

Title IX For Career, Technical & Trade Schools: Advisor and Decision Maker

Presented by
Edward Cramp & Jessica High
Higher Education Practice Group
September 3, 2020

©2020 Duane Morris LLP. All Rights Reserved. Duane Morris is a registered service mark of Duane Morris LLP.
Duane Morris – Firm Offices | New York | London | Singapore | Philadelphia | Chicago | Washington, D.C. | San Francisco | Silicon Valley | San Diego | Los Angeles | Taiwan | Boston | Houston | Austin | Hanoi |
Ho Chi Minh City | Shanghai | Atlanta | Baltimore | Wilmington | Miami | Boca Raton | Pittsburgh | Newark | Las Vegas | Cherry Hill | Lake Tahoe | Myanmar | Oman | Duane Morris – Affiliate Offices | Mexico City | Sri Lanka |
Duane Morris LLP – A Delaware limited liability partnership



Edward M. Cramp

Partner

EMCramp@duanemorris.com

(619) 744 2223



Jessica S. High

Associate

JHigh@duanemorris.com

(619) 744 2214

Today's Presentation

- Recap and Overview of Title IX Sexual Harassment Complaint Process and Definition of Sexual Harassment
- Recap of Informal Resolution and Investigation
- Role of Advisor
- Role of Decision Maker
- Live Hearing
- Impartiality, Conflicts of Interest and Bias



RECAP AND OVERVIEW OF TITLE IX COMPLAINT PROCESS

Recap

- Final Rule published 5-19-2020 (85 Fed Reg 30026)
- Effective August 14, 2020
- Amends 34 CFR Part 106

Prohibits Sex Discrimination

No person in the United States shall on the basis of **sex**, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance

WHAT IS SEXUAL HARASSMENT?

Sexual Harassment

- Conduct on the basis of sex that falls into one or more of the following 3 categories:

1. Quid Pro Quo

- An employee of the school conditioning the provision of an aid, benefit, or service of the school on an individual's participation in unwelcome sexual conduct;

2. Hostile Environment

- 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

3. Sexual Violence

- “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 Violence

- **Sexual Assault:** As defined in 20 U.S.C. 1092(f)(6)(A)(v), means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.
- **Dating Violence:** As defined in 34 U.S.C. 12291(a)(10), means 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: the length of the relationship; the type of relationship; and, the frequency of interaction between the persons involved in the relationship.

Sexual Violence

- **Domestic Violence:** As defined in 34 U.S.C. 12291(a)(8), includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.
- **Stalking:** As defined in 34 U.S.C. 12291(a)(30), means 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.

Title IX Complaint Process Overview

- Formal Complaint Received by Title IX Coordinator
- Optional Informal Resolution Process
- Investigation
- **Live Hearing**
- **Decision and Remedial Measures**
- Appeals



RECAP INFORMAL RESOLUTION

Recap - Informal Resolution

- School employee or 3rd party (must be trained)
- Must have a Formal Complaint
- Title IX Coordinator determines if appropriate
- Discretionary
- Parties can withdraw
- Cannot be used when employee is Respondent
- Complainant and Respondent involved in the outcome



RECAP INVESTIGATION

Recap - Investigation

- Title IX Coordinator, other employee, 3rd party
- Impartial, fair and objective
- Burden on the school
- No gag-orders
- Right to an advisor
- Written notice with sufficient time to prepare
- Equal opportunity for the parties
- Prepare before interviews
- Investigative report



ADVISORS

Advisors

- Parties have the right to select an advisor of their choice
 - Can be but does not have to be an attorney
- Only required at live hearing
 - Cross-examination must be conducted by an advisor and not by the parties directly
- If the party does not have an advisor, the school must provide, without charge, an advisor of the school's choice

Selecting an Advisor

- Party provided
 - Family member
 - Friend
 - Attorney
 - School employee
- If school-selected can be
 - Other school employee
 - Third party

Advisor Training

- None required by Title IX Final Rule
- Advisors do not need to be free from conflicts of interest or bias to give parties the flexibility to pick an advisor
- Up to the school to determine what training will be provided for school-appointed advisors

Advisor Policies

- School can implement policies regarding advisor conduct, which should be clearly explained at the outset of each interview, hearing, etc.
- Require all participants behave in an orderly manner
- Schools can require advisors to use evidence received for inspection and review as well as the investigative report only for purposes of the grievance process

Advisor Limitations

- Parties are expected to ask and respond to questions on their own behalf during investigation
- Advisors cannot disrupt proceedings
- Maintain privacy of records shared - prohibited from sharing with third parties or disclosed publicly

DECISION MAKERS

Selecting a Decision Maker

- School employee or 3rd party
- Can be more than one person - panel
 - If there is a panel, appoint a Decision Chair
- Cannot be the Title IX Coordinator
- Must be trained

Decision Maker Training

- School's policies and procedures including technology
 - Presumption of innocence
- Definition of Sexual Harassment
- Relevance
- Impartiality, bias and conflicts of interest
- How to analyze evidence in relation to legal standard
- Determination of responsibility
- Documentation requirements



LIVE HEARING

Elements and Order of a Live Hearing

- Give notice of a date and time for the hearing
- Opening Statements
 - Complainant, Respondent, Complainant Reply (Optional)
- Pre-Hearing Motions
- Presentation of Cases
 - Complainant, Respondent, Rebuttal and Surrebuttal
 - Objections & Motions
- Closing Argument
 - Complainant, Respondent, Complainant Rebuttal

Considerations

- Opening and Closing
 - Consider time limits
 - Can vary based on the complexity of the case
- Motions
 - Listen to arguments
 - Rule on the spot or consider ruling later
 - Ok to accept written motions
- Evidence
 - Consider relevance, but be careful be overly restrictive

Keeping Good Order

- Explain your role as the Hearing Officer- neutral, factfinder, decision maker
- Set expectations for professional behavior
- Set reasonable time limits on opening, closing, arguments of motions, and possibly presentation of evidence
- Be sure that both sides feel they were fairly heard
- Maintain a "game face" during the hearing
- Provide regular breaks

Separating the Parties

- At the request of either party, the school will provide for the entire live hearing (including cross-examination) to occur with parties located in separate room
 - Technology enabled so parties can see and hear each other
- At the school's discretion, live hearing can be conducted virtually

Refusing Cross-Examination

- If a party does not submit to cross-examination at a live hearing, the Decision Maker cannot rely on that party's statements in reaching a determination
- Decision Maker also cannot draw an inference regarding responsibility based solely on that party's absence from live hearing

Relevance

- Determined by Decision Maker (with explanation)
- Evidence is relevant if it is pertinent to proving whether facts material to the allegations are more or less likely to be true
 - Repetition of the same question is irrelevant
- A Complainant's sexual predisposition or prior sexual behavior is not relevant, unless:
 - Offered to provide that someone other than the Respondent committed the alleged conduct; or
 - To prove consent

Evidence

- Types:
 - Direct
 - Circumstantial
 - Character Evidence
 - Inculpatory
 - Exculpatory
- Limitations – cannot rely on or seek information protected under a legally recognized privilege (unless waived)

Making a Determination

- Review the school policy
- Review the evidence
- Assess credibility of evidence and witness statements
 - Credibility = assessing the extent to which you can rely on the statement
- Assess consistency of the story
- Evaluate evidence in light of standard of evidence

Written Determination

- Use published standard of evidence
- Identify the allegations constituting Sexual Harassment
- Describe procedure from formal complaint through hearing
- Make findings of fact and conclusions
- Provide a rationale for the outcome on each allegation and imposition of any sanctions
- State the procedures and allowable bases for any appeal
- Be provided simultaneously to both parties

Sanctions

- Determined by Decision Maker
- Imposed on the Respondent
- Reasonable based on the severity of the behavior
- May be educational
- Determine what is appropriate based on the case specifics
- Examples: warning, suspension, termination, no contact, additional training

Remedies

- Title IX Coordinator is responsible for implementation
- Required to be provided to a Complainant when a Respondent is found responsible
- Must be designed to maintain Complainant's equal access to education and may include supportive measures
- Remedies do not need to be non-disciplinary or non-punitive and do not need avoid burdening the respondent

IMPARTIALITY, CONFLICTS OF INTEREST & BIAS

Fair and Impartial

- § 106.45 requires recipients to adopt a grievance process where Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions are free from conflicts of interest and bias and are trained to serve impartially without prejudging the facts at issue

Fair Grievance Process

- All persons involved in grievance process
 - Must be free from conflicts of interest or bias against Complainant and Respondent
 - Must receive training on:
 - Definition of sexual harassment
 - Grievance process
 - How to serve impartially
 - How to make relevancy determinations

Impartiality

- Cannot have a conflict of interest or bias for or against Complainants or Respondents generally or an individual Complainant or Respondent

Conflict of Interest

- When an individual has competing interests or loyalties
- Potential to reap personal gain from decisions, actions or inaction
- Inclination to filter decisions through lens of self-interest

Bias

- Prejudice in favor of or against an individual or situation
- Disproportionate weight in favor or against certain facts that prevents objectivity
- Insensitivity to facts that otherwise would be significant
- Bias can represent any variable that improperly influences a finding or sanction

Roles

Title	Responsibilities	Training	Status
Title IX Coordinator	Intake reports and Formal Complaints, provide supportive measures	Sexual harassment definition, scope of education program, how to conduct an investigation, grievance procedure (hearing, appeals, informal resolution), impartiality	Must be school employee Cannot serve as decision-maker
Investigator	Conduct a fair, objective and impartial investigation	Impartiality, how to conduct an investigation, issues of relevance, rape shield, report writing	Employee or 3 rd party Cannot serve as decision-maker
Decision-Maker	Evaluate evidence, determine relevancy during hearing, make and issue determination	Sexual harassment definition, hearing process, technology to be used in hearing, issues of relevance, evidence, rape shield	Employee or 3 rd party Cannot serve in any other capacity
Advisor(s)	Question opposing party and witnesses during hearing	None required	Party provided Employee or 3 rd party
Informal Resolution Facilitator	Conduct informal resolution process	Informal resolution process	Employee or 3 rd party

QUESTIONS AND DISCUSSION



Thank You!

©2020 Duane Morris LLP. All Rights Reserved. Duane Morris is a registered service mark of Duane Morris LLP.
Duane Morris – Firm Offices | New York | London | Singapore | Philadelphia | Chicago | Washington, D.C. | San Francisco | Silicon Valley | San Diego | Los Angeles | Taiwan | Boston | Houston | Austin | Hanoi |
Ho Chi Minh City | Shanghai | Atlanta | Baltimore | Wilmington | Miami | Boca Raton | Pittsburgh | Newark | Las Vegas | Cherry Hill | Lake Tahoe | Myanmar | Oman | Duane Morris – Affiliate Offices | Mexico City | Sri Lanka |
Duane Morris LLP – A Delaware limited liability partnership