Title IX Basic and Role Training for K-12 Administrators

October 30, 2020
Presented by Jackie Gharapour Wernz

Ask Questions
Why are we here?

Know the Rules
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

According to a 2017 report from the Justice Department, only 23 percent of all sexual assaults are reported to the police.
Harassment and assault can have long lasting, detrimental effects on victims
Effects on Individuals

- Depression
- Drop-out
- Anger
- Disengagement
- Distraction
- Conflict
- Mistrust
- Acting out
- Absenteeism
- Suicidal
- Anxiety
- PTSD
- Fear
- Poor performance in school
- Lost Opportunities

Effects on Teams

- Decreased focus
- Lost productivity
- Withdrawal
- Absenteeism
- Lack of trust in leadership
- Neglect
- Malingering
- Turnover
Unfair processes can have long lasting, detrimental effects on the parties.

Mattress Protest and Its Aftermath

Case of alleged rape at Columbia first yielded much sympathy for the accuser and protest, but ends with the university apologizing to the accused. The case has had a lasting impact on the discussion of sexual assault on campus.

By Jeremy Bauer-Wolf // July 24, 2017

When the university told my wife about the sexual-harassment complaints against her, we knew they weren’t true. We had no idea how strange the truth really was.
Responding to Harassment

Is required by the law
You could be personally responsible.

Ice Breaker
Have you been involved in a Title IX complaint during your time at the District?

Yes

No
Have you been involved with a student or employee issue involving unwanted conduct on the basis of sex?

Yes

No

In the Zoom Chat

Name, Title

What is the most important question you would like answered today?
What is Title IX?

What is the first word you think of when you hear "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 the School Respond to Sexual Harassment?

It Depends Who [Well, Which Law] You Ask

**Employment**
- State Civil/Human Rights Law
- Title VII
- Title IX

**Students**
- State Civil/Human Rights Law
- 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.
Notice

ACTUAL knowledge

To Title IX Coordinator or "official with authority" (all K-12 employees)

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
Actual Knowledge

1. Sense
2. Report

Reporting Sexual Harassment: Who, How and When?

• Any person may report sex discrimination, 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
Key Word: “Allegation”

Once a school has notice of an allegation that, if true, would constitute Title IX 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 Sexual Harassment grievance process.

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Order of protection: Principal served with order of protection requiring student to have no contact with another student due to alleged sexual assault.
Does the Principal have "actual knowledge" of the sexual assault claim?

Yes  No

What is Sexual Harassment?
It Depends
Who [Well, Which Law] You Ask

**Employment**
- State Civil/Human Rights Law
- Title VII
- Title IX

**Students**
- State Civil/Human Law
- Title IX

**Title IX Sexual Harassment**
- Employee quid pro quo
- Hostile environment (newly defined)
- Clery/VAWA “Big 4”
Quid Pro Quo

Quid = Something

Pro = For

Quo = Something
Title IX Quid Pro Quo

**Definition:** An employee of the educational institution conditioning an aid, service, or benefit of the educational institution on participation in unwelcome sexual conduct

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

**Codified:** Severity and harm presumed

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**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 a Hostile Environment

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

**subjective + reasonable person**
Severe

- Something more than juvenile behavior
- Something more than antagonistic, non-consensual, and crass conduct
- Simple acts of teasing and name-calling are not enough, even when comments are based on sex
- It is not enough to show that a student has been teased or called offensive names

What is the first word you think of when you hear "pervasive"?
Pervasive

- Systemic or widespread
- Multiple incidents of harassment
- One incident is not enough, even if very severe

What is the first word you think of when you hear "objectively offensive"?
Objectively Offensive

• Behavior that would be offensive to a reasonable person under the circumstances
• Not just offensive to the victim, personally or subjectively
• Consider ages, numbers, relationships

Constellation of surrounding circumstances, expectations, and relationships
Hostile Environment Factors

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

Identity, Number, Ages, and Relationships of the Persons involved
Yes or No?
Is this “Title IX Sexual Harassment”?
A teacher makes a sexually inappropriate comment to a student in class?

- Yes
- No
- Need more information

One student grabs another student's breasts during a soccer game.

- Yes
- No
- Need more information
A student "uses tongue" during an acting scene without the other student's permission.

Yes
No
Need more information

A group of students (one sex) make a Facebook post rating students (another sex) by attractiveness and share with school community

Yes
No
Need more information
A teacher (one sex) tells a student (another sex) to trade a back rub in the classroom for a good grade on a test

Yes
No
Need more information

Students incessantly mock a female student for not wearing makeup saying she looks "like a boy"

Yes
No
Need more information
### A student sends a completely nude picture to the student's significant other (another student)

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<tr>
<td>Yes</td>
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<td>No</td>
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<td>Need more information</td>
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### The recipient student forwards the photo to 20 classmates

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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.
Title IX Sexual Harassment Must Be “In a Program or Activity”

Program or Activity: Any location, events, 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?

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.
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.

Schools need only address sex discrimination occurring against a person in the United States under Title IX.
DISMISSALS

Mandatory if conduct alleged:
- Not Title IX Sexual Harassment
- 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)

How Must You Respond?
Board Policies on Harassment

Option 1: Title IX Sexual Harassment Procedure

Option 2: Uniform or General Grievance Procedure (violation of law, violation of board policy)

Option 3: Other rules or policies not related to SH
Adequate Response

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

Title IX Coordinator

• Must be called Title IX Coordinator
• Must meet with alleged victims of sexual harassment (the Title IX Complainant) upon actual knowledge of Title IX harassment even if no formal complaint filed
• Can delegate responsibilities
**Terminology**

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

**Title IX Coordinator**

The 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

**New: Initial Response**
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).

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
• Should be confidential

Emergency Removal/ 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., expulsion laws, “change in placement” under IDEA or 504

Employee administrative leave (34 C.F.R. 106.44(d))
• Not prohibited
• Consider state law, board policy, handbooks, and bargaining agreements
## Informal Resolution (Voluntary)

<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>
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<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>
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<td>• Cannot require use of informal resolution process</td>
<td>• Requires voluntary, written consent from both parties</td>
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<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>
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<tr>
<td>• Not available to resolve allegations that employee sexually harassed a student</td>
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**Franczek**
Informal Resolution Facilitators

• We do not recommend using the Title IX Coordinator or investigator(s) or decisionmakers (complaint and appeal)

Investigation
New:
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

Who should investigate?

- Can be the Title IX Coordinator
- But should it?
• 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)

More Steps: Written Notice

• 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
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 directly related 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 Plans Aren’t Static

Reassess plan for investigation frequently

Gathering Other Evidence
Warning! Hands off

- Rape shield (for CP)
  - Unless
    1. Used to prove someone other than respondent committed the conduct or
    2. Specific incidents related to the RP to show consent
- Medical records (treatment)
- Privileged information

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 directly related 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 all 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 other determination of responsibility
4 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
- 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

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**Warning! Hands off**

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  - Unless
    1. Used to prove someone other than respondent committed the conduct or
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Rulings on Relevance in Written “Cross”

• Provide reasoning for irrelevance
• Admit and consider all relevant evidence
• Questions must be appropriate
• Identify exceptions

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<table>
<thead>
<tr>
<th>Identify</th>
<th>Identify the allegations</th>
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<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>
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**Written Determination**

Remember the Standard of Proof

Preponderance of the Evidence
Remedies

- Can be punitive/disciplinary
- Can be supportive measures or similar actions as well
- Can address individuals or larger community
Appeal Process

• Available to both parties
• Can appeal determination regarding responsibility or dismissal
• Three bases for appeal (must impact outcome):
  • Procedural issue;
  • New evidence not reasonably available; or
  • Conflict of interest or bias

Appeal Process

• Notify party of appeal in writing
• Apply procedures equally for both parties
• 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)

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**Bias, Conflicts of Interest, and Other Fairness Concerns**
Bias, Conflict, 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 not prejudge any matter before them.

• Consider perceptions, not just reality
  ➢ Institution bias
  ➢ Your friendship or other relationship with the accused or their family
  ➢ Your personal characteristics
  ➢ Your personal conflicts (even if just perceived)
  ➢ Personality conflicts
What is the first word you think of when you hear "bias"?

What is the first word you think of when you hear "conflict of interest"?
What is the first word you think of when you hear "prejudgment"?

Go Back and Think

What steps can you take to avoid:

Prejudgment
Conflict of Interest
Bias
Recordkeeping

- 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)

Written Notice: Required

Resulting consequences of participating (e.g., records)
Written Notice: Required

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

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.
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