

Title IX Coordinator and Investigator Training Hartford Public Schools

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Goals of Today's Presentation?

- Understand why sexual harassment is a problem that needs to be addressed.
- Identify and explore what types of conduct constitute sexual harassment.
- Learn about the new Title IX regulations for addressing sexual harassment in schools.
- Understand what conduct falls under the Title IX regulations.
- Learn the obligations of the Title IX Coordinator when he/she learns of a claim of sexual harassment.
- Learn about the investigation process required by the new regulations.
- Learn how the new regulations interact with existing state and federal laws.
- Learn how to recognize and avoid prejudgment of the facts, conflicts of interest and bias.

Some Statistics on Sexual Harassment in Schools

According to the National Women's Law Center:

About 1 in 2 students in grades 7-12 are sexually harassed in any given school year.

More than 1 in 5 girls ages 14-18 have been kissed or touched without their consent.

More than 60% of college students experience sexual harassment, and 1 in 4 women, 1 in 4 transgender or gender-nonconforming students, and 1 in 15 men are sexually assaulted during college.

<https://nwlc.org/resources/let-her-learn-toolkit-sexual-harassment/>

What Is Title IX?

Title IX of the Education Amendments of 1972 (20 U.S.C. §§ 1681 *et seq*)

“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.”
Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.* [“Title IX”].

What Institutions Are Covered by Title IX?

- Educational institutions that receive federal funds
- Includes public schools, charter schools, for-profit schools, athletic associations, colleges and universities
 - Also includes educational programs offered by non-educational institutions that receive federal funds
 - For example: libraries and museums

Who is Protected by Title IX?

- Students
- Staff
- US citizens and non-US citizens
- Men and Women
- Pregnant students
- While it is still not clear if it protects transgender students or students based on sexual orientation, it is clear that it protects students from harassment for exhibiting or failing to exhibit stereotypical sex-based characteristics
- Does not matter if the alleged harasser is the same or different sex than the alleged victim

Difference Sources of Guidance

- Federal Statutes – enforceable by OCR and the Courts
- Federal Regulations – have the force of law and are enforceable by OCR and the Courts
 - Regulatory Guidance – offers guidance from OCR – enforceable only by OCR
 - Dear Colleague Letters and Q&A – issued by OCR, enforceable only by OCR
- Federal Case Law – force of law – based on jurisdiction
 - Supreme Court – binding on entire country
 - 2d Circuit Court of Appeals – binding on Circuit (includes CT, NY and VT)
 - District Court of Connecticut – binding in Connecticut
- State Law – binding in Connecticut

Difference Sources of Guidance

- Federal Law, Case Law and Federal Regulations set the “floor”
 - i.e. the minimum requirements that must be met
 - OCR guidance generally elevates the floor
 - States often pass laws that provide more protection than federal law
 - District policy often provides additional protection to students beyond what is required by law

Title IX History

- Prior to the new regulations, various federal courts established that sexual harassment was prohibited by Title IX
- OCR's April 4, 2011 Dear Colleague Letter provided guidance on handling sexual harassment in schools
 - Aimed mostly at colleges
 - Was heavily weighted in favor of the alleged victim
 - Expressed a belief that colleges were taking insufficient steps to address sexual harassment on their campuses
 - Was combined with OCR issuing a list of colleges and universities being investigated for failing to address and remediate sexual assault claims
 - Resulted in significantly more discipline of students for allegedly engaging in sexual harassment on college campuses

Title IX History

- The April 4, 2011 DCL was withdrawn on Sept. 22, 2017
- OCR also issued a Q&A on Title IX and Single Sex Elementary and Secondary Classes and Extracurricular Activities
 - This was also withdrawn on Sept. 22, 2017
- DOE announced that it intended to engage in a rulemaking process to develop new Title IX regulations
- In the interim, the DOE issued a new Q&A on Campus Sexual Misconduct (issued Sept. 22, 2017) and indicated that it would continue to rely on its previous guidance (2006 DCL, 2001 Revised Sexual Harassment Guidance)

Title IX Anti-Harassment Regulations

- In May 2020, the Office of Civil Rights published new regulations regarding sexual harassment under Title IX
- These regulations went into effect on August 14, 2020
 - This gave school districts exactly 89 days to implement the regulations during a global pandemic
- They appear to be designed for colleges and are often a poor fit for K-12 schools
- They require sweeping changes to numerous things including:
 - The definition of sexual harassment under Title IX,
 - How schools must address sexual harassment under Title IX,
 - How complaints under Title IX must be investigated, and
 - Many other aspects of addressing sexual harassment in schools

Definition of Sexual Harassment Under the Title IX Regulations

- Conduct on the basis of sex that satisfies one of the following:
 - An employee of the district conditioning the provision of an aid, benefit, or service on the individual’s participation in unwelcome sexual conduct;
 - 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 district’s education program or activity; or
 - sexual assault, dating violence, domestic violence or stalking.

If conduct does not fall into one of these categories it is not prohibited by Title IX.

Definition of Sexual Harassment Under the Title IX Regulations

- Per the Regulations, Title IX only applies to conduct that occurs in a program or activity over which the district exerts substantial control over both the respondent and the context.
 - Thus, no longer covers off-campus conduct even if it has an on-campus effect
- Does not apply if the conduct occurred against a person outside the U.S.
 - For example, they would not apply during a field trip outside of the United States

NOTE – just because OCR will not treat conduct as a Title IX violation, it does not mean the conduct does not violate some other section of the district's policies and/or state or other federal law

Sexual Harassment

- Must be:
 - Unwelcome
 - Sexual, sex-based and/or gender-based
 - Verbal, written, online and/or physical contact

Quid Pro Quo Sexual Harassment

- Unwelcome sexual advances, requests for sexual favors, other verbal or written conduct of a sexual nature
- By a school employee
- When submission to or rejection of such conduct is made either explicitly or implicitly a term or condition of the receipt of some benefit such as a grade, a part in a school play, field time on a sports' team

Hostile Environment

- A hostile environment is created when the sexual harassment is so:
 - Severe
 - Pervasive **AND**
 - Objectively offense

That it effectively denies a person equal access to the district's education program or activity

Could be the academic program, or
Extracurricular activities.

Hostile Environment

- There is an increasing problem in schools with misunderstanding between things that may create discomfort or offend someone versus the higher standard of creating a hostile environment.
- Not everything that is offensive to a student/employee creates a hostile environment.
- This is especially important to note in the high school where students are often encouraged to address topics in some classes that may be sensitive and their opinions may make other students uncomfortable.

Hostile Environment

- Things to look at:
 - How frequently did the conduct occur
 - Was the conduct physically threatening
 - What the conduct humiliating
 - The age and relationship between the alleged harasser and victim
 - What was the effect on the alleged victim's emotional state
 - Did it unreasonable interfere with an individual's ability to engage in a school activity
 - Did it unreasonably interfere with a student's educational performance or an employee's work performance
 - Was the conduct directed at more than one person
 - Was the conduct protected First Amendment speech

Other Sexual Harassment

- Based on the Violence Against Women Act
 - Adopts the definitions effectively importing the act into the K-12 realm
- sexual assault - an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation as set forth in 20 USC §1092(f)(6)(A)(v).
- Includes:
 - Rape
 - Fondling
 - Incest
 - Statutory rape

- Dating Violence – means violence committed by a person
 - (a) who has been in a social relationship of a romantic or intimate nature with the victim, and
 - (b) where the existence of such relationship shall be determined based on consideration of the following factors (i) the length of the relationship, (ii) the type of relationship, and (iii) the frequency of interaction between the persons involved in the relationship as set forth in 34 U.S.C. §12291(a)(10).

May include things such as sexual or physical abuse or the threat of such abuse.

- Stalking - means engaging in a course of conduct directed at a specific person that would cause a reasonable person to
 - (a) fear for his or her safety or the safety of others, or
 - (b) suffer substantial emotional distress
- 34 U.S.C. §12291(a)(30)

Generally includes – two or more acts, including, but not limited to, acts in which the stalker directly, indirectly or through a third party follows, monitors, observes, surveils, threatens or communicates to or about a person, or interferes with a person's property

Examples of Potential Sexual Harassment

George is the principal at Southern Elementary School. Susie is a new teacher who just started at Southern. George finds Susie attractive and would like to go out with her. George calls Susie into his office and asks her for a date. She says no. George then begins to speak with her about the school's evaluation process and informs her that they could do away with all that if she goes on the date with him.

What type of harassment is it?

Examples of Sexual Harassment

Sarah is a fifth grade student. You overhear Sarah making fun of John on the playground because John likes to wear pink shirts to school. When you ask John about it, he says that Sarah says things like that to him all the time.

What type of harassment is it?

Examples of Sexual Harassment

- Kathy is a high school student on the girls' soccer team. She was dating Pete last year, but they broke up. Pete wants to get back together with Kathy. Pete keeps calling Kathy on the phone asking her to go out with him. When he sees her in the hallways at school he will immediately run up to her and tell her things like how he likes how she looks in her soccer uniform and ask her to go out with him again.

What type of sexual harassment is it?

Title IX Overlap with Other State and Federal Statutes

- C.G.S. § 10-222d – Anti-Bullying in schools
- C.G.S. § 10-15c – Discrimination in public schools
- C.G.S. § 46a-58 - General anti-discrimination statute
- Title VII of the Civil Rights Act – Anti-discrimination in employment
- Connecticut Fair Employment Practices Act – Anti-discrimination in employment

- Current definition of bullying in Connecticut (until June 30, 2021)
 - Repeated use by one or more students of a
 - Written, oral or electronic communication
 - Directed at or referring to another student attending school in the same school district, OR
 - A physical act or gesture by one or more students repeatedly directed at another student attending school in the same school district that
 - Causes physical or emotional harm to the student or damage to the student's property
 - Places such student in reasonable fear of harm to self or of damage to property
 - Creates a hostile environment at school for the student
 - Infringes on the rights of such student at school OR
 - Substantially disrupts the education process or orderly operation of a school

CT Anti-Bullying Statute

“Bullying” shall include a written, oral or electronic communication, or a physical act or gesture **based on actual or perceived differentiating characteristics** such as:

- Race
- Color
- Religion
- Ancestry
- National origin
- Gender
- Sexual orientation
- Gender identity or expression
- Socioeconomic status
- Academic status
- Physical appearance
- Mental disability
- Physical disability
- Developmental disability
- Sensory disability
- Association with a group or individual with one or more of these characteristics

CT Anti-Bullying Statute

- “Cyberbullying” means:
 - Any act of bullying through the internet, interactive and digital technologies, cellular mobile telephone or other mobile electronic devices or any electronic communications
- “Teen dating violence” means:
 - Any act of physical, emotional or sexual abuse, including stalking, harassing and threatening, that occurs between two students who are currently in or who have recently been in a dating relationship
- “Hostile environment” means:
 - A situation in which bullying among students is sufficiently severe OR pervasive to alter the conditions of the school climate
 - NOTE – this is different that the term “hostile environment” under Title IX

Future CT Anti-Bullying Statute

- Effective July 1, 2021 the definition of bullying is set to change:

- An act that is direct or indirect and severe, persistent OR pervasive, which
 - A. Causes physical or emotional harm to an individual
 - B. Places an individual in reasonable fear of physical or emotional harm, or
 - C. Infringes on the rights or opportunities of an individual at school.

- C.G.S. § 10-15c – Discrimination In Public Schools Prohibited
- Requires an equal opportunity for all students to participate in the activities, programs and courses of study without discrimination on account of:
 - Race
 - Color
 - Sex
 - Gender identity or expression
 - Religion
 - National origin
 - Sexual orientation

- The Connecticut Commission on Human Rights and Opportunities has taken the approach that it is able to investigate and regulate discrimination that occurred in schools through C.G.S. § 46a-58. This statute prohibits the deprivation of any right guarantees by the laws of the state or the United States on account of
 - Religion
 - National origin
 - Alienage
 - Color
 - Race
 - Sex
 - Gender identity or expression
 - Sexual orientation
 - Blindness, mental disability
 - Physical disability
 - Veteran Status

Title VII of the Civil Rights Act

- Title VII prohibits discrimination in employment on the basis of:
 - Race
 - Color
 - Religion
 - Sex
 - National origin

- Makes it unlawful for an employer to refuse to hire or discharge, or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment because of the individual's protected status.

Title VII of the Civil Rights Act

- Other federal laws also protect employees from discrimination based on:
 - Disability
 - Age (over 40)
 - Veteran's status
 - Genetic Information
- Title VII – to be actionable, the conduct must be severe, pervasive OR objectively offensive
 - No requirement that it deny access to education
 - Is a much broader category of conduct

Connecticut Fair Employment Practices Act prohibits discrimination (including harassment) on the basis of:

race,
color,
religion,
age,
sex,
marital status,
family status
sexual orientation,
pregnancy

national origin, ancestry,
present or past history of
mental disability,
intellectual disability, learning
disability,
physical disability,
gender identity or expression
retaliation,
veteran status.

Two Separate Situations

- The District has knowledge of sexual harassment but there has not been a request for a formal investigation
 - The District must take steps to eliminate sexual harassment and provide support to the victim whenever it has actual knowledge of sexual harassment
 - The District cannot issue discipline to the alleged harasser under Title IX
 - Other statutes such as bullying might apply that would allow discipline

- A formal complaint of sexual harassment is filed under Title IX
 - The District may discipline the alleged harasser if the alleged harasser is determined to be responsible for sexual harassment after the completion of the grievance process

When Can A District Be Liable Under Title IX?

- A district with actual knowledge of sexual harassment must take steps to address it.
- In elementary and secondary schools “**actual knowledge**” means that **any** employee of an elementary or secondary school had knowledge.
 - As written, this covers all employees including custodians, secretaries, food service workers, paraprofessionals, etc.
- Once the district has knowledge, it must act in a way that is not deliberately indifferent to the alleged harassment.

Various New Roles

- **Title IX Coordinator**
 - Employee who will coordinate the district's efforts to comply with its responsibilities under Title IX
- **Investigator**
 - If possible, should not be the Title IX Coordinator
- **Decision-maker**
 - Must not be the Title IX Coordinator or the Investigator
- **Appeal Decision-maker**
 - Must not be the Title IX Coordinator, Investigator or Decision-maker

New Terminology

- Complainant – the alleged victim
- Respondent – the alleged harasser
- Responsible Party – someone found responsible for sexual harassment at the end of the formal grievance process

Reports of Sexual Harassment

- Who may report sexual harassment? – anyone
 - Does NOT need to be the individual who is being harassed
 - Report may be made anonymously
- How can sexual harassment be reported?
 - In person
 - By telephone
 - By mail
 - By electronic mail
 - By any other reasonable means
- There should be multiple people to whom a report can be made
 - All employees should know to bring to the Title IX Coordinator any report of sexual harassment

The Title IX Coordinator

- Once a report of sexual harassment is made, the Title IX Coordinator must contact the complainant
- The following things should be discussed with the complainant
 - What occurred
 - What supportive measures are available
 - Explain the formal complaint process
 - Make sure the complainant knows that supportive measures will be available whether or not a formal complaint is filed
- At this stage, confidentiality should be maintained as much as possible except where it is necessary to inform other staff in order to implement supportive measures

What are Supportive Measures

- Non-disciplinary, non-punitive individualized services offered without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.
 - Such measures are designed to restore or preserve equal access to the education program or activity without unreasonably burdening the other party,
 - Includes measures designed to protect the safety of all parties or the district’s educational environment or to deter sexual harassment.

Potential Supportive Measures

- Change in class schedule,
- Additional time to make up missed assignments due to the alleged harassment,
- Ability to retake assignments/tests that were impacted by the harassment,
- Ability to withdraw from elective classes without penalty,
- Separating the parties as much as possible during the school day,
- Providing support by the guidance counselor, social worker or other,
- Increased monitoring, supervision, security.

- The Title IX Coordinator should document the conversation
- They must document at a minimum:
 - Measures taken to restore or preserve equal access to the District’s education program or activity
 - The documentation should be sufficient to show that the response was not deliberately indifferent
 - Document all supportive measures offered
 - Document which, if any, were accepted
 - If supportive measures are not provided, must document why they were not provided

Consider whether any other laws are applicable

- Is there an allegation of abuse or neglect?
 - a DCF report must be made
- Does a report need to be made to the police?
- Are the allegations such that a bullying report must be made?
- Are there allegations of harassment based on any other protected category in addition to sex?
- Are any other school policies implicated?

- If the complainant wants to file a formal complaint, the process should be explained and the complainant can be assisted with the process
 - Ensure that a formal written complaint is signed
 - Ensure the student/parent is aware that one of the consequences of filing a formal complaint is that the complaint and the evidence will be shared with the respondent
- There should be a standardized form for the complaint that can be given to the complainant
- The complaint should be in the complainant's words

The Formal Complaint

- What is a formal complaint?

- Signed by complainant (or the complainant's parent if the complainant is a student) or the Title IX Coordinator
- Alleges sexual harassment
- Requests investigation

ONLY a formal written complaint can lead to a Title IX investigation

A complaint filed by anyone else is NOT a formal complaint as defined under Title IX and cannot be used as a basis of discipline for a Title IX violation

To Sign or Not to Sign

- The Title IX Coordinator is the only one empowered to sign a formal complaint without the Complainant's permission
- What happens if the Title IX Coordinator signs a complaint over the objection of the one being harassed
 - The student who is alleged to have been harassed becomes the Complainant
 - All regulations allowing both parties access to information apply
 - Thus the Respondent would have to be given the name of the Complainant and the allegations
 - The Complainant cannot be forced to participate in the investigation against their will

To Sign or Not to Sign

- Consequences of not signing
 - The harassment could continue
 - The alleged harasser cannot be disciplined for a Title IX violation
 - The alleged harasser could move on to harass others
- Things to consider
 - Is the alleged harassment widespread or limited to the single student
 - Was the alleged harassment severe
 - Why doesn't the student want to file a formal complaint
- Ultimately, the decision will be reviewed as to whether the decision to sign or not to sign was deliberately indifferent

The Formal Complaint

- At a minimum, a formal complaint must contain the following:
 1. The name of the complainant,
 2. The date of the complaint,
 3. The date of the alleged harassment,
 4. The name or names of the harasser(s), if known,
 5. Identification of the location where the harassment occurred, and
 6. A detailed statement of the circumstances constituting the alleged harassment

- Some underlying principles for sexual harassment investigations
 - **Equitable**
 - Due process
 - Complainants and Respondents should be treated equally
 - **Impartial**
 - The people in all of the roles should not have biased towards or against complainants/respondents, men/women
 - Should not be biased against the individual complainant or respondent
 - **Thorough**
 - Must **objectively** evaluate all **relevant evidence** (both inculpatory and exculpatory).
 - **Prompt**
 - Although there is no definitive answer, generally the process should be completed within 60 days unless there are extenuating circumstances

- Presumption of non-responsibility:
 - Must have a **presumption that Respondent is not responsible** for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.

HBOE has adopted the “preponderance of the evidence” standard

Preponderance of the evidence: It is “more likely than not “ that the district’s Title IX policy was violated.

- More likely than not to be true
- 50% plus a feather

Mandatory Dismissal

- The Title IX Coordinator makes the initial determination as to whether the complaint falls within the confines of Title IX
- The complaint **MUST** be dismissed at the outset if:
 - The conduct as alleged did not occur in the District's education programs or activities
 - The conduct did not occur against a person in the United States

It is suggested that prior to dismissing a complaint under this provision that it be discussed with the District-Wide Title IX Coordinator or the Superintendent

Mandatory Dismissal

The Hartford Public Schools' boys' soccer team is at a soccer meet at another district's field. During the meet, several boys in the stands shout at your students that they are "sissies" and they should stop acting like "little girls." One of the Hartford boys files a formal Title IX harassment complaint with Hartford claiming the other team engaged in sexual harassment.

Must this complaint be dismissed?

Mandatory Dismissal

Hartford is the sponsor of a school dance. The Dance occurs in the high school's gym. John and Susie attend the dance together. Halfway through the dance, John convinces Susie to go outside under the bleachers where he attempts to kiss and grope her. She later files a formal Title IX harassment complaint.

Must this complaint be dismissed?

First steps once a formal complaint is filed

- The Title IX Coordinator must provide each party with the following:
 - Notice of the allegations, including:
 - Identity of parties
 - Conduct alleged to be sexual harassment
 - Date and location of incident
 - Provide:
 - A copy of the grievance process including any informal resolution processes available
 - A statement that the respondent is presumed not responsible and that the determination of responsibility will not be made until the end of the process,
 - The ability for each party to have advisor (including an attorney) at all stages, and
 - The section of the code of conduct that prohibits providing false statements and information during the grievance process

First Steps - Risk Assessment

- The Title IX Coordinator should make an individualized risk assessment upon receipt of a formal complaint
- Determine whether there is an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment that would justify removal of the respondent from the school setting
- Determine if a report should be made to DCF
- Determine if a report should be made to the police

First Steps - Risk Assessment

- Any decision to suspend or expel a student would need to follow state law and board policy
 - Do not forget about special education laws
- Any decision to remove an employee would need to follow state law, board policy and the provisions of any applicable collective bargaining agreement
- To the extent removal cannot be accomplished, other safety measures should be put into place during the pendency of the grievance process

Final Steps

- Give the assigned investigator the complaint and any other relevant information
- Periodically check in with the complainant during the complaint process to ensure that any supportive measures provided are working

The Investigation

Avoiding Bias, Conflict of Interest, and Prejudgment of Facts

- Investigators and decision-makers (as well as Title IX Coordinators, informal resolution facilitators, and appeals officers) must:
 - Be free from **conflict of interest**,
 - Be free from **bias**, and
 - Be trained to serve impartially and **without prejudging facts**.

- The regulations make clear that at each stage, the school employee must not be biased.
 - Bias may be as to categories
 - e.g. a belief that because evidence shows that female students are often subjected to sexual harassment that it is more likely that the female student is telling the truth
 - Bias as to the specific individual
 - The more you know about the Complainant and/or Respondent the more you are likely to believe that they behaved in keeping with how you perceive them
 - e.g. – the Respondent is an honor student so he could not have engaged in the alleged acts
 - The Complainant has a reputation for going out with a lot of different boys at school so she is not believable
 - Pressure from outside
 - Is the Respondent the star of the school play that is about to open
 - Is the Respondent the star of the school's football team

Potential Bias

- Bias can be
 - Conscious or unconscious
 - Positive or negative
 - Based on societal norms or your own cultural perspective

Conflicts of Interest

- Things that are **not** automatic conflicts of interest
 - Just because you know the student/employee does not mean there is a conflict of interest
 - Just because you have disciplined the student/employee in the past does not equate to a conflict of interest

Conflicts of Interest

- Conflicts of interest
 - Wearing too many hats in the process
 - Title IX Coordinators who are also acting as Investigators must take care not to let the roles bleed into one another
 - A relationship with one of the parties that goes beyond the school setting
 - Friendship with students' parents
 - Coaching a student on a sports team

Avoiding Prejudgment of Facts

- Keep an open mind.
- Each case is unique and different.

“Dangerous Words” to Avoid

- Just ignore it.
- It's just a joke.
- This is just part of growing up.
- If we disciplined every student that said a bad word, we would never be able to get any teaching done.
- It's just a prank.
- Nobody else has ever complained about it.
- Boys will be boys OR Girls will be girls.

Bias/Conflict of Interest Hypothetical

- Mr. Johnson is the assistant principal at Top High School. He has been in that position for the past three years. As part of his job, he is responsible issuing student discipline that can be issued within the school such as detentions and suspensions. He also acts as the investigator for Title IX complaints at the school.
- John Jones and Susie Smith are two students at Top High School. John Jones is a senior and has a long disciplinary record. He served a short expulsion for bringing marijuana into school when he was a sophomore and has served various detentions and suspensions for things such as insubordination, using profanity at school and has served one ten days suspension for fighting.

Bias/Conflict of Interest Hypothetical

- Susie Smith is an honor roll student. She has never served a detention or a suspension.
- John Jones has filed a sexual harassment complaint alleging that Susie Smith has been spreading rumors about him at school. He claims that Susie asked him out and when he turned her down she was very upset. He believes that she is spreading the rumors because he refused to go to the school dance with her.

- Role of Investigator:
 - Gather and organize relevant evidence directly related to the allegations (both inculpatory and exculpatory).
 - District must ensure that “all relevant questions and evidence are admitted and considered (though varying weight or credibility may of course be given to particular evidence by the decision-maker).”
- Must provide equal opportunities to parties throughout investigation:
 - Must provide an equal opportunity for the parties to present witnesses (including fact and expert witnesses) and other inculpatory and exculpatory evidence.
- Discussing Allegations:
 - Cannot restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.
- Burden of proof and burden of gathering evidence is not on Complainant or Respondent.

Investigation First Steps

1. Review all relevant school policies and procedures as well as any relevant state and federal statutes. Ensure that you follow all policies and procedures throughout the investigation.
 - a. Make sure you review the district's sexual harassment policies and procedures before starting the investigation.
2. Review the written complaint
3. Make an investigation plan

Typical Order of Investigation

4. Review any relevant portions of the student/staff files of the Complainant and Respondent

5. Interview the Complainant and any other alleged victims

- a. Things to ask include, but are not limited to:
 - i. What occurred?
 - ii. How did the alleged harassment affect you or your school experience?
 - iii. Are there any other students, teachers or staff who may have relevant information?
 - iv. Do you have any notes, emails, text messages, WhatsApp messages, SnapChats, or any other relevant physical evidence?

6. Interview witnesses identified by the Complainant, as necessary

- a. Some suggested questions to ask
 - a. What did you observe/see/hear?
 - b. Relationship with the parties?
 - c. What, if anything, did the Complainant tell you about the incident?
 - d. Describe the Respondent's behavior toward the Complainant?
 - e. Are you aware of the Respondent doing anything similar in the past?
 - f. Do you know of anyone else who may have relevant information?

Typical Order of Investigation

7. Interview of any other witnesses identified
8. Interview the Respondent
9. Interview any witnesses identified by Respondent
9. Review notes
10. Follow up on any inconsistencies.

- Must provide Complainant and Respondent with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any interview or related meeting or proceeding by the advisor or their choice.
- Who can be an advisor?
 - Advisor may be an attorney but need not be.
- Cannot limit the choice or presence of advisor for either party in any meeting or grievance proceeding.
- May establish restrictions regarding extent to which advisor may participate in the proceedings, as long as applies *equally* to both parties.

- District must **objectively** evaluate all **relevant evidence** (both inculpatory and exculpatory).
 - Recipient must ensure that “all relevant questions and evidence are admitted and considered (though varying weight or credibility may of course be given to particular evidence by the decisionmaker).”
- What is relevant?
 - Includes evidence that is “probative of any material fact concerning the allegations.”
 - Includes “evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true (i.e., on what is relevant)”.
- The Rules of Evidence do NOT apply.

- Medical treatment records:
 - Cannot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other professional, and which are made/maintained in connection with the provision of treatment of the party, unless obtain voluntary written consent.
- Legally privileged information:
 - A recipient’s grievance process cannot require, allow, rely upon, or otherwise use evidence or questions that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.
- Complainant’s sexual behavior (Rape Shield Protections):
 - Evidence about Complainant’s prior sexual history must be excluded unless such evidence/questions:
 - Are offered to prove that someone other than the Respondent committed the conduct, or
 - If the evidence/questions concern specific incidents of the Complainant’s prior sexual behavior with respect to the Respondent and are offered to provide consent.
 - Note: Rape shield protections do **not** apply to Respondents.
 - “[E]vidence of a pattern of inappropriate behavior by an alleged harasser must be judged for relevance as any other evidence must be.”

Relevance Hypothetical

You are assigned to investigate a complaint filed by Mr. and Mrs. Jones that their daughter's sixth grade teacher, Mrs. Smith, showed an inappropriate movie in class that had a scene where two of the characters were engaged in kissing and starting to undress before the scene cut away. Mr. and Mrs. Jones filed a formal complaint alleging that their daughter was highly embarrassed and she does not want to go back to the class because during the movie and afterward she heard many of the other students make inappropriate sexual statements.

What evidence might be relevant?

- Provide written notice to individuals who you intend to interview (including Complainant, Respondent, and witnesses) which must contain the following information:
 - Date,
 - Time,
 - Location,
 - Participants, and
 - Purpose of interview.
- Must provide sufficient time for the individual to prepare to participate.

Interview Preparation

- Carefully prepare a list of questions in advance for each interview.
- Be prepared to revise questions as you learn more from the party or witness during the interview.
- Select a neutral, comfortable setting for the interview(s).

Interview Basics - Introductions

- Introduce yourself and explain your role.
- Develop a rapport.
- Explain why they are being interviewed.
- Explain retaliation policy.
- Ask if they have any questions.

- In general, ask **open-ended** (vs close-ended) questions.
 - i.e. who, what, how, etc.
- Ask questions **one at a time**.
- Avoid multiple choice questions.
- Avoid jumping from one line of questioning to another.
- Avoid suggesting the answer in your question.
- Avoid questions that are not relevant.

Interview Basics – Active Listening

- Remain attentive and carefully listen to everything being said.
- Watch for non-verbal behaviors.
- Avoid unnecessary writing.
- Avoid whispering between investigators unless absolutely necessary.
- Never accuse an interviewee or participate in heated arguments.

Interview Basics - Complainant

- Don't guide the interview unless necessary, allow Complainant to narrate without interruption.
- Use trauma-informed interview techniques.
- Speak carefully and accurately.
 - Avoid words that imply consent.
 - Do not victim blame.

Interview Basics - Conclusion

- Ask if the party or witness has any questions.
- Request copies of evidence potentially available.
- Discuss confidentiality:
 - Note: **Cannot** prohibit a party from discussing allegations.
- Explain next steps.

- Document the interview.
- Update witness list and evidence list.
- Write down follow up questions for others.
- Consider whether additional allegations were raised that must be brought to Title IX Coordinator.

- Investigator may need to gather evidence other than statements from parties and witnesses.
- Some evidence may be identified by the parties or witnesses, and the investigator may identify other evidence.
 - Follow up with individuals regarding evidence mentioned in interviews.
- Examples of possible evidence:
 - Copies of text messages and voicemail messages
 - Copies of phone bills
 - Posts on social media
 - Medical records (only allowed with signed permission)
 - Police reports
 - Photographs, video recordings, video surveillance
 - Diaries/journals

Parties' Opportunity to Review Evidence and Respond

- Prior to completion of investigative report, must provide Complainant and Respondent (and advisors) equal opportunity to inspect and review any evidence that is directly related to the allegations.
 - Electronic or paper copy.
 - Includes evidence upon which District does not intend to rely in reaching a determination regarding responsibility.
 - Includes inculpatory and exculpatory evidence, from all sources.
- Parties must have at least 10 days to submit a written response.
- The investigator must consider the written responses prior to completion of investigative report.

- Prior to writing report, consider:
 - Has all evidence been examined?
 - Have all leads been exhausted?

- Investigative report must fairly summarize all relevant evidence.
 - Summarize the facts.
 - Both undisputed and disputed.
 - Do not make any determinations.
 - Investigator may provide credibility determinations although the decision-maker is not bound by those determinations.

Investigative Report Content

- Information to include in investigative report:
 - Introductory information:
 - Identify those involved (Complainant, Respondent, witnesses, investigator)
 - Date filed
 - Name of person and office that received allegations
 - Background:
 - History of relationship between parties
 - Other details surrounding allegations
 - List specific allegations.
 - Description of alleged policy violations.
 - Include definition of prohibited conduct from policy.
 - Witnesses interviewed (and those not interviewed).
 - Procedures followed (and any abnormalities).
 - Explanation of how report is organized (chronologically, by allegation, etc.).
 - Statement regarding relevant evidence:
 - Ex: “All relevant information gather during the course of the investigation has been included in this report.”

Investigative Report Content

- Appendices to report may include:
 - Summaries/transcripts of interviews
 - Documents/physical evidence
 - Timeline of incident
 - Timeline of investigation
 - Witness list/flowchart
 - Diagrams

Opportunity to Review/Respond to Investigative Report

- Must send Complainant and Respondent (and any advisors) the investigative report, at least 10 days prior to hearing or other time of determination regarding responsibility.
 - Electronic or hardcopy.
- Complainant and Respondent must have opportunity to review and respond.

Refusal to Participate

- Parties (including Complainant, Respondent, and witnesses) have the right to elect not to participate in the investigation, a recipient cannot retaliate against them.

Hypothetical 1

- Susie Smith is a sixth grade student at Noname Middle School. She informs the assistant principal at her school that on the school bus home yesterday, John Jones, an eighth grade student, sat in the seat next to her. John Jones is much bigger than her. She said that he kept trying to put his hands on her leg and down her shirt. She was too afraid of him to tell him to stop. They were sitting in the back of the bus and she is not sure if the bus driver saw anything. She was crying by the time she got to her stop. The bus driver did not say anything to her. She is the third stop on the bus and she knows there were some other kids on the bus, but she is not sure who they are.

Create an investigation plan.

The Investigation Report

- Once the investigation report is completed and comments have been received from both sides, the entire file should be provided to the decision-maker.

The Grievance Process – Administrative Dismissals

- The district MAY dismiss a formal complaint or any allegations therein, if at any time during the investigation:
 - The complainant notifies the Title IX Coordinator in writing that he/she would like to withdraw the formal complaint or allegations therein,
 - The respondent is no longer enrolled in or employed by the district, and/or
 - Specific circumstances prevent the district from gathering evidence sufficient to make a determination.

- Such dismissal does not preclude initiating discipline under another section of the district’s code of conduct

- The district can always offer an informal resolution process for issues between students or between employees
 - Before doing so, the district must provide the parties with a written notice disclosing:
 - The allegations,
 - The requirements of the informal process including circumstances under which it would preclude a party from resuming the formal complaint process from the same allegations,
 - Any party has the right to withdraw from the informal resolution at any time, and
 - Any consequences from engaging in the informal resolution process including whether records from it will be maintained and/or shared in the formal complaint process.
- Informal resolution process is **NOT** available for complaints that an employee harassed a student.

Title IX Regulations and Conflicts - FERPA

- 20 U.S.C. §1232g(b) prohibits the release of a student's education records, or personally identifiable information contained therein, other than directory information unless one of the exceptions applies or there is signed permission
 - There is no exception in the rule to allow the release confidential education records of a student who has filed a sexual harassment complaint against another student or school employee
 - There is no exception to the rule to allow release of confidential discipline records for a student who is found to be responsible for sexual harassment in a K-12 school
 - FERPA exception that allows release of the name of a perpetrator of a sexual offense and the discipline does NOT apply in the K-12 setting. See 20 U.S.C. sec. 1232g(b)(6)

Title IX Regulations and Conflicts - FERPA

- The US DOE in *New York et al v. DeVos* attempted to reconcile this by claiming:
 - “The Rule allows a recipient to redact personally identifiable information from education records if that information does not directly relate to a formal complaint’s allegations and acknowledges that such redactions may even be required under FERPA.”
- QUERY – what if the information is confidential student information protected by FERPA, but would also directly relate to a formal complaint allegation?

Title IX Regulations and Conflicts – IDEA

- Similar to FERPA, evidence that may be reviewed by the investigator and/or decision-maker could include special education records of either the Complainant or the Respondent
 - The mandate to release all evidence reviewed during the investigation to the parties would appear to violate the IDEA's confidentiality mandates
- The requirement that a single decision-maker decide discipline could result in violation of the IDEA's required procedures prior to making a disciplinary change in placement

Recordkeeping Requirements

- The Formal Complaint
 - Keep each investigation file for at least 7 years,
 - Including the disciplinary sanctions, if any, and
 - Including remedies and any supportive measures provided
- Records of any appeals and the results of the appeal,
- Record of any informal resolution and the results therefrom,
- All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process,
- Records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment.

- The regulations prohibit any recipient (i.e. school district) or “other person” from
 - Intimidating,
 - Threatening,
 - Coercing, or
 - Discriminating against any individual

for the purpose of interfering with any right or privilege secured by Title IX.

Protected Activity Under Title IX

- Reporting sexual discrimination including harassment
 - On your own behalf or on behalf of someone else
- Filing a discrimination complaint
- Assisting someone in reporting discrimination or filing a complaint
- Participating in any matter in an investigation into sexual harassment
 - e.g. protects witnesses
- Protesting any form of sexual discrimination
 - Although we are discussing harassment today, this would include protesting alleged lack of equality in athletic teams, etc.

Retaliation Defined Under Title IX Regulations

- The regulations prohibit retaliation not just for engaging in a protected activity but:

Because an individual has “refused to participate in any manner in an investigation, proceeding, or hearing under this part.”

Retaliation according to the regulations includes:

“charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purposes of interfering with any right or privilege secured by title IX or this part ...”

Retaliation Examples

- For Students:
 - Discipline for engaging in protected conduct
 - Reduction in grades
 - Removal from a sports team
 - Refusal to allow play time on the sports field
 - Writing a poor recommendation for college
 - Harassment in class or on a team
 - Denial of an honor

Retaliation Examples

- For employees:
 - Demotion
 - Termination
 - Other discipline
 - Giving a poor job reference
 - Giving unequal work assignments

- Establishing retaliation requires proving the intent to retaliate
- This is rarely proven by direct evidence
- Is generally based on circumstantial evidence
- What must be proven
 - Did the Complainant (i.e. the person alleging retaliation) engage in protected activity
 - Was the Complainant subjected to an adverse action?
 - Does the evidence suggest a connection between the protected activity and the adverse action?

- Is there something that would rebut a finding of retaliation
 - Is there an explanation for the adverse action that is legitimate on its face?
- If so, is there evidence that the reason given is really a pretext to retaliate against the individual for the protected conduct?
 - Things to look at:
 - Did the alleged retaliator know about the protected activity
 - The time between the protected activity and the adverse action
 - Any evidence that would suggest the alleged retaliator really took the action because of the protected activity
 - Does the explanation make sense
 - Were others in a similar situation who did not engage in protected activity treated better
 - Did others engage in similar protected activity without adverse action

- As with any other investigation, complete confidentiality cannot be guaranteed and should not be promised.
- Confidentiality, however, should be maintained as much as possible.
- The regulations require the district to maintain the confidentiality of identity of an individual who reports or complains of sex discrimination or harassment, including filing a formal complaint of sexual harassment, as well as the identity of the complainant, respondent and witnesses, *except as required to carry out the purposes of the Title IX regulations.*

The Decision Making Process

- The decision-maker must be a different person than the investigator and the Title XI Coordinator
- The decision-maker has two roles
 - Determine responsibility
 - Issue discipline
- In certain circumstances there may be a different decision maker for each step

The Decision-Making Process

- In K-12 school, an in-person hearing is NOT required prior to determining whether the respondent is responsible for sexual harassment
- The decision-maker still must:
 - Give each party the opportunity to submit relevant questions that the party wants asked for any party or witness,
 - Provide each party with the answers to those questions, and
 - Allow for follow up questions

Note that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the district, not the parties

The Decision Making Process

- The Written Decision on Responsibility
- This is a formal written decision that must at a minimum:
 - Identify the allegations,
 - Describe the procedural steps taken to investigate,
 - Make findings of fact,
 - Make conclusions regarding the application of the code of conduct to the facts,
 - Contain a statement of rationale for the result as to each allegation,
 - Identify any disciplinary sanctions to be imposed,
 - Identify whether remedies will be provided to the complainant, and
 - Inform the parties of the appeal procedures.

The decision must be provided to both parties simultaneously
Again – Beware of FERPA

The Appeal Process

- Is available to both parties,
- Must be decided by a different decision-maker,
- Only bases for appeal:
 - Procedural irregularity that affected the outcome of the matter;
 - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
 - The Title IX Coordinator, investigator(s) or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

The Appeal Process

- The other party must be notified in writing if an appeal is filed
- Both parties must be given a reasonable, equal opportunity to submit a written statement in support of, or challenging the decision,
- The decision-maker must issue a written decision describing results of the appeal and the rationale for the result,
- The decision must be given to each party simultaneously.

Major Changes in the Process

Prior OCR Guidance	New Regulations
<u>Knowledge:</u> The district “knows or reasonably should know” of the conduct	<u>Knowledge:</u> Any employee has actual knowledge of the conduct
<u>Hostile educational environment:</u> “so severe, persistent OR pervasive”	<u>Hostile educational environment:</u> “severe, pervasive AND objectively offensive”
<u>Investigation:</u> is required if the district knows or reasonably should know of harassment	<u>Investigation:</u> is only allowed if a formal written complaint is filed requesting an investigation
<u>Supportive measures:</u> may be offered if knowledge of sexual harassment	<u>Supportive measures;</u> must be offered
<u>Roles:</u> Title IX Coordinator, Investigator and Decision-Maker can be the same person	<u>Roles:</u> Decision-Maker cannot be the Investigator or Title IX Coordinator

Questions?

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