

TITLE IX TRAINING

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Background

- ❑ Title IX of the Education Amendments of 1972
 - Prohibits discrimination based on sex in educational institutions that receive federal financial assistance.
- ❑ Harassment based on sex is a form of discrimination based on sex. This has been established in the law for a long time.
- ❑ Specific guidance on compliance has been limited, until now.
 - No officially adopted regulations addressing sexual harassment or school response
 - Primary guidance from court interpretations and “Dear Colleague” letters issued by the Department of Education (DOE).



But now....

- ❑ Regulations have been proposed for adoption, published in the Federal Register, commented upon (almost 125,000 comments!).
- ❑ Those comments have been reviewed by the Department Of Education, and the final regulations have now been promulgated.
- ❑ Effective date: August 14, 2020, unless stopped by court order.



Definitions and Terminology: 34 CFR 106.30(a).

- Six Kinds of Sexual Harassment
- Complainant
- Respondent
- Formal Complaint vs. "Report"
- Actual knowledge
- Substantial control
- Supportive Measures



Definition: Sexual Harassment

- ❑ Six Types of Sexual Harassment
 1. Quid pro quo
 2. Hostile environment
 3. Sexual assault
 4. Dating violence
 5. Domestic violence
 6. Stalking



Definitions: Sexual Harassment: Quid Pro Quo

- ❑ *Quid pro quo*: When an employee conditions favorable treatment on the acceptance of unwelcome sexual attention.
- ❑ This definition applies only to actions of employees.
 - Teacher offers good grades to student.....
 - Principal offers promotion to teacher...



Definitions: Sexual Harassment: Hostile Environment

- ❑ Conduct that it is so SEVERE, PERVASIVE AND OBJECTIVELY OFFENSIVE that it effectively DENIES a person EQUAL ACCESS to the program.
- ❑ What has changed from prior guidance?
 - OR → AND
 - LIMITS → DENIES
 - These changes are consistent with judicial interpretations but a departure from prior OCR guidance.



Definitions: Sexual Harassment: Hostile Environment

- ❑ This could be student-to-student conduct, employee-to-student conduct, or employee-to-employee conduct.
- ❑ Note: A lot of things happen in schools that are inappropriate and sexually oriented, but fall short of this definition. More on that later.



Definitions: Sexual Harassment: Four More

- ❑ Sexual assault: Forcible or non-forcible sexual offenses under the Uniform Crime Reporting System of the FBI.
- ❑ Dating violence: Violence done by a person who is, or has been, in a dating relationship with the other person.
- ❑ Domestic violence: Violence by a current or former intimate partner.
- ❑ Stalking: A course of conduct directed at a specific person that would cause a reasonable person to fear for personal safety of self or others; or to suffer emotional distress.



Terminology: Complainant = Victim

- ❑ This term always refers to the victim of sexual harassment, even if someone else is the one who made the complaint.
- ❑ Parent complains that Child is being harassed. Parent has made the complaint, but Child is the “complainant.”
- ❑ Teacher reports that Student is being harassed. Teacher makes the Report, but Student is the “complainant.”



Terminology: Respondent

- ❑ This term refers to the person accused of sexual harassment.
- ❑ Note: these terms (Complainant, Respondent) apply even when there is a Report, but no Formal Complaint.
- ❑ Example: Mom complains that Billy is being harassed by a coach based on his sex. The Title IX Coordinator (T9C) meets with mom and explains the Formal Complaint process. Mom does not want that. T9C also decides not to initiate Formal Complaint process.
- ❑ So there is no Formal Complaint, but there is a Report, and Billy is still the Complainant, and Coach is the Respondent.



Terminology: Supportive Measures

- ❑ Non-disciplinary, non-punitive measures to support the Complainant or Respondent after a Report of harassment is made. These measures must:
 - Be offered at no charge,
 - Be designed to maintain equal access to educational services, and
 - Not unreasonably burden either party.
- ❑ The Respondent might be “burdened” but not “unreasonably burdened.”
- ❑ More on this below.



The Role of the Title IX Coordinator: 34 CFR 106.8.

- ❑ Every district must have at least one, and that person must be designated as and identified as the Title IX Coordinator (T9C).
- ❑ T9C must have authority as well as responsibility—authority to “coordinate its efforts to comply with its responsibilities.”
- ❑ T9C meets promptly with Complainant upon receipt of a Report. More on that later.
- ❑ Contact information for the T9C should be prominent on the website and in catalogs and handbooks. These should also contain district policies and grievance procedures for sexual harassment complaints.



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What does “actual knowledge” mean? 34 106.30(a).

- ❑ This term is important because the school’s duty to respond arises only when it has “actual knowledge” of sexual harassment, or of allegations of conduct that, if true, would be sexual harassment.
- ❑ Under the regulations, the school has “actual knowledge” when any employee of the school--*other than the actual perpetrator of the harassment*—has actual knowledge.
- ❑ What has changed?
 - Previously, actual knowledge was imputed to the school only when it was known by someone who had the authority to address it.
 - Now, it is *any* employee.



Why the Change?

- ❑ The standard for “actual knowledge” at the post-secondary level remains as it was—someone with authority to take corrective action.
- ❑ DOE notes that with young children in K-12 schools, an adult is an adult.
 - K-12 students may not understand the distinctions between a para and a teacher, for example.
 - Regulation expanded to put the school on notice if *any* employee has actual knowledge.



Scenarios – Is there “actual knowledge”?

- ❑ Custodian witnesses an act of sexual harassment in the bathroom.
- ❑ Student confides in a teacher’s aide about what happened on the school field trip.
- ❑ These are examples of situations that, in the past, did not put the school on notice of “actual knowledge.” Now they do.



What does “substantial control” mean?

- ❑ The school is not responsible for responding to allegations of sexual harassment unless the school had “substantial control” over the harasser and the “context.”
- ❑ Consider how this will be applied to:
 - extracurricular activities;
 - field trips;
 - out of town, overnight trips;
 - cyberbullying off campus.



What does “substantial control” mean?

- ❑ Scenario: Student engages in cyberbullying off campus and on the weekend.
 - Does the school have “substantial control”?
 - What about state law which gives schools the authority to discipline students for certain off campus cyberbullying?



The Duty to Respond: 34 CFR 106.44.

- ❑ If the district has “actual knowledge” of “sexual harassment” as those terms are defined here, it “must respond promptly in a manner that is not deliberately indifferent.”
- ❑ The “response must treat complainants and respondents equitably by offering supportive measures....to a complainant, and by following a grievance process that complies with 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures....against a respondent.”



Implications of That.....

- ❑ The Respondent (student or employee) cannot be punished for “sexual harassment” unless the school first goes through the lengthy and complicated “grievance process.”
- ❑ What if the reported conduct doesn’t meet the definition of “sexual harassment”?
 - Most Reports of sexual harassment in K-12 schools will not meet the definition of “sexual harassment” under these regulations.
 - Under those circumstances, the district is required to respond promptly and equitably, and to offer “supportive measures” but is not required to provide a “grievance process.”



When is the “Grievance Process” Required?

- ❑ If a Formal Complaint is filed, the school must use the formal grievance process.
- ❑ If the school intends to impose disciplinary sanctions for “sexual harassment” as defined in these regulations, the formal grievance process must be completed before sanctions are imposed.
- ❑ What is the difference between a “formal complaint” and “formal grievance”?



What if There is no Formal Complaint?

- If neither the Complainant nor the T9C makes a Formal Complaint, you still have a Report. The district still has a duty to seek a “prompt and equitable resolution.”
- Supportive Measures must be offered.



Supportive Measures

- ❑ Non-disciplinary, non-punitive individualized services offered to Complainant or Respondent with no charge.
- ❑ Designed to “restore or preserve equal access to...the education program or activity without unreasonably burdening the other party.”



Supportive Measures

□ Examples:

- counseling,
- extension of deadlines,
- modification of schedule,
- campus escort services,
- mutual restrictions on contact,
- leave of absence,
- increased security/monitoring. 34 CFR 106.30.



How does all this mesh with our Code of Conduct?

- ❑ The regulations restrict the use of “emergency removal” of a person from the educational program unless:
 - 1) there is an individualized safety/risk analysis;
 - 2) there is an immediate threat to the physical health or safety of the person to be removed or others; *and*
 - 3) the person removed is given notice and an opportunity to challenge the decision immediately after the removal.



How does all this mesh with our Code of Conduct?

- ❑ “Emergency removal” could include out of school suspension.
- ❑ But remember: This restriction applies only when the removal is based on allegations that meet the definition of “sexual harassment.”



Perspective....

- ❑ Most of what is reported as misconduct in school, even if sexual in nature, falls short of the Title IX definition of “sexual harassment.”
- ❑ Students may violate the Code of Conduct in ways that justify short term suspension, but not go so far as to be “severe, pervasive and objectively offensive.”
 - Short term removals based on such conduct should be documented as being based on your Code of Conduct.
- ❑ Behavior that meets the Title IX definition of “sexual harassment” would normally call for a more serious penalty—DAEP for example.



So You've Got A Complaint

**Practical Question 1:
What constitutes a report of sexual
harassment?**

Reporting Allegations of Sexual Harassment: 34 CFR 106.8(a)

- Any person can report.
- A report can take any form: in person, mail, phone, email, etc.
- A report can occur at any time, does not have to be during business hours.
- No “magic words” required.
- Although timely reporting is encouraged, a report can be made as long as the complainant or the respondent is enrolled in the district or trying to access the education program.



The Duty to Respond: 34 CFR 106.44

- ❑ If the district has “actual knowledge” of “sexual harassment” it “must respond promptly in a manner that is not deliberately indifferent.”
 - Actual knowledge=notice of sexual harassment or allegations of sexual harassment to *any employee*.
 - The district’s response must not be “clearly unreasonable in light of the known circumstances.”
 - All employees need to know the designated person to whom they should turn over sexual harassment allegations.
 - Child abuse reporting requirement found in state law still applies.



**Practical Question #2:
Are you even dealing with a sexual
harassment complaint?**

First Decision: Is It Sexual Harassment?

- ❑ An institution must dismiss a Formal Complaint if it finds that the conduct alleged in the complaint does not constitute sexual harassment under Title IX.
 - Does not preclude action under another provision of the institution's code of conduct.



The Duty to Respond: 34 CFR 106.44

- ❑ If the allegations do not meet the definition of sexual harassment, the T9C must dismiss the complaint.
 - Dismissal triggers notice to Respondent and Complainant of dismissal and appeal option.
 - Dismissal notice must state the rationale, why dismissal is not deliberately indifferent, and must be maintained for 7 years.
 - Even after dismissal, Complainant may still file a Formal Complaint.



Respecting the Complainant's Wishes

While a complainant's wishes regarding filing a Formal Complaint should be considered, the T9C may need to initiate a Formal Complaint without the complainant's permission to make sure that the district is not responding to sexual harassment with deliberate indifference.



Formal Complaint Process

Receiving the Formal Complaint

- ❑ A “report” is distinguished from a “formal complaint.”
- ❑ A “formal complaint” is a document or electronic submission filed by a complainant that alleges sexual harassment and requests the recipient school investigate the allegation.
- ❑ The T9C may also sign a complaint, which does not make the T9C a party in the grievance process.
- ❑ A third-party reporter may not file a formal complaint.



Responding: Benchmarks for Response to Formal Complaint of Sexual Harassment

1. Equal Access/Treatment
2. Objective Evaluation
3. Bias Free Training
4. Presumption of Innocence
5. Reasonable Time Frames

6. Description of Possible Outcomes
7. Standard of Evidence
8. Appeal
9. Supportive Measures
10. Protection of Privilege

1. Provide Notice

- Upon receiving a formal complaint, an institution must provide written notice to the known parties, including:
 - Description of the process, including informal resolution process
 - Allegations involved
 - Statement of presumed innocence of the respondent
 - The parties' right to an advisor of their choice (who may be an attorney)
 - Parties' right to inspect evidence relevant to the allegations
 - Notice any provision in the code of conduct that prohibits knowingly making false statements or providing false information.



2. Investigate Formal Complaint

- ❑ Investigations of Title IX grievances come with additional requirements. Investigations must:
- ❑ Place the burden of proof and responsibility to gather evidence on the institution, not on the parties; and
- ❑ Present an equal opportunity for parties to present witnesses and other evidence.

Note: the investigation must provide opportunities for the parties to present evidence, but the burden of proof remains on the institution to gather and present evidence



2. Investigate Formal Complaint (cont.)

- Permit parties to discuss allegations under investigation and gather relevant evidence.
- Provide parties with equal opportunity to have others present during any grievance proceeding.
- Provide advance written notice of all hearings, interviews, or other meetings to any involved party, with sufficient time for the party to prepare.



2. Investigate Formal Complaint (cont.)

- ❑ Provide equal opportunity to both parties to inspect and review evidence obtained as part of the investigation (including evidence which the institution does not intend to rely on), and send to each party the evidence at least 10 days before completion of the investigative report.
- ❑ Create an investigative report summarizing relevant evidence.
 - Must send a copy of the report to each side 10 days prior to the time of determination to permit them an opportunity to send a written response.



3. Live Hearings

Postsecondary institutions are required to hold live hearings as a component of the grievance process, but for K-12, live hearings are optional.



4. Written Questions

- Whether or not a hearing takes place, district must:
 - provide each party the opportunity after the investigation report is completed to submit written questions to be asked of another party or witness;
 - Provide each party with the answers; and
 - Provide for limited follow-up questions.



**Practical Question #3:
Which standard of evidence
should your District use?**

5. Determination of Responsibility

- ❑ The school's decision-maker in a Title IX proceeding cannot be the T9C or any investigator of the allegations.
- ❑ The decision-maker must issue a written determination of responsibility with:
 - Findings of fact;
 - Conclusions about whether the misconduct occurred;
 - Explanations of each conclusion; and
 - Any disciplinary sanctions or remedies being enacted
- ❑ Written copy of determination must be sent simultaneously with information on filing an appeal.



6. Appeal

- ❑ A school must offer both parties an opportunity to appeal a determination of responsibility based on:
 - Procedural irregularity that affected the outcome of the matter;
 - Newly discovered evidence that could affect the outcome of the matter; and/or
 - Title IX personnel had a conflict of interest or bias, that affected the outcome of the matter
- ❑ A school may offer an appeal on additional bases, as long as the appeal is offered equally to both parties.
- ❑ Requires new decision-maker.



Informal Resolution

- ❑ A school may choose to offer informal resolution options like mediation, as long as both parties give voluntary, informed, written consent to attempt informal resolution.
- ❑ Cannot require a party waive their right to investigation as a condition of enrollment or employment, and also may not require parties to participate in informal resolution.



Informal Resolution

- ❑ Schools cannot offer informal resolution until a formal complaint is filed and cannot ever offer informal resolution of allegations that an employee sexually harassed.
- ❑ Any party may withdraw from the informal resolution process and resume the grievance process at any point before an agreement is reached.



Retaliation

- ❑ Retaliation is prohibited against any individual for the purpose of interfering with Title IX rights or because an individual has made a complaint or been involved with a Title IX investigation.
- ❑ Cannot charge an individual with a code of conduct violation not involving sex discrimination or sexual harassment but arising out of the same events as a report of sexual harassment, for the purpose of interfering with Title IX rights.



Retaliation

- ❑ An individual's exercise of a First Amendment right will not constitute retaliation.
- ❑ Charging an individual with a code of conduct violation for making a materially false statement in bad faith during a Title IX grievance proceeding does not constitute retaliation.



Protection of Constitutional Rights

- ❑ No requirement under Title IX can require an institution to restrict any person's rights under the First Amendment, the Due Process Clauses of the Fifth and Fourteenth Amendments, or any other rights protected from federal abridgement.
 - The U.S. Constitution
 - Federal laws like FERPA or the Civil Rights Act of 1964



7. Record-Keeping

- ❑ Maintain all documents from the Formal Complaint for seven (7) years:
 - Dismissal;
 - Determination;
 - Any Disciplinary Sanctions issued;
 - Remedies provided to the Complainant;
 - Any appeal; and
 - Any Supportive Measures implemented or if none were provided, the reasons why.



Title IX Coordinator Training



Overview

In this section, we will outline the key provisions of the new regulations and emphasize the practical implications for Title IX Coordinators (“T9Cs”) at the district or campus level.

Role of Title IX Coordinator (T9C) Overview

- ❑ Every district must have at least one, and that person must be designated as and identified as the “Title IX Coordinator,” (T9C).
 - Must have authority to coordinate the school district’s compliance efforts.
 - May investigate complaints, but may not be the “decision maker.”
 - Must be referred to as the “Title IX Coordinator” in district policies and publications, including website.
 - A district must notify all potential reporters of sexual misconduct of the T9C’s contact information: name/title, office and email addresses, and telephone number.



Key Roles Outlined in Regulations

- ❑ Title IX Coordinator
- ❑ Investigator
- ❑ Decision Maker
- ❑ Facilitator
- ❑ Appeals Decision Maker



Timeliness and Eligibility

- ❑ Although reports of sexual harassment should be made in a timely manner, unlike other district grievances, a sexual harassment complaint can be made as long as the complainant and respondent are either or both still enrolled in the district or are the beneficiaries of the district's programs.
- ❑ Include years in all documentation to avoid confusion.



Step-by-Step Guide for T9C's Response to a Formal Complaint

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WG

Formal Complaint

- ❑ We are distinguishing a “report” from a “formal complaint.”
- ❑ A “formal complaint” is a printed document or electronic submission filed by a complainant that alleges sexual harassment and requests the recipient school investigate the allegation.
- ❑ 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.



Formal Complaint

- ❑ The T9C may also sign a complaint, which does not make the T9C a party in the grievance process.
- ❑ A third party reporter may not file a formal complaint, but the T9C can and often may need to so to protect the District.



Remember to Make an Initial Determination

- ❑ Does the formal complaint meet the definition of “sexual harassment” pursuant to Title IX?
 - Formal Complaint must be dismissed if it does not meet definition. That is:
 - If reported conduct alleged is not “sexual harassment” even if the allegations are true.
 - If reported conduct did not occur in the school’s program or activity.
 - If reported conduct did not occur in the United States.



Formal Complaint Considerations

- ❑ *Must* dismiss a Formal Complaint if the conduct alleged does not constitute "sexual harassment."
 - Does not preclude action under another provision of the district's code of conduct.

- ❑ *May* dismiss a Formal Complaint if:
 - Complainant notifies T9C in writing that the complainant wishes to withdraw the Formal Complaint.
 - Complainant is no longer enrolled or employed by the district.
 - Circumstances prevent the district from gathering sufficient evidence to make a determination.



Concluding Comments

Important Role of the T9C: Summary

- Duty to respond to report.
- Must determine if allegations meet definition of sexual harassment.
- Formal complaint? Must give written notice to parties.
- Must promptly meet with complainant and discuss “supportive measures.”
- Must contemplate emergency removal.
- Investigate or appoint a trained, independent investigator to conduct an investigation into the sexual harassment allegations.
- Must dismiss or provide investigation report to decision maker.
- Implement Remedies.



Other State Reporting Requirements

This presentation is specific to Title IX, but do not forget about other reporting requirements, including mandatory reporting related educator misconduct under Texas Education Code §21.006 and Texas Administrative Code §249.14 (inappropriate relationships with students).

Let's Remember!

- ❑ These regs do not change the standard of liability for schools under Title IX.

- ❑ Liability of the district occurs only if:
 - 1) sexual harassment happened;
 - 2) the district knew about it; and
 - 3) the district responded with "deliberate indifference."



Let's Remember!

- ❑ Remember that it's not "sexual harassment" under Title IX unless the district had "substantial control" over the harasser, and the context.
- ❑ Most of the lawsuits against districts cannot overcome the "deliberate indifference" hurdle. But this is not a phrase that educators should be using. Set your sights higher than that!



Set the Right Tone....

- ❑ We only have liability under the law when things are really bad.
- ❑ But the way we keep things from getting really bad is to address the minor incidents that occur along the way.
- ❑ Make sure that teachers, coaches, bus drivers, and other employees who have regular interaction with students are setting the right tone, being good role models, and being attentive.



Questions?

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