

Foundational Principles of Title IX and Legal Requirements of Process in Current Regulations



EICHELBAUM WARDELL
HANSEN POWELL & MUÑOZ, P.C.

Dennis J. Eichelbaum

October 19, 2021

1

Title IX: 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 subject to discrimination under any education programs or activity receiving federal financial assistance.”

Immediate Impact: Athletic Opportunities

1979: Students can Sue for Discrimination

1982: Employees can Sue for Discrimination

1992: Students can Sue for Sexual Harassment by Employees

1999: Students can Sue for Sexual Harassment by Students

2016: Dear Colleague Letter on LGBTQ (May 13)

2

New OCR Guidelines: What is Title IX now?

- Title IX covers sexual harassment that happens in a school’s “education program or activity.”
- Now defined as broader than “on campus” situations.
- That includes locations, events, and circumstances where a school exercises *substantial control over the context of the alleged harassment and the person accused of committing sexual harassment*.
- Includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution (fraternity house).

3

Outline for Changes to be Covered Herein

1. What is sexual harassment?
2. When is a school on notice of sexual harassment?
3. What must a school do to support alleged victims?
4. What personnel and policies do schools need?
5. What grievance process must a school generally follow before making findings and disciplining?
6. What are other features of the new regulations?
7. How do the new regulations “protect” free speech?
8. Who needs to be trained?

4

1. The definition of sexual harassment

“Quid Pro Quo” harassment, or...

- (Hostile Environment*) 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 school’s education program or activity*. (Old definition used by courts for student to student)
- Or: “Sexual assault,” “dating violence,” “domestic violence,” or “stalking” as those terms are defined under the Federal laws called the Clery Act and the Violence Against Women Act. (These have their own definitions)

*Purple signifies our editorial/advice/clarification

5

2. When does a school have notice?

- Once a school has actual knowledge of sexual harassment or allegations of sexual harassment, the school has to respond and take action.
- A school has **actual knowledge** when the school has **notice** that a person may have been victimized by sexual harassment.
- Any person, whether the alleged victim or a parent, friend, or bystander, has the right to report sexual harassment to put the school on notice.
- If school personnel will personally witness sexual harassment.

6

Notice/Reports

Reports may be made by:

- Filling out Form
- Verbal
- Mail
- Telephone
- Email

Reports may be made at any time, including non-school hours

7

Actual Knowledge and School Personnel

- The Title IX Coordinator for the school district or school.
- Schools have to provide the contact information for the Title IX Coordinator. (see next slide)
- Other people within the school who have authority to institute corrective measures. This could vary from school to school, but always includes the Title IX Coordinator.
- **In elementary and secondary schools, telling any school employee always puts the school on notice. This includes cafeteria workers, substitute teachers, bus drivers, custodians, clerks.**
- This means we must train ALL employees.

8

Notice

Title IX Coordinator's Contact Information must be given to:

- Students
- Employees
- Applicants for Admission
- Employee Applicants
- Parents/Legal Guardians
- All Unions

Contact Information: Name, Title, Office Address, email address, and telephone number. **Must be "prominently displayed" on website.**

9

3. What kind of response must the school provide?

- The school can't be "**deliberately indifferent.**" **Deliberate indifference = liability.** That also means that it can't be "**clearly unreasonable**" in light of the known circumstances. **The clearly unreasonable standard may protect districts who "do not do enough, but were not clearly unreasonable"**
- The Title IX Coordinator must provide information to the individual:
 - The availability of supportive measures; **[better have a list of these]**
 - The right to file a complaint, and
 - How to file a complaint and the process. **[should have a form ready with instructions for filing]**

10

4. What personnel and policies do schools need to have?

- Title IX Coordinator;
 - Specific information about how to contact the Title IX Coordinator must be provided by the school. [in policy, in handbooks, on website]
- Non-Discrimination policy; [we have]
- Written grievance procedures; [we have but must tweak]
- Information about how to file a formal complaint regarding sexual harassment. [policy, handbook, poster?]

11

Formal Complaints

- A formal complaint is an official document alleging sexual harassment.
- It's filed **and signed** by the student (or their parent or legal guardian in some cases), or in some cases the Title IX Coordinator.
- In cases where an alleged victim doesn't file a formal complaint, a Title IX Coordinator might initiate **grievance procedures** where discipline is appropriate. **Discipline for Title IX will be difficult without using procedure.**

12

Written Grievance Procedures

- Schools' written grievance procedures for dealing with sexual harassment must abide by the new regulations. [we will need to tweak]
- The grievance procedures themselves can't discriminate on the basis of sex, and any additional provisions that a school adds must **apply equally to complainants as respondents**. (New attitude)
- Note: The final regulations refer to alleged **victims as complainants** and alleged **perpetrators as respondents**, whether or not the grievance process has begun.
- Written grievance procedures need to include **10 other specific items**.

13

Requirement 1: Treat Parties "Equitably"

- The school's grievance process must treat complainants and respondents equitably by providing remedies to a complainant if a respondent is found responsible, and by following the prescribed grievance process imposing discipline on a respondent.
- The **remedies for a complainant have to be designed to restore or preserve equal access to the school's education program or activity**.
- Unlike supportive measures in place with or without a grievance process pending, a complainant's remedies CAN be punitive or disciplinary against the respondent.

14

Requirement 2: Objective Evaluation of Evidence

- The school's **grievance process** must ensure an objective evaluation of all relevant evidence – including inculpatory and exculpatory evidence.
- Credibility determinations can't be made on the basis of a person's status as a complainant, respondent, or witness.

The term "grievance process" by OCR refers to the investigative process by a school.

15

Requirement 3: Training; No Conflicts of Interest

- The individuals involved in the process - like the **Title IX Coordinator, investigators, decision-makers, or facilitators of informal, voluntary resolution efforts** – must not have any bias or conflict of interest.
- **These individuals must also be trained.** The **materials used to train** Title IX personnel can't rely on sex stereotypes, must promote impartial investigations and adjudications, and must be **posted on each school's website** (and if a school does not maintain a website, **make them available for public inspection upon request**). **Must have copyright permission to publish.**

16

Requirement 4: Presumption of Innocence

- Under the school's grievance procedures, the respondent must be presumed not responsible, so that any finding of responsibility only comes at the conclusion of a grievance process. *This implies that before a conclusion can be reached, therefore as part of the investigation, there must be a grievance process.*



17

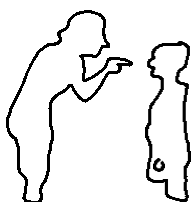
Requirement 5: Reasonably Prompt Time Frames

- The grievance process must include reasonably prompt time frames for resolving formal complaints of sexual harassment.
- **Temporary delays** are permitted only for **good cause**. *Good cause can include law enforcement activities, the absence of a party or witness, the absence of a party's advisor of choice, or the need to provide language assistance or accommodation of disabilities. District policy and handbooks should include these reasons along with "any other reason deemed good cause."*

18

Requirement 6: Description of Outcomes

The grievance process must describe or list the range of possible remedies and disciplinary sanctions that could occur following a determination of responsibility. This means “the range” should be listed in handbook and administrative regulations that are published.



19

Requirement 7: Standard of Evidence

- The grievance process must state which standard of evidence the school will use to reach a determination regarding responsibility.
- Schools can choose between the **preponderance of the evidence** standard and the **clear and convincing evidence** standard.
- Whichever standard the school chooses, it **has to use that standard for all formal complaints of sexual harassment, whether the respondent is a student or employee.**
- All sexual harassment proceedings must have the same standard of evidence.

20

Requirement 8: Right to Appeal

- The grievance procedures must contain the **right to appeal the result of a grievance process**. Will need appeal process in handbook and administrative regulations that are published.
- Schools must **offer an appeal** (details in later slide)

21

Requirement 9: Description of Range of Supportive Measures

The school's grievance process must describe the **range of supportive measures** available to complainants and respondents. **The range will need to go into handbooks and administrative regulations that are published.**



22

Supportive Measures

Supportive measures may include:

- individualized services that are non-punitive, non-disciplinary, and do not unreasonably burden the other party yet are designed to restore or preserve a person's equal access to education;
- placing students immediately in separate classes pending the results of the school's investigation;
- notify the complainant of the options to avoid contact with the respondent and allow students to change academic situations as appropriate;
- counseling.

23

Requirement 10: Privileges

- The school's grievance process must explain that **no information protected by a legal privilege, such as the attorney-client privilege or the doctor-patient privilege, can be used during an investigation unless the person holding that privilege has waived it.** **Not sure how school would obtain privileged information.**
- Neither a party nor the school is allowed to seek, permit questions about, or allow the introduction of evidence that is protected by a recognized privilege.
- Individuals can always opt to waive their own privileges.

24

5. Walking Through the Grievance Process

- This is the process initiated by a formal complaint, either by an individual or the Title IX Coordinator.

The “Grievance Process” contains multiple parts, including the the “investigation,” which comes before you come to any “conclusions,” and before any “appeal.”

25

Emergency Removals

Two quick notes:

- A school may **remove a respondent from the school’s education programs or activities on an emergency basis if the respondent poses an immediate threat to anyone’s physical health or safety.** There are additional requirements for emergency removal proceedings that schools should consider if they institute this process.
- **If the respondent is a school employee, the final regulations don’t prevent a school from placing that employee on administrative leave during the investigation.**

26

Overarching “Principles”

- The grievance process cannot itself discriminate against a complainant or a respondent on the basis of sex.
- Practices must apply equally to both complainants and respondents – either of which can be male or female – and can’t discriminate as between men and women, notable with respect to credibility determinations.

27

Written Notice to the Parties

- When the school begins an investigation, it has to provide the parties with written notice of certain information. This could result in retaliation or intimidation by “respondent.”
- It has to give notice to the parties of the school’s grievance process, which must comply with the 10 items we listed before. Miranda for harassment allegations.
- It also has to include whether there is an opportunity to engage in informal resolution. Schools don’t have to offer informal resolution processes, but if they choose to, it’s important that they are mentioned in this initial notice. No informal resolution option for employee-student harassment.

28

Details of Written Notice

1. The actual allegations and facts that would constitute sexual harassment.
2. The presumption of innocence.
3. A statement that the parties are entitled to advisor of their choice.
4. A statement that the parties can request to inspect and review certain evidence.
5. Information regarding the code of conduct and false statements.

29

Mandatory Dismissal

- A school must dismiss a complaint:
 - that does not describe conduct that meets the definition of sexual harassment;
 - that alleges sexual harassment that did not occur in the school's education program or activity;
 - that alleges sexual harassment that did not occur in the United States at all. *Schools trips out of U.S. excluded.*
- Schools can still address these complaints under their code of conduct, even if the misconduct is not sexual harassment under Title IX.

30

Discretionary Dismissals

A school may dismiss a complaint:

- if the complainant notifies the Title IX Coordinator in writing that he/she wishes to withdraw the formal complaint or some of its allegations;
- if the respondent is no longer enrolled or employed by the school; or [for EEs, continue for SBEC/DNHR]
- if specific circumstances prevent the school from gathering evidence sufficient to reach a determination about the allegations.

31

Dismissal Procedures

- Whenever a school dismisses a formal complaint, or any allegations in it, the school must promptly **send written notice of the dismissal and the reasons to the parties.**
- Both parties have the right to appeal a school's dismissal decisions (more later).



32

Gathering Evidence: Schools and Parties

- The school must give both parties specific, equal rights and protections. These rights and protections apply whether the complainant filed the formal complaint, or whether the Title IX Coordinator began the investigation by signing the formal complaint.
- The school is not allowed to access a party's personal records if they are maintained by a physician, psychiatrist, psychologist, or other professional for the purpose of treatment to the party, without consent.

33

Gathering Evidence: Schools and Parties

- The school must provide an equal opportunity for the parties to present witnesses and evidence, **including expert witnesses**, as well as inculpatory or exculpatory evidence.
- **The school can't restrict the ability of either party to discuss allegations under investigation, or to gather and present relevant evidence. Note this is for parties, not witnesses.**
- **The school has to provide the same opportunities to the parties to have others present during the grievance proceedings, including access to an advisor of choice for any meetings or hearings. Both complainant and respondent entitled to an "advisor" of their choice. This needs to be in handbook and administrative regulations.**

34

Gathering Evidence: Schools and Parties

- The school has to provide **to the party whose participation is invited or expected** written notice of the date, time, location, participants, and purpose of all hearings, interviews, or other meetings, with sufficient time for the party to prepare.
- The school must also provide equal opportunities for the parties and their advisors to inspect and review the evidence obtained by the school as part of its investigation, if the information is directly related to the allegations raised in the formal complaint.
- The school also must give the parties a meaningful opportunity to respond to the evidence **after the school has provided it**. Strange?

35

Investigative Reports

- After gathering evidence, the school needs to prepare an **investigative report** on the allegations of the formal complaint.
- A school has to give the parties at least 10 days to respond to the evidence in writing. If a response is submitted, the school must consider that response before finalizing the investigative report. The investigative report can then be finalized and provided to the parties.
- That report must be circulated to the parties **at least another 10 days before any determination of responsibility, or 10 days before a hearing**, if a hearing happens. This means before there can be a conclusion, we wait **at least 20 days**.

36

Hearings (ESE)

- *For elementary and secondary schools, the school has the **option**, but never the obligation, to hold a hearing.*
- **Event without a hearing**, the elementary or secondary school must still give the parties equal opportunity to submit relevant, written questions to each other, before the decision-maker reaches a determination.
- Rape Shield Laws: Questions and evidence about a complainant's prior sexual history are not relevant, with two limited exceptions:
 - to prove someone other than the respondent committed the alleged misconduct or
 - to prove consent.

37

Cross-Examination

- No *party* is EVER allowed to personally cross-examine anyone.
- Parties **must be permitted an advisor of the party's choosing**. If a school offers an advisor for a hearing, **solely for the purpose of conducting cross-examination** on that party's behalf.
- An advisor chosen by the school **does NOT need to be a lawyer**.
- OCR: By hearing each party's version of events and hearing each party answer questions about their version of events, the neutral, unbiased decision-maker is more likely to reach an accurate determination regarding responsibility. **Thus, both parties must testify. This may chill complaints.**

38

Participation and Cross-Examination

- Every person has the right to choose to participate, or not participate, in any part of a grievance process. No one may be forced, threatened, coerced, or discriminated against for choosing not to be part of the school's grievance process.
- If a party or witness chooses not to appear at the live hearing, or not to answer cross-examination questions, the decision-maker excludes that party's or witness's statements and evaluates any evidence that doesn't involve those statements. If party does not permit cross examination, their statement is out.
- The decision-maker must never make inferences about the determination regarding responsibility based on the fact that a party or witness didn't come to the hearing or submit to cross-examination.
- A school may hold the entire live hearing virtually, or a school may allow some participants to appear virtually, with technology that allows everyone to see and hear each other.

39

Recordings

- Schools also must create an audio or audiovisual recording, or a transcript, of any live hearing, and make it available to the parties for inspection and review.
- It's important to remember that a school must ALWAYS comply with disability laws, so that individuals with disabilities who participate in a school's grievance process are appropriately accommodated, including with respect to the use of technology and reliance on visual, auditory, or written modes of communication.

40

Decision-making: Objective and Unbiased

- The school's decision-maker needs to objectively evaluate the relevant evidence and reach conclusions about whether the respondent is responsible for the alleged sexual harassment.
- A **school's decision-maker** needs to use independent judgment: **cannot be the same person who conducted the investigations or the Title IX Coordinator.**

Who are the decision-makers?

- Decision-makers must be free from conflicts of interest or bias for or against complainants or respondents and **must receive special training about how to be impartial and how to decide what evidence is relevant.**
- The decision-maker will weigh the relevant evidence and decide whether it meets the school's standard of evidence for sexual harassment allegations.

41

Decision-making: Written Decisions

After the evidence has been weighed, must issue a **written decision**. It must include:

1. The **portion of the school's policies that was violated.**
2. A **description of the procedural steps that were taken by the school on the way to getting to that point.**
3. A **findings of fact section**
4. A **section that draws conclusions after applying the facts to the portion of the school's policy that applies**
5. A **statement and rationale for the ultimate determination of responsibility.**

42

Decision-making: Written Decisions

6. **Any disciplinary sanctions** that the school will impose on the respondent and state whether the school will provide remedies to the complainant.
7. **A statement and rationale for any remedies for the complainant, addressing how those remedies will restore or preserve equal access.**
8. **A statement of the recipient's procedures, a statement that the parties have a right to appeal the initial determination regarding responsibility, and the permissible bases for appeal.**

43

Decision-making: After the Decision

- The school must **send the written determination to the parties simultaneously, along with information about how to appeal the determination.**
- A school has discretion to set deadlines for when an appeal must be filed, bearing in mind the obligation to conclude the entire grievance process and bring resolution to the situation for both parties, within a reasonably prompt time frame.
- The **Title IX coordinator is responsible for carrying out the remedies contained in the written decision.**

44

Remedies

The District's remedies are designed to "restore or preserve equal access to the school's education program or activity." Possible "range of remedies" - verbal warning to assignment to disciplinary alternative placement.

Consider:

- training program for those involved in the complaint
- comprehensive education program for the school community
- counseling to the complainant and the respondent who engaged in prohibited conduct
- increasing staff monitoring of areas where prohibited conduct has occurred
- reaffirming the District's policy against discrimination and harassment.

Respondents who are employees may be subject to a range of discipline from a written warning up to and including termination of employment.

45

Appeals

- A school has to offer **both parties** an opportunity to appeal.
- Appeals can be taken from two different steps in the process.
 - **After a dismissal** before the grievance process, whether mandatory or discretionary
 - **At the end of the grievance process** (after a hearing, if you allow hearings)

46

Grounds for Appeal

1. A procedural irregularity affected the outcome of the matter.
2. New evidence has been discovered that was not reasonably available at the time of the determination of responsibility or dismissal.
3. A conflict of interest on the part of a Title IX Coordinator, an investigator who compiled the evidence, or a decision-maker, and the conflict of interest affected the outcome.
4. **Schools can offer additional grounds for appeals**, if they want to, so long as the grounds apply on an equal basis to the parties.

47

Appellate Process

- The recipient has to notify the parties in writing and implement appeal procedures equally.
- Both parties must have equal opportunity to submit a written statement supporting or challenging the outcome
- **The person who decides the appeal cannot be the same person who reached the determination regarding responsibility, or the same person as the investigator or Title IX Coordinator.**
- After considering the parties' written statements, the decision-maker on appeal has to issue a **written decision** and send it to the parties simultaneously.
- The school's determination about whether the respondent is responsible for the sexual harassment allegations **become final after appeal**. **Final does not mean an employee is denied due process if we wish to terminate.**

48

Informal Resolution

- Schools can offer informal resolution in appropriate cases:
 - **Exception: Where the respondent is an employee of the school**
- Informal resolution only if voluntary by each party.
- A school can never force, threaten, or require informal resolution.
- If informal resolution proceeds, the school must provide a **facilitator** who is **unbiased**, and **who has received special training**.
- The school still needs to provide complainant and respondents with notice of the allegations, notice of their rights, information about whether an informal process is confidential, and about withdrawing from the process.

49

6. Other Issues: Record-keeping

This duty extends for **7 years**, and includes several categories of documents:

1. Records of investigation.
2. Records of any appeal/materials associated with an appeal.
3. Records of any informal resolution process
4. All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution (and remain posted on District's website).
5. Records of the supportive measures that they took in response to a report or complaint of sexual harassment.

50

Other Issues: Retaliation

- No school or person is allowed to retaliate against anyone for exercising rights under Title IX.
- Any person retaliated against can file a complaint with the school, and the school must have procedures in place for the prompt and equitable resolution of such complaints.
- The school should keep the identities of parties and witnesses confidential, unless disclosure of someone's identity is required under other laws (e.g. FERPA) or is necessary in order to conduct the grievance process.

51

Retaliation: Code of Conduct Issues

- It is retaliation to charge a person with code of conduct violation for the purpose of discouraging the person from pursuing a sexual harassment report or formal complaint, or exercising any other Title IX rights.
- It may be prohibited retaliation if a code of conduct charge is for a violation unrelated to sexual harassment yet arises from the same facts as a sexual harassment allegation.

52

7. Free Speech

- OCR says they can never require a school to violate the First Amendment. **No kidding?**
- When OCR investigates a school for possible Title IX violations, OCR will never view a school's attempt to suppress free speech as an appropriate response to sexual harassment. **Is this a Captain Obvious commercial?**



53

Record Keeping - Training

A recipient must maintain for a period of **seven** years records of:

- All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.
- Training materials must be made publicly available on a district's website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.

54

Need to Decide

- **Standard for Finding a Violation:**

preponderance of the evidence standard

or

clear and convincing evidence

- Hearing Process?

(Both must be noted on website, in policy, and in handbooks)

55

Need to Add:

Language to published administrative regulations and Handbooks on:

- Title IX Coordinator (already there)
- Campus Handbooks: Anyone on Campuses who have authority to institute “corrective measures”
- “Grievance” Process
- Informal Resolution Process
- Appeal Process
- Range of remedies and disciplinary sanctions for Respondent
- Range of Supportive Measures for Complainant
- Sexual Harassment Complaint Form
- Form letters (notice)

56

Need to Create Position of:

- Title IX Coordinator
- Investigators
- Decision-makers (independent, unbiased)
- Facilitators (independent, unbiased) (trained in informal resolution efforts)
- **Advisors (Optional)**

The materials used to train Title IX personnel can't rely on sex stereotypes, must promote impartial investigations and adjudications, and must be posted on each school's website (and if a school does not maintain a website, make them available for public inspection upon request).

57

More on Training:

Training must include:

- Definition of sexual harassment
- The Scope of the school's education program/activity (what is included)
- How to conduct an investigation/grievance process
- Hearing (if you have them)
- Appeals
- Informal Resolution Process
- Avoiding prejudgment of the facts at issue, conflicts of interest, bias
- Investigators must receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence

58

“Decision-maker” Training

- Decision makers must be trained in technology if will be used at live hearing
- Decision makers and Investigators trained in issues of “relevance”
- Decision makers and Investigators trained in rape shield protections

59

More on OCR

- To learn more about OCR, visit: www.ed.gov/OCR
- If you have questions for OCR, you may contact OCR at the OPEN Center at T9questions@ed.gov

60

Questions?

CONTACT US



EICHELBAUM WARDELL
HANSEN POWELL & MUÑOZ, P.C.

www.edlaw.com

(800) 488-9045

information@edlaw.com