

TITLE IX COORDINATOR TRAINING: INTAKE TO INVESTIGATION

August 17-18, 2022





TITLE IX TRAINING REQUIREMENTS

Who must be trained?

- Institutional Title IX Coordinator(s), investigators, decision-makers (including those responsible for an institution's determination and those responsible for handling appeals), and any person responsible for facilitating informal resolutions

Training topics must include:

- Title IX's definition of "sexual harassment"
- The scope of an institution's "education activity or program"
- How to conduct an investigation and grievance process (including hearings, appeals, and informal resolutions)
- How to remain impartial, including avoidance of prejudgment of the facts, conflicts of interest, and bias
- For decision-makers:
 - Issues of relevance of questions and evidence, including when questions and evidence about a complainant's sexual predisposition or prior sexual behavior are not relevant.
 - How to use any technology utilized at live hearings
- For investigators:
 - Issues of relevance in order to create an investigative report that fairly summarizes relevant evidence



Bias and Conflicts of Interest

- Title IX personnel (Title IX Coordinators, investigators, decision-makers, persons designated to facilitate informal resolutions) cannot have conflicts of interest for or against complainants or respondents generally, or for a complainant or respondent individually.
- Existence of bias should be based on a reasonable person standard.
- Types of bias to be aware of and avoid:
 - Sex-stereotypes as evidence.
 - Prior affiliations as evidence.
 - Evaluating bias based on outcomes.

Avoiding Bias and Conflicts of Interest



- Treat complainants and respondents equitably.
- Respondent is presumed not responsible until the grievance process determines otherwise.
- Avoid using stereotypes in training materials, policies, and procedures.
- Remain impartial and avoid prejudgment of the facts at issue.
- Treat parties as individuals, not as members of a class.
- Abide by the relevancy standards when examining evidence.
- Ensure both parties are provided the opportunity to review and present evidence, including witness testimony.



BOR Policy Definitions

- **Actual Knowledge:** Notice of sexual harassment or allegations of sexual harassment to a Title IX coordinator, any employee with the authority to institute corrective measures, or any employee at the Special Schools. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only employee of the institution with actual knowledge is the respondent. BOR Policy 1:17.B.1.
- **Complainant:** An individual who is alleged to be the victim of conduct that could constitute sexual harassment. 1:17.B.2.
- **Education Program or Activity:** Any locations, events, or circumstances taking place in the United States where the institution exercised substantial control over both the respondent and the context in which the alleged violation occurs—including locations that correspond to land, buildings, facilities, and other property in the possession of, or owned, used, or controlled by the, the institution, and adjacent streets and sidewalks. For purposes of BOR Policy 1:17, the term also includes any building owned or controlled by a student organization that is officially recognized by the institution. 1:17.B.5.



More on “Education Program or Activity”...

- Includes all incidents of sexual harassment occurring on an institution’s campus.
- Includes off-campus incidents under certain conditions:
 - If an institution exercises substantial control over both the respondent and the context of the alleged sexual harassment.
 - If the alleged sexual harassment occurs at an off-campus building owned or controlled by a student organization recognized by the institution (i.e. a fraternity or sorority).
 - If an incident involves members of a student organization recognized by the institution, but does not take place at the organization’s building or property, the incident should be reviewed in the same manner as an off-campus incident: whether the institution exercised substantial control over the respondent and the context of the alleged harassment.

1:17.B.5; p. 30197.

More on “Education Program or Activity”...



- What constitutes “substantial control”?
 - Multiple factors, such as whether the institution funded, promoted, or sponsored the event or circumstance in which the alleged harassment occurred, should be considered but no single factor is determinative. p. 30197.
- The preamble to the updated regulations notes that statutory and regulatory definitions of “program or activity” encompass “all of the operations of” institutions, and such “operations” may include computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of an institution, such that certain online harassment may fall within the scope of Title IX. p. 30202 (citing 20 U.S.C. 1687; 34 CFR 106.2(h))



BOR Policy Definitions

- **Formal Complaint:** A document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the institution investigate the allegation of sexual harassment. 1:17.B.6.
- **Respondent:** An individual that has been reported to be the perpetrator of conduct that could constitute a violation of BOR Policy 1:17. 1:17.B.8.
- **Sexual Harassment:** Conduct on the basis of sex that satisfies one or more of the following:
 - An employee of an institution conditioning the provision of education benefits on participation in unwelcome sexual conduct (i.e. quid pro quo); or
 - Unwelcome conduct that a reasonable person would determine is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the institution's education program or activity; or
 - Sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA), the definitions of which are provided in BOR Policy 1:17.1.1:17.B.9.



Other Key Terms

- **Supportive Measures:** Non-disciplinary, non-punitive individualized services offered to a complainant or respondent. 1:17.B.10.
- **Deliberately Indifferent:** A manner or response that is clearly unreasonable in light of the known circumstances. 1:17.C.2.; 1:17.C.10.2.
- **Preponderance of the Evidence:** The standard for determining responsibility. A preponderance of the evidence indicating responsibility is shown if, in considering all the evidence, it is more likely than not that the respondent is responsible for the alleged conduct. 1:17.C.2.2.9.



Required Notices for Posting of Publication by Universities

- Designated Title IX Coordinator
- Policy Contents
- Complaint Procedures
- Training Materials
- Publications



Notice of Designated Title IX Coordinator

- An institution must designate at least one Title IX Coordinator. 1:17.C.8.1.
- An institution must notify applicants for admission and employment, students, employees, and all professional organizations holding professional agreements with the institution of the Title IX Coordinator's information, including:
 - Name/Title;
 - Office address;
 - Email address; and
 - Telephone number.1:17.C.8.3.
- Institutions must prominently display the Title IX Coordinator contact information on their website and in any handbook or catalog made available to persons required to receive notice. 1:17.C.8.3; 106.8(b)(2)(i).



Notice of Contents of TIX Policy

- Any applicable Title IX policy must be included on an institution's website, along with the Title IX Coordinator contact information. 1:17.C.8.3.
 - The policy should include:
 - a statement that the institution does not discriminate on the basis of sex in education program or activities operated by the institution,
 - that Title IX prohibits such discrimination.
 - that the prohibition on discrimination extends to admission and employment,
 - that inquiries regarding the application of Title IX may be referred to the Title IX Coordinator (or the Assistant Secretary of Education).
- 1:17.C.8.3; 106.8(b)(1).

Notice of Complaint Procedures



- Institutions must provide notice of the complaint procedures and process, including how to report or file a complaint of sexual harassment or discrimination, and how the institution will respond.
- Complaint procedures are specified in BOR Policy 1:17 and include:
 - Institutional response requirements and procedures:
 - Supportive measures;
 - List of possible disciplinary sanctions or remedies in the event of a violation,
 - Receipt of a formal complaint;
 - Investigations;
 - Hearings;
 - Petitions for Administrative Review;
 - Informal Resolutions.



Misc. Institutional Obligations

- An institution is required to make Title IX training materials available on its website. 1:17.C.10.1.4
- An institution must not use or distribute publications that state that the institution treats applicants, students, or employees differently on the basis of sex, except as such treatment is permitted by Title IX. 106.8(b)(2)(ii).



Reports vs. Formal Complaints

- Both reports (i.e., something less than a formal complaint constituting actual knowledge) and formal complaints trigger an institution's obligation to respond. 1.17.C.2.1.2.
 - Report = supportive measures
 - Formal complaint = supportive measures/investigation/grievance process
- Any individual can report sexual harassment (whether or not they are the alleged victim), but only an alleged victim of conduct that may constitute sexual harassment proceeds through the process as a complainant. 106.8(a); 1:17.B.2.
- Anonymous "reports" do not constitute formal complaints

Duty to Respond



- An institution with actual knowledge (whether from a report or formal complaint) of sexual harassment in its education program or activity must respond promptly in a manner that is not deliberately indifferent, or not clearly unreasonable in light of the known circumstances. 1:17.C.2.
 - Which employees count as having “actual knowledge” for the institution to act?
 - The BOR definition of actual knowledge includes the Title IX Coordinator and employees of an institution who have the authority to institute corrective measures on behalf of the institution, or any employee of the Special Schools. 1:17.B.1.
 - Whether an employee has authority to institute corrective measures may depend on the institution’s management structure and/or the employee’s role and duties. p. 30039.
 - If the only employee with actual knowledge of alleged sexual harassment is the respondent, an institution is not considered to have actual knowledge. 1:17.B.1.



Response Obligations

- Complainants and respondents must be treated equitably, through the offer of supportive measures, without or without the filing of a formal complaint, and when a formal complaint is filed, by following the BOR grievance process outlined in Policy 1:17 prior to imposing any disciplinary sanctions or actions that are not supportive measures.
1:17.C.2.
- The process must be completed in a reasonably prompt timeframe.
 - Deadlines occurring prior to a hearing on a formal complaint may be extended by an institution for good cause and with written notice to the parties stating the reason for granting an extension.
1:17.C.2.2.10



Response Obligations

- Upon receipt of any report of sexual harassment, the Title IX Coordinator must:
 - Promptly contact the complainant to discuss the availability of supportive measures;
 - Consider the complainant's wishes with respect to the supportive measures;
 - Inform the complainant about the availability of supportive measures with or without the filing of a formal complaint;
 - Explain to the complainant the process for filing a formal complaint.

1:17.C.2.1.2.
- An institution may need to undertake initial fact-finding (not a formal investigation) to determine whether a report falls within the scope of Title IX.



Response Obligations

- If a formal complaint is filed, an institution must initiate the grievance process.
 - Formal complaints are those that:
 - Allege sexual harassment;
 - Are made by person (or their parent) who allegedly experienced the harassment and is participating or attempting to participate in an education program or activity;
 - Are signed by the complainant or the Title IX Coordinator;
 - Are made “against a respondent”; and
 - A respondent may be unidentified in a formal complaint. The institution must still investigate, as the investigation may identify a respondent. The identified parties would then receive the required notice. If the investigation did not identify a respondent, the complaint would be dismissed.
 - Request an investigation

1:17.C.3.1



Response Obligations

- When sexual harassment has been alleged and the report falls under Title IX, but no formal complaint has been filed, the Title IX Coordinator must either:
 - Close the report, or
 - Sign a formal complaint and initiate the Title IX grievance process
(circumstances warranting this action will likely occur on rare occasion and legal counsel should be consulted before proceeding in this fashion).
- A Title IX coordinator may file a formal complaint if the circumstances require the filing to protect the institution's educational community and/or if not doing so would be deliberately indifferent to a report of sexual harassment.
p. 30132.



Written Notice of Formal Complaints

- When a formal complaint is filed, an institution must provide written notice **within five working days** to the known parties. The notice must contain:
 - Notice of the allegations of sexual harassment potentially constituting sexual harassment, including sufficient details known at the time and with sufficient time to prepare a response before any initial interviews.
 - Sufficient details include:
 - Identities of involved parties, if known;
 - Conduct allegedly constituting sexual harassment;
 - Date and location of the alleged incident, if known.

1:17.C.3.1-3.1.1



Written Notice of Formal Complaints

- Written notices must also contain:
 - 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.
 - A statement informing the parties that they may have an advisor of their choice who may be, but is not required to be, an attorney; that the advisor may accompany the party to related meetings or proceedings; and that the party and their advisor may inspect and review evidence obtained as part of the investigation that is directly related to the allegations raised in the formal complaint.
 - If any restrictions on the role of or participation by an advisor have been established, a statement informing the parties of those restrictions shall also be included.
 - A statement of the maximum disciplinary sanction(s) that may be imposed on a respondent following a determination of responsibility by the institution.
 - The process for informal resolution of the complaint.
 - A statement informing the parties of any applicable provision in policy that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

1:17.C.3.1.2-3.1.5; 1:17.C.7.1-7.1.3



Misc. Complaint Issues

- If, during the course of an investigation, an institution decides to investigate allegations about the complainant or respondent that were not included in the original notice of the formal complaint, the institution must provide notice of the additional allegations to those parties whose identities are known.
1:17.C.3.2
- Where allegations of sexual harassment arise out of the same facts or circumstances, an institution may consolidate formal complaints alleging misconduct:
 - By one complainant against more than one respondent, or
 - By more than one complainant against one or more respondents.1:17.C.3.3.



Mandatory Dismissal

- **Within 10 days** of receiving a formal complaint, the institution must determine if the conduct alleged, if taken as true, would constitute sexual harassment, and if the allegations contained in the formal complaint occurred in the institution's education program or activity.
- An institution **shall** dismiss a formal complaint if the allegations, if taken as true, either
 - Fail to constitute sexual harassment; or
 - Did not occur in the institution's education program or activity.

1:17.C.3.4-3.4.2.



Discretionary Dismissal

- An institution may dismiss a formal complaint or any allegations therein if, at any time during the investigation or hearing, one of the following occurs:
 - A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein;
 - The respondent is no longer enrolled or employed by, or otherwise affiliated with, the institution;
 - Specific circumstances prevent the institution from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

1:17.C.3.5.



Notice of Dismissal

- If an institution dismisses a formal complaint, the institution has **five working days** to send a written notice of dismissal simultaneously to the parties.
 - The notice of dismissal should contain:
 - Reasons for the dismissal; and
 - The procedure for parties to petition for administrative review of the dismissal.
- 1:17.C.3.6; 1:17.C.6.



Misconduct Outside the Scope of TIX

- Allegations of harassment not constituting sexual harassment will be handled pursuant to the appropriate policy:
 - Protected class-based harassment - BOR Policy 1:18.
 - Student harassment – BOR Policy 3:4.
 - Non-protected class-based employee harassment – applicable employee class conduct/disciplinary policy



Supportive Measures

- Supportive measures are non-disciplinary, non-punitive individualized services offered at no cost.
 - Offered where no formal complaint has been filed, or before or after a formal complaint is filed.
- Should be designed to restore or preserve equal access to the institution's education program or activity without unreasonably burdening the other party and may include measures designed to protect the safety of all parties or the institution's educational environment, or to deter sexual harassment.

1:17.C.2.1.



Supportive Measures

- May include:
 - Counseling;
 - Extension of deadlines or other course-related adjustments;
 - Modifications of work or class schedules;
 - Campus escort services;
 - Mutual restrictions on contact between the parties;
 - Changes in work or housing locations;
 - Leaves of absence;
 - Increased security and monitoring of certain areas of campus;
and/or
 - Other similar measures.

1:17.C.2.1.1.



Supportive Measures

- Supportive measures offered by an institution to a complainant or respondent must be kept confidential, to the extent that maintaining such confidentiality would not impair the ability of the institution to provide the supportive measures. 1:17.C.2.1.3.
- Do not have to be “proportional to the harm alleged” or constitute the “least burdensome measures” possible but cannot impose an unreasonable burden to the other party. p. 30183.
- Fact-specific, but should not unreasonably burden one party over the other (remember presumption of non-responsibility).

Supportive Measures



- Factors to consider regarding burden on the parties
 - “Unreasonable burden” standard should be applied to access to all education opportunities and benefits
 - Supportive measures should not amount to sanctions (non-punitive)
 - Scope of the supportive measure in relation to the burden on the parties
 - Removal of a respondent from an institution’s education program or activity on an emergency basis may be permitted under certain circumstances.
 - One-way or mutual no-contact orders may be appropriate in certain circumstances.

1:17.C.2.1.4; pp. 30182-84.



Supportive Measures

- Title IX Coordinator has responsibility to coordinate the implementation of supportive measures:
 - Should promptly contact the complainant,
 - Should consider the complainant's wishes with respect to supportive measures, and
 - Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint.
1:17.C.2.1.2.
- An institution must document whether or not supportive measures were provided, along with a basis for the decision. 1:17.C.10.2.



Informal Resolutions

- When can informal resolutions be utilized?
 - A complaint has already been filed;
 - the complaint does not include allegations against an employee filed by a student;
 - both parties voluntarily consent to the information resolution in writing; and
 - the institution gives the parties written notice of the allegations containing:
 - The allegations; and
 - The requirements of the informal resolution process, including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including records that will be maintained or could be shared.

1:17.C.7.1-7.1.3.



Informal Resolutions

- Flexible in form:
 - Mediation,
 - Arbitration,
 - Restorative justice, or
 - Other strategies.
 - Do NOT require:
 - Live hearings or cross examination;
 - Provision of advisors or advisor participation in the informal resolution process.
 - May result in any sanction that could be imposed during a formal complaint grievance process.
 - But the respondent has the option with withdraw from information resolution at any time instead of agreeing to a particular sanction.
- pp. 30329, 30401-407.



Informal Resolutions

- Informal Resolution Facilitators:
 - Are subject to the same training and impartiality requirements as Title IX Coordinators, investigators, and decision-makers.
 - Could serve as witnesses in a subsequent grievance proceeding:
 - If this possibility was disclosed to the parties in the written notice prior to the start of the informal process.
 - However, South Dakota law declares all mediation communications confidential unless certain exceptions are met.
 - 1:17.C.2.2.5; p. 30401; SDCL 19-13A-4, 19-13A-8.
- An institution may not condition enrollment, employment, or any other right of students or employees on agreeing to an informal process. 1:17.C.7.2.



Relevance

- Why is it important for coordinators to understand relevance?
 - Instruction on relevance is a specific training requirement because it applies in multiple phases of the grievance process.
 - Must be considered during the investigation, hearing, and administrative review phases of the grievance process.
 - An institution bears the burden to ensure that evidence sufficient to reach a determination regarding responsibility is gathered.
 - The objective evaluation of “all relevant evidence,” both inculpatory and exculpatory, is required.
1:17.C.2.2.3; 1:17.C.4.1.
- Relevance is not defined in the regulations, but the preamble refers to relevant evidence as “evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true.” p.30294.

Investigations



- Burden of Proof
 - The burden of proof and burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the institution. 1:17.C.4.1.
 - But equal opportunity shall be provided to the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.
 - An institution cannot institute a “gag order” during investigations—it cannot restrict the ability of either party to discuss the allegations under investigation or to gather/present relevant evidence. 1:17.C.4.3.
- Report
 - The institution is responsible for compiling an investigative report. 1:17.C.4.7. This function has been assigned to dedicated system investigators.



Investigations

- Scope of an Investigation
 - Allegations identified in a formal complaint. 1:17.C.3.1.
 - If the investigation identifies additional allegations and the institution decides to investigate those allegations against the complainant or respondent that fall within the scope of sexual harassment, the institution must provide notice of the additional allegations to the known parties. 1:17.C.3.2.
 - Consolidation of complaints where applicable. 1:17.C.3.3.



Use of Templates

- System templates for the Notice of Complaint and Notice of Hearing were developed and distributed to each campus in August 2020. They continue to be the appropriate templates to compliance with 1:17's notice requirements.



Title IX Overlap with Other Laws

- First, Fifth, Fourteenth Amendments to the U.S. Constitution: The new regulations emphasize that an institution's grievance process must not restrict any right protected by the First Amendment or deprive any party of due process guaranteed by the Fifth and Fourteenth Amendments. 1:17.C.2.2.
- Other areas to consider:
 - FERPA
 - Title VII
 - Title VI
 - Clery Act
 - Violence Against Women Act (VAWA)
 - IDEA
 - Section 504 of the Rehabilitation Act
 - ADA
 - HIPAA
 - Criminal law



2022 Notice of Proposed Rule-Making

- THE PROPOSED RULES ARE NOT IN EFFECT IN ANY WAY AT THIS TIME.
- USEd issued the NPRM on July 12, 2022. The comment period ends September 12, 2022.
 - As of the afternoon of August 16, over 48,000 comments had been provided.
- After the comment period closes, USEd will review and respond to the comments and issue the final rules.
 - For reference, the 2020 rule changes received over 125,000 comments and it took USEd approximately 18 months to review and respond before issuing final rules.