TITLE IX COMPLIANCE TRAINING

Practical Solutions for a Complex Process

Laura Tubbs Booth
Megan J. Renslow
Christian R. Shafer
What do you think of when you think about Title IX?
“[n]o 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.” 20 U.S.C. § 1681(a).
PROHIBITS DISCRIMINATION ON THE BASIS OF SEX

- Discrimination includes harassment
- Requires equity in treatment of complainant/respondent
NEW REGS EFFECTIVE 8/14/2020

USDOE ISSUED NEW REGULATIONS IMPLEMENTING TITLE IX

NEW DEFINITIONS

NEW INVESTIGATION REQUIREMENTS
GENERAL RESPONSIBILITIES

For Public Elementary/Secondary Schools
SCHOOLS MUST:

1. Have a policy
2. Identify Title IX Coordinator
3. Offer Supportive Measure
4. Have a grievance process
DEFINITIONS
RESPONSE TO SEX HARASSMENT

- A recipient with **actual knowledge** of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is **not deliberately indifferent**...
RECIPIENT of Federal Funds
SEX HARASSMENT IS...
SEX HARASSMENT IS...

Conduct based on sex:

1. And a school employee **conditions** receipt of a benefit on participating in unwelcome sexual conduct or

2. Unwelcome conduct determined by a reasonable person to be so **severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the school’s education program or activity; or

3. **Sexual assault**, dating violence, domestic violence, or stalking, as those terms are defined by federal law.
If an employee of the school knows of sex harassment or

Allegations of sex harassment the district has “actual knowledge”
EDUCATION PROGRAM OR ACTIVITY
PERSON IN THE UNITED STATES
RESPONSE: NOT DELIBERATELY INDIFFERENT

- Davis v. Monroe County Bd. of Ed.
LaShonda was a fifth grade student
Reports to parents & teacher three incidents during school by a classmate named Kim
Mom speaks to teacher
Eventually parents speak to principal
LaShonda reports to physical education teacher when Kim put a door stop in pants and motions toward LaShonda

P.E. teacher reports to principal

Another student asks to speak to principal but is denied

LaShonda’s grades plummet, does not want to attend school, suicide note.

School is deliberately indifferent if it acted unreasonably in light of the known circumstances.
Now a “formal complaint” is required and means:

| The Complainant files a written complaint or | The Title IX Coordinator files a written complaint | No third party complaints |

Previously, a formal complaint was not required
REPORT VS. FORMAL COMPLAINT

Report

▪ Actual knowledge by school employee of harassment or
▪ Actual knowledge by employee of report or
▪ Complainant reports to Title IX Coordinator but no formal report

Formal Complaint

▪ By the complainant in writing or
▪ By the Title IX Coordinator
Supportive Measures

School must offer the complainant supportive measures regardless of formal complaint.
New regulations require that each school district have:

- Title IX Coordinator
- Investigator
- decision-maker
- Appeal Decision-Maker
TITLE IX COORDINATOR

- Understands law and policy – trained
- Must be an employee
- Can also be investigator
- May facilitate informal resolution
- MAY NOT be decision maker or appeal decision maker
- Responsible for coordination of grievance process & implementation of remedies
INVESTIGATOR

- Understands law and policy-trained to investigate
- May not be biased or have conflict of interest
- Must summarize findings in objective way
- May make recommendation but not required
- Understands law and policy – trained
- May not be biased or have conflict of interest
- Must issue written report in compliance with requirements
- May not be Title IX investigator and may not decide appeal
• Must allow for written statement
• Be unbiased and have no conflict of interest
• May not be Title IX Coordinator or Decision-Maker
PRACTICALLY SPEAKING...

- Title IX Coordinator can also be the investigator & facilitate informal resolution
- Title IX Coordinator can’t be decision-maker or appeal decision maker
- Each role must be trained
- Who might be one of the three-four roles:
  - Superintendent
  - HR Professional
  - Assistant Principal
  - Athletic/Activities Director
  - Dean
  - Social Worker
  - Counselor etc.
STEP ONE

ROLE OF THE TITLE IX COORDINATOR
Actions to Take Upon Receipt of a Report

Receipt of Report from a Witness
Content of Report is “Actual Knowledge”
Deliberate Indifference Standard Requires Contact with Complainant
Complainant Files Complaint
Next Step

Content of Complaint Results in “Actual Knowledge”
Title IX Coordinator Files Complaint
Next Step
ACTIONS TO TAKE UPON RECEIPT OF A COMPLAINT

Receipt of a “Formal Complaint”

Next Step
A formal complaint must immediately be dismissed if:

a. The conduct alleged in the formal complaint, even if proven, does not meet the definition of sexual harassment set by these regulations;

b. The conduct alleged in the formal complaint did not occur in the school or school district’s education program or activity; or

c. The conduct alleged did not occur against a person in the United States.
A formal complaint *may* be dismissed if:

a. The complainant notifies the Title IX Coordinator, in writing, that they would like to withdraw the complaint;

b. The respondent is no longer enrolled at or employed by the school; or

c. Specific circumstances prevent the school or school district from gathering evidence sufficient to reach a determination as to the complaint.
RESPONSIBILITIES WHEN DISMISSING A COMPLAINT
KEEP IN MIND...

- Conduct that does not rise to the level of a Title IX complaint may still require action
1. Grievance/Informal Resolution Process;
2. Allegations;
3. Presumption Respondent Is Not Responsible;
4. Right to an Advisor; and
5. Code of Conduct Prohibits False Statements or Information.
INTERIM SUPPORT MEASURES

Supportive measures, offered equally to both parties, are non-disciplinary measures including:

- Counseling
- Modification of deadlines/other adjustments
- Modifications of work or class schedules
- Campus escort services
- Mutual restrictions on contact between parties
- Changes in work or school locations
- Leaves of absence
- Increased security and monitoring
INTERIM EMERGENCY REMOVAL OF STUDENT RESPONDENTS

- Mandatory individualized safety and risk analysis
- Immediate threat arising from the allegations of sexual harassment
- The threat must relate to the physical health or safety of any individual
- Requires notice to the respondent and an opportunity for challenge immediately following removal
- The respondent bears the burden of proving the removal decision was incorrect
- Not applicable to offenses outside Title IX
INTERIM EMERGENCY REMOVAL OF EMPLOYEES

- Non-Applicability of Title IX Procedures
- Factors to Consider
- Possible Directives to Employees
INFORMAL RESOLUTION

- Timing
- Notice
- Non-Applicability to Employees
STEP TWO
ROLE OF THE TITLE IX INVESTIGATOR
NEW TITLE IX REQUIREMENTS FOR INVESTIGATIONS
INDEPENDENT INVESTIGATION
The school or district bears the burden of proof, not either party.
SPECIFIC TYPES OF INFORMATION AND DATA CONCERNS IN A TITLE IX INVESTIGATION

Consideration of privileged information

Review of external medical records

Interplay between data privacy laws and Title IX
PRACTICAL CONSIDERATIONS

- Consolidation of multiple complaints
- All parties must be given an equal opportunity to present witnesses
REQUIRED NOTICES AND OPPORTUNITY TO REVIEW EVIDENCE
STEPS TO TAKE BEFORE CONDUCTING THE INVESTIGATION
INITIAL CONSIDERATIONS: EXTERNAL REPORTS

- Remember to make any mandated reports of maltreatment
- Potential referrals to law enforcement
A BRIEF DATA PRACTICES INTERLUDE
PLAN AHEAD
LASHONDA’S CLAIMS: WHO MIGHT THE INVESTIGATOR WANT TO INTERVIEW?
DISTRACTIONS
INTERVIEW BASICS
Important Notice

REQUIRED INTERVIEW NOTICE
OPENING REMARKS

Explaining
Explaining the purpose of the interview

Explaining
Explaining the investigation process and your role as investigator
NOT CONFIDENTIAL
ASK THE RIGHT QUESTIONS
DO NOT GUARANTEE RESULTS
“The facts, Ma’am. Just the facts.”

INTERVIEWING THE COMPLAINANT AND FACT WITNESSES
INTERVIEWING THE COMPLAINANT AND WITNESSES

- Short, open-ended questions
THE INVESTIGATOR MIGHT HAVE TO DEFEND THE INTERVIEW QUESTIONS, SO...
WATCH OUT FOR BIASES!
INTERVIEWS

101

SOME SPECIFIC TIPS FOR INTERVIEWING WITNESSES AND COMPLAINANTS
SPECIAL CONSIDERATIONS FOR INTERVIEWING THE RESPONDENT

“Ahh... Just one more thing...”
WATCH OUT FOR BIAS IN THE COMPLAINANT INTERVIEW TOO!
Explaining the role of the investigator as a neutral factfinder

Establishing ground rules

Provision of similar initial statements that were provided to the Complainant
WHAT IF THE COMPLAINANT REFUSES TO ANSWER?
SPECIFIC STRATEGIES FOR INTERVIEWING THE COMPLAINANT
BACK TO LASHONDA: WHAT KINDS OF QUESTIONS MIGHT THE INVESTIGATOR ASK?
WAS THE WITNESS OR PARTY CREDIBLE?

TRUST ME.
Computer evidence
SURVEILLANCE FOOTAGE
SOCIAL MEDIA IN INVESTIGATIONS
IS THERE ANY TYPE OF ELECTRONIC EVIDENCE THAT THE INVESTIGATOR MIGHT CONSIDER IN THE LASHONDA INVESTIGATION?
COORDINATING ANY INVESTIGATION WITH LAW ENFORCEMENT
INVESTIGATION CONCLUSIONS MUST BE BASED ON RELEVANT EVIDENCE
Time frame for completing investigation reports

Time frame for providing investigation reports to parties

An investigation must “fairly summarize” the relevant evidence

The investigator does not decide if harassment occurred
STRATEGIES FOR WRITING AN INVESTIGATION REPORT
AVOIDING CONFLICTS OF INTEREST
ONE MORE WORD ABOUT BIASES
STEP THREE
ROLE OF THE TITLE IX DECISION MAKER
Preponderance of the Evidence

“Preponderance of the evidence” means that the respondent will be found responsible only if it is more likely than not that he or she engaged in the conduct constituting sexual harassment.

Clear and Convincing Evidence

“Clear and convincing evidence” means that the respondent will be found responsible only if it is highly more likely to be true that the respondent engaged in the conduct constituting sexual harassment.
PROCEDURES REQUIRED PRIOR TO A DECISION

- Opportunity for Parties to Respond to the Report
- Notification of the Right to a Hearing and/or Written Questions
SUBMISSION OF WRITTEN QUESTIONS

All schools must allow for an exchange of written relevant questions, regardless of whether a live hearing is also offered.
“Relevant evidence” means evidence having any tendency to make the existence of any fact more probable or less probable than it would be without the evidence.
WHAT EVIDENCE MAY BE APPROPRIATE TO EXCLUDE OR ALLOW IN LASHONDA’S CASE?
LIVE HEARINGS

Recording

Appointment of Advisor

Questioning
THE DETERMINATION

- Identification of the allegations
- Description of the procedural steps taken
- Findings of fact
- Conclusions applying the code of conduct/policy
- Assignment of responsibility, rationale, sanctions and remedies
- The procedure for appealing the determination of responsibility
STEP FOUR
IMPLEMENTATION OF THE DECISION AND THE APPEALS PROCESS
(ROLE OF THE APPELLATE DECISION-MAKER)
POTENTIAL REMEDIES

May include but are not limited to:

- Education
- Continued supportive measures
- Discipline
- Restorative Justice
APPEAL

- Either party may appeal:
  - Determination of Responsibility or
  - Dismissal
APPEAL ON THE BASIS OF...

Procedural irregularity that impacted outcome

New evidence not available at the time of investigation that could impact outcome

Conflict of Interest or Bias on part of investigator, Title IX Coordinator or...
OR ANY OTHER BASIS FOR APPEAL

- As long as both parties have the right to appeal on that basis
Ensure appeal decision maker is not the investigator or Title IX Coordinator. And employs same standards as decision maker.

Provide notice to both parties.

Ensure each party has reasonable opportunity to submit written statement.

Issue a written decision.
TRAINING MATERIALS

- Must train the three roles at a minimum
- Must ensure employees know their responsibility to report = actual knowledge
- Must retain training materials for 7 years
- Must retain complaints, investigation, decision, appeal decision for 7 years
- Must review policy annually
Questions