

Title IX Overview and Key Personnel

Salome Consolidated Elementary School District

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Disclaimer

The information provided in this document is for informative purposes only and should not be used in place of legal advice.

Learning Objectives

- What is Title IX and what does it cover?
 - 2020 and 2024 Title IX Regulations
- Recognizing Sexual Harassment and Sexual Violence
- Overview of Title IX Processes and Key Personnel
- Legal Challenges and Lawsuits
- Foundation for specific role training

What is 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.”

United States Congress, 1972

2024 Regulations Expand Protected Persons

Title IX covers “sex discrimination” based on:

- Sex stereotypes
- Sex characteristics
- Sexual orientation
- Gender identity
- Parental Status
- Pregnancy or related conditions

Sex Stereotypes

- “Fixed or generalized expectations regarding a person’s aptitudes, behavior, self-presentation, or other attributes based on sex”
- 2024 Regulations
- OCR has been treating discrimination based on sex stereotypes as part of Title IX since at least 2012

5 Types of Sex Stereotypes

1. Personality: women = accommodating and emotional; men = self-confident and aggressive
2. Domestic: women care for children, cook and clean house; men handle finances, work on car and do home repairs
3. Occupations: women = teachers and nurses; men = pilots, doctors, and engineers

Sex Stereotypes, cont.

4. Physical appearance (body): women expected to be thin and graceful, men expected to be tall and muscular

5. Physical appearance (dress and grooming): women wear dresses and makeup; men wear pants and have short hair

Sex Characteristics

- Based on “a person’s physiological sex-based characteristics”
- May include “anatomy, hormones, and chromosomes associated with male or female bodies”
- Includes “intersex traits” (born with reproductive or sexual anatomy that does not fit typical definitions of male or female—physical, hormonal or genetic)

Sexual Orientation

- No specific definition in regulations
- Generally applicable LGBTQ+
 - Lesbian
 - Gay
 - Bisexual
 - Queer

Gender Identity

- No specific definition in regulations
- “An individual’s sense of their gender, which may or may not be consistent from their sex assigned at birth”
- A person’s “deeply felt inherent sense of their gender”

Parental Status

- The status of a person who, with respect to another person who is under the age of 18 or who is 18 or older but is incapable of self-care because of a physical or mental disability is:
 - Biological Parent
 - Adoptive Parent
 - Foster Parent

Parental Status

- Stepparent
- Legal custodian or guardian
- In loco parentis
- Actively seeking legal custody, guardianship, visitation, or adoption

Pregnancy or Related Conditions

- **Pregnancy, childbirth, termination of pregnancy, or lactation**
- Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation
- Recovery from pregnancy, childbirth, termination of pregnancy or lactation

Examples of Pregnancy Related Conditions

- Fatigue
- Dehydration
- Nausea (morning sickness)
- Anemia
- Bladder dysfunction
- Infertility
- Recovery from miscarriage or abortion
- Prenatal or postpartum depression

Requirements re: Pregnancy

- Employee, student or legal representative must notify the District of the pregnancy
- Modifications or accommodations
- Student can inform Title IX coordinator (ex. student will be late because of doctor's appointment)

IN SHORT, IT MAY BE TIX IF

Allegations involve

- Physical sexual activity or sexualized touching (caressing, massaging, etc.)
- Comments mentioning sex acts or relating to one's sexual orientation, gender identity, certain appearances, or certain behaviors
- Touching or exposing intimate body parts (breasts, buttocks, crotch, or pubic area)
- Pregnancy/termination of pregnancy
- Parental status

Who can be a party to a Title IX complaint?

- Student vs. Student
- Student vs. Staff
- Staff vs. Student
- Staff vs. Staff
- May be broader still under 2024 regs covering District “operations” (Board Member, Contractor, etc.)

Why do we care whether TIX applies?

- TIX protects vulnerable classes of persons
- Possible OCR complaint
- Potential District liability
- Following TIX procedures delays the typical discipline processes for students and staff

School Liability: 2020 Regulations

2020 regulations:

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.

Actual Knowledge (2020 regs)

Whenever any employee has notice that sexual harassment might have occurred, the school's response obligation is triggered.

- Notice of conduct that would meet the definition if true

Liability for Deliberate Indifference (2020 regs)

A response to notice of sexual harassment that is clearly unreasonable in light of the known circumstances will subject the District to liability under Title IX (i.e. the District can be found to be acting “deliberately indifferent”)

School Liability/Affirmative Duties (2024 Regs)

- Respond promptly and effectively (vs. not act with “deliberate indifference” under prior regulations) when school has notice of conduct
- Proactively address sex discrimination in the program or activity
- Monitor for barriers to reporting conduct that may “reasonably” constitute sex discrimination AND take reasonably calculated steps to address

Education Program or Activity (2020 Regs)

- 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.
- Does not include conduct that occurred outside of the U.S.

Education Program or Activity (2024 Regs)

- Includes all the operations of the District regardless of where they are located - even outside the U.S.
- No longer requires “control” by District

DOE: Sex Discrimination (2024 Regs)

- Pregnancy discrimination
- Unequal athletic opportunities
- Sex-based discrimination in STEM courses and programs
- Discriminatory application or enforcement of dress code policies
- Sex-based harassment
- Sexual violence
- Retaliation

Title IX Sexual Harassment or Sexual Violence

- 3 Types
- All three require:

**Unwelcome sexual conduct
(no consent)**

+

**Conduct effectively denies (or limits) a
person's equal access to educational
activity**

Examples of Denial or Limitation to Educational Activity

- Skipping classes or refusal to go to school
- GPA goes down
- Difficulty concentrating in class
- Bedwetting, crying at night
- Quitting sports or extracurricular activities to avoid contact with alleged perpetrator

Type 1: Quid Pro Quo

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

(effectively the same under 2020 and 2024 regs)

Type 2: Severe, Pervasive and Objectively Offensive (2020 Regs)

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

Type 2: Hostile Environment (2024 Regs)

Unwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity (i.e. that creates a hostile environment).

5 Hostile Environment Factors (2024 Regs)

1. Degree to which the conduct affected the complainant's ability to access the District's education program or activity;
2. Type, frequency, and duration of the conduct;
3. Parties' ages, roles within the District's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct;

5 Hostile Environment Factors

4. Location of the conduct and context in which the conduct occurred; and
5. Other sex-based harassment in the District's education program or activity.

Type 3: Sexual Assault or Violence

- Sexual assault
[20 U.S.C. 1092(f)(6)(A)(v)]
- Domestic violence
[34 U.S.C. 12291(a)(8)]
- Stalking
[34 U.S.C. 12291(a)(30)]
(effectively the same under 2020 and 2024 regs)

Possible Title IX Scenarios

- 14 y.o. male student places his hand on a 13 y.o. female student's thigh and massages it
- Student calls another “shrimp dick” in front of a group of students—1 time? 20 times?
- “Nut Tag” Tuesday or “Whack a Sack” Wednesday

More Possible Scenarios

- Overnight trip, students play “Truth or Dare” and a couple are “dared” to have sex, and do
- Two special education students have sex in a school restroom
- Student comments to teacher she wants a dildo for Christmas, after winter break teacher asks her if she got the dildo

District's Obligations (Response)

- Respond promptly and effectively (vs. “not act with ‘deliberate indifference’” under 2020 regulations)
- Address sex discrimination in the program or activity
- Designate confidential employees
- Monitor for barriers to reporting conduct that may “reasonably constitute sex discrimination” AND take reasonably calculated steps to address—Title IX Coordinator

Is it more than Title IX?

- Mandatory report to DCS and/or law enforcement
- HR issues
- Report to State Board of Education (unprofessional conduct by adult employee)

Impartiality and Bias

Title IX requires that Key Personnel act Impartially and avoid Explicit Bias, Conflicts of Interest, Perception of Bias, and Implicit Bias.

Explicit Bias

- Forming opinions based on prejudices or attitudes toward certain groups
- Positive or negative preferences for a particular group
- Examples: racism, sexism, ageism, anti-LGBTQIA+

Conflicts of Interest and/or Perception of Bias

- Actions may create a reasonable impression that the actor's ability to perform duties is impaired
- Examples: family or close friend relationship, prior negative or positive interactions with party

Implicit Bias

- Unconscious bias
- Based on subconscious feelings, perceptions, attitudes, and stereotypes developed as a result of prior influences and imprints
- Does not require animus
- Implicit bias can be reduced/managed by discussing and recognizing

Important Changes in Obligations

- Training
- Non-discrimination Policy
 - Requirements of the policy
 - Publication requirements

TRAINING

2020 Regs

A District must ensure that Title IX Coordinators, investigators, decision-makers and any person who facilitates an informal resolution process, receive training in:

- Definition of sexual harassment, grievance process, how to serve impartially, conflicts of interest, etc.

TRAINING

2024 Regs

The District must ensure that employees, Title IX Coordinator, decisionmaker, investigator) receive training related to their duties under Title IX promptly upon hiring or change of position, and annually thereafter.

TRAINING

2024 Regs

All employees must be trained on:

- District's obligations to address sex discrimination in its education program or activity;
- Scope of conduct that constitutes sex discrimination under Title IX and this part, including the definition of sex-based harassment; and
- All applicable notification and information requirements.

Non-Discrimination Policy

Requires the District to adopt, publish and implement a policy stating the recipient does not discriminate on the basis of sex and prohibits sex discrimination.

Non-Discrimination Policy

Requires the District to provide notice of the policy to student, parents, guardians, or other authorized legal representatives of elementary school and secondary school students, employees, applicants for admission, and all unions and professional organizations holding collective bargaining agreements with the recipient.

Non-Discrimination Policy

The notice must include:

- A statement that the District does not discriminate on the basis of sex and prohibits sex discrimination
- Statement that inquiries about Title IX may be referred to the Title IX Coordinator, OCR, or both
- Name/Title, address, email and phone number of Title IX Coordinator
- How to locate the policy
- How to report information that may be a Title IX violation

Non-Discrimination Policy

The District does not discriminate on the basis of sex and prohibits sex-based discrimination in any education program or activity that it operates, as required by Title IX, including in employment.

[Sample language that DOE states meets the minimum requirements of the 2024 changes.]

Non-Discrimination Policy

The notice must prominently be included in/on the recipient's:

- Website
- Handbooks
- Catalog, announcements or bulletins
- Application forms

Key TIX Personnel

- Title IX Coordinator
- Title IX Investigator
- Title IX Decision Maker
- Title IX Informal Resolution Facilitator
- Title IX Decision Maker on Appeal

Title IX Coordinator

Title IX Coordinator

- Must have the actual title and be authorized to initiate the grievance procedure against a respondent
- Must have authority to provide supportive measures that will restore or preserve “equal access”
- Must be trained and is responsible for ensuring that other relevant individuals are trained

Title IX Coordinator

- Cannot have a conflict of interest
 - Must ensure others involved in grievance process do not have a conflict of interest
- Trained to act impartially throughout the process
- Does not prejudge the alleged facts
- Thoroughly understands the definition of sex discrimination and sexual harassment under Title IX

Title IX Coordinator

- Receives notice of allegations of sexual harassment
- Fulfills duties related to “notice” obligations of new regulations
- Coordinates implementation of supportive measures
- Helps draft and accepts Complaints

Title IX Coordinator

- Decides whether to sign Complaint if a victim refuses
- Issues written notice when there is a Complaint
- Determines whether Complaint must be dismissed or, if dismissal is permitted, whether to dismiss it
- Offers informal resolution where appropriate

Title IX Coordinator

- May conduct the investigation
- Monitors the implementation of the grievance procedure (tracks deadlines, maintains records, etc.)
- Effectively implements remedies where there has been a determination of responsibility

**It's Title IX.
So, now what do we do?**

Grievance Procedures

Process

District employee learns of allegations which--if true--are covered by Title IX



Coordinator receives complaint (allegations); meets with victim to discuss Title IX and supportive measures,



Coordinator provides notice of allegations to Respondent



Investigator investigates, shares evidence, and drafts report



Decision Maker writes decision



Appeal (if made by party)

What is Notice?

- A report to ANY (non-confidential) 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

All Notice Triggers Responsibility

Contact alleged victim promptly to discuss:

- Whether the Complainant wants **supportive measures**
- Advise Complainant that supportive measures are available regardless of whether a Title IX complaint is made
- Explain the process for making a complaint

Complainant

- 2020 regs: individual who is alleged to be the victim of “current” conduct
- 2024 regs: Complainant means an individual who is alleged to be the victim of conduct that could constitute sexual harassment (or sex discrimination) whether it occurred in the past and including a victim who is an applicant to an educational program or activity

Is there a statute of limitations?

Supportive Measures

- Designed to restore or preserve **equal access** to education program or activity
- Equal access is the same access that someone who hasn't experienced sexual harassment has
- What does a limitation of “equal access” look like?
 - Does NOT require total loss of educational access

Examples of Limitation on Equal Access

- Poor attendance, failing or diminished grades
- Quitting an extracurricular/club to avoid respondent
- Dropping a class
- Being unable to concentrate in a class/activity
- Manifestations of stress (bed-wetting, self-harm, hair loss)

Supportive Measures

- Non-disciplinary
- Non-punitive
- Individualized to the person and situation
- Offered as appropriate and without charge
- Must be offered to Complainant
- Offered to respondent if grievance procedures or informal resolution initiated, as appropriate
- Cannot unreasonably burden either a complainant or respondent

Examples of Supportive Measures

- Counseling
- Course modifications
 - Extend a deadline
 - Allow exam retake
- Schedule changes
 - For complainant or respondent
- Allow student to repeat a course
- Increased monitoring or supervision
- Mutual non-contact order
- One-way no contact order
- Cannot include anything that is listed as a potential disciplinary consequence

Supportive Measures

- Cannot sanction or discipline Respondent in any way until grievance procedure has been followed
- Must continue to be offered during an investigation and whether an investigation is ever done
- If Respondent is an employee, you may send employee home on administrative leave (with pay) as a supportive measure

Supportive Measures

- Do not completely remove a student respondent from an educational activity as a supportive measure for complainant
- UNLESS there is need for an emergency removal (explained later)

Supportive Measures

- Provide complainant and respondent timely opportunity to seek modification or reversal of supportive measures decisions that apply to them
 - Ex: Respondent can challenge a safety plan in place, but cannot challenge counseling offered to complainant
- Impartial employee to review and have authority to modify or reverse decision
 - Cannot be the employee who initially determined the supportive measure(s)

When Respondent is an Employee

- School may send an employee home on paid administrative leave as a supportive measure “during the pendency of the grievance process”
- Employee may also choose Title VII, as part of the HR process
- Can reassign the employee to another site (Be careful)

EMERGENCY REMOVAL OF STUDENT

- Requires an individualized safety and risk analysis (threat assessment)
- Requires “imminent and serious threat to the health or safety of a complainant or any students, employees or other persons arising from the allegations of sex discrimination” justifying removal
- 2024 regs removed “physical” threat requirement

EMERGENCY REMOVAL OF STUDENT

- Requires “notice and an opportunity to challenge the decision immediately following the removal”
- Emergency removal of a student with an IEP or a 504: Remember that the student still has rights under IDEA or ADA.

Coordinator's Analysis: Is it Title IX?

- Is it sex discrimination, sexual harassment, or sexual violence?
- Does it occur in an educational program that is an operation of the District?

Reminder: District Liability (2024 regs)

A recipient of federal funds violates Title IX where it has notice of an allegation of sex discrimination experienced by an individual in the educational program and the school fails to respond promptly and effectively.

Assessing Whether to Proceed With Complaint w/o Complainant

2024 Regs

To make this fact-specific determination, the Title IX Coordinator must consider, at a minimum, the following eight (8) factors:

- 1) Complainant's request not to proceed
- 2) Complainant's reasonable safety concerns regarding initiation of complaint

Assessing Whether to Proceed With Complaint w/o Complainant

Continued

3) Risk that additional acts of sex discrimination would occur if complaint is not initiated

4) Severity of the alleged sex discrimination

5) Age and relationship of the parties, including whether the respondent is an employee

Assessing Whether to Proceed With Complaint w/o Complainant

Continued

6) Scope of the alleged sex discrimination, including information suggesting a pattern, ongoing sex discrimination or sex discrimination alleged to have impacted multiple individuals

Assessing Whether to Proceed With Complaint w/o Complainant

Continued

7) Availability of the evidence to assist a decisionmaker

8) Whether the recipient could end the alleged sex discrimination and prevent its recurrence without initiating the grievance procedures

If Complaint Declines Title IX Process, And Coordinator Decides Not To Open

- Document (for your records)
 - That you offered supportive measures and what was offered/accepted
 - That you explained Complaint procedure
 - That the Complainant(s) declined

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
- Include a copy/reference to 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 district policy 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:

- Identities of the parties involved
- The conduct alleged to constitute sexual harassment
- The date(s) and location(s) 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, Title IX Coordinator must provide written notice of the additional allegations to the parties.

Consolidation of Complaints

- Complaints may be consolidated:
 - Against one or more respondents;
 - By one or more complainants; or
 - By one party against another party
- ***IF*** the allegations of sex discrimination rise out of the same facts or circumstances
- Be careful to assess privacy and confidentiality concerns when determining whether to consolidate

Good Cause Delay

- Reasonable extension of “prompt” timeframes may be allowed on a case-by-case basis for good cause
- Good cause = concurrent law enforcement or DCS activity; unavailability of respondent; school break
 - It is **not** good cause to delay because Coordinator, Investigator, or Decisionmaker are unavailable

Good Cause Delay

- Delay may be needed for:
 - Evaluation of whether to dismiss or investigate complaint
 - Investigation overall or any specific portion
 - Decision of determination of responsibility
 - Appeal
- Must provide written notice to parties if there will be a good cause delay and include the reason for the delay

(Mandatory) Dismissal of Complaints

Complaint may be dismissed if:

- 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 operations**

***Regulations say may, but if either of these is the circumstance you should dismiss.**

(Permissive) Dismissal of Complaints

Complaint may be dismissed if:

- Recipient is unable to identify the respondent after taking reasonable steps to do so
- Respondent is not participating in the education program or activity, and is not employed by the school – be careful here!!
- Complainant voluntarily withdraws complaint (evaluate 8 factors)
- 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 (no statute of limitations)

Complaint Triggers the Investigation

- Complaint triggers responsibility to conduct an investigation that complies with the adopted grievance procedures
- Upon notice of a complaint, the Title IX Coordinator will provide a written notice to parties explaining basic rights during the process and will assign an investigator

Informal Resolution Process

- When: 2024 Regs allow even without/before a Complaint, 2020 Regs require Complaint
- What: Settlement or restorative process
- How: Mediation is common process

Informal Resolution

- District is not required to use informal resolution, but if it chooses to use it, then it is appropriate to offer if:
 - Complaint is filed (2020 regs require this; 2024 regs do not)
 - Conduct alleged, but no complaint filed (2024 regs permit this, but 2020 regs do not)
 - Both parties voluntarily agree to participate in writing
 - The Respondent is NOT an employee and the Complainant a student

Informal Resolution

- Cannot be required and either party can withdraw at any time
- Process may include arbitration, mediation, or restorative justice
- Must have reasonably prompt time frame to complete the process
- Pauses the grievance process at the time of request/voluntary agreement

Informal Resolution

- Decide whether confidentiality can be a term of an informal resolution and include that information in written notice
- If the informal resolution facilitator may be called as a witness in investigation, must disclose that possibility to the parties in the written notice
- Facilitator must not have a conflict of interest, must be trained in these regulations, and must be free of bias

Informal Resolution

- Suggested that facilitator be trained in mediating sexual harassment situations
- Be aware of power dynamics when implementing an informal resolution
 - Should there be a face-to-face meeting?
 - Is someone manifesting signs of trauma?
 - Should facilitator press parties on facts?

Why Parties May Prefer Informal Resolution

- Parties may be more satisfied if they had a say in creating the outcome
- Process may be less adversarial
- They can control the outcome
- Resolutions can include creative solutions
- Process is shorter and does not involve a full investigation and determination

What is the Process?

- Process is voluntary for all parties
- Mediation
- Restorative process = repair harm done (restore access to educational program or activities)
- Consider: issues with apologies
- Have parties sign consent to informal resolution

Assignment to Investigator

- If you are not going to investigate, assign to a trained investigator
- Ensure that investigator does not have a conflict of interest
- Continue to monitor deadlines and be a resource to the investigator (definition of sexual harassment, course of investigation, etc.)
- Provide with District's Templates & Forms

Investigator Procedure Reminders

Redact personally identifiable information such as: student ID #, phone #, address, etc.

- Complainant and Respondent names are **never** redacted
- Redact student witness names through creation of a legend – ABC, 123, etc. for aliases
- Determine who gets legend in addition to Coordinator and Investigator (parties or just decision maker - talk to counsel)

Investigator Procedural Reminders

- Non-disclosure Agreements for Parties
 - Non-disclosures signed
 - Have investigator sign at interviews vs. asking for non-disclosure right before sending evidence
 - Contact before interviewing
 - Non-disclosures cannot preclude parties from building or investigating their own case
 - If party does not sign non-disclosure Coordinator facilitates their access to review evidence

Advise your Investigators to Plan, Plan, Plan

- Map out a plan for investigation
- Understand the allegations
- Understand definition of sexual harassment to determine what elements must be established
- Who to interview?
 - Notification to parent of interview for witness students
- What documents must be gathered?
 - Assist investigator as needed
- Necessary for IT to run a server search? (Coordinator facilitates)
- Need recordings from surveillance cameras? (Coordinator facilitates)

Assign Decision Maker

- If you are not going to be decisionmaker, assign to a trained decisionmaker
- Ensure that decision maker does not have a conflict of interest
- Continue to monitor deadlines and be a resource to the decision maker (definition of sexual harassment, course of investigation, etc.)
- Provide with District's Templates & Forms

Remedies

- If a determination of responsibility, you will oversee implementing remedies
- If a determination of non-responsibility, continue to provide supportive measures as needed
- Continue to be a resource for both parties as needed
- No discipline until time for appeal has run

Appeals

The Regulations provide Parties the opportunity to appeal the following:

- Dismissal of Complaint
- Determination of Responsibility Decision

Appeals

- Three grounds for appeals
 1. A procedural irregularity that would change the outcome;
 2. New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that would change the outcome; and
 3. The Title IX Coordinator, investigator(s), and/or Decision Maker had a conflict of interest or bias for or against Complainants or Respondents generally or the individual Complainant or Respondent that would change the outcome.
- District can include additional bases to appeal in policy

Appeals

A school must:

- Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
- Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator or the Title IX Coordinator;
- Decision-maker(s) for the appeal can be a single Appeal Officer or an Appeal Panel.

Appeals

- If an appeal is filed, ensure that the decision-maker on appeal has no conflict or bias and receives all necessary documents
- Decisionmaker on appeal must be trained in definitions, procedures, etc.
- Monitor timelines and competition of that process and ensure that notices are sent to the parties

Appeals

- The written determination on responsibility and sanctions, if applicable, are postponed until the decision on the appeal is sent to the parties. §106.45(b)(7)(iii).
 - Keep supportive measures in place during appeal period to maintain status quo between the parties and ensure equal access to education.
 - Can revisit emergency removal if necessary.

Discipline

- Unless the Respondent waives the appeal, let the time for appeal run before initiating discipline
- If the Respondent has an IEP or 504, depending on the type or length of discipline, a MDR may be required

Discipline and IDEA/504

- If discipline would effect a change in placement for more than 10 days (note prior discipline counts), a manifestation determination review (MDR) is required before discipline is imposed
- MDR team can review decision and refer to review but do not make part of SPED records; consider having MDR team members sign an NDA

Records Retention

- All records related to Title IX complaints must be maintained for a minimum of 7 years, including records substantiating remedies and supportive measures
- Title IX records retained separately and confidentially—not part of student's cumulative file (nor special education)
- Training materials must be posted on the District's website

Title IX Investigators: Running an Investigation

Reminders

- Respondent is presumed not responsible for conduct
- Disciplining Respondent for TIX conduct or conduct directly connected to the TIX conduct = Retaliation
- Both parties must have equal opportunity to present witnesses and evidence

Advisors

- Parties may have an advisor of their choice
- Advisor may be an attorney, but doesn't have to be
- Parents of minor students are not advisors, but do have the right to be there for their child
 - i.e. a minor student may have *both* a parent and another adult advisor present/notified

Parties' Right to Review Evidence

- Have the opportunity to inspect and review evidence collected during the investigation
- Should sign a non-disclosure agreement (NDA), which does not restrict either party's ability to discuss the allegations or gather and present evidence

Expanding the Investigation

If, during the course of the investigation, additional allegations are brought forward that were not included in the initial notice, alert the Title IX coordinator, who will:

- provide written notice of the additional allegations to the parties
- determine the course of action for the investigation of the addition allegations

Timelines

- You must meet the timelines set out in your district's policy
- The investigation must be reasonably prompt (specific number of days for completion of the process must be established)
- Coordinator can determine if temporary good cause delay (school administrative needs ARE NOT good cause for delay)

Investigator: Requirements

- Must be trained on Title IX regulations
- May be the Title IX Coordinator
- 2024 Regs allow to also be the Decision-maker
- Can be a third party hired for this purpose
- Must not have a conflict of interest

Pre-planning

- Review Title IX sex discrimination and what elements must be established
 - Quid Pro Quo
 - Hostile Environment
 - Sexual Violence
- Review the allegations made in the particular matter

Planning

- Interviews?
- Documents?
 - Student/staff records?
 - Server search?
 - Recordings from surveillance cameras?
 - Police report?
- Understand disabilities of persons involved?
- Need an interpreter?

Physical Evidence to Consider

- Attendance records and class schedules
- Discipline records
- Medical or counseling information
- Social media
- Screenshots
- Videos
- Compromising evidence (nude photos/videos) should be redacted and summarized

Note re: Sexual History

The Complainant's sexual predisposition and prior sexual behavior are not relevant, unless:

- It is needed to prove that someone other than the Respondent committed the conduct alleged
- Specific incidents of the Complainant's prior sexual behavior with the Respondent are needed to prove consent

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- Should sign a non-disclosure agreement (NDA), which does not restrict either party's ability to discuss the allegations or gather and present evidence

Expanding the Investigation

If, during the course of the investigation, additional allegations are brought forward that were not included in the initial notice, alert the Title IX coordinator, who will:

- provide written notice of the additional allegations to the parties
- determine the course of action for the investigation of the addition allegations

Timelines

- You must meet the timelines set out in your district's policy
- The investigation must be reasonably prompt (specific number of days for completion of the process must be established)
- Coordinator can determine if temporary good cause delay (school administrative needs ARE NOT good cause for delay)

Investigator: Requirements

- Must be trained on Title IX regulations
- May be the Title IX Coordinator
- 2024 Regs allow to also be the Decision-maker
- Can be a third party hired for this purpose
- Must not have a conflict of interest

Pre-planning

- Review Title IX sex discrimination and what elements must be established
 - Quid Pro Quo
 - Hostile Environment
 - Sexual Violence
- Review the allegations made in the particular matter

Planning

- Interviews?
- Documents?
 - Student/staff records?
 - Server search?
 - Recordings from surveillance cameras?
 - Police report?
- Understand disabilities of persons involved?
- Need an interpreter?

Physical Evidence to Consider

- Attendance records and class schedules
- Discipline records
- Medical or counseling information
- Social media
- Screenshots
- Videos
- Compromising evidence (nude photos/videos) should be redacted and summarized

Note re: Sexual History

The Complainant's sexual predisposition and prior sexual behavior are not relevant, unless:

- It is needed to prove that someone other than the Respondent committed the conduct alleged
- Specific incidents of the Complainant's prior sexual behavior with the Respondent are needed to prove consent

Collecting Evidence

- Do not require or rely on the parties to anticipate and provide you with the evidence you need
- You may not require a party to provide evidence (documentary or verbal) that would be legally protected under attorney-client privilege, doctor-patient privilege, or spousal privilege

Collecting Evidence

- If the parties want to provide otherwise privileged information, you must obtain written, voluntary consent (of parent or adult student) allowing the district to include that evidence (see forms for a template)
- **Even if the school/district has the medical evidence, it may not be used in the investigation without consent**

Interview Notice

- For all interviews, provide written notice of interview: date; time; location; participants; and purpose of any investigation activity that requires a **party's presence**—provide notice with enough time for the party to prepare to participate
- See forms for template

Preparing Questions

- Plan your interview outlines (checklists in forms may be helpful)
 - Go with the flow
 - To the extent reasonable, ask both parties the same questions and then allow the interview to take you down different roads
 - Ask witnesses the same or similar questions

Style

- Avoid putting words in mouth of witness
 - ASK: “How did _____’s behavior make you feel?”
 - DON’T ASK: “Did _____’s behavior upset you?”
- Avoid “why” questions
- Avoid conclusion questions
- Avoid compound questions

Setting the Stage for the Interview

- Summarize Title IX
- Explain process
- Share purpose
- Give the organization's need
- Establish credibility
- Explain investigator role

Interview

- Plan location—private, safe, comfort (tissues)
- Sense of formality
- Reassure no retaliation for participating
- Caution confidentially to both parties and the District
- Put interviewee at ease/develop rapport
- Remember you are wearing your investigator hat

Explain Expectations

- Recording by parties
 - you can decide whether you will allow or not
 - realistically can't control
- Tell the truth
- Rules for advisors
- Virtual interview—confirm who is present

More Expectations

- Explain that they do not have to provide evidence protected by privilege (and if you use confidential information, you will need consent to disclose)
- Explain that no one may threaten, intimidate, or harass anyone who participates in the process

Questioning Pitfalls

- Arguing or becoming angry
- Showing personal prejudice
- Lying
- Hurrying (plan your schedule carefully)
- Interrupting
- Making assumptions
- Being dismissive
- Making promises

Questioning Pitfalls, cont.

- Losing track of elements of definition
- Leading questions: “When you touched her arm, did you . . .”
- Putting too much value on inconsistencies or irrelevant information
- Accepting one-word responses
- Phrasing things negatively

Questioning Techniques

- Monitor witness's (and parent's) body language
- Take notes
 - Slows process
 - Provides reflection and reference
 - Make sure that you get an answer
- One question at a time
- Wait for a response—do not feel need to fill the silence.

Considerations When Questioning a Child

- “I heard that some students do not feel safe during P.E. class. Have you heard that?” (Follow up: who, what, when, etc.)
 - “Have you ever felt unsafe during P.E. class?” (Follow up)
- *DO NOT use parties or witnesses or other potential victim’s names UNLESS and UNTIL the child does

Open-Ended Questions

- “Explain what happened third hour”
- “What are some experiences you have had with...”
- Paraphrase/summarize back
- Start broad and narrow down
 - “Tell me more about...”
 - “What are some other details?”

Nearing end...

- Ensure the pertinence and accuracy of information
- Ask if there is anything else
- Every time more information is given, ask again if there is any else
- Ask if there are others with whom you should speak
- Share relevant evidence or documents

Closing Interview

- Reassure if any concerns raised
- Ask to contact later if something comes to mind
- Inform you may be in touch if you need more information
- Thank and express empathy for their time and cooperation
- Provide your contact information

Closing Interview of Parties

- When you expect concluding interviews and will send evidence
- Give non-disclosure agreement
 - May sign now or return later, before evidence disclosure
- If you do not receive signed NDA, only provide access to review of documents
 - Notify them that access will be facilitated by the Title IX Coordinator and provide contact info

Investigation Tips

- Keep written documentation of all communications
- Update the complainant and respondent periodically as to progress/status (not insight or details of the investigation)—your Title IX Coordinator may do this
- When possible, copy both parties **separately** on responses or when **informing** the other party

Investigation Tips

- The need to delay: Notify the Title IX coordinator who will notify both parties of Good Cause Delay
- Report any child abuse information not previously reported directly to DCS
- Remember your mandatory reporting obligations
- Report possible crimes to Title IX Coordinator and law enforcement (e.g. threats or photos)

Good Cause Delay Reasons

- Concurrent law enforcement activity
- Witness unavailability
- Illness
- School breaks
- Absence of a party or party's advisor
- Need for language assistance or ADA accommodations
- Overburdened school administrators (true!) is not good cause

Let Title IX Coordinator Know

- Additional Supportive Measures are needed or need to be modified
- Additional allegations that were not included in the initial notice
- New mandatory or permissive dismissal comes to light
- Informal Resolution—if wanted by either party
- Expansion of investigation

Sharing Evidence with Parties

- Form for notice
- Not your personally created reference materials to complete the report (e.g. personal notes)
- Information that will go into the report for the decision-maker
 - Statements
 - Summaries of interviews
 - Documents
 - Records

Redactions

- Check with Title IX Coordinator regarding redaction of witness names
- Must redact information protected by privilege unless there is written consent
- May redact information in the evidence that is not directly related to the allegations
- May not redact confidential information that is directly related and relevant
- Redact disability information related to a 504 Accommodation Plan or an Individualized Education Plan, but give summary of relevant facts

Evidence Sharing with NDA

- Send the signed NDA with evidence
- Provide parties an equal opportunity to inspect and review (with necessary redactions) evidence gathered as part of the investigation that is ***directly related*** to the allegations raised in the complaint; include evidence on which you do not intend to rely in drafting your report

Evidence Sharing with NDA

- Send the evidence to the parties in an electronic and/or hard copy format and allow the parties 10 days to submit a written response
- Send to both parties at the same time
- May begin **drafting** report

Evidence Sharing - No NDA

- Inform Title IX coordinator
- Provide opportunity for physical review of evidence
 - Notify them of their right to access the evidence to review
 - Notify them how they can do this – contacting the Title IX Coordinator w/i the 10 day timeframe to schedule
- No copies or photographs of evidence permitted

Additional Evidence

- The district's Title IX Coordinator will decide whether parties must provide all evidence PRIOR to the disclosure of evidence for review has been provided by the investigator OR whether to allow parties to provide additional evidence after disclosure evidence has been shared

Review Written Responses

- Consider the written responses to be evidence provided by the parties and address in the report
- Consider additional evidence shared after initial disclosure (if allowed)
- Questions submitted for other party should be given to the decision-maker to manage, but noted in your report
- See form for Notice of Party's Written Response to the Evidence

Investigation Report

Use the template from the Title IX forms packet to ensure that you include all of the required elements

Investigation Report

- Be thorough
 - In interview summaries, include observations of witnesses—report on credibility
 - Details and witness observations
 - If you were the decision-maker, what would you NEED to know?
- Decision-maker should not need to contact investigator for clarification

Report Submission

- Email to Title IX coordinator
- Email separately (read receipt) to both parties and copy Title IX coordinator on each and/or mail hard copies
- Send at same time
 - Scheduled/delayed sends are very helpful for this in Outlook, Gmail, etc.

After Submitting the Report

- The Investigator should be done
- However, the Decision Maker can either ask additional questions of parties (2024 regs) or ask the Coordinator to ask the Investigator to ask additional questions

After Report is Submitted

- Each party has at least 10 days to review the investigation report and provide a written response; District can decide whether to allow additional time or limit it to 10 days
- Decision-maker will consider the written response in addition to the investigation report

Title IX: Decision Makers

DECISION MAKERS:

Your Job Starts with Receipt
of the Investigation Report
with the Evidence

Basic Premises: Decision Makers

- Objectively evaluate all available evidence, both inculpatory and exculpatory
- Weigh the evidence using preponderance of the evidence (or clear and convincing) burden of proof standard adopted by the District
 - The evidence must show that it is *more likely than not* (or *highly probable*) that the respondent is responsible for the alleged conduct

Decision Makers Cannot be Biased

- Keep an open mind
- Remember that each case is unique and different
- Actual Bias
- Perception of Impropriety/Bias
- Implicit Bias

Investigation Report by Title IX Investigator

- The written investigation report summarizes the relevant evidence
- Should include observations
- The report is provided to the parties AND their advisors, if any, at the same time for review and opportunity to provide another written response prior to the decision maker rendering a determination

Upon Receipt of Investigation Report

- Send notice to parties for written questions—template provided
- New regulations—if implemented by your District—are more complex and allow Decision Maker to question parties in person

Written Questions

The District does 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 (= due process)

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

Decision

- Standard = preponderance of the evidence or clear and convincing (standard adopted by the District)
- Determines if there is a violation of TIX
- Determines consequences
- Written decision provided to parties
- If not TIX, there may be another policy violation and consequences outside TIX—but that is not part of TIX Decision

Issuing a Determination

Using a preponderance of the evidence standard to review the evidence, issue a written determination that includes the following components:

1. Allegations of the Complaint
2. Applicable Legal Standard
3. Compliance with Grievance Procedures
4. Standard of Evidence
5. Findings of Fact
6. Determination
7. Disciplinary Consequences
8. Appeal Rights

Determining Sanctions

- Use District Code of Conduct/Handbook Policies
- Considerations:
 - Founded = Consequence(s)
 - Context
 - Age
 - Disability (Special Education/504)
 - MDR may be necessary if discipline will exceed 10 days

Determining Sanctions

- Considerations:
 - Prior history
 - Severity
 - Resources district has
 - Resources district doesn't have
 - How long? How can District enforce?

Sanction Examples

- Counseling
- Threat assessment
- Community service
- Short-term suspension
- School reassignment (another, alternative, online)
- Referred for long-term suspension
- Referred for expulsion

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 now can be punitive toward respondent (i.e. discipline)
 - Discipline matrix may be relevant/helpful

Scenario # 1 (Decision Maker)

You have received the investigation report regarding the allegation that Respondent (teacher) sexually harassed Complainant (student). In it, you learn that when the Respondent allegedly touched the Complainant, there was an assistant teacher present, and the investigator interviewed that witness. The notes from that interview state as follows:

Scenario #1 (Decision Maker)

- How do you make your decision without this information?
- Can you make a decision without this information?
- Issue findings or request additional information
- Discuss with Title IX Coordinator (may need to request Investigator to re-interview)

Scenario #2 (Decision Maker)

- A teacher witnesses Student A smack Student B on the buttocks during recess.
- The teacher sends Student A to the principal's office and calls over Student B to talk to him.
- Student B is embarrassed and doesn't want to talk about it.
- The principal calls home to tell both students' parents about the incident.

Scenario #2 continued

- The following morning, the principal gets a call from Student B's parent who tells her that her child reported that Student A hit the child on the buttocks several times before the incident observed by the teacher and that Student A also stated on several occasions, "I am going to rape you."

Scenario #2 (Decision Maker)

- You receive an investigator report on a Title IX matter where the kindergarten Respondent has been smacking the buttocks of the kindergarten Complainant. The Complainant's mother stated, "You're going to be in trouble for doing that." The Respondent was in school and wasn't scared to come to school, but his mother stated at the end of his interview that he has been wetting the bed since this conduct began. In the Respondent's interview, the investigator noted that the Respondent thought the word "rape" meant "to fight," and when the investigator followed up with the Complainant, he also reported not knowing what the word meant, but stated, "I knew it was mean, and I thought it might hurt."

What's your finding?

Is the Respondent's understanding of the word "rape" relevant? Why?

Is the Complainant's understanding of the word relevant? Why?

Scenario #3 (Decision Maker)

You receive an investigator report on a Title IX matter where the kindergarten Respondent has been smacking the buttocks of the kindergarten Complainant and stating, “I am going to rape you.” The Complainant stated in his interview that he has been doing well in school and wasn’t scared to come to school, but his mother stated at the end of his interview that he has been wetting the bed since this conduct began.

Scenario #3 (Decision Maker)

In the Respondent's interview, the investigator noted that the Respondent thought the word "rape" meant "to fight," and when the investigator followed up with the Complainant, he also reported not knowing what the word meant, but stated, "I knew it was mean, and I thought it might hurt."

Scenario # 3 (Decision Maker)

What's Your Decision?

- Is this Title IX?
- Is Respondent's understanding of word rape relevant?
- Is Complainant's?
- Why or Why not

Hot-button Issues

Women's Sports Teams

Use of Pronouns

Restrooms and Locker Rooms

Women's Sports Teams

Not at this time—although the legal analysis is the same. DOE indicated it will issue separate guidance specific to sports teams. That guidance is currently in the rulemaking process.

*Doe v. Horne – 9th Circuit Case enjoining AZ law banning transgender males from participating in women's sports from being enforced against two transgender females who never went through male puberty due to puberty blockers

Use of Pronouns

Intentional misgendering or not using the person's preferred pronouns can also be considered sex discrimination (sexual harassment)

Restrooms & Locker Rooms

It can be considered sex discrimination to prohibit persons from using the restroom, locker room, or shower facility associated with the gender to which they identify.

- District cannot separate students or subject them to different treatment if it causes “more than *de minimis* harm”

Restrooms & Locker Rooms continued

- 9th Circuit case (14th Amendment privacy right does not provide parent with fundamental right to determine bathroom policies of District)
- Options: single-occupancy facilities or gender-neutral facilities
- Focus on resolution between the complaining parties

The 2024 Lawsuits

Pending Lawsuits

Several lawsuits ask the courts to block the new rules alleging that the regulations exceed the Agency's rule-making authority to expand "sex" to include "gender identity, sexual orientation, sex stereotypes, and sex characteristics, and that some provisions violate the First Amendment's protections for Free Speech and Free Exercise of Religion.

Pending Lawsuits Cont.

- There are 9 lawsuits with a combination of 26 states, several national organizations, and some school districts as plaintiffs in the lawsuits
- None of the cases are in the 9th Circuit (AZ's Circuit)
- Arizona is not a plaintiff state in any of these, nor are any Arizona school districts, but one case affects some Arizona schools (Kansas case)

Preliminary Injunctions Enjoining States

- The Preliminary Injunctions granted prevent (enjoin) the U.S. Department of Education from “implementing, enacting, enforcing, or taking any action to enforce” the 2024 Regulations in the party states and in some schools with party organization members

Kansas Preliminary Injunction

- Enjoins DOE from enforcing 2024 regulations in Kansas, Utah, Alaska, and Wyoming, AND
 1. Schools attended by members of Young America's Foundation
 2. Schools attended by members of Female Athletes United
 3. Schools attended by minor children of members of Moms for Liberty

More from Kansas...

- The Court ordered the organization-plaintiffs to file a list of “schools” in which they have members/parents by 7/15/2024 so the U.S. DOE has notice of which schools are affected
- The Court also permitted the parties to supplement that list on an ongoing and indefinite basis
 - Multiple lists have been filed since 7/15/2024 and we are actively monitoring

The Supreme Court

- On July 22, 2024, U.S. DOE filed an application for a partial stay of the injunctions entered by the federal courts in Kentucky and Louisiana with SCOTUS (5th and 6th Circuits)
- DOE argued that the injunctions should be stayed EXCEPT for the “controversial” portions of the rule relating to gender identity argued in the lawsuits

DOE's Arguments

The courts discussed only 3 provisions/issues as “likely to have success on the merits”

1. Expansion of sex discrimination to include gender identity
2. Use of facilities by transgender students
3. “Hostile environment” definition including gender identity

SCOTUS Per Curiam Ruling

- All Justices accept that preliminary injunctive relief is proper as to the three provisions of the rule regarding gender identity
- 5 Justices concluded the 3 allegedly unlawful provisions “are not readily severable” from the balance of the rule
- 4 Justices disagreed, concluding that the 3 provisions are severable

QUESTIONS????



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