

Title IX Coordinator Training: Implementing the 2020 Regulations

Title IX Coordinator Training: Implementing the 2020 Regulations



Caution

- These slides reflect general legal standards for the related presentation and are not intended as legal advice for specific situations.
- Future legal developments may affect these topics.
- This document may not be reproduced or redistributed, in whole or in part, without the express written permission of Thrun Law Firm, P.C.

Intent of the Training

- This presentation does not fully satisfy the 2020 Title IX training requirements. Rather, it is designed to supplement the required training and is intended for individuals who desire additional training about the Title IX Coordinator's role.
- Individuals who have not been trained on the 2020 Title IX regulations should not serve as the Title IX Coordinator or in any other role in the new Title IX sexual harassment grievance process until properly trained.
- These training materials must still be posted on your District's website.

Agenda

- Title IX Overview
- Title IX Coordinator's Role
- Responding to a Report
 - Initial Contact with Complainant
 - Supportive Measures
 - Respondent Removal
- Signing a Formal Complaint
- Dismissal of Formal Complaint
- After the Responsibility Determination
- Confidentiality/Privacy Considerations

Title IX

*"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 . . ."*

20 USC 1681

Scope of 2020 Regulations

- Effective August 14, 2020
- Do NOT apply retroactively
- Focus on sexual harassment as subset of sex-based discrimination
- Apply to staff-to-staff, staff-to-student, student-to-staff, and student-to-student sexual harassment
- Schools still obligated to address other forms of sex discrimination and unlawful harassment under other policies and laws
- Revised regulations are coming soon.

Title IX Coordinator Training: Implementing the 2020 Regulations

2020 Sexual Harassment Definition

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

- Employee *quid pro quo*;
- Sexual assault, dating violence, domestic violence, stalking (definitions from Violence Against Women Act); and
- Hostile Environment (new stricter definition)

Deliberate Indifference

Must not be *deliberately indifferent* to sexual harassment.

Old Definition

The school must take immediate action to eliminate the sexual harassment or sexual violence, prevent its recurrence, and address its effects

New Definition

Failure to respond reasonably in light of known circumstances

Must respond in **reasonably prompt** time frame.

Title IX Coordinator's Role



34 CFR 106.8(a)

"Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the 'Title IX Coordinator.'"

Title IX Coordinator

- Must be district employee(s)
- *Authorized* to coordinate school's Title IX efforts
- Referred to as "Title IX Coordinator"
- Must serve without bias or conflicts of interest
- May also serve as the investigator but not as the decision-maker or appeals officer in grievance process

Training Required

- Must be trained on 2020 regulations
- Must be knowledgeable about school's policies and procedures on sex discrimination, including, but not limited to, Title IX sexual harassment

Title IX Coordinator Training: Implementing the 2020 Regulations

Responsibilities

- Oversees process from initial report to conclusion of grievance process, including coordination of the effective implementation of any supportive measures and remedies
- Assists in ensuring school community is aware of Title IX rights and responsibilities

Coordinator's Contact Information

- Notify applicants for employment and admission, students, parents, employees, and unions or professional organizations of name or title, office address, email address, and phone number of Title IX Coordinator
- Must prominently display contact information above on district's website and in employee and student handbooks

Responding to a Report of Sexual Harassment



Process Overview

- Report
- Contact with Complainant (i.e., the "Triage Meeting")
- Formal Complaint
- Investigation
- Determination of Responsibility
- Disciplinary Sanctions
- Appeals
- Implementation of any remedies

Initial Contact with Complainant

- Title IX Coordinator must *promptly*, upon receipt of **report**:
 - Contact Complainant to discuss "supportive measures"
 - Inform Complainant of "supportive measures" available whether Formal Complaint filed or not
 - Explain process for filing Formal Complaint
- Failure to do the above = deliberate indifference
- Note: Report ≠ Formal Complaint

"Contact" Method

- Title IX Coordinator must "contact" Complainant but regulations do not specify the manner of the contact (i.e., in-person, phone, email, etc.)
- Thrun recommends meeting with the Complainant (i.e., the "triage" meeting)

Title IX Coordinator Training: Implementing the 2020 Regulations

Supportive Measures



Supportive Measures

- Available before, during, and after investigation, **and** if no Formal Complaint is filed
- Must be:
 - Non-disciplinary
 - Non-punitive
 - Individualized
 - Designed to restore or preserve equal access to education program or activity without “unreasonably” burdening the other party

Examples

- Counseling
- Extensions of deadlines or course-related adjustments
- Modification of work/class schedules
- Escort
- Mutual no-contact
- Leaves of absence
- Increased security or monitoring

Does not include anything that completely removes student Respondent from an activity except under very limited circumstances

Offering Supportive Measures

- Must be individualized, no “one size fits all”
- Must be offered whether Complainant files a Formal Complaint or not
- Should be modified, as necessary, to avoid being deliberately indifferent
- May not remove student Respondent from school, even temporarily, as a supportive measure except in limited circumstances

Respondent Removal



General Rule

- Discipline or other actions that are not supportive measures may not be imposed against Respondent for alleged Title IX sexual harassment *before* grievance process except in limited circumstances
- School officials may place employee respondents on paid non-disciplinary leave
- Student respondents may not be removed from school’s educational program or activities except on an emergency basis

Title IX Coordinator Training: Implementing the 2020 Regulations

Student Emergency Removal

- School officials must:
 - Conduct individualized safety and risk analysis;
 - Determine that an *immediate* threat to the *physical* health or safety of students or staff justifies removal; and
 - Provide removed student notice and opportunity to challenge the removal immediately after being removed
- Removal must be consistent with IDEA and Section 504 requirements

Key Points

- Respondent may not be disciplined for conduct that constitutes alleged Title IX sexual harassment unless grievance process is complete *and* Respondent has been determined responsible
- Building administrators should be reminded regularly of Title IX's student removal provision
- All allegations or incidents of Title IX sexual harassment should be referred immediately to the Title IX Coordinator before any disciplinary action is taken

Hypothetical

- Student A reports to principal that Student B groped Student A in hallway near school gym
- After reviewing school surveillance video, principal suspends Student B pending board hearing
- Student A and B ride the same bus and are in AP Chemistry together and Student A is worried it will happen again
- What if you learn Student B was charged two weeks ago for inappropriately touching Student A at the mall and had threatened to harm Student A if Student A told anyone?

“Triage” Meeting Tips

- Promptly contact Complainant
- Neither encourage nor discourage Complainant to file a Formal Complaint
- Be specific about the supportive measures school is offering
- Get Complainant's input and consider Complainant's wishes about supportive measures
- Document any supportive measures offered, refused, and, if no supportive measures were given, why

Additional Tips

- Make clear school has obligation to implement Supportive Measures, as appropriate, whether Complainant files Formal Complaint or not
- Manage expectations, e.g., process, timelines, confidentiality
- Explain that school will address the allegations to the best of its ability and to the extent permitted by law, including, when warranted, by Title IX Coordinator signing Formal Complaint
- See Initial Procedures checklist

Signing a Formal Complaint



Title IX Coordinator Training: Implementing the 2020 Regulations

34 CFR §106.30

Formal complaint means a **document filed** by a complainant **or signed** by the Title IX Coordinator **alleging** sexual harassment against a respondent and **requesting** that the recipient (district) investigate the allegation of sexual harassment.

Implications of Signing a Formal Complaint

- Initiates the grievance process, possibly against Complainant's wishes
- Complainant may choose not to participate or cooperate in the investigation, resulting in school not being able to gather evidence sufficient to reach determination of responsibility

Key Question

Is it clearly unreasonable in light of the known circumstances for the Title IX Coordinator to sign or not sign a Formal Complaint?



General Considerations

- Does the alleged conduct constitute sexual harassment?
- Did the alleged conduct occur in the recipient's (school) program or activity and in the U.S.?
- Is the Complainant identified?
- Is the Respondent identified?
- Do you have the ability to identify the Reporter? Complainant? Respondent?
- Does the recipient have control over the Respondent?

General Considerations Cont'd

- Is the Respondent a school employee?
- Is there a pattern of alleged sexual harassment by the same Respondent?
- Would it be clearly unreasonable in light of the known circumstances for the Title IX Coordinator to sign or not to sign a formal complaint?
- Does the District want to discipline for harassment if proven?

Hypothetical

School receives anonymous report through OK2Say about a student-to-student sexual assault that allegedly occurred behind gym bleachers last week after a volleyball game. Do you file a Formal Complaint?

What if this conduct allegedly occurred a year ago? What if this is the third anonymous report received in the past month alleging the same conduct?

Title IX Coordinator Training: Implementing the 2020 Regulations

Anonymous Reporter

“Irrespective of whether a report of sexual harassment is anonymous, a recipient...with actual knowledge of sexual harassment or allegations of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent generally and must meet the specific obligations [in the revised Title IX regulations].”

Commentary to 2020 Title IX Regulations

Implications of Signing when Complainant is Unknown

“When a formal complaint is signed by a Title IX Coordinator rather than filed by a complainant, the written notice of allegations...requires the recipient to send both parties details about the allegations, including the identify of the parties, if known,...However, if the complainant’s identity is unknown...then the grievance process may proceed..., even though the written notice of allegations does not include the complainant’s identity.”

OCR: Part 1: Questions and Answers Regarding the Department’s Title IX Regulations (1/15/21)

Hypothetical

Student reports to school counselor that friend was cornered in an empty classroom by another student and touched inappropriately on more than one occasion. Reporting student claims friend says he/she can handle it, it wasn’t a big deal, and Complainant does not want to get the Respondent in trouble. What if Respondent is the Complainant’s teacher?

Reluctant Complainant

“The decision to initiate a grievance process in situations where the complainant does not want an investigation or intends not to participate should be made thoughtfully and intentionally, taking into account the circumstances of the situation including the reasons why the complainant wants or does not want the recipient to investigate.”

OCR: Part 2: Questions and Answers Regarding the Department’s Title IX Regulations (1/15/21)

Hypothetical

Complainant transferred to another school district for second semester. After transferring, Complainant reports to the Title IX Coordinator a pattern of alleged sexual harassment by a school employee during first semester until Complainant transferred. What if the Complainant makes these allegations six years later?

Former Student Complainant

- Complainant must be “participating in or attempting to participate” in school’s programs or activities to file Formal Complaint
- Students who have graduated may still be “attempting to participate” in the school’s programs or activities. For example, does the former student intend to remain involved in the school’s activities or would former student return to your school if the harassment is appropriately addressed?
- Remember: Title IX Coordinator may sign Formal Complaint regardless of whether Complainant is “participating or attempting to participate” in school’s programs

Title IX Coordinator Training: Implementing the 2020 Regulations

Document Your Rationale

- Decision to sign Formal Complaint rests with Title IX Coordinator, not other school officials
- Document specific circumstances or factors justifying your decision to sign OR not to sign Formal Complaint
- Decision either way may be challenged as “deliberately indifferent”

Final Points

- Title IX Coordinator does **not** become the Complainant merely because Title IX Coordinator signed the Formal Complaint
- Grievance process remains the same regardless of who initiated the Formal Complaint
- Because Respondent may argue bias or pre-judgment, Thrun recommends, where feasible, that Title IX Coordinator *not* serve as the investigator on Formal Complaints that the Title IX Coordinator signed

Dismissal of a Formal Complaint



Grounds for Formal Complaint Dismissal

Mandatory

Must be dismissed if allegations, if proven:

- Would not constitute sexual harassment under new definition;
- Did not occur in recipient's (school) program or activity; or
- Did not occur against a person in the U.S.

Permissive

May be dismissed if:

- Complainant requests withdrawal;
- Respondent's enrollment or employment ends; or
- Specific circumstances prevent the school from gathering evidence sufficient to reach a determination (e.g., Complainant not cooperating with investigation, many years between alleged misconduct and complaint filing)

REMEMBER: Even if complaint is dismissed under Title IX, it can still be addressed under other policy or Code of Conduct provision

Forms of Sexual Harassment

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

- Employee *quid pro quo*;
- Sexual assault, dating violence, domestic violence, stalking (definitions from Violence Against Women Act); and
- Hostile Environment (new stricter definition)

Quid Pro Quo

- Recipient's *employee* conditioning an aid, service, or benefit of the recipient on an individual's participation in unwelcome sexual conduct.
- **New:** only applicable to employee as Respondent; not applicable to Respondent volunteer, student, etc.

Title IX Coordinator Training: Implementing the 2020 Regulations

Sexual Violence 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.
- “Dating violence”: violence committed by a person who is or has been in a romantic or intimate relationship with the Complainant. The existence of such a relationship is based on a consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

Sexual Violence Definitions Cont.

- “Domestic violence”: felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the Complainant, person with whom the Complainant shares a child, person who is cohabitating with or has cohabitated with the Complainant as a spouse or intimate partner, person similarly situated to a spouse of the Complainant under the domestic or family violence laws of Michigan; or any other person against an adult or youth Complainant who is protected from that person’s acts under the domestic or family violence laws of Michigan.
- “Stalking”: engaging in a course of conduct directed at a specific person that would cause a reasonable person to (1) fear for the person’s safety or the safety of others; or (2) suffer substantial emotional distress.

Hostile Environment

- “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.”
- “Education program” is any location, event, or circumstance over which the recipient exhibits substantial control over both the Respondent and the context in which the harassment occurred.

Denial of Equal Access

- Reactions to sexual harassment may vary
- Assess from perspective of reasonable person in Complainant’s position
- Denial may include skipping class to avoid harasser, grade decline, difficulty concentrating in class
- No concrete injury required
- Do not have to show that Complainant dropped out of school, failed a class, had a panic attack, or otherwise reached “breaking point”

OCR, Question and Answers Regarding the Department’s Final Title IX Rule, September 4, 2020

Staff-to-Student Conduct

- Sexual conduct between a school employee and a student is **always** prohibited
- Consent is irrelevant
- May result in criminal charges
- May require CPS report

Jurisdiction

Harassment must be:

- Against a person in the United States
- Who is currently participating in a school’s educational programs or activities.

What about trips abroad?

- “[R]egardless of whether a study abroad program is part of a recipient’s education program or activity, Title IX does not have extraterritorial application.”

Title IX Coordinator Training: Implementing the 2020 Regulations

Scope of Education Program or Activity

School Jurisdiction Factors:

- Place of conduct – new regulations define sexual harassment as occurring in the United States
- Relationship to school or school activity
- Involvement of student, employee, volunteer
- Policy/handbook language
- If no jurisdiction under Title IX policy, may have jurisdiction under another policy, rule, or law

Off-Campus Sexual Harassment

- Case-by-case analysis
- Don't know where misconduct occurred?
 - Investigate!
- Not during school activity?
 - Consider effects of off-campus conduct!
- Prevent additional harassment or retaliation
- Consider applicable codes of conduct and Revised School Code provisions

Hypothetical

Student A files a Formal Complaint alleging that Student B made vulgar, sexual comments and touched Student A inappropriately while they were on the end-of-year school choir trip in Germany. Student also alleges that Student B did it again after choir class this fall. Once Title IX Coordinator receives the report, the Coordinator learns Student B's parents recently informed the school registrar that Student B will either be transferring schools or travelling abroad for the rest of the semester.

During the Grievance Process



Coordinator's Responsibilities

- Oversee the grievance process
- Know board policy and relevant timelines and follow-up with investigator and decision-maker as necessary
- Provide investigator with party's/witness's contact information, secure evidence at investigator's request
- Be mindful of bias/conflicts of interest
- Manage expectations
- Consider informal resolution if appropriate

Informal Resolution

- Determine if informal resolution is appropriate for the matter
 - Consider the Complainant's desired relief
 - May not be used when alleged harassment involves staff-on-student conduct
- If appropriate, determine:
 - Are both parties interested in participating?
 - Process that will be used
- Provide parties required notices and get parties agreement

Title IX Coordinator Training: Implementing the 2020 Regulations

After the Responsibility Determination



Coordinator's Responsibilities

- Provide written determination to parties simultaneously
- Notify the other party in writing if appeal is filed, implement appeal procedures equally for both parties, and provide appeal decisions to parties simultaneously
- Implement any remedies "effectively"

Remedies

- DoR must include *whether* Complainant will receive remedial measures
- Title IX Coordinator should directly communicate with Complainant about specifics
- Remedies are designed to restore and preserve equal access to the District's education program or activity

Confidentiality and Recordkeeping



Confidentiality

- Schools must keep confidential the identity of a person who reports sexual harassment or files a Formal Complaint
 - Includes: parties and witnesses
 - Supportive measures must also be kept confidential
- Exception: As permitted or required by law or to carry out any provision of Title IX

Confidentiality of Evidence

"Recipients may require parties and advisors to refrain from disseminating the evidence (for instance, by requiring parties and advisors to sign a non-disclosure agreement that permits review and use of the evidence only for purposes of the Title IX grievance process), thus providing recipients with discretion as to how to provide evidence to the parties that directly relates to the allegations raised in the formal complaint."

85 Fed Reg 30297-30298 (May 19, 2020)

Title IX Coordinator Training: Implementing the 2020 Regulations

Record Keeping

- Records relating to Title IX reports must be maintained for at least seven years
 - Applies to investigation records, disciplinary sanctions, remedies, appeals, and records of any action taken (i.e. supportive measures)
- Must retain any materials used to train Title IX Coordinators, Investigators, Decision-Makers, Appeals Officers, and any person designated to facilitate an informal resolution process
 - This PowerPoint!

Additional Resources

- OCR September 4, 2020 guidance: <https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-20200904.pdf>
- OCR January 15, 2021 guidance
 - Part 1: <https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-part1-20210115.pdf>
 - Part 2: <https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-part2-20210115.pdf>

Additional Resources (Cont'd)

- OCR July 2021 Q&A on the Title IX Regulations on Sexual Harassment
<https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>

#TeamThrun Title IX Attorneys



@THRUNLAW