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# Title IX Training

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# 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

# Title IX Background

- ▶ Passed in 1972, with limited rule-making in 1975.
- ▶ Court decisions interpreted parts of the Act through the 1980s and 1990s.
- ▶ Until 2017, the Office for Civil Rights (“OCR”) commonly relied on policy guidance to establish requirements for a school’s response to sexual harassment
  - ▶ Dear Colleague Letters
  - ▶ Q&A documents

# New Title IX Rules

- ▶ 2018: US DOE published a Notice of Proposed Rulemaking to address sexual misconduct under Title IX
- ▶ May 6, 2020: DOE released the new Title IX regulations
  - ▶ The final rules followed a preamble that summarized, discussed, and responded to more than 124,000 comments received during the comment period.
  - ▶ The final regulations are found at 34 C.F.R. pt. 106.
- ▶ August 14, 2020: New Title IX regulations went into effect
  - ▶ BOR revised and passed Board policies in alignment with the new regulations that also became effective August 14, 2020.
    - ▶ BOR Policies 1:17, 1:17.1, 1:18, and 3:4.

# Substantive Changes to BOR Policy

- ▶ Adds key terms and changes some existing definitions
- ▶ Emphasizes impartiality and prohibits bias, conflicts of interest, and prejudgment of facts
- ▶ Changes the scope of conduct under Title IX jurisdiction
- ▶ Alters the standards for an institution's response and liability
- ▶ Confidentiality requirements
- ▶ Ensures constitutional protections for involved parties
- ▶ Includes rape shield protections
- ▶ Prohibits "gag orders"

# Procedural Changes

- ▶ Reporting
- ▶ Notice requirements
- ▶ Supportive measures
- ▶ Informal resolutions
- ▶ Prescriptive grievance process
- ▶ Investigations
- ▶ Hearings
- ▶ Appeals
- ▶ Training

# 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.

# BOR Policy Definitions

- ▶ **Consent:** Consent may be implied from the facts and circumstance surrounding the commission of an act. Consent will not be found where an act has been done through the use of force, coercion, or threats of immediate and great bodily harm. Submission does not equal consent, and to establish consent, a party charged must utterly negate any element of force, coercion, or threat. Consent, once given, may be retracted. Consent will not be found under any of the following circumstances:
  - ▶ If the victim is less than thirteen years of age; or
  - ▶ Through the use of force, coercion, or threats of immediate bodily harm against the victim or other person within the victim's presence, accompanied by apparent power of execution; or
  - ▶ If the victim is incapable, because of physical or mental incapacity, of giving consent to such act; or
  - ▶ If the victim is incapable of giving consent because of any intoxicating, narcotic, or anesthetic agent or hypnosis; or
  - ▶ If the victim is thirteen years of age, but less than sixteen years of age, and the perpetrator is at least three years older than the victim.

1:17.B.3; 1:17.1(3)E.

# BOR Definitions

- ▶ **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 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.

# 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.

# 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 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.

# BOR Definitions

- ▶ **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

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

# 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).

# Contents of Title IX 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).

# 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 and the 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.
  - ▶ 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 application provision in policy that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

# 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 Title IX

- ▶ 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 informal 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 informal 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 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

- ▶ 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.
- ▶ Inculpatory and Exculpatory evidence (not defined in regulations):
  - ▶ Legal definitions:
    - ▶ Inculpatory: Evidence showing or tending to show one’s involvement in a crime or wrong.
    - ▶ Exculpatory: Evidence tending to establish a criminal defendant’s innocence.

# Relevance

- ▶ Evidence that is “relevant” versus “directly related”
  - ▶ Parties must have an equal opportunity to inspect and review any evidence obtained as part of an investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the institution does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source. 1:17.C.4.6.
  - ▶ The preamble notes that “directly related” is not synonymous with “relevant” and that “directly relevant” may encompass a broader universe of evidence than “relevant” evidence. p. 30304.
    - ▶ The regulations do not define “directly related” just as they do not define relevance but notes that the terms should be interpreted “using their plain and ordinary meaning.”

# Relevance

- ▶ Certain types of evidence are excluded as not relevant (or otherwise excluded):
  - ▶ Evidence falling under rape shield protections. 1:17.C.5.3.5.
  - ▶ Evidence protected by a legally recognized privilege (unless waived). 106.45(b)(1)(x).
  - ▶ Any party's medical, psychological, and similar records (unless the party gives consent). 106.45(b)(5)(i).
  - ▶ Party or witness statement from a party or witness that does not submit to cross examination. 1:17.C.5.3.6.

# Relevance

## ▶ Rape Shield Protections

- ▶ Ensures questions and evidence about a complainant's sexual predisposition or prior sexual behavior are considered not relevant, unless:
  - ▶ Such questions and evidence about the complainant's prior sexual behavior (but *not* sexual predisposition) are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
  - ▶ The questions and evidence concern specific incidents of the complainant's sexual behavior with respect to the respondent and are offered to prove consent.

1:17.C.5.3.5.

# Relevance

- ▶ Sexual Predisposition and Prior Sexual Behaviors
    - ▶ Not defined in the regulations.
    - ▶ Preamble discusses, however, that the regulations' rape shield protections are patterned after the Federal Rules of Evidence and cites to the Federal Rules Advisory Committee Notes from the pertinent rule.
      - ▶ Sexual Behavior: All activities involving actual physical contact or that imply sexual intercourse or sexual contact, including a victim's use of contraceptives, evidence of childbirth, and sexually transmitted diseases.
      - ▶ Sexual Predisposition: Includes a victim's mode of dress, speech, or lifestyle.
- p. 30350, FN 1343 (citing Advisory Committee Notes, Fed. R. Evid. 412).

# 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.

# Investigations

- ▶ Uses for the investigative report
  - ▶ Can be presented at the live hearing by the institution, the complainant, or the respondent
    - ▶ Can be relied upon by the hearing examiner, but the hearing examiner should decide without giving deference to the investigative report. p. 30314.
  - ▶ Part of documents reviewed in a petition for administrative review
    - ▶ Could potentially be used by complainants or respondents in other legal proceedings or litigation, or by the institution in defense of such litigation.
  - ▶ Personnel action

# Investigations

- ▶ Who should conduct an investigation?
  - ▶ An investigator should be:
    - ▶ Familiar with the Title IX regulations, BOR policies, and an institution's rules, policies, and procedures;
    - ▶ Trained in conducting the type of investigation required; and
    - ▶ Able to accurately report and summarize the gathered evidence.
  - ▶ An investigator must be:
    - ▶ Free from conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent;
    - ▶ Impartial, avoid prejudgment of the facts at issue, and not rely on sex stereotypes; and
    - ▶ Competent in issues of relevance.

# 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.

# Investigations

## ▶ Planning an Investigation

- ▶ The parties must be given equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence. 1:17.C.4.2.
- ▶ Collect pertinent background information and review to ensure prompt and thorough witness interviews.
- ▶ Obtain written consent for certain background information as needed.

# Investigations

- ▶ Conducting the investigation
  - ▶ Determine individuals to be interviewed.
  - ▶ Provide written notice of the interviews to required individuals.
    - ▶ An institution shall provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice. An institution shall not limit the choice or presence of advisor for either party in any meeting or grievance proceeding. However, the institution may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply to both parties. 1:17.C.4.4.
    - ▶ An institution shall provide, to a party whose participation is invited or expected, written notice of the time, date, location, participants, and purpose of all hearings, investigative interviews, or other meetings, at least five working days in advance. 1:17.C.4.5.

# Investigations

- ▶ Providing investigation evidence to the parties
  - ▶ An institution shall ensure both parties and their advisors have an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the institution does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence, whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to the conclusion of the investigation. 1:17.C.4.6.
  - ▶ Prior to completion of the investigative report, an institution must send to each party and the party's advisor, if any, the evidence subject to inspection and review in electronic format or hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. 1:17.C.4.6.
- ▶ Providing investigation evidence for the hearing
  - ▶ An institution must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross examination. 1:17.C.4.6.

# Investigations

- ▶ The investigative report
  - ▶ The investigative report must fairly summarize the relevant evidence. 1:17.C.4.7.
    - ▶ The regulations and BOR policy do not require the report to contain conclusions or recommendations pertaining to evidence or a determination of responsibility.
  - ▶ The investigative report must be sent to each party and the party's advisor, if any, in electronic format or hard copy, at least 10 working days prior to a hearing, for their review and written response. 1:17.C.4.7.
  - ▶ Caution against including recommendations or conclusions in the report. (The facts, ma'am, just the facts.)

# Hearings

- ▶ Institutions shall provide for a live hearing before a hearing examiner using the contested case proceedings set forth in SDCL chapter 1-26. 1:17.C.5.1.
- ▶ Institutions will coordinate with the BOR office to retain law-trained hearing examiners.
- ▶ Live hearings may be conducted with all parties physically present in the same geographic location or, at the institution's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other. 1:17.C.5.
  - ▶ Either party may request that the hearing occur with the parties located in separate rooms. 1:17.C.5.3.3.
  - ▶ Decision-makers (hearing examiners) shall be trained on technology utilized during the hearings.
- ▶ The institution shall create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review. 1:17.C.5.1.

# Hearings - Notice

- ▶ An institution shall provide notice to both parties at least 15 days prior to the hearing. The notice shall include:
  - ▶ The time, place, and nature of the hearing;
  - ▶ The legal authority and jurisdiction under which the hearing is to be held;
  - ▶ Reference to the particular policy, rules, or laws involved;
  - ▶ A short, plain statement of the allegations asserted;
  - ▶ A statement of any action authorized, which may affect the parties, as a result of any decision made at the hearing;
  - ▶ A statement that the hearing is an adversarial proceeding and that a party has the right at a hearing to be present, to be represented by an attorney, and that these and other due process rights will be forfeited if they are not exercised at the hearing;
  - ▶ A statement that if the amount in controversy exceeds two thousand five hundred dollars or if a property right may be terminated, any party may require the use of the Office of Hearing Examiners by giving notice of the request to the institution no later than ten (10) days after service of the notice required by this section; and
  - ▶ A statement that the final decision may be appealed to circuit court and the South Dakota Supreme Court as provided by law.

1:17.C.5.2.1-5.2.8.

# Hearings

## ▶ Role of the Advisor

- ▶ Parties have the right to an advisor of their choice, who may be, but is not required to be, an attorney. 1:17.C.4.4.
- ▶ An institution must provide an advisor at the live hearing if a party does not have one.
  - ▶ The institution must provide the advisor at no fee or charge to the party, but the institution may choose the advisor, who may be, but is not required to be, an attorney. 1:17.C.5.3.
- ▶ An advisor may be permitted, at the hearing examiner's discretion, to ask the other party and any witnesses all relevant questions and follow up those questions, including those challenging credibility. 1:17.C.5.3.1.
- ▶ An advisor is required to conduct cross examination. A party may never personally cross examine a witness. 1:17.C.5.3.2.
- ▶ Any restrictions imposed on advisor participation by the hearing examiner must apply equally to both parties. 1:17.C.4.4.

# Hearings

- ▶ Due to confidentiality requirements, other than an advisor, a party may not have others attend the hearing. This includes support persons.
  - ▶ If a party has a disability, the party may be entitled to have additional persons such as persons assisting with the disability, or a language interpreter, as such individuals' presence is required by law (IDEA, ADA) and/or necessary to conduct the hearing.

p. 30499.

# Hearings

## ▶ Role of the Hearing Examiner

- ▶ Determine whether any question asked of the complainant, respondent, or a witness is relevant before they may answer the question and explain any decision to exclude a question as not relevant before a party or witness answers a cross examination or other question. 1:17.C.5.3.4.
- ▶ Ensure rape shield protections are implemented. 1:17.C.5.3.5.
- ▶ Ensure that if a witness does not submit to cross examination at the live hearing, no statement of that party or witness is relied upon in reaching a determination regarding responsibility, provided that an inference about the determination regarding responsibility solely on a party's or witnesses absence from the live hearing or refusal to answer cross examination or other questions. 1:17.C.5.3.6.
  - ▶ May be exceptions for prior statements or video evidence. p. 30328, 30349.

# Hearings

- ▶ Procedural Issues
  - ▶ Pre-hearing depositions or hearing subpoenas are not permitted.
  - ▶ Rules of conduct or decorum for the hearings must apply equally to all parties.
- ▶ Evidentiary Issues
  - ▶ Use of the preponderance of the evidence standard. 1:17.C.2.2.9.
  - ▶ Parties must have equal opportunities to present evidence, including expert evidence. 1:17.C.4.2.
  - ▶ The institution may also present evidence (and bears the burden of proof to meet the standard of evidence). 1:17.C.4.1.

# Hearings

- ▶ Written determination regarding responsibility
  - ▶ The hearing examiner shall issue a proposed determination to the president/superintendent of the institution, or their designee (who cannot be the same person as the Title IX Coordinator). The institution must then issue a written determination of responsibility. 1:17.C.5.4.
  - ▶ To reach this determination, the president/superintendent/designee:
    - ▶ Must also apply the preponderance of the evidence standard.
    - ▶ Must give due regard to the hearing examiner's opportunity to observe the witnesses.
    - ▶ May reject or modify the hearing examiner's proposed determination, but shall provide the reasons for doing so in writing.

1:17.C.5.4.

# Hearings

- ▶ The written determination must include:
  - ▶ Identification of the allegations potentially constituting sexual harassment;
  - ▶ A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
  - ▶ Findings of fact supporting the determination;
  - ▶ Conclusions regarding the application of the institution's code of conduct to the facts;
  - ▶ A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the institution imposes on the respondent, and whether remedies designed to restore or preserve equal access to the institution's education program or activity will be provided by the recipient to the complainant; and
  - ▶ The institution's procedures and permissible bases for the complainant and respondent to petition for administrative review.

1:17.C.5.4.1-5.4.6.

# Hearings

- ▶ An institution must provide the proposed written determination to the parties simultaneously. The proposed determination becomes final either:
    - ▶ At the conclusion of the petition for administrative review to the Executive Director; or
    - ▶ If a petition for administrative review is not filed by either party, the date on which the petition for administrative review would no longer be considered timely.
- 1:17.C.5.5.
- ▶ If no petition for administrative review is filed within the timeframe provided, upon the expiration of the timeframe, the proposed determination of the institution shall constitute the final decision on the matter, which is subject to appeal to the state circuit court in accordance with South Dakota law. 1:17.C.5.5.

# Petitions for Administrative Review

- ▶ Petitions may be filed by either party.
- ▶ Review may be sought from:
  - ▶ An institution's proposed determination regarding responsibility; or
  - ▶ An institution's dismissal of a formal complaint or any allegations therein.

1:17.C.6.1.

- ▶ A petition for review must be filed:
  - ▶ In writing to the Executive Director of the Board of Regents; and
  - ▶ No later than ten working days after notice of the institution's decision is deemed received.

1:17.C.6.1.

# Petitions for Administrative Review

- ▶ Grounds for review by either party:
    - ▶ A procedural irregularity that affected the outcome of the matter;
    - ▶ New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
    - ▶ The Title IX Coordinator, investigator, or decision maker had a conflict of interest or bias for or against complainants or respondents general or the individual complainant or respondent that affected the outcome of the matter.
- 1:17.C.6.1.1-6.1.3.
- ▶ Petitions not made on one of these grounds, or that do not include supporting arguments or documentation, will be rejected. 1:17.C.6.2.

# Petitions for Administrative Review

- ▶ Within five working days of receiving a petition, the Executive Director, or their designee, shall provide written notice of the petition to the other party. That party will have five working days from the date of the notice to submit a written statement to the Executive Director in support of, or challenging, the outcome. 1:17.C.6.3.
- ▶ Petitions for administrative review will be limited to a review of:
  - ▶ The written determination of the institution, which shall include the proposed determination of the hearing examiner;
  - ▶ The verbatim record of the hearing;
  - ▶ Supporting documents submitted as part of the hearing; and
  - ▶ Written statements and/or supporting documentation submitted by the respondent and/or complainant in accordance with the appeal process.

1:17.C.6.4.1-6.4.4.

# Petitions for Administrative Review

- ▶ The Executive Director will issue a decision on the petition after receipt of the non-petitioning party's written statement or after the expiration of the time provided to submit such a statement.
  - ▶ The decision will be issued simultaneously to both parties.
- ▶ The Executive Director's review of the petition is limited to determining whether:
  - ▶ Any material decisions lack substantial support in the record; and
  - ▶ Any procedural errors materially impacting the integrity of the decision.
- ▶ The Executive Director may affirm or modify the decision of the institution, or return the decision to the institution for reconsideration, additional investigation, or a new hearing.

1:17.C.6.5.

# Continuing Requirements

- ▶ Supportive measures to maintain the status quo may continue during pendency of an appeal. p. 30393.
  - ▶ In certain circumstances, an institution may also opt to continue supportive measures in the event of a determination that a respondent is not responsible for the conduct alleged in a formal complaint.
- ▶ Preservation of Records
  - ▶ The following must be obtained for a seven-year period:
    - ▶ Each sexual harassment investigation including:
      - ▶ Any determination of responsibility;
      - ▶ Any audio or audiovisual recording or transcript of any live hearing conducted in the matter;
      - ▶ Any disciplinary sanctions imposed on the respondent; and
      - ▶ Any remedies provided to a complainant designed to restore or preserve equal access to an education program or activity.
    - ▶ Any appeal and the result therefrom;
    - ▶ Any informal resolution and the result therefrom; and
    - ▶ All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution.

1:17.C.10.1.1-10.1.4.

# Sanctions

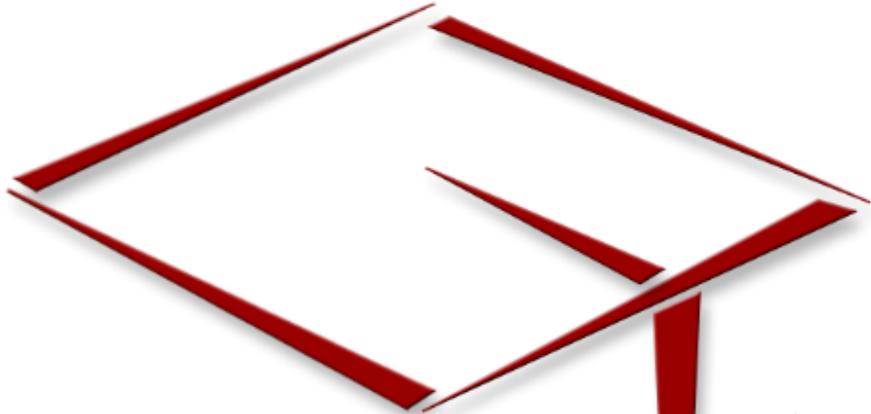
- ▶ May only be implemented after a determination of responsibility is issued and cannot be effective until after an appeal, if one is requested, has been resolved.
  - ▶ Supportive measures may still be implemented.
- ▶ A determination of responsibility is not required to result in a specific sanction. Institutions have flexibility to determine which sanction is most appropriate for the institution's campus community. p. 30407.
- ▶ An institution may consider mitigating circumstances when imposing sanctions. p. 30144.
- ▶ More than one type of sanction may be imposed on a respondent for any single finding of responsibility. 1:17.C.2.2.11.

# Remedies

- ▶ Remedies should restore or preserve equal access to the institution's education program or activity. 1:17.C.5.4.5.
  - ▶ They must be provided to a complainant when a respondent has been found responsible for sexual harassment against the complainant.
  - ▶ A remedy to the complainant may take the same form as a sanction on the respondent.
  - ▶ A remedy may take the same form as a supportive measure, although remedies may be disciplinary or punitive in nature and may burden the respondent.
  - ▶ The Title IX Coordinator is responsible for implementing remedies.
  - ▶ Remedies should not be disclosed to the respondent unless the respondent is directly affected or disclosure to the respondent is necessary to carry out the remedy. p. 30425.

# 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



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