

The Four Corners of Title IX Regulatory Compliance: Intermediate

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Day 2

Corner 2 Issues

Policies—Core Features of Policies Based on Promising Practices

- * Some good policy examples?????
- * Integrate values of institution
- * Clear jurisdictional language
- * Provisions for rapid change
- * Anti-bias language/addresses conflicts of interest
(heavily addressed in Sept. 2017 guidance)
- * Clear definition of consent

Policies Cont'd

- * Clear definitions for harassment v. hostile environment (remember these definitions could change pending new regs)
- * Match procedures to actual practice
- * Appropriate appeal conditions
- * Do not involve least trained as decision-makers (President, etc.)

Policy Revision Process

- * Who should be at the table?
- * How involved should the Title IX coordinator be?
- * When do you need outside help?

What Type of Adjudication Model Should You Use?

Pure Hearing Model

- Traditional model of student conduct adjudication
 - * Can be panel or an administrative hearing
 - * Always think about institutional roles when deciding who will serve in these capacities
- Benefits:
 - Purely internal/community-based remedy
 - Lots of ways parties can participate
 - Offers some versatility

Pure Hearing Model (cont'd)

- Challenges:
 - Logistics
 - Panel selection/training
 - Inconsistencies/bias
 - Lengthy process

Investigation Model

* Advantages:

- Removes the need for an in-person hearing while still allowing for procedural due processes and the opportunities to be heard
- Can be less traumatizing for reporting students due to not having to confront respondent
- Investigation done by trained investigator
- Confidentiality
- Expediency

Investigation Model (cont'd)

- Disadvantages:
 - Resource/staffing concerns
 - Institutional support for investigator/decision-maker
 - Depending on institutional culture, could be tough to implement
 - Separation of powers concerns
 - Some reporting students want to “tell their story, with the respondent present.”
 - Single investigator model may be unlawful in certain jurisdictions at this time—consult counsel.

Hybrid Model

- * Features:

- Combination of hearing model and investigation model
- Can separate roles for maximum effectiveness
- Requires collaboration and trust (deference to fact finder)

Third Party Adjudicator Model

- Advantages
 - True neutral. Independent third party
 - Highly trained
 - Skilled in making factual determinations, weighing evidence, and credibility
- Disadvantages:
 - Cost
 - Availability of skilled personnel in your area
 - Possible lack of understanding of higher education and your institutional culture
 - Formal training may be too legalistic to adapt to college/university fact patterns

“Montana Process”

- * Ways to address harassment that doesn't rise to the level of hostile environment
- * Informal processes
 - * Educational conferences?
- * FIRE/chilling effect?
- * **Dega Bah Case Study**

Investigations

Importance of an Investigation

Conduct Process Alone is Not Enough

“Investigation” means the process used to resolve complaints. There may be different types of “investigations” used to resolve different types of complaints

Must be:

- Adequate
- Reliable
- Prompt
- Impartial

Investigative Overview



Promising Investigative Practices

Know your policy

Document, document, document

Be consistent

Communicate

Assume everything you write or do will be on the front page of the paper

Do not be afraid to do what you think is appropriate but get approval (and document why)

If you didn't write it down, it didn't happen

Be creative: know what factual information you need and figure out how to get it

Investigation Infrastructure

Who oversees investigation?

How are files being stored?

How are investigations tracked and monitored?

Templates

Anticipate and prepare for all problems and challenges

- Documentation
- Storing Evidence
- Working with Law Enforcement
- The Role of Attorneys

Who is the main point of contact?

- Consistent and equal communication

Who makes decisions?

How will you manage investigation failures, mistakes, personnel misconduct?

Intake Process

Threshold assessment: “Is this a Title IX complaint”? Does this meet our standard?

Where are your “eyes and ears”? Is there knowledge on your campus about where to go for Title IX complaints:

- Get creative here: Use social media, speak with the Communications and Marketing experts on your campus to help design a campaign

Once we receive a complaint or have notice possible sexual harassment, the institution is obligated to investigate and take steps reasonably calculated to:

1. Stop the harassment
2. Provide remedies
3. Prevent recurrence

Interim measures and good coordination between offices is key

Interviews: Preventing Re-traumatization

Logistics and location:

- How is the room set up?
- Keep boxes of tissue strategically placed
- Set the tone
- Multidisciplinary Response: Advocates, Advisors, Counselors, BIT Teams
- Location of Interviews
- Selection of Investigator
- Building a Rapport

Basic Goals of Questioning:

Establish a narrative and timelines of events

Clarify conflicting information

Understand how all parties perceived events

During the Interview

Introduce yourself and explain your role as an investigator

- You are simply a fact gatherer NOT a fact finder

State that you will be taking notes during the interview and explain why this is important

Explain the Investigation Process

Explain the role of advisors

- Reinforce that advisors are **SILENT PARTICIPANTS**
- Advisors may speak with their advisee but not in a manner that disrupts the process
- Advisors will be warned **ONCE** and **ONLY ONCE** and will be asked to leave the interview if they do not respect the rules
- Interviews will continue if the advisor is asked to leave

During the Interview Cont'd

Ask the interviewee if they have any questions about the process

- Information will be kept as confidential as possible
- Anti-Retaliation and Intimidation Policy
- Purpose of Investigation (You are not investigating other non-related violations of the Student Code of Conduct)
- Amnesty Policy if Applicable (Please consult Title IX Coordinator or Director of Student Conduct and Community Standards prior to beginning the investigation)

Tips for Good Questioning

- Ask open ended questions
- Listen more than talk
- Give time to answer
- Be comfortable with silence
- Use appropriate tone
- Observe body language
- Avoid questions that imply judgments

What Should I Ask?

Do I need to know the information?

Will an answer to my question help me understand what happened?

Will getting an answer to this question inform the decision?

Don't go off the rails

To Ask or Not to Ask?

- In framing questions, be sensitive to Complainant's emotional state
- But don't make assumptions about Complainant's fragility or vulnerability
- Important/relevant questions should always be asked
- Trauma-informed interviewing – “Neurobiology of Trauma,” Rebecca Campbell YouTube video

Useful Phrases

Would you be willing to tell me more about...?

How did you feel about...?

What did you do after...? **What** happened then?

What did you mean when you said...?

What was your reaction to...?

How did you become involved in...?

What is your understanding of...?

- **Avoid “Why” questions or multiple choice questions**

The Investigative Report

Identify the key questions that need to be answered

- Was there sexual contact between the parties?
- Was there meaningful consent given?
- Incapacitation?
- Did the respondent know or should he have known that the reporting student was incapacitated?

WHAT DOES YOUR POLICY SAY?

Bryan A. Garner, *The Winning Brief: 100 Tips for Persuasive Briefing in Trial and Appellate Courts* (3rd ed. 2014).

ANAYLZE FACTUAL INFORMATION

Using a preponderance of the evidence standard (or clear & convincing per 2017 guidance), and considering relevant definitions in the Policy, the Investigator (or hearing panel) weighs the evidence to determine whether the Respondent violated the Policy

- Policy definitions are key:
 - Was there unwelcome conduct of a sexual nature that was sufficiently serious to deny or limit the Complainant's ability to participate in the school's programs and activities, from both a subjective and objective perspective.

Drafting the Investigative Report

Use Templates

Use the Language of the Involved Parties

- Exact quotes, phrases, and terms
- Make sure to ask “What do you mean?” and to include “translation”

Ask and Include what the Involved Parties were Thinking or Feeling

Know what Your Fact Finders Are Looking For

Review Process

- Utilize Title IX coordinator (second set of eyes)

Include information about possible violations and discuss facts related to that specific violation

Think about the relevant violations, but don't overcharge

Practice makes perfect

Provide detailed information for the fact finder

Findings of Fact

Findings of Fact are based on the information provided and should make a conclusion about what happened.

Findings should be specific enough to explain what parts of the Policy (if any) were violated.

Sample Investigative Report Structure

- I. Introduction and Background
- II. Relevant University Policies
- III. Interview Summaries for Complainant and Respondent
- IV. Key Factual Consideration
 - i. The Complainant & Respondent agree that the following occurred:
 - ii. The Complainant & Respondent disagree on the following:
 - iii. The Complainant's alcohol consumption
 - iv. Witness interview summaries
 - v. Other evidence collected
- V. Questions Considered During Analysis of Evidence (Key Questions)
- VI. Investigative Finding

Trauma-Informed Investigations

- * The trauma informed approach changes the way we respond and investigate, and most importantly, the way we interview victims.
- * Avoid victim-blaming questions
 - * Why did/didn't you...
- * Expect delay in reporting and fragmented memory
- * Capturing the trauma and the sensory and peripheral details of the event is **compelling evidence**.

Trauma-Informed Investigations

- * Some systems require any Title IX training to be trauma-informed.
- * In some ways, trauma-informed training is under attack.
 - * See Emily Yoffe, *The Bad Science Behind Campus Response to Sexual Assault*, *The Atlantic* (Sept. 8, 2017).

Notification of Outcomes

- * Simultaneous Notification
- * Brown University Examples
 - * Letter to Complainant
 - * Letter to Respondent
- * FERPA
 - * The hearing and the facts surrounding it are educational records but can be shared if it specifically relates back to the other party.
 - * Most times, the remedies are joint and will need to, and can be, shared, except for issues of a purely individual sanction. (Ex: Counseling)

Procedural Due Process

- * Liberty//Property Interests
- * Is the process that is DUE!
 - * What is due in an educational environment is not the same as what is due in the court system
- * Burden of proof
- * Cross-Examination
- * Access to “file”
- * Notice
- * Type of “hearing”
- * Grievance v. Hearing
- * Appeal
- * “Beyond Discipline”—MAPs (Intentionality, Planning, Mentoring)

Some Other Corner 2 Issues

Receiving Reports

- * Responsible Employees
 - * Not reporting at all
 - * Reporting to someone else
- * Students don't understand or trust the system (A culture issue, as well!)
- * Limited reporters (advocates, etc.)
- * Traps
 - * The spontaneous utterance
 - * Promised confidentiality by RE

Managing No-Contact Orders “Supportive Measures”

- * Who?
 - * Title IX coordinator?
 - * Student conduct?
- * Mutual no-contact (Proposed new regs?)
- * What happens when there is a violation? Who handles that?
- * Probation-like system
- * Can be time consuming
- * Relationship management?

Coordinating Title IX Response with Other EO Compliance Mandates

- * Title VII
- * Title VI
- * ADA/504/Disability
- * Non-Title IX Discrimination
- * Problem Professor Case Study (Jessica/Ella/Professor Xi Scenario)