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Sexual Harassment Complaints:
New Title IX Requirements
Training for Investigators, Title IX
Coordinators and Decisionmakers

Brief Overview: What is New

- May 6, 2020, U.S. Dep't of Ed., OCR issued rule amending Title IX regulations
- Final rule went into effect on August 14, 2020

Brief Overview: What is New

- Sexual harassment is now expressly defined in Regulation
- Identification of & Notice requirements for Title IX Coordinator
- Grievance Process requirements
- Recordkeeping & training requirements
- “Notice” v. “Formal Complaint” and how to address each
- Requirements for determination of responsibility

Brief Overview: What is New

- Formal Complaints can only be filed by alleged victim
- But ALL notice triggers certain obligations
- Investigation must follow grievance procedure
- Investigators CAN NOT be decision makers regarding determination of responsibility
- Title IX Coordinator, investigators and decision makers must be trained in Title IX regulations

School Liability

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

What is Actual Knowledge of Harassment?

- A report to ANY elementary or secondary school employee
 - ALL employees must be trained to immediately communicate any report of conduct that would meet the definition of harassment to Title IX Coordinator
- A report to the Title IX Coordinator made at any time via any method of communication
- A report made to any School official who has authority to institute corrective measures

Education Program or Activity

The School is only required to address sexual harassment in the education program or activity, which is:

- Any location, event, or circumstance over which the School exhibits **substantial control over both the alleged harasser and the context in which the harassment occurred**

What is Deliberate Indifference?

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

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

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

Avoid Deliberate Indifference

Title IX Coordinator must PROMPTLY contact every Complainant (whether formal complaint or not) to discuss:

- Wishes regarding supportive measures
- That supportive measures are available with or without filing a formal complaint
- The process for filing a formal complaint

Avoid Deliberate Indifference

- Treat Complainants and Respondents equitably
- Provide supportive measures in all cases
- Investigate every instance of formal complaint
- Use procedures set out in the regulations
- Provide Complainant remedies if Respondent is found to have responsibility

GRIEVANCE PROCESS REQUIREMENTS

Grievance Process Must. . .

- Treat all parties equitably
- Upon receipt of a formal complaint, provide written notice
- Objectively evaluate all evidence, including allowing the Respondent to prepare a response before any initial interview
- Ensure there is no conflict of interest for the investigator and decisionmaker

Grievance Process Must . . .

- Include a presumption that the Respondent is not responsible
- Include reasonably prompt timeframes
- Include a description or list of possible discipline or other remedies
- Include a statement of the standard used = preponderance of the evidence
- Include appeal procedures and when appeal is available
- Include a range of supportive measures available

Informal v. Formal

PROCEDURES UPON RECEIPT OF REPORT OF SEXUAL HARASSMENT

How is it Reported?

- Reports can be made by anyone and by mail, telephone, email to Title IX Coordinator or by any means that results in the Title IX Coordinator receiving the report
- Any report triggers school responsibilities – **Send notice of any report to Title IX Coordinator**
- Only victim, who is student or employee of school, can file a formal complaint

Informal vs Formal Complaint

- Formal complaint = a document filed by a Complainant *or one that is signed by the Title IX Coordinator* alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment
- Title IX Coordinator can sign a formal complaint where victim will not also triggering investigation
- Informal complaint is where notice is made but no written document filed

Informal Resolution

- **Not** allowed unless there has been a formal complaint filed
- **Not** allowed for a complaint alleging an employee harassed a student
- **Allowed** at any time during formal complaint process if:
 - Both parties have been provided written notice of their rights
 - Both parties written voluntary consent is obtained

Informal Resolution

- Title IX Coordinator will facilitate the process
- Alternative to the formal grievance procedure
- There can be no conditions placed on the parties in exchange for their consent & either party can withdraw consent at any time (revert to the formal grievance procedure)
- Must be equitable process
- Mediated by neutral third party

Informal Resolution

Both parties must be notified, in writing, of the informal resolution process, to include:

- The allegations made in the formal complaint
- The requirements of the informal resolution process
- What elements of the process will remain confidential (or not)

All Notice Triggers Responsibility

Even if no formal complaint filed, Title IX Coordinator MUST initially:

- Contact Complainant to discuss supportive measures
- Consider the Complainant's wishes with respect to supportive measures
- Inform Complainant of the availability of supportive measures with or without the filing of a formal complaint
- Explain the process to file a formal complaint

Supportive Measures

Supportive measures are non-disciplinary, 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 formal complaint has been filed.

Examples of Supportive Measures

- Counseling
- Course modifications
- Schedule changes
- Increased monitoring or supervisions
- Designed to restore or preserve equal access to education program or activity
- Do not unreasonably burden either a Complainant or Respondent

Supportive Measures “Don'ts”

Do not sanction or discipline Respondent in any way until grievance procedure has been followed

- Do not completely remove a student Respondent from an activity as a supportive measure for complainant
- UNLESS there is need for an emergency removal; which can only happen if necessary to protect an individual from IMMEDIATE THREAT TO **PHYSICAL HEALTH OR SAFETY**

Written Notice Requirements: Formal Complaint

Written notice must include:

- Notice of the School's grievance process, including any informal resolution process
- Notice of allegations, with enough detail to allow Respondent to respond (names of parties, conduct alleged, date and location of conduct if known)
- Notice of Parties' rights to have an attorney or non-attorney advisor inspect and review evidence

Written Notice Requirements: Formal Complaint

- A statement that the Respondent is presumed not responsible for conduct and that a determination will not be made until the conclusion of the grievance process; and
- Notice of any provisions in the code of conduct that prohibit knowingly making false statements or providing false evidence during the grievance process

Written Notice Requirements: Formal Complaint

If, during the course of the investigation, the School decides to investigate additional allegations involving the Complainant or Respondent that were not included in the initial notice/formal complaint, the School must provide written notice of the additional allegations (and allow enough time to respond).

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

**UNDERSTAND THE “NEW”
REGULATION’S DEFINITION
OF SEXUAL HARASSMENT**

Sexual Harassment

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

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

Definition of Sexual Harassment

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

1. A School employee conditions the provision of an aid, benefit, or service of the school on an individual's participation in unwelcome sexual conduct;

Definition of Sexual Harassment

2. Unwelcome conduct that a reasonable person would find to be so severe, pervasive, and objectively offensive that it “*effectively denies a person equal access*” to the School’s education program or activity;
3. Sexual assault, dating violence, domestic violence, or stalking.

Sexual Harassment: Element 1

Element 1 is considered “*quid pro quo*” harassment:

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

Sexual Harassment: Element 2

- This prong requires the unwelcome sexual conduct to be:
 - Severe AND
 - Pervasive AND
 - Objectively offensive
- Such that the victim is denied **equal access** to the School's programs and activities
- Narrowly tailored to protect 1st Amendment rights

Sexual Harassment: Element 3

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

- Does not require severe and pervasive analysis
- When it occurs, equal access is denied
- Like Element 1, it is *per se* actionable

Sexual Assault

An offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.

20 U.S.C. 1092(f)(6)(A)(v)

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

34 U.S.C. 12291(a)(30)

Dating Violence

Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim and where the existence of such a relationship shall be determined based on a consideration of the following factors:

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

34 U.S.C. 12291(a)(10)

Domestic Violence

Felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.

34 U.S.C. 12291(a)(8)

**DISMISSAL PRIOR TO
DETERMINATION**

Mandatory Dismissal of Formal Complaints

- The complaint does not state an allegation of sexual harassment, even if all facts are found to be true
- The sexual harassment, even if it did occur, did not occur in a School program or activity
- The sexual harassment did not occur against a person in the United States

Permissive Dismissal

- If the Complainant notifies the Title IX Coordinator that s/he wants to withdraw the complaint
- If the Respondent's employment or enrollment with the school ends
- If circumstances, such as several years between the conduct and the complaint or a Complainant's refusal to cooperate, prevents the gathering of evidence sufficient to render a determination

CONDUCTING INVESTIGATIONS: THE INVESTIGATOR

No Conflict of Interest

- Investigator must not have a conflict of interest. . .
 - Against the specific Complainant or Respondent or
 - Against Complainants or Respondents in general
- If you have a conflict of interest, notify the Title IX Coordinator immediately

Basic Premises: Investigators

- Meet the timeline set out in the School's policy (60 days of receipt of formal complaint)
- If there is a temporary delay for good cause, provide written notice to both parties explaining the reason for the delay
- School administrative needs DO NOT create good cause for a temporary delay

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

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

Investigation Basics

- Burden of proof is on the School
- No restrictions are placed on the rights of the parties to discuss allegations or gather/present evidence
- Parties are provided with written notice of date, time, participants, purpose, and location of each investigative interview with sufficient time allowed to prepare

Investigation Basics

All evidence is provided to the parties, and any attorney/advisor, by sending the evidence to the parties in an electronic or hard copy format and allowing the parties 10 days to submit a written response

- Provide both parties an equal opportunity to inspect and review evidence gathered as part of the investigation that is *directly related* to the allegations raised in the formal complaint
- Including evidence you do not intend to rely on when drafting the investigation report

Investigating the Complaint

You must gather the relevant evidence:

- Do not require or rely on the parties to provide you evidence
- You may not require a party to provide evidence (documentary or verbal) that would be legally protected under attorney-client privilege, doctor-patient privilege, spousal privilege (e.g., cannot require outside counseling records)

Investigating the Complaint

Both parties must have equal opportunity to present witnesses and evidence

- Interview both parties
- Ask both parties to provide any documents they think are relevant
- Ask both parties who else they think you should talk to and then interview the witnesses identified by the parties

Investigating the Complaint

- Do not restrict either party's ability to discuss the allegations or gather and present evidence
- If allowing others to be present during the Complainant or Respondent interview (such as an advisor), must allow both parties the same opportunity
 - You may restrict the extent to which the advisor can participate, so long as restrictions apply to both parties

Written Investigation Report

- Write investigation report summarizing all steps and evidence (no determination of responsibility)
- Be sure to consider the written responses to the evidence that was provided by the parties when finalizing the written investigative report
- The written investigation report must fairly summarize the relevant evidence and be provided to parties and attorney/advisor at least 10 days before any determination of responsibility is completed

DECISION MAKERS

Basic Premises: Decision Makers

- Decision maker CANNOT be the Title IX Coordinator or the investigator
- Objectively evaluate all available evidence, both inculpatory and exculpatory
- Weigh the evidence using a preponderance of the evidence standard adopted by the School (i.e., The evidence must show that its *more likely than not* that the respondent is responsible for the alleged conduct)

After the Investigation

After the written investigation report is provided by the investigator and BEFORE a determination of responsibility is made:

- a) Both parties must be given the opportunity to submit relevant written questions that he/she wants asked of any party or witness
- b) Must provide each party with the answers, AND
- c) Allow for limited follow up questions from the parties

Written Questions

- If a question is excluded by the decision maker, the decision maker must explain why the question is not relevant
- Complainant's sexual history or predisposition is NOT RELEVANT unless:
 - offered to establish that someone else committed the acts complained of
 - Offered to establish consent with the specific respondent

Issuing a Determination

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

- List of the allegations
- Description of the procedural steps taken from receipt of the formal complaint through determination (include dates of notices, interviews, etc.)
- Findings of fact that support the determination
- Application of the code of conduct to the facts and conclusions of same

Issuing a Determination

- Statement of and rationale for the determination as to each allegation, including:
 - Determination of responsibility
 - Any disciplinary actions
 - Whether remedies to restore or preserve equal access to the educational program or activity will be provided to complainant
- Include procedures and information regarding the permissible basis for appeal

Remedies

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

APPEALS

Appeals

- Appeals cannot be heard by the Title IX Coordinator, the investigator, or the decision maker
- Appeals must be offered to both parties equally
- Appeals are **mandatory** in the following circumstances:
 - A procedural irregularity affected the outcome
 - Availability of new evidence that was not reasonably available at the time of the determination that could affect outcome

Appeals

(Mandatory appeals cont'd):

- Conflict of interest on the part of the Title IX Coordinator, investigator, or decision maker that affected the outcome
- Appeals may also be heard for other reasons as determined by School policy/regulation

Appeals

- Written notice that an appeal has been submitted must be provided to both parties
- Both parties must have an equal opportunity to submit a written statement in support of, or challenging, the determination by the decision maker

**A FEW MORE IMPORTANT
THINGS**

Staff Training

- All staff must be trained on how to identify and report sexual harassment
- Different from the training required for the investigators, decision makers, persons designated for appeal and informal resolution and the Title IX Coordinator

Records Retention

- All records of any action related to sexual harassment complaints must be maintained for a minimum of 7 years, including records that substantiate remedies and supportive measures provided
- Training materials used to train Title IX Coordinators, decision makers and investigators must be posted on the School's website

Records Retention

For each response to a complaint; formal or informal; the School must create and maintain for 7 years, a record that:

- documents the basis for the School's conclusion that its response was not deliberately indifferent,
- documents that it has taken measures designed to restore or preserve equal access to the School's education program or activity

Records Retention

If the School did not provide a Complainant with supportive measures, then the School must document the reasons why such a response was not clearly unreasonable in light of the known circumstances.

Retaliation

- Do not take any adverse action against any person for the purpose of interfering with rights under Title IX or because the person participated **or refused to participate** in a Title IX proceeding
- Keep the names of all individuals involved confidential except as necessary to investigate (parties have right to know names)

Retaliation

- Beware of disciplining for a non-harassment code of conduct violation where you learned of the violation via the sexual harassment complaint—it can be done, but should be for an infraction which you typically would discipline
- Someone other than the investigator or decisionmaker should process any such discipline and should know as little as possible about the Title IX Complaint

Retaliation

Disciplining a student based on a code of conduct violation for making a materially false statement in bad faith during the investigation of a complaint does not constitute retaliation.