

Patterson Belknap Webb & Tyler LLP

Title IX Procedures Training

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Training Requirement

- Title IX Regulations require that decisionmakers in the adjudication process receive training on:
 - “the definition of sexual harassment”
 - “the scope of the recipient’s education program or activity”
 - “how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes”
 - “how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.”
- The training materials must be posted on the institution’s website

Major changes to Title IX Regulations

- No extraterritorial application (victim must be in the United States at time of harassment)
- Narrower definition of “sexual harassment”
- Procedural requirements, including live hearing with cross-examination

Presentation Overview

- Triggers for Title IX Obligations
- Definition of Sexual Harassment
- Investigative and Adjudicative Procedures, including avoiding bias

AUB Policies Prohibiting Harassment

- Sexual Harassment Policy
- Non-Discrimination and Anti-Discriminatory Harassment Policy
- Procedures to Address Allegations of Discrimination, Discriminatory Harassment, and Sexual Harassment
- Procedures to Address Allegations of Title IX Harassment

Title IX's Applicability

- “Actual knowledge” of
- “Sexual Harassment”
- Within “educational program”
- Committed against “a person in the United States.”

“Actual Knowledge”

- Actual knowledge means, for purposes of Title IX, “notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient.”
- At AUB, such individuals include the President and the Title IX Coordinator
- Constructive notice cannot substitute for actual knowledge

“Sexual Harassment”

- Three types of inappropriate behavior—when engaged in on the basis of sex—may constitute “Sexual Harassment,” referred to in AUB’s policies as “Title IX Harassment”:
 - An employee (including faculty member) of AUB conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct; also known as “*quid pro quo*” harassment
 - 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 recipient’s education program or activity
 - “Sexual assault,” as defined in 20 U.S.C. 1092(f)(6)(A)(v), “dating violence” as defined in 34 U.S.C. 12291(a)(10), “domestic violence” as defined in 34 U.S.C. 12291(a)(8), or “stalking” as defined in 34 U.S.C. 12291(a)(30)
- If harassment does not fall into one of these three categories, it may still be prohibited by another policy, but it not “Title IX Harassment”

“A person in the United States”

- The new Title IX regulations make clear that Title IX has no extraterritorial application
- Unless the victim is present in the United States at the time of the harassment, the conduct will not implicate Title IX (although it may be addressed by another policy)
- Generally, conduct on the Beirut campus will not fall under Title IX
- Allegations that may fall under the Title IX policy include, *e.g.*, sexual harassment at the Debs Center or cyber-harassment against an AUB staff member, faculty member or student who is in the United States at the time of the harassment

“Within Educational Program or Activity”

- “Educational program or activity” means all of the “operations” of a University, and 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”; and
 - Likely extends to include harassment of a student by a professor at the professor’s private, off-campus residence
 - “any building owned or controlled by a student organization that is officially recognized by a postsecondary institution”
- “Program or activity” is interpreted broadly by the Department of Education
 - Covers academic, educational, extra-curricular, athletic, and other programs of the school, whether they take place in the facilities of the school, at a class or training program sponsored by the school at another location, or elsewhere
 - Factors to consider include whether the school funded, promoted, or sponsored the event or circumstance where the alleged harassment occurred
- Employees of AUB are generally considered to be participating in AUB’s educational program

Overview of the Adjudicative Process

- Complaint
- Initial Assessment of Formal Complaint
- Interim and Supportive Measures
- Possibility of Informal Resolution
- Investigation
- Hearing
- Decision and Sanctions
- Appeal

Formal Complaint

- A written complaint of Title IX Harassment is required to trigger the Title IX adjudication process
- If a verbal complaint is received, the Complainant must be informed about process for submitting a written complaint
- Title IX Coordinator has discretion to sign a formal complaint if alleged victim declines to do so, unless it is “clearly unreasonable to do so” under the circumstances

Confidentiality

- In order to protect Parties and witnesses, AUB endeavors to investigate allegations of Title IX Harassment with sensitivity and due regard for the importance of maintaining confidentiality
- AUB will not prevent Parties from discussing the allegations with others (with the exception of no-contact orders that prevent communication with another Party) or from gathering evidence
- AUB will honor requests for confidentiality and anonymity to the greatest extent possible under the circumstances
- Respondent may not be disciplined for Title IX Harassment if the Complainant remains anonymous

Initial Assessment of Formal Complaint by Title IX Coordinator

- Evaluation of viability of complaint
 - Must dismiss Title IX complaint if allegations, even if proved, would not constitute Title IX sexual harassment (e.g., Complainant was not in the United States; conduct was not sufficiently severe, pervasive, and objectively offensive)
 - May dismiss if:
 - The Complainant notifies the Title IX Coordinator in writing that they would like to withdraw the Formal Complaint (or does not wish to pursue the Formal Complaint, if it was submitted by a third party);
 - The Respondent is no longer enrolled at or employed by AUB; or
 - The specific circumstances prevent AUB from gathering evidence sufficient to reach a determination as to the Formal Complaint or allegations therein
- Assessment of need for supportive or interim measures

If Title IX Complaint is Dismissed:

- Parties are notified in writing
- Assessment to determine whether conduct violated Non-Discrimination and Anti-Discriminatory Harassment Policy or Sexual Harassment Policy, or other AUB policy
- If conduct may have violated another policy, adjudicate in accordance with applicable procedures (*e.g.*, Procedures to Address Allegations of Discrimination, Discriminatory Harassment, and Sexual Harassment)

Interim and Supportive Measures

- “Supportive measures” are defined by the Regulations as “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
- designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other Party, including measures designed to protect the safety of all parties or the recipient’s educational environment, or deter sexual harassment
- AUB’s policies, including the Title IX policy, subdivide “supportive measures” into two categories: “Interim Measures” (typically designed to protect the Parties and the AUB community) and “Supportive Measures” (typically services to assist the Parties during the resolution process)

Interim Measures and Supportive Measures

- Available to both parties, free of charge
- Must be non-disciplinary and non-punitive
- May not *unreasonably* burden either Party
- Must be kept confidential “to the extent that maintaining such confidentiality would not impair the ability of the [school] to provide the supportive [or interim] measures.”

Interim Measures

- Examples of Interim measures (among others) include:
 - No Contact Order (NCO) between the Complainant and Respondent
 - Interim suspension or leaves of absence
 - Temporary exclusion from areas of campus
 - Temporary assignment of an employee to a different unit/department
 - Removal from or relocation to another residence hall
 - Changes in academic/course schedules or in work schedules
 - Change in academic/thesis advisor
 - Limiting participation in certain events, gatherings, or activities

Interim Measures

- Title IX Coordinator recommends interim measures to President, who makes final determination as to which, if any, will be implemented
- Title IX Coordinator responsible for implementation
- Should be revisited as appropriate during pendency of resolution, and adjusted, as needed
- No contact orders should generally be mutual, although one-way no-contact orders may be permissible in limited circumstances (e.g., when a court has imposed such an order)

Supportive Measures

- Examples of supportive measures
 - counseling
 - extensions of deadlines or other course or employment-related adjustments
 - modifications of work or class schedules
 - campus or job-site escort services
 - changes in work or housing locations
 - leaves of absence
 - increased security and monitoring of certain areas of the campus
- Title IX Coordinator makes determination as to what supportive measures are appropriate, and oversees implementation
- Supportive measures should be revisited as appropriate during pendency of resolution, and adjusted as needed

Informal Resolution

- Prerequisites
 - Formal Complaint was filed
 - Both Parties consent
 - Title IX Coordinator agrees informal resolution is appropriate
 - Written notice given to Parties informing them that, among other things, any agreement reached is binding, and that failure to abide by agreement may result in sanctions (Parties sign written acknowledgement)
- Process
 - Generally involves mediation or abbreviated investigation, although process may vary
 - Outcomes may include sanctions and appropriate remedial measures (e.g., no contact orders, permanent assignment of an employee to a different unit/department, and changes in academic/course schedules)

Formal Resolution Overview

- Investigation
- Live Hearing
- Decision, including sanctions
- Appeal

General Rights

- Investigators and Decision-makers free from bias or conflict of interest
 - Preamble: “Prohibiting conflicts of interest and bias, including racial bias, on the part of people administering a grievance process is an essential part of providing both parties a fair process and increasing the accuracy and reliability of determinations reached in grievance processes.”
- Parties have right to have advisor (who may be attorney) present whenever they are interviewed, and during any hearing

Types of Prohibited Bias Include:

- Reliance on gender or sex-based stereotypes
 - The gender, gender identity and/or sexual or orientation of any Party to an investigation must not have any bearing on how the investigation is conducted
 - For example, both men and women can be victims of sexual assault
- Bias against Complainants or Respondent generally

Evaluating Whether Bias Exists

- Regulations decline to state what constitutes a “conflict of interest” or “bias,” leaving institutions to make that determination.
- Institutions are encouraged to apply reasonable person standard, *i.e.*, would reasonable person think that decisionmaker was biased
- In determining whether bias exists, avoid generalizations (for example, assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against Complainants or Respondents)

Avoid Bias and Conflict of Interest

- Recognize that every case is different
- Prior outcomes do not predict future outcomes
- Avoid prejudging reports or testimony, and instead focus on the facts
- Individuals who are fact witnesses, or have a close personal relationship with any party or key witness, should not be decision-makers
- Title IX Coordinator, investigator, hearing officer, or any other decision-maker must recuse themselves in any case where they are biased or have conflict of interest

Investigation Process

- Investigations conducted by the Title IX Coordinator or their designee
- The Complainant and the Respondent will have an equal and meaningful opportunity to be heard, to submit information and corroborating evidence, and to identify witnesses who may have relevant information
- The Investigator will gather facts and information through interviews (of the Parties involved and witnesses), review of supporting documents provided by the Parties and witnesses, and by collection other types of evidence including documentary, demonstrative, digital, direct, and circumstantial evidence
- Both inculpatory and exculpatory evidence will be gathered and considered
- Each party will receive written notice of the date, time, location, participants, and purpose of all interviews and meetings in which that party is invited to participate, with sufficient time for the Party to prepare to participate (typically at least 48 hours)

Review of Evidence by Parties

- Prior to the completion of the investigation, the Investigator will provide both Parties with an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in the Formal Complaint
- The Parties will have 10 working days after receiving the evidence to respond
- All responses must be submitted in writing to the Investigator

Investigative Report

- After parties have had opportunity to respond to evidence, the Investigator will draft an Investigative Report, a document that summarizes all relevant evidence
- The Investigator will send each Party and the Parties' advisors (if any) the Investigative Report at least 30 working days prior to a hearing
- The Parties and/or their advisors may submit a written response to the Investigator and the Hearing Officer no later than 15 working days prior to the hearing
- The Parties may also submit supplemental witness statements as part of their written response if they believe that the Investigator omitted, or mischaracterized, relevant facts

Live Hearing Basics

- Live hearing is held before a single Hearing Officer trained to conduct Title IX Harassment hearings and designated by the Title IX Coordinator, and will be recorded by Hearing Officer
- The Hearing Officer will not be the Title IX Coordinator or an Investigator involved in the investigation of the Formal Complaint
- Either Party may request that the hearing be conducted with the Parties located in separate rooms with live video feeds allowing the Hearing Officer and the Parties to simultaneously see and hear the Party or witness answering questions
- Parties have right to call witnesses and have their advisor cross-examine witnesses called by other Party
- Irrelevant evidence will be excluded
- Hearing officer makes determination as to culpability and appropriate sanctions

Pre-Hearing Procedures

- Parties will receive written notice of hearing date and location at least ten working days before hearing
- No later than ten working days prior to the hearing date, the Parties must submit the name of any witness that they plan to call to provide live, direct examination testimony at the hearing, excluding the Parties themselves
- No later than five working days prior to the hearing date, the Parties must submit the names of any witness that they plan to cross examine, excluding the Parties themselves
- Within two working days of the hearing, the Hearing Officer may request in writing, copying both Parties, that a witness identified in the Investigative Report (or who provided a supplemental witness statement), but not identified as a live witness by either party, appear at the hearing to provide live testimony

Role of Advisors at Hearing

- Both Parties may have an advisor of their choice, who may be, but is not required to be, an attorney, present at the hearing
- If a Party does not have an advisor present at the live hearing, AUB will provide that Party with an advisor (at no charge)
- Advisors may speak during live hearings only when examining witnesses or when addressed by the Hearing Officer, and may not make arguments to the Hearing Officer, including with respect to the relevance of evidence or questions, except with respect to sexual history questions

Hearing Procedures

- At beginning of hearing, the Hearing Officer will explain to the Parties that the Investigative Report, as well as any evidence collected by the Investigator or submitted by the parties, including supplemental witness statements, will automatically be admitted as evidence.
- The Hearing Officer will then inquire as to whether the Parties wish to call any witnesses, including for cross-examination.
 - With the exception of the Parties themselves, only witnesses identified by the Parties in advance of the hearing may provide live testimony.
- If the parties decline to call witnesses, the Hearing Officer will render a decision based solely upon the Investigative Report, as well as any evidence collected by the Investigator or submitted by the parties, including supplemental witness statements.

Hearing Procedures – Examination of Witnesses

- Only advisors may ask questions, never Parties
- Direct examination of Party or Parties' witnesses is not required (may instead rely on witness statements, including as set forth in Investigative Report)
- Witnesses who do not testify on direct examination may still be cross-examined
 - Refusal to submit to cross-examination requires disregarding direct examination testimony or written statement (but inference of a Party's responsibility or lack thereof may not be drawn based upon refusal to participate)
- Following cross-examination, re-direct examination permitted, regardless of whether live direct examination testimony given
- Re-cross examination testimony will be permitted only at the discretion of the Hearing Officer if they believe that it is appropriate under the circumstances because new, material facts were elicited on re-direct examination
- Hearing officer may ask questions of any witness called to testify

Hearing Procedures – Only Relevant Evidence and Questions Permitted

- Only relevant evidence may be presented, and only relevant questions may be asked of witnesses, including on cross-examination
- Two specific types of evidence prohibited
 - 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
 - Evidence subject to a legal privilege (*e.g.*, attorney-client privilege)

Hearing Officer's Decision

- The Hearing Officer will conduct an objective evaluation of all relevant evidence, including both inculpatory and exculpatory evidence
- Hearing Officer may make credibility determinations, but will not base credibility determinations on a person's status as a Complainant, Respondent, or witness (*i.e.*, they will not consider Complainants to be generally be more trustworthy than Respondents, or vice versa)
- In determining whether the Respondent engaged in Title IX Harassment, the Hearing Officer will apply a preponderance of the evidence standard (*i.e.*, whether it is more likely than not that the Respondent committed a violation)
- The decision will be made in writing, and issued within ten working (10) days of the hearing (unless good cause exists for a brief extension)
 - Copies provided to Parties and Title IX Coordinator.

Contents of the Written Decision

- Identification of the allegations potentially constituting Title IX Harassment;
- A description of the procedural steps taken from the receipt of the Formal Complaint through the determination, including any notifications to the Parties, interviews with Parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
- Findings of fact supporting the determination;
- Conclusions regarding the application of the Title IX Harassment Policy to the particular facts (e.g., why conduct does or does not qualify as Stalking);
- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility;
- Sanctions and remedial measures, if applicable, and an explanation for each; and
- Procedures and permissible bases for the Complainant and Respondent to appeal.

Sanctions

- Up to and including expulsion from educational programs
- Considerations
 - Number and severity of violations
 - Whether violations involved violence
 - Overall circumstances of the violations
 - The impact on Respondent and University Community
 - Whether Respondent has accepted responsibility for misconduct
 - Whether Respondent has history of misconduct

Appeals – What May Be Appealed

- A determination regarding responsibility
- The Title IX Coordinator's dismissal of a Formal Complaint or any allegations contained in a Formal Complaint (but not a decision not to dismiss a Formal Complaint or any allegations contained in a Formal Complaint); and
- The sanctions imposed by the Hearing Officer

Appeals – Who May Appeal

- Both Parties may file an appeal

Appeals – Grounds for Appeal

- Except for appeals of sanctions, only the following grounds may be raised:
 - A 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; and
 - The Title IX Coordinator, Investigator(s), Hearing Officer, or other decision-maker(s) had a conflict of interest or bias for or against Complainants or Respondents generally or the individual Complainant or Respondent that affected the outcome of the matter

Appeal – Procedures

- Appeals must be in writing
- Must be submitted to the University President within 10 working days of the date that the Hearing Officer issued a written decision, unless good cause exists for an extension
- Must clearly state one or more of the three permissible bases for the appeal.
- The President will promptly provide the other Party with a copy of the appeal submission, and allow the other Party 10 working days to respond, unless good cause exists for an extension
- No additional appeal submissions will be accepted

Appeal – Decision

- The President will issue a written decision with 10 working days of receiving the responsive submission from the non-appealing Party (unless there is good cause for an extension).
- The written decision will describe the result of the appeal and the rationale for the result, and will be simultaneously provided to both Parties
- The President's decision is final, and no further appeals are permitted

Questions

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