

TITLE IX

PROHIBITS DISCRIMINATION
BASED ON SEX IN EDUCATION
PROGRAMS OR ACTIVITIES
THAT RECEIVE FEDERAL
FINANCIAL ASSISTANCE

34 C.F.R. Part 106





A Review of the New Title IX Final Rule

Final Rule places emphasis on Due Process and Equitable Treatment of complainants and Respondents

- 1) New definition of Sexual Harassment
- 2) Key Players: Title IX Coordinator, Investigator, Decision-Maker
- 3) Notice Requirements
- 4) Detailed procedures for how educational institutions must respond to allegations of sexual harassment (Investigation)
- 5) Training: definition of sexual harassment, conducting investigations, grievance process

New Definition of Sexual Harassment

- ▶ Employee quid pro quo
- ▶ Hostile environment (newly defined)
- ▶ Violence Against Women Act (VAWA) “big four”



Sexual harassment
unwelco
In most



An employee of the District conditioning aid, service or benefit on an individual's participation in unwelcome sexual conduct

Hostile Environment

OLD

- ▶ Unwelcome conduct
- ▶ Determined by a reasonable person
- ▶ To be severe, pervasive or persistent, and to interfere with or limit a student's ability to participate in or benefit from school services, activities, or opportunities

NEW

- ▶ 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 recipient's education program or activity

**Violence
Against
Woman
Act
“Big Four”**

- **Sexual
Assault**
- **Domestic
Violence**
- **Stalking**
- **Dating
Violence**



**When must a school respond
to sexual harassment?**

Response Required

- ▶ School must respond when:
 - (1) the school has **actual knowledge** of sexual harassment;
 - (2) that occurred within the school's **education program** or **activity**;
 - (3) against a person in the United States.

“Actual Knowledge”

OLD (OCR Guidance)

- ▶ Failure to respond promptly and effectively if a school **knows or should have known** about sexual harassment

NEW (Final Rule)

- ▶ A school with **actual knowledge** of sexual harassment in a program or activity must respond promptly and in a manner that is not **deliberately indifferent**



School must respond in a way that is not
“Deliberately Indifferent”

Deliberate Indifference =
Failure to respond to actual knowledge of sexual harassment reasonably in light of known circumstances

“Deliberate Indifference”

OLD

- ▶ Failure to take immediate action to eliminate the sexual harassment or sexual violence, prevent its recurrence, and address its effects

NEW

- ▶ Failure to respond to actual knowledge of sexual harassment reasonably in light of known circumstances



Scope of Education Program or Activity

- ▶ Includes locations, events, or circumstances over which school exercises substantial control over both the respondent and the context in which the harassment occurs.

Education Program or Activity (cont'd)

- ▶ Not just on school campus, but not all places;
- ▶ Must be in the United States;
- ▶ At school, on the bus, at school sponsored activity, athletics;
- ▶ Includes harassment by or against students or staff.

Title IX

Personnel Key Players



TITLE IX COORDINATOR



INVESTIGATOR

**DECISION
MAKER**

Reporting Sexual Harassment: Who, How and When?

- ▶ Any person may report
- ▶ By mail, telephone, or email using the contact information posted for the Title IX Coordinator
- ▶ Or by any means that results in the Title IX Coordinator receiving the report
- ▶ Report may be made at any time, including during non-business hours



Initial/General Response

Initial Response – even if no formal complaint:

Title IX Coordinator must promptly:

- ▶ Contact complainant to discuss “supportive measures”
- ▶ Consider complainant’s wishes with respect to supportive measures
- ▶ Inform complainant of availability of supportive measures with or without filing of formal complaint
- ▶ Explain the process for filing formal complaint

34 CFR 106.30 (a), .44(a)



“Supportive Measures”

OLD

- ▶ Used terms such as “interim measures” or “interim steps” to describe measures to help a complainant maintain equal educational success
- ▶ 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

- ▶ **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
- ▶ **Should be designed to restore or preserve equal access to the education program or activity without “unreasonably” burdening the other party**

Supportive Measures

Fair and Balanced

- ▶ Moving target, not one-time requirement – discuss, at initial meeting, but these measures may need to change over time.
- ▶ Coordinator has a duty to continue to reassess – are they sufficient, or even warranted?

Provide to Both Parties

- ▶ Don't favor one over the other.
- ▶ Look at each party as a student – their right to an education is paramount.

Emergency Removal/Administrative Leave

Student Immediate Emergency Removal

- ▶ Based on individual and safety risk analysis
- ▶ Necessary to protect student or person from **immediate threat** to **physical health** or **safety**
- ▶ **Immediate notice** and opportunity to **challenge** removal

Employee Administrative Leave

- ▶ Not prohibited



Grievance Process

Once formal complaint is filed:

DISMISS if:

- 1) conduct could not constitute sexual harassment (under new definition) even if proved; or
- 2) conduct did not occur in educational program or activity; or
- 3) conduct did not occur in the United States.

Once formal complaint is filed:

▶ **May Dismiss if:**

- 1) complainant notifies Title IX Coordinator in writing they wish to withdraw the formal complaint; or
- 2) Respondent is no longer enrolled or employed by District; or
- 3) specific circumstances prevent the District from gathering evidence sufficient to make a determination as to complaint or allegations.

Grievance Process Must

- ▶ Treat parties equitably
- ▶ Objectively evaluate evidence
- ▶ Ensure no conflict of interest for Title IX Coordinator, investigator or decision-maker
- ▶ Presumption that respondent is not responsible
- ▶ Reasonably prompt time frames
- ▶ Inform all parties of critical information about grievance procedures, including range of remedies and disciplinary sanctions
- ▶ Inform parties of standard of evidence (POE or C&C)
- ▶ Inform parties of Appeal procedures
- ▶ Inform parties of the range of supportive measures available
- ▶ Protect any legally recognized privilege

Section 106.45(b)(1)(i)-(x)

Notice Requirements **§106.45(b)(2)**

- ▶ Written Notice to both parties with notice of allegations in sufficient detail to allow Respondent to Prepare a response (name, conduct alleged, date, location, witnesses)
- ▶ Sufficient time for Respondent to Prepare a response before any Initial Interview
- ▶ Statement that Respondent is presumed not responsible and that responsibility is determined at conclusion of grievance process
- ▶ Notice of Grievance Process
- ▶ Notice of parties' rights to have an attorney or non-attorney advisor
- ▶ Notice of parties' right to have advisor review evidence
- ▶ Notice of any scheduled investigative interviews, meetings, hearings
- ▶ Must send evidence related to the allegations to the parties and allow them **10 days** to review and respond

Investigation

34 CFR §106.45(b)
(5)(i) –(vii)
1/2

- 1) Burden of proof and gathering of evidence rests on recipient rather than parties;
- 2) Provide equal opportunity for parties to present witnesses and evidence;
- 3) Cannot restrict either party's ability to discuss, gather or present evidence;
- 4) Provide parties with equal opportunity to select advisor of party's choice;
- 5) Provide to a party whose participation is invited or expected, written notice of date, time, location, participants, and purpose of any investigative interview, hearing, or meeting with enough time to allow them to prepare and participate;

Investigation

34 CFR §106.45(b)

(5)(i) –(vii)

2/2

- 6) Equal opportunity to review all evidence directly related to the allegations in formal complaint (including exculpatory or inculpatory evidence from any source) **must be provided before completion of final investigation report and give parties at least 10 days to respond before final report;**
- 7) Prepare written investigation report that fairly summarizes evidence, provide to parties and advisors for their review and written response **at least 10 days before hearing or other determination of responsibility.**

Documentation

Investigation Files

Content:

- ▶ Policies considered
- ▶ Interview notes (including outlines)
- ▶ Log of interviews
- ▶ Record of efforts to set up interviews
- ▶ Documents collected
- ▶ Report/recommendations
- ▶ Communications

After completion of Investigation...

MUST provide each party the opportunity to submit written questions the party wants asked of another party or witnesses, provide each party with the answers and allow for limited follow-up questions BEFORE a determination of responsibility

§106.45(b)(6)



Guidance Regarding Cross- Examination Questions

- ▶ Must be RELEVANT
- ▶ Questions about complainant's prior sexual behavior only allowed to the extent they establish that another person committed the alleged conduct or that the conduct was consensual (rape shield)

What is Relevant?

what are other
words for
relevant?

pertinent, germane, applicable,
apposite, apropos, suitable,
appropriate, apt, related,
material



Determination of Responsibility

34 CFR
§106.45(b)(7)
1/2

Decision maker (who cannot be the investigator or the Title IX Coordinator) must apply the standard of evidence and issue **written determination of responsibility** that:

- Identifies **allegations** that potentially constitute sexual harassment;
- Describes **procedural steps** taken from receipt of complaint to determination.

Determination of Responsibility

34 CFR
§106.45(b)(7)
2/2

- Include **findings of fact** supporting the determination;
- **Conclusion** regarding application of code of conduct to facts;
- Statement of, and rationale for, the result as to **each allegation**, including **determination of responsibility**, any disciplinary **sanctions**, whether **remedies** to restore or preserve equal access to education program will be provided.

Appeal

34 CFR §106.45(b)(8)

Must offer appeals equally to both parties on the bases that procedural deficiencies, newly discovered evidence, or bias or conflict of interest affected the outcome.

Informal Resolution Process

34 CFR § 106.45(b)(9)

- ▶ Not offered unless a formal complaint is filed;
- ▶ Both parties must enter **voluntarily** and consent in **writing**;
- ▶ Either party has the right to withdraw from informal resolution and resume the formal grievance process;
- ▶ NOT permitted where allegation is that an employee sexually harassed a student (i.e. never for allegation of quid pro quo).

Recordkeeping

34 CFR § 106.45(b)(10)

- ▶ Must retain investigative files (into each sexual harassment investigation) for seven (7) years.

Retaliation Prohibited

34 CFR § 106.71

- ▶ Retaliation “for purposes of interfering with Title IX rights” or “because a person has participated or refused to participate in any manner in a proceeding under Title IX regulations” is prohibited.
- ▶ Charging an individual with code of conduct violations that do not involve sexual harassment, but arise out of the same facts and circumstances as a report or complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX constitutes retaliation.

WHAT is being INVESTIGATED?

- ▶ What is the allegation?
 - ▶ (does it meet definition of sexual harassment under Title IX?)
 - ▶ (educational program or activity?)
- ▶ Who is the complainant?
- ▶ Who is the Respondent
- ▶ When did it happen?
- ▶ Where did it happen?
- ▶ Who was present?

WHAT evidence needs to be collected ?



Identify all possible sources of evidence



Record what you review




Retain what you review (regardless of the findings)

WHO will be interviewed?

Identify all relevant parties including complainant and respondent

Take notes of interviews (with date, time, location, attendees) and/or obtain statements from witnesses



Impartiality and Mandatory Training of Title IX Personnel

How to be impartial and unbiased

How to avoid prejudgment of facts at issue

How to avoid conflict of interests

How to avoid bias

34 CFR § 106.45(b)(1)(iii)



No person designated as a Title IX Coordinator, investigator, decision-maker, nor any person designated by the District to facilitate an informal resolution process, may have a **conflict of interest** or **bias** for or against complainants or respondents generally or an individual complainant or respondent.



What is Conflict of Interest?



CONFLICT OF INTEREST

noun

1.

a situation in which the concerns or aims of two different parties are incompatible.

"the conflict of interest between elected officials and corporate lobbyists"

What is Bias?



BIAS

noun

1.

prejudice in favor of or against one thing, person, or group compared with another, usually in a way considered to be unfair.

"there was evidence of **bias against** foreign applicants"