

# Title IX Coordinator Training

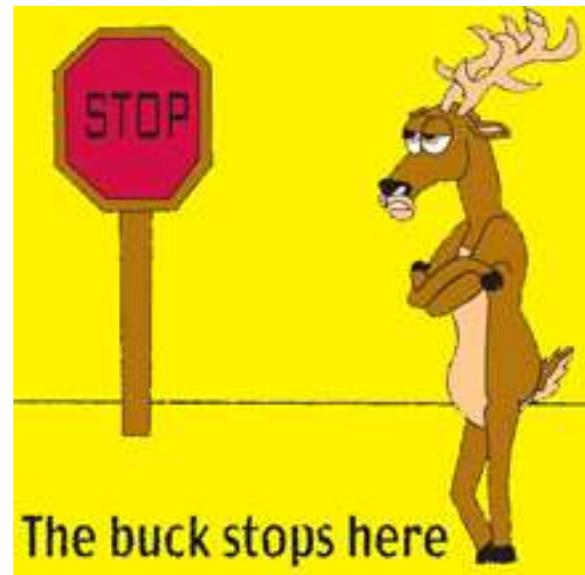
The Arizona Risk Retention  
Trust

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# Title IX Coordinators

You are the front line for preventing district liability. You are critical to successful implementation of Title IX regulations



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# Reminder: District Liability

A recipient of federal funds violates Title IX where it has *actual knowledge* of an allegation of sexual harassment experienced by an *individual in the educational program* and the school acts with *deliberate indifference* to that notice.

# 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 1<sup>st</sup> Amendment rights
- A presumption of non-responsibility of the accused
- Provision of supportive measures

# Title IX Coordinators

- Must have the actual title and be authorized to initiate the grievance procedure against a respondent
- Must have authority to provide supportive measures that will restore or preserve “equal access”
- Must be trained and is responsible for ensuring that other relevant individuals are trained

# Title IX Coordinators

- Can not have a conflict of interest
  - Must ensure others involved in grievance process do not have a conflict of interest
- Be trained to act impartially throughout the process
- Never prejudge the alleged facts
- Thoroughly understand the definition of sexual harassment under Title IX

# Title IX Coordinator

- Receives notice of allegations of sexual harassment
- Fulfills duties related to “notice” obligations of new regulations
- Coordinates implementation of supportive measures
- Helps draft and accepts Formal Complaints

# Title IX Coordinator

- Decides whether to sign Formal Complaint where a victim will not
- Issues written notice when there is a Formal Complaint
- Determines whether Formal Complaint must be dismissed or, if dismissal is permitted, whether to dismiss it
- Offers informal resolution where appropriate

# Title IX Coordinator

- Possibly does the investigation
- Monitors the implementation of the grievance procedure (track deadlines, maintain records)
- Effectively implements remedies where there has been a determination of responsibility

Impartiality is Required by Regulations

# **AVOID BIAS AND PREJUDGMENT**

# Avoiding Bias is Critical to Implementing Regulations

- Following grievance procedure that meets requirements of the regulations is important step to showing non-bias
- Recognize and acknowledge allegations of sexual harassment no matter who the alleged victim is
  - Do not adopt stereotypes about who is, and who is not, subjected to sexual harassment

# Avoiding Bias is Critical to Implementing Regulations

- Recognize that no one is free of implicit bias
  - <https://implicit.harvard.edu/implicit/takeatest.html>
  - Take several of the tests looking at race and gender bias
- Suggested that Title IX Coordinator attend an implicit bias training

Notice of allegation of sexual harassment received

# **TITLE IX COORDINATOR'S FIRST STEP**

# What is Notice?

- A report to ANY school employee
  - ALL employees must be trained to immediately communicate any report of conduct that would meet the definition of harassment to administration
- Report to the Title IX Coordinator made at any time via any method of communication



# All Notice Triggers Responsibility

Contact alleged victim promptly to discuss:

- Whether the Complainant wants **supportive measures**
- Advise Complainant that supportive measures are available regardless of whether Formal Complaint is filed
- Explain the process for filing a Formal Complaint

# Supportive Measures

- Designed to restore or preserve **equal access** to education program or activity
- Equal access is the same access that someone who hasn't experienced sexual harassment has
- What does a loss of “equal access” look like?
  - Does NOT require total loss of educational access

# Examples of Loss of Equal Access

- Poor attendance, failing or diminished grades
- Quitting an extracurricular/club to avoid respondent
- Dropping a class
- Being unable to concentrate in a class/activity
- Manifestations of stress (bed-wetting, self-harm, hair loss)

# Supportive Measures

- Non-disciplinary
- Non-punitive
- Individualized to the person and situation
- Offered as appropriate and without charge
- Must be offered to Complainant
- May be offered to respondent if appropriate
- Can not unreasonably burden either a complainant or respondent

# Examples of Supportive Measures

- Counseling
- Course modifications
  - Extend a deadline
  - Allow exam retake
- Schedule changes
  - For complainant or respondent
- Allow student to repeat a course
- Increased monitoring or supervision
- Mutual non-contact order
- One-way no contact order
- Cannot include anything that is listed as a potential disciplinary consequence

# Supportive Measures

- Can not discipline a respondent in any way as a supportive measure (though can as a remedy upon a determination of responsibility)
- Must continue to be offered during an investigation and whether an investigation is ever done if necessary to ensure equal access

# If Respondent is an Employee

- School may send an employee home on administrative leave as a supportive measure
- May also do this as part of the HR process, but remember, if a formal complaint is filed, an investigation may take 60 days or more
- Can reassign the employee to another site

## If Respondent is a Student

- Do not completely remove a student respondent from an educational activity as a supportive measure for complainant
- UNLESS there is an **emergency removal** necessary because a respondent poses an immediate threat arising from the sexual harassment allegations

# Emergency Removal

- Must be an individualized safety and risk analysis that determines that respondent poses an immediate threat to **any person's physical health or safety**
  - Does not require a licensed provider to make this determination
  - Does not require objective evidence
  - NOT a threat to mental health

# Emergency Removal

Examples of possible emergency removal scenarios:

- Respondent threatens physical violence against complainant in response to allegation of sexual harassment
- Respondent threatens physical self-harm

Accepting the Formal Complaint

# **TITLE IX COORDINATOR'S SECOND STEP**

# Formal Complaint

Formal complaint signed by alleged victim or Title IX Coordinator triggers responsibility to conduct investigation that complies with the District's grievance procedure.

Upon receipt of a Formal Complaint, provide the notice described below.

# To Sign or Not To Sign

- Regulations seek to give complainants greater agency to make a decision whether to file or not
- Title IX Coordinator may, and should, sign formal complaint in certain instances
- Would the school be deliberately indifferent to the notice of potential sexual harassment if you don't sign?
- Does not make you a witness or a party

# Written Notice Requirements: Formal Complaint

Provide written notice of the District's grievance procedure to both parties, including information about informal resolution process, if the District adopts one

## **Written notice must:**

- Include 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

# Written Notice Requirements: Formal Complaint

- inform parties that they may have an advisor of their choice
  - Advisor may be an attorney, but doesn't have to be
- inform parties that they may inspect and review evidence collected during this investigation
- inform parties of any provision of the code of conduct that prohibits making false statements or knowingly submitting false evidence

# Written Notice Requirements: Formal Complaint

Notice of the allegations of sexual harassment provided to the parties must include sufficient details, and be provided in enough time, to allow preparation of a response prior to initial interview

Sufficient notice includes, if known:

- The conduct alleged to constitute sexual harassment
- The date and location of the alleged incident

# Written Notice Requirements: Formal Complaint

If, during the course of the investigation, the school decides to investigate additional allegations about complainant or respondent that were not included in initial notice, Title IX Coordinator must provide written notice of the additional allegations to the parties.

Decide Whether Formal Complaint is to be Investigated

# **TITLE IX COORDINATOR'S THIRD STEP**

# 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 the **school's program or activity**
- The sexual harassment did not occur against a **person in the United States**

# IS IT SEXUAL HARASSMENT?

# Sexual Harassment

The regulations use a definition of sexual harassment that is designed to protect 1<sup>st</sup> 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 is 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;
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.

# Types of Conduct

Sexual harassment includes unwelcome conduct

- Of a sexual nature or
- Other conduct on the basis of sex

Unwelcome is analyzed using a “reasonable person” standard—standing in the shoes of the complainant.

# Definition of Sexual Harassment: Prong 1

Prong 1 is *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

Exs: a teacher requires sexual favors for a better grade; a staff member demands sexual favors or s/he will post compromising pictures

# Definition of Sexual Harassment: Prong 2

Harassment based on speech

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 education programs and activities.

Narrowly tailored to protect 1<sup>st</sup> Amendment rights

# Definition of Sexual Harassment: Prong 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

**WAS IT IN THE SCHOOL'S  
EDUCATION PROGRAM OR  
ACTIVITY?**

# Education Program or Activity

Schools are 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**

# Is It the Education Program or Activity?

- A cheerleader experiences sexual harassment an away game?
- At an overnight trip sponsored by the German Club?
- At a non-school related party held in a private home on a weekend?
- During a distance learning class?

**WAS THE PERSON IN THE  
UNITED STATES?**

# Against a Person in the United States

- This is a jurisdictional requirement for application of Title IX
- Students in a study abroad program are not protected by Title IX outside the U.S.
- Final rule notes that though not required, a school may initiate a student conduct proceeding against a perpetrator or offer supportive measures to a victim

# Permissive Dismissal of Formal Complaints

- 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

Informal resolution

# **TITLE IX COORDINATOR'S FOURTH STEP**

# Informal Resolution

- School is not required to use informal resolution, but if it chooses to use it, then it is appropriate to offer if:
  - Formal Complaint has been filed
  - Both parties voluntarily agree to participate in writing
  - The Respondent is NOT an employee and the complainant a student

# Informal Resolution

- Cannot be required and either party can withdraw at any time
- Process may include arbitration, mediation, or restorative justice
- Decide what process the District will use and include that information in written notice of Formal Complaint
- Must have reasonably prompt time frame to complete the process

# Informal Resolution

- Decide whether confidentiality can be a term of an informal resolution and include that information in written notice
- If the informal resolution facilitator may be called as a witness in investigation, must disclose that possibility to the parties in the written notice
- Facilitator must not have a conflict of interest, must be trained in these regulations, and must be free of bias

# Informal Resolution

- Suggested that facilitator be trained in mediating sexual harassment situations
- Be aware of power dynamics when implementing an informal resolution
  - Should there be a face-to-face meeting?
  - Is someone manifesting signs of trauma?
  - Should facilitator press parties on facts?

# Informal Resolution

Outcome of a successful informal resolution may include:

- Continuation of supportive measures
- Discipline for a Respondent
- Other agreements made between the parties

# Informal Resolution

- Terms of resolution should be negotiated in good faith, be in writing, and include language regarding enforceability
- If successful, IR results in a dismissal of the Formal Complaint without adjudication

Investigation

# **TITLE IX COORDINATOR'S FIFTH STEP**

# Assignment to Investigator

- If you are not going to investigate, assign to a trained investigator
- Ensure that investigator does not have a conflict of interest
- Continue to monitor deadlines and be a resource to the investigator re: definition of sexual harassment, course of investigation

# IF YOU ARE GOING TO INVESTIGATE

# Plan, Plan, Plan

- Map out a plan for your investigation
- Understand the allegations
- Understand definition of sexual harassment so that you know what elements must be established
- Who will you interview? What documents must you see? Do you need to ask IT to run a server search? Do you need to get recordings from surveillance cameras?

# Medical Evidence

- Can not require party to provide medical evidence
- If they do want to provide it, must obtain written, voluntary consent (of parent or adult student) allowing district to use that evidence in grievance process
  - Even if we already have the evidence, we can't use it in investigation without that consent

# Investigating the Complaint

- Interview both parties (required)
- Interview any witnesses identified by the parties and anyone else you identify as potentially having information
- Request documents from district, parties, and witnesses

# Interview Phase

- Recommendation is to start by interviewing complainant and then the respondent
- Provide written notice of the date, time, location, participants, and purpose of any investigation activity that requires a **party's presence** and provide notice with enough time for the party to prepare to participate in the activity

# Interview Phase

- You've identified the allegations and understand what information will be needed to make a determination, so use that to guide interviews
- Plan your interview outlines
  - To extent reasonable, ask both parties the same questions
  - Ask witnesses the same or similar questions

# Conducting Interviews

- Explain purpose of interview:
  - Important part of the investigation into the allegation of sexual harassment that the District received
- Provide reassurances:
  - No retaliation for participating
  - Will maintain confidentiality except as between the parties and the District personnel who are required as part of the Title IX process

# Conducting Interviews

## Explain expectations

- No recording (you can decide whether you will allow or not)
- Tell the truth
- What the rules are for advisors
- You don't have to provide evidence protected by privilege
- You may not threaten, intimidate, or harass anyone who participates in this process

# Conducting Interviews

- If interviewing virtually, ask witness to confirm who is present with them
- Ask open ended questions
  - Use the answers to ask more pointed questions to drill down into the detail you need
- Document the responses in a reliable and consistent fashion

# Conducting Interviews

At the end:

- Ask both parties and any witnesses to provide any documents they think are relevant
- Ask both parties and any witnesses who else they think you should talk to and then interview the witnesses identified by the **parties** and consider whether anyone identified by witnesses should be interviewed

# Providing the Evidence

- Get a signed non-disclosure agreement
- Provide both parties an equal opportunity to inspect and review all evidence gathered as part of the investigation that is *directly related* to the allegations raised in the formal complaint
  - Including evidence on which you do not intend to rely on it in drafting an investigation report 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

# Redacting Evidence

- You must redact information protected by privilege unless we have written consent
- You may redact information in the evidence that is not directly related to the allegations
- You may not redact confidential information that is directly related and relevant

# Investigation Report

- Draft a written investigation report that summarizes the relevant evidence
- Can include observations and even recommendations
- Provide the report to the parties AND their advisors, if any, at the same time for review and opportunity to provide another written response prior to the decision maker rendering a determination.

Remedies and Wrapping Up

# **TITLE IX COORDINATOR'S SIXTH STEP**

# Remedies

- If there was a determination of responsibility, you will play a role in implementing remedies
- If there was a determination of non-responsibility, continue to provide supportive measures as needed
- Continue to be a resource for both parties as needed

# Appeals

- If an appeal is filed, ensure that the appeal decision-maker receives necessary documents
- Monitor timelines and competition of that process and ensure that notices are sent to the parties

# Records Retention

- All records related to sexual harassment complaints must be maintained for a minimum of 7 years, including records that substantiate remedies and supportive measures
- Training materials must be posted on the District's website

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