

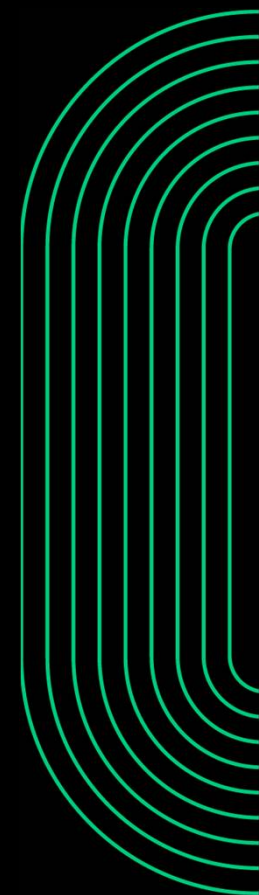


Title IX Refresher

Eaton Regional Education Service Agency

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September 20, 2021



Title IX Final Rule

- Released on May 6, 2020
- Effective August 14, 2020
- Applies to K-12 Schools
- Legal Challenges to Final Rule = Went Nowhere
- New Administration/More Changes to Come? = Likely, but not soon
- Public Hearings on Final Rule = Many Comments Pro/Against
- New Guidance Released by USDOE: Q&As and Sample Policies = July 2021



What is Title IX of the Education Amendments of 1972?

- No **person** in the United States shall, **on the basis of sex**, be excluded from participation, or denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.
20 U.S.C. § 1681, *et seq.*



Title IX's Protections

Protects ALL students

- Elementary → High School
- Male + female + straight + gay + lesbian + bisexual + transgender + questioning students.
- Gender Identity/Sexual Orientation/LGBTQ Students
 - Failure to conform to stereotypical notions of “masculinity” or “femininity.”
- “Same sex” discrimination claims must be handled with same procedures as opposite sex claims.



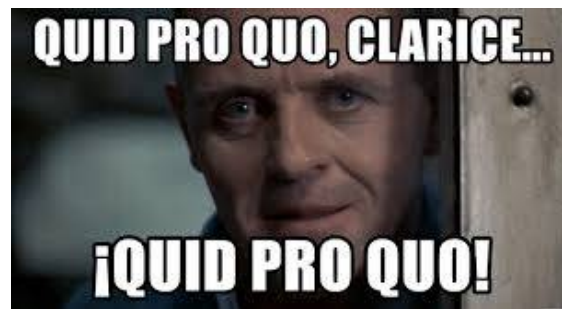
Gender Identity or Sexual Orientation Protections under Title IX

- Title VII SCOTUS decision: *Bostock v. Clayton County* – June 2020
 - “on the basis of sex” = sexual orientation and gender identity
- Biden Executive Orders reinforce this interpretation under Title IX
 - Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation – January 2021 (13988)
 - Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, including Sexual Orientation or Gender Identity – March 2021 (14021)
- USDOE Q&A on Title IX – July 2021



Definition of Sexual Harassment

- "Quid Pro Quo" harassment by a school employee.
- 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.
- "Sexual assault," "dating violence," "domestic violence," or "stalking" as those terms are defined under other Federal laws called the Clery Act and the Violence Against Women Act.



Sexual Harassment – What Changed?

OLD DEFINITION (OCR Guidance)

- Unwelcome conduct
- Determined by a reasonable person
- To be severe, pervasive, or persistent, and to interfere with or limit a student's ability to participate in or benefit from school services, activities or opportunities

NEW DEFINITION (Final Rule)

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



Is It Sexual Harassment?

- **SEVERE:**
 - *Causing discomfort or hardship*
 - *Very painful or harmful*
 - *Requiring great effort or a great degree*
- **PERVASIVE:**
 - *Existing in or spreading through every part of something*
 - *Systemic*
- **OFFENSIVE:**
 - *Giving painful or unpleasant sensations*
 - *Causing displeasure or resentment*
 - *Objective person standard*



Is It Sexual Harassment?

Going to require individual case-by-case analysis by frontline Administrators first.

- **Single, isolated, events = unlikely, but could occur (e.g. rape)**
 - Butt smack in hallway
 - Single inappropriate text/photo (isolated vs. systemic disclosure?)
 - Verbal sexual remarks only = grey area
 - MUTUAL sexual conduct/communication (consent)
- **Severe, pervasive AND objectively offensive**
- **Effectively denies equal access to education**
 - Drop out/withdrawal from program or activity
 - Increased absences
 - Decline in grades
 - Increased emotional or academic supports?



If Not, What Is It?

- **Bullying/Cyberbullying?**
- **Other discrimination/harassment?**
- **Student Code of Conduct Offenses?**
 - Inappropriate Displays of Affection
 - Undesirable Physical Conduct
 - Sexual Misconduct
 - Profanity/Obscenity
 - Indecency
 - Inappropriate conduct/communication (Teasing/Disorderly conduct)
 - Acceptable use violation/Technology Abuse
- **What is your duty to investigate? Who is your investigator? What type of investigation required?**



If Not, What Is It?

STATE LAW = ELLIOT LARSEN CIVIL RIGHTS ACT

"Sexual harassment" is defined under Michigan law as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, when:

- Submission to such conduct is made either implicitly or explicitly a term or condition of an individual's employment, or status in a class, educational program, or activity;
- Submission or rejection of such conduct by an individual is used as the basis for employment or educational decisions affecting such individual;
- Such conduct has the purpose or effect of **interfering** with the individual's work or educational performance; of creating an intimidating, hostile, **or** offensive working, and/or learning environment; or **interfering** with one's ability to participate in or benefit from a class or an educational program or activity.

NEOLA Board Policy **5517** (Anti-Harassment) vs. **2266** Title IX Sexual Harassment

Informal/Formal Investigation vs. Title IX Grievance Procedure



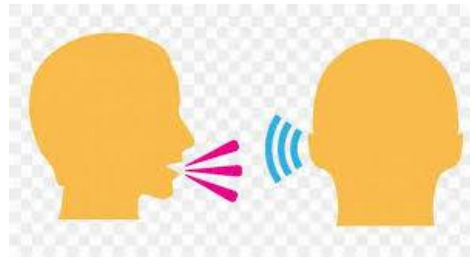
When Does a School Have Notice?

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



Actual Knowledge and School Personnel

- The Title IX Coordinator(s) for the school district.
- Schools have to provide the contact information for the Title IX Coordinator(s).
 - Board Policies, Handbooks, Website
- Other people within the school who have authority to institute corrective measures. This could vary from school to school, but always includes the Title IX Coordinator(s).
- In elementary and secondary schools, telling any school employee always puts the school on notice.



Deliberate Indifference – What Changed?

OLD DEFINITION (OCR Guidance)

- The school must take immediate action to eliminate the sexual harassment or sexual violence, prevent its recurrence, and address its effects

NEW DEFINITION (Final Rule)

- Failure to respond reasonably in light of known circumstances



NEW POLICY AND PROCEDURE REQUIREMENTS



Revise Board Policies

- New definition of Sexual Harassment under Title IX
- Identify **Title IX Coordinators**, or that the school will designate at least one (identify in AG/AP)
- Continue to identify **Compliance Officers**: responsible for all other complaints of discrimination/harassment (e.g. race, religion, disability, etc.)
- Identify separate grievance procedure/Administrative Guideline for investigation of non-Title IX complaints
- Keep procedure in AG/AP; no Board approval



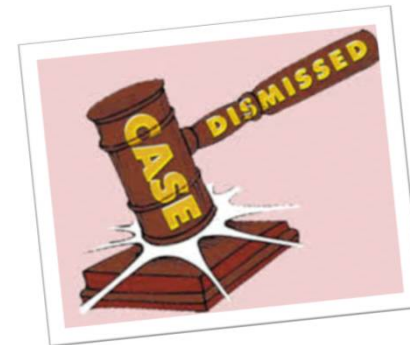
Written Grievance Procedures: 10 Specific Items

1. Treat Parties Equitably
2. Objective Evaluation of Evidence
3. Training; No Conflicts of Interest
4. Presumption of Innocence
5. Reasonably Prompt Timelines
6. Description of Range of Outcomes
7. Standard of Evidence
8. Right to Appeal
9. Description of Range of Supportive Measures
10. Privileges



Mandatory Dismissals

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



Discretionary Dismissals

A school may dismiss a complaint:

- if the complainant notifies the Title IX Coordinator in writing that the complainant wishes to withdraw the formal complaint or some of its allegations;
- if the respondent is no longer enrolled or employed by the school; or
- if specific circumstances prevent the school from gathering evidence sufficient to reach a determination about the allegations.
 - Less latitude to address elsewhere.



Dismissal Procedures

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



Informal Resolution

- Schools can offer informal resolution in appropriate cases.
 - *Exception:* Where the respondent is an employee of the school.
- Informal resolution may only be attempted if each party enters the process completely voluntarily.
- A school can never force, threaten, or require any party, complainant or respondent, into going into informal resolution.
- If informal resolution proceeds, the school must provide a facilitator who is free from conflicts of interest or bias, and who has received special training.
- The school still needs to provide complainants and respondents with notice of the allegations, notice of their rights, information about whether an informal process is confidential, and about withdrawing from the process.



Informal Investigation Procedure

- **Just because it's informal, doesn't mean you can skip formal documentation!**
 - Document complainant's willingness to forgo filing a formal complaint.
 - Document discussions with both parties and parents/union (if applicable).
 - Document actions taken to remedy the complaint.
 - Document any discipline imposed as a result.
 - Follow up via written correspondence.
 - Keep Title IX Coordinator "in the loop" to assure procedures are followed.
 - Supportive measures must still be considered (and documented)!



DOCUMENTATION REQUIREMENTS DURING FORMAL INVESTIGATION



Formal Complaint

- Defined as a document filed and signed by a complainant or the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. 34 C.F.R. § 106.30(a).
- Document must be signed by complainant or Title IX Coordinator.



Written Notice to the Parties

- When the school begins an investigation, it has to provide the parties with written notice of certain information.
- It has to give notice to the parties of the school's grievance process, which must comply with the 10 items listed before.
- It also has to include whether there is an opportunity to engage in informal resolution. Schools don't have to offer informal resolution processes, but if they choose to, it's important that they are mentioned in this initial notice.



Details of Written Notice

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



Gathering Evidence: Schools and Parties



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

Investigative Reports

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



Compliance with FERPA? Confidentiality?

- Given that the requirements to comply with Title IX include allowing the parties (and their advisors, if any) an opportunity to inspect/review all relevant evidence as well as providing a copy of the investigation reports, the following safety measures are recommended to ensure confidentiality and FERPA compliance:
 - If there is video evidence, allowing the parties to view the video is sufficient under Title IX and FERPA (i.e. do not provide a copy of the video unless the District can effectively blur the other student(s) faces).
 - Redact student names on documents and replace with identifiers (“Complainant” “Respondent” “Witness 1, 2, 3,” etc.)
 - Provide a “key” only to the Complainant and Respondent identifying the names of the students.
 - Include a watermark (“Complainant” and “Respondent”) on all documents provided to the parties.



Hearings (Live or Written)

- For elementary and secondary schools, the school has the option, but never the obligation, to hold a hearing.
- Even without a hearing, the elementary or secondary school must give still the parties equal opportunity to submit relevant, written questions to each other, before the decision-maker reaches a determination. (*i.e. second 10 day requirement on previous slide*).
- Questions and evidence about a complainant's prior sexual history are not relevant, with two limited exceptions:
 - Offered to prove that someone other than the respondent committed the alleged misconduct; or
 - Offered to prove consent.



Decision-Making: Written Decisions (AKA: Outcome Letters)

After the evidence has been weighed, the determination has to be written. It must include:

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



Decision-Making: Written Decisions (AKA: Outcome Letters)

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



Decision-Making: After the Decision

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



Appeals

- A school has to offer both parties an opportunity to appeal.
- Appeals can be taken from two different steps in the process.
 - After a dismissal before the grievance process, whether mandatory or discretionary.
 - Based on decision to dismiss.
 - At the end of the grievance process.
 - Remember, only **THREE** reasons.



Appellate Processes

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



Don't Forget About Retaliation

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



QUESTIONS?



Thank You



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Legal Disclaimer

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