



TITLE IX: SEXUAL HARASSMENT

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This presentation is meant to give you some basic information, and the materials are not intended to be relied upon as legal advice. If you have any questions, please contact your attorney or Pemberton Law.



“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.”

20 U.S.C. §1681





Purpose

- Protect every student's right to educational opportunities free from sex discrimination
- Previously never formally addressed sexual harassment or assault
- New requirements:
 - What constitutes sexual harassment
 - What triggers a school's legal obligation to respond
 - How a school must respond



Sexual Harassment

Sexual Harassment

- Old definition used for Title IX:
 - “unwelcome conduct of a sexual nature” that included “unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.” OCR Guidance for Title IX



Sexual Harassment

- New Title IX defines Sexual Harassment as:
 - An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
 - Unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
 - Sexual assault, as defined in 34 C.F.R. 668.46(a)

34 C.F.R. §106.30



Sexual Harassment

- If the formal complaint does not meet this new definition, a complaint **must be** dismissed with respect to whether it constitutes sexual harassment under Title IX.

34 C.F.R. 106.45(b)(2)(B)(3).



Title IX Coordinator

Title IX Coordinator

- Notify applicants for admission and employment, parents, students, and all unions of the name of employee designated as the Title IX Coordinator
- Notify all of existence of grievance procedure/policy
- Prominently display contact info in Title IX policy including on website and/or in handbook



When a School Must Respond

1. When the school has actual knowledge of sexual harassment

New rule expands “actual knowledge” to **include notice to any elementary or secondary school employee and that any person** (alleged victim or third party) may report to the Title IX Coordinator. 34 C.F.R. §106.30

2. That occurred within the school’s education program or activity

“education program or activity” = school exercised substantial control

3. Against a person in the U.S.



When a School Must Respond Continued

- Prompt response that is not deliberately indifferent
- Mandatory response obligations:
 - Offer supportive measures for victim
 - “**Supportive measures**”: individualized services reasonably available that are non-punitive, non-disciplinary, and not unreasonably burdensome while designed to ensure equal educational access
 - Coordinator contact complainant confidentially (regardless of formal or informal complaint)
 - Follow grievance process
 - Investigate any sexual harassment allegations



A Fair Grievance Process

A Fair Grievance Process: Complaint

- “Formal Complaint” = a document that is either **filed by a complainant or signed by the Title IX Coordinator**
 - Complainant = an individual **who is alleged to be** the victim of conduct that could constitute sexual harassment. 34 C.F.R. §106.30
- Can still have an informal resolution process
- BUT if agree in writing to voluntarily participate in informal process, schools cannot offer an informal complaint process until a formal complaint has been filed. 34 CFR 106.45(b)(9).
 - Exception: Informal complaint process not permitted to resolve employee sexually harassed student



A Fair Grievance Process: Complaint Continued

- ONLY complainants and Title IX Coordinator can file a formal complaint
 - Third party cannot
 - Third party may report sexual harassment, but this is not a formal complaint
- If complainant does not complete formal complaint, Title IX Coordinator needs to finish otherwise cannot begin grievance procedure



A Fair Grievance Process: Standard of Proof

- OCR encouraged “**preponderance of the evidence**” meaning “more likely than not” standard
- Now, Schools MAY use “**clear and convincing evidence**” meaning “substantially more likely than not”
- Schools may use either standard but must choose one and apply it to all sexual harassment complaints. 34 C.F.R. 106.45(b)(1)(vii).



A Fair Grievance Process: Notice Requirements

- Must provide written notice to all parties for a formal complaint
- Include in notice:
 - Any grievance processes
 - Allegations with “sufficient details known at the time” and “sufficient time to prepare a response before any initial interview” 106.45(b)(2).
 - Must provide key info about allegations so they can investigate and meaningfully participate
 - Right to advisor of choice
 - Presumption of Innocence
 - Relevant Code of Conduct provisions



A Fair Grievance Process: Compliance with FERPA

- Title IX is an exception to FERPA
- Title IX complainant anonymous except where necessary for respondent to have due process rights for a fair grievance process



Investigation

Investigative Process

- Must investigate and send written notice of allegations
- Right to be present and receive notice of any meetings, hearings, or interviews
 - Date, time, location, participants, and purpose of interviews, meetings or hearing with sufficient time must be provided in writing
- Provide all evidence subject to inspection and review electronically or hard copy before investigation report is completed
- No gag orders



Investigative Process

- Schools may dismiss a formal complaint or allegations if complainant asks and:
 - The respondent is no longer enrolled or employed by school
 - Or if specific circumstances prevent school from gathering sufficient evidence to reach a determination
- Schools must give notice of dismissal and reason for dismissal



Investigative Process

- Parties must be given **10 days** to submit written responses for investigator to consider
- Investigation reports must be sent to both parties for review and response **at least 10 days before** any determination of responsibility is made. 34 C.F.R. 106.45(b)(5)(vii)
 - Different than 10 days to review and respond to evidence
- Schools **cannot** access, consider, disclose, or otherwise use party's records maintained by a recognized professional unless school obtains that party's voluntary written consent. 34 C.F.R. 106.45(b)(5)(i).



Determination of Responsibility

Determinations Of Responsibility

- Schools can voluntarily choose to provide for live hearings but do not have to
- With or without live hearing, must provide:
 - Opportunity to submit “written, relevant questions”
 - Provide answers to those questions; and
 - Allow for additional limited follow-up questions

34 C.F.R.106.45(b)(5)(vii).



Determinations Of Responsibility

- **Rape Shield:** Questions about complainant's sexual predisposition or sexual behavior are **generally irrelevant** except for specific purposes related to demonstrating that someone other than the respondent engaged in the alleged behavior or if specifically related to an issue of consent



Determinations Of Responsibility

- Neither Title IX Coordinator nor investigator can make final determination
- Must be provided to both parties simultaneously
- Not final until appeal period expires, or appeal is resolved



Determinations Of Responsibility

- Written determination must include:
 - Identify sexual harassment allegations
 - Description of procedural steps taken
 - Findings of fact supporting determination
 - Conclusions regarding school's code of conduct
 - Statement and rationale for result for each allegation
 - Procedures and permissible reasons for appeal

34 C.F.R. 106.45(b)(7)(ii)



Appeals

Appeals

- Either party can appeal
- Three required appeals:
 - Procedural irregularity
 - New evidence
 - Title IX Coordinator, investigators, or decisionmaker had a conflict of interest or biased
- Set equal procedures for both parties
 - Opportunity to submit written statement in support of or challenging outcome
 - Submit decision simultaneously



Informal Resolution

Informal Resolution

- Both parties must voluntarily agree
- School cannot require waiver of right to investigate and adjudicate formal complaint
- Cannot offer informal resolution unless a formal complaint is filed
- Any time prior to resolution, party has right to withdraw and resume formal process
- Not available for allegations that employee sexually harassed student

34 C.F.R. 106.45(b)(9)



Training

New Training Requirements

- All involved must be trained in new requirements
- 7-year retention period 34 C.F.R. 106.45(b)(10)(i)(D)
- Training materials must be publicly available on website
- Cannot rely on sex stereotypes



New Training Requirements

- Need training of:
 - Definition of “sexual harassment”
 - Scope of school’s education program or activity
 - Investigation and grievance process
 - Importance of serving impartially
 - Avoiding conflict of interest and bias
 - Technology used for live hearing
 - Rape Shield Protections



Prohibited Retaliation

Prohibited Retaliation

- Cannot charge employee with code of conduct violations that arise from facts of report or formal complaint
- Must keep confidential identity of complainant, respondents, and witnesses
 - Exception FERPA
- Can charge an employee with code of conduct violation for making materially false statement in bad faith during grievance process



Questions?



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