

Title IX and Preventing Sexual Discrimination and Harassment In Your Schools

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Goals of Today's Presentation?

- Understand why sexual harassment is a problem that needs to be addressed.
- Identify and explore what types of conduct constitute sexual harassment.
- Learn about the new Title IX regulations for addressing sexual harassment in schools.
- Understand what conduct falls under the Title IX regulations.
- Get an overview of the investigation and decision-making process required by the new regulations.
- Learn how the new regulations interact with existing state and federal laws.
- Learn how to recognize and avoid prejudgment of the facts, conflicts of interest and bias.

Sexual Harassment is Widespread

- Nationwide, 81% of women and 43% of men reported experiencing some form of sexual harassment or assault in their lifetime, according to a 2019 study published by the University of California, San Diego, and the nonprofit Stop Street Harassment.

What Is Title IX?

Title IX of the Education Amendments of 1972 (20 U.S.C. §§ 1681 *et seq*)

“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 of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.* [“Title IX”].

What Institutions Are Covered by Title IX?

- Educational institutions that receive federal funds
- Includes public schools, charter schools, for-profit schools, athletic associations, colleges and universities
 - Also includes educational programs offered by non-educational institutions that receive federal funds
 - For example: libraries and museums

Who is Protected by Title IX?

- Students
- Staff
- US citizens and non-US citizens
- Men and Women
- Pregnant students
- While it is still not clear if it protects transgender students or students based on sexual orientation, is clear that it protects students from harassment for exhibiting or failing to exhibit stereotypical sex-based characteristics
- Does not matter if the alleged harasser is the same or different sex than the alleged victim

Examples of Sex-Based Discrimination

- Is it or isn't it sex-based discrimination?

Difference Sources of Guidance

- Federal Statutes – enforceable by OCR and the Courts
- Federal Regulations – have the force of law and are enforceable by OCR and the Courts
 - Regulatory Guidance – offers guidance from OCR – enforceable only by OCR
 - Dear Colleague Letters and Q&A – issued by OCR, enforceable only by OCR
- Federal Case Law – force of law – based on jurisdiction
 - Supreme Court – binding on entire country
 - 2d Circuit Court of Appeals – binding on Circuit (includes CT, NY and VT)
 - District Court of Connecticut – binding in Connecticut
- State Law – binding in Connecticut

Difference Sources of Guidance

- Federal Law, Case Law and Federal Regulations set the “floor”
 - i.e. the minimum requirements that must be met
 - OCR guidance generally elevates the floor
 - States often pass laws that provide more protection than federal law
 - District policy often provides additional protection to students beyond what is required by law

Title IX History

- Title IX does not actually mention harassment and the original regulations did not mention sexual harassment
- Two Supreme Court cases established the appropriate standards of liability under Title IX for sexual harassment.
- **Gebser v. Lago Vista Independent School District**, 524 U.S. 274 (1998), established the standard of liability imposed on schools when a school employee sexually harasses a student.
- **Davis v. Monroe County Board of Education**, 526 U.S. 629 (1999), established the standard for school liability when a student is sexually harassed by another student.
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Title IX History

- In Gebser, the Supreme Court held that a school will **not** be liable for sexual harassment of a student by a school employee unless:
 - An school official with **authority to take corrective action** had **actual knowledge** of discrimination, but failed to adequately respond; and
 - The **inadequate response** must amount to **deliberate indifference** to discrimination.

Title IX History

- Similarly, in Davis, the Court held that liability is imputed to the school **only** where:
 - a. The school has been “deliberately indifferent to sexual harassment, of which the [district had] actual knowledge”;
 - b. The harassment is so “severe, pervasive and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit”; and
 - c. The school responded in a way that was clearly unreasonable under the circumstances.

- Jackson v. Birmingham Board of Education, 544 U.S. 167 (2005)

The US Supreme Court extended the protection under Title IX to encompass retaliation against third parties who complain about sexual discrimination against students.

The Court found that a coach who had complained of unequal treatment of the girls' sports team versus the boys' sports team was protected against retaliation.

Title IX History

- OCR's April 4, 2011 Dear Colleague Letter provided guidance on handling sexual harassment in schools
 - Aimed mostly at colleges
 - Was heavily weighted in favor of the alleged victim
 - Expressed a belief that colleges were taking insufficient steps to address sexual harassment on their campuses
 - Was combined with OCR issuing a list of colleges and universities being investigated for failing to address and remediate sexual assault claims
 - Resulted in significantly more discipline of students for allegedly engaging in sexual harassment on college campuses

Title IX History

- The April 4, 2011 DCL resulted in significant amounts of litigation from alleged harassers claiming that were not given proper due process prior to being expelled from college.
 - It was recently estimated that approximately 500 such lawsuits have been filed across the United States.
- At least one court also interpreted Title IX, which the guidance said only applied to situations where the conduct was “severe, pervasive and objectively offensive” to exclude single instances of sexual assault a single incident was not “pervasive”

Title IX History

- The April 4, 2011 DCL was withdrawn on Sept. 22, 2017
- OCR also issued a Q&A on Title IX and Single Sex Elementary and Secondary Classes and Extracurricular Activities
 - This was also withdrawn on Sept. 22, 2017
- DOE announced that it intended to engage in a rulemaking process to develop new Title IX regulations
- In the interim, the DOE issued a new Q&A on Campus Sexual Misconduct (issued Sept. 22, 2017) and indicated that it would continue to rely on its previous guidance (2006 DCL, 2001 Revised Sexual Harassment Guidance)

Title IX Anti-Harassment Regulations

- In May 2020, the Office of Civil Rights published new regulations regarding sexual harassment under Title IX
- These regulations went into effect on August 14, 2020
 - This gave school districts exactly 89 days to implement the regulations during a global pandemic
- They appear to be designed for colleges and are often a poor fit for K-12 schools
- They require sweeping changes to numerous things including:
 - The definition of sexual harassment under Title IX,
 - How schools must address sexual harassment under Title IX,
 - How complaints under Title IX must be investigated, and
 - Many other aspects of addressing sexual harassment in schools

Definition of Sexual Harassment Under the Title IX Regulations

- Conduct on the basis of sex that satisfies one of the following:
 - An employee of the district conditioning the provision of an aid, benefit, or service on the individual's participation in unwelcome sexual conduct;
 - 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; or
 - sexual assault, dating violence or stalking.

If conduct does not fall into one of these categories it is not prohibited by Title IX.

Definition of Sexual Harassment Under the Title IX Regulations

- Per the Regulations, Title IX only applies to conduct that occurs in a program or activity over which the district exerts substantial control over both the respondent and the context.
 - Thus, no longer covers off-campus conduct even if it has an on-campus effect
- Does not apply if the conduct occurred against a person outside the U.S.
 - For example, they would not apply during a field trip outside of the United States

NOTE – just because OCR will not treat conduct as a Title IX violation, it does not mean the conduct does not violate some other section of the district's policies and/or state or other federal law

Sexual Harassment

- Must be:
 - Unwelcome
 - Sexual, sex-based and/or gender-based
 - Verbal, written, online and/or physical contact

Quid Pro Quo Sexual Harassment

- Unwelcome sexual advances, requests for sexual favors, other verbal or written conduct of a sexual nature
- By a school employee
- When submission to or rejection of such conduct is made either explicitly or implicitly a term or condition of the receipt of some benefit such as a grade, a part in a school play, field time on a sports' team

Hostile Environment

- A hostile environment is created when the sexual harassment is so:
 - Severe
 - Pervasive **AND**
 - Objectively offense

That it effectively denies a person equal access to the district's education program or activity

Could be the academic program, or
Extracurricular activities.

Hostile Environment

- There is an increasing problem in schools with misunderstanding between things that may create discomfort or offend someone versus the higher standard of creating a hostile environment.
- Not everything that is offensive to a student/employee creates a hostile environment.
- This is especially important to note in the high school where students are often encouraged to address topics in some classes that may be sensitive and their opinions may make other students uncomfortable.

Hostile Environment

- Things to look at:
 - How frequently did the conduct occur
 - Was the conduct physically threatening
 - What the conduct humiliating
 - The age and relationship between the alleged harasser and victim
 - What was the effect on the alleged victim's emotional state
 - Did it unreasonable interfere with an individual's ability to engage in a school activity
 - Did it unreasonably interfere with a student's educational performance or an employee's work performance
 - Was the conduct directed at more than one person
 - Was the conduct protected First Amendment speech

Other Sexual Harassment

- Based on the Violence Against Women Act
 - Adopts the definitions effectively importing the act into the K-12 realm
- sexual assault - an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation as set forth in 20 USC §1092(f)(6)(A)(v).
- Includes:
 - Rape
 - Fondling
 - Incest
 - Statutory rape

- Dating Violence – means violence committed by a person
 - (a) who has been in a social relationship of a romantic or intimate nature with the victim, and
 - (b) where the existence of such relationship shall be determined based on 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 as set forth in 34 U.S.C. §12291(a)(10).

May include things such as sexual or physical abuse or the threat of such abuse.

- Stalking - means 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
- 34 U.S.C. §12291(a)(30)

Generally includes – two or more acts, including, but not limited to, acts in which the stalker directly, indirectly or through a third party follows, monitors, observes, surveils, threatens or communicates to or about a person, or interferes with a person’s property

Examples of Potential Sexual Harassment

George is the principal at Southern Elementary School. Susie is a new teacher who just started at Southern. George finds Susie attractive and would like to go out with her. George calls Susie into his office and asks her for a date. She says no. George then begins to speak with her about the school's evaluation process and informs her that they could do away with all that if she goes on the date with him.

What type of harassment is it?

Examples of Sexual Harassment

Sarah is a fifth grade student. You overhear Sarah making fun of John on the playground because John likes to wear pink shirts to school. When you ask John about it, he says that Sarah says things like that to him all the time.

What type of harassment is it?

Examples of Sexual Harassment

- Kathy is a high school student on the girls' soccer team. She was dating Pete last year, but they broke up. Pete wants to get back together with Kathy. Pete keeps calling Kathy on the phone asking her to go out with him. When he sees her in the hallways at school he will immediately run up to her and tell her things like how he likes how she looks in her soccer uniform and ask her to go out with him again.

What type of sexual harassment is it?

Title IX Overlap with Other State and Federal Statutes

- C.G.S. § 10-222d – Anti-Bullying in schools
- C.G.S. § 10-15c – Discrimination in public schools
- C.G.S. § 46a-58 - General anti-discrimination statute
- Title VII of the Civil Rights Act – Anti-discrimination in employment
- Connecticut Fair Employment Practices Act – Anti-discrimination in employment

- Current definition of bullying in Connecticut (until June 30, 2021)
 - Repeated use by one or more students of a
 - Written, oral or electronic communication
 - Directed at or referring to another student attending school in the same school district, OR
 - A physical act or gesture by one or more students repeatedly directed at another student attending school in the same school district that
 - Causes physical or emotional harm to the student or damage to the student's property
 - Places such student in reasonable fear of harm to self or of damage to property
 - Creates a hostile environment at school for the student
 - Infringes on the rights of such student at school OR
 - Substantially disrupts the education process or orderly operation of a school

CT Anti-Bullying Statute

“Bullying” shall include a written, oral or electronic communication, or a physical act or gesture **based on actual or perceived differentiating characteristics** such as:

- Race
- Color
- Religion
- Ancestry
- National origin
- Gender
- Sexual orientation
- Gender identity or expression
- Socioeconomic status
- Academic status
- Physical appearance
- Mental disability
- Physical disability
- Developmental disability
- Sensory disability
- Association with a group or individual with one or more of these characteristics

CT Anti-Bullying Statute

- “Cyberbullying” means:
 - Any act of bullying through the internet, interactive and digital technologies, cellular mobile telephone or other mobile electronic devices or any electronic communications
- “Teen dating violence” means:
 - Any act of physical, emotional or sexual abuse, including stalking, harassing and threatening, that occurs between two students who are currently in or who have recently been in a dating relationship
- “Hostile environment” means:
 - A situation in which bullying among students is sufficiently severe OR pervasive to alter the conditions of the school climate
 - NOTE – this is different that the term “hostile environment” under Title IX

- Effective July 1, 2021 the definition of bullying is set to change:

- An act that is direct or indirect and severe, persistent OR pervasive, which
 - A. Causes physical or emotional harm to an individual
 - B. Places an individual in reasonable fear of physical or emotional harm,
or
 - C. Infringes on the rights or opportunities of an individual at school.

- C.G.S. § 10-15c – Discrimination In Public Schools Prohibited
- Requires an equal opportunity for all students to participate in the activities, programs and courses of study without discrimination on account of:
 - Race
 - Color
 - Sex
 - Gender identity or expression
 - Religion
 - National origin
 - Sexual orientation

- The Connecticut Commission on Human Rights and Opportunities has taken the approach that it is able to investigate and regulate discrimination that occurred in schools through C.G.S. § 46a-58. This statute prohibits the deprivation of any right guaranteed by the laws of the state or the United States on account of
 - Religion
 - National origin
 - Alienage
 - Color
 - Race
 - Sex
 - Gender identity or expression
 - Sexual orientation
 - Blindness, mental disability
 - Physical disability
 - Veteran Status

Title VII of the Civil Rights Act

- Title VII prohibits discrimination in employment on the basis of
- Makes it unlawful for an employer to refuse to hire or discharge, or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment because of the individual's
 - Race
 - Color
 - Religion
 - Sex
 - National origin

Title VII of the Civil Rights Act

- Other federal laws also protect employees from discrimination based on:
 - Disability
 - Age (over 40)
 - Veteran's status
 - Genetic Information
- Title VII – to be actionable, the conduct must be severe, pervasive OR objectively offensive
 - No requirement that it deny access to education
 - Is a much broader category of conduct

Connecticut Fair Employment Practices Act prohibits discrimination (including harassment) on the basis of:

race,
color,
religion,
age,
sex,
marital status,
family status
sexual orientation,
pregnancy

national origin, ancestry,
present or past history of
mental disability,
intellectual disability, learning
disability,
physical disability,
gender identity or expression
retaliation,
veteran status.

Two Separate Situations

- The District has knowledge of sexual harassment but there has not been a request for a formal investigation
 - The District must take steps to eliminate sexual harassment and provide support to the victim whenever it has actual knowledge of sexual harassment
 - The District cannot issue discipline to the alleged harasser under Title IX
 - Other statutes such as bullying might apply that would allow discipline

- A formal complaint of sexual harassment is filed under Title IX
 - The District may discipline the alleged harasser if the alleged harasser is determined to be responsible for sexual harassment after the completion of the grievance process

When Can A District Be Liable Under Title IX?

- A district with actual knowledge of sexual harassment must take steps to address it.
- In elementary and secondary schools “**actual knowledge**” means that **any** employee of an elementary or secondary school had knowledge.
 - As written, this covers all employees including custodians, secretaries, food service workers, paraprofessionals, etc.
- Once the district has knowledge, it must act in a way that is not deliberately indifferent to the alleged harassment.

Various New Roles

- **Title IX Coordinator**
 - Employee who will coordinate the district's efforts to comply with its responsibilities under Title IX
- **Investigator**
 - If possible, should not be the Title IX Coordinator
- **Decision-maker**
 - Must not be the Title IX Coordinator or the Investigator
- **Appeal Decision-maker**
 - Must not be the Title IX Coordinator, Investigator or Decision-maker

New Terminology

- Complainant – the alleged victim
- Respondent – the alleged harasser
- Responsible Party – someone found responsible for sexual harassment at the end of the formal grievance process

Reports of Sexual Harassment

- Who may report sexual harassment? – anyone
 - Does NOT need to be the individual who is being harassed
 - Report may be made anonymously
- How can sexual harassment be reported?
 - In person
 - By telephone
 - By mail
 - By electronic mail
 - By any other reasonable means
- There should be multiple people to whom a report can be made
 - All employees should know to bring to the Title IX Coordinator any report of sexual harassment

- Once a report of sexual harassment is made, the Title IX Coordinator must contact the complainant
- The following things should be discussed with the complainant
 - What occurred
 - What supportive measures are available
 - Explain the formal complaint process
 - Make sure the complainant knows that supportive measures will be available whether or not a formal complaint is filed
- At this stage, confidentiality should be maintained as much as possible except where it is necessary to inform other staff in order to implement supportive measures

What are Supportive Measures

- Non-disciplinary, non-punitive individualized services offered without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.
 - Such measures are designed to restore or preserve equal access to the education program or activity without unreasonably burdening the other party,
 - Includes measures designed to protect the safety of all parties or the district’s educational environment or to deter sexual harassment.

Supportive Measures

Brainstorming – what type of supportive measures are available in your district?

Potential Supportive Measures

- Change in class schedule,
- Additional time to make up missed assignments due to the alleged harassment,
- Ability to retake assignments/tests that were impacted by the harassment,
- Ability to withdraw from elective classes without penalty,
- Separating the parties as much as possible during the school day,
- Providing support by the guidance counselor, social worker or other,
- Increased monitoring, supervision, security.

- The Title IX Coordinator should document the conversation
- They must document at a minimum:
 - Measures taken to restore or preserve equal access to the District’s education program or activity
 - The documentation should be sufficient to show that the response was not deliberately indifferent
 - Document all supportive measures offered
 - Document which, if any, were accepted
 - If supportive measures are not provided, must document why they were not provided

Consider whether any other laws are applicable

- Is there an allegation of abuse or neglect?
 - a DCF report must be made
- Does a report need to be made to the police?
- Are the allegations such that a bullying report must be made?
- Are there allegations of harassment based on any other protected category in addition to sex?
- Are any other school policies implicated?

Title IX Coordinator

- If the complainant wants to file a formal complaint, the process should be explained and the complainant can be assisted with the process
- There should be a standardized form for the complaint that can be given to the complainant
- The complaint should be in the complainant's words

The Formal Complaint

- What is a formal complaint?

- Signed by complainant (or the complainant's parent if the complainant is a student) or the Title IX Coordinator
- Alleges sexual harassment
- Requests investigation

A complaint filed by anyone else is NOT a formal complaint as defined under Title IX and cannot be used as a basis of discipline for a Title IX violation

The Formal Complaint

- At a minimum, a formal complaint must contain the following:
 1. The name of the complainant,
 2. The date of the complaint,
 3. The date of the alleged harassment,
 4. The name or names of the harasser(s), if known,
 5. Identification of the location where the harassment occurred, and
 6. A detailed statement of the circumstances constituting the alleged harassment

The Grievance Process

- Some underlying principles for sexual harassment investigations
 - **Equitable**
 - Due process
 - Complainants and Respondents should be treated equally
 - **Impartial**
 - The people in all of the roles should not have biased towards or against complainants/respondents, men/women
 - Should not be biased against the individual complainant or respondent
 - **Thorough**
 - Should collect as much relevant information and evidence as possible
 - **Prompt**
 - Although there is no definitive answer, generally the process should be completed within 60 days unless there are extenuating circumstances

The Grievance Process

- Standard of evidence to be used should be pre-defined in policy and consistent for investigations into staff and students
 - District chooses: “***preponderance of the evidence***” or “***clear and convincing evidence***”

First steps once a formal complaint is filed

- The Title IX Coordinator must provide each party with the following:
 - Notice of the allegations, including:
 - Identity of parties
 - Conduct alleged to be sexual harassment
 - Date and location of incident
 - Provide:
 - A copy of the grievance process including any informal resolution processes available
 - A statement that the respondent is presumed not responsible and that the determination of responsibility will not be made until the end of the process,
 - The ability for each party to have advisor (including an attorney) at all stages, and
 - The section of the code of conduct that prohibits providing false statements and information during the grievance process

Mandatory Dismissal

- The Title IX Coordinator makes the initial determination as to whether the complaint falls within the confines of Title IX
- The complaint **MUST** be dismissed at the outset if:
 - The conduct as alleged did not occur in the District's education programs or activities
 - The conduct did not occur against a person in the United States

It is suggested that prior to dismissing a complaint under this provision that it be discussed with the District-Wide Title IX Coordinator or the Superintendent

Mandatory Dismissal

The Torrington boys' soccer team is at a soccer meet at another district's field. During the meet, several boys in the stands shout at your students that they are "sissies" and they should stop acting like "little girls." One of the boys files a formal Title IX harassment complaint with Torrington against one of the other teams' students.

Must this complaint be dismissed?

Mandatory Dismissal

Torrington is the sponsor of a school dance. The Dance occurs in the high school's gym. John and Susie attend the dance together. Halfway through the dance, John convinces Susie to go outside under the bleachers where he attempts to kiss and grope her. She later files a formal Title IX harassment complaint.

Must this complaint be dismissed?

Mandatory Dismissal

- Would your answer change if John took Susie off campus before kissing her?

First Steps - Risk Assessment

- The Title IX Coordinator should make an individualized risk assessment upon receipt of a formal complaint
- Determine whether there is an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment that would justify removal of the respondent from the school setting
- Determine if a report should be made to DCF
- Determine if a report should be made to the police

First Steps - Risk Assessment

- Any decision to suspend or expel a student would need to follow state law and board policy
 - Do not forget about special education laws
- Any decision to remove an employee would need to follow state law, board policy and the provisions of any applicable collective bargaining agreement
- To the extent removal cannot be accomplished, other safety measures should be put into place during the pendency of the grievance process

First Steps – Supportive Measures

- Determine if any supportive measures will be put in place
- Discuss the same with the Complainant and the Complainant's parent
- Document any supportive measures that were offered (even if rejected by the student/parent)
- Document any supportive measures agreed to.

First Steps Continued

- If the investigator is not the Title IX Coordinator, the Title IX Coordinator would provide all information in his/her possession regarding the complaint to the assigned investigator
- The Title IX Coordinator should remain in contact with the complainant and the complainant's parents/guardians to ensure the supportive measures put in place during the investigation are appropriate

The Grievance Process

- Focus on due process – overview of major investigation steps
 - Each party must have equal opportunity to present witnesses, including fact and expert witnesses, and other evidence,
 - Cannot restrict the ability of either party to discuss the allegation or gather/present relevant evidence,
 - Allow each party to have an advisor of their choosing at each step,
 - The district may establish consistent restrictions on the extent to which the advisor may participate in the proceedings
 - Provide each party the opportunity to inspect and review all evidence, and
 - Prior to the completion of the formal investigation report, send to each party and his/her advisor, the evidence subject to inspection and review.
 - Each party must be given 10 days to provide written responses

- The Investigation Report

- This is a formal written report that must fairly summarize relevant evidence
- The investigator must provide both parties and their advisors a copy of the investigation report at least 10 days prior to the determination regarding responsibility so the parties may review and provide a written response
 - The investigation report should be provided to each side simultaneously

The Investigation and FERPA

- Be aware of the requirements of FERPA to keep student information confidential
- Be aware of the confidentiality provisions of the IDEA for any student who has a disability
- To the extent possible, the investigator should avoid reviewing confidential student information during the investigation
 - Ex. it is doubtful that the Complainant's grades would be relevant to an investigation
- Confidential student information should be redacted from anything shared with the other side unless there is written permission to share the information

The Investigation

- Once the final investigation report is written it should be turned over to the decision-maker

The Decision Making Process

- The decision-maker must be a different person than the investigator and the Title XI Coordinator
- The decision-maker has two roles
 - Determine responsibility
 - Issue discipline
- In certain circumstances there may be a different decision maker for each step

The Decision-Making Process

- In K-12 school, an in-person hearing is NOT required prior to determining whether the respondent is responsible for sexual harassment
- The decision-maker still must:
 - Give each party the opportunity to submit relevant questions that the party wants asked for any party or witness,
 - Provide each party with the answers to those questions, and
 - Allow for follow up questions

Note that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the district, not the parties

The Decision Making Process

- The Written Decision on Responsibility
- This is a formal written decision that must at a minimum:
 - Identify the allegations,
 - Describe the procedural steps taken to investigate,
 - Make findings of fact,
 - Make conclusions regarding the application of the code of conduct to the facts,
 - Contain a statement of rationale for the result as to each allegation,
 - Identify any disciplinary sanctions to be imposed,
 - Identify whether remedies will be provided to the complainant, and
 - Inform the parties of the appeal procedures.

The decision must be provided to both parties simultaneously
Again – Beware of FERPA

The Appeal Process

- Is available to both parties,
- Must be decided by a different decision-maker,
- Only bases for appeal:
 - Procedural irregularity that affected the outcome of the matter;
 - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
 - The Title IX Coordinator, investigator(s) or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

The Appeal Process

- The other party must be notified in writing if an appeal is filed
- Both parties must be given a reasonable, equal opportunity to submit a written statement in support of, or challenging the decision,
- The decision-maker must issue a written decision describing results of the appeal and the rationale for the result,
- The decision must be given to each party simultaneously.

Recordkeeping Requirements

- The Formal Complaint
 - Keep each investigation file for at least 7 years,
 - Including the disciplinary sanctions, if any, and
 - Including remedies and any supportive measures provided
- Records of any appeals and the results of the appeal,
- Record of any informal resolution and the results therefrom,
- All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process,
- Records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment.

The Grievance Process – Administrative Dismissals

- The district MAY dismiss a formal complaint or any allegations therein, if at any time during the investigation:
 - The complainant notifies the Title IX Coordinator in writing that he/she would like to withdraw the formal complaint or allegations therein,
 - The respondent is no longer enrolled in or employed by the district, and/or
 - Specific circumstances prevent the district from gathering evidence sufficient to make a determination.

- Such dismissal does not preclude initiating discipline under another section of the district’s code of conduct

- The district can always offer an informal resolution process for issues between students or between employees
 - Before doing so, the district must provide the parties with a written notice disclosing:
 - The allegations,
 - The requirements of the informal process including circumstances under which it would preclude a party from resuming the formal complaint process from the same allegations,
 - Any party has the right to withdraw from the informal resolution at any time, and
 - Any consequences from engaging in the informal resolution process including whether records from it will be maintained and/or shared in the formal complaint process.
- Informal resolution process is NOT available for complaints that an employee harassed a student

- The regulations prohibit any recipient (i.e. school district) or “other person” from
 - Intimidating,
 - Threatening,
 - Coercing, or
 - Discriminating against any individual

for the purpose of interfering with any right or privilege secured by Title IX.

Protected Activity Under Title IX

- Reporting sexual discrimination including harassment
 - On your own behalf or on behalf of someone else
- Filing a discrimination complaint
- Assisting someone in reporting discrimination or filing a complaint
- Participating in any matter in an investigation into sexual harassment
 - e.g. protects witnesses
- Protesting any form of sexual discrimination
 - Although we are discussing harassment today, this would include protesting alleged lack of equality in athletic teams, etc.

Retaliation Defined Under Title IX Regulations

- The regulations prohibit retaliation not just for engaging in a protected activity but:

Because an individual has “refused to participate in any manner in an investigation, proceeding, or hearing under this part.”

Retaliation according to the regulations includes:

“charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purposes of interfering with any right or privilege secured by title IX or this part ...”

Retaliation Examples

- For Students:
 - Discipline for engaging in protected conduct
 - Reduction in grades
 - Removal from a sports team
 - Refusal to allow play time on the sports field
 - Writing a poor recommendation for college
 - Harassment in class or on a team
 - Denial of an honor

Retaliation Examples

- For employees:
 - Demotion
 - Termination
 - Other discipline
 - Giving a poor job reference
 - Giving unequal work assignments

Retaliation Investigations

- Establishing retaliation requires proving the intent to retaliate
- This is rarely proven by direct evidence
- Is generally based on circumstantial evidence
- What must be proven
 - Did the Complainant (i.e. the person alleging retaliation) engage in protected activity
 - Was the Complainant subjected to an adverse action?
 - Does the evidence suggest a connection between the protected activity and the adverse action?

- Is there something that would rebut a finding of retaliation
 - Is there an explanation for the adverse action that is legitimate on its face?
- If so, is there evidence that the reason given is really a pretext to retaliate against the individual for the protected conduct?
 - Things to look at:
 - Did the alleged retaliator know about the protected activity
 - The time between the protected activity and the adverse action
 - Any evidence that would suggest the alleged retaliator really took the action because of the protected activity
 - Does the explanation make sense
 - Were others in a similar situation who did not engage in protected activity treated better
 - Did others engage in similar protected activity without adverse action

- As with any other investigation, complete confidentiality cannot be guaranteed and should not be promised.
- Confidentiality, however, should be maintained as much as possible.
- The regulations require the district to maintain the confidentiality of identity of an individual who reports or complains of sex discrimination or harassment, including filing a formal complaint of sexual harassment, as well as the identity of the complainant, respondent and witnesses, *except as required to carry out the purposes of the Title IX regulations.*

- The regulations make clear that at each stage, the school employee must not be biased
 - Bias may be as to categories
 - e.g. a belief that because evidence shows that female students are often subjected to sexual harassment that it is more likely that the female student is telling the truth
 - Bias as to the specific individual
 - The more you know about the Complainant and/or Respondent the more you are likely to believe that they behaved in keeping with how you perceive them
 - e.g. – the Respondent is an honor student so he could not have engaged in the alleged acts
 - The Complainant has a reputation for going out with a lot of different boys at school so she is not believable
 - Pressure from outside
 - Is the Respondent the star of the school play that is about to open
 - Is the Respondent the star of the school's football team

Potential Bias

- Bias can be
 - Conscious or unconscious
 - Positive or negative
 - Based on societal norms or your own cultural perspective

- Conflicts of interest
 - Wearing too many hats in the process
 - Title IX Coordinators who are also acting as Investigators must take care not to let the roles bleed into one another
 - A relationship with one of the parties that goes beyond the school setting
 - Friendship with students' parents
 - Coaching a student on a sports team

Conflicts of Interest

- Things that are **not** automatic conflicts of interest
 - Just because you know the student/employee does not mean there is a conflict of interest
 - Just because you have disciplined the student/employee in the past does not equate to a conflict of interest

To Sign or Not to Sign

- The Title IX Coordinator is the only one empowered to sign a formal complaint without the Complainant's permission
- What happens if the Title IX Coordinator signs a complaint over the objection of the one being harassed
 - The student who is alleged to have been harassed becomes the Complainant
 - All regulations allowing both parties access to information apply
 - Thus the Respondent would have to be given the name of the Complainant and the allegations
 - The Complainant cannot be forced to participate in the investigation against their will

To Sign or Not to Sign

- Consequences of not signing
 - The harassment could continue
 - The alleged harasser cannot be disciplined for a Title IX violation
 - The alleged harasser could move on to harass others
- Things to consider
 - Is the alleged harassment widespread or limited to the single student
 - Was the alleged harassment severe
 - Why doesn't the student want to file a formal complaint
- Ultimately, the decision will be reviewed as to whether the decision to sign or not to sign was deliberately indifferent

- There are currently four law suits brought in different federal district courts challenging the regulations
- *State of New York et al v. US DOE* (SDNY)
 - Court denied the plaintiffs' motion for a preliminary injunction thus allowing the regulations to go into effect on August 14th
 - The case is currently on appeal to the Second Circuit with briefs due in mid-October
- *Commonwealth of PA et al v. DeVos* (DDC)
 - Court denied a motion for preliminary injunction
 - Cross motions for summary judgment are due mid-November

- *Know Your IX et. al v. DeVos* (D.Md.)
 - The US DOE has filed a motion to dismiss that appears to be fully briefed

- *Victims Rights Law Center v. DeVos* (D.Mass.)
 - The Court ordered collapsed the request for a preliminary injunctions and the merits and scheduled a trial for October 14th
 - Appears to be the only current case that has students as plaintiffs

Sample Documents

1. Complaint Form
2. Notice of Complaint to Respondent
3. Notice of Complaint to Complainant
4. Title IX Coordinator Outline

- Scenario 1
- Mrs. Smith contacts the Title IX Coordinator. Her son is in first grade at Noname Elementary School. Mrs. Smith is upset because at recess, a fifth grade student, whose name she does not know, asked her son to pull down his pants and show her his private parts.

What do you do?

Scenario 2:

- Mrs. Jones is a 10th grade English teacher at the high school. She comes to you complaining that Pete in her 4th period English class keeps swearing at her in sexually explicit ways and she feels that she is being subjected to a hostile work environment by the student. She has tried speaking to him and has made a referral to the office, but he continues to engage in the behavior.

What do you do?

Scenario 2 – Part 2

- Peter is identified as having an emotional disturbance and has an IEP
- Does this change your answer???

Scenario 3:

- Sally comes to you and complains that Mr. Smith, her science teacher, spent the first 10 minutes of class yesterday talking about the woman who he was dating and how hot she is. Sally says that he informed them that he was late to class yesterday because his girlfriend kept him up late last night and had knocked the alarm clock off the table beside his bed. Sally is very uncomfortable and does not want to go back to this class tomorrow.

What do you do?

- Samantha and Jeff were dating. Jeff broke up with Samantha and is now dating Jennifer. Jennifer comes to you and says that she does not want Jeff to know that she has talked to you. She tells you that Samantha has sent photographs of Jeff without a shirt on to many of the students at school and has written derogatory things on the pictures about how Jeff looks. Jennifer has not told Jeff about the pictures.
 - What do you do?
 - Does the answer change if the pictures were sent while Samantha was sitting in English class?

Questions???

Contact Information



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