

Data Management in the Title IX Environment

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Introduction

Institutions of higher education are inundated with external as well as internal requirements to track, analyze, and store data to satisfy a variety of reporting requirements and goals, improve processes and systems, and ensure proper records retention and business continuity.

In this context, data refers to any factual information collected to convey or memorialize information, and actions taken by the institution. Institutional data may also constitute institutional records, including emails, documents, and more. Other data may be less obvious, such as a log providing the access history of a document within a system.

Some examples of what may be considered data include a transcript created by a phone call that is kept in an electronic file, a calendar record for a meeting (which may include date, time, location, attendees, and an agenda or notes), a recording of a meeting, or notes or agendas from such a meeting.

This briefing paper focuses on the Title IX environment and includes reasons to maintain data, reviews the types of data that should be kept in these matters, and best practices in data management.

Why Maintain Data?

There are three main reasons to maintain data: satisfy external legal and compliance obligations; assist with the practical execution of responding to reports and complaints; and, supporting institutional goals related to process and procedure improvement, including budget and strategic planning.

Supporting Compliance for Audits or Lawsuits

Document, document, document. Title IX has many compliance obligations, and they are detailed. The best way for an institution to prove that it acted in a way that is not deliberately indifferent is to provide evidence of its response. To provide such information, the institution must maintain its records appropriately. If a student or employee alleges that an institution did not follow its policies or procedures in its response to or adjudication of an allegation of prohibited conduct, it is the institution's records that will reflect the steps taken (or not) by an institution.

Compliance with Title IX Recordkeeping Requirements

Recordkeeping is required under the Title IX regulations. Section 106.45(b)(10) describes a recipient's obligation to maintain certain records for a period of seven (7) years. Recipients are those receiving federal financial assistance, in this case mainly institutions of higher education and schools.

Among records to be maintained under the current regulations are:

- Records related to investigations,
- Determinations regarding responsibility,
- Audio or audiovisual recordings or transcripts,
- Disciplinary sanction information,
- Remedies,
- Appeals, and results of appeals,
- Informal resolutions and results,
- Training materials for Title IX personnel,
- Actions taken in response to reports or formal complaints, including supportive measures, and
- Explanations for actions taken (or not).

If institutions use any external resources to complete tasks related to the Title IX process, and those tasks include the above types of documentation, institutions must take care to maintain the required documentation. Ultimately the recordkeeping obligations belong to the recipient.

Additionally, some state laws require regular data reporting about matters that may overlap with the Title IX office. Regular records maintenance will ensure that such records are available for the applicable time period, and easy to gather and produce. Outside of the seven years mandated by the Title IX regulations, there may be other reasons to maintain records for a longer period of time, including ongoing litigation or Office for Civil Rights compliance reviews or investigations.

Maintain Appropriate Business Operations

Recordkeeping is a basic component of day-to-day business continuity. Title IX personnel must track all incoming reports, the steps and efforts by the institution to



respond and resolve those reports, and have a mechanism to understand each matter's status as it progresses. Title IX case management, investigation, and adjudication involve many timelines as directed by federal regulations and institutional policy; even when there is not an exact timeline for next steps (such as “the parties must have at least 10 days to submit a written response” to evidence submitted during the investigation), many actions require promptness. The status will drive the professional's to-do list as they follow best practices and institutional policy. Without accurate recordkeeping, the status (and next steps) will not be clear, and personnel will not know what has (or has not) been done.

Identify Trends & Training and Prevention Needs

Both ongoing review of matters received, and regular review of aggregate data make it possible to identify patterns, trends, or systemic issues in your campus community. For example, if a Title IX office tracks aggregate data about the number of complaints, type of prohibited conduct alleged, and complainant and respondent status (student, faculty, staff),

they may notice increases or decreases in reports overall, or in certain departments or schools. Personnel can then reflect or research to identify potential reasons for such changes.

For example, were there fewer reports because prevention education has become more effective, and prohibited behavior is not occurring? Or are reports decreasing because the campus community is not familiar with the policy, or does not know how or where to make a report?

Are there any common themes among reports that indicate repeated misconduct by a particular individual, or reflect a systemic or climate issue about behavior and expectations in certain departments, programs, residence halls, or clubs/organizations?

Support Title IX Office Needs

Recordkeeping may assist Title IX office leaders in supporting the case for additional resources, including approval to add capacity, engage external support, or invest in training (both for Title IX staff and the community).

Types of Data

There is an abundance of data and information that may be gathered as part of an institution's Title IX process. This section describes the types of information that may be collected and retained by the institution and used in furtherance of the goals described above.

Number of Inquiries or Initial Reports

Many institutions track the total number of reports, disclosures, or inquiries received to the Title IX office. At times, the Title IX office may receive multiple reports of the same complaint, disclosure, or inquiry. Some individuals' reports may come in through another office rather than Title IX directly, or through multiple offices. For example, a student may disclose sex discrimination to a hall director, faculty member, and to their advisor. Then the student may approach the Title IX office directly. Around the same time, those other employees may be forwarding information about the disclosure they received to the Title IX office. Consider whether and how to maintain the integrity of each report, including what steps if any were taken in response to the report. At

the same time, take care not to create multiple records of the same incident, which may lead to duplication in record-keeping. Avoid having multiple records of the same incident, instead deferring to one record containing all of the data and information related to all of the effort that went to responding to and resolving the complaint. Important data to keep is data related to any information provided to the Title IX office by the person making the report, and other information known at the time the report is made, such as names of parties, dates, locations, witnesses, information about what is alleged to have occurred, and any information that may have been provided to the complainant at the time of the initial report.

Identifying Details in the Report

Once a formal complaint is filed, the institution will have a lot more information about the allegation(s), data and information that is critical to maintain in order to document the institution's efforts to respond to and address the complaint, the decisions that were made by the institution and reasons for

those decisions. This data demonstrates the institution's efforts to address the complaint, and documents the information that was available at the time, informing institutional decision making and actions. Data and information that is critical to maintain at this time include steps taken to reach out to the complainant(s) including how many times outreach occurred and on what dates; documentation provided to the complainant(s) regarding their rights and reporting options; whether complainant(s) responded to the outreach and if so, dates of their response; formal complaint documentation; supportive measures offered, accepted/declined; and, any decisions regarding resolution methods including dismissal and referral of the complaint to another process/department. Documenting which steps were available, and then which steps were taken and why will allow Title IX personnel to track the status of the inquiry, determine next steps, and recall what occurred.

Other information embedded in a complaint and investigation process may include the

parties' race, age, sexuality, gender identity, clubs/organizations, residential information, job title, department, supervisors, and more. The institution need not ask questions or survey parties for this information, but it may come up and be part of their reporting.

Maintaining such data may help the Title IX office better understand the complaint and response landscape including whether students from certain schools, or employees from certain departments are more at risk; or individuals from certain backgrounds or who hold certain identities are more or less likely to move forward with formal complaints. Such information tracked over time may also assist a Title IX office improve training, or other efforts to address persistent problems in a given department or organization.

Resolution Information

Once a determination is made regarding how a complaint will be addressed, it will be important to maintain data and information related to every step of the resolution process including all notices and communications with parties and dates associated with those

notices and communications, all evidence collected in connection with the resolution, any reports or determinations related to the resolution method, extensions to resolution timelines and reasons for those extensions, policy findings, discipline, and remedies resulting from the resolution process, and any deviations to the institution's process and reasons for those deviations.

Data collected during a resolution process may help an institution understand how many reports and complaints actually move from initial report to the Title IX office through to full resolution. Such knowledge can then be used to address obstacles complainants face in moving through the resolution process, address weaknesses in the implementation of an institution's resolution process, and improve training for individuals who have a responsibility for one or more aspects of the resolution process. Additionally, aggregate data regarding how complaints are resolved may assist the Title IX office in communicating critical information to the institution's community and constituents regarding the work of the Title IX office to address complaints, resources needed to improve the

Title IX office response, and communicate the commitment of the institution to address reports of sexual harassment and discrimination.



Data Management Best Practices

Data management includes practical considerations and also compliance considerations. The legal landscape on data protection is an evolving landscape, and institutions should work with counsel to ensure continued alignment with applicable laws and regulations. This section includes information about staying up to date on records management, creating and following security and data access protocols under law and policy, considering open records law if applicable, and conducting regular training.

Ongoing, Regular Tracking

Title IX offices should have standard operating procedures when it comes to what data is to be kept, the manner in which it is to be kept, and the cadence at which the data should be recorded. Data should be entered daily, so that it is not lost to memory which may lead to inaccurate or incomplete data being retained, and so that it does not pile up and become an onerous task.

In order to run data and meaningful reports, it is critical that Title IX offices have naming conventions for storing such data as emails, documents, and other materials related to the reporting and resolution processes. Without such conventions and consistency in how data is recorded, the reports or information that may be gleaned from the data may be inconsistent thus making reporting more difficult, and may compromise the usefulness of the data to improving the response and resolution process.

Security (from External)

Typically, the first consideration about data security is security from those outside the organization. Institutions might use shared drives with folders to collaborate, or web-based or other application systems that require institutional logins and passwords. Institution-owned devices or certain systems or applications may require additional security, such as signing into a VPN or virtual private network. A VPN is an encrypted internet connection between a device and a network,

and it adds an additional layer of security to prevent unauthorized access.

Title IX offices should work closely with their IT departments to determine which systems may best keep the data and information secure and limited to those the Title IX office determines should have access to the data and information. This includes systems to share sensitive and confidential information securely. It would also be helpful if such systems logged or tracked access, so the institution would know who edited or accessed a file, and when.

Comply with Breach Notification Laws

Federal, state, and foreign laws all impact data maintenance and security practices and policies. While the United States has thus far been reluctant to enact comprehensive data privacy legislation, the European Union's General Data Protection Regulation (GDPR) has an impact in how institutions of higher education in the United States maintain, use, and/or store data about an individual. GDPR could have its own white paper, but Title IX



professionals should know that it exists, and that campus policies should address any requirements coming out of GDPR and other applicable laws. States may also have breach notification laws relating to the personal information of state residents. These vary state-by-state, and may require notification to a state agency about such breaches and/or notice to the person whose information was disclosed inadvertently.

The word “breach” often brings to mind a massive event where some bad actor gains access to a lot of information. But keep in mind that a breach can be as simple as sending the wrong file to someone when the file contains personal information that the recipient should not have received. In the era of quick communications, where email systems auto-populate names or email addresses after a user types one or two letters, it is easier than ever to share information with unintended parties.

Comply with Institutional Policy (including FERPA)

The hallmark privacy law in education is FERPA, the Federal Education Rights and Privacy Act. FERPA protects student records from disclosure and affords access to the records for the record owners (typically the students). Generally, if the institution retains a record about a student, the student has the right to request access to (not a copy of) such a record. And generally, the institution cannot release student records without consent.

As always, there are exceptions to every rule. In this case, a key exception for institutions of higher education to function is when records are provided to or shared among “school officials with a legitimate educational interest.” A school official has a legitimate educational interest if the official needs to review an education record in order to fulfill their job responsibilities. Institutions can designate categories of people who may be included in the term “school officials,” and that may include not only employees, but also consultants, volunteers, or contractors to whom the institution has outsourced functions.

Just because two people work for the same institution does not mean that they both have the right to all the same student records as the other person. Sharing more information than needed can cause a number of problems, besides being gossipy and unprofessional. First, it may violate FERPA. Second, it may create an actual or perceived conflict of interest. For example, if a decisionmaker in a Title IX case is venting or debriefing to a colleague, that colleague may be an appeals decisionmaker or have another role where such information could create an actual or perceived conflict. Title IX personnel are mostly required to be neutral, unbiased, and free from conflicts. Regularly review who has access, and if applicable, what level of access, to ensure compliance with expectations and sharing protocols. For example, if an employee transfers from one department to another, there should be a review of what systems, folders, etc. they have access to in the former role, and whether it should be terminated or altered in consideration of the change.

FERPA does not have a records retention requirement with any set time periods, but best practice would be to set (and document) a

schedule for records destruction and follow it consistently.

Be Mindful State Open Records Laws

Most states also have a sunshine or open records law that applies to public entities, including public colleges and universities. These laws presume that state and local government records are accessible to the public unless a statute or rule provides otherwise. These laws contain various exclusions and exceptions, including exceptions for those records that are protected by federal laws or other laws in that state.

For institutions subject to open records laws, think critically about what optional documents to develop and maintain. De-identified aggregate reports described above, used to report out on the number of cases and which type and more, would likely be produced if requested under open records laws. And even if the report was not de-identified, it could be redacted and produced.

Conduct Regular Training for Staff

Institutions should regularly train all staff about records creation and retention policies. Not only will regular, consistent training level-set among employees, but also consistent records creation, maintenance and destruction practices will be better for business continuity.

Conclusion

Data received and collected in connection with a Title IX report and resolution process that is consistently and properly recorded and stored tells the story of the effort the institution took to address and resolve reports and complaints of harassment and discrimination and permits an analysis of information critical to an institution's goals of reducing incidents of harassment and discrimination.



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