

Sexual Harassment Complaints: Title IX Coordinator and Investigator Requirements

ASA Webinar

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TITLE IX FRAMEWORK REMINDERS

School Liability

A school will violate Title IX where it has *actual knowledge* of an allegation of sexual harassment experienced by an *individual in the educational program* and the school acts with *deliberate indifference* to that notice.

What is Deliberate Indifference?

A response to notice of sexual harassment that is clearly unreasonable in light of the known circumstances

The new regulations set out the required response to notice within the context of:

- Protecting 1st Amendment rights
- A presumption of non-responsibility of the accused
- Provision of supportive measures

Avoid Deliberate Indifference

- Treat complainants and respondents equitably
- Offer supportive measures in all cases
- Investigate every instance of formal complaint
- Use procedures set out in the regulations
- Provide complainant remedies if respondent is found to have responsibility

Conflict of Interest

- Investigator/Title IX Coordinator/Decision-maker must not have a conflict of interest
 - Against the specific complainant or respondent or
 - Against complainants or respondents in general

If you have a conflict of interest, notify the Title IX Coordinator immediately

In order to investigate and make decisions about sexual harassment, we must

UNDERSTAND REGULATION DEFINITION OF SEXUAL HARASSMENT

Sexual Harassment

The regulations use a definition of sexual harassment that is designed to protect 1st Amendment rights of students and teachers by:

- Distinction between physical conduct and speech
- Speech is largely protected unless it rises to high standard-no prior restraint on speech
- Physical conduct is *per se* actionable

Definition of Sexual Harassment

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

1. A school employee conditions the provision of an aid, benefit, or service of the school on an individual's participation in unwelcome sexual conduct;
2. Unwelcome conduct that a reasonable person would find to be so severe, pervasive, and objectively offensive that it **“effectively denies a person equal access”** to the school's education program or activity;
3. Sexual assault, dating violence, domestic violence, or stalking.

Definition of Sexual Harassment: Element 1

Element 1 is *quid pro quo* harassment

- Does not require a severe, pervasive, and objectively offensive analysis
- By its very terms, it will deny access to the program

Exs: a teacher requires sexual favors for a better grade; a staff member demands sexual favors or s/he will post compromising pictures

Definition of Sexual Harassment: Element 2

Harassment based on speech

This prong requires the unwelcome sexual conduct to be:

- Severe AND
- Pervasive AND
- Objectively offensive

Such that the victim is denied **equal access** to the school's programs and activities.

Narrowly tailored to protect 1st Amendment rights

Definition of Sexual Harassment: Element 3

Offenses based on violence (sexual assault, dating violence, domestic violence, stalking):

- Does not require severe and pervasive analysis
- When it occurs, equal access is denied

Like Element 1, it is *per se* actionable

Element 3 Definitions

- Sexual assault: an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.
- Stalking: means engaging in a course of conduct directed at a specific person that would cause a reasonable person to: 1) fear for his or her safety or the safety of others; or 2) suffer substantial emotional distress

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 and where the existence of such a relationship shall be determined based on a consideration of the following factors:

- 1) the length of the relationship;
- 2) the type of relationship;
- 3) the frequency of interaction between the persons involved in the relationship

Domestic Violence

Violence committed by a current or former spouse or intimate partner of the victim, a person whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of Arizona, or by 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

BASIC PROCEDURAL REQUIREMENTS OF INVESTIGATION

Formal Complaint Triggers the Investigation

Formal complaint triggers responsibility to conduct an investigation that complies with the District's grievance procedure.

Upon receipt of a Formal Complaint, the Title IX Coordinator will provide a written notice to parties explaining basic rights during process and will assign an investigator.

Procedural Requirements

- Respondent is presumed not responsible for conduct and a determination will not be made until the conclusion of the grievance process
- Parties may have an advisor of their choice
 - Advisor may be an attorney, but doesn't have to be
- Both parties must have equal opportunity to present witnesses and evidence

Procedural Requirements

- Parties must be given, in writing, details about what conduct is alleged to constitute sexual harassment, including the date and location of the alleged incident(s) (TIX Coordinator will do this)
- If there is a prohibition against making false statements in the code of conduct, a party can be disciplined for doing so during this investigation

Procedural Requirements

- Parties will have the opportunity to inspect and review evidence collected during the investigation
 - Sign a non-disclosure agreement
- Do not restrict either party's ability to discuss the allegations or gather and present evidence

Expanding the Investigation

If, during the course of the investigation, you decide to investigate additional allegations that were not included in initial notice, discuss with the Title IX Coordinator, who will then provide written notice of the additional allegations to the parties.

Written Notice Requirements

In sufficient time to prepare a response, parties must be given written notice of the following:

- All of the procedural requirements above and the specifics of the allegations (Title IX Coordinator does this)
- Any investigative activity that will require a party's presence

Investigator Reminders

- **Be impartial and avoid bias**
- Presume that the respondent is not responsible for the alleged conduct
- Do not make assumptions about who can experience sexual harassment
- Follow the District's grievance procedure and maintain list of procedural steps that have been accomplished

Timelines

Meet the timeline set out in the District's policy-there must be a reasonably prompt investigation (specific number of days for completion of the process must be established)

- If there is a temporary delay for good cause, provide written notice to both parties explaining the reason for the delay
- School administrative needs DO NOT create good cause for a temporary delay

Good Cause Delay

Non-exhaustive list of reasons that may create a good cause delay in completion:

- Concurrent law enforcement activity
- Witness availability
- A pandemic-related reason (illness, unavailability)
- School breaks
- Absence of a party
- Availability of a party's advisor
- Need for language assistance or ADA accommodations

CONDUCTING THE INVESTIGATION

Plan, Plan, Plan

- Map out a plan for your investigation
- Understand the allegations
- Understand definition of sexual harassment so that you know what elements must be established
- Who will you interview? What documents must you see? Do you need to ask IT to run a server search? Do you need to get recordings from surveillance cameras?

Obtain Necessary Evidence

Do not require or rely on the parties to anticipate and provide you the evidence you need

- You may not require a party to provide evidence (documentary or verbal) that would be legally protected under attorney-client privilege, doctor-patient privilege, spousal privilege.

Medical Evidence

- Can not require party to provide medical evidence
- If they do want to provide it, must obtain written, voluntary consent (of parent or adult student) allowing district to use that evidence in grievance process
 - Even if we already have the evidence, we can't use it in investigation without that consent

Investigating the Complaint

- Interview both parties (required)
- Interview any witnesses identified by the parties and anyone else you identify as potentially having information
- Request documents from district, parties, and witnesses

Interview Phase

- Recommendation is to start by interviewing complainant and then the respondent
- Provide written notice of the date, time, location, participants, and purpose of any investigation activity that requires a **party's presence** and provide notice with enough time for the party to prepare to participate in the activity

Interview Phase

- You've identified the allegations and understand what information will be needed to make a determination, so use that to guide interviews
- Plan your interview outlines
 - To extent reasonable, ask both parties the same questions
 - Ask witnesses the same or similar questions

Conducting Interviews

- If you allow others to be present during an interview (such as an advisor), allow both parties the same opportunity.
 - You may restrict the extent to which the advisor can participate, so long as restrictions apply to both parties

Conducting Interviews

- Explain purpose of interview:
 - Important part of the investigation into the allegation of sexual harassment that the District received
- Provide reassurances:
 - No retaliation for participating
 - Will maintain confidentiality except as between the parties and the District personnel who are required as part of the Title IX process

Conducting Interviews

Explain expectations

- No recording (you can decide whether you will allow or not)
- Tell the truth
- What the rules are for advisors
- You don't have to provide evidence protected by privilege
- You may not threaten, intimidate, or harass anyone who participates in this process

Conducting Interviews

- If interviewing virtually, ask witness to confirm who is present with them
- Ask open ended questions
 - Use the answers to ask more pointed questions to drill down into the detail you need
- Document the responses in a reliable and consistent fashion

Conducting Interviews

At the end:

- Ask both parties and any witnesses to provide any documents they think are relevant
- Ask both parties and any witnesses who else they think you should talk to and then interview the witnesses identified by the **parties** and consider whether anyone identified by witnesses should be interviewed

Providing Parties the Evidence

- Get a signed non-disclosure agreement
- Provide both parties an equal opportunity to inspect and review evidence gathered as part of the investigation that is *directly related* to the allegations raised in the formal complaint
 - Including evidence on which you do not intend to rely on it in drafting an investigation report by sending the evidence to the parties in an electronic or hard copy format and allowing the parties 10 days to submit a written response

Redacting Evidence

- You must redact information protected by privilege unless we have written consent
- You may redact information in the evidence that is not directly related to the allegations
- You may not redact confidential information that is directly related and relevant

Completing the Process

- Consider the written responses to evidence provided by the parties
- The District can decide whether parties must provide all evidence PRIOR to the investigator sending out the evidence for review OR whether it will allow parties to provide additional evidence after reviewing the existing evidence.

Investigation Report

- Draft a written investigation report that summarizes the relevant evidence
- Can include observations and even recommendations
- Provide the report to the parties AND their advisors, if any, at the same time for review and opportunity to provide another written response prior to the decision maker rendering a determination.

Decision-maker Responsibility

DETERMINATIONS

Basic Premises: Decision Makers

- Objectively evaluate all available evidence, both inculpatory and exculpatory
- Weigh the evidence using preponderance of the evidence (or clear and convincing) burden of proof standard adopted by the District
 - The evidence must show that it is *more likely than not* (or *highly probable*) that the respondent is responsible for the alleged conduct

Written Questions

The District will not hold in-person hearings but after the investigation report is completed, and before a determination is made, the parties must have the opportunity to review the investigation report and submit written, relevant questions to the decision maker that the party wants asked of the other party or witnesses

Written Questions

- Each party may submit relevant questions to decision maker
- If a question is excluded by the decision maker, the decision maker must explain why the question is not relevant
- Each party will be provided answers to its questions and then will have a limited opportunity to ask limited follow up questions

Relevance of Questions

Complainant's sexual history or predisposition is NOT RELEVANT unless:

- offered to establish that someone else committed the acts complained of
- Offered to establish consent with the specific respondent

Issuing a Determination

Using a preponderance of the evidence standard to review the evidence, issue a written determination that includes the following:

- List of the allegations
- Description of the procedural steps taken from receipt of the formal complaint through determination (include dates of notices, interviews, etc.)
- Findings of fact that support the determination

Issuing a Determination

- Conclusions regarding the application of the code of conduct to the facts
- A rationale for the determination as to each allegation
 - Determination of responsibility
 - Any disciplinary sanctions
 - Whether remedies will be provided to complainant
- Includes procedures and information regarding permissible basis for appeal

Remedies

- If the determination is that the respondent is responsible for the conduct, then determine remedies that will restore or preserve equal access to the education program or activity
 - Same types of things as supportive measures except that they can be punitive toward respondent

Questions?



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