

#METOO IN SCHOOLS: THE NEW TITLE IX REGULATIONS

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TITLE IX OF THE EDUCATION AMENDMENTS OF 1972

“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.”

- “Sexual harassment” component evolved from US Supreme Court decisions.
- OCR is the administrative agency that enforces Title IX in schools.
- Failure to comply can result in withholding of federal funding.
- Latest regulations stem from due process concerns for accused students in the college context.

STANDARD FOR DISTRICT LIABILITY UNDER TITLE IX

The rules require the district to respond **promptly**, in a manner that is **not deliberately indifferent**, to **actual knowledge** of sexual harassment in an education program or activity.

Deliberate indifference is the failure to respond reasonably in light of known circumstances.

The new regulations expand the definition of “actual knowledge” as applied to K-12 schools. The new standard is if any school employee has notice of sexual harassment or allegations of sexual harassment, then the school has “actual knowledge” and the legal responsibilities begin.

The reason for the standard is that children, particularly young children, do not differentiate between school employees. To a child, an adult is an adult.

TRAINING OF ALL EMPLOYEES IS CRITICAL.

“SEXUAL HARASSMENT” DEFINED

1. An *employee* conditioning an aid, benefit, or service of the district on an individual’s participation in unwelcomed sexual conduct (quid pro quo)
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 district educational program or activity (hostile environment)
3. Sexual assault, dating violence, domestic violence, or stalking as defined in federal law

TITLE IX TEAM

In the past, oversight for Title IX compliance was the responsibility of one coordinator. The new regulations require a team with a minimum of four individuals with distinct roles to implement processes. The team and associated roles include the following:

- *Title IX coordinator*: coordinates compliance for the educational entity
- *Investigator*: investigates the formal complaint; may also serve as Title IX coordinator
- *Decision-maker*: makes a determination after the investigation is completed
- *Appellate decision-maker*: makes a determination upon appeal
- *Facilitator*: oversees the informal resolution process of a complaint if both parties agree to this process

NOTICE OF FORMAL COMPLAINT

When a district is in receipt of a formal complaint the district/school must provide the following written notice to the parties who are known:

- Notice of the district's Title IX formal complaint process, including any informal resolution process;
- Notice of the allegations of sexual harassment which includes, (1) the identities of the parties involved if known, (2) the conduct alleged as sexual harassment and (3) the date and location of the alleged incident, if known.

The written notice needs to have the following language as part of every notice of formal complaint:

- The respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the Title IX formal complaint process.
- The parties may have an advisor of their choice, who may be, but is not required to be, an attorney.
- The parties may inspect and review evidence.
- Cite the district/school's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the Title IX formal complaint process.

PRESUMPTIONS AND BURDEN OF PROOF

- ❑ All school district actions must presume that the respondent is not responsible for the alleged conduct until after a final determination in a formal complaint process.
- ❑ All Title IX personnel must serve impartially and free from conflicts of interest or bias against the individual complainant and respondent.
- ❑ Most schools are adopting a “preponderance of evidence” standard regarding evidence necessary to establish a violation.
- ❑ “Preponderance of evidence” is a standard meaning that a proposition is more likely than not to be true.

What must the district/school do if, during the course of the investigation, new allegations are brought forward?

If the district decides to investigate allegations about the complainant or respondent that are not included in the Notice of Formal Complaint, the district/school must provide written notice of the additional allegations to the parties whose identities are known.

WHEN CAN A DISTRICT/SCHOOL DISMISS A FORMAL COMPLAINT?

All formal complaints must be investigated. However, a complaint can be dismissed after a review for the following reasons:

- The alleged conduct in the formal complaint would not constitute sexual harassment even if proved; or
 - The alleged conduct did not occur in the district's education program or activity; or
 - The alleged conduct did not occur against a person the United States.
- ❖ Even if a complaint is dismissed, the district/school can take action under another provision of the district's code of conduct.

WHEN "MAY" A COMPLAINT BE DISMISSED?

A complaint **may** be dismissed any time during the investigation by the school or district when:

- A complainant sends written notification to the Title IX Coordinator that they would like to withdraw the formal complaint or any allegations that are part of the Title IX complaint; or
- The respondent is no longer enrolled or employed by the district; or
- Special circumstances prevent the district from gathering evidence sufficient to reach a determination as to the formal complaint or allegations.

NOTICE OF DISMISSAL

The district/school must promptly and simultaneously provide written notice of the dismissal setting forth the reason(s) for the dismissal to the parties.

- ❖ Even if a complaint is dismissed, the district/school can take action under another provision of the district's code of conduct.

Does the district have to conduct separate investigations if allegations involve more than one respondent or complainant?

The district has the choice to consolidate formal complaints when the allegations are against more than one respondent or by more than one complainant against one or more respondents or by one party against the other party, when the allegations of harassment arise out of the same facts or circumstances.

SUPPORTIVE MEASURES

Supportive measures must be offered to a complainant and, as appropriate, also to a respondent. Supportive measures must be offered regardless of whether a formal complaint is initiated, or whether the complainant participates in the formal complaint process.

The Title IX coordinator must document whether a complainant elects to accept or decline the supportive measures offered.

Supportive measures must be individualized, non-punitive, free of charge, and they shall not unreasonably burden either party.

EXAMPLES OF SUPPORTIVE MEASURES

- ✓ Counseling about inappropriate behaviors
- ✓ Explaining policies and expectations to the respondent
- ✓ Temporary removals
- ✓ Changing seating, class or campus assignments
- ✓ Extending deadlines or other course-related adjustments
- ✓ Implementing “stay-away” agreements
- ✓ Establish specific campus employees as points of contact
- ✓ Modify class or activity schedules
- ✓ Escorting students or employees
- ✓ Increase security and monitoring of certain areas of the campus

DISTRICT REQUIREMENTS DURING THE TITLE IX COMPLAINT PROCESS

- Ensure that the gathering of sufficient evidence and the burden of proof for reaching a determination is the district's responsibility.
- The district cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist or other healthcare professional which is made and maintained in connection with the provision of treatment to the party, ***unless the party has given voluntary, written consent.***
- Each party has the right to present witnesses, including fact and expert witnesses, and other evidence.

DISTRICT REQUIREMENTS DURING THE TITLE IX COMPLAINT PROCESS

- The district cannot restrict the ability of either party to discuss the allegations under investigation or from gathering and presenting relevant evidence.
- Each party has the right to have others present during any Title IX formal complaint proceeding. (The district may establish restrictions regarding the extent to which the advisor may participate in the proceedings)
- Provide to a party whose participation is invited or expected, written notice of the date, time, location, participants and purpose of the meeting, with sufficient time for the party to prepare to participate.
- Prior to completion of the investigate report, the district must send to each party and the party's advisor, if any, the evidence obtained as part of the investigation, whether relied on or not, in an electronic format or hard copy at least ***ten*** days prior to the completion of the investigative report so that the parties may submit a written response if they so choose.

What must be done after the investigative report is completed?

Once the investigative report has been sent simultaneously to the parties, the decision maker must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional limited follow-up questions from each party.

Can a party submit questions and/or evidence about the complainant's sexual predisposition or prior sexual behavior?

Questions or evidence about the complainant's prior sexual behavior or sexual predisposition are normally not relevant or permitted *unless* they are offered to:

- Prove that someone other than the respondent committed the conduct alleged; or
- The questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

The decision-maker must explain to the party proposing the questions any decision to exclude a question or evidence as not relevant.

DETERMINATION OF RESPONSIBILITY

The decision-maker must issue a *written determination* regarding responsibility which is provided to the parties simultaneously. The written determination must include the following:

- The sexual harassment allegations;
- A description of the steps taken from the beginning of the receipt of the complaint through the determination by the decision-maker (including any notifications to the parties, interviews with the parties and witnesses, site visits, and methods used to gather other evidence)
- Findings of fact supporting the determination;
- Conclusions regarding the application of the district's code of conduct to the facts;
- A statement and explanation for the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the district imposes on the respondent, and whether remedies designed to restore or preserve equal access to the district's education program or activity will be provided by the district to the complainant; and
- The permissible reasons for an appeal and the appeal process.

When does the determination of responsibility become final?

If an appeal is filed, the date that the district provides the written determination of the result of the appeal. If no appeal is filed, the day after the last day to file an appeal.

THE APPEAL PROCESS

The district/school must offer both parties an opportunity to appeal from a determination of responsibility or a dismissal of a formal complaint or a dismissal of any of the allegations of a formal complaint on the bases of the following:

- Procedural irregularity that affected the outcome of the matter;
- New evidence that was not reasonably available at the time the determination was made that could affect the outcome of the matter; or
- The Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias for or against the complainant or respondent that affected the outcome of the matter.

What must the district/school do if an appeal is filed?

The district/school must do the following:

- Send written notice to the other party that an appeal has been filed;
- Give both parties a reasonable opportunity to submit a written statement;
- Provide both parties simultaneously a copy of the written decision describing the result of the appeal and the basis for the decision.

INFORMAL RESOLUTION

- Applies after a formal complaint is filed
- Both parties must give voluntary, informed, written consent
- Process cannot be used in the employee/student context
- Either party has the right to withdraw from the process prior to an agreement
- If an agreement is reached, put the terms in writing, and be specific
- Require confidentiality to the extent allowed by law

RECORDS RETENTION

Any records related to the school's entire response and process relating to an allegation of sexual harassment must be maintained in accordance with the district's record retention schedules or *a minimum of seven years*, whichever is longer.

The requirement also applies to training materials.



Questions and Answers

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