



Title IX Coordinator Certification Higher Education

Session 2: Developing Policies and Conducting Investigations

Presented by: Richard F. Verstegen





Policies

CareerLearning

Title IX Coordinator Certification Higher Education
Session 2: Developing Policies and Conducting Investigations

Presented by: Rick Verstegen

Overview

I

Policies and Procedures

- Grievance Procedure
- Grievance Process

II

Investigations

- Reports
- Formal Complaints
- Investigation
- Determination
- Appeal

III

Conclusion

POLICIES

PROCEDURES

Policies and Procedures

Title IX Complaints

- Policies need to consider
 - Interaction when claims also involve other protected classes (race, disability, etc.)
 - Interaction with other state laws
 - Interaction with overlapping federal laws (Title VII)
 - Interaction with student code of conduct



Grievance Procedure

- **Important elements**

- Notice to students and employees of the grievance procedures, including where complaints may be filed
- Application of the grievance procedure to complaints filed by students or on their behalf alleging sexual violence carried out by employees, other students, or third parties
- Provisions for adequate, reliable, and impartial investigations of complaints
- Written notice to the complainant and alleged perpetrator of the outcome of the complaint
- Assurance that the institution will take steps to prevent the recurrence of any sexual violence and remedy discriminatory effects on the complainant and others, if appropriate
- Designated and reasonably prompt time frames for the major stages of the complaint process

Grievance Procedure

- **April 2014 Guidance (rescinded)**
 - The April 2014 Guidance (now rescinded) included additional suggestions for grievance procedures.
 - No longer suggested, but may be included:
 1. A statement of the school's jurisdiction over Title IX complaints;
 2. Adequate definitions of sexual discrimination;
 3. Reporting policies and protocols, including provisions for confidential reporting

Grievance Procedure

- **April 2014 Guidance (rescinded)**
 4. Identification of the employee or employees responsible for evaluating requests for confidentiality;
 5. Notice that Title IX prohibits retaliation;
 6. Notice of a student's right to file a criminal complaint and a Title IX complaint simultaneously;
 7. Notice of available interim measures that may be taken to protect the student in the educational setting;
 8. The evidentiary standard that must be used in resolving a complaint;
 9. Notice of potential remedies for students;
 10. Notice of potential sanctions against perpetrators; **and**
 11. Sources of counseling, advocacy, and support.

Grievance Process

- **Grievance process components**
 - Basic requirements
 - Notice of allegations
 - Dismissal of formal complaint
 - Consolidation
 - Informal resolution
 - Investigation
 - Hearing (not required in K-12 schools)
 - Determination regarding responsibility
 - Appeals
 - Recordkeeping

Sexual Harassment Complaint Form

Policies and Procedures

Poll Question

- **How many sexual harassment cases have you addressed since August 2020?**
 - Around 0 to 5
 - Around 6 to 10
 - Around 11-20
 - More than 20

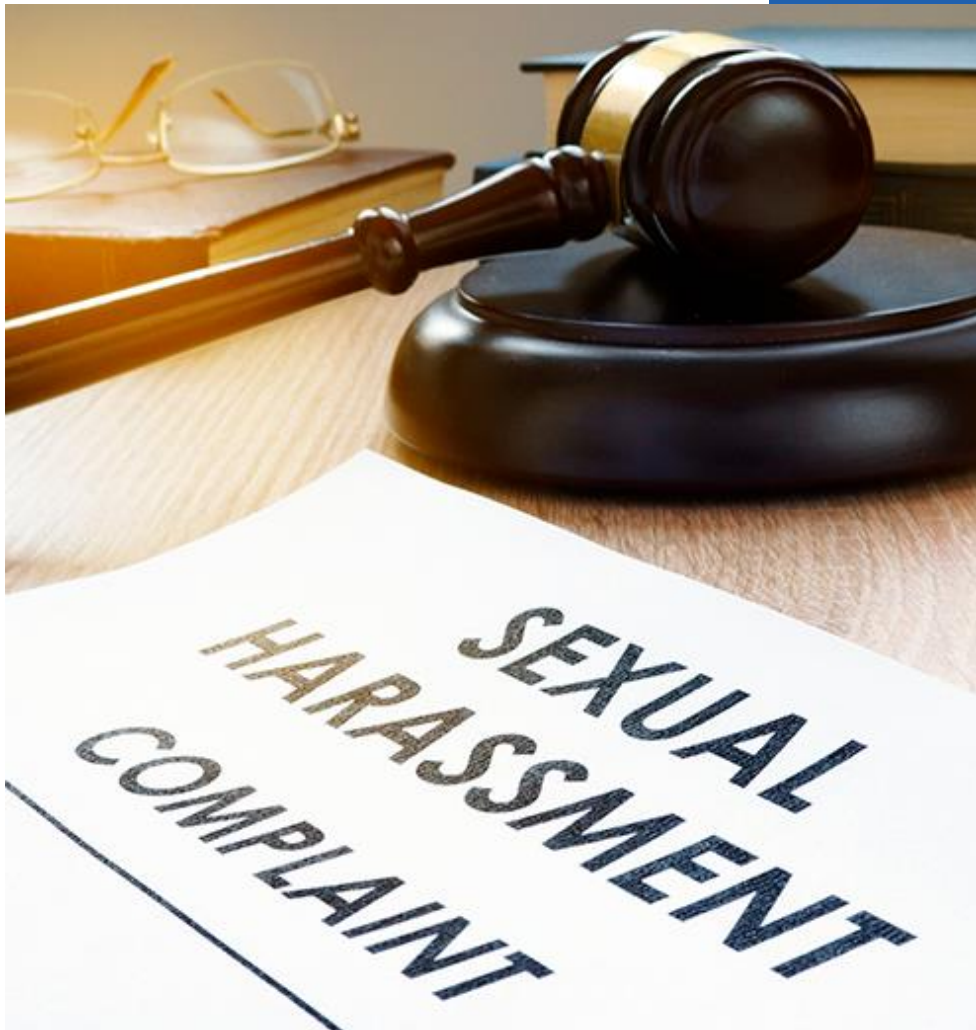


Responding to Sexual Harassment Allegations

- Absence of formal complaint, must still respond in a manner that is not deliberately indifferent. No investigation is required, but the institution must do something.
- Schools must treat complainants and respondents equitably by offering supportive measures to a complainant and by following a grievance process under 106.45 before the imposition of any disciplinary sanctions or other actions against a respondent.

Definitions– Recognizing Sexual Harassment

- **Sexual harassment**
 - An employee of the institution conditioning the provision of an 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; **or**
 - Sexual assault, dating violence, domestic violence, or stalking (as defined by law).

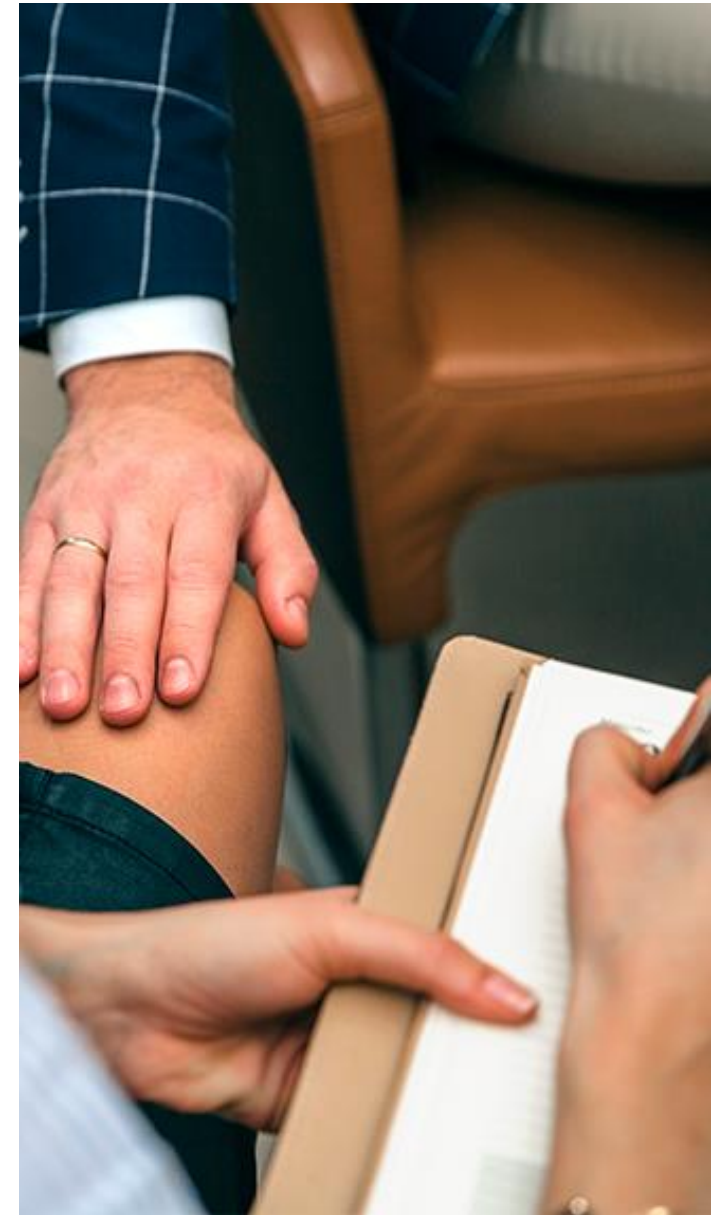


Responding to Sexual Harassment

- An institution with **actual knowledge** of sexual harassment in an **education program or activity** of the institution against a **person in the U.S.** must **respond** promptly in a manner that is not deliberately indifferent.
- A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

Obligation to Respond– Actual Knowledge

- **Notice of sexual harassment or allegations of sexual harassment to:**
 - Title IX Coordinator
 - Any official of the institution who has the authority to institute corrective measures on behalf of the institution
 - Any employee of an elementary or secondary school
- **Imputation of knowledge-based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge.**





Obligations for Responding Within the Education Program or Activity

- **Within the education program or activity**
 - Includes 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 any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

Definitions– Parties

- **Complainant**

- An individual who is alleged to be the victim of conduct that could constitute sexual harassment
- The complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed

- **Respondent**

- An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment

Responding to Sexual Harassment Allegations

- Title IX Coordinator must promptly:
 - Contact the complainant to discuss the availability of supportive measures,
 - Consider the complainant's wishes with respect to supportive measures,
 - Inform the complainant of the availability of support measures, **and**
 - Explain to the complainant the process for filing a formal complaint.



Responding to Sexual Harassment Allegations

- **Supportive measures**
 - Means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent, before or after the filing of a formal complaint or where no formal complaint has been filed
 - Are designed to restore or preserve equal access to the institution's education program or activity without unreasonably burdening the other party



Responding to Sexual Harassment Allegations

- **Supportive measures**
 - Includes measures designed to protect the safety of all parties or the institution's environment or deter sexual harassment
 - May include counseling, extensions of deadlines or course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures

Response to Sexual Harassment Allegations

- **Supportive measures**
 - The institution must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the institution to provide the supportive measures.
 - The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.



Response to Sexual Harassment Allegations— Emergency Removal

- **Nothing precludes the institution from removing a respondent from the education program or activity on an emergency basis.**
 - The institution must undertake an individualized safety and risk analysis, determine that immediate threat to health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provide the respondent with notice and opportunity to challenge following the removal.
 - This provision may not be construed to modify any rights under IDEA, Section 504, and ADA.

Response to Sexual Harassment Allegations—Administrative Leave

- Nothing precludes the institution from placing a non-student employee respondent on administrative leave during the pendency of a grievance process.
- These provisions may not be construed to modify any rights under Section 504 or the ADA.





Formal Complaints

- **Formal complaint**
 - A document filed by the complainant or signed by the Title IX Coordinator (1) alleging sexual harassment against a respondent and (2) requesting the institution investigate the allegation of sexual harassment
 - A document filed by the complainant means 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.



Formal Complaints

- **Formal complaint**
 - Complainant must be participating or attempting to participate in the education program or activity of the institution with which the formal complaint is filed.
 - Complaints may be filed with the Title IX Coordinator in person, by mail, by email, by using contact information, or by another method designated by the institution.
 - Institution must follow the grievance process.
 - Supportive measures must be offered as appropriate.

Grievance Process– Dismissal

- **Dismissal of complaint**
 - If conduct, if proved, would not constitute sexual harassment
 - If conduct did not occur in the education program or activity
 - If conduct did not occur against a person in the U.S.
 - Institution must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under Title IX or this part.
 - Such a dismissal does not preclude action under another provision of the recipient's code of conduct.
- **Upon dismissal, the institution must promptly send written notice of the dismissal and reasons for dismissal.**

Grievance Process– Dismissal

- **Dismissal of complaint**
 - The institution may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing:
 - A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein;
 - The respondent is no longer enrolled or employed by the institution; **or**
 - Specific circumstances prevent the institution from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.
- **Upon dismissal, the institution must promptly send written notice of the dismissal and reasons for dismissal.**

Grievance Process– Informal Resolution

- An institution may not require (as a condition of enrollment, employment, or another right) a waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section.
- An institution may not require the parties to participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed.



Grievance Process– Informal Resolution

- At any time, prior to reaching a determination regarding responsibility, the institution may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication.
- Informal resolution requires an institution to follow certain requirements, including (1) providing the parties a written notice disclosing certain information (described below); (2) obtaining the parties' voluntary, written consent to the informal resolution process; and (3) ensuring that it does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

Grievance Process– Informal Resolution

- **The written notice to the parties must disclose:**
 1. The allegations;
 2. The requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations (provided, 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); **and**
 3. Any consequences resulting from participating in the informal resolution process, including records that will be maintained and could be shared.

Poll Question

- **Have you used any informal resolution process in your sexual harassment cases?**
 - Yes for both students and employees
 - Yes, for students only
 - Yes, for employees only
 - No



Grievance Process— Consolidation

- 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.





Grievance Process– Investigations

- Upon receipt of a formal complaint, an institution must provide written notice to parties who are known.
- **Written notice must include:**
 - Notice of recipient's grievance process
 - Notice of allegations of sexual harassment, including sufficient details known at that time (i.e., identities of the parties involved in the incident if known, the conduct allegedly constituting sexual harassment and the date and location of the alleged incident)

Grievance Process– Investigations

- **Written notice must also:**
 - Include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.
 - Inform the parties that they may have an advisor of their choice who may be an attorney and that they may inspect and review evidence.
 - Inform the parties of any provision in the institution’s code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.



Grievance Process— Investigations

- Written notice must be provided with sufficient time to prepare a response before any initial interview.
- If other allegations are investigated later, notice must be provided of the additional allegations to the parties whose identities are known.

Grievance Process– Investigations

- **An institution must:**
 - Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the institution and not on the parties.
 - The institution cannot access, consider, disclose, or otherwise use a party's records that are made and 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 recipient obtains that party's voluntary, written consent to do so for the grievance process.

Grievance Process– Investigations

- **An institution must:**
 - Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;
 - Not restrict the ability of either party to discuss the allegations under investigation or gather and present relevant evidence; **and**
 - Provide parties with the same opportunities to have others present during any grievance proceeding, including an advisor of their choice, but may establish reasonable restrictions regarding participation.

Grievance Process— Investigations

- **An institution must:**
 - Provide, to a party whose participation is invited or expected, written notice 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
 - Create an investigation report that fairly summarizes relevant evidence.
 - Investigator must be able to assess credibility and identify relevant evidence.
 - Relevant evidence is evidence and testimony that directly relates to the issues disputed or discussed.



Grievance Process— Investigations

- **An institution must:**
 - Prior to the completion of the investigative report, the recipient must send to each party and the party's advisor, the evidence subject to review and inspection in an electronic format or a hard copy.
 - The parties must have 10 days to submit a written response, which the investigator must consider prior to completing the investigation report.

Grievance Process— Investigations

- **An institution must:**
 - At least 10 days prior to a hearing (if a hearing is required) or other time of determination regarding responsibility, send to each party and the party's advisor the investigation report in an electronic format or hard copy, for their review and written response.



Grievance Process– Investigations

- **Possible investigation report contents**
 - Summary of the complainant's allegations and response of the accused
 - Summary of the persons interviewed and a statement about their credibility
 - Presentation of the findings of fact
 - Summary of relevant standards and other statements concerning process
 - Careful consideration should be given concerning whether the report should include conclusions about the allegations and recommendation for disciplinary or other corrective action.



Responsibility Decision-Maker

- Not Title IX Coordinator or Investigator
- Must issue written determination regarding responsibility
- Determination must apply evidence standard.

Poll Question

- Who do you use as responsibility decision-makers?
 - School employees
 - Outside legal counsel
 - Outside administrators



Grievance Process– No Live Hearing

- Elementary and secondary schools may, but need not, provide for a hearing.
- With or without a hearing, after the institution has sent the investigative report to the parties and before reaching a determination regarding responsibility, the decision-maker must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.

Grievance Process– No Live Hearing

- The decision-maker must explain to the party proposing the questions any decision to exclude a question as not relevant.
- With or without a hearing, questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless (1) 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 (2) 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.

Grievance Process– Live Hearings

- **Post-secondary institutions must provide a live hearing.**
 - The decision-maker must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.
 - Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally (notwithstanding the discretion of the institution to otherwise restrict the extent to which advisors may participate in the proceedings).
 - At the request of either party, the institution must provide for the 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 the witness answer questions.

Grievance Process– Live Hearings

- **Post-secondary institutions must provide a live hearing.**
 - 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 and explain any decision to exclude a question as not relevant.
 - If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.

Grievance Process– Live Hearings

- **Post-secondary institutions must provide a live hearing.**
 - Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the institution's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other.
 - Recipients must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

Determination

- **Written determination must include:**
 - Identification of the allegations potentially constituting sexual harassment;
 - A description of the procedural steps taken from the receipt of the formal complaint to the determination, including any notifications to the parties, interviews, site visits, methods used to gather other evidence, and hearings held;
 - Findings of fact supporting the determination;
 - Conclusions regarding the application of the recipient's code of conduct to the facts;



Determination

- **Written determination must include:**
 - A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the institution imposes on the respondent, and whether remedies designed to restore or preserve equal access to the education program or activity will be provided by the institution to the complainant; **and**
 - The institution's procedures and permissible bases for the complainant and respondent to appeal.



Determination

- **Written determination**
 - The institution must provide the written determination to the parties simultaneously.
 - The Title IX Coordinator is responsible for the effective implementation of any remedies.





Appeal

- An institution must offer both parties an appeal from a determination of responsibility, and from an institution's dismissal of a formal complaint or any allegations contained therein.
- If appeal, the decision is final after appeal.
- If no appeal, then the decision is final on the date on which an appeal would no longer be considered timely.

Appeal

- **The appeal must be on the following bases:**
 - Procedural irregularity that affected the outcome of the matter;
 - New evidence that was not reasonably available at the time of the determination regarding responsibility or dismissal 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 the complainants or respondents that affected the outcome of the matter;
- **The institution may offer an appeal equally to both parties on additional bases.**

Grievance Process– Investigations

- **For any appeal, the institution must:**
 - Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties.
 - Ensure that the appeal decision-maker is not investigator, responsibility decision-maker, or Title IX Coordinator.
 - Ensure that the appeal decision-maker complies with standards (no conflict of interest).





Appeal

- **For any appeal, the institution must:**
 - Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome.
 - Issue a written decision describing the result of the appeal and the rationale for the result.
 - Provide the written decision simultaneously to both parties.



Conclusion

Title IX Proposed Regulations

- **June 23, 2022 Proposed Regulations**
 - Sex discrimination applies to sexual orientation, gender identity, and sex characteristics.
 - New definition of sex-based harassment, including hostile environment that looks at “sufficiently severe or pervasive” conduct
 - New definition of confidential employees
 - New response requirements, including eliminating the definition of actual knowledge and deliberately indifferent

Title IX Proposed Regulations

- **June 23, 2022 Proposed Regulations**
 - Requires institutions to address off-campus conduct
 - Expands the definition of complainant
 - Requires institutions to provide supportive measures to students and employees in instances involving any sex discrimination
 - Sets forth additional training requirements
 - Combining grievance procedures for sex discrimination and sexual harassment complaints in certain instances



Conclusion

- Need to review policies
- Need to include a grievance process in your policies
- Need to identify different individuals to serve as investigators and follow the process

COMING SOON

Join us!
I have upcoming webinars with CareerLearning.



What was your key takeaway?

Please let us know in the Q&A.

We will use your response with your first name and last initial on our website so others can benefit!



Questions?



Richard Verstegen
Attorney



Boardman & Clark, LLP



<https://www.boardmanclark.com>



(608) 286-7233



rverstegen@boardmanclark.com

Disclaimer of Warranties

While our certification and webinar programs are designed to provide participants with the skills and knowledge necessary to improve employability and career performance, ultimately the success of a certification or webinar program comes down to the background, practical experience, ability and (especially) commitment of each participant. Because these qualities vary, we are unable to provide universal warranties, representations or guarantees (collectively “Warranties”) that a particular certification or certification program or webinar will result in required legal or regulatory compliance, job placement advantages, career opportunities, or overall attainment of career goals. And while our Programs (as defined below) are designed, written and presented to be as accurate and authoritative as possible, we do not provide medical, legal, accounting or other professional services or advice, and our Programs may not be relied upon as such. The participant (“you”) remains solely responsible for compliance with all applicable laws, regulations, accounting standards, and official health guidelines.

Therefore, you agree that you purchase, participate in, use, and rely on (“your Use”) our certifications, certification programs, webinars, presentations, commentaries, products, services, and materials (collectively, our “Programs”) at your own risk. Our Programs are provided “as is” without any express or implied Warranties of any kind, including any Warranties of merchantability, fitness for a particular purpose, or non-infringement. We provide no Warranties, and you agree by your Use not to rely on any Warranties, that our Programs are free of errors or omissions. As part of the consideration given in connection with being allowed to participate in our Programs, and by your Use of our Programs, you (a) release us from all claims for damages arising or alleged to have arisen from your Use of our Programs, (b) agree that in no event will we be liable for any direct, indirect, special, or consequential damages arising or alleged to have arisen out of your Use of our Programs, and (c) you further agree that any damages you may be awarded against us notwithstanding the foregoing limitations of liability will be limited to the amount, if any, you paid for the Program resulting in or alleged to have resulted in your damages.