New Title IX Protections Against Sexual Harassment: The Investigative Role

October 30, 2020
Grievance Process

Complaint Received

Initial Assessment

- Formal Complaint Filed - Support Measures Offered
  - Investigation
    - Determination of Responsibility
  - Informal Resolution
- No Complaint Filed - Support Measures Offered
- Complaint Dismissed
Definitions of Terms
New Definition of Sexual Harassment

- 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 recipient’s education program or activity
- Sexual assault, dating violence or stalking
New Terms

Complainant: Alleged victim of the conduct
Respondent: Alleged perpetrator of the conduct
Advisor: An adult of a party’s choosing (may be an attorney)
Formal Complaint: Document alleging sexual harassment filed by a student, parent/legal guardian, school staff or in some cases the School Title IX Coordinator
New Title IX Regulations

- Increased procedural rights and timelines
- Provision of supportive measures to restore equal access
- Protection against disciplinary sanctions before conclusion of the grievance process
- Freedom from staff conflict of interest and bias during the grievance process
Greater Transparency of Information:

- Published School Title IX Coordinator contact information
- Published grievance procedures and training materials
- Identification of procedural roles:
  - School Title IX Coordinator
  - Investigator
  - Decision Maker
  - District Title IX Coordinator
Investigator Role:

● Gather information in a fair and impartial manner about the allegations
● Avoid conflict of interest or bias
● Assume innocence of all parties
● Report the findings
Written Notifications
Written Notifications

- Complaint
- Intent to interview
- Preliminary investigative findings
- Investigative Report
- Determination of Responsibility
- How to appeal
Notification Timelines

- Supportive measures - offered immediately
- Interview - allow time for an advisor to be present
- Preliminary findings + 10 days to respond
- Investigative Report + 10 days to respond
- Written Determination of Responsibility + 30 days to submit an appeal
Standard of Evidence

Preponderance of Evidence:
The Complainant’s/Respondent’s proposition is more likely to be true than not true.
Supportive Measures

● Non-disciplinary, measures meant to:
  ○ Restore
  ○ Protect
  ○ Deter

● Post the range of available supportive measures
Outcomes

Range of Outcomes:

- School must describe or list the range of disciplinary sanctions that could occur following a determination of responsibility
Right to Appeal

- Grievance procedures must contain the right to appeal and information on how to make an appeal
- Schools must offer an appeal to every party
Written Notice
Required Written Notices

- Complaint
- Rights
- Intent to Interview
- Preliminary Investigative Findings
- Investigative Report
- Determination of Responsibility
- Dismissal
Written Notice: Intent to Interview

Must provide sufficient time for parties to have an advisor present if they so choose
Written Notice: Preliminary Findings

- Informal written presentation of the facts
- Affords parties 10 days to review and submit additional information
Written Notice: Investigative Report

● Written report sent to both parties and the Decision Maker
● Affords 10 days for parties to submit written responses to the Decision Maker before final determination of responsibility
Should Include:

- Identification of the grievance procedures taken
- Description of witnesses/parties interviewed and their final statements
- Documentation of evidence
- Summary of findings
Written Notice: Notification of Dismissal

- Must send written notice of the dismissal and the reasons for dismissal to both parties
- Both parties have the right to appeal a school’s dismissal decision
Mandatory Dismissal

- Behavior does not meet the definition of sexual harassment
- Incident did not occur in the school’s educational program or sponsored activity
- Incident did not occur in the United States
Discretionary Dismissal

- Complainant withdraws the formal complaint in writing
- Respondent is no longer enrolled
- Circumstances prevent the gathering of sufficient evidence to reach a determination
When Does A School Have Notice?

- When it has knowledge of sexual harassment allegations
- When sexual harassment is personally witnessed by staff
- When any school employee puts the school on notice
Informal Resolution
Informal Resolution

- May be attempted if each party enters the process voluntarily.
- School must provide a facilitator who is free from conflicts of interest or bias, and who has received training.
Informal Resolution Requirements

School still needs to provide complainants and respondents:

- Notice of the allegations
- Notice of their rights
- Signed voluntary agreement to pursue informal resolution
- Information about withdrawing from the informal resolution process
Formal Complaint Investigation
Investigative Requirements

- Provide equal opportunity for both parties to present witnesses and evidence
- Do not restrict the ability of either party to discuss allegations or gather evidence
- Provide the same opportunities to parties to have an advisor of choice present for any meeting
Investigative Requirements Continued

- Provide written notice of interviews with sufficient time for the party to prepare
- Provide parties equal opportunity to review the evidence if directly related to the allegations in the complaint
- Give parties a meaningful opportunity to respond to the evidence after it has been provided
Investigative Requirements Continued

- Provide a preliminary report of investigative findings
- Give parties at least 10 days to respond to the evidence in writing
- Finalize the report with consideration of party responses
- Provide finalized Investigative Report to both parties and the Decision Maker
Investigative Process

1. Request for a Title IX Investigation is received
2. Send *Notice of Intent To Interview* to Complainant and Respondent (Allow sufficient time)
3. Interview Complainant, Respondent, and Witness(es) (Gender considerations)
4. Send Preliminary Findings + wait 10 days
5. Incorporate any additional relevant findings
6. Send Investigative Report to both parties and the Decision Maker
Student Procedural Rights

Students have the right to:

- Prior knowledge of the conduct which is prohibited
- Be informed of the specific violations of the discipline regulation
- Refute the allegations
Witness Interviews

- Interview witnesses provided by involved parties
- Separate multiple witnesses
- Obtain statements in writing
Written Statements

Should be:

● Signed and dated by the witness/party
● Signed and dated by both the investigator and student if written on behalf of a student.
● Legible and include facts reported during the interview
Written Summary of Findings

Should:

● Be void of subjective language
● Fairly summarize relevant evidence
● Report findings without recommendation to the Decision Maker
Appeals
When Can Appeals Occur?

- After a dismissal
- After a written Determination of Responsibility
Appeal Process

- Must notify parties in writing and implement appeal procedures equally
- Must afford parties equal opportunity to submit a written statement supporting or challenging the outcome
Record Keeping
Record Retention

District Title IX Coordinator must retain all records pertaining to the grievance procedure for 7 years.
Retaliation
Retaliation: Code of Conduct

- A school may not charge a person with a code of conduct violation for the purpose of discouraging the person from filing a sexual harassment complaint.
- Issuing a code of conduct violation on discoveries made during the investigation that are unrelated to the allegation may be considered retaliation.
Non-Retaliatory Conduct

- A school may discipline someone for making a bad-faith false statement during a Title IX grievance process in accordance with SMCPS policy JFDG
- A bad-faith statement cannot be based on the outcome of a case
Title IX Materials File

https://drive.google.com/drive/folders/1HFm5IB2WoZgM7DAEoubocx5UZK6JGsmK?usp=sharing
Questions?