2020 Title IX Regulations: K-12 Basic Compliance Training

Why Are We Here?

Know Rules: Sexual Harassment complaint form

Recognize Title IX Sexual Harassment

Take Action

But not just any action, the right action for the conduct at issue!
Why is this so important?

According to a 2017 report from the Justice Department, only 23 percent of all sexual assaults are reported to the police.

This doesn't add up:

Harassment and assault can have long lasting, detrimental effects on victims.
**Effects on Individuals**
- Stress
- Disengagement
- Fear
- Mistrust
- Lack of trust in leadership
- Absenteeism
- Drop-out
- Suicide
- Anxiety
- Depression
- PTSD

**Effects on Teams**
- Decreased focus
- Lost productivity
- Withdrawal
- Neglect
- Malingered
- Turnover

**Unfair processes can have long lasting, detrimental effects on the parties**

**Mattress Protest and Its Aftermath**
A case of alleged rape at Columbia first yielded much sympathy for the accuser and a protest, but ended with the university apologizing to the accused. The case has led to a reconsideration of how to handle sexual assault on campus.

**ED Office for Civil Rights (OCR)**

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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, Admission, 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
- Illinois Human Rights Act
- Title VII
- Title IX

Students
- Illinois Human Rights Act
- Illinois Sex Equity Regulations
- Title IX

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 promptly and in a manner that is not deliberately indifferent.

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 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 procedures.

Order of protection: Principal served with order of protection requiring 17 year old male student to have no contact with 16 year old female student due to alleged sexual assault off campus.

Raise Your Hand

Is this notice under the new Title IX?

What is Sexual Harassment?

It Depends Who [Well, Which Law] You Ask

Employment
- Illinois Human Rights Act
- Title VII
- Title IX

Students
- Illinois Human Rights Act
- Illinois Sex Equity Regulations
- Title IX
Title IX Sexual Harassment
- Employee quid pro quo
- Hostile environment (newly defined)
- Clery/VAWA “Big 4”

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

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 Sexual Harassment?

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

**reasonable person**

What is "severe"?

Severe

"Severe" means something more than just juvenile behavior among students, even behavior that is antagonistic, non-consensual, and cruel. The Davis Court made an explicit admonishment that "simple acts of teasing and name-calling" are not enough, "even where these comments target differences in gender." Davis, 526 U.S. at 651, 119 S.Ct. 1661; 652. "It is not enough to show... that a student has been teased or called offensive names" (quotation marks and editorial marks omitted).

Kollaritsch v. Michigan State Univ. Bd. of Trustees, 944 F.3d 613, 620 (6th Cir. 2019)

What is "pervasive"?

Pervasive

"Pervasive" means "systemic" or "widespread," id. at 652-53, 119 S.Ct. 1661, but for our purposes, it also means multiple incidents of harassment: one incident of harassment is not enough. Id. (explaining that this cause of action does not cover "claims of official indifference to a single instance of one-on-one peer harassment"). The Davis Court hypothesized that a single incident could be sufficiently severe that it would result in the articulated injury—and we do not doubt that a sexual assault would be such a severe incident—but the Court held that a single incident would nonetheless fail short of Title IX's requirement of "systemic" harassment.

Kollaritsch v. Michigan State Univ. Bd. of Trustees, 944 F.3d 613, 620-21 (6th Cir. 2019)

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What is "objectively offensive"?

Objectively Offensive

"Objectively offensive" means behavior that would be offensive to a reasonable person under the circumstances, not merely offensive to the victim, personally or subjectively. Id. at 651, 119 S.Ct. 1661. "Whether gender-oriented conduct rises to the level of actionable harassment thus depends on a constellation of surrounding circumstances, expectations, and relationships, including, but not limited to, the ages of the harasser and the victim and the number of individuals involved." Id. (quotation marks omitted). The victim’s perceptions are not determinative. Indeed, the (Davis majority) ... suggests that the ‘objective offensiveness’ of a comment is to be judged by reference to a reasonable child at whom the comments were aimed. Id. at 678, 119 S.Ct. 1661 (Kennedy, J., dissenting).

Kolleritsch v. Michigan State Univ. Bd. of Trustees, 944 F.3d 613, 621 (6th Cir. 2019)

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

Denial of Access

Nor do we contemplate, much less hold, that a mere "decline in grades is enough to survive" a motion to dismiss. Ibd. The dropoff in [the student]'s grades provides necessary evidence of a potential link between her education and [the perpetrator]'s misconduct, but petitioner’s ability to state a cognizable claim here depends equally on the alleged persistence and severity of [the perpetrator]'s actions, not to mention the Board's alleged knowledge and deliberate indifference.

What about....
casual or isolated comments or conduct?

Yes or No?
Is this severe, pervasive, and objectively offensive?

A student makes multiple insensitive jokes to another student?

- Yes
- No
- Need more information

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)

Yes
No
Need more information

The recipient student forwards the photo to 20 classmates

Yes
No
Need more information

ACCESS DENIED
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?

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

DISMISSALS

Mandatory if conduct alleged:
- Not sexual harassment if true
- Did not occur in the school’s program or activity
- Did not occur in the United States

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: NEW Board Policy 2:265 Title IX Sexual Harassment (for Title IX Sexual Harassment only)

Option 2: Board Policy 2:260 Uniform Grievance Procedure (for any other violation of law, including other types of "sexual harassment")

Option 3: Other Board policies prohibiting conduct, e.g., bullying, sex equity policies

Adequate Response

- Initial Response/Supportive Measures
- Internal Investigation
- External Investigation
- Appeal

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 Sexual Harassment even if no formal complaint filed
- Can delegate responsibilities
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

Supportive Measures

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 CFR 106.300).
- Should be designed to restore or preserve equal access to the education program or activity without "unreasonably burdening the other party"
- Should be confidential

Examples of Supportive Measures
- Counseling
- Course modifications
- Schedule changes
- Increased monitoring or supervision
- Supportive measures that completely removes a respondent from an activity would likely be considered punitive, except for "emergency removals" for students and "administrative leave" for employees
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" indicates the removal
- Consider other laws, e.g. 5100 (school tardiness gets you in trouble)

Employee administrative leave (34 C.F.R. 106.44(d))
- Not prohibited
- Consider state law, board policy, handbook and bargaining agreements

What about Protective Orders?

Informal Resolution (Voluntary)

2 Informal Resolution (Voluntary)

Informal Resolution

Informal resolution is not permitted under the following conditions:
- Cannot condition reinstatement, employment, or any right or waiver of right to investigation and adjudication of formal complaint under grievance procedures
- Cannot require use of informal resolution process
- Cannot offer informal resolution process until formal complaint is filed
- Not available to resolve allegations that employee sexually harassed a student

Informal resolution may move forward under the following conditions:
- Any time prior to reaching a determination, either party may request informal resolution
- Requires voluntary, written consent from both parties
- Either party has a right to withdraw prior to agreement

Informal Resolution Facilitators
- We do not recommend using the Title IX Coordinator or investigator(s) or decisionmakers (complaint and appeal)

Written Notice: Required
- 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)
- Resulting consequences of participating (e.g., records)
3 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

ANATOMY OF AN INVESTIGATION

- Written notice to the parties
- Choosing an investigator
- Required elements of an investigation

- 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

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

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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.

Who should investigate?

- Trained
- Unbiased
- No actual or perceived conflict of interest
  - Consider "institutional interests"
- No prejudgment of the facts

Who should investigate?

- Consider the perception of bias
  - Your friendship or other relationship with the accused or their family
  - Your personal characteristics
  - Your personal conflicts (even if just perceived)
  - Personality conflicts

Contents of an Investigation

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<thead>
<tr>
<th>Investigation</th>
<th>34 C.F.R.</th>
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<td>106.45(b)(5)</td>
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<tr>
<th>Contents of an Investigation</th>
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<tr>
<td>- Burden of proof on school</td>
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<td>- Certain treatment records cannot be obtained without voluntary, written consent</td>
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<td>- No restriction of rights of parties to discuss allegations or gather or present evidence</td>
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<tr>
<td>- Same opportunities for others present during interviews or related proceedings (e.g., attorney or non-attorney advisor)</td>
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<tr>
<td>- Written notice to parties of date, time, participants, purpose, and location of each investigative interview with sufficient time to prepare</td>
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<tr>
<td>- All evidence provided to parties and their advisors with 10 days to respond before report</td>
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<tr>
<td>- Written investigative report fairly summarizes the relevant evidence provided to parties and advisors at least 10 days before hearing or other determination of responsibility</td>
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Investigation Best Practices

Investigation plan
Follow steps in policies closely
Coordinate with law enforcement as required by policy and District practice
Remember that both complainants and respondents may be experiencing trauma and other strong emotions
Consult with Title IX Coordinator and/or counsel as needed

Interviewing Best Practices

Explain your role as a neutral
Open-ended questions followed by more tailored follow up
Allow ample time, don't interrupt or rush
Ask "Is there anything else?"
Ask for other witnesses, evidence, incidents

Notice to Parties in Interviews

What to expect about future contact (timing, updates, encourage follow-up to you)
Written copy of policies/procedures
Notify about protections from retaliation – provide specific examples
No “Gag” order but can warn of retaliation risks

First Amendment Rights

Investigation Plans Aren’t Static

Reassess plan for investigation frequently

Gathering Other Evidence
Warning! Medical Records

Notice of allegations should not divulge either party’s medical information
Prohibited from accessing or using medical, psychological, or similar records in grievance process without a party’s (or parent’s) voluntary, written consent

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 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 the 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

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

Relevance

Rape shield laws – for CP only
- Unless
  1. Used to prove someone other than respondent committed the conduct or
  2. Specific incidents related to the RP to show consent

Treatment records
Legally privileged information

Rulings on Relevance in Written “Cross”

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

Written Determination

Identify: Identify the allegations
Describe: Describe procedural steps taken
Cite: Cite potential policy violations
Summarize: Fairly summarize all relevant evidence
Provide: Provide statement of result, with rationale, for each allegation
Appeal: Appeal procedures

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
- Three bases for appeal:
  - Procedural issue affecting the outcome;
  - New evidence that wasn’t reasonably available at the time the determination regarding responsibility or dismissal was made that could affect the outcome; or
  - TIXC, investigator, or decision-maker had 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.
- Notify party of appeal in writing
- Apply procedures equally for both parties
- Opportunity to submit written statement
- Issue written decision to both parties

Bias, Conflicts of Interest, and Other Fairness Concerns
Decisionmaker(s) (Appeal)
- Cannot be the Title IX Coordinator or the investigator(s) or the decisionmaker (complaint)
Bias

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.

5 Min Guided Breakout
What steps can you take to avoid:
  Prejudgment
  Conflict of Interest
  Bias

Recordkeeping
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

Questions

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
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