August 27, 2020

Offices of Equity and Inclusion and General Counsel

Title IX Coordinators Training: Revised System Procedure 1B.3.1

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Outline of Today's Presentation

- Review key changes to System Procedure 1B.3.1 made to comply with the new Title IX regulations
  - Key definitions.
  - Intake and Determining what Policy and Procedure to use.
  - Supportive Measures.
  - Some new Investigatory Requirements.
  - Live Hearing Preparation and Process
  - Decision-maker role.
  - Advisors.
- Deeper Dive on Intake Process
- Questions/Discussion

What Is Title IX?

- Title IX is a federal civil rights law enacted to eradicate sex discrimination, in general, in all facets of the educational setting
- By accepting federal funds, institutions agree not to discriminate on the basis of sex or allow the separation of the sexes in curriculum and extracurricular activities, unless permitted by the statute
- Failure to comply may result in liability on the part of the institution

Title IX

- No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.
  - *20 U.S.C. §1681 (1972)*

Timeline

- November 16, 2018 US Department of Education (DOE) Notice of Proposed Rule-making
- Proposed rule officially published in the federal register on November 29, 2018
- 60 Day Comment Period = January 28, 2019
- Final Rule = May 6, 2020
- Effective Date = August 14, 2020 (to incidents occurring on or after that date)
- Response = revised System Procedure 1B.3.1

Overall Process Map

- Old 1B.3.1 Procedure
  - Complaint, Investigation, Decision-maker, internal appeal, Ch. 14 if serious student sanction.
- New 1B.3.1 Procedure
  - Formal Complaint, Investigation (with enhanced requirements), Ch. 14, Decision-maker, internal appeal.
- Also consider Policy 1B.1 and student conduct processes for non-Title IX sexual harassment and jurisdiction
- Basic legal responsibility = deliberate indifference standard

Three Quick Deliverables (or To Do's)

- Update your web-sites and information to the new System Procedure 1B.3.1
- Notice of Title IX Coordinator
- Notice of Non-Discrimination

Notice of Title IX Coordinator

- Each college and university must notify applicants for admission and employment, students, employees, and all unions holding collective bargaining agreements with the college or university of the name or title, office address, electronic mail address and telephone number of the employee or employees designated at the Title IX Coordinator

Notice of Non-Discrimination

- Each college and university must notify applicants for admission and employment, students, employees and all unions holding collective bargaining agreements with the college and university that the college or university does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by Title IX not to discriminate in such a manner. Inquiries about the application of Title IX may be referred to the Title IX Coordinator and/or the United States Department of Education.

Key Elements of the New Procedure

Definition of Title IX Sexual Harassment

- Conduct based on sex that occurs in a college or university's program or activity in the United States that satisfies one or more of the following:
  - An employee of the college or university conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
  - 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 college or university's education program or activity; or
  - Sexual assault, dating, intimate partner, and relationship violence; and stalking as defined in Board Policy 1B.3.

Formal Complaint

- Defined as:
  - Document filed by a complainant or signed by the Title IX Coordinator alleging Title IX sexual harassment against a respondent and requesting investigation.
  - At the time of filing a formal complaint of Title IX sexual harassment, a complainant must be participating in or attempting to participate in the education program or activity of the college or university with which the formal complaint is filed.
- See template

Educational Program or Activity

Includes locations, events, or circumstances over which the college or university exercises substantial control over both the respondent and the context in which the Title IX sexual harassment occurred, and also includes any building owned or controlled by any officially recognized student organization of the college or university.

Title IX Coordinator

- Employee designated by the president to coordinate the college or university's efforts to comply with its Title IX responsibilities and Board Policies 1B.1 and 1B.3
- This does not have to be one person – can have deputy Title IX Coordinators, Investigators, etc

Supportive Measures

- Designed to preserve or restore a student's access to the education program or activity, with or without a formal complaint ("non-disciplinary, non-punitive individualized services" available to both complainant and respondent).
- Examples
  - Academic course adjustments.
  - Counseling.
  - No-contact orders (mutual).
  - Dorm room reassignments.
  - Leaves of absences.
  - Class Schedule changes.

Reporting

- Internal Reporting = New Procedure is the same as Old Procedure (3 buckets)
  - Required Reporters.
  - Confidential Resources (not required to internally report).
  - Encouraged Reporters.
- Clarifies that reporting is to Title IX Coordinator
- New Information on External Mandatory Reporting

Investigation and Resolution

- Title IX Coordinator
  - Discuss options with complainant – supportive measures, referral to law enforcement, filing a formal complaint, pursuing other policy processes (1B1, student conduct, etc.)
  - If formal complaint:
    - Determine Jurisdiction.
    - Conflicts.
    - Information to complainant and respondent (see form notice of allegations).

Conflict of Interest

- Title IX Coordinator to identify any real or perceived conflict of interest in proceeding as the Title IX Coordinator, for the decision-maker, and/or for any person designated to facilitate an informal resolution
- Assign new person

Informal Resolution

- School may facilitate an informal resolution process at any time before reaching a determination regarding responsibility provided that each party provides their voluntary, written consent to the process.
- Any party may withdraw from informal resolution process and return to formal complaint process.
- Informal resolution shall not be used to resolve allegations that an employee sexually harassed or assaulted a student.

Interim Actions

- Employee reassignment or administrative leave
  - Discuss with HR/LR
- Student summary suspension
- No real change to prior practice = note that the regulations use the term “emergency removal.”

No Basis to Proceed Determinations: Title IX Sexual Harassment

- Must dismiss formal complaint if:
  - The conduct would not constitute Title IX Sexual Harassment, even if proved;
  - The conduct alleged did not occur in the college or university's educational program or activity;
  - The conduct did not occur against a person in the United States
- May dismiss formal complaint if:
  - The complainant, at any time, notifies the Title IX Coordinator that they would like to withdraw the formal complaint;
  - The respondent is no longer enrolled or employed by the institution; or
  - Specific circumstances prevent the college or university from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

Dismissals, continued

- And remember -- at the time of filing a formal complaint of Title IX sexual harassment, a complainant must be participating in or attempting to participate in the education program or activity of the college or university with which the formal complaint is filed.
- Must promptly notify both the complainant and the respondent of any dismissal.
- May consider other policy avenues (1B.1, student conduct, etc.).

Investigatory Process

- Essentially the same as the 1B.1.1 investigatory process, **BUT:**
  - Required presumption of innocence notice in notice of allegations (see template).
  - Consider both inculpatory and exculpatory evidence.
  - Not use questions or evidence that involve a legally recognized privilege.
  - Before completing investigation report – send to both the complainant and respondent and their advisors, if any, the evidence subject for inspection and review. Both parties must have at least 10 calendar days to submit a written response to the evidence, which must be considered before completing the report.

Timely Completion

- Timely completion after a complaint = no strict timeline
- Reasonable cause for delay includes considerations such as:
  - Absence of a party, an advisor, or a witness;
  - Concurrent law enforcement activity;
  - The need for language assistance or accommodation of disabilities.

Formal Hearing

If complaint not resolved then:

- Prepare investigation report; and
- Refer the matter for a formal hearing.
- At least ten (10) days prior to formal hearing, parties and advisors, receive the investigation report for their review and response (consult AAG as this should be done through the Ch. 14 process).

Formal Hearings for Title IX sexual harassment complaints conducted by the Office of Administrative Hearings.

- Notify assigned Assistant Attorney General or OGC that Ch. 14 required.
- Assigned Assistant Attorney General will initiate and arrange for the Ch. 14.
- See information sheet on Ch. 14 hearings.
- Costs.

Standard of Evidence

- Remains preponderance of the evidence.

Decision-maker

- ALJ prepares report and recommendation
- Decision-maker receives report and recommendation and decides:
  - Whether the policy has been violated; and
  - On appropriate sanctions if the policy has been violated.
  - Issues a written determination that includes:
    - Identification of allegations;
    - Description of procedural steps;
    - Findings of fact supporting the determination;
    - Conclusions as to responsibility and any sanctions;
    - Procedures for appeal.
  - The required elements may be satisfied by adopting all or portions of the report and recommendation.

Appeals

- Within ten (10) calendar days
- Both parties may appeal final decision and an appeal of a dismissal of a formal complaint
- Grounds for appeal
  - Procedural irregularity;
  - New evidence;
  - Conflict of interest.

When Student Discipline Final

- Either
  - Date of written determination on appeal; or
  - If no appeal, the date on which the appeal would no longer be timely.

Advisors

- Process Advisors
  - Available to provide guidance on hearing process
  - Both complainant and respondent may have an advisor of their choice;
  - Campus will provide if either party does not have their own.
  - Can be but not required to be an attorney
- Advisors at the Ch. 14 Hearing.
  - May also be the process advisor?
  - Both complainant and respondent may have an advisor of their choice.
  - Campus will provide if either party does not have their own.

Education and Training

- Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must be made publically available on the college or university's website.

Document Retention

- 7 years.

Deeper Dive on Intake

Intake

- Initial thoughts on jurisdiction and mandatory and discretionary dismissals.
- Explain formal complaint process for Title IX sexual harassment.
- Discuss policy options with complainants.
- Consider wishes of complainant but also interest of the college or university.
- Remember basic legal responsibility = deliberate indifferent standard.

Notice of Allegations

- Upon formal complaint, provide written notice to both parties including:
  - Statements that:
    - Respondent is presumed not responsible
    - Determination of responsibility is made at the conclusion of the 1B.3.1 process
    - Right to advisor of choice who may be but is not required to be an attorney
    - Parties may inspect and review evidence
    - Inform parties of prohibiting knowingly making false statements

Interim Actions

- Institution may remove a respondent from the education program or activity on an emergency basis if institution:
  - Undertakes an individualized safety and risk analysis;
  - Determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations justifies removal; and
  - Provides the respondent with notice and an opportunity to challenge the decision immediately following removal.

Offering Supportive Measures

- Non-disciplinary, non-punitive individualized services
- Offered as appropriate, as reasonably available, and without fee or charge to complainant or respondent
- Before or after the filing of a formal complaint or where no formal complaint has been filed

Supportive Measures (cont.)

- Designed to restore or preserve equal access to education program or activity, without unreasonably burdening the other party
- Includes measures designed to protect safety
  - Of all parties
  - Educational environment
  - Deter sexual harassment
- Must maintain as confidential as long as confidentiality does not impact ability of the institution to provide measures

Informal Resolution Path

- May never require the parties to participate in an informal resolution process.
- May not condition enrollment/continuing enrollment, employment/continuing employment, or enjoyment of any other right on waiver of the right to an investigation and adjunction of formal complaint.
- May not offer or facilitate informal resolution to resolve allegations that an employee sexually harassed a student.

Informal Resolution (cont.)

- Any time prior to determination, may facilitate informal resolution process if:
  - Provide parties with written notice disclosing
    - Allegations
    - Requirement of the informal resolution process including circumstances when it precludes the parties from resuming a formal complaint for the same allegations
    - Consequences resulting from participating in the informal resolution process, including records that are maintained and could be shared
    - Obtain parties' voluntary written consent to informal process

Conclusion of the Interview

- Thank the complainant for bringing the issue forward
- Give them your contact information in case they remember anything
- Explain future procedures and timeline
- Explain retaliation policy and procedure for reporting

Questions & Answers

Please Chat in your questions to the host or the panelists.

Websites

Office of Equity and Inclusion
https://www.minnstate.edu/system/equity/

Office of General Counsel
http://www.minnstate.edu/system/ogc/