

# **Sexual Harassment Complaints: Title IX Requirements**

*General Overview &  
Investigator Training*

# Brief Overview: What is New

- May 6, 2020, U.S. Dep't of Ed., OCR issued rule amending Title IX regulations
- Final rule went into effect on August 14, 2020



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# Brief Overview: What is New

- Sexual harassment is now expressly addressed in REGULATION
- Designation of Title IX Coordinator
- Notice requirements re: Title IX Coordinator
- “Notice” v. “Formal Complaint” and how to address each
- Publication of notice in handbooks and on website



# Brief Overview: What is New

- A school becomes liable for sexual harassment where it has been deliberately indifferent to actual notice of harassment
- Notice is imputed to school when **ANY school employee becomes aware that sexual harassment may have occurred**

# Examples of Notice

- Sally reports to her paraprofessional that Jeff keeps trying to grab her breasts and butt
- Johnny reports to his teacher that almost everyday, during online classes, Jennifer uses a homophobic slur toward him in the chat function
- Jessica reports to the bus driver on her way home one day that Stephanie had photoshopped Jessica's head on a nude photo and sent it to the entire 7<sup>th</sup> grade class

# Examples of Notice

David tells his best friend that a coach makes him very uncomfortable because one evening after a training session, the coach got into the shower at the same time David was showering and has, several times since then, rubbed David's shoulders and brushed up against him in a way that David finds creepy. David is really upset now because this coach told him privately that he would like to make David team captain next year, but David is going to need to do "something" for him. The best friend goes to a teacher and tells him what David said

# Examples of Notice

Parent of Jamie tells her neighbor, who works in the cafeteria of the local middle school, that she saw messages from a boy on her daughter's phone that included a demand for a nude photo and threat to tell everyone on social media that she is a whore if she doesn't send him the picture. Parent tells her neighbor that she blocked the student's number but isn't planning to alert the school

# Brief Overview: What is New

- Formal Complaints can only be filed by alleged victim
- But ALL notice triggers certain obligations
- Investigation must follow grievance procedure
- Investigators CAN NOT be decision makers regarding determination of responsibility
- Title IX Coordinator, investigators and decision makers must be trained in Title IX regulations



# School Liability

A school will violate 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 Actual Knowledge of Harassment?

- 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

# 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?

# 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

# Avoid Deliberate Indifference

Title IX Coordinator must PROMPTLY contact every complainant to discuss

- Wishes regarding supportive measures
- That supportive measures are available with or without filing a formal complaint
- The process for filing a formal complaint

# Avoid Deliberate Indifference

- Treat complainants and respondents equitably
- Offer supportive measures in all cases
- Investigate every instance of formal complaint
- Use procedures set out in the regulations
- Provide complainant remedies if respondent is found to have responsibility

# DISCIPLINE

- CANNOT discipline a student for sexual harassment until this entire grievance process is complete
- Do not code any conduct violation as sexual harassment



Informal v. Formal

# **PROCEDURES UPON RECEIPT OF REPORT OF SEXUAL HARASSMENT**

# Reporting

- Any person can report and school responsibilities are triggered
  - **Send notice of any report to Title IX Coordinator**
- Only victim, who is student or employee of school can file formal complaint
- **HOWEVER**, Title IX Coordinator can sign a formal complaint where victim will not, triggering investigation

# All Notice Triggers Responsibility

- Contact alleged victim immediately to discuss as indicated in previous slide
- Offer the complainant **supportive measures**
  - Supportive measures are non-disciplinary, 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

# Examples of Supportive Measures

- Counseling
- Course modifications
- Schedule changes
  - For complainant or respondent
- Increased monitoring or supervision
- No contact mandate
- Designed to restore or preserve equal access to education program or activity
- Do not unreasonably burden either a complainant or respondent

# Supportive Measures

Do not sanction or discipline respondent in any way until grievance procedure has been followed

- Do not completely remove a student respondent from an educational activity as a supportive measure for complainant
- UNLESS there is need for an emergency removal, which can only happen if necessary to protect an individual from IMMEDIATE THREAT TO **PHYSICAL** HEALTH OR SAFETY

# 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.

# 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, the school must provide written notice of the additional allegations.

In order to investigate and make decisions about sexual harassment, we must

# **UNDERSTAND REGULATION DEFINITION OF 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.

# Definition of Sexual Harassment: Element 1

Element 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: Element 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 programs and activities.

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

# Definition of Sexual Harassment: Element 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



# Element 3 Definitions

- Sexual assault: an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.
- Stalking: means engaging in a course of conduct directed at a specific person that would cause a reasonable person to: 1) fear for his or her safety or the safety of others; or 2) suffer substantial emotional distress

# Dating Violence

Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim and where the existence of such a relationship shall be determined based on a consideration of the following factors:

- 1) the length of the relationship;
- 2) the type of relationship;
- 3) the frequency of interaction between the persons involved in the relationship

# Domestic Violence

Violence committed by a current or former spouse or intimate partner of the victim, a person whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of Arizona, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction

# **CONDUCTING INVESTIGATIONS**

# Basic Premises

- Ensure that notice of complaint is provided as described above
- Investigator/Title IX Coordinator/Decision maker must not have a conflict of interest
  - Against the specific complainant or respondent or
  - Against complainants or respondents in general

If you have a conflict of interest, notify the Title IX Coordinator immediately

# Basic Premises: Investigators and Decision Makers

- **Be IMPARTIAL**
- Presume that the respondent is not responsible for the alleged conduct
- Don't make assumptions about who can experience sexual harassment
- Follow the District's grievance procedure
- Treat parties equitably by providing *remedies* to a complainant ONLY if a determination of responsibility is made against respondent

# Basic Premises: Investigators

Meet the timeline set out in the District's policy-there must be a reasonably prompt investigation (specific number of days for completion of the process must be established)

- If there is a temporary delay for good cause, provide written notice to both parties explaining the reason for the delay
- School administrative needs DO NOT create good cause for a temporary delay

# Basic Premises: Investigators

Non-exhaustive list of reasons that may create a good cause delay in completion:

- Concurrent law enforcement activity
- Witness availability
- A pandemic-related reason (illness, unavailability)
- School breaks
- Absence of a party
- Availability of a party's advisor
- Need for language assistance or ADA accommodations



# Your Job Is (Mostly) Finished

- Decision-makers use the body of evidence in investigators report to determine whether sexual harassment has occurred
- If so, site administrators will likely have some role in the implementation of sanctions (but someone other than investigator should do this)
- May have some role in remedies

# Remedies

If the decision-maker determines that the respondent is responsible for the conduct, then remedies will be provided to complainant that will restore or preserve equal access to the education program or activity

- Same types of things as supportive measures except that they can be punitive toward respondent

**A FEW MORE IMPORTANT  
THINGS**

# 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

# Retaliation

- DON'T DO IT
- Do not take any action against any person for the purpose of interfering with rights under Title IX or because the person participated **or refused to participate** in a Title IX proceeding
- Keep the names of all individuals involved confidential except as necessary to investigate

# Retaliation

Beware of disciplining for a non-harassment code of conduct violation where you learned of the violation via the sexual harassment complaint—it can be done, but better be an infraction for which you typically discipline

- Someone other than the investigator should process any such discipline and should know as little as possible about the Title IX Complaint

# Questions?

