Putting the New Title IX Rules Into Practice
Nondiscrimination

Enacted to avoid the use of federal resources to support discriminatory practices and to provide individual citizens effective protection against those practices.
The final regulations obligate recipients to respond promptly and supportively to persons alleged to be victimized by sexual harassment, resolve allegations of sexual harassment promptly and accurately under a predictable, fair grievance process that provides due process protections to alleged victims and alleged perpetrators of sexual harassment, and effectively implement remedies for victims.
New Terminology

- **Complainant**: A person who is alleged to be the victim of conduct that could constitute sexual harassment
- **Respondent**: A person who has been informed to be the perpetrator of conduct that could constitute sexual harassment
Summary of New Rules

New Definitions of Sexual Harassment
- **Quid Pro Quo** - A school employee conditioning an educational benefit or service upon a person’s participation in unwelcome sexual conduct
- **Hostile School Environment** - Unwelcome conduct on the basis of sex that is **so severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the school’s education program or activity
- **Sexual Assault, Dating Violence, Stalking, Domestic Violence**

New Grievance Process
- Requires schools to investigate and adjudicate formal complaints of sexual harassment
- Treat complainants and respondents equally, giving each a meaningful opportunity to participate in the investigation
- Provide a predictable, consistent, impartial process for both parties
Hostile Environment

- Evaluate under reasonable person standard (from the complainant’s perspective)
- Must be all three—severe, pervasive and objectively offensive (look to conduct)
  - Severe—is conduct extreme?
  - Pervasive—generally means a one-time incident is not enough (could be if it impacts several individuals or is widespread)
  - Objectively offensive (from a reasonable complainant’s perspective)
  - AND must effectively deny a person equal access to education program or activity (impact on education)
“Sexual assault,” “dating violence,” “domestic violence” or “stalking” under the Clery Act and VAWA any of these can be sexual harassment regardless of severity or the number of times they occur.

“Sexual Assault”- defined as- Any sexual act directed against another person, forcibly and/or against the person’s will; not forcibly or against the person’s will when the victim is incapable of giving consent. Includes rape, statutory rape, fondling, or attempts to do the same. Sexualized touching must be for purpose of sexual gratification.
“Dating violence” - Any act of violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim and where the existence of such a relationship shall be determined based on a consideration of the following factors: the length of the relationship; the type of the relationship; and the frequency of the interaction of the persons involved in the relationship.

Consider the location and context of the incident.
“Domestic violence”- Any felony or misdemeanor act of violence committed by a current or former spouse or intimate partner of the victim; a person with whom the victim shares a child in common; a person who is cohabitating with the victim or who has cohabited with the victim as a spouse or intimate partner; a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or; any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of this jurisdiction.

Consider the location and context of the incident as it may or may not be in the district’s educational program or activity.
“Stalking” defined as engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others; or suffer substantial emotional distress.

Consider location and context of incident.
Actual Knowledge

Old
A school has a responsibility to respond promptly and effectively if a school knows or should have known about sexual harassment

New
A school with actual knowledge of sexual harassment in a program or activity against a person in the United States must respond promptly and in a manner that is not deliberately indifferent
OLD
The school must take immediate action to eliminate the sexual harassment or sexual violence, prevent its recurrence and address its effects

New
Failure to respond reasonably in light of known circumstances.
Responsibility to Report

- All employees in k12 setting have an obligation to report instances of sexual harassment / sexual allegations.
Notice results whenever any elementary and secondary school employee, any Title IX Coordinator, or any official with authority witnesses sexual harassment; hears about sexual harassment or sexual allegations from a complainant or a third party; receives a written or verbal complaint about sexual harassment or sexual allegations by another means.
Reporting — Who, how and when?
• Any person may report sex harassment, regardless of whether the person is the alleged victim of the reported conduct.
• Reports can be made by mail, by telephone, or by email, using the contact information listed for the Title IX Coordinator.
• Or by any means that result in the Title IX Coordinator receiving the report.
• Report may be made at anytime—no business hours rule.
Jurisdiction/Substantial Control

Who and where?

• The complainant MUST be a current student or attempting to enroll (does not cover former employees)
• Covers any school event and any location where a school event was taking place (does not cover actions off campus and not school-related)
  • Can includes remote/ virtual learning through school resources
• If the respondent is no longer enrolled the school *may* end its investigation
• The complaint may withdrawal the complaint and the school *may* end its investigation
Relationship to other Policies

- Important for employee of school district who receives initial report to work with the complainant to identify the problematic behavior
- If misconduct implicates sexual harassment MUST report to Title IX Coordinator
… a Title IX Coordinator, an official with authority to institute corrective measures on behalf of the recipient, and any employee of an elementary and secondary school may receive notice through an oral report of sexual harassment by a complainant or anyone else, a written report, through personal observation, through a newspaper article, through an anonymous report, or through various other means.”
Receipt of Notice/Initial Report

- Acknowledge receipt of Report
- Establish tracking system/file for reports
- Assign investigator
- Schedule Initial Contact with Complainant
The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures, consider the complainant’s wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.
“...[D]esigned to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment, or deter sexual harassment.”
Supportive Measures

- Free, individualized services designed to **restore or preserve equal access** to education, protect safety, or deter sexual harassment
- Designed to support student, **cannot be punitive or disciplinary** with respect to another student
- Cannot unreasonably burden another person
Title IX Coordinator is responsible for determining appropriate supportive measures and effectively implementing the supportive measure.
When is a school required to investigate?

- An investigation is not required absent a Formal Complaint.
Parent/guardian

Rule allows parents/guardians to act on behalf of student and sign a Formal Complaint. Must be informed of student either filing complaint or when student is named as respondent.
Notice of Complaint

- Contact with respondent
- Must include specific information in order for the responding party to prepare before interview
  - Who, what, where, when—description of conduct alleged to be sexual harassment
  - Avoid generalizations
Dismissal of a Formal Complaint-Mandatory

- Conduct alleged does not constitute sexual harassment even if proved, or
- Conduct did not occur in the recipient’s education program or activity, or
- Conduct did not occur against a person in the United States.
Permissive Dismissal

- Complainant seeks to withdraw complaint
- Alleged respondent is no longer a student or employee
- Specific circumstances prevent the District from gathering evidence to reach a determination
Special Circumstances Dismissal

- When no complainant is identified during the investigation.
- When a formal complaint contains allegations that are precisely the same as allegations already investigated and adjudicated.
- When substantial length of time elapsed between an incident of alleged sexual harassment and the filing of a formal complaint.
- When the complainant is no longer participating in the investigation and has not withdrawn complaint.
Special Circumstances

- Must prevent the recipient from meeting its responsibility to gather sufficient evidence to reach a determination.
Required Action following Dismissal

- Must send written notice of the dismissal and reasons to both Complainant and Respondent and Notice of Right to Appeal
Receive Report of Sexual Misconduct Allegations

Implicates Title IX?

YES
- Offer supportive measures
- Review formal complaint and process

NO
- Dismiss
- Refer to Principal
  Can offer supportive measures
Emergency Removal

Before removing a student, district must:

- Undertake an individualized safety and risk assessment
- Determine if an immediate threat to the physical safety of any student or individual arising from the allegations of sexual harassment justifies removal
- Provide notice of right to appeal following removal
Informal Resolution

- Cannot be used for complaints alleging employee/student sexual harassment
- Must have consent of both parties
- Must keep records of any informal resolutions for 7-year period
Grievance Process

• Requires an objective evaluation of all evidence
• Requires that any person involved in the Title IX process not have a conflict of interest
• Requires Presumption of Innocence
• Requires Reasonably prompt timeframes
• **Requires a description of potential outcomes and remedies**
  • Requires a standard of evidence-Description of standard for determining responsibility-clear and convincing or preponderance of the evidence.
  • Cannot use/rely upon evidence protected by privilege unless waived
  • Requires procedures for appeal by respondent or complainant
Investigator
Role & Responsibility
Burden of Proof

- Burden of gathering evidence on school district
Must provide the parties with the same opportunities to have others present during any proceeding under grievance process, to include meetings, who may be, but is not required to be an attorney.
Investigation

- Interview techniques
  - What do you mean by ___?
  - I need you to clarify____
  - Can you explain_____?
  - I need to make sure I understand______
Investigative Report

- Summary of evidence
- Shared with parties/advisors
- Shared with decision-maker
- Considered in final determination
Investigative Report

- Easy to read
- Factually accurate
- Neutral tone
- Avoid editorial comments or opinions
Investigative Report

- Overview - parties, receipt of report
- Statement of Jurisdiction
- Identity of Investigator and properly trained
- Objective – Form language from policy
- Alleged Conduct
- Witnesses
- Summary of Evidence
Decision-Maker
Role & Responsibility
Prior Sexual Behavior/Sexual Predisposition

- Questions and evidence about the prior sexual acts or complainant’s sexual predisposition are not relevant UNLESS
  - Offered to prove that someone other than respondent is responsible
  - Or if to prove consent with respect to specific incidents between complainant and respondent
Cross-Examination

- Parties through advisors will submit to decision-maker written cross-examination questions
  - Decision-Maker will assess relevance of questions
Relevance

- Tends to make a fact more or less probable than it would be without the proffered evidence
- Related to a fact at issue
Standard of Evidence
Preponderance or Clear and Convincing
Preponderance of the Evidence

- In civil cases this is the lowest degree of proof
- More likely than not inquiry
- Fact-finder finds the existence of a contested fact more probable than its nonexistence
Clear and Convincing

- Highest standard of proof for civil claims
- Evidence that is so clear, direct, weighty and convincing to enable the trier of fact (decision-maker) to come to a clear conviction without hesitation of the truth of the precise fact at issue.
Weight of evidence

- Value decision-maker assigns to the piece of evidence
  - What is relationship between the parties?
  - Any bias?
  - Demeanor of witness?
Privilege

- Grievance process must not require, allow, rely upon or otherwise use questions or evidence that constitute a legally recognized privilege, unless the person holding the privilege has waived the privilege.
Written Determination of Responsibility

- Identification of allegations constituting sexual harassment
- Description of procedural steps—notices to parties, interviews
- Findings of fact supporting the determination
- Conclusion regarding application of code of conduct to the facts
Written Determination

- A statement /rationale for each factual allegation and a determination of responsibility
- Statement of disciplinary sanctions
- Statement of remedies designed to restore or preserve equal access to the program or activity
- Notice of Appeal
Sanctions and Remedies

- Disciplinary decisions enforce code of conduct
- Proportionate response to the violation
Appeal
Appeals

- Most likely heard before Board of School Directors

- Appeals should be allowed for
  - Procedural irregularity
  - Newly discovered evidence
  - Investigator/Decision-maker had a conflict of interest
Any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, [must] not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.
Fair and Impartial Proceeding

- Relies upon evidence that is:
  - RELEVANT
  - RELIABLE
  - TRUSTHWORTHY
Fair and Impartial Process

Avoid-
- Prejudgment
- Gut feelings
- Stereotypes
- Rumors
- Facts not in evidence
- Bias

Focus-
- Reliable
- Legitimate
- Impartial
- Accurate
- Truth seeking
Bias

- Personal and unreasoned judgment
- Prejudice
- Focused on characteristics of a party rather than the evidence
Let’s review some concepts

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<th>Reporting</th>
<th>Respond Promptly</th>
<th>Notice</th>
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<tr>
<td>Obligation of all employees</td>
<td>Offer supportive measures</td>
<td>Inform Respondent sufficient detail</td>
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<tr>
<td></td>
<td>Explain Formal Complaint and Grievance Process</td>
<td>Inform sufficient time before meetings</td>
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<tr>
<th>Investigate</th>
<th>Determination</th>
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<td>District responsibility to collect evidence, follow all leads, treat both equitably and provide access to evidence</td>
<td>Based on relevant evidence. No bias in decision-making. Reasoned and objective. Support conclusions with fact. Apply standard of evidence.</td>
<td>Must provide notice and timeframes</td>
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Scenarios

Student approaches principal and reports overhearing at a party a situation of unwanted sexual contact between two other students during school field trip.

Receive anonymous report of sexualized communication occurring between teacher and former student. Report includes copies of text and social media messages.

Receive a report from a colleague of unwanted attention and gifts from another employee. Shares the individual approaches them throughout the day.
Issues

- Safe to Say Reports
- Out of school social media
- Police
- Confidentiality
Thanks!

Any questions?

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