

# Title IX Training



# Introduction

- Review the new Title IX regulations governing sexual harassment complaints, investigations, and final actions.
- Provide training for Title IX coordinators, investigators, and decision-makers.

# Overview of Title IX

- Title IX is a federal law that prohibits discrimination on the basis of sex by any education program or activity receiving federal funding. 20 U.S.C. 1681(a)
- It applies to both students and employees in “any academic, extracurricular, research, occupational training, or other education program or activity.” 34 C.F.R. 106.31(a)
- The focus of this training are the new regulations governing sexual harassment under Title IX.

# Training Requirements

- Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process must be trained on:
  - Title IX's definition of sexual harassment;
  - The scope of the school's educational programs and activities;
  - How to conduct an investigation and grievance process, including hearings, appeals, and informal resolution processes;
  - How to serve impartially, including by avoiding prejudgment of facts at issue, conflicts of interest, and bias;
  - How to determine whether questions and evidence are relevant;
  - When questions and evidence about a complainant's sexual predisposition or prior sexual behavior are relevant; and
  - How to prepare an investigative report that fairly summarizes relevant evidence. 34 C.F.R. 106.45(b)(1)(iii).

# Definitions

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# School Programs or Activities

- An “education program or activity” includes “locations, events, or circumstances over which the recipient exercised substantial control over both the [subject of a complaint] and the context in which the sexual harassment occurs...34 C.F.R 106.44(a)

# Sexual Harassment

- Sexual harassment is conduct on the basis of sex that includes one or more of the following:
  - An employee conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
  - Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to a school's education program or activity;
  - "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 1229 (a)(10), "domestic violence" as defined in 34 U.S.C. 12291 (a)(8), or "stalking" as defined in 34 U.S.C. 12291 (a)(30).

# Supportive Measures

- Non-disciplinary, non-punitive individualized services offered as appropriate and reasonably available to the complainant or the respondent.
- Must be offered at no cost.
- Must be offered before or after a formal complaint is filed or if no formal complaint is filed.
- Designed to deter sexual harassment and to restore or preserve equal access to an education program or activity by both parties without reasonably burdening the other party, which includes protecting the safety of all parties and the educational environment.
- Must be kept confidential to the extent doing so does not impair the ability of a school to provide supportive measures.
- Coordinated and implemented by the Title IX Coordinator.

# Designated Personnel

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# Title IX Coordinator

- Title IX Coordinators must coordinate the school's efforts to comply with Title IX. 34 C.F.R.106.8(a).
- The Title IX Coordinator may be designated by a title, "Human Resources Director" rather than by name.
- Due to the sensitive nature of the information and processes handled by the Title IX Coordinator, it is best practice that this individual be an administrator or director-level employee.

## **Investigators, Decision-makers, and Informal Resolution Facilitators**

- Schools must designate *at least* one individual in each of these roles.
- The same individual may serve in multiple roles, but may not do so in the same complaint.
- Individuals in these roles must not demonstrate bias against complainants or respondents generally, and no bias in individuals' investigations.

# Grievance Procedure

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# Purpose

A grievance procedure must “provide for the prompt and equitable resolution of student and employee complaints alleging any action prohibited by [Title IX].” 34 C.F.R. 106.8(c).

# Requirements

- Complainants and respondents must be treated equally.
- All relevant evidence must be objectively evaluated and credibility determinations must not be solely based on a person's status as a complainant, respondent, or witness.
- Individuals involved in the Title IX grievance process must be trained and must not demonstrate bias.
- The respondent is presumed not responsible for the alleged conduct until a determination of responsibility is made after the grievance process.
- There must be reasonably prompt time frames for conclusion of the grievance process.

# Requirements, con't...

- The range of potential disciplinary sanctions must be outlined.
- The standard of evidence used must be identified.
- Appeal procedures and basis for appeal must be outlined.
- Range of supportive measures available to complainants and respondents must be described.
- The procedures must not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege unless the person holding the privilege has waived the privilege.

# **Allegations and Formal Complaints of Sexual Harassment**

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## Reporting Sex Discrimination or Sexual Harassment

- **ANY PERSON** may report sex discrimination or sexual harassment to the Title IX Coordinator.
- A report may be made by any means that results in the Title IX Coordinator receiving the person's verbal or written report.
- A report may be made at any time, regardless of business hours. 34 C.F.R. 106.8(a).
- A parent of a dependent child may file a formal complaint on behalf of their child. 34 C.F.R. 106.6(h).

## Actual Notice

- A school must act once it has “actual knowledge” of alleged sexual harassment.
- “Actual knowledge” is imputed to a school if any employee has notice of the sexual harassment allegation. 34 C.F.R. 106.30(a).
- Best practice is for any employee who has notice of a sexual harassment allegation to report it to the Title IX coordinator.

## Response to Allegations of Sexual Harassment

- A school's response to allegations of sexual harassment cannot be "deliberately indifferent."
- A school's response is deliberately indifferent if it is "clearly unreasonable in light of the known circumstances." 34 C.F.R.160.44(a).

# Complaints

- Three types:
  - Formal Complaints
  - Title IX Coordinator Complaints
  - Complaints that are not formal complaints

# Formal Complaints

- A formal document filed by an individual who is the victim of alleged sexual harassment or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting an investigation. 34 C.F.R. 160.30(a).
- Once a formal complaint is filed, the grievance process must be followed.

# Notice of a Formal Complaint

- Notice of a formal complaint to respondent must include:
  - Notice of the grievance process, including any informal resolution process
  - Notice of the allegations potentially constituting sexual harassment, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment, and the date and the location of the alleged harassment, if known. The notice must also include:
    - A statement that the respondent is presumed not responsible for the alleged conduct;
    - A statement that the parties may have an advisor of their choice, who may be, but is not required to be, an attorney;
    - A statement that the parties may inspect and review evidence;
    - Notice of any provision in the school's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

# Title IX Coordinator Complaints

- The Title IX Coordinator is the only school official with authority to initiate a formal complaint.
- The Coordinator may file a complaint over the objection of a complainant if it is “reasonable” to do so.

# Complaints that are not formal complaints

- A school must respond to any complaint, regardless of whether it is a formal complaint.
- A school cannot act in a deliberately indifferent manner.
- If a school has actual knowledge of potential sexual harassment, the Title IX Coordinator must promptly contact the suspected victim (“complainant”) to discuss the availability of supportive measures, inform the complainant of the availability of supportive measures regardless of whether a formal complaint is filed, and discuss the process for filing a formal complaint.” 34 C.F.R. 160.44(a).

# Investigating a Formal Complaint

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# Obligation to investigate or dismiss

- If a formal complaint is filed, the school's investigator must initiate an investigation.
- A complaint must be dismissed if:
  - The conduct alleged in the formal complaint would not constitute sexual harassment; or
  - Did not occur against a person in the United States.

# Investigation Process Standards

- Investigation procedures must address the following elements:
  - Schools bear the burden of proof and are responsible for gathering evidence.
  - A school cannot access, consider, disclose, or otherwise use a party's records from a physician, psychiatrist, psychologist, or similar professional that are made and maintained in connection with treatment of that party unless the party (or parent) provides voluntary, written consent.
  - Both parties must have an opportunity to present fact and expert witnesses, and evidence.
  - Parties must be allowed to discuss allegations with other individuals.

## Investigation Process Standards, con't...

- The school must provide the parties with the same opportunities to have others present during the grievance proceeding, including an advisor. This may be an attorney.
- The school must provide reasonable advance written notice of the date, time, location, participants, and purpose for any meetings, including hearings or investigative interviews, to any invited or expected participant.
- Both parties must be allowed to review all evidence.

## Investigation Process Standards, con't...

- The investigator must prepare an investigation report that fairly summarizes relevant evidence and provide a copy of the investigation report to each party and their advisors at least ten days before a determination of responsibility is made by the decision-maker.
- Prior to completing the investigative report, the investigator must send all evidence to the parties or their advisors, if any, and provide the parties ten days to submit a written response.

# Formal Complaint Resolution

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# Hearing

- K-12 schools are not required to have live hearings, but may do so if they wish.
- If there is no hearing, the decision-maker must allow each party to submit written questions to any party or witness once the investigation report is provided to the parties.
  - The decision-maker makes the decision as to relevancy of the questions.
  - If the questions are relevant, they are sent to the party or witness, who is given time to provide a written response.
  - That written response must be provided to the party who asked the question.
- Limited follow-up questions must also be allowed.

# Informal Resolution

- Complaints may be resolved informally as long as it is completely voluntary for both parties.
  - Consent must be in writing.
- The informal resolution process may be initiated any time prior to a decision.
- Prior to agreeing to an informal resolution process, parties must receive written notice.
- An informal resolution process cannot be offered unless a “formal complaint” is filed.

# Written Decision

- A decision must be provided in writing and contain the following:
  - Identification of the allegations potentially constituting sexual harassment;
  - A description of the procedural steps taken;
  - Findings of fact supporting the determination;
  - Conclusions regarding the application of the school's code of conduct to the facts;
  - A statement of, and rational for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the school's education program or activity will be provided by the school to the complainant; and
  - The school's procedures and permissible bases for the complainant and respondent to appeal. 34 C.F.R. 106.45(b)(7).

# Appeals

- Any party may appeal from a determination of responsibility or dismissal. 34 C.F.R. 106.45(b)(8).
- Grounds for appeal:
  - Procedural irregularity that affected the outcome;
  - New evidence that was not reasonably available at the time the determination regarding responsibility or a dismissal was made and that could affect the outcome of the matter; and
  - The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complaints or respondents generally or the individual complainant or respondent that affected the outcome.

# Removals

- A school may remove a student from an education program or activity on an emergency basis.
  - To do so, the school must do an individualized safety and risk analysis, to determine that an immediate threat to physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies the removal;
  - Must provide respondent with notice and an opportunity to challenge the decision;
  - An employee may be placed on a paid suspension during an investigation. 34 C.F.R. 106.44(d).

# **Additional Title IX Requirements**

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# Prohibition on Retaliation

- The regulations prohibit schools from intimidating, threatening, coercing, or discriminating against anyone for the purpose of interfering with a right or privilege provided by Title IX or because a person made a complaint or participated in an investigation. 34 C.F.R. 106.71(a)
- Complaints about retaliation should be investigated in the same way as a sexual harassment complaint.

# Recordkeeping

- For any incident that requires a response, the school must maintain records of the complaint, any discipline or other consequences, and any remedies or supportive measures offered to the complainant for **seven years**. 34 C.F.R. 106.45(b)(10)(ii).
- Records of any investigation, appeal, and informal resolution must be kept for **seven years**. 34 C.F.R. 106.45(b)(10)(i).

# How to Conduct an Investigation

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# Preliminary Steps - Review the Complaint

- Review the complaint to determine whether the alleged conduct, if true, would meet the definition of sexual harassment or retaliation.
- If the allegations would not support a finding of sexual harassment or retaliation, if proven to be true, the formal complaint must be dismissed.
- If the allegations would support a finding of sexual harassment or retaliation, then there must be an investigation or voluntary resolution.
- If the allegations could potentially constitute criminal conduct or child abuse, please review and follow mandatory reporting obligations.

# Preliminary Steps - Make a Plan

- Identify who should be interviewed (complainant, respondent, and any witnesses).
- Identify any documents mentioned in the complaint to review prior to interviewing individuals.
  - Obtain documents if they are not provided.

# Additional Preliminary Steps

- Ensure that notice has been provided to the known parties.
- Determine if a respondent should be placed on leave.
- Determine whether supportive measures need to be put in place for the complainant or respondent.

# Interviewing the Complainant

- Provide written notice to the complainant of the date, time, location, participants, and purpose of the interview.
  - Notice must be provide with “sufficient time for the party to participate.”
- During the interview:
  - The complainant may have a representative of his or her choice.
  - The investigator should explain the purpose of the interview and that the school takes complaints seriously.
  - Do not guarantee confidentiality. This is not consistent with the Title IX regulations and can impede the investigation.
  - Explain the investigator’s role in the process as an impartial investigator.
  - Explain the investigation process.
  - Ask the complainant *who, what, when, where, why, and how*. Get specific dates, places, and descriptions of the alleged incidents, names, and statements. Try to get as much detail as possible.
  - Do not be afraid to ask tough questions.
  - Ask for corroborating evidence.
  - Ask who the complainant spoke to after the incident, if anyone. Get details about this individual(s).
  - Do not guarantee any particular results from the investigation.
  - Explain next steps and the timeframe for completing those steps.

# Interviewing the Respondent

- At the start of the interview, explain that allegations have been made against the respondent.
- Describe the evidence the you have in support of the allegations.
- Let the respondent know this is his/her opportunity to tell his/her side of the story.
- Decide how you will respond if a respondent refuses to answer questions.
- Ask follow-up questions in order to gather details.
- Prepare closing remarks that ask for any other information that may be helpful or any other information the respondent would like to provide. These remarks should also ask the respondent if they felt the investigator provided a full and fair opportunity to respond to the allegations.
- Request the respondent refrain from engaging in retaliation or taking any action which could give the appearance of attempting to influence the testimony of a witness in the investigation.

# Interviewing Witnesses

- Student witnesses
  - Determine whether parents will be invited to attend the interview of their child. Schools are not required to allow parents to attend interviews of fact witnesses.
- Staff witnesses
  - Staff are not entitled to have a representative with them if they are being interviewed as a fact witness.

# Interview Tips

- Prepare a list of questions in advance. These questions should be short and open-ended. This will achieve the goal of having the witness speak more than the investigator.
- Always cover who, what, when, where, why, and how questions.
- Ask follow-up questions if necessary.
- Ask questions to separate what the interviewee knows from personal knowledge from what the interviewee has heard from others.
- Be impartial and thorough. Be respectful, but do not be afraid to ask direct or tough questions.
- Observe witness demeanor throughout the interview and document your observations in your notes.
- Follow-up on all “I don’t know” or “I can’t recall” answers.
- Follow-up if the witness has not answered the question you asked.
- Consider whether it is appropriate for the witness to draw a picture of the setting where the alleged misconduct took place.
- Use your judgment to determine how much to tell the witness about the complaint. Disclose as little as possible.
- Ask if there are any other people who might have information about the incident and determine what information they might have.
- Inform every witness that retaliation will not be tolerated and that it should be reported immediately.

# Investigation Report

- Prior to completing the investigation report, the investigator must provide an opportunity for the complainant and respondent to inspect and review any evidence that is directly related to the allegations.
- They must be allowed 10 days to submit a written response to the investigator.

# Drafting the Investigation Report

- The purpose of the report is to document the actions the investigator took and summarize the evidence received.
- Both parties must be given an opportunity to present inculpatory and exculpatory evidence. The investigator should summarize all *relevant* evidence.
- The report should describe the behavior that occurred.
- An investigator may include “recommended” findings of facts and conclusions, but it is up to the decision-maker to reach a final conclusion.

# Key Elements of an Investigation Report

- Summary of the allegations;
- Summary of the documents reviewed and witnesses interviewed;
- Findings of fact as to what occurred with respect to each allegation.

# Review of the Investigation Report

- The report must be provided to the complainant, respondent, and decision-maker to review.
- If there will be a live hearing, the report must be provided at least 10 days prior to the hearing.
- If no live hearing, the report must be provided at least ten days before a determination of responsibility by the decision-maker.

# Making a Decision- Hearing and Questions

- K-12 Schools may have a live hearing, but it is not required.
- After receiving the investigation report, the complainant and respondent must be allowed to submit written, relevant questions to the other party and/or any witness.
- The decision-maker may exclude irrelevant questions, but must explain that decision.
- Limited follow-up questions must be allowed in writing with written answers provided to the decision-maker and produced to the parties.

# Making a Decision- Written Determination of Responsibility

- The written determination of responsibility must include the following:
  - Identification of the allegations potentially constituting sexual harassment;
  - A description of the procedural steps taken beginning with the receipt of the formal complaint;
  - Findings of fact supporting the determination;
  - Conclusions regarding the application of the school's policies or codes of conducts to the facts;
  - A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions, and whether remedies designed to restore or preserve equal access to the school's education program will be provided to the complainant; and
  - The school's procedures and permissible basis for an appeal.
- The decision must be provided to the parties simultaneously and starts the time period for any appeal.

# Appeals

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# Basis for Appeal

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

# Appeal Process

- The decision-maker on appeal cannot be the investigator or decision-maker on the initial complaint or the Title IX Coordinator.
- The decision-maker for the appeal must provide notice to the other party when an appeal is received.
- Both parties must have an opportunity to submit a written statement in support of, or challenging the outcome.
- The decision-maker on appeal must issue a written decision describing the result of the appeal and rationale for the result.
- The written decision on the appeal must be provided to both parties simultaneously.

# Evaluating Evidence

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# Relevance

- Investigators and decision-makers are tasked with making relevance determinations.
- The regulations do not define relevance, but we can look to the federal rules of evidence for guidance. Under the federal rules of evidence, evidence is relevant if:
  - It has any tendency to make a fact more or less probable than it would be without the evidence; and
  - The fact is of consequence in determining the action.

## Questions and Evidence Regarding Prior Sexual Behavior

- Questions and evidence of this nature will *rarely* be relevant.
- These types of questions and evidence can only be offered to prove:
  - Someone other than the respondent committed the alleged conduct; or
  - If they relate to conduct between the complainant and respondent and are used to prove consent.

# Burden of Proof

- The school *always* has the burden of proof. It is the school's responsibility to gather evidence to support its findings.
- Respondents are entitled to a presumption that they are not responsible for the alleged conduct. If the decision-maker does not have evidence to support any specific fact required to find the respondent responsible, then the decision-maker cannot conclude the respondent is responsible for the alleged conduct.
- Respondent's failure to answer questions asked by the complainant cannot be taken into account by the decision-maker.

# Evidentiary Standard

- The regulation provides two options for evidentiary standards. Schools should choose which one to use:
  - Preponderance of the evidence: more likely than not that something occurred.
  - Clear and convincing evidence: evidence is substantially more likely to be true than not true and the outcome is highly probable.
- The same standard must apply to complaints involving students and employees.

# Credibility Determinations

- The regulations provide no guidance in this area, but the EEOC's guidance is instructive:
  - Inherent plausibility: is the testimony believable on its face? Does it make sense?
  - Demeanor: Did the person seem to be telling the truth or lying?
  - Corroboration: Is there witness testimony or physician evidence that corroborates the party's testimony?
  - Past record: Did the respondent have a history of similar behavior in the past?
- However, none these factors are determinative as to credibility.

# Conflicts of Interest

- Individuals should not participate in a grievance process that includes a family member.
- Other relationships may also affect a decision makers close working relationships for example.
- But a mere prior interaction is not a disqualifying conflict of interest.
- Individuals should not participate in investigations in which they or their family would receive a financial benefit as a result of the grievance process.

**Questions?**

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# Thank You!

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