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ATTORNEYS AT LAW



Title IX Training for Investigators and Decision-makers

NOBLESVILLE : FISHERS : TIPTON : MERRILLVILLE : ZIONSVILLE

Title IX

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.

By the Numbers

- Proposed Rules issued **1.5 years** ago
- **124,000 comments**
- Only formal regulations issued **since 1997**
- **25 pages** of regulations
- **2007 pages** of preamble (explanation)
- **until August 14, 2020** to implement

Requirement

The new Title IX regulations require that all Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution must receive training. See 106.45(b)(1)(iii).

New Title IX Regulations Require Training on:

1. The definition of sexual harassment in § 106.30
2. The scope of the recipient's education program or activity
3. How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable
4. How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
5. Issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section
6. Issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section

1. The Definition of Sexual Harassment

Sexual Harassment, Type 1

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

1. A school employee conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct

This is the quid pro quo (something for something else) type.

Sexual Harassment, Type 2

Unwelcome conduct determined by a reasonable person to be so severe, pervasive, **and** objectively offensive that it effectively denies a person equal access to the recipient's education program or activity

- With the 3rd prong covering most everything physical, this prong is focused on verbal or written/electronic forms of harassment.
- Standard is subjective with respect to the unwelcome-ness of the conduct (i.e., whether the complainant viewed the conduct as unwelcome), but as to elements of severity, pervasiveness, objective offensiveness, and denial of equal access, determinations are made by a reasonable person in the shoes of the complainant.

Why severe “and” pervasive?

Rationale for preventing a hostile workplace environment free from any severe or pervasive sexual harassment that alters conditions of employment does not allow for the social and developmental growth of young students learning how to interact with peers in the elementary and secondary school context and fostering robust exchange of speech, ideas, and beliefs in a college setting. Thus, the Department does not believe that aligning the definitions of sexual harassment under Title VII and Title IX furthers the purpose of Title IX or benefits students and employees participating in education programs or activities.

In other words, U.S. Dept. of Education thinks the nature of education means a higher quantity of low grade offensive speech must be tolerated as part of free expression.

While non-severe instances of unwelcome harassment may negatively impact a person, and schools retain authority to address such instances, Title IX is focused on sex discrimination that jeopardizes educational access.

In other words, U.S. Dept. of Education thinks sex-based conduct toward students must be severe to rise to the level of sexual harassment.

Sexual Harassment, Type 3

"Sexual assault" (as defined by the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act at 20 USC 1092 (f)(6)(A)(v));

"dating violence" (as defined by the Violence Against Women Act at 34 USC 12291 (a)(10));

"domestic violence" (as defined by the Violence Against Women Act at 34 USC 12291 (a)(8)); or

"stalking" (as defined by the Violence Against Women Act at 34 USC 12291 (a)(30)).

More on SH Type 3

- “Fondling,” defined under the Clery Act (referring to the FBI’s Uniform Crime Reporting system), as “the touching private body parts of another person for the purpose of sexual gratification, without the consent of the victim,” is the only type of sexual harassment that depends on the intent or purpose of the perpetrator or victim.
- While the sexual harassment definition does not identify “grooming behaviors” as a distinct category of misconduct, some grooming behaviors may constitute sexual harassment, and behaviors that do not constitute sexual harassment may still be deemed inappropriate behavior addressed under other areas of policy, procedure, and/or handbook.

2. The Scope of the Recipient's Education Program or Activity

Educational Program or Activity

34 CFR 106.44(a)

Schools must respond when sexual harassment occurs in the school's education program or activity, against a person in the United States.

Education program or activity includes locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

Triggering Title IX

- Off-campus incidents incur Title IX response:
 1. if the off-campus incident occurs as part of the recipient's "operations" pursuant to 20 U.S.C. 1687 and 34 CFR 106.2(h);
 2. if the recipient exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus pursuant to § 106.44(a); or
 3. if a sexual harassment incident occurs at an off-campus building owned or controlled by a student organization officially recognized by a postsecondary institution pursuant to §106.44(a).
- If complainant is no longer enrolled when the complaint is filed, or if the perpetrator is no longer enrolled or employed, no reason for the school to do a investigation because the school can't do anything.

Example of Defining Scope

For the purposes of Title IX, the scope of the Corporation's educational program or activities includes locations, events, or circumstances over which the Corporation exercises substantial control over both the respondent and the context in which the sexual harassment occurs *[only for postsecondary: and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.]*

This includes all activities taking place within a school building or on Corporation property; any athletic, extracurricular, or co-curricular activity officially recognized by the Corporation and led by a Corporation employee; computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of, the Corporation.

3. How to Conduct an Investigation and Grievance Process

Non-Disclosure Agreement

NON-DISCLOSURE AGREEMENT ¶

→ This NON-DISCLOSURE AGREEMENT (the “**Agreement**”) made as of the _____ day of [month], [year] (the “**Effective Date**”), by and between [School Name] (“**School**”) and _____ [by and on behalf of (Student Name if under 18)] (“**Receiving Party**”), sets forth the terms and conditions of the confidential disclosure of and restrictions on the use of records/information by each party. ¶

¶ Consistent with Federal regulations, the School must provide due process protections to alleged victims and alleged perpetrators of sexual harassment in its educational program and activity. 34 CFR Part 106. The regulations provide several instances where sensitive information may be exposed including, but not limited to: i) all parties must receive notice of the allegations contained in a formal complaint, 34 CFR 106.45(b)(2); ii) both parties have an opportunity to inspect and review any evidence directly related to the allegations, 34 CFR 106.45(b)(5)(vi); iii) both parties may review the investigative report created at the conclusion of any investigation, 34 CFR 106.45(b)(5)(vii). The regulations further provide that each party may have an advisor of his or her choice and that such advisor shall also have access to the information described above. 106.45(b)(5)(iv). In an effort to allow both parties to gather and present relevant evidence under 34 CFR 106.45(b)(5)(iii) while protecting the sensitive information contained therein, this Agreement is hereby entered into by the above-listed parties. ¶

1. → For purposes of this Agreement, “**Confidential Information**” shall include any and all statements, records, video, photographs, or knowledge related to the allegations made in a Title IX investigation by the School. If Confidential Information is in written form, the School shall label or stamp the materials with the word “**Confidential**” or some similar warning. If Confidential Information is transmitted orally, the School shall promptly provide a writing indicating that such oral communication constituted Confidential Information. ¶
2. → The Receiving Party shall hold and maintain the Confidential Information in strictest confidence for the sole and exclusive benefit of the School. Receiving Party shall not, without prior written approval of the School, use for Receiving Party’s own benefit, publish, copy, or otherwise disclose to others, or permit the use by others for their

Interview Complainant

- Identify – who, what, when, where.
- Specific descriptions of incident(s)
- Similar experiences in the past
- Determine what offended Complainant
- Impact on Complainant
- Discuss complainant's response
- Identify Witnesses
- What relief is being requested

Other Interviews

- Potential witnesses named by Complainant
 - Purpose for interview – investigating allegations against {Individual}
 - Complainant indicated you might have information
 - Who/when/why/how of what you did or did not witness or hear
 - Ask that they not discuss the interview (NDA)
 - Explain no retaliation for telling the truth

In closing

- Any other information?
- Contact me if you remember anything, or if observe anything relevant.

Respondent Interview

- Define the allegation at issue
- Ask to identify situations where he/she harassed others or engaged in behavior in violation of rule
- Confront with general allegations
- Confront with more specifics
- **Note responses**
- Permit him/her to offer evidence/witnesses
- Ask that they not discuss the interview (NDA)
- Explain no retaliation against complainant

Other Interviews

- Potential witnesses named by Respondent
 - Same general questions as other witnesses
 - Ask that they not discuss the interview (NDA)
 - Explain no retaliation against complainant
- Complainant and/or Respondent (Follow Up)
 - If necessary
 - Clarify allegations and inconsistencies
 - Gather additional information

Review of Records and Evidence

Review Personnel/Student Files

- Look for patterns
- Prior relationships

Review other Contemporaneous Evidence

- Video
- Log Sheets
- Phone and e-mail records
- Records made at the time of allegations

Analyzing the Evidence

Credibility Decisions

- Bias
- History of Similar Conduct
- Corroboration
- Other Discipline
- Eye contact, voice tone, demeanor during interviews.

Determine if Substantiated

- Review notes, statements and other evidence

Inspection and Review of Evidence

Must provide all evidence, even that not relied upon to the parties for inspection, parties have 10 days to respond

Evidence must be “directly related to the allegations”

- Non-treatment records and information, such as a party’s financial or sexual history, must be directly related to the allegations at issue in order to be reviewed by the other party.
- School has discretion on how to provide the evidence.
- May redact information not directly related to the allegations.
- “Confidential” information may not be redacted if directly related to the allegations.

106.45(b)(5)(vii)

Investigative Report

“Create an investigative report that fairly summarizes relevant evidence and, **at least 10 days** prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party’s advisor, if any, the investigative report in an electronic format or a hard copy, **for their review and written response.**”

106.45(b)(5)(vii)

- The regulations do not proscribe how to incorporate the parties’ response into the final determination.

Submission of Written Questions

After the recipient has sent the investigative report to the parties pursuant to paragraph (b)(5)(vii) of this section and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.

106.45(b)(6)(ii)

Determination

Must include:

- Identification of the allegations potentially constituting sexual harassment;
- A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
- Findings of fact supporting the determination;
- Conclusions regarding the application of the recipient's code of conduct to the facts;
- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and
- The recipient's procedures and permissible bases for the complainant and respondent to appeal.

Optional Hearing

- “For recipients that are elementary and secondary schools, and other recipients that are not postsecondary institutions, the recipient’s grievance process may, but need not, provide for a hearing.”
- 106.45(b)(6)(ii)
- May, but need not provide a hearing for K-12.
- Footnote in comments indicate decision to hold a hearing could be made on a case-by-case basis.

It's All About the Process

OCR and Courts will generally not second-guess the outcome of an investigation, as long as the investigation is done according to policy and appropriate standards

READ, RE-READ, ASK QUESTIONS, FOLLOW THE POLICY + PROCEDURES

Follow Up!

- Retain documentation(7 years)
 - Complete notes and reports
 - Ensure everything signed and dated
- Check in with Complainant
- Check in with Respondent (if still employed)
- Review policies and procedures

4. How to Serve Impartially

Role of Title IX Coordinator

Impartial Investigator and Consultant

- Trained to understand Title IX, analyze whether something rises to level of substantiation
- Title IX Coordinator's delegates (building administrators, counselors, etc.) conduct "on the ground" investigation at her delegation
- Determines if harassment is substantiated based on preponderance of the evidence, writes formal report
- Coordinates with legal counsel as necessary

Single Investigatory Model Prohibited

“The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility.” 106.45(b)(7)(i).

Title IX Coordinator not required to investigate, but cannot be the decision maker.

Conflicts of Interest

- Two types: Legal conflicts (less common in this situation) and Perceived conflicts (more common)
- Person named as Harasser or Witness ≠ Member of investigatory team
- If district-level administrator, board member, or Title IX Coordinator is named as Harasser or Witness, good idea to call in outside investigator

5. Issues of Relevance of Questions and Evidence

Evidence that Must Be Deemed Irrelevant, with Exceptions

Questions and evidence about a Complainant's sexual predisposition **must always** be deemed irrelevant, and therefore excluded.

Questions and evidence about a Complainant's prior sexual history **must** be deemed irrelevant, and therefore excluded- with two limited exceptions:

1. Where Respondent contends that someone other than the respondent committed the misconduct
2. Where the question(s) or evidence concern incidents between the Complainant and Respondent and are offered to prove consent.

6. Issues of Relevance to Create an Investigative Report that Fairly Summarizes Recent Evidence

Issues of Relevance to Create an Investigative Report

- Evidence is relevant if it has “any tendency” to make a fact that is “of consequence” to the determination of sexual harassment “more or less probably that it would be without the evidence.”
 - The evidence must be directed to a matter of consequence, essentially the definition of sexual harassment.
 - The evidence must be probative – it must make something more or less probative. It does not have to be in dispute. Whether something is more or less likely is guided by logic and human experience.

Issues of Relevance to Create an Investigative Report

Example: Defendant in bank robbery case was overheard saying he wanted to rob the bank, human experience tells us that when someone says they will do something, they are more likely to do it.

Questions?
Thank You.

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