelevant, inculpatory and exculpatory information.
- The parties will have at least 10 days to submit a written response to this evidence, which the investigator(s) will consider while finalizing the report
- Once the 10 days has passed, the investigators may begin the process of writing the investigative report.

Inspection of Records—Second Review

- After the investigation, the investigator(s) will prepare and send to the parties an ***investigative report*** containing only relevant evidence
 - Before this report is finalized, the investigator(s) will send to each party and his/her Advisor the relevant evidence
 - The parties will have at least 10 days to submit a written response to this evidence, which the investigator(s) will consider while finalizing the report
- Investigator(s) will then distribute the final investigative report at least 10 days before a hearing
- An investigative report ***does not (and cannot) include a determination of responsibility***

The Live Hearing

- The college's formal grievance process ***must provide*** for a live hearing led by a Decision-maker
- The entire live hearing will occur with the parties located in separate rooms, with technology enabling them to simultaneously see and hear each other
- The hearing can be scheduled for a specific time period, but there must be discretion on the part of the Decision-maker to extend the time period in order to ensure fairness and that the parties can present their position on the allegations.

Determination Regarding Responsibility

- Following the hearing, the Decision-maker will issue a written ***determination regarding responsibility***, which must include:
 - The allegations potentially constituting Title IX sexual harassment;
 - A description of the procedural steps taken from receipt of the complaint through the determination regarding responsibility;
 - Findings of fact supporting the determination.

Determination Regarding Responsibility

- Additional requirements:
 - Conclusions regarding the application of the college's code of conduct to the facts;
 - A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions and remedies; and
 - Procedures and permissible bases for the Complainant and Respondent to appeal the determination.

Determination Regarding Responsibility

- This written determination regarding responsibility must be sent simultaneously to the parties
 - Title IX Coordinator is responsible for effective implementation of any remedies in the determination
- This determination becomes final:
 - If an appeal is not filed, the date on which an appeal would no longer be considered timely
 - If an appeal is filed, on the date that the college provides the parties with the written determination of the result of the appeal

Appeals

- Grounds to appeal a determination regarding responsibility and/or dismissal include:
 - A procedural irregularity that affected the outcome
 - New evidence that was not reasonably available at the time of the determination
 - The Title IX Coordinator, investigator(s) or Decision-maker(s) had a conflict of interest or bias that affected the outcome of the matter

Appeals

- When a Complainant or Respondent appeals, the college must:
 - Notify the other party in writing when an appeal is filed;
 - Ensure that the appeal officer is not the same person as the person who reached the determination regarding responsibility, the investigator(s), or the Title IX Coordinator;
 - Ensure that the appeal officer is not biased;
 - Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
 - Issue a written decision describing the result of the appeal and the rationale for the result; and
 - Provide the written decision simultaneously to both parties

Quiz – Test Your Knowledge!

- After an investigation and live hearing, the Decision-maker determines that the Respondent, Charlie, engaged in sexual harassment under Title IX. As such, the Decision-maker issues a suspension and other disciplinary sanctions. Charlie adamantly denies engaging in such conduct, and claims that the Decision-maker just did not like them for some reason.
- Charlie wants to appeal this determination. Does he have grounds to do so?

Quiz – Test Your Knowledge!

- **Answer:** Yes – Charlie can argue and present information to demonstrate that the Decision-maker had a bias that affected the outcome of the hearing.
- **Reasoning:** One of the grounds for an appeal is that the Title IX Coordinator, investigator, and/or Decision-maker had a conflict of interest or bias that affected the outcome of the matter.

Retaliation

- ***Retaliation*** is specifically prohibited under Title IX's regulations
- Retaliation includes intimidation, threats, coercion or discrimination for the purpose of interfering with any right or privilege secured by Title IX
- Complaints of retaliation may be submitted through the Title IX grievance process

Recordkeeping

- A college must maintain records of:
 - Each sexual harassment investigation, including:
 - Any determination regarding responsibility
 - Any audio or audiovisual recording or transcript required
 - Any disciplinary sanctions imposed on the Respondent
 - Any remedies provided to the Complainant
 - All appeals and the results of such appeals
 - Any informal resolution and the results of such appeals

Recordkeeping

- All materials used to train Title IX personnel and any person who facilitates an informal resolution process
- Any actions taken in response to an informal report or formal complaint of sexual harassment, including supportive measures
- If a college does not provide a Complainant with supportive measures, documentation of why such a response was appropriate
- All such records must be maintained for 7 years

WHAT QUESTIONS DO YOU HAVE?