

A Practical Guide to Title IX

The Keffer Hirschauer LLP Guide to the Title IX Process

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SPECIAL NOTE

This eBook was compiled by the team at Keffer Hirschauer LLP with special help from certified legal intern Ana Carolina Corey.

DISCLAIMER

The information in this eBook is not intended as a substitute for professional legal advice or to solicit representation; nor does it form an attorney-client relationship. There is no one-size-fits all way to resolve a Title IX case or matter, and each school implements their own procedures. If you desire to pursue representation for the roll of an advisor, please contact the law firm of Keffer Hirschauer LLP for a free and confidential consultation at (317) 857-0160.

The following is advertising material but not a solicitation within the meaning of the Indiana Rules of Professional Conduct on behalf of Keffer Hirschauer LLP, 230 East Ohio Street, Suite 400, Indianapolis, Indiana 46204.

WARNING

The following contains sexual references and descriptions of sexual or violent conduct. The purpose of the eBook is to educate mature audiences as to the process and grounds of a Title IX claim. Discretion is advised.

Introduction

“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 educational program or activity receiving federal financial assistance.”

20 U.S.C. § 1681

Title IX of the Education Amendments of 1972 was written by former Indiana Senator Birch Bayh. The legislation prohibits discrimination on the basis of sex at educational institutions that are funded by federal tax dollars.

More recent years have led to a wider interpretation of this provision; where a claim under Title IX is not limited to those solely on the basis of sex. Claims can arise as a result of alleged discrimination or harassment on the basis of sex, sexual orientation, pregnancy, parental status, gender nonconformity, and more. Allegations of sexual assault, violence, and misconduct can also form the basis of a Title IX allegation. The purpose of the proceedings are to establish a fair and equitable determination as to the allegation. However, the investigations and processes by which these cases are decided can be unfairly one-sided and biased against the respondent.

On May 6, 2020, Secretary Betsy DeVos, the then-head of the U.S. Department of Education, released regulations for interpreting and applying Title IX to educational institutions, specifically those receiving federal funding. Schools must offer protections and more equal footing for those accused of sexual harassment in the educational setting. As we will explore further in this eBook, these regulations brought the following changes:

- A **narrower definition of sexual harassment** now requires “severe, pervasive, and objectively offensive” conduct. Quid pro quo sexual harassment could meet the definition. A single incident of any type of sexual harassment may not meet the new definition, although stalking, dating violence, and sexual assault do not have to be severe or pervasive to qualify.
- A **narrower definition of locations of incidents schools are required to investigate** includes only incidents that occur in the United States during school-owned or -sponsored on-campus activities and off-campus activities (such as educational trips or fraternities recognized by the school) but not in independently owned off-campus apartments or during study abroad programs.

- Colleges may designate only certain employees to have **mandatory reporting requirements**. However, all employees at K-12 schools are obligated to report Title IX sexual harassment.
- **All Title IX officials at a school must receive training** on Title IX and its regulations, including the definition of sexual harassment, how Title IX applies to the school's programs and activities, how to conduct a formal Title IX grievance process, and how to be an impartial decision-maker. Colleges and universities must also publish the training materials online.
- A school at any level that receives a formal complaint must proceed with a **formal grievance process**, which must include a **live hearing with cross-examination**.
- Schools may no longer use the single-investigator model. In other words, the **Title IX investigator of a sexual harassment complaint cannot also be the person who adjudicates** at the hearing.
- The **accused may use a legal adviser or lawyer to cross-examine** the complainant.
- A school **may raise the burden of proof to the clear and convincing standard** as long as the standard applies equally to faculty/employees and students.
- The school receiving a sexual harassment report must **provide the accused in writing the allegations and the evidence gathered**. If the accused is a minor, the school must also provide this writing to the parents of the accused.
- **All schools must engage a grievance process for every formal complaint and respond meaningfully and/or offer supportive measures** to every known alleged sexual harassment victim.
- Designated **Title IX personnel dealing with a complaint must be free of conflicts of interest** regarding the parties to the complaint.
- Schools must provide anyone accused of Title IX sexual harassment with a **written assurance of the presumption of innocence**.
- Schools must **retain written records for seven years** of sexual harassment complaints and the actions taken in response.

Most people generally think that Title IX is the school policy that applies to them. However, it is the interpretation of federal legislation, U.S. Department of Education rules, the school's individual policy, and school's application of the specific facts of an incident to that policy which determines your outcome.

The United States Code sets out the Title IX law and the U.S. Department of Education uses rulemaking to provide more context to the law via Title IX Regulations. Then the schools draft and enact their own Title IX policies to be in compliance with the Title IX Regulations. Then,

when an incident arises that falls under the school’s Title IX policy, an investigation is conducted, involving the parties, and an outcome is determined based on that policy.



For the purposes of this eBook, Title IX will be discussed in terms of its larger application in schools. Keep in mind as you read, that “schools” applies to K-12 programs, colleges, universities, and groups such as fraternities, sororities, and other federally funded educational programs. A school’s size may impact the number of people involved in the Title IX proceeding, the investigation process, and the remedies available to the parties. As the regulations required each school to make their policies accessible by the public, it is important to review each school’s specific policies.

Title IX processes are not as robust as those for cases that are criminal or administrative in nature, in part because the procedures are not clearly defined in legislation. The law mandates action by schools but fails to specify each specific action a school should undertake in each circumstance; leaving room for personal biases and outside pressure to unduly influence outcomes. The mandate of a response and lack of detailed guidance, combined with public pressure on schools to take swift and decisive action in Title IX cases, has at times contributed to environments and procedures that heavily favor the accuser.

People facing a Title IX claim have fewer protections and less access to information than those charged with crimes. Where criminal cases need to be proven *beyond a reasonable doubt*, Title IX violations are found with a lower standard of proof. There is no penalty for perjury that parties

face. Additionally, Title IX processes move at a rapid pace compared to many legal matters; with most investigations and proceedings completed and decided within 60 days. The potential consequences of these matters include suspension, expulsion, banning from participation or receipt of a diploma for students, loss of tenure or employment for teachers, impacts on future opportunities, and reputational harm. Schedule a free consultation today. If you are accused of a Title IX violation, you should not go through it alone.

Chapter 1: Behavior Actionable Under Title IX

Definitions

To determine whether incidents would be actionable under Title IX, the regulations outline certain behaviors and their definitions. These definitions can be found in §106.30 of the regulations. The main categories of behavior are sexual harassment and sexual assault.

Sexual Harassment
As described in the introduction, the regulations have created a narrower definition of sexual harassment. To be deemed sexual harassment, the behavior must be “ severe, pervasive, and objectively offensive ” that it denies a person equal access to educational programs or activities. This is also typically considered a behavior that would constitute a hostile environment. A single incident of any type of sexual harassment may not necessarily meet the new definition, although stalking, dating violence, and sexual assault do not have to be severe or pervasive to qualify.

The definition of sexual harassment is further broken down into four major categories: (1) Quid Pro Quo, (2) Domestic Violence, (3) Dating Violence, and (4) Sexual Assault.

Quid Pro Quo
Sexual harassment where an aid, benefit, or educational service is conditioned on unwanted sexual conduct. An example would be a professor offering to give a student a higher grade in the class in return for sexual favors.

Domestic Violence
Violence between two people who are cohabitating, current or former spouses, or are engaged in an intimate relationship.

Dating Violence
Violence which occurs between two people who are or have been in a romantic or intimate relationship. Violence includes sexual or physical abuse, or the threat of sexual or physical abuse. To constitute dating violence, a determination of whether a relationship exists is first made, looking to the type of relationship, frequency of interactions, and length of relationship.

Sexual Assault	
Sexual acts that are directed at another person but lacking consent either due to age, temporary or permanent mental incapacity, or temporary or permanent physical incapacity. Also, includes (1) forcible rape; (2) forcible sodomy; (3) sexual assault with an object; (4) forcible fondling.	
Forcible Rape	Forcible Sodomy
Forcible rape includes any penetration, no matter how slight, of the vagina or anus with any body part of object. It also includes oral penetration by a sex organ of another person, without the consent of that person.	Forcible sodomy includes oral or anal sexual intercourse with another person where it is performed forcibly and/or against the person's will. It also includes such behavior when the person is incapable of giving consent either due to age, temporary or permanent mental incapacity, or temporary or permanent physical incapacity.
Sexual Assault with an Object	Forcible Fondling
Sexual assault with an object is the use of an object or instrument to forcibly or non-consensually penetrate another person's genital or anal openings.	Forcible fondling includes the non-consensual touching of private body parts of another person, such as the groin, breasts, or buttocks, for the purpose of sexual gratification. Such fondling is against the person's will, non-consensual, or lacking consent where the individual is incapable of giving consent due to age, temporary or permanent mental incapacity, or temporary or permanent physical incapacity.
Nonforcible Sexual Assault	
Consensual sexual intercourse between two persons who are first cousins or closer, as prohibited in the State of Indiana (i.e., incest), or between two persons where one is under the statutory age of consent (i.e., statutory rape).	

Additional behaviors that would not fall under either definition of sexual harassment or sexual assault do constitute behavior actionable under Title IX, such as stalking and retaliation.

Stalking
Stalking is actionable under Title IX as defined by behavior that is directed at a specific person that would cause a reasonable person to suffer emotional distress, or fear for their personal safety or the safety of others. To constitute stalking, there must be two or more acts by the stalker. This can include a stalker directly or indirectly monitoring, observing, communicating, or threatening another person.

Retaliation

If an allegation is brought against another, Title IX protects against any sort of retaliation. Retaliation is prohibited where a person threatens, discriminates, or intimidates a complainant or respondent in a Title IX claim. The retaliatory behavior does not need to be sexual in nature and can merely arise out of the same facts and circumstances of the allegations. Retaliation extends to third parties who testified, assisted in, or participated in an investigation.

Parties

Title IX relief is limited to incidents arising in four different situations:

- **Student on Student Conduct:** Where the acts of harassment, discrimination, or violence are from one student of the school against another.
- **Employee on Student Conduct:** Where the acts of harassment, discrimination, or violence are from an employee of the school against a student. Alternatively, though rare, this also includes acts of harassment or discrimination from a student of the school against an employee.
- **Employee on Employee Conduct:** Where the acts of harassment, discrimination, or violence are from an employee of the school against another employee.
- **University-Related Contractor Conduct:** Where the acts of harassment, discrimination, or violence are from a university-related contractor against a student or employee of the school. Any individuals or companies doing business with the school may be subject to Title IX liability by virtue of their business with the school. Examples could include vendors and caterers.

Setting

As seen in the introduction, the regulations have narrowed the definition of locations of incidents where schools are required to investigate. Incidents that occur on the school's campus are clearly within the purview of the school's investigation obligation. The definition would also require a school to investigate incidents that occurred in the United States during a school-owned or school-sponsored off-campus activity. Such activity could be an educational trip within the United States, or an incident that occurred a fraternity which is recognized by the school. Incidents that occur in independently owned, off-campus apartments would not be covered by Title IX, nor would those occur during a study abroad program.

The chart below outlines locations of incidents and whether or not they would find recourse under Title IX.

Location	Recourse under Title IX?
Classroom	Yes
On-Campus Residence/Dormitory	Yes
Study-Abroad Trip to France	No
Football Team's Away Game	Yes
Off-Campus Bar	No*

*While this situation would not fall under Title IX, it may fall under the student code of conduct violation, or would be eligible for relief in a more formal, legal process. Where these are very cut-and-dry examples, real life situations are often more nuanced. To know if you have recourse under Title IX, you need to contact an experienced attorney.

No Recourse Under Title IX?

If the alleged behavior does not fall under one of these definitions, then Title IX would not provide adequate recourse. Additionally, if the allegation does not occur within the United States, it is outside the scope of Title IX. However, there are other avenues. One of which is through the school's student or employee code of conduct violation procedures. To understand if recourse would be found through this avenue, a consultation of your school's policies is necessary. The school policies will outline what would constitute a violation and what action will be taken as a result.

Another avenue would be to file a civil protective order (sometimes called a "restraining" or "no-contact order"). A petitioner may request a civil protective order to prevent a third-party from contacting them, visiting their residence, visiting their workplace, or from continuing in behavior that is harassment, stalking, or violent in nature. If granted, the order is enforced with the support of law enforcement and can result in legal repercussions if violated. If you are wondering if a protective order is the right course of action for you, please contact the law firm of Keffer Hirschauer LLP for a free consultation.

Chapter 2: The Process

Cast of Characters

In a Title IX investigation, the two main parties will be the **complainant**, or the person who is bringing the allegations, and the **respondent**, the one against whom the allegations are being brought. When a complaint is made, school officials will become involved, and more people will be added to support both the complainant and respondent as well as to facilitate the investigation.

The new regulations require that all Title IX officials at a school must receive training on Title IX and its regulations, including the definition of sexual harassment, how Title IX applies to the school's programs and activities, how to conduct a formal Title IX grievance process, and how

to be an impartial decision-maker. Colleges and universities must also publish the training materials online. This ensures that all people involved in the process are fully aware of the procedures and requirements of Title IX.

During the process, you will encounter a variety of individuals. Where before, Title IX investigations could be investigated, and adjudicated by the same person, also known as a single-investigator model; new regulations require more parties to be involved in the interest of fairness. The personnel that will be dealing with the complaint must also be free from any conflicts of interest. If the investigator has any sort of relationship, whether personal, or professional that could likely weigh in favor of one party over the other, they are not allowed to participate in the investigation.

The main roles, apart from the **complainant** and **respondent**, that will be involved in the process are:

- **Title IX Coordinator:** The coordinator helps interpret Title IX as it relates to the school's policies and also coordinates the investigation and adjudication process. The coordinator ensures that these matters are conducted in a timely manner, and that the investigation process and adjudication are ultimately equitable.
- **Investigator:** The main fact finder of the process. Depending on the school size, there may be a panel of investigators, or a single person whose sole role is to determine the truth of the facts. The investigator may work alongside the coordinator to schedule interviews and draft interview questions.
- **Adjudicator:** The adjudicator will make a determination as to whether or not a Title IX policy violation occurred. Adjudicators will review the evidence presented, participate in the hearing, and decide whether there is sufficient evidence to support a policy violation, and whether there is a responsible party.
- **Hearing Administrator:** An individual who oversees and conducts the hearing, including asking questions of the parties and witnesses.
- **Hearing Officer:** A participant in a hearing who will be present at the hearing at be able to vote but will not have any part in running the hearing.
- **Appeals Officer:** Discussed in Chapter 4, the Appeals Officer is not involved in the investigation unless either party chooses to appeal the determination. Then Appeals Officer reviews the procedures and ruling and decides whether to enforce the previous determination or sanction.
- **Advisor:** Both the complainant and the respondent will be allowed to have advisors help them during the process. These advisors attend meeting and interviews, comfort and support the advisee, assist is the formal resolution

process, and communicate with investigators. Advisors also cross-examine witnesses during the hearing.

- **Witness:** A witness may be called to testify on behalf of either party. This is an individual who either witnessed the event or events first-hand or witnessed either party soon after the incident.

Advisors

Parties are allowed to choose who they would like to serve as their advisor. Advisors have the right to receive any and all evidence that is relevant or directly related to the incident. They may choose a family member, an attorney, or another third party. Advisors are restricted in their participation. Depending on the school's policies, they may not be able to speak during the interview or meetings. However, they will have the ability to cross-examine witnesses that are brought forth during the hearing.

If a party does not have an advisor, the school is required to provide one for the purposes of cross examination. These advisors are to be provided by the school at no cost to the parties. During the hearing, the parties are not allowed to question the witnesses themselves, though they may provide a list of questions prior to the hearing.

Our team of experienced Indianapolis lawyers, that include ATIXA-certified investigators, coordinators, and administrators, can help you navigate the Title IX process and be by you every step of the way. Instead of having a school-appointed representative serve as an advisor during the Title IX process, a Title IX attorney provides the following benefits:

- **Legal Knowledge:** Title IX attorneys maintain current knowledge of Title IX law and guidelines, as well as civil and criminal law, to provide holistic advice concerning all legal options and ramifications.
- **Title IX Experience:** Our team is skilled in investigating Title IX matters and has served in various capacities during investigations at both large and small universities throughout the state. Additionally, a Title IX attorney provides objective assistance as someone not employed by or otherwise invested in the school or university.
- **Litigation Skills:** As advocates for your civil rights and interests, Title IX attorneys can advise you of potential consequences, both immediate and indirect, of a Title IX adjudication. These attorneys also possess the courtroom skills and demeanor to proceed with litigation if necessary.

Formal Process

From complaint until final determination, schools are required to make a good faith effort to resolve allegations promptly. Generally, a resolution will come within sixty (60) days. However, timeframes for the grievance process and for the appellate process will be outlined in the school's procedures. Temporary delays are allowed for good cause and if there is proper notice of a delay to both parties. Reasons for delays for good cause might present in cases of high complexity or where there are a large numbers of witnesses. Delays may also be reasonable for certain school breaks, such as winter or spring break. However, delays are not deemed reasonable over summer break, or due to administrative needs.

The process, simply illustrated below, will begin with a filed complaint and continue with an investigation, a hearing on the evidence, a determination of responsibility and the possibility of an appeal will follow. If an appeal is pursued, the process may be extended if the finding of responsibility or the imposed sanctions are changed.



Filing a Formal Complaint

A formal complaint is the document filed by the complainant, or alleged victim, that alleges sexual harassment or assault by a respondent. This complaint also requests the Title IX Coordinator to conduct an investigation of the conduct. Submitting a formal complaint triggers the school's obligation to assess the allegations, determine the appropriate process, and possibly initiate the grievance process.

For the complaint to be submitted, it must be in writing and must either be submitted by the complainant or by the Title IX Coordinator, on behalf of and with the permission of the complainant. The contents of the complaint should include the following:

- The name of the respondent, if known;
- The date(s) of the alleged incident;
- The location(s) of the alleged incident; and
- A description of the conduct that is alleged to have occurred.

In response to the filed complaint, schools will look to the behavior that is alleged, the participants, and the setting, as described in Chapter 1, to determine whether the complaint has recourse under Title IX. If the behavior falls instead under the student or employee code of conduct, then the complaint will be transferred to the proper investigatory body.

A formal complaint may be dismissed by the Title IX Coordinator if it does not meet the requirements as laid out in Chapter 1. For instance, if the conduct alleged in the complaint would not constitute behavior actionable under Title IX, then the formal complaint will be dismissed, and the complainant will need to pursue an alternate route. If it is dismissed, the school is required to submit a written notice of dismissal to both the complainant and the respondent.

The complaint may also be dismissed at the discretion of the Title IX Coordinator at any time during the investigation or hearing. The reasons for the discretionary dismissal usually are:

- **Voluntary Withdrawal:** The complainant decides that they would like to withdraw the formal complaint, or any allegations within. To do so, the complainant must submit a written notice of withdrawal.
- **Current Status:** If the respondent is no longer enrolled, employed, or contracted by the school, the allegations are then outside of the scope of Title IX. The main purpose of Title IX as well as any sanctions that would be imposed are no longer attainable. Please note, however, that if an allegation is made shortly before a student is scheduled to graduate, a Title IX investigation can delay that graduation or conferring of diploma.
- **Special Circumstances:** Any incident, event, or situation that prevents the Title IX investigator from gathering sufficient evidence to reach a determination as to the formal complaint or allegations may result in a discretionary dismissal.

If such a dismissal occurs, parties retain the right to appeal. The appellate process will be explained more in depth in Chapter 4.

If a complainant has voiced allegations or concerns that would evoke Title IX procedures, immediate action may be taken in the form of supportive, interim, or emergency measures. Respondents are often made aware of any measures taken when they are first told of the complaint against them and the investigation which is to ensue.

[Supportive or Interim Measures](#)

Interim, or supportive measures, are non-disciplinary, non-punitive individualized services offered to both the complainant and the respondent while the investigation is pending. They are called interim measures because they are in place while the investigation is pending. These measures are offered when they are deemed appropriate and reasonably available, and without fee or charge to

the party. The goal of these measures is to restore or preserve equal access to the school’s educational program or activity without submitting the other party to an undue burden. Above all, these measures are designed to protect the safety of the parties, witnesses, and the school.

Supportive measures can be issued whether or not a formal investigation is conducted. If a complainant chooses not to pursue an investigation, they can still access supportive measures that would serve to protect, help, or care for them. The nature, purpose, and substance of both supportive and interim measures are the same. Where supportive measures are available outside of an investigation, interim measures are employed while an investigation is underway.

This chart contains examples of supportive measures that would be available to both parties.

Supportive Measures		
Campus Escorts	Class Schedule Modifications	Student Financial Aid
Transportation Accommodations	Referrals to Counseling or Other Health Services	No Contact Orders
Campus Housing Changes	Work Schedule Modifications	<i>Persona Non Grata</i> Orders
Academic Support	Visa and Immigration Assistance	Heightened Security

Emergency Interim Measures

In determining emergency measures, there is first an undertaking of an individualized safety and risk analysis. A determination is made as to whether the respondent poses an immediate threat to the physical health or safety of any student or other individual arising from the allegations of the Title IX investigation. One example of an emergency measure would be removing respondent from the school grounds. If this happens, the respondent is given notice prior to the removal and is provided an opportunity to challenge the decision immediately following the removal. The new regulations ensure that one party is not unduly burdened over the other party. When determining emergency measure that are to be taken, the school is to take the least restrictive means possible.

Investigation

A formal investigation will be conducted by an investigator, or investigators. During the investigation, there must be equal opportunity for both parties to present witnesses and evidence. One of the first steps in the investigatory process will be an interview of each of the parties. This will be one of the first opportunities that the respondent will have to speak to the investigator and present their defense. The interview also allows the investigator or coordinator to further outline the Title IX process and explain to the parties what will be expected of them. The interview is between the investigator and the party alone. Where an advisor is not able to participate during the interview, they are allowed to be present with the party. Obtaining a Title IX lawyer early in the

process is crucial as they are able to help you prepare for the interview. After participating in numerous investigations, the lawyers at Keffer Hirschauer LLP know what questions to anticipate and will help the interview process seem less daunting.

Apart from the interview, pieces of evidence will be collected. Such evidence may include electronic evidence, testimonial evidence, circumstantial evidence, and more. Simply put, anything that relates to the allegations may be considered during the investigation; however, whether evidence is actually considered will depend on if it is deemed relevant and related to the allegations at issue. Evidence that is collected during the investigation will fall under one of three categories:

- **Directly Related and Relevant Evidence:** This includes all evidence that is both relevant to the claim of the complainant, and also directly related. Such evidence includes include text messages, social media posts, photographs, or police reports, security footage, and eyewitness accounts of the allegations at issue.
- **Directly Related Evidence:** This includes evidence that may be directly related to the complaint, but that the investigator has found to be not relevant. Parties may present arguments that such evidence be deemed relevant or be deemed not directly related to the complaint.
- **Unrelated and Irrelevant Evidence:** This is evidence that is neither related to the complaint nor deemed relevant by the investigator. Though it is not used for the purposes of the process, any evidence presented that falls under this category must be maintained by the investigator.

Ultimately, whether or not a piece of evidence is deemed relevant will depend on the interpretation from investigators and the coordinator. Relevant evidence will then be included in the investigation report and presented at the hearing; where irrelevant evidence will not.

[Investigation Report](#)

Prior to final completion of the investigation report, there must be equal opportunity for parties to inspect and review any evidence obtained that is **directly** related to the complaint. This includes any evidence that the school does not necessarily intend to rely on in making a determination but has reviewed. Any evidence that would lean toward finding the respondent responsible or not must also be available for review by both parties, regardless of their source. Parties will have at least ten (10) days to review the report and submit a written response. In the response, the parties may challenge what is deemed **relevant evidence**. Though the decision-maker is the final arbitrator of relevance, parties may argue that the evidence that the school is intending to rely on should or should not be included. Once parties have had a time to response to the investigation report, an amended investigation report will be issued to both parties.

The investigation report must be sent to both parties at least ten (10) days prior to the date of the Title IX hearing. This time presents an opportunity for advisors to review the investigator's process and prepare for the hearing. In the preparation, parties and their advisors will outline any arguments that will be presented, and draft questions for the advisor to ask during the hearing.

It is important to note that the investigation report should **not** be a determination of responsibility. Rather it is determination of relevance of the evidence to be used in making the final determination. Specifically, the relevance of the evidence that will be presented at the hearing.

The investigation report must fairly summarize the relevant evidence. Copies must be sent to each party and the party's advisor and include all evidence obtained that is **directly related** to the complaint, to review in an electronic format or a hard copy, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source.

[Title IX Hearing](#)

During the hearing, relevant evidence will be presented, and questions will be asked of the complainant, respondent, and any witnesses. Advisors will have the opportunity to question the other party and witnesses. These questions are ones that the parties and their advisors will have prepared beforehand. The questions that are asked can challenge the credibility of the other party's version of events. Given that intimate conduct can form the basis of a Title IX investigation, and witnesses may be limited in number as a result, a Title IX determination often times comes down to a determination of credibility. As such, it is important that the relevant evidence, the parties, and the witness are examined and question as to their veracity.

The prior sexual history of parties may be introduced during a hearing. Sexual history may be relied upon to determine the consent of each party. For example, if an allegation of rape is brought between a couple who had prior sexual relations, that history will be examined to determine what communication and consent looked like for the prior encounters, and if it was present during the alleged incident. If sexual history is likely to be brought up, a trained Title IX attorney can help best prepare you, both emotionally and practically, for that line of questioning.

If a party or a witness chooses not to attend or not to subject themselves to questions, a hearing board is not permitted to attribute any weight to those actions. However, it is strongly encouraged for all parties to appear. If the respondent does not appear, there will not be much evidence to refute the complainant's account of the incident. It is in your best interest to appear, prepare and present evidence, and have a qualified advisor to help navigate the investigation process.

Written Determination

After a determination has been made as to the presence of a violation and identification of a reasonable party, a written report must be completed. In this determination, the allegations that formed the basis of the investigation must be identified. Each of the procedural steps that took place during the investigation, from the submission of the complaint until the final determination, will be laid out. The report will describe when notice to the parties was given, the interviews that were conducted, and evidence that was gathered.

Included in the written determination will be a section outlining the findings of fact. Any evidence that was presented will be identified. The report will explain how the evidence presented was interpreted and how the school's Title IX policy was applied to the facts. Additionally, a statement of, and rationale for, the result of the investigation will outline the determination of responsibility, any sanctions that will be imposed on the respondent, and whether there will be remedies provided to the complainant.

Both parties will simultaneously receive delivery of the written determination, along with information about the appeal process. If neither party appeals within a reasonable time, as detailed in the school's policy, then the determination is deemed final, and the outlined sanctions are imposed. If, however, a party pursues an appeal, either wanting to challenge the determination of responsibility, or the imposition of sanctions, the written determination will be reviewed, and the process will continue as we will discuss in Chapter 4.

Informal Resolution

There is a possibility for parties to pursue an informal resolution. Such a resolution would not involve a full investigation or adjudication and may be offered at any time during the investigation, prior to a determination. The Title IX Coordinator must make a determination as to whether or not the case would be appropriately handled by an informal resolution. If the Coordinator agrees, and if the parties mutually and voluntarily agree to participate in investigation process, so long as the process is not made a condition of ongoing employment or enrollment, and the parties have to give full written consent to participate then informal methods may be followed. Parties have the option to discontinue the informal process and pursue a formal resolution. The informal option is precluded, however, when a determination regarding responsibility has been made.

Informal methods include mediation, restorative practices, and conflict resolution. Depending on the nature of the allegation, different methods may be used. The regulations do not prescribe the specific methods that schools can use, so it will be a school specific determination. However, some schools have policies barring informal resolutions in cases of sexual assault or violent conduct.

Chapter 3: Sanctions and Adjudications

If the Title IX investigation finds an individual responsible for the accused actions, sanctions may be imposed. In determining the sanctions, schools are required to take into consideration the impact the sanction would impose on both parties. Three factors that are mainly considered are as follows:

- **Risk:** Sanctions are decided based on a risk assessment audit and mitigation process. In other words, if the individual who is found responsible for the actions presents an on-going risk, then higher sanctions (such as expulsion) may result.
- **Education:** The decision also takes into consideration the respondent's education. The school will consider whether to suspend or expel the individual, or if there are alternative means that would not impact the respondent as much, such as having the individual switch sections of a class.
- **Severity:** The sanction that is imposed needs to be reasonable and reflect the severity of the behavior for which the respondent is found responsible.

The main goal of sanctions falls under one of three goals:

- **Stop:** Stop the behavior that was the basis of the Title IX claim.
- **Prevent:** Prevent the furtherance of the behavior and ensure that it will not continue after the conclusion of the investigation.
- **Remedy:** Remedy the situation by bringing a consequence or punishment that reflects the severity of the behavior.

Where the Title IX Coordinator helped with the determination of the case, they will not be involved in the issuance of a sanction. Where the Title IX Coordinator will continue to oversee the process, a separate campus administrator will issue a sanction. As these campus administrators are educators at heart, they will be faced with a tension between the education of the respondent, and the developmental sanctions of the student conduct process.

In issuing a sanction, a rationale as to the purpose and reason for that sanction is required. The campus administrator does not need to produce a formal finding of fact, as seen in the legal field, but needs to explain each specific allegation of the policy, the decision, and evidence relied on as well as the sanction and rationale for the sanction.

Imposed sanctions vary widely on the status of the respondent. Generally speaking, sanctions may include orders of *persona non-grata* and trespass on school property. If the respondent is a student, possible sanctions range from no-contact orders and remedial measures to expulsion and a denial of diploma. Employees of the school, such as professors, may face sanctions such as denial of tenure and termination of employment. Contractors may have their service terminated and be

prohibited from return to the school campus. As these sanctions may have detrimental impacts on an individual's educational and employment future, hiring a Title IX attorney will give you the fighting chance you need.

Chapter 4: Appeal

After a determination of responsibility is made, either of the parties has an opportunity to appeal. The possibility of an appeal must be offered by schools equitably based on the determination or dismissal of any allegations. This allows all parties to support or oppose the outcome of the Title IX investigation. As such, if the respondent is found to be in violation of Title IX, the respondent can appeal the decision. Additionally, if the respondent is found to not in violation of Title IX, the complainant can appeal the decision.

To follow proper procedure, a party requesting an appeal must do so in writing shortly after the final determination is made. There is a short window to request an appeal, which will depend on the school's individual policy. After a request is submitted, schools have an obligation to submit a decision within a reasonably prompt timeframe. All parties involved need to receive notification of any appeal. During the appeal process, any sanctions determined as a result of the finding will be held in abeyance. In other words, the sanctions will be suspended pending a decision on the request for appeal. However, any interim measures in place would continue throughout the appeal process. To further the propriety of the appeal procedure, the decision-maker cannot have had any other role in the investigation or resolution process. For example, if an individual served as the investigator, they cannot then serve as the decision-maker for the appeal.

There are three possible grounds for which an appeal may be based:

- **Procedure:** There was an irregularity with the Title IX procedure that affected the outcome of the matter.
- **New Evidence:** Since the time of the determination, evidence that was not reasonably available before has been discovered that could affect the outcome of the matter.
- **Bias:** The Title IX Coordinator, investigator, or decision-maker involved in the investigation had a conflict of interest or bias that could affect the outcome of the matter.

The appeal process exists to provide review of the grounds for determination of responsibility and sanction, and is a decision based on the merits of the argument concerning these determinations. However, the appeal process does not exist to rehear the case in total. If the request for an appeal is denied, then the prior decision stands. However, if the request for appeal is accepted, three possibilities arise:

- **Remand:** The Title IX case is remanded, or sent back, to essentially redo a portion of the process. This may be the entire investigation, the hearing, or just the sanction determination.
- **Stand:** The appellate officer reviews the investigation and decides to uphold the previous decision.
- **Adjust:** The findings of the investigation are upheld, however, the sanctions that were previously ordered are adjusted.

If an advisor is present, they can assist the party in drafting the appeal. This includes determining the appropriate grounds for appeal and ensuring that the request is made in a timely manner. Above all, the advisor's role would extend far beyond the decision-maker's findings by securing and maintaining supportive measures for the party.

Far too much is at stake when individuals are accused of Title IX violations. Even if an individual is cleared of allegations and Title IX sanctions are not imposed, the effects of an accusation of this nature can still linger long into the future, especially if a case is not well-managed from the start. The Indianapolis Title IX defense attorneys at Keffer Hirschauer LLP can work, even at the appellate stage, to protect the rights and the futures of those involved in a Title IX investigation.

Chapter 5: More Changes to Come?

Though the regulations were just recently amended, they are not set in stone. These regulations are current as of now, however, the nature of Title IX makes them subject to change. Student populations change, behaviors change, and the expectations of schools to provide protections change. The result is rapid and sudden modifications to Title IX and the interpretation and application thereof. These changes may come in the various forms:

- **Legislative:** Amendments to 28 U.S.C. § 1681 or to 34 C.F.R. Part 106.
- **Departmental:** Modifications, clarifications, or definitional changes from the U.S. Department of Education; as was the case in the most recent changes.
- **Institutional:** Policy or procedural adaptations that each school or institution implements to be in compliance with legislative and departmental regulations.

With an increased presence of online courses, the implications on Title IX and the school's ability to protect its students, employees, and contractors remotely have yet to be discovered. As such, it is important to contact a Title IX attorney who stays abreast of the most up-to-date Title IX law.

Conclusion

The pace of proceedings and potentially severe consequences of Title IX violations make it critical for those accused to contact experienced counsel right away. Title IX violations may negatively impact future educational or employment opportunities in addition to tarnishing an accused's reputation. And the information collected in Title IX proceedings may form the basis of later criminal charges or civil actions for monetary damages. Engaging a reliable Title IX defense lawyer early in the process can better protect your rights and bring about the best possible outcome.

If you are facing Title IX allegations in Indiana, we can provide knowledgeable and compassionate legal guidance. Our deep understanding of Title IX and the policies and procedures used by Indiana educational institutions means that we can hit the ground running. And our experience as skilled criminal defense and Title IX defense attorneys in Indiana allows us to provide comprehensive advice to help you anticipate and avoid additional legal problems.

For most, the ability to handle a Title IX investigation on their own is too much. The stakes are too high. The hope is that you are left with a better understanding of how the Title IX process will unfold through this eBook. However, this resource will fall short in fully preparing you for your school's policy and nuances that you are sure to face during your Title IX investigation. That is why it is recommended you seek legal counsel to assist you as an advisor throughout the process. Contact Keffer Hirschauer LLP to schedule a free and confidential consultation with one of our experienced lawyers.



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