

Higher Education & Collegiate Athletics Practice

Title IX Training for Your Institution

Scott Marrs
LaKeisha Marsh
Jamel Greer
Cary Farris
John Linker

August 7, 2020

The logo for the law firm Akerman, featuring the word "akerman" in a lowercase, sans-serif font with a red underline under the letter "a".

- Akerman kindly requests that these materials be stored behind a university private/secure wall.
- These materials are confidential and are intended solely for this training program.
- These materials were delivered in connection with a verbal presentation and are incomplete without the accompanying oral comments by the Akerman team. Since these materials and related discussions are informational and educational in nature, attendees should consult with counsel before taking any actions, and should not consider these materials or discussions thereabout to be legal or other advice. Professional advice should be obtained before attempting to address any legal situation or problem.

Today's Presenters



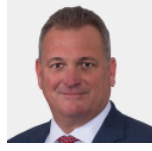
Scott Marrs
Regional Managing Partner, Texas
scott.marrs@akerman.com
713-960-7308



LaKeisha Marsh
Chair, Higher Education and
Collegiate Athletics Practice
lakeisha.marsh@akerman.com
312-634-5739



Jamel Greer
Associate, Higher Education
and Collegiate Athletics
jamel.greer@akerman.com
312-870-8006



John Linker
Partner, Labor and Employment
john.linker@akerman.com
713-960-7364



Cary Farris
Partner, Labor and Employment
cary.farris@akerman.com
713-960-7394

Agenda

Topics to Cover:

- Title IX Scope and Jurisdiction
- Definition of Sexual Harassment
- Title IX Coordinator
- Decision-Maker
- Party's Advisor
- Importance of Impartiality
- Grievance Process

Title IX... What is it?

Title IX (34 C.F.R. § 106.31)

- *“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any educational program or activity receiving Federal financial assistance.”*

Scope and Jurisdiction

Jurisdiction

- The Title IX statute applies to educational institutions that receive Title IV Federal financial assistance. This includes sexual harassment occurring in an institution's education programs or activities.
- Education program or activity includes the operations of an educational institution.
 - Is not private conduct occurring in a private location, separate and apart from an education program or activity.

Scope and Jurisdiction (cont'd)

- Education Programs & activities -- locations, events, or circumstances over which the institution exercised substantial. Examples include but are not limited to:
 - Anything that occurs on campus
 - On/off campus housing for students and/or faculty (including officially recognized student organizations)
 - Athletic teams (including facilities and sponsored events)
 - Academic instruction Employment
 - Admissions, Financial Assistance

Scope and Jurisdiction (cont'd)

- Education Programs & Activities DOES NOT include activities that occur outside of the United States (e.g. study abroad)



Definition of Sexual Harassment

akerman

Sexual Harassment

Definition

- Section § 106.30 defines Sexual Harassment as conduct on the basis of sex that satisfies one or more of the following:
 - Quid pro quo
 - Severe, pervasive AND objectively offensive
 - Other Definitions
 - “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 Harassment (cont'd)

Definition

Scenario (Quid pro quo)

- A faculty member informs a student that they will fail their History class unless they are willing to preform sexual act as “extra credit.”

Scenario (Severe, pervasive and objectively offensive)

- An athletic training repeatedly gropes a student’s intimate area while providing treatment for an injured hamstring.

Sexual Harassment (cont'd)

Definition

- Sexual Assault – An offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.



Sexual Harassment (cont'd)

Definition

Scenario

- At a staff party for the education department, one staff member places the “date-rape” drug in the drink of another colleague, who becomes subdued and vulnerable. The employee then takes the victim to a nearby classroom and performs a sexual act while the victim is unconscious.

Sexual Harassment (cont'd)

Definition

- Dating Violence - 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: (i) The length of the relationship.
 - (ii) The type of relationship.
 - (iii) The frequency of interaction between the persons involved in the relationship.

Sexual Harassment (cont'd)

Definition

Scenario

- Two senior students who have had a romantic relationship since sophomore year are heard arguing inside a campus dorm room at night. The next day, one of the students attends chemistry class with bruises on the face, neck and arms.



Sexual Harassment (cont'd)

Definition

- Domestic Violence –
 - felony or misdemeanor crimes of violence committed by
 - current or former spouse or intimate partner of the victim;
 - by other familial connections; or
 - other acts covered by domestic or family violence laws of the jurisdiction.

Sexual Harassment (cont'd)

Definition

Scenario

- Information is reported to a Title IX coordinator that police were called to the campus housing last night because a graduate student in the business school was seen physically beating their younger sibling, who is also an undergraduate at the same institution.

Sexual Harassment (cont'd)

Definition

- Stalking - 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.
- **Includes Cyber Stalking*



Sexual Harassment (cont'd)

Definition

Scenario

- Two faculty members who previously had a romantic relationship continue to teach in the political science department. One of the faculty members decides to take pictures of the other faculty member every day when that individual arrives on campus and as that individual walks to the faculty parking lot after class.

Sexual Harassment (cont'd)

Definition

Retaliation

- Prohibits intimidation, threats, coercion, or discrimination against any individual for:
 - the purpose of interfering with any right or privilege secured by Title IX and its implementing regulations, or
 - participation - individual has made a report or complaint, testified, assisted, participated in or refused to participate in any manner in an investigation, proceeding, or hearing under the institution's policy.

Title IX v. State Law

State Law Implications

- Institutions must comply with both Title IX and State Law.
- If State law conflicts with some element of the Title IX regulations, the State law is preempted.
- What does this mean:
 - Institutions may have to process complaints and misconduct that does not fall within Title IX under parallel procedures covered by other laws, or they may follow the procedures under the Title IX regulations.
 - Also applies to collective bargaining agreements with faculty and staff that conflict with the Title IX regulations.

Title IX Coordinator

Title IX Coordinator

- Institutions must designate the Title IX Coordinator, who is responsible for coordinating the institution's efforts to comply with Title IX including, but not limited to:
 - Be accessible to receive complaints and/or information related to Title IX complaints;
 - Coordinate campus-wide education on Title IX to campus stakeholders;
 - Initiate formal grievance procedures as needed;
 - Communicate the policy to campus stakeholders;
 - Promptly contacting the parties involved and coordinating supportive measures.

Title IX Coordinator (cont'd)

- Contact information for Title IX Coordinator must be provided to students, employees, applicants for admission and employment, and all unions. The contact information must also be maintained on the institution's website.

Title IX Coordinator (cont'd)

Title IX Coordinator and Formal Complaint

- May file a formal complaint:
 - When there is an important institutional interest in adjudicating a report irrespective of the alleged victim's wishes.
 - Involves serious misconduct, repeated misconduct, or misconduct by employees.
- Decision must not be clearly unreasonable.

Decision-Maker

Decision-Maker

- An institution has decision in its selection of a decision-maker:
 - A single individual;
 - A panel of individuals or multiple individuals responsible for adjudicating specific portions of the grievance process.



Decision-Maker (cont'd)

- The institution has discretion:
 - Existing personnel,
 - Hire new personnel, or
 - Hire an outside contractor to serve in the role as decision – maker.



Decision-Maker (cont'd)

BUT

- The individual(s) may not have a conflict of interest or bias to a particular gender.



Decision-Maker (cont'd)

- Decision-Makers must be trained on and understand the following:
 - definition of Sexual Harassment as defined in § 106.30;
 - scope of the institution's education program or activity;
 - how to conduct an investigation, and grievance process, including live hearings;
 - appeals and informal resolution;
 - how to serve impartially, avoiding prejudgment of the facts at issue, conflicts of interest and bias;
 - Make determinations about admissibility of evidence during the grievance process and/or live hearings; and
 - training on any technology to be used at a live hearing.

Decision-Maker (cont'd)

- During the grievance process, the decision maker must:
 - weigh the relevant evidence, and decide whether it meets the institution's standard of evidence for sexual harassment allegations;
 - determine the relevance of each cross-examination question before a party or witness answers;
 - reach conclusions about whether the Respondent is responsible for the alleged sexual harassment;
 - determine whether remedies will be provided to the Complainant;
 - determine the appropriate disciplinary consequences for Respondent, if any; and
 - issue a written determination, simultaneously to both parties, outlining the facts and reasons for the conclusions reached.

Decision-Maker (cont'd)

- During the hearing, the decision-maker plays a key role in facilitating the cross examination process. Including but not limited
 - Evaluate evidence and determine whether questions and/or evidence are relevant;
 - Refrain from making inferences where a party refuses to be cross-examined or refuses to answer certain questions during cross-examination.

Decision-Maker (cont'd)

Determining Responsibility

- The person deciding a sexual harassment case must not be the same person who received the formal complaint or investigated the complaint, including the Title IX Coordinator.



Party's Advisor



Party's Advisor

Advisor Role

- Each party may select an advisor of their choice.
- An advisor may participate in both the investigation and live hearing.
- Advisor may be an attorney but does not have to be.
- If a party does not have an advisor, an institution must provide a party with an advisor to question the other party at a live hearing.
- Institution may impose limits/rules on an advisor's role and certain behavior standards. Violations can result in being excluded but must allow replacement.
- Institutions may limit the involvement of an advisor during an investigation (i.e. passive role).

Offer supportive measures.

Importance of Impartiality

Importance of Impartiality

- According to OCR, the new Title IX rule guarantees a fair and equitable grievance process for all those involved in a Title IX proceeding.
- The Department of Ed. has emphasized:
 - The need for complainants to receive appropriate support;
 - That respondents are treated as responsible only after receiving due process and fundamental fairness.
 - That Institutional officials serve impartially without bias for or against *any* party.
 - This includes all aspects of the Title IX proceeding: the complaint, supportive measures, investigation, hearing, and appeal processes.

Importance of Impartiality (cont'd)

Scenario

- A Title IX coordinator contacts a Complainant who filed a complaint under Title IX and provides supportive measures including a change in class schedule and opportunity to speak to a campus counselor. The Title IX coordinator takes the allegations in the complaint as true and fails to offer the Respondent any supportive measures under the guise that Respondent is presumed liable.

Grievance Process

akerman

Grievance Process

- An institution's overall duty under Title IX:
 - Respond to known acts of sexual harassment in a manner not clearly unreasonable.
 - Treat complainants and respondents equitably.
 - Fair and equitable procedure in response to formal complaints and before imposing discipline.
 - Offer supportive measures.

Grievance Process (cont'd)

- The goal of Title IX is to ensure a fair grievance process for all parties involved including:
 - providing procedural protections and rights
 - promptly respond to complaints and complete grievance process
 - ensure that all relevant evidence is evaluated objectively, free from conflicts of interest, and bias.

Grievance Process (cont'd)

- Upon learning that someone is alleged to have been a victim of sexual harassment, the institution must promptly
 - Contact the person and inform them of their rights (e.g. supportive measures, filing complaint etc.).
 - Consider the alleged victim's wishes in offering appropriate supportive measures under the circumstances.
 - Offer supportive measures if requested by the respondent or as necessary to ensure a fair process.

Grievance Process

SUPPORTIVE MEASURES

akerman

Supportive Measures

- Previously
 - Interim measures provided that would end any current misconduct and prevent future misconduct during the course of the investigation.
- August 14, 2020
 - SUPPORTIVE measures are required when Title IX is triggered (promptly).

Supportive Measures (cont'd)

Key Component of the Grievance Process

- When an institution learns that someone is said to be the victim of sexual harassment, it must:
 - Promptly contact the person to discuss supportive measures.
 - Consider the person's wishes with respect to supportive measures.
 - Offer supportive measures.
 - Inform the complainant that supportive measures are available with or without the filing of a formal complaint.

Supportive Measures (cont'd)

Purpose of Supportive Measures

- The supportive measures are designed to protect the safety of all parties of the institution's educational environment, or deter sexual harassment.
- They should be non-disciplinary, non-punitive individualized services offered without fee or charge.
- Goal - restore or preserve equal access to the institution's education program or activity without unreasonably burdening the other party.

Supportive Measures (cont'd)

What are Supportive Measures?

- Supportive measures may include but are not limited to:
 - counseling;
 - extensions of deadlines or other course-related adjustments;
 - modifications of work or class schedules;
 - mutual restrictions on contact between the parties;
 - changes in work or housing locations;

Supportive Measures (cont'd)

- To the extent possible, the institution must keep supportive measures provided to the parties confidential.



Grievance Process

FORMAL COMPLAINT

akerman

Investigation Obligations Have Changed

- The DOE has reconsidered the position that a recipient's response obligations are triggered whenever employees "should have known"
- Institutions are now obligated to investigate whenever a complainant files, or a Title IX Coordinator signs, a "formal complaint."
- The Department will hold institutions responsible for a failure or refusal to investigate a formal complaint.

The Key for an Investigation to be Instituted is the Filing of a Formal Complaint

- Through the actual knowledge condition in the regulations, the institution must provide potential complainants clear, accessible channels by which to report and/or file a formal complaint.
- Students and employees must be notified of the Title IX Coordinator's contact information and have clear reporting channels, including options accessible even during non-business hours.

Designation of Mandatory Reporters

- Institutions given discretion to implement their own employee reporting policy to designate (as to employees who are not the Title IX Coordinator and not officials with authority):
 - Mandatory reporters (i.e., employees who must report sexual harassment to the Title IX Coordinator)
 - Employees who may listen to a student's or employee's disclosure of sexual harassment without being required to report it to the Title IX Coordinator
 - Employees must report sexual harassment to the Title IX Coordinator but only with the complainant's consent.

“Official with Authority” Definition has Changed

- The DOE will not assume that a person is an official with authority solely based on the fact that the person has received training on how to report sexual harassment or has the ability or obligation to report sexual harassment.
- Institutions can designate those with authority to institute corrective measures on behalf of the recipient.
- No universal, mandatory reporting system in the postsecondary context
- DOE will not conclude that volunteers and independent contractors are officials with authority, unless the institution granted them authority to institute corrective measures on behalf of the recipient.

Requirements for Initial Response to a Report of Sexual Harassment

- Must be prompt
- Must consist of offering supportive measures to a complainant
- Title IX Coordinator must contact each complainant to discuss supportive measures and explain to the complainant the process for filing a formal complaint.
- The response must treat complainants and respondents equitably, meaning that for a complainant, the recipient must offer supportive measures, and for a respondent, the recipient must follow a grievance process that complies with § 106.45 before imposing disciplinary sanctions.

Formal Complaint Definition

- The § 106.30 definition of “formal complaint” requires a document “alleging sexual harassment against a respondent,” but contains no requirement as to a detailed statement of facts.
- Defined as a document, filed by a complainant or signed by a Title IX Coordinator, alleging sexual harassment, against a respondent, and requesting that the institution investigate the allegation of sexual harassment.
- The phrase “document filed by a complainant” refers to a document or electronic submission (such as an e-mail or through an online portal provided for this purpose by the recipient) that contains the complainant’s physical or digital signature.

Formal Complaint Definition (cont.)

- A formal complaint is **not required** in order for an institution to have actual knowledge of sexual harassment, or allegations of sexual harassment, that activates the institution’s legal obligation to respond promptly, including by offering supportive measures.



Complainant or Title IX Coordinator Can Initiate Investigation

- A complainant can require the institution to initiate an investigation and grievance process by filing formal complaint.
- Title IX Coordinator can initiate if they believe that a non-deliberately indifferent response to the allegations requires an investigation.

Third Party cannot file Formal Complaint

- Third parties precluded from filing formal complaints.
- An investigation against a complainant's wishes or without a complainant's willingness to participate, should happen only when the Title IX Coordinator has determined that the investigation is necessary under the particular circumstances.
- Any person may disclose or report a sexual harassment incident. When Title IX Coordinator or an official with authority to institute corrective measures on the recipient's behalf gets report, the institution must respond promptly in a non-deliberately indifferent manner.

Parent or Guardian can File Formal Complaint on Behalf of Their Child

- If they have legal parental rights over child



Formal Complaints Cannot be Filed Anonymously

- A complainant cannot file a formal complaint anonymously.
- The institution must send written notice of the allegations to both parties upon receiving a formal complaint, including identity of parties.
- Complainant cannot remain anonymous or prevent the complainant's identity from being disclosed to the respondent.

Electronic Filing of Formal Complaint

- A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by email.
- A formal complaint cannot be filed by telephone.
- “Any additional method designated by the recipient” may include an online submission system or portal.
- Title IX Coordinator contact info must be prominently displayed on the institution’s website and in any of the recipient’s handbooks or catalogs.

Circumstances Where Student Not Currently Enrolled can File Formal Complaint

- General Rule: A complainant must be participating in, or attempting to participate in, the institution’s education program or activity at the time of filing a formal complaint.
- A complainant who has graduated may still be “attempting to participate.”
- Example: complainant has graduated from one program but intends to apply to a different program, or the graduated complainant intends to remain involved with an institution’s alumni programs and activities.

Circumstances Where Student Not Currently Enrolled can File Formal Complaint (cont'd)

- A complainant who is on a leave of absence may be “participating or attempting to participate” in the institution’s education program or activity.
- A complainant who has left the institution because of sexual harassment, but expresses a desire to re-enroll if the institution appropriately responds to the sexual harassment, is “attempting to participate” in an education program or activity.

When Institution May Initiate Investigation Against Complainant’s Wishes

- There is flexibility to investigate allegations even where the complainant does not wish to file a formal complaint where initiating a grievance process is not clearly unreasonable in light of the known circumstances.
- Institutions may, for example, pursue a grievance process against a potential serial sexual perpetrator.
- Institution is required to document its reasons why its response to sexual harassment was not deliberately indifferent, taking into account the circumstances of each situation.

Reasons for Institution to Initiate Formal Complaint Against Complainant's Wishes

- To protect the institution's educational community.
- To otherwise avoid being deliberately indifferent to known sexual harassment.

Scenario

The Title IX Coordinator receives reports of sexual assault from two different students with remarkably similar descriptions of the assailant and how the assaults occurred. Neither student wishes to file a Formal Complaint but both are credible and said they would participate further if needed.

1. Can the Title IX Coordinator file a Formal Complaint on their own to start the investigation process?
2. What would be some documented reasons for the Coordinator to file a Formal Complaint here even though the students declined to file?

Title IX Coordinator is Only Institution Official Who Can File a Formal Complaint

- Institution administrators other than the Title IX Coordinator may still have significant interests in ensuring that the recipient investigate potential violations of institution policy.
- However, the decision to initiate a grievance process in situations where the complainant does not want an investigation or where the complainant intends not to participate must be made by the Title IX Coordinator.
- Other institution administrators may report sexual harassment incidents to the Title IX Coordinator, and may express to the Title IX Coordinator reasons why the administrator believes that an investigation is warranted.

Confidentiality of Supportive Measures and Formal Complaint

- A complainant may obtain supportive measures while keeping the complainant's identity confidential from the respondent.
- But for an investigation to begin, the complainant's identity must be disclosed to the respondent in the formal complaint.
- However, the identities of complainants (and respondents, and witnesses) should be kept confidential from anyone not involved in the grievance process.

Must Still Respond and Provide Supportive Measures Even if No Formal Complaint

- Institutions must respond promptly and supportively to every known allegation of sexual harassment whether or not a complainant wants to also file a formal complaint.
- Filing a formal complaint is not required for a complainant to receive supportive measures.
- Must investigate every time the institution has actual knowledge, in a way that is not deliberately indifferent – even in the absence of a formal complaint.

No Statute of Limitations for Formal Complaints

- The new regulations do not set a statute of limitations for filing a formal complaint.
- Grievance process may take into account any effect of passage of time on party or witness memories or the availability or quality of other evidence.
- Complainant must be participating in or attempting to participate in the recipient's education program or activity.

Reasons for Dismissal of Formal Complaint

- If the conduct alleged in the formal complaint would not constitute sexual harassment even if proved.
- If the conduct did not occur in the institution's education program or activity
- If the conduct did not occur against a person in the United States
- Such a dismissal does not preclude action under another provision of the institution's code of conduct.

Permissive Dismissal of Formal Complaints

- The institution may also dismiss the formal complaint, if:
 - During the investigation or hearing a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint.
 - The respondent is no longer enrolled or employed by the recipient
 - Specific circumstances prevent the institution from gathering evidence sufficient to reach a determination.
- Upon a dismissal, the institution must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties.

Grievance Process

INVESTIGATION

akerman

When You Must Initiate an Investigation

- A complainant files, or a Title IX Coordinator signs, a formal complaint.
- The Title IX Coordinator should take into account the wishes of a complainant and only initiate a grievance process against the complainant's wishes if doing so is not clearly unreasonable in light of the known circumstances.
- The institution's decision not to investigate when the complainant does not wish to file a formal complaint will be evaluated under the deliberate indifference standard; that is, whether that decision was clearly unreasonable in light of the known circumstances.
- Similarly, a Title IX Coordinator's decision to sign a formal complaint initiating a grievance process against the complainant's wishes also will be considered under the deliberate indifference standard.

Written Notice to Parties After Formal Complaint Filed

- Upon receipt of a formal complaint, an institution must provide written notice, including the following, to the parties who are known:
 - Notice of the institution's grievance process, including any informal resolution process.
 - Notice of the allegations of sexual harassment, including
 - Identities of the parties involved in the incident, if known
 - The conduct allegedly constituting sexual harassment
 - The date and location of the alleged incident, if known.

Written Notice to Parties After Formal Complaint Filed (cont.)

- Must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.
- Must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, and may inspect and review evidence.
- Must inform the parties of any provision in the institution's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.
- If the institution decides to investigate allegations that are not included in the original notice, the institution must provide notice of the additional allegations to the parties.

Investigating Formal Complaints

- Institutions must investigate formal complaints, determine if a formal complaint is subject to mandatory or discretionary dismissal, and must notify the parties of any dismissal.
- Institutions may also use their discretion to consolidate any formal complaints when allegations of sexual harassment arise out of the same facts or circumstances.

Required Elements of an Investigation of a Formal Complaint

- Must keep the burden of proof and burden of gathering evidence on the institution;
- Must protect every party's right to consent to the use of the party's own medical, psychological, and similar treatment records;
- Must provide the parties equal opportunity to present fact and expert witnesses and other inculpatory and exculpatory evidence;
- Must not restrict the parties from discussing the allegations or gathering evidence;

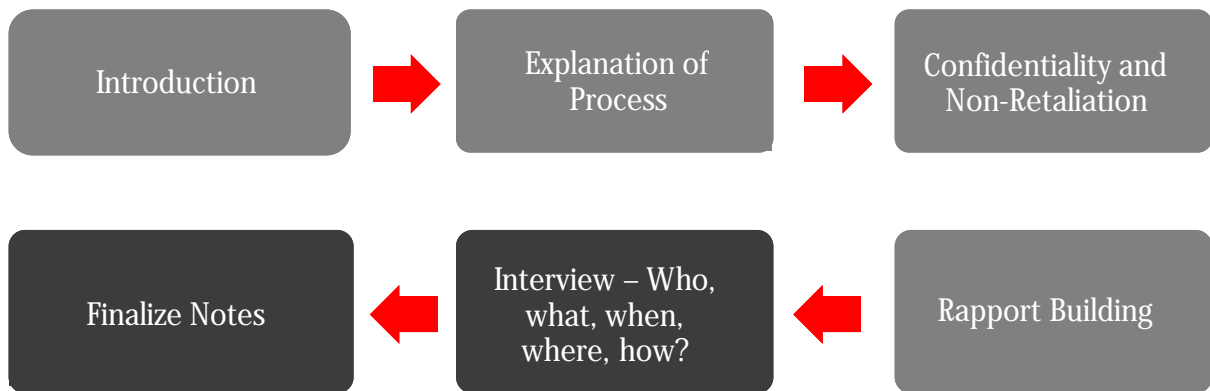
Required Elements of an Investigation of a Formal Complaint (cont.)

- Must give the parties equal opportunity to select an advisor of the party's choice (who may be, but does not need to be, an attorney);
- Must require written notice when a party's participation is invited or expected for an interview, meeting, or hearing;
- Must provide both parties equal opportunity to review and respond to the evidence gathered during the investigation; and,
- Must send both parties the recipient's investigative report summarizing the relevant evidence, prior to reaching a determination.

Investigation Step

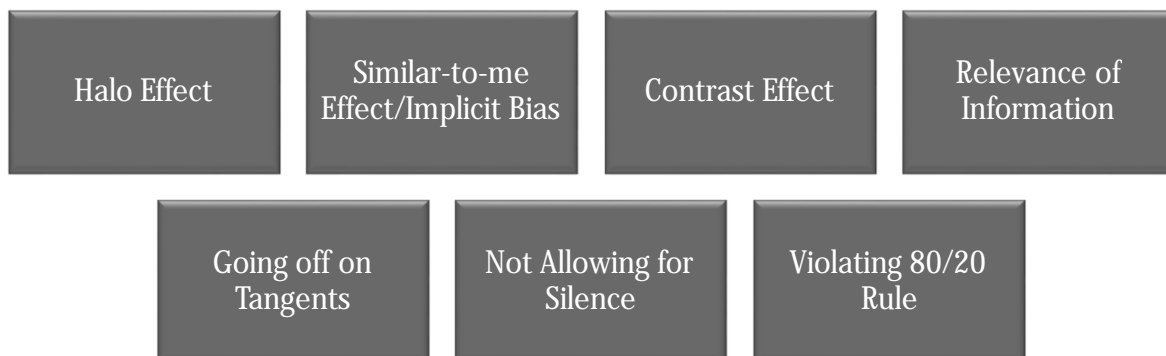
- Gather all relevant information related to the allegations made in the Formal Complaint:
 - Gather documents, files, audio recordings, video recordings, CCTV footage, photos, social media posts, emails, texts, cell phone records, etc.
 - Interview the Complainant and Respondent—draft notes of all interviews. Focus on the facts—who, what, when, where, how?
 - Interview any witnesses identified by Complainant or Respondent.
 - Work with local law enforcement if they are involved.

Interview Process



Points to Keep in Mind

When Interviewing



Interviewing Techniques

Reflecting

I considered making a report a while back

Nudge: a while back...?

Paraphrasing

I was in the library from 6-12 on Thursday night and never left

Paraphrase: sounds like you were at the library for at least 6 hours, but you never left to take a break?

Unpacking

Can we pause for a minute here? I want to go back and make sure I caught everything you mentioned: 1...., 2...., 3...., did I miss anything?

Motivational Probes

- Tell us more about why you made that decision ...
- What led you to ...
- Why make the report now?

Interview Best Practices

Points to Keep in Mind

- Set expectations for the Interview
- Ask for the “Story”
- Ask relevant follow-up questions – “Click on the Link”
- Use silence when necessary
- Pay attention to non-verbal behaviors, but don’t over-interpret

Good Interview Notes Are Critical

- Only write down information relevant to the allegations in the Formal Complaint.
- Document key facts.
- Use quotes when key statements are made.
- Notes will be available to all parties and the Decision-Maker.
- Be consistent taking notes.

Written Notice to Advisors During Investigation

- Copies of the evidence, and a copy of the investigative report, must be sent to the parties and to the parties' advisors, if any.
- Advisors are not required to be copied on all correspondence during the investigation.
- Institution may copy party advisors on all notices sent out, so long as the institution ensures that such a practice applies equally to both parties.

Sharing Evidence With all Parties During Investigation

- Evidence “directly related to the allegations”, including “inculpatory or exculpatory evidence whether obtained from a party or other source.”
- Evidence gathered by the investigator from, for example, law enforcement where a criminal investigation is occurring concurrently with the institution’s Title IX grievance process.

Investigation of Medical Records

- The Rule: An institution cannot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional unless the institution obtains the party’s voluntary, written consent to do so for a grievance process.



Relevant Information For Investigation

- All evidence summarized in the investigative report must be “relevant”
- Evidence about a complainant’s sexual predisposition would never be included.
- Evidence about a complainant’s prior sexual behavior would only be included if it meets one of the two narrow exceptions:
 - If such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct
 - If the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.

Investigator Determinations of Relevance of Evidence During Investigation

- The parties should have the opportunity to argue that evidence directly related to the allegations is in fact relevant.

Investigator Determinations of Relevance of Evidence During Investigation

- **EXAMPLE:** An investigator may discover during the investigation that evidence exists in the form of communications between a party and a third party (such as the party's friend or roommate) wherein the party characterizes the incident under investigation. If the investigator decides that such evidence is irrelevant (perhaps from a belief that communications before or after an incident do not make the facts of the incident itself more or less likely to be true), the other party should be entitled to know of the existence of that evidence so as to argue about whether it is relevant.

Investigator Determinations of Relevance of Evidence During Investigation (cont'd)

- The investigator would then consider the parties' viewpoints about whether such evidence is relevant, and decide whether to summarize that evidence in the investigative report.
- A party who believes the investigator reached the wrong conclusion about the relevance of the evidence may argue again to the decision-maker about whether the evidence is actually relevant.

Providing Evidence to Parties for Their Review During Investigation

- Institutions must send the evidence subject to inspection and review to each party, and the party's advisor (if any), in electronic format or hard copy.
- Institutions are neither required nor prohibited from using a file sharing for downloading or copying the evidence.
- Institutions may require parties and advisors to refrain from disseminating the evidence (for instance, by requiring parties and advisors to sign a non-disclosure agreement).

Redaction of Evidence

- With regard to the sharing of confidential information, an institution may permit or require the investigator to redact information before sending to the parties for inspection that is:
 - Not directly related to the allegations.
 - That is otherwise barred, such as information protected by a legally recognized privilege, or a party's treatment records if the party has not given written consent.

Timeframes for Review of Evidence and Investigative Report

- 10-day time period for the parties to inspect evidence
- 10-day period to review and respond to the investigative report.
- Institutions can choose whether business days or calendar days
- Institutions may give the parties more than 10 days to respond, as long as the grievance process is not unduly delayed.

Written Response from Parties on Evidence Gathered by Investigator

- Institutions may require all parties to submit any evidence that they would like the investigator to consider.
- Institution may allow both parties to provide additional evidence in response to their inspection of the evidence and an opportunity to respond to the other party's additional evidence.
- Institution may choose whether to provide a copy of each party's written response to the other party.

Grievance Process

INVESTIGATION REPORT

akerman

Investigative Report

- The contents of an investigative report are discussed broadly in § 106.45(b)(5)(vii):
 - The investigative report should contain relevant evidence including exculpatory and inculpatory evidence.
 - The evidence should be included whether obtained from a party or other source.
 - The investigative report should fairly summarize all the relevant evidence.

Contents of Investigative Report

- The DOE takes no position on the exact content of the investigative report, and simply states that the investigative report must fairly summarize relevant evidence.
- The decision-maker must prepare a written determination regarding responsibility that must contain certain elements (for instance, a description of procedural steps taken during the investigation), so an institution may wish to instruct the investigator to include such matters in the investigative report.

Amendments After Parties' Review of Investigative Report

- No specific process for additional information or for amending or supplementing the investigative report in light of the parties' responses after reviewing the report.
- Institutions should consider best practices and respect for fundamental fairness with regard to amending and supplementing the report.
- Institutions can decide whether and how to amend and supplement the investigative report.

7-year Document Retention Period

- §106.45(b)(10) requires documents to be retained for 7 years.
- This extends the prior retention period of 3 years.



Requirements for Investigator

- According to very broad and limited language in the new regulations, the institution's investigator must "be well-trained in how to conduct an investigation and grievance process and in issues of relevance, under § 106.45(b)(1)(iii)."
- Institutions may consider sending investigators to more lengthy training sessions focused on their specific duties under the new regulations.



Grievance Process

INFORMAL RESOLUTION

akerman

Informal Resolution

When Can Informal Resolutions be Given?

- An institution may provide the parties an option of an informal resolution but *only with* the written consent of both parties and never in a case involving an employee harassing a student.

104 ©2020 Akerman LLP. All rights reserved.

akerman

Informal Resolution (cont'd)

Informal Resolution Application

Scenario

- The parties agree to pursue informal mediation instead of formal grievance process. During mediation, the parties agree to a no-contact order and the institution implements measures such that the students do not take the same course together, to the extent that this is feasible.

Informal Resolution (cont'd)

Informal Resolution Application

Please note...

- Discretion to identify an individual to coordinate the informal resolution process;
- Informal resolution process must be communicated before the parties agree;
- Either party can withdraw at anytime prior to executing a resolution;
- Once executed, resolutions are final.

Grievance Process

LIVE HEARING

akerman

Live Hearings

- Previously
 - Optional
- August 14, 2020
 - Required when a formal complaint is filed and must permit both parties to present evidence, witnesses, and cross-exam each other through representatives.
 - Must accommodate requests for the hearings to proceed virtually such that both parties are not in the same room during a portion of or the entire proceeding.
 - Required to provide a representative when one party does not have one.

108 ©2020 Akerman LLP. All rights reserved.

akerman

Live Hearings (cont'd)

Role of Live Hearing in Grievance Process

- Purpose of the Hearing:
 - To hear testimony and evidence so that the decision-maker can determine facts under a standard of evidence;
 - Apply those facts to the policy, and
 - Issue a written determination resolving the formal complain and imposing discipline/remedial measures as necessary.
- No specific requirements on the structure of the hearing or the duration of the hearing.

Live Hearings (cont'd)

Requirements of Live Hearing

- Live hearings are required to be
 - In person; or
 - Virtually, upon request
- Institutions must obtain an audio/audio visual recording or transcript of the hearing and make it available for both parties for inspection and review.

Live Hearings (cont'd)

Nuts and Bolts of the Live Hearing

- Attendance at the Live Hearing
 - Decision-Maker
 - Necessary institutional personnel or institutional advisor (i.e. legal)
 - Parties
 - Party's advisor
 - Witnesses (when called to testify)
 - Support persons for parties, if permitted by institution
- Who Administers the Live Hearing
 - Decision-Maker
 - Single Person or Hearing Panel

Example of How Hearing Could Work

Institution's Discretion



Grievance Process

CONFLICT OF INTEREST BIAS

akerman

Conflicts of Interest and Bias

- New Regulations require that respondent be presumed *not responsible* until the conclusion of grievance process.
- Parties may choose which individual should serve as their advisors, including friends, family, attorneys, or other trusted individuals.
- In the event of conflict between a union contract and the regulations, the regulations control.

Governing Principles of Grievance Process

- No stereotypes based on party's status as complainant or respondent.
- Equitable treatment of complainants and respondents.
- Conflict and bias-free institutional participants.

Impermissible Stereotype Examples

- “There are no false rape reports, complainant must be believed.”
- “Anyone who drinks that much, must have wanted to have sex.”
- “The fact that respondent has hired a lawyer seems guilty to me.”
- “People dating can't commit sexual assault against each other.”

Defining Conflict of Interest

- When an individual has a material connection to a dispute, or the parties involved, such that a reasonable person would question the individual's ability to be impartial (*not applied to advisors*).
- May be based on prior or existing relationships, professional interest, financial interest, prior involvement, and/or nature of position.

Grievance Process



EVIDENCE

What Standard of Proof is Used?

- Prior regulations required more lenient Preponderance of Evidence (“50% plus a feather”)
- Now: University must choose either
 - ØPreponderance of the evidence, *or*
 - ØClear and convincing evidence

Once selected standard must be applied uniformly in all cases, regardless of identity of respondent

Standard of Proof

- Institution must provide written notice to parties on whether the standard to be used to determine responsibility is the preponderance of the evidence or the clear and convincing evidence standard.
- Institution must apply same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty.
- Institution must apply same standard of evidence to all formal complaints of sexual harassment.

Standard of Evidence Used

- Cross-Exam questions must only relate to the incident in question
- A complainant's prior sexual behavior is irrelevant (unless questions or evidence meet one of two exceptions):
 - Øquestion or evidence about sexual behavior is offered to prove that someone other than the respondent committed alleged misconduct
 - Ørelates to sexual behavior between complainant and respondent and offered to prove consent
- Information protected by any legally recognized privilege cannot be used
- No party's treatment records may be used without that party's voluntary, written consent

What is Relevance?

Evidence is relevant if:

1. It has a tendency to make a fact more or less probably than it would be without the evidence; and,
2. The fact is of consequence in determining the action.



Who Determines Relevance?

- Decision-maker determines whether all questions meet relevance standard.
- Decision-maker must screen questions for relevance and resolve objections.
- Decision-maker must explain any decision to exclude a question based on relevance grounds.

Standard of Evidence

- Statements not subject to cross-exam in postsecondary institutions cannot be relied upon by decision-maker.
- Evidence that is duplicative of other evidence may be deemed irrelevant.
- Exculpatory and inculpatory evidence must be given same weight.
- Relevance must be determined within scope of rape shield protection.



Relevant or Not?

Student A has accused Student B of sexual assault by having sex with Student A after Student A became impaired with alcohol after attending a party. Advisor for Student B wants to ask Student A:

1. Did you send any text messages or make any calls during the party?
2. Didn't Student B leave the party early with other friends?
3. Did you tell your roommate about the incident?
4. Were you treated for alcohol abuse while in high school?
5. Didn't the host of the party ask you to leave because you were caught going into someone else's bedroom with someone other than Student B?

Relevant or Not?

Student A has accused a faculty member of sexual harassment. Advisor for faculty member wants to ask:

1. Haven't you recently boasted about sleeping around with other faculty?
2. Did the faculty member promise you any benefit or threaten you in any way?
3. Isn't it true you told the investigator that the faculty member had only made one offensive remark to you?
4. Did you send any emails or texts to anyone about the faculty member's behavior?

Is Statement Excluded or Included

- Witness gives statement to investigator that witness overheard Respondent bragging about the alleged conduct with Complainant, but witness fails to attend hearing?
- Complainant provides emotional account of sexual harassment and answers questions from advisor. After a break is taken, Complainant leaves the hearing?
- Witness answers questions from hearing officer. After consulting with complainant, advisor for complainant says the advisor has not questions for witness. Advisor for respondent proceeds with cross-examine and the witness changes testimony?

Setting Standards of Behavior at Hearings

- Institution is permitted (and encouraged under regulations) to set appropriate behavior standards, provided they are equally applied and do not violate explicit guarantees from Title IX Regs
- Rules limiting the time of questioning
- Equally applied evidentiary rules consistent with Title IX rights
- Rules governing the conduct of cross-examination by advisors to ensure no party is treated abusively or disrespectfully

Grievance Process

CROSS EXAMINATION

akerman

Cross-Examination

The New Regulations Shift from Conducting Cross-Examination by Hearing Panels to Party Advisors for Postsecondary Institutions

- Promotes fair process where cases turn largely on witness testimony
- Helps resolve factual disputes between parties
- Best measure of testing credibility of claims and witnesses
- Provides decision-maker with ability to observe how parties and witnesses answer questions posed by other party to determine credibility
- Reduces sexual bias in the Title IX grievance process with competing narratives
- Equally benefits complainants and respondents in proceeding with contested facts
- Aids the decision-maker's ability to reach just conclusion of responsibility

130 ©2020 Akerman LLP. All rights reserved.

akerman

Cross-Examination Requirements

- Balancing truth-seeking while mitigating re-traumatization of Complainants.
- Cross-Exam Conducted only by Party Advisors, and not directly by parties themselves. Questions must be asked “*directly, orally, and in real time.*”
- Upon Request, Cross-Exam Conducted in Separate Rooms, so long as appropriate technology permits parties and decision-maker to see and hear the answers.
- Questions about Complainant’s prior sexual behavior or predisposition barred as irrelevant, except under certain circumstances.

Requirements

- Medical or Psychological Records only used with Party’s voluntary, written consent.
- Decision-Maker must determine relevance prior to party or witness answering a cross-examination question.
- Cross-Examination must not be aggressive, abusive, or disrespectful.
- Both parties have the right not to submit to questioning, and such refusal may not be used by decision-maker to draw negative or positive inference.

Choosing to not Submit to Questions

- New regulations permit any party or witness to opt out of being questioned at hearing.
- Decision-Maker must not rely on any statement of that party or witness in reaching a determination on responsibility.
- But....Decision-maker cannot draw any inference about the determination on responsibility based solely on a party's or witness's absence from the hearing or refusal to answer cross-examination questions.

Grievance Process

**FINAL WRITTEN
DETERMINATION**

Final Written Determination

Written Determination

- A decision-maker is required to provide a single written determination after the conclusion of live hearing. The written determination must include the following:
 - Allegations;
 - Description of the procedural steps taken during the grievance process;
 - Findings of fact supporting the determination;
 - Conclusions regarding the application of the institution's code of conduct to the facts;
 - Statement of and rational for the result as to each allegation;
 - Disciplinary sanctions and remedies, if implicated by the determination made; and
 - Procedures and permissible basis for the complainant and respondent to appeal.

Final Written Determination (cont'd)

Who Determines Discipline and Remediation

- The Institution may choose who will issue discipline and/or remediation.
- Institution may choose:
 - Decision-Maker(s) of the hearing may issue discipline/remediation
 - Someone of authority with jurisdiction over the respondent (i.e., Dean of Students, Provost, Director of Human Resources, etc.)
 - Provost
 - Dean of Students
 - Human Resources Manager/Director
 - If referred to someone else, other than Decision-Maker handling the hearing, must occur before the written determination is issued.

Final Written Determination (cont'd)

Determining Discipline and Remedies

• Discipline

- Should vary depending on the nature of the violation found considering aggravating and mitigating factors.
- Like violations should have like punishments (as long as all things are equal).
- Should have educational, punitive, and protective elements.

• Remediation

- If violation is found, take steps to restore or preserve the Complainant's access to education.
- Supportive measures may be used to restore or preserve access to education.
- Not required to provide exact remedy requested, but must provide one that is not clearly unreasonable.

Final Written Determination (cont'd)

Something to Remember

• Important!

- Determination must be based on:
 - an objective evaluation of the evidence,
 - using the appropriate evidentiary standard, and
 - the procedural steps described must conform to the presumption of innocence.

Grievance Process

APPEAL

akerman

Appeal

Title IX Regulations Requirements

- Institutions must offer an appeal to both parties on the following bases:
 - Procedural deficiencies
 - Newly discovered evidence
 - Bias or conflict of interest affected the outcome
 - Other grounds for appeal offered by the institution, so long as they are provided on an equal basis.
- The decision-maker in an appeal cannot be the decision-maker who made the initial determination.

140 ©2020 Akerman LLP. All rights reserved.

akerman

Appeal (cont'd)

Appeal Process

- Deadline – Party must file appeal by deadline.
- **Notice** – Non-appealing party must be notified in writing of the appeal.
- Statements – Both parties must be given a reasonable, equal opportunity to submit a written statement in support of or in opposition to the appeal.
- **Written Decision** – Decision-Maker (appeal officer) must issue a written decision describing outcome and rationale.
- Distribution of Decision – Written decision must be provided simultaneously to the parties.

Appeal (cont'd)

Other things to know!

- Appeals are not an opportunity to re-argue an outcome or seek another review.
- Either party can appeal and not a third party (i.e. parent)
- Institution can not make an appeal of its own determination.
 - Title IX Coordinator does not have the right to request an appeal.
- An institution can require an appealing party to state the grounds for appeal and explain, with some specificity, why the appeal should be granted.
- Institution should set a deadline for appeals - require an appeal to be filed within a reasonable number of days after dismissal or determination.
- Institution may set deadline for any cross appeals.
- Dismissal of an appeal is appropriate if appeal is filed after the reasonable deadline set in the policy or appealing party does not articulate one of the grounds for appeal.

Appeal (cont'd)

Appeals Officer

- Review of the appeal is limited in scope to the grounds stated for appeal and nothing further.
- Must review the appeal, response, and hearing record (only when necessary, dependent on basis for the appeal).
- Is not required to hold a new hearing as part of the appeals process.
- Draft a written decision that includes the outcome of the appeal and rationale for the decision.

Appeal (cont'd)

Appeal Decision

- Appeal denied and determination is made final.
- Appeal granted and determination is changed by the Appeal Officer.
- Appeal is granted and determination is vacated and Appeal Officer sends the matter back for a new investigation and/or hearing as appropriate.





145 ©2020 Akerman LLP. All rights reserved.

akerman

Akerman LLP
700+ Lawyers
25 Offices

akerman.com

©2020 Akerman LLP. All rights reserved.

akerman