2020 Title IX Regulations: K-12 Initial Compliance Training

Jacqueline M. Litra
Ask Questions
Terminology

Apply to parties in both *reports* and *Formal Complaints* of sexual harassment

**Title IX Complainant:** A person who is alleged to be the victim of conduct that could constitute sexual harassment

- **NOT** a third party who reports Title IX Sexual Harassment perpetrated against someone else
- **NOT** the Title IX Coordinator, even if the TIXC “signs” a Formal Complaint

**Title IX Respondent:** A person who has been reported to be the perpetrator of conduct that could constitute sexual harassment

©Fagen Friedman & Fulfrost LLP 2022. Not legal advice. Subject to limited license; see final page.
WHY ARE WE HERE?
Know the Rules

SEXUAL HARASSMENT complaint form
Recognize Title IX Sexual Harassment
But not just any action, the right action for the conduct at issue!
Why is this so important?
1 in 4 women experiences sexual assault before age 18

10% of children are targets of educator sexual misconduct before high school graduation

48% of U.S. students are subject to sexual harassment or assault at school before graduating high school

In 2010-2011, 36% of girls, 24% of boys and 30% of all students grades 7-12 experienced online sexual harassment
THIS DOESN’T ADD UP:

79% of public schools reported zero incidents of sexual harassment or bullying.

AAUW research has shown that nearly half of students in grades 7–12 reported experiencing some form of sexual harassment, yet more than three-fourths of schools reported zero incidents for the 2015–16 school year.
Harassment and assault can have long lasting, detrimental effects on victims
Effects on Individuals

- Poor performance in school
- Mistrust
- Fear
- Lost Opportunities
- Drop-out
- PTSD
- Anxiety
- Depression
- Suicide
- Acting out
- Absenteeism
- Distraction
- Anger
- Stress
Effects on Teams

- Decreased focus
- Lost productivity
- Withdrawal
- Neglect
- Malingering
- Absenteeism
- Turnover
- Lack of trust in leadership
Unfair processes can have long lasting, detrimental effects on the parties.
Have you been involved in a Title IX complaint?
Have you been involved with a student or employee issue involving unwanted conduct on the basis of sex?
WHAT IS TITLE IX?
Title IX
Title IX Statute

(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."
What falls under Title IX?

- Recruitment, Admissions, and Counseling
- Financial Assistance
- Athletics
- Sex-Based Harassment
- Treatment of Pregnant & Parenting Students
- Discipline
- Single-Sex Education
- Employment
- Retaliation
Title IX Regulations

(34 C.F.R. Part 106 – Amended as of 8/14/2020)

- Prohibit discrimination on the basis of sex
- Establish procedural requirements
  - Policy + detailed grievance procedure
  - Designation of Title IX coordinator(s)
  - And many more requirements!
When Must a School Respond to Sexual Harassment?
It Depends Who [Well, Which Law] You Ask

**Employment**
- California Fair Employment & Housing Act (FEHA)
- Title VII
- Title IX

**Students**
- Title IX
When must a school respond to Title IX sexual harassment?

A school with actual knowledge of [Title IX] sexual harassment in an education program or activity against a person in the United States must respond as required under the new Title IX rules....
Notice

ACTUAL knowledge

To Title IX Coordinator or “official with authority” (all K-12 employees)
Actual Knowledge

1. Sense
2. Report
Official with Authority

- Title IX Coordinator
- Any other officials who have been given authority to institute corrective measures by the school district
- K-12: All employees
Reporting Sexual Harassment: Who, How and When?

- Any person may report sex discrimination, including sexual harassment, regardless of whether the person is the alleged victim of the reported conduct.

- Reports can be made by mail, by telephone, or by email, using the contact information listed for the Title IX Coordinator.

- Or by any means that results in the Title IX Coordinator receiving the person’s report.

- Such a report may be made at any time, including during non-business hours, by using the telephone number or electronic mail address, or by mail to the office address listed for the Title IX Coordinator.
Once a school has notice of an allegation that, if true, would constitute sexual harassment, it must respond.

“Well, we didn’t believe there was enough evidence it happened” does not get you past your responsibility to use your Title IX procedures.
Order of protection:
Principal served with order of protection requiring 17 year old male student to have no contact with 16 year old female student due to alleged sexual assault off campus.
Does the Principal have actual knowledge/notice of sexual harassment?
What is Sexual Harassment?
It Depends Who [Well, Which Law] You Ask

**Employment**
- California Fair Employment & Housing Act (FEHA)
- Educ. Code § 212.5
- Title VII
- Title IX

**Students**
- Educ. Code § 212.5
- Title IX
Title IX Sexual Harassment

- Employee quid pro quo
- Hostile environment (newly defined)
- Clery/VAWA “Big 4”
QUID PRO QUO
Title IX Quid Pro Quo

**Definition:** An employee of the school conditioning an aid, service, or benefit of the school on an individual’s participation in unwelcome sexual conduct

**New:** Only an employee (not a volunteer, another student, etc.)

**Codified:** Severity and harm presumed
VAWA “Big Four”


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

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

Stalking 34 U.S.C. 12291(a)(30)
Title IX – What is Sexual Harassment?

Old Definition

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

New Definition (8/14)

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 school’s education program or activity.
Unwelcome Conduct

- Not Consent
- Not Participation
- Not Silence
- Age Matters
- Intoxication Matters
- Culture Matters
- Ability Matters
What is severe?
Severe

- Something more than just juvenile behavior among students
- Something more than behavior that is even antagonistic, non-consensual, and crass
- Simple acts of teasing and name calling are not enough, even when based on sex
What is pervasive?
Pervasive

- Systemic, widespread
- Multiple incidents—one incident is likely not enough
- Reconciles the general principle that Title IX prohibits indifference to known harassment with the practical realities of responding to misconduct

©Fagen Friedman & Fulfrost LLP 2022. Not legal advice. Subject to limited license; see final page.
What is objectively offensive?
Objectively Offensive

Constellation of surrounding circumstances, expectations, and relationships
Access Denied

- Hostile environment - harm is not presumed
  - Effectively denies a person EQUAL access to the school’s education program or activity
- “So undermines and detracts from the victims’ educational experience…”
- Specific manifestation of trauma not require
Hostile Environment Factors

Context, Nature, Scope, Frequency, Duration, and Location of the Incidents

Identity, Number, Ages, and Relationships of the Persons involved
What about....
casual or isolated comments or conduct?
Practical Analysis

Is this severe, pervasive, and objectively offensive?
A student makes multiple insensitive sexual jokes to another student.
Teacher repeatedly tells a student they look good after losing weight.
One student grabs another student’s breasts during a soccer game.
Without permission, a student films a consensual sex act with another student off campus. Student shows the video to other students on campus.
A group of students make a Facebook post rating students by attractiveness and share it with school community.
A teacher offers a student to trade a back rub for a good grade on a test.
Teacher makes a sexually inappropriate comment to a student in class.
Students incessantly mock a female student for not wearing makeup, saying she looks “like a boy.”
A student sends a completely nude picture to the student’s significant other (another student).
The student who received the photo forwards it to 20 classmates.
Title IX Sexual Harassment Must Be “In a Program or Activity”
**Program or Activity:** 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
Online & Off Campus

Substantial control over the context?
Schools need only address sex discrimination occurring against a person in the United States under Title IX.
HOW MUST YOU RESPOND?
Option 1: **AR 4119.12/4219.12/4319.12 (Personnel) & AR 5145.71 (Students) Title IX Sexual Harassment Complaint Procedures** (for TIX Sexual Harassment *only*)

Option 2: **AR 4119.11/4219.11/4319.11 (Personnel) & AR 5145.7 Sexual Harassment** (for any other violation of law, including other types of “sexual harassment”)

Option 3: Other Board policies prohibiting conduct, e.g., bullying, nondiscrimination
Conduct that, if true, would be "Title IX Sexual Harassment"

REMEMBER: If you find no responsibility, consider whether another sexual harassment policy should be used

NEW Title IX Sexual Harassment AR

BUT ALWAYS consider whether another non-"sexual harassment" policy or procedure applies

Proceed under another policy

Dismissal under Title IX Process

OR

Conduct that, even if true, would not "Title IX Sexual Harassment"

© Fagen Friedman & Fulfrost LLP 2022. Not legal advice. Subject to limited license; see final page.
Adequate Response

1. Initial Response / Supportive Measures
2. Informal Resolution (Voluntary)
3. Investigation
4. Decision
5. Appeal
Sexual Harassment Allegations

Initial Response / Supportive Measures

No Formal Complaint

Formal Complaint – Notice of Allegations

Dismissal

Informal Resolution

Investigation

Determination

Appeal
Initial Response/Supportive Measures
Title IX Coordinator

- Must be called Title IX Coordinator
- One person with oversight over all Title IX programs
- Can have other responsibilities (e.g., nondiscrimination, ADA)
Terminology

Apply to parties in both *reports* and *Formal Complaints* of sexual harassment

*Title IX Complainant*: A person who is alleged to be the victim of conduct that could constitute sexual harassment

- NOT a third party who reports Title IX Sexual Harassment perpetrated against someone else
- NOT the Title IX Coordinator, even if the TIXC “signs” a Formal Complaint

*Title IX Respondent*: A person who has been reported to be the perpetrator of conduct that could constitute sexual harassment

©Fagen Friedman & Fulfrost LLP 2022. Not legal advice. Subject to limited license; see final page.
Title IX Coordinator or designee must promptly, **even if no Formal Complaint is filed**:

- Contact the Title IX Complainant to discuss the availability of “supportive measures”
- Consider the Title IX Complainant’s wishes with respect to supportive measures
- Inform the Title IX Complainant of the availability of supportive measures with or without the filing of a formal complaint
- Explain the process for filing a Formal Complaint
Formal Complaint

Defined as a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment. 34 C.F.R. § 106.30(a).
Confidentiality

- Not required to maintain anonymity of Complainant after formal complaint is filed
- Both parties must be identified (if identity is known) in written notice of allegations
- Using party initials or withholding Complainant’s identity is insufficient
Signing a Complaint

Factors to consider
Supportive Measures

What Changed?

**OLD TERM**
(OCR Guidance)

- Used terms such as “interim measures” or “interim steps” to describe measures to help a complainant maintain equal educational access.
- Implied only available during pendency of investigation, did not mandate offering them, not clear if could be punitive or disciplinary, and did not clarify if available to respondents.

**NEW TERM**
(Final Rule)

- 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 (34. C.F.R.106.30(a)).
- Should be designed to restore or preserve equal access to the education program or activity without “unreasonably” burdening the other party.
Examples of Supportive Measures

- Counseling
- Course modifications
- Schedule changes
- Increased monitoring or supervision

A supportive measure that completely removes a respondent from an activity would likely be considered punitive, except for “emergency removals” for students and “administrative leaves” for employees
Emergency Removals / Admin Leave

Immediate emergency removal (34 C.F.R. 106.44(c))
- Based on an individualized safety and risk analysis
- Necessary to protect a student or other individual from immediate threat to physical health or safety
- Notice, opportunity to challenge provided “immediately” provided the removal
- Consider other laws, e.g., “change in placement” under IDEA

Employee administrative leave (34 C.F.R. 106.44(c))
- Not prohibited
  Consider state law, board policy, handbooks and bargaining
Mandatory if conduct alleged:
- Not sexual harassment, even if true
- Did not occur in the school’s program or activity
- Did not occur in the United states

**can still address under non-Title IX policy

Permissive if:
- Complainant requests to withdraw in writing
- Respondent’s enrollment or employment ends
- Specific circumstances prevent school from gathering evidence sufficient to reach a determination (e.g., passage of time, lack of cooperation by complainant)
Informal Resolution (Voluntary)
## Informal Resolution

<table>
<thead>
<tr>
<th>INFORMAL RESOLUTION IS NOT PERMITTED UNDER THE FOLLOWING CONDITIONS:</th>
<th>INFORMAL RESOLUTION MAY MOVE FORWARD UNDER THE FOLLOWING CONDITIONS:</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Cannot condition enrollment, employment, or any right on waiver of right to investigation and adjudication of formal complaints under grievance procedure</td>
<td>• Any time prior to reaching a determination, either party may request informal resolution</td>
</tr>
<tr>
<td>• Cannot require use of informal resolution process</td>
<td>• Requires voluntary, written consent from both parties</td>
</tr>
<tr>
<td>• Cannot offer informal resolution process until formal complaint is filed</td>
<td>• Any party has a right to withdraw prior to agreement</td>
</tr>
<tr>
<td>• Not available to resolve allegations that employee sexually harassed a student</td>
<td></td>
</tr>
</tbody>
</table>
Informal Resolution Facilitators

We do not recommend using the Title IX Coordinator or investigator(s) or decisionmakers
Written Notice: Required

- To both parties
- In writing
- Allegations
- Requirements of informal resolution process (including circumstances under which the party cannot resume a formal complaint arising from the allegations)
- Resulting consequences of participating (e.g., records)
3 Investigation
Formal Complaint Response

34 C.F.R. 106.45(b)

- Requires a number of specific steps for investigating
- Major shift from previous, more deferential stance toward specific policies and practices for complaint resolution
Anatomy of an Investigation

- Written notice to the parties
- Choosing an investigator
- Required elements of an investigation
• Written notice to known parties “upon receipt of written complaint”
• In sufficient 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 known parties, conduct alleged, date and location of conduct, if known)
• Must include:
  ➢ Statement that respondent presumed not responsible and that responsibility determined at conclusion of 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 statements or providing false evidence during the grievance process

• Must be supplemented if new allegations opened for investigation
Written Notice: Required

- Informal resolution notice
- Notice at start of investigation
- Dismissal notice
- Interview notices
- Report
- Notice which proposed questions not asked on cross and why
- Written determination and notice of appeal rights

©Fagen Friedman & Ful frost LLP 2022. Not legal advice. Subject to limited license; see final page.
Written Notice: Recommended

- Document information to complainant at initial meeting, including supportive measures requested/provided
- Document that review of evidence provided to both parties
- Document opportunity to ask questions, answers, follow-up questions, etc.
Who should investigate?

Can be the Title IX Coordinator... But should it?
Who should investigate?

- Trained
- Unbiased
  - No actual or perceived conflict of interest
  - Check “institutional interests”
  - Presumption that Respondent is not responsible
Who should investigate?

- No “one size fits all” approach
- May need to designate
- Consider the perception of bias
  - Your friendship or other relationship with the accused or their family
  - Your sex/gender identity
  - Your personal conflicts (even if just perceived)
  - Personality conflicts
Contents of an Investigation
Investigation
34 C.F.R.
106.45(b)(5)

- Burden of proof on school
- Certain treatment records cannot be obtained without voluntary, written consent
- No restriction of rights of parties to discuss allegations or gather or present evidence
- Same opportunities for others present during interviews or related proceedings (e.g., attorney or non-attorney advisor)
- Written notice to parties of date, time, participants, purpose, and location of each investigative interview with sufficient time to prepare
- All evidence provided to parties and their advisors with 10 days to respond before report
- Written investigative report “fairly summarizes the relevant evidence” provided to parties and advisors at least 10 days before hearing or other determination of responsibility
Investigation Best Practices

- Investigation plan
- Follow steps in policies closely
- Coordinate with law enforcement as required by policy and District practice
- Remember that both complainants and respondents may be experiencing trauma and other strong emotions
- Consult with Title IX Coordinator and/or counsel as needed
Interviewing Best Practices

- Explain your role as a neutral
- Open-ended questions followed by more tailored follow up
- Allow ample time, don’t interrupt or rush
- Ask “Is there anything else?”
- Ask for other witnesses, evidence, incidents
Notice to Parties in Interviews

- What to expect about future contact (timing, updates, encourage follow-up to you)
- Written copy of policies/procedures
- Notify of retaliation rights – provide specific examples
- No “Gag” order but can warn of retaliation risks
First Amendment Rights

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
Investigation Plans Aren’t Static

Reassess plan for investigation frequently
Gathering Other Evidence
Warning! Medical Records

- Notice of allegations should not divulge either party’s medical information
- Prohibited from accessing or using medical, psychological, or similar records in grievance process without a party’s (or parent’s) voluntary, written consent
Opportunity to Review Evidence

- Before the investigatory report is completed, evidence relating to the allegations must be sent to each party and advisor and should include all evidence (including that which the school does not intend to rely upon and exculpatory and inculpatory evidence)
- Parties have 10 days to provide a written response
Investigation Report Writing

- Fairly summarizes the relevant evidence
- Provide the report to the parties and their advisors, if any, for their review and written response, at least 10 days before a hearing or determination of responsibility
Investigation Report Should Include

- Applicable policies and procedures
- Timeline of investigation
- Description of allegations
- Unbiased summary of evidence gathered, including interviews
- Credibility determination(s)
Decision
Decisionmaker(s)
(Complaint)

• Cannot be the Title IX Coordinator or the investigator(s)
Determinations of Responsibility
34 C.F.R. 106.45(b)(6)

- Live hearing with live cross by party advisors required for higher ed, **not K-12**
- Hearings permitted for K-12, with each party allowed to submit written, relevant questions to be asked of another party or witness to the decisionmaker, who will provide each party with the answers and the opportunity for follow-up questions
Relevance

- Rape shield laws
- Treatment records
- Legally privileged information
- Improper inference
- Prior statements
Rulings on Relevance in Written “Cross”

- Provide reasoning for irrelevance
- Admit and consider all relevant evidence
- Exceptions
  - Sexual behavior (except in limited situations)
  - Legal privilege
  - Treatment records
# Written Determination

<table>
<thead>
<tr>
<th>Identify</th>
<th>Identify the allegations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Describe</td>
<td>Describe procedural steps taken</td>
</tr>
<tr>
<td>Cite</td>
<td>Cite potential policy violations</td>
</tr>
<tr>
<td>Summarize</td>
<td>Fairly summarize all relevant evidence</td>
</tr>
<tr>
<td>Provide</td>
<td>Provide statement of result, with rationale, for each allegation</td>
</tr>
<tr>
<td>Appeal</td>
<td>Appeal procedures</td>
</tr>
</tbody>
</table>

©Fagen Friedman & Fulfrost LLP 2022. Not legal advice. Subject to limited license; see final page.
Standard of Proof:
Preponderance of the Evidence
Remedies & Sanctions

- Disciplinary action against perpetrator
- Counseling for perpetrator/victim
- Changes to services or policies
- Remedies for complainant and others
- Etc.!!
5 Appeal
Appeal Process

- Available to both parties
- Appeal of dismissal or written determination
- Three bases for appeal
  - Procedural issue
  - New Evidence
  - Bias or Conflict of Interest
- Must affect the outcome
Appeal Process

- Notify parties of appeal in writing
- Apply procedures equally for both parties
- Provide equal opportunity to submit written statement
- Issue written decision to both parties
Decisionmaker(s) (Appeal)

Cannot be the Title IX Coordinator or the investigator(s) or the decisionmaker (complaint)
Bias, Conflicts of Interest, and Other Fairness Concerns
Bias, Conflict of Interest, Prejudgment

The Title IX Coordinator, investigator, decision-maker, or informal resolution facilitator must not have a conflict of interest or bias for or against Complainants or Respondents generally or for or against any individual Complainant or Respondent. And that they must not prejudge any matter before them.
Bias

- Prejudice for or against one person or group
- An affinity or habitual attraction to something
- The property of not being in balance
- A particular point of view from which something is seen or presented

Wordhippo.com
Conflict of Interest & Prejudgment

- A conflict between the private interests and the official responsibilities of a person in a position of trust
  Merriam-Webster.com

- Prejudgment is a judgment made before the evidence has been presented
  Wordhippo.com
Recordkeeping
Recordkeeping

Must maintain the following for 7 years:

- Sexual harassment investigation documents, including:
  - Determination regarding responsibility
  - Recordings or transcripts of live hearing
  - Disciplinary sanctions imposed on Respondent
  - Remedies provided to Complainant

- Appeal and result

- Informal resolution and result

- Actions taken in response to a report of sexual harassment

- Actions taken in response to a formal complaint of sexual harassment
Recordkeeping

Responses to formal and informal complaints and actions taken in response should include:

- The basis for the school’s conclusion that its response was not deliberately indifferent
- Documentation that it has taken measures designed to restore or preserve equal access to the school’s education program or activity
- Supportive measures or if no supportive measures are provided, document the reasons why such a response was not clearly unreasonable in light of the known circumstances
QUESTIONS?