

Title IX Legal Update 2020

UNDERWOOD

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What's Covered:

- Who is OCR and what do they do
- New terms and changes to some old terms
- Identifying new processes and procedures
- Identifying the new players and their roles
- Next steps for complying with the new Title IX regulations

U.S. Dept. of Education, Office of Civil Rights

- Ensure equal access to education and promote educational excellence **through vigorous enforcement** of civil rights in our nation's schools
- OCR investigates complaints that allege discrimination
- OCR conducts “compliance reviews” to determine if policies, procedures and actions are consistent with civil rights laws

U.S. Dept. of Education, Office of Civil Rights

- If a covered entity does not comply with regulation or law, OCR will seek corrective action through a voluntary agreement
- Issue Letter of Findings and may require corrective action
- Refer matters to the Department of Justice for investigation, enforcement action and/or to terminate federal funds

Title IX: The Law

- Title IX prohibits discrimination on the basis of sex in education programs and activities that receive federal funds
- Congress passed Title IX in 1972



Title IX: The Law

No Person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.



Title IX: Sexual Harassment

- Until recently, neither the statute nor the regulations referred to sexual harassment.
- Title IX applied to sexual harassment through the courts.



“Sexual Harassment” Under Title IX



New Regulations Define Sexual Harassment

Conduct on the basis of sex that is one or more of the following:

- (1) Quid pro quo sexual harassment;
- (2) Hostile environment sexual harassment; or
- (3) Conduct that meets the criteria of certain federal laws regarding sexual violence.

34 C.F.R. § 106.30(a)

Quid Pro Quo Sexual Harassment

- District employee conditions receipt of a benefit or service on an individual's participation in unwelcome sexual conduct
- Applies to employee conduct toward a student

Hostile Environment Sexual 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 district's education program or activity
- Applies to student on student conduct

Conduct that Meets the Criteria of Certain Federal Laws Regarding Sexual Violence

- “Sexual assault” (20 U.S.C. 1092(f)(6)(A)(v)),
- “Dating violence” (34 U.S.C. 12291(a)(10)),
- “Domestic violence” (34 U.S.C. 12291(a)(8)), or
- “Stalking” (34 U.S.C. 12291(a)(30)).

Terminology for Sexual Harassment Complaints:

- **Complainant:** Any individual who is alleged to be the victim of sexual harassment
- **Respondent:** Any individual who is reported to be the perpetrator of conduct that could constitute sexual harassment
- Parent may act on behalf of a minor student who is a complainant or a respondent

Designating a Title IX Coordinator

- Recipients must identify and authorize an individual to coordinate the school's Title IX compliance efforts
- Authorized to sign a complaint that initiates a formal complaint process (otherwise only the complainant can initiate a formal complaint)

Designating a Title IX Coordinator

- Cannot have a bias against alleged victims or perpetrators of sexual harassment
- OCR guidance for designating Title IX coordinator
 - Conflict with duties of Title IX coordinator may occur for “dean of students, superintendent, principal, or athletics director”
 - If superintendent is only option, document consideration of potential conflict and steps taken to protect complainants

Notice of Title IX Coordinator

- Must be known as the “Title IX Coordinator”
- Notice to parents, students, and employees required with contact information

34 CFR 106.8(e).

Notice of Title IX Coordinator

Options for providing notice of Title IX Coordinator with contact information include:

- Update Exhibits to Board Policy
- Posters
- Student & Employee Handbooks
- Website
- Employment application materials



Reporting Allegations of Sexual Harassment

- **All District employees should be trained on recognizing and reporting sexual harassment**

Recognizing Sexual Harassment

- Verbal
 - Inappropriate statements
 - Spreading sexual rumors
 - Rating other students as to sexual activity or performance
 - Making sexual propositions or pressuring students for sexual favors
 - Telling sexual or dirty jokes
- Non-verbal
 - Displaying or distributing sexually explicit drawings, pictures, or written materials
 - Performing sexual gestures or touching oneself sexually in front of others

Recognizing Sexual Harassment

- Physical
 - Pinches
 - Touches
 - Grabbing in a sexual way
 - Touching of a sexual nature
- Online
 - Circulating or showing e-mails or web sites of a sexual nature

Recognizing Sexual Harassment

- Age and maturity level may impact district's response to allegations of harassment, but should not prevent reporting conduct.

Making a Report

- District should develop procedure to receive reports from employees
- Reports made to someone other than the Title IX Coordinator must be forwarded
- Train/notify employees on how to report and document reports



Responding to Sexual Harassment



District's Obligation to Respond:

“A recipient (i.e. school district)

- with **actual knowledge** of sexual harassment
- in an **education program or activity** of the recipient
- against a person in the United States
- **must respond promptly** in a manner that is **not deliberately indifferent.**”

34 CFR 106.44(a)

What is “actual knowledge”?

Notice of sexual harassment or allegations of sexual harassment to:

- Title IX coordinator;
 - Official with authority to institute corrective measures;
 - *Any employee of an elementary and secondary school.*
- 34 C.F.R. § 106.30(a).

Notice requiring a response may result from:

- (1) Informal report (verbal or written) from employee, student, parent, or any other third party
 - Report can be made by anyone
 - Report can be made anytime (24/7) by phone or email – make sure Title IX coordinator information is current
- (2) Receipt of a *formal complaint* of sexual harassment:
 - A document filed by a complainant
 - Complaint signed by the Title IX Coordinator alleging sexual harassment and requesting an investigation of alleged sexual harassment.

What is an “education program or activity” ?

- Any location, event or circumstance where the District exhibits substantial control over both the harasser (respondent) and the context in which the alleged harassment occurred

What is “deliberate indifference”?

- The response is clearly unreasonable in light of known circumstances.

What is “deliberate indifference”?

- Examples:
 - Ignoring a report or formal complaint
 - Undue delay in responding to a report or complaint
 - Responding in a manner known to be ineffective or inadequate

Initial Response by Title IX Coordinator:

- Promptly contact the complainant to discuss the availability of supportive measures and consider the complainant's wishes with respect to supportive measures;
- Inform the complainant supportive measures are available with or without the filing of a formal complaint;
- Explain the process for filing a formal complaint.

34 C.F.R. 106.44(a)

- **Note:** the above actions are required **regardless** of whether a formal complaint is filed.

Initial Response by Title IX Coordinator:

- Comments to the regulations discuss opportunity for Title IX Coordinator to delegate duties.

What are “supportive measures”?

- Non-disciplinary, **non-punitive**, individualized services, offered as appropriate and **without charge** to a **complainant** or a **respondent** before or after the filing of a formal complaint, or where no complaint has been filed.
34 C.F.R. § 106.30(a)
- Must be designed to restore or preserve equal access to education programs or activities without unreasonably burdening the other party

What are “supportive measures”?

- Examples:
 - Counseling
 - Course modifications
 - Schedule changes
 - Increased monitoring or supervision
 - Complete removal of a respondent from an activity would likely be considered punitive, except for an “emergency removal”

Emergency removal

- Must be based on an individualized safety and risk analysis
- Necessary to protect a student or other individual from **immediate threat to physical health or safety**
- Notice & opportunity to challenge provided “immediately” following the removal

34 CFR 106.55(c)

Emergency removal

- Emergency removal does NOT modify any rights under:
 - Individuals with Disabilities and Education Act (IDEA),
 - Section 504 of the Rehabilitation Act of 1973, or
 - American with Disabilities Act
- The Office of Civil Rights will provide technical assistance to recipients regarding compliance with all relevant laws
- School must coordinate their compliance efforts with special education staff

District's Response to Formal Complaint:

- Response MUST treat complainants and respondents equitably.
- Offer both parties supportive measures.
- Follow grievance process that complies with Title IX regulations before the imposition of any disciplinary sanctions that are not supportive measures against a respondent.

Elements of Grievance Process for Formal Complaint

- Objective evaluation of all evidence
- No conflict of interest or bias for investigator or decision-maker
- Initial presumption respondent not responsible
- Reasonably prompt time frames
- Description or list of possible discipline/remedies
- Identify standard of evidence to be applied
- Appeal procedure
- Range of supportive measures available

Elements of Grievance Process – Title IX Personnel

- Title IX Coordinator
- Investigator
- Decision Maker
- Appeal Review and Decision Maker
- Informal Resolution Facilitator (if applicable)



Revisions to Board Policy FFH (Legal)



Process for Title IX
Formal Complaint

For the purpose of addressing formal complaints of sexual harassment, a district's process must comply with the following requirements. Any provisions, rules, or practices other than those required by this provision that a district adopts as part of its **process for handling formal complaints of sexual harassment must apply equally to both parties**. 34 C.F.R. 106.45(b)

A district's Title IX formal complaint process must:

1. Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a process that complies with the Title IX regulations before the imposition of any disciplinary sanctions or other actions that are not supportive measures against a respondent. Remedies must be designed to restore or preserve equal access to the district's education program or activity. Such remedies may include the same individualized services described as supportive measures; however, remedies need not be nondisciplinary or nonpunitive and need not avoid burdening the respondent;

2. Require an objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence—and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness;
3. Require that any individual designated by a district as a Title IX Coordinator, investigator, decision-maker, or any person designated by a district to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

4. Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the Title IX formal complaint process;

5. Include reasonably prompt time frames for conclusion of the Title IX formal complaint process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the district offers informal resolution processes, and a process that allows for the temporary delay of the Title IX formal complaint process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities;

STUDENT WELFARE
FREEDOM FROM DISCRIMINATION, HARASSMENT, AND RETALIATION

FFH
(LEGAL)

6. Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the district may implement following any determination of responsibility;

7. State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment;

8. Include the procedures and permissible bases for the complainant and respondent to appeal;
9. Describe the range of supportive measures available to complainants and respondents; and
10. Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

34 C.F.R. 106.45(b)(1)

FFH (LOCAL) – Considerations for Formal Complaint Procedures

- Assigning roles for formal complaint process
- Standard of Evidence
- Informal resolution process (optional)
- Opportunity for live hearing (optional)



Training on Title IX Regulations



Training on Title IX Regulations

- All staff must know how to identify and report sexual harassment
- Title IX Coordinator, investigators & decision makers must be trained on investigation procedures, definitions and standards identified in the regulations, how to consider and apply evidence, and maintaining impartiality

Title IX – Next Steps for Compliance

- Decide on formal complaint procedures & adopt revisions to FFH (LOCAL)
- Provide notice of Title IX Coordinator with contact information
- Training for Title IX Coordinator
- Training for investigators, decision makers, appeals
- Training for all employees on recognizing & reporting sexual harassment
- Update employee and student handbooks

Summary of Training Requirements

- Title IX Coordinators, Investigators and Decision Makers:
 - Definition of sexual harassment
 - Identifying the district's education program or activity (to establish jurisdiction)
 - How to conduct an investigation
 - Title IX formal complaint procedures including hearings, appeals, and informal resolution processes (if applicable)
 - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

Additional Training for Decision-Makers

- Technology to be used at a live hearing, if district allows live hearings
- Considering issues of relevance for both questions and evidence presented (including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant)

Additional Training for Investigators

- Consideration of relevance of evidence, including creating an investigative report that fairly summarizes relevant evidence

Requirement for Training Materials

- Must be posted on District website
- Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment

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