



Requirements for Title IX Sexual Harassment Investigations

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What is Title IX?

- Title IX of the Education Amendments of 1972 – 20 U.S.C. §§ 1681-1688
 - “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance”
- Encompasses protection against sexual harassment



What is Title IX?



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



Updated Regulations

- Effective August 14, 2020
- New requirements for handling complaints and investigations of sexual harassment
- Significant change from past practices – numerous specific procedural, policy, staffing, and training requirements
- Applies only to situations involving sexual harassment or sexual assault – rules regarding other forms of sex discrimination are unaltered by these new regulations



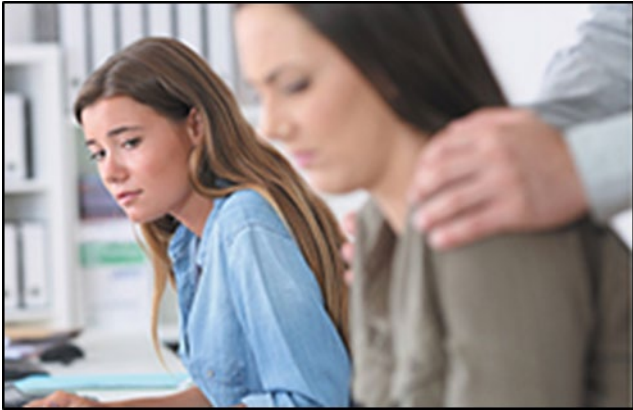
What's New?

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



Sexual Harassment – Quid Pro Quo

- When a school employee conditions receiving an aid, benefit, or service of the school on a student's participation in unwelcome sexual conduct (“quid pro quo”)



- Employee - student
- Sexual conduct can include:
 - Sexual advances
 - Requests for sexual favors
 - Verbal, nonverbal, or physical conduct of a sexual nature



Sexual Harassment – Hostile Environment

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

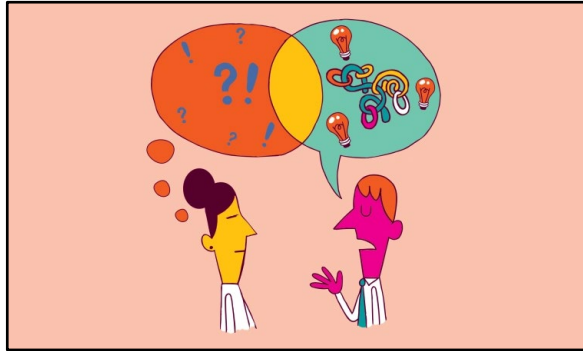


What is a hostile environment?

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



First Amendment Protection



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



Sexual Assault

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

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



Dating Violence

Violence committed by a person—

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



Domestic Violence



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



Stalking

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



Title IX Coordinator



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



Update Your Policies!

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



Notifications

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



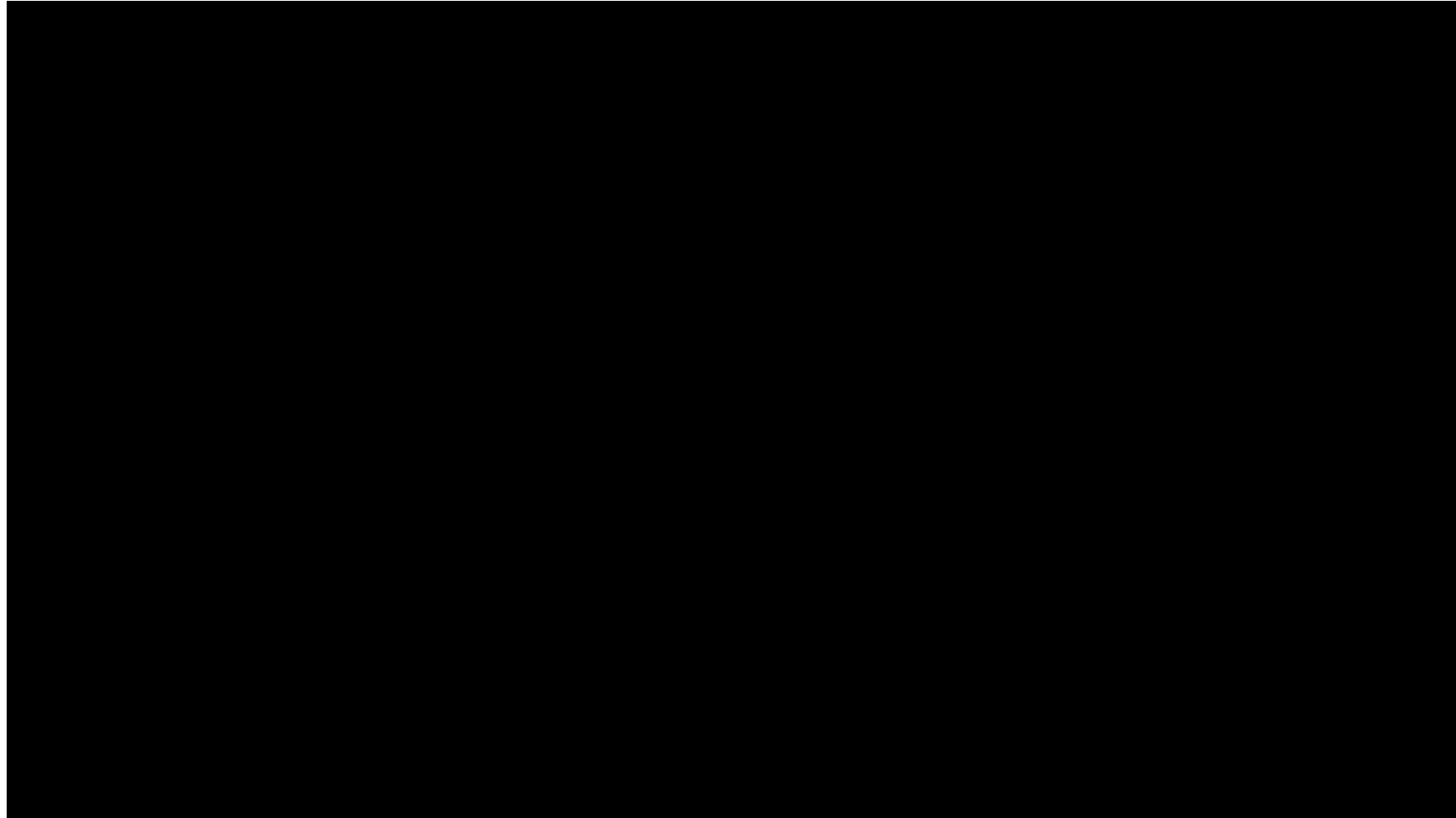
Reporting Requirements

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

**Report
it!**



U.S. DOE – Office for Civil Rights Guidance



General Response

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



Confidentiality

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



Procedural Requirements



- Prompt and equitable resolution of complaints
- Title IX Coordinator must promptly contact complainant when s/he learns of potential sexual harassment to discuss availability of supportive measures with or without a formal complaint, consider complainant's wishes with respect to supportive measures, and explain complaint process for formal complaint.



Supportive Measures

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



Supportive Measures

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



Supportive Measures

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



Emergency Removal of Student

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



Paid Administrative Leave



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



Informal Resolution

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



Formal Complaint – Grievance Process

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



Formal Complaint – Grievance Process

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



Presumption of Non-Responsibility



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



Prompt Time Frame

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



Notice of Allegations

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



Notice of Allegations (con't)

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



Dismissal of Formal Complaint

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



Investigation

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



Investigation (con't)

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



Investigation Report

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



Hearings

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



Determination

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





Appeal

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



Appeal Process

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



Training

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



Record-Keeping

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



No Retaliation

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



RESOURCES

- Full text of new regulations:

<https://www2.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf>

- U.S. Department of Education – includes summaries, webinar videos, training materials, and fact sheet:

<https://sites.ed.gov/titleix/policy/>



Stay Tuned . . .

- On April 6, 2021, the U.S. Department of Education’s Office for Civil Rights announced plans to begin a comprehensive review of its regulations implementing Title IX of the Education Amendments of 1972, in response to President Joe Biden’s executive order of March 8, 2021, “[Executive Order on Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity](#)” (Executive Order 14021).



The Executive Order Requires the Secretary of Education to Do the Following:

- Enforce the policy in the executive order as well as legal prohibitions on sex discrimination in the form of sexual harassment, which encompasses sexual violence.
- The policy stated in the Executive Order states: “It is the policy of the Administration that all students should be guaranteed an educational environment free from discrimination on the basis of sex, including discrimination in the form of sexual harassment, which encompasses sexual violence, and including discrimination on the basis of sexual orientation or gender identity.”





The Executive Order Requires the Secretary of Education to:

- Account for intersecting forms of prohibited discrimination that can affect the availability of resources and support for students who have experienced sex discrimination, including discrimination on the basis of race, disability, and national origin.
- Account for the significant rates at which students who identify as lesbian, gay, bisexual, transgender, and queer (LGBTQ+) are subject to sexual harassment, which encompasses sexual violence.
- Ensure that educational institutions are providing appropriate support for students who have experienced sex discrimination.
- Ensure that the school has procedures that are fair and equitable for everyone.



Even more recently this month . . .

- The U.S. Department of Education announced that it will release proposed new Title IX regulations this year.
- It is anticipated that the proposed new regulations will attempt to codify elements of the United States Supreme Court decision in [*Bostock v. Clayton County*](#) at the K-12 level.
- New proposed regulations will not be effective immediately, but rather would more than likely go into effect some time during the 2022-2023 school year.

The Upcoming New Proposed Rules are Anticipated to Cover:

- More specific protection for LBGTQ
- More specificity on protections for transgender students, including:
 - Their right to access school bathrooms that match their gender identity, and
 - Their right to participate in school sports.



What Should You Do Now?



- Review your policies to ensure they are compliant with the current Title IX regulations.
- Make sure you are training all staff who are involved in the Title IX grievance process.
- Make sure you are posting your Title IX staff training materials on the School Corporation's web site.



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THANK YOU!

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