



*Presents*

# **Handling Employee Complaints of Sexual Harassment Under Title IX**

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Presenter: Kate Nearpass, Esq.

# Handling Employee Complaints of Sexual Harassment under Title IX

Presented by Kate Nearpass

Nearpass & Koegel PLLC  
March 13, 2025



NEARPASS & KOEGEL PLLC  
— An Investigations Law Firm —



## **Meet the Presenter: Kate Nearpass**

Nearpass & Koegel PLLC, Partner



Kate specializes in conducting impartial investigations for higher education institutions, nonprofits, and municipalities, ensuring compliance with civil rights and employment laws.

She has extensive Title IX and higher education experience. In addition to conducting investigations, Kate serves in key Title IX roles, including hearing officer, appellate officer, and interim Title IX Coordinator.

As co-founder of Nearpass & Koegel PLLC and faculty for the Association of Workplace Investigators' Training Institute, she actively shapes best practices in workplace investigations and compliance.

Kate holds a J.D. from Albany Law School and an undergraduate degree from Mount Holyoke College. She is licensed as both an attorney and a private investigator in New York.



# Key Topics Covered Today

## I. Title IX Status

- Understanding the evolving definitions of sex-based harassment vs. sexual harassment.

## II. Complaint Processing

- Determining which employee complaints fall under Title IX regulations.

## III. Process Differences

- Navigating the distinctions between Title IX and HR-based investigations.

## I.V. Informal Resolution

- How to create a fair and effective informal resolution program.

## I.V. Practical Tips

- Maintaining actual and perceived neutrality during a Title IX process.

## I.VI. Evaluating Credibility

- Who is responsible for this and how to do it fairly and without bias.

## The Foundation: When does Title IX apply?

The *statute* has been in place since 1972:

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.

— Title IX of the Education Amendments of 1972

- Applies to any educational institution (higher ed or K-12) that receives federal funds



# The Status of Title IX Regulations

What in the world is happening right now?

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## The 2020 Regulations – Full Circle

- Implemented during the first Trump administration, effective August 1, 2020.
- Changes from prior non-regulatory guidance from OCR:
  - Formal complaint
  - Hearing requirement
  - Cross examination
- In general, these regulations are more process-heavy and emphasize respondent rights to achieve neutrality.

# The Saga of the 2024 Biden Regulations

First announced  
April 6, 2021

Finalized  
April 29, 2024

Effective, finally, August  
14, 2024

- By July, regs enjoyed in 26 states as well as hundreds of individual campuses nationwide
- Major changes from 2020:
  - Broadened prohibition on sex-based harassment to include gender identity and gender expression
  - Expansion of coverage of grievance procedure from “sexual harassment” to “sex-based harassment” (to include more complaints of sexual harassment as well as complaints relating to parental, family, or marital status and pregnancy or related conditions)
  - No formal complaint needed
  - Jurisdiction broadened to possibly include off-site behavior
  - Hearing optional



## Legal Challenges to the 2024 Regulations

- State of Tennessee v. Cardona, 2:24-cv-00072, (E.D. Ky. Jan 09, 2025) ECF No. 143
- Vacated the 2024 regulations nationally
- The court found the new definitions in the Final Rule would compel Title IX institutions, including teachers, to “use names and pronouns associated with a student’s asserted gender identity” in violation of the First Amendment. It also found the new definitions were “so vague that recipients of Title IX funds have no way of predicting what conduct would violate the law.”

## Trump Administration Guidance

- DOE did not issue guidance prior to the January 20, 2025, inauguration of President Trump
- ***January 31, 2025: DOE issued a Dear Colleague Letter – OCR will enforce Title IX under the 2020 Regulations, including the 2020 definition of sexual harassment and 2020 procedural requirements.***  
<https://www.ed.gov/media/document/title-ix-enforcement-directive-dcl-109477.pdf>

# Complaint Processing

Where are we now?

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## What complaints need to be processed under Title IX

- Narrower definition of sexual harassment: severe, pervasive AND objectively offensive. Effectively *denies or bars* access.
  - \*This analysis is based on the allegations not the findings
- Only sexual harassment; disparate treatment sex discrimination is prohibited by the statute but not subject to the grievance procedure
- Definition of sexual harassment also includes: sexual assault, dating/domestic violence, stalking.
- Behavior that occurs at a location or event or under circumstances where the institution exercised *substantial control over the respondent and the context in which it occurred*



## Title IX: Beyond Students

Title IX is not just for students!

- *Complainant* means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.
- “[A] complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.”
- *Respondent* means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

34 CFR § 106.30(a)



## Title IX or not?

The Department of Chemistry has hired a recent graduate into an administrative assistant role. She complains to HR that the department chair, a man who has been with the university for 30+ years, has been sending her Instagram reels every day for the last few weeks. The reels have become increasingly sexual, including sexual innuendos and lewd language. She provided the HR rep with six of these videos, all sexual, sent over the past month. She also claims that the chair has come to her workspace and touched her knee and lower back on at least five occasions. She has asked to start working from home.



## Questions and Determinations

- Complainant attempting to participate in educational program or activity?
- Severe, pervasive and objectively offensive?
- Occurred at a location controlled by the University?
- Effectively denied access?



## Factors and Considerations

What if?

- The admin alleged that the videos were sent but did not allege the touching?
- The videos were in poor taste, but only a few were sexual?
- The videos were all sexual but were sent after hours, between personal cell phones?
- There was no allegation of videos, but only the allegations of touching?
- The allegation was that he touched the complainant's buttocks instead of her knee?

# Process Differences

Navigating the distinctions for investigations





# Process Considerations for Employee Title IX Investigations

A formal complaint is required

"a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment."

34 CFR § 106.30(a)



# Process Considerations for Employee Title IX Investigations

## What if the complainant declines to sign?

The TIXC *may* sign the complaint, 2020 does not provide specific guidance, but the 2024 regs did, and this is still instructive:

1. The complainant's request not to proceed with initiation of a complaint;
2. The complainant's reasonable safety concerns regarding initiation of a complaint;
3. The risk that additional acts of sex discrimination would occur if a complaint is not initiated;
4. The severity of the alleged sex discrimination, including whether the discrimination, if established, would require the removal of a respondent from campus or imposition of another disciplinary sanction to end the discrimination and prevent its recurrence;
5. The age and relationship of the parties, including whether the respondent is an employee of the recipient;
6. The scope of the alleged sex discrimination, including information suggesting a pattern, ongoing sex discrimination, or sex discrimination alleged to have impacted multiple individuals;
7. The availability of evidence to assist a decisionmaker in determining whether sex discrimination occurred; and
8. Whether the recipient could end the alleged sex discrimination and prevent its recurrence without initiating its grievance procedures



A close-up photograph of a person's hand holding a silver pen, signing a document. The hand is wearing a ring. The document is white with some text and lines. The background is blurred, showing other people and a desk.

## Process Considerations for Employee Title IX Investigations

\*\*\*\*If the complainant declines to sign, the institution cannot default to another policy or process for resolving the concern.

If the complaint meets the threshold requirements of Title IX, the institution must use the Title IX grievance process to investigate and resolve the complaint.



# Process Considerations for Employee Title IX Investigations

A Notice of Allegations is required and must include:

- Sufficient details known at the time including identities of the parties, conduct alleged, date and locations of alleged incidents;
- A statement that the respondent is presumed not responsible for violating the policy;
- A statement that the respondent is entitled to an advisor of choice who may be but is not required to be an attorney;
- A statement that the respondent may inspect evidence collected in the investigation; and
- A reference to any provision in other institutional policies prohibiting the respondent from knowingly making false statements or submitting false information during the process.

34 CFR 106.45

HR investigation processes typically do not provide respondents with advance notice of the allegations. Does this change the investigator's approach to the interview?

# Process Considerations for Employee Title IX Investigations

## **Advisor of choice: Both parties are entitled to this**

### Considerations

- Will you appoint advisors? Train employees to act as advisors?
- Will you require an advisor? Throughout the process or only at the hearing?
- Will you pay for an external hearing advisor?
- Consider the implications of having an attorney advisor attend an interview – will campus counsel attend as well?

### Advisor's Role

- They are not defense counsel
- No objections in interviews
- May not speak on behalf of their advisee
- Consider having a document outlining the role of the advisor with clear outcomes if an advisor does not follow the rules

## Process Considerations for Employee Title IX Investigations

### Sharing the evidence:

- Both parties are entitled to inspect and review the evidence that is “directly related to the allegations.” This includes evidence that the institution does not intend to rely on in reaching a determination.  
34 CFR 106.45
- Parties are required to be given at least 10 days to review the evidence and the opportunity to submit a written response.



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# Process Considerations for Employee Title IX Investigations

## How does the evidence share requirement change your investigation?

- All parties and witnesses must be told upfront that their statement (or transcript of interview) and any evidence they provide will be shared with the parties.
- Important to think about if the investigation starts out under a different policy but transitions to Title IX.
- Anonymized witness statements are not permissible.

# Process Considerations for Employee Title IX Investigations

The hearing requirement:

- Very limited exception to the hearing requirement under the 2020 regulations for academic medical centers. Practically speaking, nearly all Title IX cases will require a hearing.
- Evidence share requirement = No new evidence at the hearing.
- The purpose of the hearing is to clarify and fill in gaps, not to repeat the investigation
- Must be recorded
- Who is the decision maker?
  - Single hearing officer (internal or external)
  - Hearing panel (internal or hybrid)
- The hearing officer can consider the entire investigation file, even if witnesses do not testify at the hearing.
- Cross examination! Not a true cross, an opportunity for advisors to question the other party and witnesses.
- No objections, the only rule is *relevance*.

# Process Considerations for Employee Title IX Investigations

Must have an appeal option that allows for appeal based on:

- Procedural irregularity that affected the outcome of the matter;
- New evidence that was not reasonably available at the time of the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter;
- The TIXC, investigator(s), or decision maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

34 CFR 106.45

\*\*\* NYS Educ Law 129(b) requires an appeal panel – this applies in cases involving student respondents.



# Overlay of other obligations over Title IX

Title VII, NY Human Rights Law:

Timing! Prompt investigation vs. the morass of a Title IX investigation

EEOC guidance requires employers to conduct a "prompt and adequate investigation," which should be done "reasonably soon after the employee complains."

EEOC Enforcement Guidance on Harassment in the Workplace, [https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace#\\_Toc164808059](https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace#_Toc164808059)

2<sup>nd</sup> Circuit called an 8 month investigation "sufficiently expeditious." *Martin v. State of New York, et. al.* No. 19-1479 (2<sup>nd</sup> Cir., March 30, 2020)

Takeaway: Move through the required steps of a Title IX investigation as quickly as possible without sacrificing thoroughness. It will take longer than an ordinary HR investigation.

# Overlay of other obligations over Title IX

Title VII, NY Human Rights Law:

What about complex investigations involving allegations relating to protected classes other than sex?

Two options:

1. Handle all allegations under the Title IX policy
  - Employee will get *more* process than they are entitled to
  - Streamlines the process
  - Make sure your Title IX policy has language stating that alleged violations of other policies will be handled under the Title IX policy if they arise out of the same facts and circumstances as Title IX allegations.
2. Bifurcate into two processes
  - Duplicate efforts
  - Non-Title IX allegations may be resolved more quickly

# Overlay of other obligations over Title IX

## Reference checks:

- The institution must keep confidential the names of the complainant and the respondent unless: the disclosure is permitted by FERPA (only applicable to student parties). 34 CFR 106.71
- NYS employers may receive requests from employers in other states that have specific statutes requiring reference checking re: past sexual misconduct. Examples: Pennsylvania's Act 168 requires prospective employers to inquire into an applicant's past history with sexual misconduct if they are seeking a position that involves contact with children.
- Takeaway: get a release that specifically references Title IX first

# Overlay of other obligations over Title IX

## Collective Bargaining Agreements:

- Compelling an employee to participate in an investigation: If your institution has an employee participation/cooperation clause in policy, you can generally compel participation in an investigation. In a Title IX case, make sure your CBA allows for you to compel participation.
- Advisor may be union delegate
- Written response to evidence may conflict with CBA requirement that employees not be asked to put statements in writing



# Informal Resolution

Creating a fair and effective program



# Informal Resolution

An institution *may* choose to offer and facilitate informal resolution options (i.e., mediation or restorative justice).

- Both parties must give voluntary, written consent to the informal process
- Informal resolution facilitators must be trained
- Institution cannot require a party to participate in informal resolution

Important:

- Informal resolution cannot be used without a formal complaint first!
- Informal resolution is not permitted in student v. employee complaints
- Will an informal process satisfy your obligations under other employment laws (Title VII, NYSHRL)?

# Informal Resolution

What could an informal resolution look like in an employee situation?

- Most commonly a mediation or other facilitated conversation.
- Give BOTH parties a written notice of their rights, including:
  - Whether and when the process can be terminated (any time prior to agreeing to a resolution)
  - Whether information shared can be used in subsequent disciplinary matters
  - How IR differs from the formal grievance procedure
- Require both parties to sign a participation agreement
- Frequent check-ins and monitoring.

# Informal Resolution

Title IX policy should require TIXC sign off on informal resolutions.

Informal resolutions are not appropriate where:

- There is an ongoing threat of harm or safety to the campus
- The respondent is a repeat offender
- There is reason to believe one party is not participating in the process in good faith



## Informal Resolution – Ensuring a Neutral Outcome

- Informal resolution facilitators must be appropriately trained: Training must be non-biased and not rely on stereotypes (i.e., "victims" and "perpetrators")
- Both parties must be given equal opportunity to participate in the process
- Both parties are entitled to the same level of care in the process

# Practical Tips

How to maintain neutrality

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## Maintaining Neutrality: Actual and perceived

### Choosing an investigator

- Watch for “conflicts” (i.e., perceived conflicts).

For example:

- Long standing working relationship between one party and investigator
  - Dotted line “reporting” relationships
  - Outside of work connections
- Consider an external investigator

## Maintaining Neutrality: Actual and perceived

Nuts and bolts of process and investigation are exactly the same for each party:

- Identical communications sent simultaneously
- Identical resources offered
- Time extension for one party = time extension for both

Rapport building should look similar across the entire investigation:

- Watch the chitchat
- Be aware of statements that sound biased, "I'm sorry that happened to you."



# Maintaining Neutrality: Actual and perceived

## Awareness of Implicit Bias

Implicit Bias is a (1) normal cognitive process (2) without conscious intent

## How bias impacts investigations:

- Influences rapport
- Increases likelihood of making predetermined outcomes
- Makes investigations less objective

## Methods of Mitigating bias:

- Appreciate alternative interpretations
- Prioritize objective evidence (e.g., documentation)
- Be self-aware

See Harvard University's Project Implicit to test your biases on various topics ([implicit.harvard.edu/implicit/takeatest.html](https://implicit.harvard.edu/implicit/takeatest.html))



# Evaluating Credibility

Who and how?

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# Evaluating Credibility in a Title IX Process

## Credibility or Reliability?

- Weighing the accuracy and veracity of evidence
- In Title IX, the investigator asks questions that go to credibility and *assesses* credibility in the investigation report
- The decision maker *determines* credibility

# Evaluating Credibility in a Title IX Process

## Credibility Factors:

- Corroboration
- Consistency
- Inherent Plausibility
- Motive to Falsify
- Material Omission
- Demeanor\*
- Reputation for honesty/deceit\*



# Evaluating Credibility in a Title IX Process

## Common pitfalls:

- Be wary of over reliance on demeanor or reputational evidence – they are most subject to bias
- Confirmation bias – tendency to credit witnesses who seem familiar
- Be aware of implicit biases of all kinds: biases for or against individuals based on protected classes, but also other categories, i.e.: bias for or against faculty vs. staff, HR vs. other staff, etc...

Q & A

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