

# Requirements for Title IX Sexual Harassment Investigations

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# **What is Title IX?**

- Title IX of the Education Amendments of 1972 – 20 U.S.C. §§ 1681-1688
  - “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”
- Encompasses protection against sexual harassment



# What is Title IX?



- Educational programs and activities must not discriminate based on gender, e.g. – Sex-based harassment and assault, athletics, discipline, pregnant and parenting students
- Applies when? On-campus and off-campus – wherever school exercises substantial control over the context and the person accused of sexual harassment, except outside U.S. (but this may change soon).



# Current Regulations

- Effective August 14, 2020
- Requirements for handling complaints and investigations of sexual harassment (which will likely be expanded soon)
- Significant change from past practices – numerous specific procedural, policy, staffing, and training requirements
- Applies only to situations involving sexual harassment or sexual assault – rules regarding other forms of sex discrimination are currently unaltered by the regulations



# **What's New with the 2020 Changes?**

- Updated definition of sexual harassment
- Title IX Coordinator requirements
- Policy requirements
- Reporting requirement – ALL staff
- Robust and specific procedural requirements – formal and informal – grievance, appeal, mediated resolution
- Limits on pre-determination discipline/corrective action
- Training requirements
- Record-keeping requirements



# Sexual Harassment – Quid Pro Quo

- When a school employee conditions receiving an aid, benefit, or service of the school on a student's participation in unwelcome sexual conduct (“quid pro quo”)
  - Employee - student
  - Sexual conduct can include:
    - Sexual advances
    - Requests for sexual favors
    - Verbal, nonverbal, or physical conduct of a sexual nature



# **Sexual Harassment – Hostile Environment**

- Unwelcome conduct that a reasonable person would conclude to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school's education program or activity (“hostile environment”)
- Employee – student OR student – student (even if not specifically targeted)



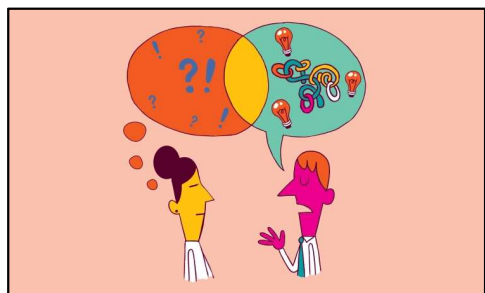
# **What is a hostile environment?**

- Factors (judged on a case-by-case basis) –
  - Degree to which the conduct affects student(s) education
  - Type, frequency, and duration – pattern or practice of harassment, or sustained and nontrivial. The more severe, the less frequent it needs to be
  - Relationship of the people involved – Power dynamic
  - How many people are involved?
  - Age and gender of the harasser and the subjected person or people
  - Size of the school, where incidents occur, and context in which they occur
  - Other incidents at the school
  - Related nonsexual, gender-based harassment





# First Amendment Protection



- Constitutionally protected speech cannot be considered sexual harassment or retaliation
- Subjectively offensive speech is not harassment
- Defending oneself against allegation via speech is not retaliation



# Sexual Assault

“an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation”

- Forcible rape, forcible sodomy, sexual assault with an object, forcible fondling, incest, statutory rape



# **Dating Violence**

Violence committed by a person—

- (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and
- (B) where the existence of such a relationship shall be determined based on a consideration of the following factors: (i) The length of the relationship; (ii) The type of relationship; and (iii) The frequency of interaction between the persons involved in the relationship.



# Domestic Violence



Violence committed ... by any other person against an ... youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.



# Stalking

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to —  
(A) fear for his or her safety or the safety of others; or  
(B) suffer substantial emotional distress.



# Title IX Coordinator



- Must designate “Title IX Coordinator” to coordinate compliance – include in job title. You can have one or more. Update job description
- Must grant sufficient authority to ensure compliance with Title IX – Board resolution or policy
- Must be easily available 24/7 to receive complaints and reports



# **Update Your Policies!**

- Authorization for Title IX Coordinator
- Specific non-discrimination language - § 106.8(b)
- Reporting requirements
- Handling reports and complaints, grievance procedures
- Code of conduct updates
- Describe or list the range of possible disciplinary sanctions or remedies if respondent found responsible
- Describe range of supportive measures available



# **Notifications**

- Notify all applicants, students, parents/legal guardians and employees:
  - Name/title, address, email, telephone number of Title IX Coordinator (and post on website and in handbook)
  - Non-discrimination policy
  - Grievance procedures – how to report or file a complaint and how school will respond
- Training materials must be on website





# Reporting Requirements

- Any person may report sex discrimination, including sexual harassment to Title IX Coordinator or ANY employee
- Reporting requirement – ALL staff.
  - Suspected or known sexual harassment
  - Reports made to employee – tell Title IX Coordinator
- May also have other reporting requirements – e.g. child abuse – this is separate and BOTH must be done

**Report  
it!**



## General Response

- If school has actual knowledge of sexual harassment must promptly respond in a manner that is not deliberately indifferent
  - Actual knowledge = notice to ANY employee (except respondent)
  - Deliberately indifferent = clearly unreasonable in light of the known circumstances
- Must treat complainant and respondent equitably



# **Confidentiality**

- Set and maintain confidentiality standards
- Discuss with complainant at the outset – make sure they understand that a confidentiality request may not be able to be honored and/or may limit the school's ability to respond. Explain retaliation is prohibited – prevent and respond
- If the student continues to ask that his or her name not be revealed, take all reasonable steps to investigate and respond to the complaint consistent with the request as long as doing so does not prevent the school from responding effectively to the harassment and preventing harassment of other students



# Procedural Requirements



- Prompt and equitable resolution of complaints
- Title IX Coordinator must promptly contact complainant when s/he learns of potential

sexual harassment to discuss availability of supportive measures with or without a formal complaint, consider complainant's wishes with respect to supportive measures, and explain complaint process for formal complaint.



# Supportive Measures

- Non-disciplinary/non-punitive individualized services
  - Offered to complainant and/or respondent
  - Before or after formal complaint or when no formal complaint has been filed – NO DISCIPLINE BEFORE GRIEVANCE PROCESS IS COMPLETE!



# Supportive Measures

- Designed to restore or preserve equal access to educational programs and activities without unreasonably burdening the other party
  - Protect safety
  - Protect educational environment
  - Deter sexual harassment
- Examples: counseling, extensions of deadlines or other course-related adjustments, modifications of class schedules, escort services, mutual contact restrictions, leave of absence, increased security



# Supportive Measures

- Confidential – must maintain confidentiality to the extent that it would not impair the ability to provide the supportive measures
- Title IX Coordinator responsible for coordinating effective implementation



# **Emergency Removal of Student**

- Respondent may only be removed from school pre-determination if the school:
  - Undertakes an individualized safety and risk analysis
  - Determines that an immediate threat to the physical health or safety of any student or individual arising from the allegations justifies removal
  - Provides respondent with notice and opportunity to challenge the decision immediately following removal
- Still must follow special ed requirements





# Paid Administrative Leave



- May place an employee on administrative leave while grievance process is pending



# **Informal Resolution**

- Mediation or similar informal resolution
- Voluntary process – written consent required
- Only if formal complaint is filed
  - Cannot use for employee-student cases
- Must provide written notice of the allegations, informal resolution procedure, and effect on complaint



# **Formal Complaint – Grievance Process**

- Written, signed (physical or digital) complaint by the complainant or “otherwise indicates” it is filed by the complainant OR signed by the Title IX Coordinator
- Complainant must be current student or attempting to enroll



# **Formal Complaint – Grievance Process**

- Provisions, rules, and practices must equally apply to both parties – no conflict of interest or bias
- Must involve objective evaluation of ALL relevant evidence - privileged evidence not allowed (e.g. treatment)
- Credibility determinations cannot be based on the mere fact that a person is a complainant, respondent, or witness
- Remedies must be designed to restore or preserve equal access to educational program or activity – describe range or possible discipline and remedies



# Presumption of Non-Responsibility



- Starting point is a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the end of the process
- Determine standard of evidence to be used – preponderance (more likely than not) or clear and convincing (highly and substantially more likely to be true – highly probable) – and use consistently



## **Prompt Time Frame**

- Must be a prompt process including reasonably prompt time frames for filing and resolving appeals and informal resolution processes
- May allow for temporary delay or limited extension of time for good cause with written notice to the complainant and respondent with reasons
- May consolidate complaints if allegations arise out of the same facts or circumstances



## **Notice of Allegations**

- Upon receipt of formal complaint, must provide written notice to known parties:
  - Notice of grievance process, including informal resolution
  - Notice of allegations including sufficient details and sufficient time to prepare a response before initial interview
    - Identities of parties, conduct, date, location
  - Statement of presumed non-responsibility



## **Notice of Allegations (con't)**

- Determination of responsibility will be made at end of grievance procedure
- Inform parties they may have an advisor of their choice (can be attorney)
- Inform parties they may inspect and review evidence
- Provisions of code of conduct that prohibit knowingly making false statements or submitting false information
- If other allegations come up during investigation, must provide updated notice





## **Dismissal of Formal Complaint**

- If the conduct alleged in a formal complaint would not constitute sexual harassment even if proved, did not occur as a part of the educational program or activity, or did not occur in the U.S. then school must dismiss the complaint
  - May still take other disciplinary action
- Complainant may withdraw complaint in writing
- Dismiss if respondent no longer enrolled or employed
- Dismiss if prevented from gathering sufficient evidence
- Send written notice of dismissal with reasons



# **Investigation**

- School has burden of proof and burden of gathering evidence
- Equal opportunity for parties to present witnesses and evidence, have others/advisor present during proceeding
  - May restrict advisor's participation if equally applied
- Parties are not restricted from discussing allegations or gathering evidence
- May not consider sexual predisposition or prior behavior, unless to prove that someone other than respondent is responsible or as relevant to consent



## **Investigation (con't)**

- Provide written advanced notice to parties of investigative interviews or other meetings – time, date, location, participants, and purpose
- Provide parties with equal opportunity to inspect and review all evidence so party can meaningfully respond. Send each party and advisor evidence and allow 10 days for written response. Must be considered before investigation is completed.



# **Investigation Report**

- Upon completion of investigation, must create report that “fairly summarizes relevant evidence” and send draft report to parties and advisors at least 10 days before hearing/final determination is made
- Parties may submit written, relevant questions that a party wants asked of any party or witness – must provide parties with answers and allow for follow-up questions
- Explain any decision to exclude a question as not relevant



# Hearings

- Are allowed to include a live hearing as a part of the grievance process, but do not need to
- Strongly advise against it – will significantly increase time and expense to little benefit
  - If you do decide to include hearings, consult regulations for requirements



# **Determination**

- Someone other than Title IX Coordinator must make determination of responsibility
- Simultaneously issue written determination of responsibility
  - Apply standard of evidence
  - Identify allegations and describe procedural steps taken
  - Detailed findings of fact
  - Details conclusions applying code of conduct
  - Statement and rationale for each allegation
  - Statement of discipline/remedies – may still have other due process requirements – e.g. expulsion, teacher contract cancellation





## Appeal

- Determination notice must include procedures and bases for appeal
- Bases:
  - Procedural irregularity that affected outcome
  - New evidence that could affect outcome
  - Conflict of interest or bias



# **Appeal Process**

- Provide notice to non-appealing party
- Decision maker on appeal cannot be original decision-maker, investigator, or Title IX Coordinator
- Both parties must be given reasonable, equal opportunity to submit written statement
- Simultaneously issue written decision describing the result of the appeal and rationale





# Training

- Title IX Coordinators, investigators, decision-makers, and any person that facilitates informal resolution:
  - Definition of sexual harassment
  - Scope of school's education program or activity
  - How to conduct an investigation and grievance process (including appeals and informal resolution)
    - Issues of relevance of questions and evidence
    - Creation of investigation report
  - How to serve impartially – stereotypes, bias, conflicts



# **Record-Keeping**

- Must maintain for seven years records of:
  - Allegations – document basis for conclusion that not deliberately indifferent, taken measures to restore or preserve equal access
  - Supportive measures – or document why none given (and not clearly unreasonable)
  - Every sexual harassment investigation and any appeal
  - Any informal resolution and results
  - All training materials



# **No Retaliation**

- No one may intimidate, threaten, coerce, or discriminate against anyone for the purpose of interfering with any right or privilege secured by Title IX or because someone has made a report or complaint, testified, assisted, or participated or refused to participate in an investigation or proceeding
  - Retaliation complaints go through grievance procedure



## Stay Tuned . . .

- On June 23, 2022, OCR rolled out proposed amendments to the Title IX regulations.
- The agency accepted public comments and planned to release the new regulations in May 2023; however, OCR recently delayed the release of the new regulations until October 2023 due to the large volume of public comments on the proposed regulations.



# Highlights of the Proposed Amendments

The proposed regulations would:

- Clearly protect students and employees from all forms of sex discrimination.
- Provide full protection from sex-based harassment.
- Protect the right of parents and guardians to support their elementary and secondary school children.
- Require schools to take prompt and effective action to end any sex discrimination in their education programs or activities – and to prevent its recurrence and remedy its effects.
- Protect students and employees who are pregnant or have pregnancy-related conditions.

# Highlights of the Proposed Amendments (cont.)

- Require schools to respond promptly to all complaints of sex discrimination with a fair and reliable process that includes trained, unbiased decision makers to evaluate the evidence.
- Require schools to provide supportive measures to students and employees affected by conduct that may constitute sex discrimination, including students who have brought complaints or been accused of sex-based harassment.
- Protect LGBTQI+ students from discrimination based on sexual orientation, gender identity, and sex characteristics.
- Clarify and confirm protection from retaliation for students, employees, and others who exercise their Title IX rights.
- Improve the adaptability of the regulations' grievance procedure requirements so that all recipients can implement Title IX's promise of nondiscrimination fully and fairly in their educational environments.
- Ensure that schools share their nondiscrimination policies with all students, employees, and other participants in their education programs or activities.
- Apply to incidents occurring outside of the U.S.

# What Should You Do Now?



- Review your policies to ensure they are compliant with the current Title IX regulations.
- Make sure you are training all staff who are involved in the Title IX grievance process, including making sure investigators are trained on how to conduct an investigation and how to remain unbiased.
- Make sure you are posting your Title IX staff training materials on the School Corporation's web site.
- Keep an eye out for the upcoming changes, which are set to be released in October 2023.
- After the new regulations are released, train your staff on the updates.



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THANK YOU!

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