

TITLE IX TRAINING

Appeal Decision Makers

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Title IX: What is it exactly?

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any educational program or activity receiving Federal financial assistance.”

- Title IX of the Education
Amendments of 1972

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- Definition of sexual harassment
- Scope of the school's education program and activities
- The investigation and grievance process, including how to avoid prejudgment of the facts at issue, conflicts of interest, and bias.
- How to serve impartially
- The investigative report
- Relevant questions and evidence
- Decisions & Appeals

Training Subjects

Definitions of Sexual Harassment

- **Quid Pro Quo-** A school employee conditioning an educational benefit or service upon a person's participation in unwelcome sexual conduct
- **Sexual Assault, dating violence, domestic violence or stalking**
 - NOTE: These types of misconduct are not evaluated for severity, pervasiveness, offensiveness, or denial of equal educational access
- **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 school's education program or activity
 - "reasonable person" standard

Parties

- **Complainant:** The person who experienced the alleged sexual harassment (“victim”)
 - Usually, the complainant files the formal complaint
 - Must be participating or attempting to participate in the educational program
- **Respondent:** The person accused of engaging in sexual harassment (“perpetrator”)
 - Presumed innocent and credible

“unwelcome sexual conduct”

- ▶ Conduct is based on sex
- ▶ It is:
 - ▶ Severe
 - ▶ Pervasive **and**
 - ▶ Objectively offensive (to the reasonable person)
- ▶ It effectively denies equal access to education
- ▶ It occurs in the school's educational program

How bad does it have to be?

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- ▶ "Severe" AND
 - "of a great degree"
- ▶ "Pervasive" AND
 - "existing in or spreading through every part of something"
- ▶ "Objectively offensive"
 - "undistorted by emotion or personal bias"
 - "perceptible to persons other than the individual affected"

"Students, teachers, faculty, and others should enjoy free speech and academic freedom protections, even when speech or expression is offensive." -USDE

Where it must occur: Scope of the Education Program and Activities

- Any school event
 - Employment
 - Extracurricular activities
 - Athletics, performances
 - Community engagement and outreach programs
- Any location where a school event was taking place
 - Remote/virtual learning
 - School bus or other school-related vehicle
 - Enroute to or from school
 - Off campus on a telecommunications access device or service provider owned or under the control of the Academy
- Does not cover actions off campus unless the school exercised **substantial control** over both the **respondent** and the **context** in which the sexual harassment occurred

- Must meet the same standards, regardless of the method of harassment

- Examples:
 - Use of computer/internet networks owned or operated by school
 - Use of a personal device during class time to perpetrate online harassment

- The school can investigate the matter under Board policy or the Code of Conduct even if not required by Title IX

Online Sexual Harassment:

1st Amendment Balancing Act

The result: “Denied equal access”

Reasonable person standard

- Doesn't require dropping out of school, panic attack or “breaking point”
- Doesn't require manifestations of trauma or “constructive expulsion”
- May not refuse to respond because complainant is “high functioning”

Signs of unequal access

- Skipping class to avoid harasser
- Decline in grades
- Difficulty concentrating in class

Mandatory Reporting

- **All** employees/staff members have an obligation to report instances of sexual harassment.
 - Witnessed
 - Heard about
- A school has “actual knowledge” of a Title IX allegation if notice is given to any employee/staff of the school.

Mandatory Initial Response

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- Legal obligation to “respond promptly”
- in a manner that *is not deliberately indifferent*
 - response that is “not clearly unreasonable in light of the known circumstances.”
- Offer appropriate supportive measures to restore or preserve equal access to the educational program or activity
- Confirm whether the complainant wants to initiate or participate in a grievance process
- Title IX Coordinator to file a formal complaint when necessary to avoid deliberate indifference if the complainant chooses not to do so.

“Supportive Measures”

- Reasonably available individualized services
- non-punitive, non-disciplinary prior to decision
- not unreasonably burdensome to the other party
- designed to:
 - ensure equal educational access,
 - protect safety or
 - deter sexual harassment.

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

- School may impose discipline sanctions against the Respondent prior to completion of the grievance process only if
- Individualized safety and risk analysis completed
 - determined that emergency removal is necessary
 - to protect a student or other individual from
 - an **immediate** threat to **physical** health or safety
- If there is an emergency removal, the School must provide the respondent with
 - notice and
 - an opportunity to challenge the decision immediately after the removal

Exception: Emergency Removals

Formal Complaint

- Written document signed by a complainant or Title IX Coordinator requesting that the school investigate allegations of sexual harassment
- Triggers investigation/grievance process
- Must provide both parties with written notice of the allegations upon receipt of a formal complaint
- Withdrawn complaint: usually respected and the Title IX investigation would end
- School may continue to investigate if the complaint is severe to avoid deliberate indifference

Informal Resolution

- May use informal resolution processes but only if:
 - There has been a formal complaint filed and
 - both parties voluntarily agree in writing
- Either party has right to withdraw from informal resolution and resume grievance process
- Not an option in cases involving allegations that an employee sexually harassed a student.
- Mediation or restorative justice

The Title IX Team



The Title IX Team:

Impartiality is Key

- Goal: protect students from victimization while at the same time providing appropriate due process to both complainants and respondents.
- It is essential to avoid prejudging the facts
- Recognize conflicts of interest
 - cannot have other job responsibilities that may create a conflict of interest.
 - Prior involvement with a student or employee that creates a conflict or bias
- Recognize Bias

Title IX Coordinator Responsibilities

- Provide access to information
- Promptly and confidentially contact complainants
- Sign a formal complaint when necessary
- Assign an unbiased investigator
- Explore informal resolution
- Ensure transparency and consistency
- Meet all notice requirements

Title IX Coordinator Responsibilities

- Ensure Title IX team is free of conflicts
- Ensure there is an objective evaluation of all relevant evidence
- Oversee training
- Post materials on the website
- Enforce rape shield protections
- Maintain confidentiality to extent permitted by law

Grievance Process

- This is the investigative process and subsequent decision
- Emphasis on “fair, equitable and without bias” process
- The school has the burden of gathering the evidence
- The investigator(s) cannot be the decision-makers

Investigation

An impartial investigator meets with the parties to gather information

Notice to both parties of the allegations and of the policies alleged to have been violated.

Opportunity for parties to provide a list of witnesses and additional evidence.

Meetings with all relevant witnesses.

Opportunity for the parties to provide list of questions for the other party and witnesses

Investigation

Gather all available and relevant evidence



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graph TD; A[Gather all available and relevant evidence] --> B[Provide parties the opportunity to review all evidence and information before the report is finalized.]; B --> C[Provide parties a copy of the draft investigation report for review and comment]; C --> D[Provide parties opportunity to address investigative report with the decision maker.];
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Provide parties the opportunity to review all evidence and information before the report is finalized.

Provide parties a copy of the draft investigation report for review and comment

Provide parties opportunity to address investigative report with the decision maker.

Relevant questions and evidence

No standard for "relevance"

Focus on behavior rather than intention or opinion

Does the evidence being offered have the potential to prove/explain or disprove an incident under investigation?

Does the evidence falls into rape shield protections or rape shield exceptions?

Rape Shield

- May not ask questions about complainant's prior sexual behavior
 - Unless it is used to prove someone other than the respondent committed the offense
 - Or offered to prove consent
- Does not apply to respondents
- Evidence of a pattern of inappropriate behavior by respondent is relevant

Irrelevant/Precluded Evidence

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- Complainant's treatment records
 - Unless you receive prior written consent
- Legally recognized privilege
- Questions about complainant's sexual predisposition or prior sexual behavior

Typical Investigation

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Interview complainant(s)

Interview respondent(s)

Interview witnesses

Written witness statements

Interview complainant parent/guardian

Interview respondent parent/guardian

Examine physical evidence

Review medical information if privilege is waived

Review student records

Review social history b/w parties

Interview teachers and/or school staff

Review student attendance /grades

Review video surveillance

Review electronic/web content

Consider history of prior conflicts and/or problematic behavior

Retaliation Prohibited

- All parties, including the witnesses, are protected
- No intimidation, threats, coercion or discrimination for reporting, testifying, refusing to participate etc.
- Includes charges for Code of Conduct violations that do not involve sex discrimination or harassment but arise out of same set of facts.

Assessing Credibility

Investigator cannot begin with an assumption that one party is more credible than the other.

Credibility is the process of weighing the accuracy and veracity of evidence.

To assess credibility, evaluate the source, content, and plausibility of what is offered in light of other evidence.

Preparing the Investigative Report

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Create an investigative report that fairly summarizes relevant evidence

01

Exclude privileged information

02

Many cases hinge on nuance and credibility so the report should identify this

03

Keep the principles of due process and equity at the forefront

04

Address each allegation separately, reporting facts that support or negate

Hearings

Most K-12 schools are
opting not to hold live
hearings

If the school chooses to
hold live hearings, it
must ensure that the
decision-maker is fully
trained in the use of
technology

Decision Maker

No timeline for completing an investigation but must be reasonable

Neither the Title IX Coordinator nor the Investigator may be the decision maker

A third party may act as decision maker

Decision maker reviews investigative report and all evidence

Decision Maker

For investigations involving students, the decision maker is the **Director of School Quality**

For investigations involving staff members, the decision maker is the **Academy's legal counsel**

- Free from conflicts of interest or bias
- Received Title IX training
- Understands the presumption that the respondent is not responsible
- Will treat parties equitably
- Will objectively evaluate all relevant evidence
- Will provide remedies when a respondent is found responsible
- Understands the standard of evidence/burden of proof

Decision Maker Assurances

Burden and Standard of Proof

- The school has the burden of proof, not the respondent
- **Preponderance of the Evidence:** met when the party with the burden convinces the fact finder that there is a greater than 50% chance that the claim is true.

Decision: Reasonable & Defensible

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- To find responsibility, decision-maker must find:
 - the incident meets the definition of sexual harassment and
 - the incident occurred within the School's educational program or activity
- Failure to find both must result in dismissal of the complaint and no disciplinary sanctions under Title IX
 - “[The school] may still address the allegations in any manner the school deems appropriate under the school’s own code of conduct.”
USDE

“Determination Regarding Responsibility” Elements

- List of **allegations** that could constitute sexual harassment;
- A **description of procedural steps** undertaken, including notifications to parties, interviews and site visits, methods used to gather evidence, and hearings;
- **Findings of fact** that support the determination regarding responsibility;
- **Conclusions** about whether the alleged conduct occurred;
- **Rationale** of the result as to each allegation;
- Any **disciplinary sanctions** imposed on respondent;
- Whether **Remedies** will be provided to the complainant;
- **Appeal** procedures and grounds

- **Remedies**
 - **Supportive measures and/or**
 - **Discipline/sanctions**

- **Available Sanctions upon finding responsibility (students)**
 - Loss of privileges
 - suspension of bus riding/transportation privileges
 - removal from extra-curricular activity
 - any other sanction authorized by the Student Code of Conduct
 - Detention
 - In-school suspension
 - Out-of-school suspension
 - Expulsion

**Decision:
“Remedies”**

**Goal is to
maintain
complainant’s
equal access to
education**

Available Sanctions upon finding responsibility (staff)

- Leave of Absence
- Termination
- Removal from school
- Reassignment

Decision

Grounds for Appeal

Either party (or parent/guardian) is allowed an appeal for

- **Procedural irregularity** that affected the outcome
- **Newly discovered evidence** not reasonably available that could affect the outcome
- Investigator or Decision maker had a **conflict of interest or bias** that affected the outcome
- Appeals must be received by the Title IX Coordinator in writing within ten (10) business days of the determination.

“Procedural Irregularity”

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There are many notice requirements that must be followed.

Appeals alleging procedural irregularity require careful analysis of the checklists identifying all notices and paperwork going to the parties during the process.

This is a fact-based inquiry for the Appeal decisionmaker.

“Newly Discovered Evidence”

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This appeal may come after the typical deadline for filing an appeal.

To overturn the decision, there must be findings that:

The evidence was not “reasonably available” at the time of the initial decision.

AND

This evidence could affect the outcome.

“Conflict of Interest or Bias”

This appeal involves an allegation that either the Investigator or the Decision maker had a conflict of interest or was biased.

Such an allegation needs to be supported by some evidence rather than mere conjecture.

The Appeal Decision Maker conducts its own investigation into whether there was a conflict or bias.

If there is such a finding, there would need to be an additional finding that the conflict/bias affected the outcome.

Appeal Decision Maker

For investigations involving students, the appeal decision maker is **Academy Legal Counsel**

For investigations involving staff members, the appeal decision maker is the **Board of Directors** (or its designee)

Appeal Decision Maker Assurances

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- ▶ Not the investigator, the Title IX Coordinator nor the original decision-maker.
- ▶ Free from conflicts of interest or bias
- ▶ Has received required Title IX training.
- ▶ Will objectively evaluate all relevant evidence
- ▶ Will avoid credibility determinations
- ▶ Understands the preponderance of the evidence standard for determining whether sexual harassment has occurred.

Appeal Process

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Title IX Coordinator provides notice to all parties within 3 days of receiving an appeal.

Each party has 5 days to submit a written statement in support of, or challenging, the decision.

The appeal decision maker must issue a written decision within 10 days after the time to submit a written statement has passed.

The appeal decision must provide the rationale for the result.

Both parties receive the written decision simultaneously

- While you may 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 population.
- Title IX personnel should develop an awareness of how their individual experiences and privilege may create expectations in their conversations with others.

Avoiding Stereotypes

- 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

Anti-bias: Integrity of the Process

Anti-bias

- Take the time to look in the mirror
- Appreciate the nuances and uniqueness of those who come from a different background, gender, sexuality, culture, disability, heritage, generation, etc. from your own.
- Evaluate the neutrality of Title IX investigator and decision maker
- Encourage implicit bias training

Summary

Understand

- Understand the legal standard

Train

- Train the team

Explore

- Find out what the complainant really wants

Pursue

- Pursue informal resolution

Investigate

- Investigate if a formal complaint is filed

Ensure

- Ensure impartiality

Process

- Have checklists

Notice

- Meet notice requirements

Justify

- Justify decision

Ask

- Ask for help along the way!

Questions?

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You'll never regret a phone call...

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