



**CCCU TITLE IX TRAINING:
PART ONE**

Kathryn Nash
Emily Mawer

2020 CONFIDENTIAL Lathrop GPM. All Rights Reserved. All contents are confidential, proprietary and the property of trainED and Lathrop GPM. All information included may not be reproduced, in any form, by anyone without the expressed written consent of the author or presenter. The contents should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and readers are urged to consult with an attorney concerning their own situations and any specific legal questions they may have.



AGENDA




- Purpose and Overview of Final Regulations
- Coordinator and Policy
- Institution's Obligation to Respond
- Definitions
- Emergency Removal
- Formal Grievance Process
- Retaliation
- OCR Enforcement
- Religious Exemption
- Recordkeeping
- Practical Recommendations

Lathrop GPM

2

TERMINOLOGY



- DOE = Department of Education
- Recipient = Institutions covered by Title IX
- OCR = Department of Education's Office for Civil Rights
- VAWA = Violence Against Women Reauthorization Act
- FERPA = Family Educational Rights and Privacy Act
- IDEA = Individuals with Disabilities Education Act
- ADA = Americans with Disabilities Act


Lathrop GPM

3

FINAL REGULATIONS 




Lathrop GPM, > 4

FINAL REGULATIONS: PURPOSE 


- Intended to effectuate Title IX’s prohibition against sex discrimination
 - Obligate institutions to **respond promptly and supportively** to persons alleged to be victims of sexual harassment
 - Resolve allegations of sexual harassment promptly and accurately under **a predictable, fair grievance process** that provides due process protections to alleged victims and alleged perpetrators of sexual harassment
 - Effectively implement remedies for victims

Lathrop GPM, > 5


FINAL REGULATIONS: OVERVIEW OF TOPICS 


- Define conduct constituting sexual harassment
- Specify what triggers a school’s legal obligation to respond
 - Conditions that activate a school’s obligation to respond to a report of sexual harassment
 - Circumstances when a school must initiate its grievance process
- Specify how a school must respond
 - Set forth mandatory steps that a recipient must take as part of every response to sexual harassment
 - Establish required grievance process

Lathrop GPM, > 6


COORDINATOR AND POLICY 


- Must designate and authorize at least one Title IX Coordinator
 - Employee must be referred to as the Title IX Coordinator
 - Notify all applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions of name and contact information

Lathrop GPM,  7


COORDINATOR AND POLICY 


- Must designate and authorize at least one Title IX Coordinator (cont.)
 - Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report.
 - Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic address, or by mail to the office address, listed for the Title IX Coordinator

Lathrop GPM,  8


COORDINATOR AND POLICY 


- Publish notice of non-discrimination
 - Institution does not discriminate on the basis of sex in education program or activity, which includes employment and admissions
 - Discrimination is prohibited under Title IX
 - Inquiries can be made to Title IX Coordinator and Assistant Secretary (OCR)
- Include notice and contact information for Title IX Coordinator prominently on website, handbooks and catalogs


Lathrop GPM,  9


COORDINATOR AND POLICY 


- Adopt and publish grievance procedures
 - “Prompt and equitable resolution of student and employee complaints” alleging conduct prohibited by regulations
 - Grievance process that complies with regulations for formal complaints
 - How to report or file complaint of sex discrimination
 - How to report or file a formal complaint of sexual harassment
 - How the recipient will respond
 - Applies only to sex discrimination occurring against a person in the United States

Lathrop GPM,  10


INSTITUTION'S OBLIGATION TO RESPOND UNDER TITLE IX 


- Must respond promptly when
 - Institution has actual knowledge of 
 - Sexual harassment
 - In an education program or activity of the institution
 - Against a person in the United States

Lathrop GPM,  11


DEFINITIONS 


- Sexual harassment means conduct *on the basis of sex* if:
 - Employee conditions aid, benefit, or service of the institution on an individual's participation in unwelcome sexual conduct (quid pro quo)
 - Unwelcome conduct determined by a reasonable person to be *so severe, pervasive, and objectively offensive* that it effectively denies a person equal access to the institution's education program or activity (hostile environment)
 - Sexual assault, dating violence, domestic violence, or stalking, as defined in Clery
 - Consent: No particular definition of consent with respect to sexual assault is required

Lathrop GPM,  12


DEFINITIONS 


- Actual knowledge
 - Notice of sexual harassment or allegations of sexual harassment to the Title IX Coordinator or an official who has authority to institute corrective measures on behalf of the institution
 - Notice includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator
 - Elementary and secondary schools: Any employee
 - Vicarious liability and constructive notice are insufficient
 - Standard not met if the only official with actual knowledge is the respondent

Lathrop GPM,  13


DEFINITIONS 


- Actual knowledge (cont.)
 - The following does not qualify an individual as having the authority to institute corrective measures
 - Mere ability or obligation to report sexual harassment
 - Ability or obligation to inform a student about how to report
 - Being trained in how to report

Lathrop GPM,  14


DEFINITIONS 


- Education program or activity
 - Locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs
 - Includes all incidents of sexual harassment occurring on an institution's campus
 - Also includes off-campus conduct if
 - Occurs as part of the institution's "operations"
 - Institution exercised substantial control over the respondent and the context of alleged sexual harassment
 - Occurs at an off-campus building owned or controlled by a student organization officially recognized by the postsecondary institution (e.g., fraternities and sororities)

Lathrop GPM,  15


DEFINITIONS 


- Deliberately indifferent
 - Response to sexual harassment is clearly unreasonable in light of the known circumstances

Lathrop GPM,  16


DEFINITIONS 


- Supportive measures (interim measures)
 - Non-disciplinary, non-punitive individualized services
 - Offered as appropriate, as reasonably available, and without fee or charge to complainant or respondent
 - Before or after the filing of a formal complaint or where no formal complaint has been filed

Lathrop GPM,  17


DEFINITIONS 


- Supportive measures (cont.)
 - *Designed to restore or preserve equal access to education program or activity, without unreasonably burdening the other party*
 - Includes measures designed to protect safety of all parties or the educational environment or deter sexual harassment
 - Must maintain as confidential as long as confidentiality does not impair ability of the institution to provide measures
 - Title IX Coordinator is responsible for coordinating effective implementation

Lathrop GPM,  18


DEFINITIONS 


- **Complainant**
 - Individual who is alleged to be the victim of conduct that could constitute sexual harassment
- **Respondent**
 - Individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment

Lathrop GPM,  19


DEFINITIONS 


- **Formal complaint**
 - 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
 - At the time of filing a formal complaint, 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


Lathrop GPM,  20


DEFINITIONS 


- **Formal complaint (cont.)**
 - A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, and a formal complaint may be filed by using the contact information required to be listed for the Title IX Coordinator and by any additional method designated by the recipient
 - Can be a document or electronic submission that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint
 - Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party, and must comply with the requirements to be free from conflicts and bias

Lathrop GPM,  21


INSTITUTION'S OBLIGATION TO RESPOND UNDER TITLE IX 


- Must promptly respond when
 - Institution has actual knowledge of
 - Sexual harassment
 - In an education program or activity of the institution 
 - Against a person in the United States

Lathrop GPM,  22


OBLIGATION TO RESPOND 


- Response must treat complainant and respondent equitably by
 - Offering supportive measures to a complaint (with or without formal complaint)
 - Following a grievance process that complies with the regulations before imposing any disciplinary sanctions or other actions that are not supportive measures against a respondent

Lathrop GPM,  23


OBLIGATION TO RESPOND 


- Report vs. Formal Complaint
 - Report
 - Initiates obligation to respond, including offering supportive measures (see next slide for more details)
 - Complainant's identity may be kept confidential from respondent
 - Formal complaint
 - Initiates grievance process
 - Cannot be filed anonymously
 - Requires complainant's physical or digital signature or otherwise indicates that the complainant is the person filing the complaint
 - Grievance process requires that complainant's identity be disclosed to respondent

Lathrop GPM,  24


OBLIGATION TO RESPOND 

- Title IX Coordinator must promptly contact complainant (with or without formal complaint)
 - Discuss availability of supportive measures
 - Consider complainant's wishes with respect to supportive measures
 - Inform complainant of the availability of supportive measures with or without the filing of a formal complaint
 - Explain the process for filing a formal complaint
- DOE may not deem an institution to have satisfied the institution's duty to not be deliberately indifferent based on institution's restriction of rights protected by the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment

Lathrop GPM,  25

EMERGENCY REMOVAL 

- Institution may remove a respondent from the education program or activity on an emergency basis if institution:
 - Undertakes an individualized safety and risk analysis;
 - Determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal; and
 - Provides the respondent with notice and an opportunity to challenge the decision immediately following the removal
- Non-student employees may be placed on administrative leave during grievance process
- Provision does not modify any rights under the IDEA, Section 504 of the Rehabilitation Act, or the ADA


Lathrop GPM,  26

RESPONSE TO A FORMAL COMPLAINT 


- In response to a formal complaint, institutions must follow a grievance process that complies with the regulations
- Any provisions, rules, or practices other than those required by the regulations that an institution adopts as part of its grievance process must apply equally to both parties




Lathrop GPM, 


**FORMAL GRIEVANCE PROCESS:
BASIC REQUIREMENTS** 


- Must treat complainants and respondents equitably by
 - Providing remedies to a complainant where a determination of responsibility for sexual harassment had been made
 - Remedies must be designed to restore or preserve equal access to the institution's education program or activity
 - May include the same individualized services as "supportive measures"
 - Do not need to be "non-disciplinary" or "non-punitive" and do not need to avoid burdening the respondent
 - Following grievance process that complies with regulations before imposing disciplinary sanctions or other actions that are not supportive measures

Lathrop GPM,  28


**FORMAL GRIEVANCE PROCESS:
BASIC REQUIREMENTS** 


- Objective evaluation of all relevant evidence
 - Inculpatory and exculpatory evidence
 - Credibility determinations may not be based on status as complainant, respondent, or witness
- No conflicts of interest or bias as Title IX Coordinator, investigator, decision-maker, or facilitator of informal resolution process
 - For or against complainants or respondents generally
 - For or against an individual complainant or respondent

Lathrop GPM,  29


**FORMAL GRIEVANCE PROCESS:
BASIC REQUIREMENTS** 


- Presumption of non-responsibility
- Reasonably prompt timeframes
 - Including timeframes for filing and resolving appeals and informal resolution processes
 - Temporary delay or extension of timeframes for good cause, which may include
 - Absence of parties, a party's advisor, or witnesses
 - Concurrent law enforcement activity
 - Need for language assistance or accommodations of disability
 - Must provide written notice to parties of the delay or extension and the reason for it
 - Some timeframes are set by the regulations
- Describe range of possible sanctions and remedies or list the possible sanctions and remedies

Lathrop GPM,  30


**FORMAL GRIEVANCE PROCESS:
BASIC REQUIREMENTS** 


- Describe appeal bases and procedures
- Describe range of supportive measures available to both parties

Lathrop GPM,  31


**FORMAL GRIEVANCE PROCESS:
BASIC REQUIREMENTS** 


- Privileged information
 - Do not require, allow, rely upon, otherwise use questions or evidence that constitute or seek disclosure of, information protected under a legally recognized privilege, unless person holding such privilege has waived the privilege
- Treatment records
 - Institution cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the school obtains that party's voluntary, written consent to do so.

Lathrop GPM,  32


**FORMAL GRIEVANCE PROCESS:
TRAINING** 


- Train Title IX Coordinator, investigator, decision-maker, or facilitator of informal resolution process on
 - Definition of sexual harassment
 - Scope of the institution's education program or activity
 - How to conduct investigation and grievance process, including hearings, appeals, and informal resolution processes, and how to serve impartially, including by avoiding prejudgment of the facts at interest, conflicts of interest, and bias
- Decision-makers must also receive training on
 - Technology to be used at a live hearing
 - 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

Lathrop GPM,  33


**FORMAL GRIEVANCE PROCESS:
TRAINING** 


- Investigators must also receive training on
 - Issues of relevance to create an investigative report that fairly summarizes relevant evidence
- Training materials must not rely on sex stereotypes and must promote impartial investigations and adjudications
- Training materials must be publicly available on institution’s website

Lathrop GPM,  34


**FORMAL GRIEVANCE PROCESS:
DISMISSAL OF FORMAL COMPLAINT** 


- Mandatory Dismissal
 - Must dismiss formal complaint if alleged conduct
 - even if proved, would not constitute sexual harassment
 - did not occur in the institution’s education program or activity or
 - did not occur against a person in the United States
 - Such dismissal does not preclude action under another provision of institution’s code of conduct
- Discretionary Dismissal
 - May dismiss formal complaint if at any time during the investigation or hearing
 - complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations, therein
 - respondent is no longer enrolled or employed by the recipient or
 - specific circumstances prevent the recipient from gathering sufficient evidence to reach a determination as to the formal complaint or allegations therein

Lathrop GPM,  35


**FORMAL GRIEVANCE PROCESS:
DISMISSAL OF FORMAL COMPLAINT** 


- Notice of Dismissal: Upon dismissal (mandatory or discretionary), institution must promptly send written notice of dismissal and reasons for the dismissal simultaneously to the parties

Lathrop GPM,  36


FORMAL GRIEVANCE PROCESS:
CONSOLIDATION OF FORMAL COMPLAINTS 


- An institution may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the *allegations of sexual harassment arise out of the same facts or circumstances*

Lathrop GPM,  37


FORMAL GRIEVANCE PROCESS:
NOTICE OF ALLEGATIONS 


- Upon formal complaint, provide written notice to known parties, including:
 - Notice of grievance process, including any informal resolution process
 - Notice of the allegations, including sufficient details known at the time and with sufficient time to prepare response before initial interview
 - Identities of the parties involved, if known
 - Conduct allegedly constituting sexual harassment
 - Date and location of the alleged incident, if known

Lathrop GPM,  38

FORMAL GRIEVANCE PROCESS:
NOTICE OF ALLEGATIONS 


- Upon formal complaint, provide written notice to both parties, including:
 - Statements that:
 - Respondent is presumed not responsible
 - Determination of responsibility is made at conclusion of grievance process
 - Right to advisor of choice who may be but is not required to be an attorney
 - Parties may inspect and review evidence
 - Inform parties of any policy provision that prohibits knowingly making false statements or knowingly submitting false information during the grievance process
 - Provide notice of *additional* allegations about the complainant or respondent that arise during process

Lathrop GPM,  39

**FORMAL GRIEVANCE PROCESS:
DUAL ROLES** 


- Independent decision-maker
 - Title IX Coordinator and decision-maker must be different individuals
 - Investigator and decision-maker must be different individuals
 - Title IX Coordinator and investigator may offer recommendations regarding findings and/or conclusions on responsibility, but decision-maker has independent obligation to objectively evaluate relevant evidence and cannot simply defer to recommendations
- Title IX Coordinator may act as investigator

Lathrop GPM, > 40


**FORMAL GRIEVANCE PROCESS:
OTHER REQUIREMENTS** 

- Burden of proof and gathering evidence is on the institution, not on the parties
- Equal opportunity to present fact and expert witnesses and other inculpatory and exculpatory evidence
- May not restrict ability of either party to discuss the allegations or to gather and present relevant evidence
- Allow advisor of choice, who may be but is not required to be an attorney
 - May establish equal restrictions on advisors' participation

Lathrop GPM, > 41


**FORMAL GRIEVANCE PROCESS:
NOTICE OF MEETINGS** 

- Written notice to the party whose participation is invited or expected of the
 - Date
 - Time
 - Location
 - Participants
 - Purpose





of all hearings, investigative interviews, or other meetings with a party, with sufficient time for the party to prepare to participate

Lathrop GPM, > 42


**FORMAL GRIEVANCE PROCESS:
OPPORTUNITY TO REVIEW AND RESPOND** 


- Prior to completion of investigation report, must provide equal opportunity to inspect and review any evidence obtained that is *directly related to the allegations*
 - Includes evidence upon which the institution does not intend to rely in reaching a determination and inculpatory or exculpatory evidence whether obtained from a party or other source
 - Must send to party and party's advisor in hard copy or electronic format
 - Party must be given at least 10 days to submit a written response
- Investigator must consider that written response before completing investigation report
- Must make all that evidence available at any hearing

Lathrop GPM,  43


**FORMAL GRIEVANCE PROCESS:
INVESTIGATION REPORT** 


- Fairly summarizes relevant evidence
- Send the report to the parties and the parties' advisors in an electronic format or hard copy
- Must send at least 10 days prior to a hearing
- Allow parties to respond to report in writing

Lathrop GPM,  44


**FORMAL GRIEVANCE PROCESS:
STANDARD OF EVIDENCE** 


- Preponderance of the evidence or clear and convincing
- Apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty
- Apply the same standard of evidence to all formal complaints of sexual harassment

Lathrop GPM,  45


FORMAL GRIEVANCE PROCESS:
LIVE HEARINGS - POST-SECONDARY ONLY 


- Must provide live hearing
 - May establish rules that apply equally to both parties
 - Permit each party's advisor to ask the other party and witnesses "all relevant questions and follow-up questions"
 - Includes questions challenging credibility
 - Must be conducted "directly, orally and in real time"
 - Questions asked by party's advisor and never by a party personally
- Must provide, without fee or charge to that party, a party without an advisor at the hearing "an advisor of the *recipient's* choice who may but is not required to be an attorney to conduct cross-examination on behalf of that party"

Lathrop GPM,  46


FORMAL GRIEVANCE PROCESS:
LIVE HEARINGS - POST-SECONDARY ONLY 


- Limited to relevant questions
 - Only relevant cross-examination and other questions may be asked of a party or witness
 - Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker must first determine whether the question is relevant
 - If a question is excluded as not relevant, decision-maker must explain the decision to exclude the question

Lathrop GPM,  47


FORMAL GRIEVANCE PROCESS:
LIVE HEARINGS - POST-SECONDARY ONLY 

- Complainant's sexual behavior or predisposition are not relevant *unless*:
 - Such questions and evidence are offered to prove someone other than respondent committed the alleged conduct or
 - 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

Lathrop GPM,  48

**FORMAL GRIEVANCE PROCESS:
LIVE HEARINGS - POST-SECONDARY ONLY** 


- If a party or witness does not submit to cross-examination at the live hearing, decision-maker must not rely on any statement of that party or witness in making a determination on responsibility; decision-maker cannot draw any inference about the determination regarding responsibility based solely on a party's or witness's absence from the hearing or refusal to answer cross-examination or other questions

Lathrop GPM,  49


**FORMAL GRIEVANCE PROCESS:
LIVE HEARINGS - POST-SECONDARY ONLY** 


- At request of either party, institution must provide for live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party or witness answering questions
- Hearing may be conducted with all parties physically present in the same geographic location, or at the recipient's discretion, any or all parties, witnesses, and other participants may appear at the hearing virtually, with technology enabling participants simultaneously to see and hear each other
- Must create audio or audiovisual recording or transcript of any live hearing held and make it available to the parties for inspection and review

Lathrop GPM,  50


**FORMAL GRIEVANCE PROCESS:
SPECIAL CONSIDERATION K-12** 


- May include hearing, but do not need to follow hearing process outlined in regulations
- Must:
 - Provide investigation report to parties before determination
 - Provide opportunity for parties to submit written, relevant questions that a party wants asked of the any party or witness
 - Provide each party with answers and allow additional, limited follow-up questions
 - Restrict questions/evidence about complainant's sexual predisposition or prior sexual behavior (see slide 48)
 - Must explain decision to exclude question(s) as not relevant

Lathrop GPM,  51


**FORMAL GRIEVANCE PROCESS:
WRITTEN DETERMINATION** 


- Identification of the allegations potentially constituting sexual harassment
- Procedural steps since complaint
 - Notices to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, hearings held
- Findings of fact
- Conclusion regarding application of code of conduct to the facts
- Statement of and rationale for the result as to each allegation
 - Determination of responsibility
 - Any disciplinary sanctions imposed on respondent
 - Whether remedies will be provided to complainant
- Appeal information
- Simultaneous delivery to the parties
- Becomes final either the date the parties receive the written determination of the appeal or the date on which an appeal would no longer be timely

Lathrop GPM,  52


**FORMAL GRIEVANCE PROCESS:
APPEALS** 


- Must be offered to both parties
 - From a determination regarding responsibility
 - From a recipient's dismissal of a formal complaint or any allegations therein
- Required bases:
 - 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;
 - The Title IX Coordinator, investigator, or decision-maker 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;
 - May offer an appeal equally to both parties on additional bases.

Lathrop GPM,  53


**FORMAL GRIEVANCE PROCESS:
APPEALS** 


- Requirements
 - Notify other party in writing when an appeal is filed
 - Appeal officer is different than Title IX Coordinator, investigator and decision-maker at hearing
 - No conflict of interest or bias
 - Give both parties reasonable, equal opportunity to submit written statement in support of, or challenging, the outcome
 - Written decision describing result of appeal and rationale
 - Simultaneous delivery of result to parties

Lathrop GPM,  54


INFORMAL RESOLUTION 


- May not offer informal resolution unless a formal complaint is filed
- May never require the parties to participate in an informal resolution process
- May not condition enrollment/continuing enrollment, employment/continuing employment, or enjoyment of any other right on waiver of the right to an investigation and adjudication of formal complaint
- May not offer or facilitate informal resolution to resolve allegations that an employee sexually harassed a student

Lathrop GPM,  55


INFORMAL RESOLUTION 


- Any time prior to determination, may facilitate informal resolution process, such as mediation, if
 - Provide parties with written notice disclosing
 - Allegations
 - Requirements of the informal resolution process including circumstances when it precludes the parties from resuming a formal complaint for the same allegations
 - Provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint
 - Consequences resulting from participating in the informal resolution process, including records that are maintained and could be shared
 - Obtain parties' voluntary written consent to informal process

Lathrop GPM,  56

FERPA 


- FERPA exception for all information sharing requirements in the regulations

Lathrop GPM,  57

RETALIATION 


- Retaliation prohibited against any individual for exercising Title IX rights:
 - No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in a Title IX investigation, proceeding, or hearing.

Lathrop GPM, ▶ 58

RETALIATION 

- Charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX, constitutes retaliation


Lathrop GPM, ▶ 59

RETALIATION 


- Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding does not constitute retaliation, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith

Lathrop GPM, ▶ 60


RETALIATION




- The exercise of rights protected under the First Amendment does not constitute retaliation
- The recipient must keep confidential the identity of complainants, respondents, and witnesses, except as may be permitted by FERPA, or as required by law, or as necessary to carry out a grievance process
- Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination (different than the sexual harassment grievance process)

Lathrop GPM,  61


OCR ENFORCEMENT




- If OCR finds that a recipient has discriminated against persons on the basis of sex in an education program or activity under this part, or otherwise violated this part, such recipient must take such remedial action as OCR deems necessary to remedy the violation
- OCR will not use outcome of process as evidence of deliberate indifference, or otherwise evidence of discrimination, solely because OCR would have reached a different conclusion in an independent weighing of the evidence


Lathrop GPM,  62


OCR ENFORCEMENT




- Institution's treatment of a complainant or respondent in response to a formal complaint may constitute discrimination on the basis of sex




Lathrop GPM,  63


RELIGIOUS EXEMPTION 


- Institution that seeks “assurance of the exemption” may either
 - Submit a statement in writing identifying which provisions in the regulations conflict with a tenet of the religious organization; or
 - After DOE begins an investigation, raise the exemption in writing, regardless of whether the institution previously sought assurance of the exemption

Lathrop GPM,  64


RECORDKEEPING 

- For 7 years, must maintain:
 - Investigation and adjudication
 - Any determination regarding responsibility
 - Any audio or audiovisual recording or transcript of the hearing
 - Any disciplinary sanctions imposed
 - Any remedies provided to complainant
 - Any appeal and result
 - Any informal resolution and the result
 - Training materials for investigators, decision-makers, coordinators, and persons designated to facilitate informal resolution process

Lathrop GPM,  65


RECORDKEEPING 


- For 7 years, must maintain (cont.):
 - Any actions taken (including supportive measures) in response to a report of sexual harassment
 - Basis for conclusion that response was not deliberately indifferent
 - Measures were designed to restore or preserve equal access to educational programs and activities
 - If supportive measures were not provided, document the reasons why such a response was not clearly unreasonable in light of known circumstances
 - Recordkeeping does not prevent inclusion of additional details or explanations later

Lathrop GPM,  66


PRACTICAL RECOMMENDATIONS 




Lathrop GPM,  67


EFFECTIVE DATE 


- Regulations are effective **August 14, 2020**
- Legal challenge pending; additional challenges are possible
- Institutions should move forward with implementing necessary changes


Lathrop GPM,  68

RECOMMENDATIONS 


- Review and update
 - Intake form
 - Non-discrimination statement (including on website)
 - Notice of allegations form
 - Advisor agreements
 - Policy




Lathrop GPM,  69


RECOMMENDATIONS 

- Consider who will act as:
 - Title IX Coordinator
 - Investigator
 - Facilitator for informal resolutions
 - Hearing panel officer/decision-maker(s)
 - Appeal officer

Lathrop GPM,  70


RECOMMENDATIONS 

- Make a plan for training
 - Heightened responsibility
 - Employees
 - Students
 - Others
- Prepare technology for hearings
- Consider messaging around adoption of new policy

Lathrop GPM,  71


Q & A 


Lathrop GPM,  72

UPCOMING TRAININGS 


- **Trainings for individuals with heightened responsibility:**
 - 6/11/20: Conducting a Live Hearing under the New Title IX Regulations
 - 7/27/20: Annual Training for Advanced Title IX Coordinators and Deputy Coordinators
 - 7/28/20: Annual Title IX/VAWA Investigator Training
 - 8/3/20: Annual Training for New Title IX Coordinators and Deputy Coordinators
 - 8/4/20: Annual Training for Advanced Title IX Coordinators and Deputy Coordinators
 - 8/5/20: Annual Title IX/VAWA Investigator Training
 - 8/11/20: Title IX/VAWA Hearing Panel Training

Lathrop GPM, > 73

ON DEMAND TRAININGS 


- **Available on-demand:**
 - Annual Trauma Informed Training for Investigators and Adjudicators
 - Annual Training for NEW Title IX Coordinators and Deputy Coordinators
 - Annual Training for ADVANCED Title IX Coordinators and Deputy Coordinators
 - Title IX/VAWA Hearing Panel Training
 - Trauma Informed Training for First Responders, Confidential Resources, and Campus Security
 - Making Your Sexual Misconduct Policy a 10
 - Title IX/VAWA Training for Chief Academic Officers
 - Title IX/VAWA Panel Discussion for Coaches and Athletic Directors
 - Compliance Update: New VAWA Guidance
 - Senior Leadership Training
 - Transgender Students and Employees Training
 - Minnesota Law Update: Title IX Coordinator Overview of Legal Requirements
 - Confidential Resources Training
 - Attorneys Serving as Advisors
 - Panel Discussion on Interviewing Survivors of Sexual Assault
 - Fundamentals of FERPA


Lathrop GPM, > 74


ON DEMAND TRAININGS 


- **Available on-demand:**
 - Drafting Your Notice of Determination
 - Post-VAWA Annual Security Report Drafting
 - Additional Requirements Under Minnesota's Campus Sexual Assault Law
 - Drafting Effective and Compliant Investigation Reports
 - Title IX Coordinator Training: Duties Beyond Sexual Assault
 - Title IX/VAWA Training for Adjudicators
 - Title IX/VAWA Investigator Training
 - Train the Trainer: Title IX/VAWA Training for Coaches and Athletic Directors
 - Panel Discussion on Title IX Recordkeeping Requirements and Best Practices
 - Complying with the NCAA Sexual Violence Policy – Part 1
 - Complying with the NCAA Sexual Violence Policy – Part 2
 - Unique Challenges in Responding to Allegations of Domestic Violence, Dating Violence, and Stalking
- **Prevention programs for students & employees—customizable online modules**

Lathrop GPM, > 75

THANK YOU 


Kathryn Nash
kathryn.nash@lathrogpm.com
612-632-3273


Emily Mawer
emily.mawer@lathrogpm.com
612-632-3035

 76
