

Sexual Harassment Complaints: New Title IX Requirements

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Brief Overview: What is New

- May 6, 2020, U.S. Dep't of Ed., OCR issued rule amending Title IX regulations
- Final rule goes into effect on August 14, 2020
 - BUT . . . there are lawsuits filed all over the country, so we'll see.



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Brief Overview: What is New

- Sexual harassment is now expressly addressed in REGULATION
- Designation of Title IX Coordinator
- Notice requirements re: Title IX Coordinator
- “Notice” v. “Formal Complaint” and how to address each
- Publication of notice in handbooks and on website



Brief Overview: What is New

- A school becomes liable for sexual harassment where it has been deliberately indifferent to actual notice of harassment
- notice is imputed to school when **ANY school employee becomes aware that sexual harassment may have occurred**

Brief Overview: What is New

- Formal Complaints can only be filed by alleged victim
- But ALL notice triggers certain obligations
- Investigation must follow grievance procedure
- Investigators CAN NOT be decision makers regarding determination of responsibility
- Title IX Coordinator, investigators and decision makers must be trained in Title IX regulations

School Liability

A school will violate Title IX where it has *actual knowledge* of an allegation of sexual harassment experienced by an *individual in the educational program* and the school acts with *deliberate indifference* to that notice.

What is Actual Knowledge of Harassment?

- A report to ANY school employee
 - ALL employees must be trained to immediately communicate any report of conduct that would meet the definition of harassment to administration
- Report to the Title IX Coordinator made at any time via any method of communication

Education Program or Activity

Schools are only required to address sexual harassment in the education program or activity, which is

- Any location, event, or circumstance over which the school exhibits **substantial control over both the alleged harasser and the context in which the harassment occurred**

Is It the Education Program or Activity?

- A cheerleader experiences sexual harassment an away game?
- At an overnight trip sponsored by the German Club?
- At a non-school related party held in a private home on a weekend?
- During a distance learning class?

What is Deliberate Indifference?

A response to notice of sexual harassment that is clearly unreasonable in light of the known circumstances

The new regulations set out the required response to notice within the context of:

- Protecting 1st Amendment rights
- A presumption of non-responsibility of the accused
- Provision of supportive measures

Avoid Deliberate Indifference

Title IX Coordinator must PROMPTLY contact every complainant to discuss

- Wishes regarding supportive measures
- That supportive measures are available with or without filing a formal complaint
- The process for filing a formal complaint

Avoid Deliberate Indifference

- Treat complainants and respondents equitably
- Provide supportive measures in all cases
- Investigate every instance of formal complaint
- Use procedures set out in the regulations
- Provide complainant remedies if respondent is found to have responsibility

Informal v. Formal

PROCEDURES UPON RECEIPT OF REPORT OF SEXUAL HARASSMENT

Reporting

- Any person can report and school responsibilities are triggered
 - **Send notice of any report to Title IX Coordinator**
- Only victim, who is student or employee of school can file formal complaint
- **HOWEVER**, Title IX Coordinator can sign a formal complaint where victim will not, triggering investigation

All Notice Triggers Responsibility

- Contact alleged victim immediately to discuss as indicated in previous slide
- Offer the complainant **supportive measures**
 - Supportive measures are non-disciplinary, 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

Examples of Supportive Measures

- Counseling
- Course modifications
- Schedule changes
- Increased monitoring or supervisions
- Designed to restore or preserve equal access to education program or activity
- Do not unreasonably burden either a complainant or respondent

Supportive Measures

Do not sanction or discipline respondent in any way until grievance procedure has been followed

- Do not completely remove a student respondent from an activity as a supportive measure for complainant
- UNLESS there is need for an emergency removal, which can only happen if necessary to protect an individual from IMMEDIATE THREAT TO **PHYSICAL** HEALTH OR SAFETY

Formal Complaint

Formal complaint signed by alleged victim or Title IX Coordinator triggers responsibility to conduct investigation that complies with the District's grievance procedure.

Upon receipt of a Formal Complaint, provide the notice described below.

Written Notice Requirements: Formal Complaint

Provide written notice of the District's grievance procedure to both parties, including information about informal resolution process, if the District adopts one

Written notice must:

- Include a statement that the respondent is presumed not responsible for conduct and that a determination will not be made until the conclusion of the grievance process

Written Notice Requirements: Formal Complaint

- inform parties that they may have an advisor of their choice
 - Advisor may be an attorney, but doesn't have to be
- inform parties that they may inspect and review evidence collected during this investigation
- inform parties of any provision of the code of conduct that prohibits making false statements or knowingly submitting false evidence

Written Notice Requirements: Formal Complaint

Notice of the allegations of sexual harassment provided to the parties must include sufficient details, and be provided in enough time, to allow preparation of a response prior to initial interview

Sufficient notice includes, if known:

- The conduct alleged to constitute sexual harassment
- The date and location of the alleged incident

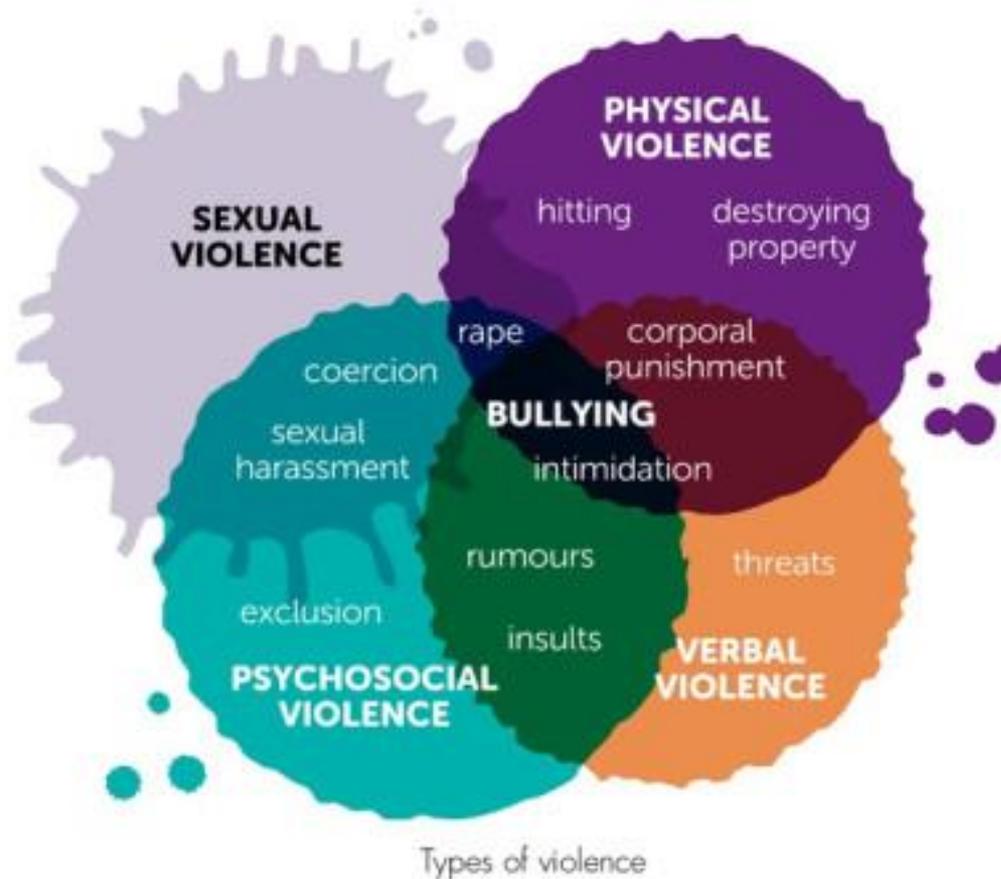
Written Notice Requirements: Formal Complaint

If, during the course of the investigation, the school decides to investigate additional allegations about complainant or respondent that were not included in initial notice, the school must provide written notice of the additional allegations.

In order to investigate and make decisions about sexual harassment, we must

UNDERSTAND REGULATION DEFINITION OF SEXUAL HARASSMENT

So what are you investigating?



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Sexual Harassment

The regulations use a definition of sexual harassment that is designed to protect 1st Amendment rights of students and teachers by:

- Distinction between physical conduct and speech
- Speech is largely protected unless it rises to high standard-no prior restraint on speech
- Physical conduct is *per se* actionable

Definition of Sexual Harassment

Conduct on the basis of sex that is one or more of the following:

1. A school employee conditions the provision of an aid, benefit, or service of the school on an individual's participation in unwelcome sexual conduct;
2. Unwelcome conduct that a reasonable person would find to be so severe, pervasive, and objectively offensive that it **“effectively denies a person equal access”** to the school's education program or activity;
3. Sexual assault, dating violence, domestic violence, or stalking.

Definition of Sexual Harassment: Element 1

Element 1 is *quid pro quo* harassment

- Does not require a severe, pervasive, and objectively offensive analysis
- By its very terms, it will deny access to the program

Exs: a teacher requires sexual favors for a better grade; a staff member demands sexual favors or s/he will post compromising pictures

Definition of Sexual Harassment: Element 2

Harassment based on speech

This prong requires the unwelcome sexual conduct to be:

- Severe AND
- Pervasive AND
- Objectively offensive

Such that the victim is denied **equal access** to the school's programs and activities.

Narrowly tailored to protect 1st Amendment rights

Definition of Sexual Harassment: Element 3

Offenses based on violence (sexual assault, dating violence, domestic violence, stalking):

- Does not require severe and pervasive analysis
- When it occurs, equal access is denied

Like Element 1, it is *per se* actionable

Element 3 Definitions

- Sexual assault: an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.
- Stalking: means engaging in a course of conduct directed at a specific person that would cause a reasonable person to: 1) fear for his or her safety or the safety of others; or 2) suffer substantial emotional distress

Dating Violence

Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim and where the existence of such a relationship shall be determined based on a consideration of the following factors:

- 1) the length of the relationship;
- 2) the type of relationship;
- 3) the frequency of interaction between the persons involved in the relationship

Domestic Violence

Violence committed by a current or former spouse or intimate partner of the victim, a person whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of Arizona, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction

DISMISSAL PRIOR TO DETERMINATION

Mandatory Dismissal of Formal Complaints

- The complaint does not state an allegation of sexual harassment, even if all facts are found to be true
- The sexual harassment, even if it did occur, did not occur in the school's program or activity
- The sexual harassment did not occur against a person in the United States

Permissive Dismissal

- If the Complainant notifies the Title IX Coordinator that s/he wants to withdraw the complaint
- If the Respondent's employment or enrollment with the school ends
- If circumstances, such as several years between the conduct and the complaint or a complainant's refusal to cooperate, prevents the gathering of evidence sufficient to render a determination

CONDUCTING INVESTIGATIONS

Basic Premises

- Ensure that notice of complaint is provided as described above
- Investigator/Title IX Coordinator/Decision maker must not have a conflict of interest
 - Against the specific complainant or respondent or
 - Against complainants or respondents in general

If you have a conflict of interest, notify the Title IX Coordinator immediately

Basic Premises: Investigators and Decision Makers

- **Be IMPARTIAL**
- Presume that the respondent is not responsible for the alleged conduct
- Follow the District's grievance procedure
- Treat parties equitably by providing *remedies* to a complainant ONLY if a determination of responsibility is made against respondent
- You may consolidate formal complaints that arise from the same facts or circumstances

INVESTIGATORS

Basic Premises: Investigators

Meet the timeline set out in the District's policy-there must be a reasonably prompt investigation

- 30 school days of receipt of formal complaint
 - If there is a temporary delay for good cause, provide written notice to both parties explaining the reason for the delay
 - School administrative needs DO NOT create good cause for a temporary delay

Basic Premises: Investigators

Non-exhaustive list of reasons that may create a good cause delay in completion:

- Concurrent law enforcement activity
- Witness availability
- A pandemic-related reason (illness, unavailability)
- School breaks
- Absence of a party
- Availability of a party's advisor
- Need for language assistance or ADA accommodations

Investigating the Complaint

- You must gather the relevant evidence
 - Do not require or rely on the parties to provide you evidence
 - You may not require a party to provide evidence (documentary or verbal) that would be legally protected under attorney-client privilege, doctor-patient privilege, spousal privilege.
 - EX: cannot require counseling records

Investigating the Complaint

- Both parties must have equal opportunity to present witnesses and evidence
 - Interview both parties
 - Ask both parties to provide any documents they think are relevant
 - Ask both parties who else they think you should talk to and then interview the witnesses identified by the parties

Investigating the Complaint

- Do not restrict either party's ability to discuss the allegations or gather and present evidence
- If allowing others to be present during an interview (such as an advisor), must allow both parties the same opportunity.
 - You may restrict the extent to which the advisor can participate, so long as restrictions apply to both parties

Investigating the Complaint

- Provide written notice of the date, time, location, participants, and purpose of any investigation activity that requires a party's presence and provide notice with enough time for the party to prepare to participate

Investigating the Complaint

- Provide both parties an equal opportunity to inspect and review evidence gathered as part of the investigation that is *directly related* to the allegations raised in the formal complaint
 - Including evidence on which you do not intend to rely on it in drafting an investigation report by sending the evidence to the parties in an electronic or hard copy format and allowing the parties 10 days to submit a written response

Investigating the Complaint

- Consider the written responses to evidence provided by the parties
- Draft a written investigation report that summarizes the relevant evidence and provide the report to the parties AND their advisors, if any, for review and opportunity to provide another written response prior to the decision maker rendering a determination.

DECISION MAKERS

Basic Premises: Decision Makers

- Objectively evaluate all available evidence, both inculpatory and exculpatory
- Weigh the evidence using clear and convincing burden of proof standard adopted by the District
 - The evidence must show that it is *highly probable* that the respondent is responsible for the alleged conduct

Written Questions

The District will not hold in-person hearings but after the investigation report is completed, and before a determination is made, the parties must have the opportunity to review the investigation report and submit written, relevant questions to the decision maker that the party wants asked of the other party or witnesses

Written Questions

- Each party may submit relevant questions to decision maker
- If a question is excluded by the decision maker, the decision maker must explain why the question is not relevant
- Each party will be provided answers to its questions and then will have a limited opportunity to ask limited follow up questions

Relevance of Questions

Complainant's sexual history or predisposition is NOT RELEVANT unless:

- offered to establish that someone else committed the acts complained of
- Offered to establish consent with the specific respondent

Issuing a Determination

Using a clear and convincing standard to review the evidence, issue a written determination that includes the following:

- List of the allegations
- Description of the procedural steps taken from receipt of the formal complaint through determination (include dates of notices, interviews, etc.)
- Findings of fact that support the determination

Issuing a Determination

- Conclusions regarding the application of the code of conduct to the facts
- A rationale for the determination as to each allegation
 - Determination of responsibility
 - Any disciplinary sanctions
 - Whether remedies will be provided to complainant
- Includes procedures and information regarding permissible basis for appeal

Remedies

- If the determination is that the respondent is responsible for the conduct, then determine remedies that will restore or preserve equal access to the education program or activity
 - Same types of things as supportive measures except that they can be punitive toward respondent

Appeals

- Appeals cannot be heard by the Title IX Coordinator, the investigator, or the decision maker
- Appeals must be offered to both parties equally
- Appeals are mandatory in the following circumstances:
 - A procedural irregularity affected the outcome
 - New evidence that was not reasonably available at the time of the determination that could affect outcome

Appeals

- Mandatory appeals (con't):
 - Conflict of interest on the part of the Title IX Coordinator, investigator, or decision maker that affected the outcome
- Appeals may also be heard for other reasons as determined by District policy.

Appeals

- Written notice that an appeal has been submitted must be provided to both parties
- Both parties must have an equal opportunity to submit a written statement in support of, or challenging, the determination by the decision maker

A FEW MORE IMPORTANT THINGS

Records Retention

- All records related to sexual harassment complaints must be maintained for a minimum of 7 years, including records that substantiate remedies and supportive measures
- Training materials must be posted on the District's website

Retaliation

- DON'T DO IT
- Do not take any action against any person for the purpose of interfering with rights under Title IX or because the person participated **or refused to participate** in a Title IX proceeding
- Keep the names of all individuals involved confidential except as necessary to investigate

Retaliation

Beware of disciplining for a non-harassment code of conduct violation where you learned of the violation via the sexual harassment complaint—it can be done, but better be an infraction for which you typically discipline

- Someone other than the investigator should process any such discipline and should know as little as possible about the Title IX Complaint

Questions?



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