



Title IX Training for Investigators and Decision Makers

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PUTNAM CITY SCHOOLS

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Title IX

- Title IX of the Education Amendments of 1972 provides that “[N]o 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....”
- It 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.



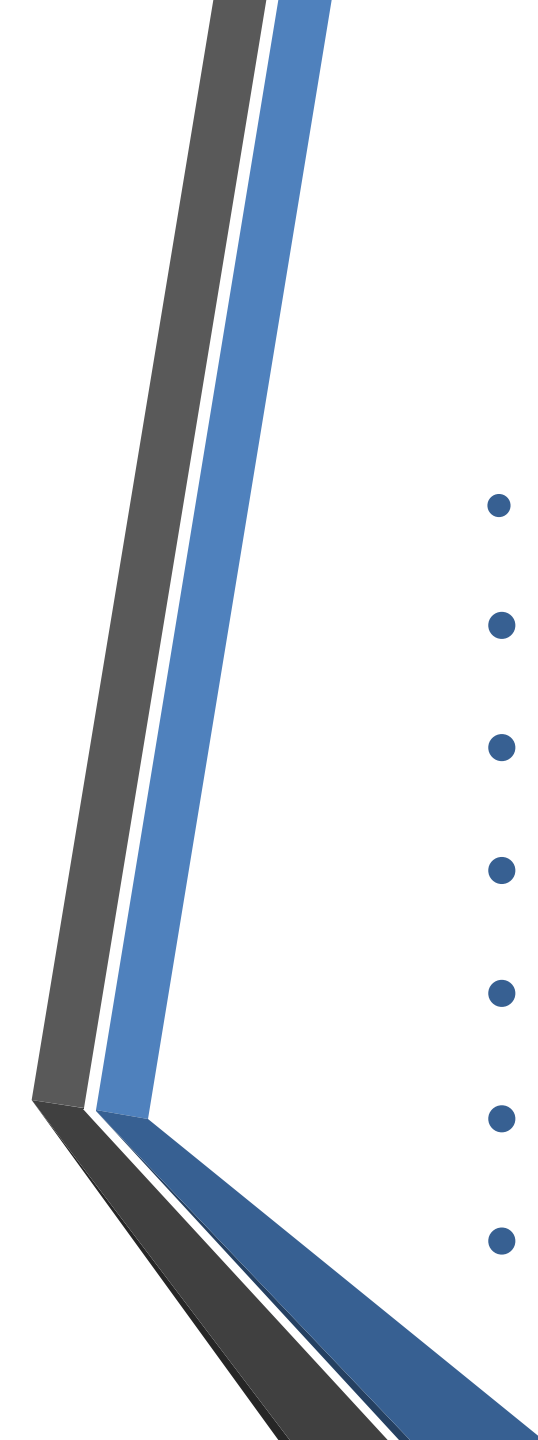
Title IX

- All Oklahoma public schools, including charter schools, receive federal financial assistance and are thus subject to Title IX.
- Primary guidance from court interpretations and “Dear Colleague” letters issued by the Department of Education (DOE).
- DOE adopted regulations in August of 2020 and new regulations are in process.

Definitions and Terminology:

34 CFR 106.30(a)

- Sexual Harassment = unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person's equal access to the recipient's education program or activity (i.e., quid pro quo, hostile environment, sexual assault, dating violence, domestic violence, stalking)



Definition: Sexual Harassment

34 CFR 106.30(a)

- Six Types of Sexual Harassment
- Quid pro quo
- Hostile environment
- Sexual assault
- Dating violence
- Domestic violence
- Stalking

Definitions: 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.....

Definitions: Hostile Environment

- **Conduct that it is so SEVERE, PERVASIVE AND OBJECTIVELY OFFENSIVE that it effectively DENIES a person EQUAL ACCESS to the program.**
- These changes are consistent with judicial interpretations but a departure from prior OCR guidance.
- 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.



Sexual Harassment: The Clery Act and VAWA

- The Clery Act and the Violence Against Women Act (VAWA) address four types of violence that are each considered forms of sexual harassment under Title IX:
 - Sexual Assault
 - Dating Violence
 - Domestic Violence
 - Stalking

Sexual Harassment: Sexual Assault

- Sexual assault: Forcible or non-forcible sexual offenses under the Uniform Crime Reporting System of the FBI.
- Rape: The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.
- Fondling: The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is unable to consent (age, disability).
- Incest: Sexual intercourse between persons who are related to each other and unable to marry.
- Statutory Rape: Sexual intercourse with a person who is under the statutory age of consent.



Sexual Harassment: Dating Violence

- Dating violence: Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.
- Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse. Dating violence does not include acts covered under the definition of domestic violence.



Sexual Harassment: Domestic Violence

- Domestic violence: A felony or misdemeanor crime of violence committed by:
 - a current or former spouse or intimate partner of the victim;
 - a person with whom the victim shares a child in common;
 - a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner;
 - a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred; or
 - any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.



Sexual Harassment: Stalking

- 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.
- Course of conduct means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about, a person, or interferes with a person's property.
- Substantial emotional distress means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling.
- Reasonable person means a reasonable person under similar circumstances and with similar identities to the victim.

Terminology

- Complainant = victim of sexual harassment
- Respondent = person accused of sexual harassment
- Formal Complaint vs. Report = report is verbal or in writing by anyone while a formal complaint may be initiated by Complainant or Title IX Coordinator
- Actual Knowledge = when any employee has knowledge
- Substantial Control = over both the alleged harasser and the context in which the harassment occurred
- Education program or activity = any academic, extracurricular, vocational or other education program operated by a district



Complainant

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

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 meets with mom and explains the Formal Complaint process. Mom does not want to pursue a Formal Complaint, and Title IX Coordinator also decides not to initiate Formal Complaint process.
- There is no Formal Complaint, but there is a Report. Billy is the Complainant, and Coach is the Respondent.

Supportive Measures

- Supportive Measures = Non-disciplinary, non-punitive individualized services offered to Complainant or Respondent at no charge designed to “restore or preserve equal access to...the education program or activity without unreasonably burdening the other party” whether or not a formal complaint is filed.
- Examples:
 - Counseling.
 - Mutual restrictions on contact – No Contact Order
 - Modification of schedule, including lunches, bus, PE, etc.
 - Campus escort services.

Actual Knowledge

- 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 constitute sexual harassment.
- A school has "actual knowledge" when any employee of the school--other than the actual perpetrator of the harassment—has actual knowledge.
- 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.

Is there “actual knowledge”?

- A. My fellow teacher and fishing buddy confides in me that he’s been “fooling around” with a student. He makes sure she gets an A and a college recommendation.
- B. Custodian witnesses an act of sexual harassment between students in the bathroom after school.
- C. Student confides in a teacher’s aide about what happened on the school field trip.
- All three of these are examples of situations that, in the past, did not put the school on notice of “actual knowledge” but now qualify as “actual knowledge.”

Substantial Control

- 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.
- 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?

Key Roles

- Title IX Coordinator (may also serve as Investigator)
- Advisor – party may provide – may be an attorney
- Investigators
- Decision Makers (cannot be Investigator or Title IX Coordinator)
- Informal Resolution Facilitator
- Appeals Decision-Maker (cannot be the Decision-Maker, Investigator or Title IX Coordinator)

Title IX Coordinator

- Every district must have at least one.
- Must be designated as and identified as the “Title IX Coordinator”.
- 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 Coordinator’s contact information: name/title, office and email addresses, and telephone number. May utilize handbook and website to do this.
- Has various responsibilities in the report and formal complaint process.

Steps in the Process

1. Report of incident or alleged misconduct received by employee of District
2. Principal obtains information regarding allegations and provides to Title IX Office
3. Initial assessment and determination of jurisdiction by Coordinator
4. Formal complaint completed and submitted to Coordinator
5. Investigation performed and Investigative Report drafted
6. Opportunity for written questions to be submitted and answered
7. Determination of Responsibility and sanctions
8. Appeal
9. Final summary of process, including supportive measures, to Complainant



Report of Sexual Harassment

- Any person may report. Not just the alleged victim.
- Can be verbal or written.
- Can be made by mail, by telephone, or by email at any time (business or non-business hours) to Coordinator or any employee.
- Any employee who observes or receives notice of sexual harassment or alleged sexual harassment shall report it.
- All employees need to know the designated person to whom they should turn over sexual harassment allegations.
- Employee reporting requirement does not replace requirement to report child abuse to law enforcement and/or DHS.

The Duty to Respond

- If the District has “actual knowledge” of “sexual harassment” it “must respond promptly in a manner that is not deliberately indifferent.”
- Actual knowledge = notice or awareness of sexual harassment or allegations of sexual harassment received by any employee.
- District’s response must not be “clearly unreasonable in light of the known circumstances.”

Timeliness

- Coordinator must promptly contact Complainant to discuss:
 1. The Report;
 2. Supportive Measures;
 3. Process to file Formal Complaint; and
 4. Initial determination of whether allegations, if assumed true, meet the definition of sexual harassment.
- Concurrent law enforcement jurisdiction – may be basis for extending investigation and decision-making deadlines



Discipline, Emergency Removals, & Administrative Leave

- Discipline: may proceed with discipline for matters that are not sexual harassment but may not discipline for matters that may be sexual harassment and need to proceed with Title IX process.
- Emergency Removal: Based on specific need to protect student from immediate threat to physical health or safety.
- Emergency Removal: Would be a change of placement for student with IEP or 504 Plan.
- Employee may be suspended or placed on Administrative Leave with Pay pending an investigation.

Formal Complaints

- A “formal complaint” is a printed document or electronic submission filed by Complainant that alleges sexual harassment and requests District to investigate the allegation.
- At the time of filing a formal complaint, Complainant must be participating in or attempting to participate in the education program or activity of District. Coordinator must promptly meet with Complainant.
- Coordinator must explain the Formal Complaint Process and consider the wishes of Complainant about pursuing it or not.
- Coordinator must offer “supportive measures” if not already offered.
- Formal Complaint may be initiated by Complainant or by Title IX Coordinator.

Dismissals

- District must have jurisdiction to conduct Title IX investigation.
- No jurisdiction if:
 - Allegations if true would not be sexual harassment
 - Incident not allege to have occurred on school property or as part of school activity
- If no jurisdiction, then Formal Complaint is dismissed.
- Complainant given written notice and notice of right to appeal dismissal.
- Scenarios: Student alleges she was raped by another student while off-campus or alleges raped by a former student.



Informal Resolution

- After receipt of Formal Complaint, may offer Informal Resolution except for employee-on-student conduct.
- Complainant and Respondent must both agree to informal resolution process and either may withdraw at any time before a resolution is reached.
- Process may resolve some issues and leave others to be investigated or may resolve all issues

Written Notice of Formal Complaint

- Upon receiving a Formal Complaint, District must provide written notice to the 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.
- Allow reasonable time for Respondent to prepare before any interview.

Investigation of Formal Complaint

- Investigation must:
 - Place the burden of proof and responsibility to gather evidence on District, not on parties.
 - Present an equal opportunity for parties to present witnesses and other evidence.
 - Permit parties to discuss allegations under investigation and gather relevant evidence.
- Provide parties with equal opportunity to have others present during any complaint proceeding.
- Provide advance written notice of all interviews, or other meetings to any involved party, with sufficient time for the party to prepare.
- Presumes that Respondent is not responsible.

Investigation of Formal Complaint

- Determine who will investigate.
- Investigator must be impartial and free of conflicts or bias.
- Review Board policies related to alleged conduct.
 - Discrimination, Harassment, Retaliation
 - Student Code of Conduct
 - Employment policies/employee handbook
- **Consider whether interim actions are necessary to protect any person or to preserve the integrity of the investigation.**
- Actions likely would have been taken by District following initial report

Investigation of Formal Complaint

- Interview Complainant first, if possible. Who, what, where, when, and why.
- Serves as road map for rest of investigation.
- Interview the person who made the report, if different than Complainant.
- Interview witnesses.
- Interview the Respondent.
- Obtain written, signed, and dated statements from each person interviewed.
- Gather any relevant documentation or evidence:
 - Email or other correspondence or notes
 - Surveillance video, cell phone video
 - Electronic messages, posts to social media
- Prepare Investigative Report that will be provided to parties.
- Report to law enforcement, DHS, etc., if required and not already reported.

Interviews

- Make a checklist of the specific allegations to cover in the interviews.
- Outline questions to be asked.
- If want to record, obtain permission on the record.
- Interview Respondent after interviewing Complainant, victim, and any witnesses named by complainant.
- If the allegations are of a criminal nature and the accused refuses or has been advised not to respond, document efforts to interview the individual.
- May request written statement or responses to written questions but that should not take the place of an interview unless person refuses opportunity to be interviewed.
- Must provide written notice of date, time, location, participants, and purpose of interviews and allow sufficient time to prepare.



Investigative Report

- Name of Complainant and Respondent.
- Name of Investigator(s).
- Date and sign document.
- Attach an evidence log which includes evidence relied on such as text messages, recordings, e-mails, and other documentary evidence.

Investigative Report

- Include the following:
 - Background such as how complaint/report was initially made and conclusion regarding jurisdiction
 - Timeline or Procedural History specifying dates of receipt of Formal Complaint, interviews, obtaining documents, etc.
 - Alleged Violation
 - Applicable Policies
 - Standard of Evidence – Preponderance of Evidence
 - Detailed summary of Complainant’s statement and/or allegations
 - Detailed summary of Respondent’s response
 - Detailed summary of witness statements
 - List of evidence obtained and reviewed by Investigator
 - Analysis of relevant facts and evidence by allegation



Investigative Report

- No live hearings required for K-12.
- After Investigative Report is completed, provide each party the opportunity to submit written questions to be asked of another party or witness.
- Provide each party with the written answers .
- Provide for limited written follow-up questions.
- Provide final Investigative Report to Complainant, Respondent, and Decision-Maker(s).

Determination of Responsibility

- The decision-makers cannot be the Coordinator or any investigator of the allegations and free from conflicts of interest or bias.
- Decision-makers should meet in person or virtually to discuss Investigative Report and elements of decision to be made.
- Decision-makers should designate a person to write the Determination of Responsibility.
- Decision-makers may utilize portions of Investigative Report to make findings of fact and conclusions.
- If Respondent is found to be responsible, Decision-Makers are to impose discipline which will maintain Complainant's access to education

Determination of Responsibility

- Policy BL: Preponderance of Evidence standard – greater than 50% chance the fact is true.
- May not consider credibility of Complainant, Respondent, and witnesses based solely on their role in the process.
- Decision must be made in good faith and be substantially related to the evidence in the Investigative Report.
- Evidence:
 - Is it Relevant? (proves or disproves a fact at issue)
 - Is it Reliable? (accuracy, corroboration, consistency)
 - Should it be relied on to support a determination? (character evidence, prior sexual behavior, privileged information)

Determination of Responsibility

- Scenario: Mark sends an e-mail from his District e-mail account to his friends which shows Angie's face on the body of a naked woman and says "For a good time, call Angie." Angie had rejected Mark's advances asking her out for a date. Mark and Angie are on their school's respective basketball teams.
- Relevancy Issues:
 - Mark's mother is a teacher at the high school and has Angie for a class.
 - Angie has dated other boys on the basketball team and those boys say she has engaged in consensual sexual activity with them and sent them pictures of her naked.
 - Mark's coach has submitted a statement about what a good person Mark is and detailing his volunteer work with younger students at the YMCA.
 - Mark wants to obtain and introduce evidence about Angie's failing grades prior to this incident.

Determination of Responsibility

- Credibility: determining the reliability of the testimony or statements of parties and witnesses.
- Be careful of irrelevant inconsistencies.
- Inherent Plausibility: Does this make sense? Be careful of bias.
- Motive to Falsify: Does person have a reason to lie?
- Corroboration: Is physical evidence or other testimony aligned with testimony of parties or witnesses.
- Past History: Is there a history of similar behavior? Consider prior discipline records of parties or witnesses.

Determination of Responsibility

- The decision-maker(s) 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 to Complainant and Respondent with information on filing an appeal.

Appeal

- A school must offer both parties an opportunity to appeal a determination of responsibility based on:
 1. Procedural irregularity that affected the outcome of the matter;
 2. Newly discovered evidence that could affect the outcome of the matter; and/or
 3. An employee involved in the investigation process with 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.
- Appeal must be heard by a new decision-maker. Superintendent is the Appeal Officer.



Other Documentation

- The recipient must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity. If a recipient does not provide a complainant with supportive measure, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances." 34 CFR 106.45(b)(10)(D)(ii).
- This may be documented in the Investigative Report or elsewhere.

Record Keeping

- 7-year retention period for records of:
 1. each sexual harassment investigation including any determination, disciplinary sanctions, remedies provided to Complainant, and Supportive Measures;
 2. any appeal;
 3. any informal resolution; and
 4. training materials.
- Retention and publication of training materials:
 - Retain any materials used with coordinator, investigators, decision makers, and any other person who facilitates an informal resolution process.
 - These materials must be publicly available on District's website.

Final Thoughts

- The 2020 regulations change how OCR will evaluate a Title IX complaint but do not change the standard of legal liability for schools under Title IX.
- District liable only if:
 - 1) sexual harassment happened;
 - 2) District had notice and
 - 3) District responded with “deliberate indifference.”