

LINCOLN UNIVERSITY

TITLE IX TRAINING

(For Title IX Coordinator, Investigators, Decision Makers and Others with Responsibilities Regarding Administration of Title IX Procedures)

August 2020

Presented by:

James A. Diamond and LaToya Winfield Bellamy, Attorneys with the Harrisburg Office of Eckert Seamans Cherin & Mellott, LLC

www.eckertseamans.com

ECKERT
SEAMANS
ATTORNEYS AT LAW

Introduction to Amended Regulations and Updated Title IX Policy

- Comprehensive Amendments to Federal Title IX Regulations (34 C.F.R. Part 106) Effective August 14, 2020
- Updated Lincoln University Title IX Policy Effective August 14, 2020 (*See copy provided to be reviewed in detail during this presentation*)

HIGHLIGHTS OF THE AMENDED REGULATIONS:

- Substantially changes how Universities are required to handle sexual misconduct cases.
- Universities must respond to Complaints of sexual harassment as defined for Title IX purposes in a manner that is “not deliberately indifferent.”
- Universities must respond to Complaints if they have “actual knowledge” of alleged sexual harassment.
 - Occurs if a University official with authority to take corrective action receives notice (consistent with standards in US Supreme Court decisions)
- Emphasis on “Equitable” treatment of “Complainants” and “Respondents,” and on Due Process.

HIGHLIGHTS OF THE AMENDED REGULATIONS (cont.):

- New very detailed “Grievance Procedure” requirements, including new investigation and hearing procedure requirements.
 - Substantially impacts how investigations are handled and requires sharing of evidence with both parties...
 - Directly regulates the content of notices that must be provided to both parties...
 - Drastically changes and closely regulates how live hearings are conducted...
 - Questioning / cross-examination of other party / witnesses must be through “advisors”...
 - “Relevance” review of all questions by decision makers (*i.e.* Title IX hearing board members) and application of “rape shield” law principles...
 - Written Decisions are required to have detailed findings of fact, procedural histories, etc.
 - Underscores the importance of equitable treatment of Respondents and Complainants in connection with “supportive measures” prior to determination regarding responsibility...
 - Mandates and sets new rules regarding appeals...

WHAT IS “SEXUAL HARASSMENT” FOR TITLE IX PURPOSES?

Consistent with the Title IX Regulations, “Sexual Harassment” for the purposes of Lincoln’s Title IX Policy means conduct on the basis of sex that satisfies one or more of the following:

- (i) An employee of the University conditioning educational benefits on participation in unwelcome sexual conduct (sometimes referred to as “*quid pro quo*”);
 - (ii) 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 University’s education program or activity; or
 - (iii) Sexual assault as defined in the Clery Act, or dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA).
- *[See Section 6 of updated Title IX Policy for examples of Prohibited Conduct]*

TITLE IX POLICY JURISDICTIONAL / APPLICABILITY ISSUES and UNDERSTANDING THE SCOPE OF LINCOLN UNIVERSITY'S EDUCATIONAL PROGRAMS AND ACTIVITIES THAT ARE SUBJECT TO THE POLICY:

- The new Regulations clarify that Title IX only applies to Lincoln's educational programs and activities that occur ***within the United States***.
 - Implications for Study Abroad Programs. (Cannot be processed as Title IX Policy violations, but may be addressed under general rules of the Student Code of Conduct.)
- The educational programs and activities of the University to which the Title IX Policy applies include all ***“locations, events, or circumstances over which the [University] exercised substantial control over both the respondent and the context in which the harassment occurs.”***
- The new Regulations clarify that this includes ***“any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.”***
 - Significance for incidents at fraternity and sorority houses.

Reporting Procedures (Policy Sec. 7)

- In The Event Of A Sexual Assault (Sec. 7.1.1)
 - Safety / Medical Treatment
 - Preservation of Evidence
- Reporting and Filing Complaints with the Title IX Coordinator (Sec. 7.1.2)
- Reports may be anonymous
- Helpful if report includes: names of the Complainant, Respondent, any witnesses, and any other relevant facts, including the date, time, and specific location of the alleged incident, if available.

University Response Obligations

(Policy Sec. 7.2)

Mandatory response obligations of the University as required by the Title IX Regulations are as follows:

- University must offer supportive measures to the Complainant.
- The Title IX Coordinator must promptly ***contact the Complainant*** confidentially about ***supportive measures*** and the formal complaint process.

Response Obligations (Cont.)

- The University must follow the grievance process set forth in the Policy before the imposition of any disciplinary sanctions or other actions that are not supportive measures, against a Respondent.
- The University must not restrict rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment, when complying with Title IX.
- The University **must investigate** sexual harassment allegations in **any formal complaint**, whether filed by a Complainant or signed by a Title IX Coordinator.
- The University should respect a Complainant's wishes with respect to whether it investigates the reported incident **unless** the Title IX Coordinator determines that signing a Formal Complaint to initiate an investigation over the wishes of the Complainant is not clearly unreasonable in light of the known circumstances.

Grievance Process – Formal Complaint (Policy Sec. 8)

- **Submission to the Title IX Coordinator** of a Formal Complaint alleging sexual harassment and requesting investigation will immediately trigger the University’s Title IX Grievance Process.
- **“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 University investigate.

Grievance Process – Notice of Allegations (Policy Sec. 8.2)

- Respondent (and Complainant) will be promptly provided with a “Notice of Allegations.”
- Notice shall include the allegations of conduct potentially constituting sexual harassment, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview.
- Such details include: identities of the parties involved, if known, the conduct allegedly constituting sexual harassment, and the date, time and location of the alleged incident, if known.

Grievance Process – Investigation by University (Policy Sec. 8.3)

- ***Obligation to investigate*** and gather evidence ***is on the University*** and not on the parties.
 - However, the University cannot access, consider, disclose, or otherwise use a party's ***medical / psychological records*** without that party's voluntary, ***written consent*** to do so.
- Equal opportunity for both parties to present witnesses, including fact and expert witnesses, and other evidence.
- No “**gag orders**” -- Cannot restrict ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.

Investigation Process (Cont.)

- 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***, who may be, but is not required to be, an attorney.
- Provide ***written notices*** to parties of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, ***with sufficient time for the party to prepare*** to participate.
- Provide both parties an equal opportunity to ***inspect and review evidence obtained in the investigation*** that is directly related to the allegations.

Tips on conducting investigations and gathering evidence.

- **Confirming no Conflict/Bias and Outlining Investigation Steps.**
- **Conducting interviews.**
- **Gathering videos, documents, and other evidence.**
- **Evaluating the evidence and preparing a report to be provided to both parties.**
- **Thoroughly documenting the investigation.**

Investigation Process (Cont.)

- Send each party (and advisors, if any) the gathered **evidence** to inspect and review and allow ***at least ten (10) calendar*** days to submit a written response to be considered by investigator ***prior to*** completion of the investigative ***report***.
- Create and send each party (and advisor) an ***investigative report*** that fairly summarizes relevant evidence ***at least ten (10) calendar days prior to a hearing*** (if a hearing is held) or other time of determination regarding responsibility for their review and written response.

Options for Informal Resolution

(Policy Sec. 8.4)

- May be offered by University after Formal Complaint is filed.
 - *BUT cannot be used where the Respondent is an employee and the Complainant is a student.*
- Must be Voluntary.
- If in a particular case expulsion is a proposed sanction, it, like all other potential outcomes, can only occur as the result of an informal resolution if both parties agree to it.

Grievance Process -- Live Hearing

(Policy Sec. 8.6)

- The trained panel of decision-makers:
 - (i) will not include the Title IX Coordinator or the investigator;
 - (ii) will be free from **conflict of interest** or **bias**, including general bias for or against Complainants or Respondents; and
 - (iii) will have been trained on topics including how to serve impartially, issues of relevance, including how to apply the rape shield protections provided for complainants, and any technology to be used at the hearing.
- “Conflict of Interest” and “bias” explained.

Grievance Process -- Live Hearing

(Cont.)

- Each party must be permitted ***through an Advisor*** of the party's choosing to cross-examine and ask ***relevant questions*** of the other party and all witnesses.
 - *Parties are prohibited from directly asking other party and witnesses questions.*
- At the request of either party, the University will provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions.

DETERMINING “RELEVANCY” OF EVIDENCE and UNDERSTANDING “RAPE SHIELD” LAW CONCEPTS (Live Hearing cont.)

Under the updated Regulations, Title IX decision makers must be trained on, and are to understand, “**issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant...**”

- Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-makers must first determine whether the question is **relevant** and explain any decision to exclude a question as not relevant. (Need for pause between question and answer.)
- Generally, evidence is considered “relevant” if it logically **tends to establish a material fact** in question, tends to make a fact at issue **more or less probable**, or **supports a reasonable inference or presumption** regarding the existence of a material fact.
- The Regulations provide, “Questions and evidence about the **complainant's sexual predisposition or prior sexual behavior** are **not relevant, unless** such questions and evidence about the complainant's prior sexual behavior are offered to prove that **someone other than the respondent committed the conduct** alleged by the complainant, **or** if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove **consent**. “

Other issues regarding the live hearing

- If a party or **witness does not submit to cross-examination**, the decision-makers are **prohibited** from relying on any statement of that party or witness in reaching a determination.
 - **BUT** no negative inference solely on the basis of a party's or witness's absence from the live hearing or refusal to answer.
- The University will create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.
- The University uses a “**preponderance of the evidence**” standard to determine responsibility. (more likely than not)

Grievance Process -- Written Determination (Sec. 8.7)

There must be a **Written determination** of responsibility or non-responsibility with:

- (i) an identification of the **allegations** potentially constituting sexual harassment;
- (ii) Detailed **history of procedural steps** taken -- including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
- (iii) **Findings of Fact** supporting the determination;
- (iv) Conclusions regarding the application of the University's **code of conduct** to the facts in the event that the University exercises its discretion to apply any University policies and procedures not otherwise required under Title IX;
- (v) a statement of, and rationale for, the **result as to each allegation**, including a determination regarding responsibility, any disciplinary sanctions the University imposes on the Respondent, and whether remedies designed to restore or preserve equal access to the University's education program or activity will be provided by the University to the Complainant; and
- (vi) the applicable **appeal procedures**.

Appeals (Policy Sec. 8.8)

- Either party may appeal.
- Limited Grounds:
 - (i) A **procedural irregularity** that affected the outcome of the matter;
 - (ii) **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;
 - (iii) The Title IX Coordinator, investigator(s), or decision-maker(s) had a **conflict of interest or bias** that affected the outcome of the matter; and/or
 - (iv) The disciplinary **sanctions or remedies** imposed are unreasonable, inappropriate, overly harsh or insufficient given the violation determined and circumstances of the case.

Supportive Measures (Policy Sec. 10)

Individualized services that are **non-punitive**, non-disciplinary, and **not unreasonably burdensome to the other party** while designed to ensure equal educational access, protect safety, or deter sexual harassment.

May include, but may not be limited to:

- Providing escorts to ensure that individuals can safely move between classes and activities;
- **Mutual** no-contact orders; ensuring that the Respondent and Complainant do not attend the same classes, etc.;
- Moving the Complainant and/or Respondent to a different residence hall;
- Providing counseling and/or medical services;
- Providing academic support services, such as tutoring.

Cases with Respondent-Employee

(Policy Sec. 11)

- The Title IX Coordinator shall coordinate the investigation with the University Vice President of Human Resources. The University Vice President of **Human Resources**, or his or her trained designee, shall act as an **investigator** in dealing with such employee. Where both Complainant and Respondent are employees, a separate set of procedures applies.
- Employees who are found responsible for violating this Policy shall be subject to disciplinary action, up to and including termination of employment. The disciplinary action other than termination may include, but is not limited to, demotion, reassignment, a suspension without pay from employment, written warnings, and oral warnings.
- Employees subject to discipline based on a determination of responsibility for violating this Policy who are members of a collective bargaining unit represented by a labor union at the University shall have the right, to the extent consistent with federal law, including the Title IX Regulations, to pursue any directly applicable grievance and arbitration procedures under the applicable collective bargaining agreement with respect to such disciplinary action.

Miscellaneous

- Separate training on the technology used in connection with hearings and other Title IX proceedings will be provided by IT specialists.

QUESTIONS?

THANK YOU!