Before we begin

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Topics for today

- Understanding the institution’s mandatory response: Scope, jurisdiction, and important definitions
- Roles in the process, and how to serve impartially, without bias, and without conflicts of interest
- Informal resolution
- How to conduct an investigation
- Relevance and special categories of evidence
- How to convene a hearing
- How to handle appeals
Mandatory jurisdiction to respond

- Actual knowledge
- Sexual harassment
- Education program or activity
- Person in the United States

Respond promptly in a manner that is not deliberately indifferent

- Promptly contact complainant to discuss availability of supportive measures regardless of whether complaint is filed and explain process for filing complaint
- What are supportive measures?
- Supportive measures for respondents
Mandatory jurisdiction to investigate
Formal complaint filed by a complainant

• What is a formal complaint?
• How to file it/where is it?
• What does it need to say?

Mandatory jurisdiction to investigate
Formal complaint filed by Title IX coordinator

When might a Title IX coordinator file a complaint?

Definition of Sexual Harassment
Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:
1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
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 recipient's education program or activity; or
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(the offense formerly known as hostile environment sexual harassment)

1) Unwelcome conduct

2) Determined by a reasonable person to be so severe AND pervasive AND objectively offensive

3) Effectively denies a person equal access to the institution's education program or activity
ROLES IN THE PROCESS, AND HOW TO SERVE IMPARTIALLY, WITHOUT BIAS, AND WITHOUT CONFLICTS OF INTEREST

Title IX Roles

- Title IX Coordinator
- Investigator
- Decisionmaker
- Appeals officer
- Facilitator of informal resolution
- Party advisor

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Title IX Roles

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How to serve impartially

■ Avoid pre-judgment of the facts
■ Bias
■ Conflict of interest

COMMENCEMENT
OF FORMAL RESOLUTION PROCESS
Formal complaint is filed . . . what now?

- Grievance process
- Allegations, including sufficient details
- Statement of presumption of non-responsibility
- Right to an advisor/attorney
- Right to inspect evidence
- Any provision in code that prohibits making false statements during process

Dismissing complaints

**MANDATORY**

- Not sexual harassment
- Did not occur in program or activity
- Not against person in the U.S.

**DISCRETIONARY**

- Complainant withdraws complaint
- Respondent no longer enrolled/employed
- School unable to collect sufficient info

Bad behavior that must be dismissed pursuant to regulations

- Why might we want to address this conduct?
- Are we prohibited from addressing it?
- If not prohibited, how can we address it?
Informal resolution

- Can only be offered after formal complaint has been filed
- May include arbitration, mediation, or restorative justice
- Facilitators must be trained in informal resolution

Steps of investigation

- Trained investigator collects information
- Investigator shares evidence “directly related” to allegations with parties
  - Parties have 10 days to respond
- Investigator creates summary of “relevant” evidence and shares with parties
  - Parties have 10 days to respond
Evidence “directly related” to the allegations

• Sensitive information
  • Consider restrictions on use and non-disclosure agreements

• Truly irrelevant information
  • Consider redactions and privilege log

Party review of evidence and written response

• Review
  • Develop document-sharing protocol

• Tips for keeping timeframes “prompt”

Creating investigative report summarizing “relevant evidence”

• Use logic and common sense

• Toss out old rules/practices regarding categories of information permitted (except for three situations)
Relevance IS

- Logical connection between the evidence and facts at issue
- Tends to make a material fact more or less probable than it would be without that evidence
- Assists in coming to the conclusion – it is "of consequence"

Relevance IS NOT

- Strength of the evidence
- Believability of the evidence
- Based on type of evidence: circumstantial v. direct
- Based on complicated rules of court

Special categories of evidence that are off-limits

- IRRELEVANT: Complainant’s prior sexual predisposition or prior sexual history (with two exceptions)
- IRRELEVANT: Information protected under a legally-recognized privilege
- CAN’T USE: Medical, psychological and similar records without written consent of party

Pre-hearing work

- Confirm advisors for each party; appoint if necessary; consider having back-ups available
- Figure out who will be requested to attend
- Explain to the parties what to expect
- Establish ground rules and structure of hearing
- Consider convening a pre-hearing conference
- Make logistical and technology decisions (and give them a trial run)
HOW TO CONVENE A HEARING

"Submitting to cross examination"

• What this means

• What does NOT submitting to cross examination look like?

• Consequences of NOT submitting to cross examination

Managing the questioning process

• Order of questioning

• Making thoughtful rulings on relevance

• Brainstorm and prepare for hearing scenarios
Remember special categories of evidence that are off-limits

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- IRRELEVANT: Information protected under a legally-recognized privilege
- CAN’T USE: Medical, psychological and similar records without written consent of party

Decision and written determination

- Use disciplined, unbiased evaluation of relevant evidence
- Understanding weight of evidence v. relevance of evidence
- Include specific elements required by regulations

Required elements in written determination

- Description of procedural steps from complaint through determination
- Findings of fact
- Conclusions regarding application of policy to facts
- Rationale for each result of each allegations
- Sanctions/remedies
- Appeal options (must permit appeal)
Grounds for appeals

- Procedural irregularity that affected the outcome of the matter
- New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter
- Title IX coordinator, investigator, or decisionmaker had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter
- Any other grounds, as long as offered equally to both parties

QUESTIONS?
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