

# TRAINING ON RESPONDING TO SEXUAL HARASSMENT UNDER TITLE IX

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# **Title IX of the Education Amendment of 1972**

*“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 educational program or activity receiving federal financial assistance.”*



## THREE KEY SUPREME COURT CASES

**Franklin v. Gwinnett County Schools**  
**530 U.S. 60 (1992)**

A student's right to **money damages** for sexual harassment is recognized by the Court.

**Gebser v. Lago Vista I.S.D.**  
**524 U.S. 274 (1998)**

District's liability for **teacher-on-student** harassment is *deliberate indifference* after *actual notice* of misconduct.

**Davis v. Monroe County Brd. of Educ.**  
**526 U.S. 629 (1999)**

\*Student-on-student harassment

In addition to *Gebser* requirements, Court adds a **narrow definition of sexual harassment**.

## TITLE IX - WHAT'S CHANGED?

- WITHDRAWAL OF 2011 DCL
- WITHDRAWAL OF 2014 Q&A
- WITHDRAWAL OF 2016 DCL
- ISSUANCE OF 2017 DCL
- ISSUANCE OF 2017 Q&A

SUMMARY OF TITLE IX FINAL RULE:

[HTTPS://WWW2.ED.GOV/ABOUT/OFFICES/  
LIST/OCR/DOCS/TITLEIX-SUMMARY.PDF.](https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf)

SEE ALSO: 20 USC §1681; 34 CFR PART 106

- Actual knowledge
- Deliberate indifference
- Sexual harassment
- Education program or activity
- Person in the United States
- Grievance Process
- Investigation Process
- Appeals

## SEXUAL HARASSMENT DEFINED

- ❑ **Quid Pro Quo:** An employee conditioning the provision of an aid, benefit, or service on an 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 an education program or activity.
- ❑ **Sexual assault** as defined by the **Clery Act**, dating violence, domestic violence, stalking as defined by Violence Against Women Act (**VAWA**).

# “SEXUAL HARASSMENT”

## PREVIOUSLY

- Unwelcome conduct as determined by a reasonable person to be severe, pervasive, **or** persistent, and interferes with or limits a student’s ability to participate in or benefit from school services, activities, or opportunities.

## NOW

- Unwelcome conduct of a sexual nature, or other unwelcome conduct on the basis of sex, as determined by a reasonable person to be so severe, pervasive, **and** offensive that it effectively denies a person’s equal access to education.

## HOW MUST A SCHOOL RESPOND TO SEXUAL HARASSMENT?

A recipient with **actual knowledge** of **sexual harassment** in an **education program or activity** against a person in the **United States** must respond promptly and in a manner that is not **deliberately indifferent**.

## “ACTUAL KNOWLEDGE”

### PREVIOUSLY

- ❑ When the school knows or should have known about sexual harassment.
- ❑ Constructive notice is sufficient

### NOW

- ❑ When any employee of the District has actual knowledge of sexual harassment in a program or activity against a person in the U.S.
- ❑ For K-12, actual knowledge is notice or allegation of sexual harassment to any employee.



## SCHOOL'S EDUCATION PROGRAM OR ACTIVITY

- Locations, events, or circumstances over which the District exercised substantial control over the respondent and in the context where the sexual harassment occurred;
- Includes any building owned or controlled by a student organization that is officially recognized by the school (more applicable to higher education institutions);
- In the United States; not in foreign countries – even if a student is participating in a school sponsored activity or program.

## “DELIBERATE INDIFFERENCE”

### PREVIOUSLY

- ❑ District must take immediate action.
- ❑ Purpose of action is to eliminate the sexual harassment or sexual violence, prevent the reoccurrence of such conduct, and address effects.

### NOW

- ❑ Failure to respond reasonably in light of known circumstances.

## REPORTING SEXUAL HARASSMENT

- Anyone can report sexual harassment. May be in writing or verbal, formal or informal.
- No specific form required.
- Any district employee** who observes sexual harassment of a student or receives notice of an allegation of sexual harassment must report the incident to the principal or Title IX Coordinator.

## TITLE IX COORDINATOR

- ❑ The District must have a Title IX Coordinator.
- ❑ Title IX Coordinator is responsible for compliance.
- ❑ Title IX Coordinator coordinates the District's response to a complaint.
- ❑ Title IX Coordinator initiates the response.

## THE TITLE IX COORDINATOR'S INITIAL RESPONSE

- ❑ The Title IX Coordinator must treat complainants and respondents equitably by (1) offering supportive measures to both; and (2) following a grievance process before disciplining or sanctioning respondent.
- ❑ The Title IX Coordinator must promptly, even if no formal complaint is filed:
  - ✓ contact the complainant to discuss the availability of supportive measures
  - ✓ consider the complainant's wishes with respect to supportive measures
  - ✓ inform the complainant of the availability of supportive measures with or without the filing of a formal complaint
  - ✓ explain the process of filing a formal complaint.

## SUPPORTIVE MEASURES

- ❑ Supportive measures are non-punitive, individualized services, offered as appropriate and without charge to a complainant or a respondent before or after the filing of a formal complaint, or where no complaint has been filed.
- ❑ Supportive measures should be designed to restore or preserve equal access to the education program or activity without “unreasonably burdening the other party.”
- ❑ The Title IX Coordinator is responsible for coordinating the implementation and must document the supportive measures offered, provided, or declined.

## IMMEDIATE EMERGENCY REMOVAL

- ❑ Based on an **individual safety and risk analysis**
  - ❑ Does not require a formal evaluation
- ❑ Necessary to protect a student or other individual from immediate threat to physical health or safety
- ❑ Notice, opportunity to challenge must be provided “immediately”
- ❑ Be sure to consider other laws (especially change in placement under IDEA)

# DON'T CONFUSE "EMERGENCY REMOVALS"

## TITLE IX

- ❑ An "individualized safety and risk analysis determines that an individual poses an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal.
- ❑ No limit on number of days.

## G.L. C. 71, §37H <sup>3</sup>/<sub>4</sub>

Principal may remove a student from school temporarily when a student is charged with a disciplinary offense and the continued presence of the student poses a danger to persons or property, or materially and substantially disrupts the order of the school, and, in the principal's judgment, there is no alternative available to alleviate the danger or disruption.

Cannot exceed two days.



## FORMAL COMPLAINTS

- ❑ Title IX Coordinator should explain the difference between a formal and informal complaint to the Complainant.
- ❑ Complainant makes the decision regarding whether to formally file a complaint.
- ❑ If the Complainant decides not file a formal complaint, the Title IX Coordinator has the authority to move forward with a formal complaint.
- ❑ A formal complaint may be dismissed where the conduct would not constitute sexual harassment, even if proved, it did not occur in the school's education program or activity, or did not occur in the U.S.
- ❑ Dismissal must be sent in writing to Complainant and Respondent.

## GRIEVANCE PROCESS

- ❑ Complainants and Respondents must be treated equitably
- ❑ Objectively evaluate all relevant evidence
- ❑ All staff involved are free from conflicts of interest
- ❑ Presumes non-responsibility of respondents until the conclusion of the process
- ❑ Includes reasonably prompt time frames for the process
- ❑ Informs all parties of all critical information
- ❑ Protects legally recognized privilege from being pierced during the grievance process

## PROVIDE WRITTEN NOTICE AFTER FORMAL COMPLAINT IS FILED AND BEFORE INVESTIGATION BEGINS

- ❑ Written notice to known parties “upon receipt of written complaint”
- ❑ Notice must be sent in time to allow respondent to prepare a response before any initial interview
- ❑ Must include:
  - ❑ Notice of grievance process, including any informal resolution process
  - ❑ Notice of allegations, in sufficient detail to allow respondent to prepare a response (names of parties, conduct alleged, date and location of conduct if known)

## WRITTEN NOTICE (CONTINUED)

- ❑ Must include (continued):
  - ❑ Statement that respondent presumed not responsible and that responsibility will be determined at the conclusion of the grievance process.
  - ❑ Notice of parties' rights to have an attorney or non-attorney advisor and to inspect and review evidence
  - ❑ Notice of any provision in the code of conduct that prohibits knowingly making false statement or providing false evidence during the grievance process

## WRITTEN NOTICE (CONTINUED)

- ❑ Notice must be supplemented if new allegations are opened for investigation during the process
- ❑ Further notice should be sent for any investigative interviews, meetings, or hearings.
- ❑ Schools should send parties and their advisors all evidence directly related to the allegations with at least 10 days for the parties to inspect, review, and respond to the evidence.

## ARE THERE ANY OPTIONS FOR RESOLUTION BEFORE THE INVESTIGATION?

- Yes – the regulations provide that the Title IX Coordinator may offer mediation.
- Cannot be used where the allegation is against an employee.
- This may only take place after a formal complaint is filed and initial written notice with supportive measures are provided.
- Must give written notice of the proposal of informal resolution.
- Both the Complainant and Respondent must consent in writing.
- District has the ability to establish the form and standards for mediation.
- Mediation should be conducted by a facilitator.
- Allowed at any time during the formal complaint process.

# INVESTIGATION TEAM



TITLE IX COORDINATOR



INVESTIGATOR



DECISION-MAKER

## THE INVESTIGATION

- ❑ Burden of proof and burden of gathering evidence is on the school.
- ❑ Must provide an equal opportunity to present fact and expert witnesses and other inculpatory and exculpatory evidence.
- ❑ Does not restrict the parties from discussing the allegations or gathering evidence.
- ❑ Gives the parties an equal opportunity to select an advisor of their choice.
- ❑ Requires written notice when a party's participation is invited or expected for an interview, meeting, or hearing.
- ❑ Provides both parties an equal opportunity to review and respond to the evidence gathered during the investigation ten days before the investigative report issues. BUT remember FERPA!



## INVESTIGATIVE REPORT

- ❑ Sent to all parties
- ❑ Fairly summarizes the relevant evidence
- ❑ Written and provided prior to reaching a determination regarding responsibility
- ❑ Used by the decision-maker to reach a decision.

## LIVE HEARING

- ❑ Live hearing is not required for K-12, but is permissible.
- ❑ Parties must have equal opportunity to submit written questions for the other parties and witnesses to answer before a determination regarding responsibility is reached.

## DETERMINATION OF RESPONSIBILITY – THE STANDARD

- ❑ Decision-maker (who is not the same person as the Title IX Coordinator or the investigator) must reach a decision by applying the standard of evidence the district has designated in its grievance process for all formal complaints of sexual harassment.
- ❑ District's written policy must indicate the evidentiary standard adopted:
  - ❑ Preponderance of the evidence: More probable than not
  - OR**
  - ❑ Clear and convincing evidence: Highly and substantially more likely to be true than untrue; highly probable.

## DETERMINATION OF RESPONSIBILITY- THE WRITING

- ❑ Written determination
  - ❑ Findings of fact
  - ❑ Conclusions as to whether the alleged conduct occurred
  - ❑ Rational for the results as to each allegation
  - ❑ Disciplinary sanctions imposed
  - ❑ Remedies

## APPEALS- 106.45 (B)(8)

The option for appeal must be offered to both parties on the bases of:

- Procedural irregularity affected the outcome;
- New evidence was discovered and may change the outcome;
- Title IX personnel involved in the process had a conflict of interest or bias that impacted the outcome

## RETALIATION –106.71

- Strictly prohibited
- Complaints of retaliation may be addressed under Title IX.

## OTHER REQUIREMENTS: TRAINING

- ❑ Mandatory training for Title IX Coordinators, investigators, decision-makers, appeal officers, informal resolution facilitators
- ❑ Training on identification and reporting of sexual harassment is required for all staff.
- ❑ Post training materials on school district's website.

## OTHER REQUIREMENTS: RECORD KEEPING

- ❑ Records related to alleged sexual harassment must be kept for at least 7 years.
- ✓ Investigative records
- ✓ Disciplinary sanctions
- ✓ Remedies
- ✓ Appeals
- ✓ Records of actions taken, including supporting measures

## DOCUMENT FOR EVERY INSTANCE

- ✓ Why response was not deliberately indifferent
- ✓ Measures taken were taken to restore or preserve equal access to the educational program or activity
- ✓ If no supportive measures were taken, why that was not deliberately indifferent



# FORMAL PROCESS

\*Informal resolution may be offered at any time after the formal complaint is filed.





Questions?



# THANK YOU!

THIS PRESENTATION, INCLUDING THE MATERIALS AND SPEAKERS' COMMENTS, IS NOT INTENDED TO BE LEGAL ADVICE. IF YOU NEED LEGAL ADVICE, PLEASE CONTACT AN ATTORNEY.



## DOES THE VICTIM HAVE A CAUSE OF ACTION UNDER TITLE IX?

- DCF notified a DESE approved OOD residential school that it is investigating a student-on-student sexual assault that allegedly occurred in the laundry room at school.
- The school is not a program that admits students with a history of sexualized or assaultive behaviors.
- The alleged perpetrator had only been at the school for about 2 weeks. The school accepted him for admission, in part, because the DCF referral identified no behavioral concerns.
- To the OOD school's knowledge, no "ASAP" or risk assessment was on file with DCF or the student's school district.
- In response to DCF's investigation, the OOD program's social worker contacted the local DCF office and asked whether any ASAP or risk assessment was on file.
- The DCF administrative assistant located a report that had never been provided to the OOD program or the school district. The report indicated the student displayed sexually predatory behavior for about 5 years.

## **WE WERE JUST JOKING!**

Three sophomore boys “host” an Instagram Live on a Saturday night. About 80 other high school students, mostly sophomores, “tune in” and participate in the comment feature of Instagram live. The 3 hosts are not particularly paying attention to the comments, but just filming themselves doing skateboard tricks. Because the comments scroll down as they are added, 6 other sophomore boys repeatedly spell out an racist term; each student posts one letter spelling out the word with the offensive term spelled out vertically in the comments. This is done several times and sexualized terms are added while other commenters, (fellow classmates) complain about the racist and offensive nature of the comments and ask them to stop.

Could the commenters be disciplined for their racist and sexualized comments on the Instagram Live?

Does it matter that the Instagram Live took place out of school? What if it was “after school” hours during a period of remote learning (vs. on a weekend or school break)?

Does it matter that each commenter only posted one letter of the racist terms (and not the entire offensive word)?

What if no one reported being offended by the comments but the comments somehow came to the attention of school administrators?

Could the three Instagram Live “hosts” be disciplined?

## SUPPORTIVE MEASURES - EMERGENCY REMOVAL

- ❑ Jessica files a formal complaint that her ex-boyfriend Nick is sexually harassing her.
- ❑ She claims he continuously approaches her in the hallway during passing periods and makes comments to her about how she looks and what he would like to do to her.
- ❑ She informs the Title IX Coordinator that Nick calls her all night, comes over to her house to try and get inside, and has progressively become more and more aggressive with his actions and words towards her. She reports being afraid to attend school and her attendance deteriorates.
- ❑ As a supportive measure, can the Title IX Coordinator emergency remove Nick from school?