

TRAINING ON RESPONDING TO SEXUAL HARASSMENT UNDER TITLE IX

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Title IX of the Education Amendment of 1972

“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 educational program or activity receiving federal financial assistance.”

Three Key Supreme Court Cases

Franklin v. Gwinnett County Schools
530 U.S. 60 (1992)

A student's right to **money damages** for sexual harassment is recognized by the Court.

Gebser v. Lago Vista I.S.D.
524 U.S. 274 (1998)

District's liability for **teacher-on-student** harassment is *deliberate indifference* after *actual notice* of misconduct.

Davis v. Monroe County Brd. of Educ.
526 U.S. 629 (1999)
*Student-on-student harassment

In addition to *Gebser* requirements, Court adds a **narrow definition of sexual harassment**.

Title IX – what has changed?

Summary of Major Provisions:

<https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf>.

Q&A ON THE TITLE IX REGULATIONS ON SEXUAL HARASSMENT (JULY 2021):

<https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>

- ☐ Actual knowledge
- ☐ Deliberate indifference
- ☐ Sexual harassment
- ☐ Education program or activity
- ☐ Person in the United States
- ☐ Grievance process
- ☐ Investigation process
- ☐ Appeals

Sexual Harassment Defined

- ❑ **Quid Pro Quo:** An employee conditioning the provision of an aid, benefit, or service 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 an education program or activity.
- ❑ **Sexual assault** as defined by the **Clery Act**, dating violence, domestic violence, stalking as defined by Violence Against Women Act (**VAWA**).

“Unwelcome Conduct”

Previously

- ❑ Unwelcome conduct as determined by a reasonable person to be severe or pervasive or persistent, and interferes with or limits a student’s ability to participate in or benefit from school services, activities, or opportunities.

Now

- ❑ Unwelcome conduct of a sexual nature, or other unwelcome conduct on the basis of sex, as determined by a reasonable person to be so severe and pervasive and offensive that it effectively denies a person’s equal access to education.

How must a school respond to sexual harassment?

A recipient with **actual knowledge** of **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**.

“Actual knowledge”

Previously

- ❑ When the school knows or should have known about sexual harassment.
- ❑ Constructive notice is sufficient

Now

- ❑ For K-12, actual knowledge means notice of sexual harassment or allegations of sexual harassment to any district employee.
- ❑ Means that the district must respond to allegations of sexual harassment.

“School’s Education Program or Activity”

- ☐ Locations, events, or circumstances over which the District exercised **substantial control** over the respondent and in the context where the sexual harassment occurred;
- ☐ Includes any building owned or controlled by a student organization that is officially recognized by the school (more applicable to higher education institutions);
- ☐ In the United States; not in foreign countries – even if a student is participating in a school sponsored activity or program.

“Deliberate Indifference”

Previously

- ☐ District must take immediate action.
- ☐ Purpose of action is to eliminate the sexual harassment or sexual violence, prevent the reoccurrence of such conduct, and address effects.

Now

- ☐ Failure to respond reasonably in light of known circumstances.

Reporting Sexual Harassment

- ☐ Anyone can report sexual harassment. May be in writing or verbal, formal or informal.
- ☐ No specific form required.
- ☐ **Any district employee** who observes sexual harassment of a student or receives notice of an allegation of sexual harassment must report the incident to the principal or Title IX Coordinator.

Title IX Coordinator

- ☐ The District must have a Title IX Coordinator.
- ☐ Title IX Coordinator is responsible for compliance.
- ☐ Title IX Coordinator coordinates the District's response to a complaint.
- ☐ Title IX Coordinator initiates the response.

The Title IX Coordinator's Initial Response

- ❑ The Title IX Coordinator must treat complainants and respondents equitably by (1) offering supportive measures to both; and (2) following a grievance process before disciplining or sanctioning respondent.
- ❑ The Title IX Coordinator must promptly, even if no formal complaint is filed:
 - ✓ contact the complainant to discuss the availability of supportive measures
 - ✓ consider the complainant's wishes with respect to supportive measures
 - ✓ inform the complainant of the availability of supportive measures with or without the filing of a formal complaint
 - ✓ explain the process of filing a formal complaint
 - ✓ Ensure respondent is not disciplined during grievance process

Supportive Measures

- ❑ Supportive measures are 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.
- ❑ Supportive measures should be designed to restore or preserve equal access to the education program or activity without “unreasonably burdening the other party.”
- ❑ The Title IX Coordinator is responsible for coordinating the implementation and must document the supportive measures offered, provided, or declined.

Examples of Supportive Measures

- Move student(s) from classes
- Mental health support
- Altered schedules
- Extended deadlines
- Student conference(s) with administrator
- Counseling/therapeutic interventions
- Classroom reassignment
- Teacher notification plan
- Parent meeting(s)
- Safe person plan
- Increased monitoring/supervision
- Mutual restrictions on contact between parties
- Check in – Check out
- Unstructured areas safety plan
- Bus planning/notification

Immediate Emergency Removal

- ❑ Based on an **individual safety and risk analysis**
 - ❑ Does not require a formal evaluation
- ❑ Necessary to protect a student or other individual from immediate threat to **physical** health or safety
- ❑ Notice, opportunity to challenge must be provided “immediately”
- ❑ Be sure to consider other laws (especially change in placement under IDEA)

Don't confuse "Emergency Removals"

Title IX

- ❑ An "individualized safety and risk analysis determines that an individual poses an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal.
- ❑ No limit on number of days.

M.G.L. c. 71, §37H ¾

Principal may remove a student from school temporarily when a student is charged with a disciplinary offense and the continued presence of the student poses a danger to persons or property, or materially and substantially disrupts the order of the school, and, in the principal's judgment, there is no alternative available to alleviate the danger or disruption. Cannot exceed two days.

Formal Complaints

- ☐ Title IX Coordinator should explain the difference between a formal and informal complaint to the Complainant.
- ☐ Complainant makes the decision regarding whether to formally file a complaint.
- ☐ If the Complainant decides not file a formal complaint, the Title IX Coordinator has the authority to move forward with a formal complaint.
- ☐ A formal complaint may be dismissed where the conduct would not constitute sexual harassment, even if proved, it did not occur in the school's education program or activity, or did not occur in the U.S.
- ☐ Dismissal must be sent in writing to Complainant and Respondent.

Grievance Process

- ☐ Complainants and Respondents must be treated **equitably**
- ☐ Objectively evaluate all **relevant** evidence
- ☐ All staff involved are free from **conflicts of interest**
- ☐ Presumes non-responsibility of respondents until the conclusion of the process
- ☐ Includes reasonably prompt time frames for the process
- ☐ Informs all parties of all critical information
- ☐ Protects legally recognized privilege from being pierced during the grievance process

Provide Written Notice after Formal Complaint is Filed and Before Investigation Begins

- ❑ Written notice to known parties “upon receipt of written complaint” in 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 parties, conduct alleged, date and location of conduct if known)

Written Notice (continued)

- ❑ Must include (continued):
 - ❑ Statement that respondent presumed not responsible and that responsibility will be determined at the conclusion of the 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 statement or providing false evidence during the grievance process

Written Notice (continued)

- ❑ Notice must be supplemented if new allegations are opened for investigation during the process.

Additional Written Notice Requirements

- ☐ Notice (from investigator) of investigative interviews, meetings or hearings.
- ☐ Notice (from investigator) of Opportunity to review evidence. Parties and their advisors must receive at least 10 days notice to review all evidence directly related to the allegations. Parties have the right to inspect, review, and respond to the evidence.
- ☐ Notice (from decision maker) of opportunity to submit question to the other party.

Are there any options for resolution before the investigation?

- ☐ Yes – the regulations provide that the Title IX Coordinator may offer mediation.
- ☐ Cannot be used where the allegation is against an employee.
- ☐ This may only take place after a formal complaint is filed and initial written notice with supportive measures are provided.
- ☐ Must give written notice of the proposal of informal resolution.
- ☐ Both the Complainant and Respondent must consent in writing.
- ☐ District has the ability to establish the form and standards for mediation.
- ☐ Mediation should be conducted by a facilitator.
- ☐ Allowed at any time during the formal complaint process.

INVESTIGATION TEAM



TITLE IX
COORDINATOR



INVESTIGATOR



DECISION-MAKER

The Investigation

- ☐ Burden of proof and burden of gathering evidence is on the school.
- ☐ Must provide an equal opportunity to present fact and expert witnesses and other inculpatory and exculpatory evidence.
- ☐ Does not restrict the parties from discussing the allegations or gathering evidence.
- ☐ Gives the parties an equal opportunity to select an advisor of their choice.
- ☐ Requires written notice when a party's participation is invited or expected for an interview, meeting, or hearing.
- ☐ Provides both parties an equal opportunity to review and respond to the evidence gathered during the investigation ten days before the investigative report issues. BUT remember FERPA!

Impartiality

- ☐ Title IX Coordinators, investigators, decision-makers and facilitators must serve impartially.
- ☐ Avoid prejudgment of the facts
- ☐ No conflict of interest
- ☐ Avoid bias
- ☐ Maintain presumption of non-responsibility

Avoiding Bias

- Essential to treat both parties equitably
- Address personal bias by:
 - Nurturing an attitude of humility
 - Nurturing a continuous curiosity about others and their points of view and experiences
 - Understanding microaggressions and how to avoid and address them.
- Race, Gender, Sexual Orientation, Ethnicity, Poverty, etc. Appreciate the nuances and uniqueness of those who come from a different background than your own.

Avoid Stereotyping

- Investigators may or may not believe they have a general understanding of experiences common to certain groups.
- It remains essential to not assume that the issues common to a certain group have been important to or experienced by a specific member of that group or population.
- Investigators and coordinators should develop an awareness of how their individual experiences and privilege may create expectations in their conversations with others.

Investigative Report

- ☐ Sent to all parties
- ☐ Fairly summarizes the relevant evidence
- ☐ Written and provided prior to reaching a determination regarding responsibility
- ☐ Used by the decision-maker to reach a decision.

Relevancy

- ☐ Information must have a tendency to prove or disprove a fact, and that fact must be of consequence in determining the action.
- ☐ Relevancy standards must be applied equally to the complainant and respondent.
- ☐ Questions about the Complainant's sexual history are deemed not relevant.

Live Hearing

- ☐ Live hearing is not required for K-12, but is permissible.
- ☐ Parties must have equal opportunity to submit written questions for the other parties and witnesses to answer before a determination regarding responsibility is reached.

Determination of responsibility: Applying the Standard

- ❑ Decision-maker (who is not the same person as the Title IX Coordinator or the investigator) must reach a decision by applying the standard of evidence the district has designated in its grievance process for all formal complaints of sexual harassment.
- ❑ District's written policy must indicate the evidentiary standard adopted:
 - ❑ Preponderance of the evidence: More probable than not
 - OR**
 - ❑ Clear and convincing evidence: Highly and substantially more likely to be true than untrue; highly probable.

Determination of Responsibility in Writing

- ☐ Written determination

- ☐ Findings of fact
- ☐ Conclusions as to whether the alleged conduct occurred
- ☐ Rational for the results as to each allegation
- ☐ Disciplinary sanctions imposed
- ☐ Remedies

Appeals- 106.45 (b)(8)

The option for appeal must be offered to both parties on the bases of:

- Procedural irregularity affected the outcome;
- New evidence was discovered and may change the outcome;
- Title IX personnel involved in the process had a conflict of interest or bias that impacted the outcome

Retaliation –106.71

- Strictly prohibited
- Complaints of retaliation may be addressed under Title IX.

Other Requirements: Training

- ☐ Mandatory training for Title IX Coordinators, investigators, decision-makers, appeal officers, informal resolution facilitators
- ☐ Training on identification and reporting of sexual harassment is required for all staff.
- ☐ Post training materials on school district's website.

Other Requirements: Record Keeping

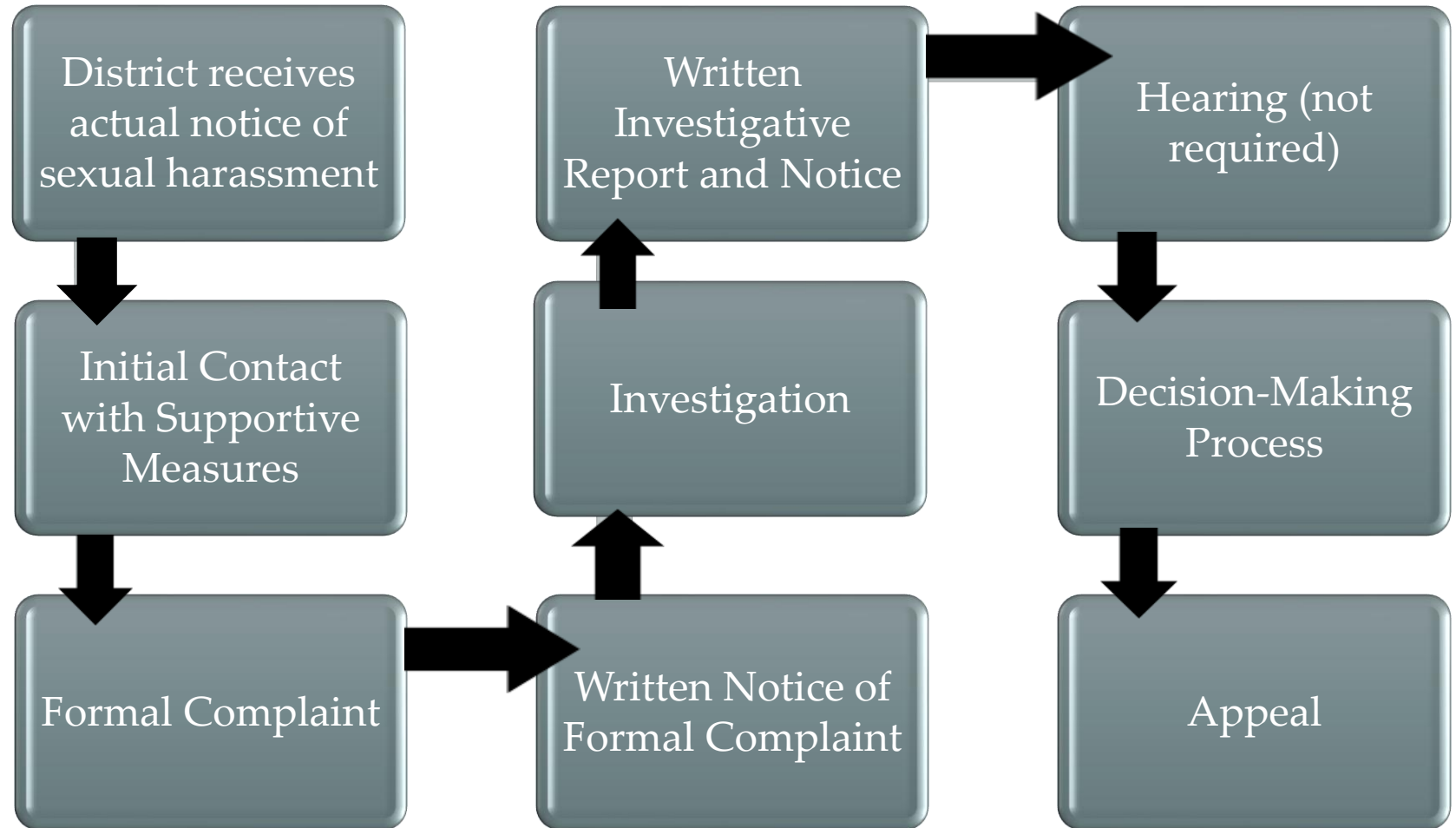
- ❑ Records related to alleged sexual harassment must be kept for at least 7 years:
 - ✓ Investigative records
 - ✓ Disciplinary sanctions
 - ✓ Remedies
 - ✓ Appeals
 - ✓ Records of actions taken, including supporting measures

Document for Every Instance

- ✓ Why response was not deliberately indifferent
- ✓ Measures taken were taken to restore or preserve equal access to the educational program or activity
- ✓ If no supportive measures were taken, why that was not deliberately indifferent

Formal Process

*Informal resolution may be offered at any time after the formal complaint is filed.





Questions?

THANK YOU!

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If you need legal advice, please contact an attorney.