

# **Title IX and Sexual Violence: Best Practices for Ensuring Safe K-12 Schools**

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## **Title IX Coordinator Bootcamp for K-12 Schools Session 4**

**An EducationAdminWebAdvisor Webinar**

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# Overview

- Purpose and Scope of Title IX
- Applicability to Sexual Harassment and Violence
- Guidance from the Department of Education
- Questions and Answers from Sept 2017 from DOE
  - Notice and Reporting Sexual Violence
  - Title IX Procedural Requirements
  - Conducting Investigations and Hearings
  - Intersection with Other Federal Laws
- Additional Considerations



# 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.”

Title IX of the Education Amendments of 1972, and its implementing regulation at 34 C.F.R. Part 106 (Title IX)



## Title IX Regulations

“The purpose of this part is to effectuate title IX of the Education Amendments of 1972 . . . which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance . . . .” 34 C.F.R. s. 106.1.

- Other regulations found under 34 C.F.R. part 106.



## Title IX

- Title IX is not an affirmative action statute, but an anti-discrimination statute.
- Enforcement is vested with the Office of Civil Rights within the Department of Education.
- OCR has issued numerous interpretations, guidance, and Dear Colleague Letters (DCLs).



# Scope of Title IX

- Title IX prohibits discrimination on the basis of sex in education programs and activities.
- All public and private elementary and secondary schools, school districts, colleges and universities receiving federal funds (“recipients”) must comply with Title IX.
- All students (as well as other persons) at recipient institutions are protected by Title IX.



# Title IX Procedural Requirements

- Title IX regulations outline three key procedural requirements for institutions.
  1. Disseminate a notice of non-discrimination
  2. Designate **at least one employee to coordinate its efforts** to comply with and carry out its responsibilities under Title IX
  3. **Adopt and publish grievance procedures** providing for the **prompt and equitable** resolution of student and employee sex discrimination complaints



# Notice of Non-Discrimination

- Institutions must disseminate a notice of non-discrimination on the basis of sex.
  - The notice should provide that questions regarding Title IX may be referred to the **Coordinator** or to OCR.
  - Notify students and employees of the **Title IX Coordinator's contact** information in its notice.



# Designating a Title IX Coordinator

- An institution must designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX and the Department's implementing regulations.
- An institution may choose to have a number of employees responsible for Title IX matters. However, it is advisable to give one official responsibility for overall coordination and oversight of sexual harassment complaints to ensure consistent practices and standards.
- The Title IX coordinator's role should be independent to avoid any potential conflicts of interest.



# Grievance Procedures

- Title IX requires that an institution adopt and publish grievance procedures providing for **prompt and equitable** resolution of student and employee complaints of sex discrimination, including sexual violence.
- OCR has concluded that a grievance procedure cannot be prompt or equitable unless students know it exists, how it works and how to file a complaint.
- There is no requirement that an institution use a separate grievance procedure solely for sexual violence complaints.



# Critical Elements of Policies and Procedures

- **Notice** to students and employees of the grievance procedures, including where complaints may be filed.
- Application of the grievance procedure to complaints filed by students or on their behalf alleging **sexual violence** carried out by employees, other students, or third parties.
- Provisions for **adequate, reliable, and impartial** investigations of complaints.
- Written notice to the complainant and alleged perpetrator of the **outcome** of the complaint.
- Assurance that the institution will take steps to **prevent recurrence** of any sexual violence and remedy discriminatory effects on the complainant and others, if appropriate.
- Designated and reasonably **prompt time frames** for the major stages of the complaint process.



## Applicability to Sexual Harassment and Sexual Violence

- Both the Department of Education and the United States Supreme Court have found that sexual harassment is a form of sexual discrimination prohibited by Title IX.
  - Sexual harassment, for purposes of Title IX is unwelcome conduct of a sexual nature.
  - Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.
  - A student may be sexually harassed by an employee of the institution, another student, or a non-employee third party (e.g. a visiting speaker or visiting athletes).



## Applicability to Sexual Harassment and Sexual Violence

- In each case, the issue is whether the harassment rises to a level that it denies or limits a student's ability to participate in or benefit from the school's program based on sex.
- Sexual violence is a form of sexual harassment.



## Applicability to Sexual Harassment and Sexual Violence

- Sexual violence refers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent (*e.g.*, due to the student's age or use of drugs or alcohol, or because an intellectual or other disability prevents the student from having the capacity to give consent).
- A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, sexual abuse, and sexual coercion.



# Hostile Environment

- Sex-based harassment by peers, employees, or third parties that is **sufficiently serious** to deny or limit a student's ability to participate in or benefit from the institution's education programs and activities based on sex.
- The Department considers the conduct from both a subjective and an objective perspective.



## Factors for Evaluating Hostile Environment

- OCR will consider a variety of factors to determine if a hostile environment has been created and will consider the conduct from a subjective and objective perspective.
  - The degree to which the conduct affected the education of one or more students
  - The type, frequency, and duration of the conduct
  - The identity of and relationship between the alleged harasser and the subject or subjects of the harassment
  - The number of individuals involved
  - The age and sex of the alleged harasser and the subject(s) of the harassment
  - The size of the institution, location of the incidents, and context in which they occurred
  - Other incidents at the institution
  - Incident of gender-based but nonsexual harassment



# Welcomeness

- In order for conduct of a sexual nature to be sexual harassment, it must be unwelcome.
- Conduct is unwelcome if the student did not request or invite it and regarded the conduct as undesirable or offensive.
- Issues of welcomeness must be considered if the alleged harassment relates to alleged consensual sexual relationship.



# Welcomeness

- The Department will consider factors involving all cases involving students, including:
  - The nature of the conduct and the relationship of the school employee to the student and
  - Whether the student was legally or practically unable to consent to the sexual conduct in questions.
- If there is a dispute about whether harassment occurred or whether it was welcome, the following types of information will be considered: (1) witness statements; (2) credibility of the individuals; (3) prior instances of harassment; (4) reactions to the alleged harassment; (5) evidence of a complaint; and (6) other contemporaneous evidence.



# Quid Pro Quo

- *Quid pro quo* is a Latin term that means “this for that” or an exchange of one thing for another.
- Occurs if a teacher or other employee conditions an educational decision or benefit on the student’s submission to unwelcome sexual conduct.
- Students and third parties are generally not given responsibility over other students and therefore cannot typically engage in quid pro quo harassment.



## Employee-on-Student Sexual Harassment

- Title IX protects students from sexual harassment carried out by employees of the institution.
- The extent of an institution's responsibility if an employee sexually harasses a student is determined by whether or not the harassment occurred in the context of the employee's provision of aid, benefits, or services to students.
- Whether or not sexual harassment occurred within the context of an employee's responsibilities for aids, benefits, and services is determined on a case-by-case basis taking into account a variety of factors.



# Employee-on-Student Sexual Harassment

- OCR will consider the following factors in determining whether or not the harassment has taken place in the context of aid, benefits, or services.
  - The type and degree of responsibility given to the employee;
  - The degree of influence the employee has over the particular student involved;
  - Where and when the harassment occurred;
  - The age and educational level of the student involved; and
  - As applicable, whether in light of the student's age and educational level and the way the school is run, it would be reasonable for the student to believe that the employee was in a position of responsibility over the student, even if the employee was not.



# Same-Sex Sexual Harassment

- An institution's obligation to respond appropriately to sexual violence complaints is the same irrespective of the sex of the parties involved.
- Title IX may extend to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity.



## Notice of Sexual Harassment or Sexual Violence

- OCR deems an institution to have notice of student-on-student sexual violence if a responsible employee **knew or in the existence of reasonable care should have known** about the harassment.
- A **responsible employee** would include any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment, or an individual who a student could reasonably believe has the authority or responsibility.



# Responding to Sexual Violence

- Once a school has notice of possible sexual harassment of students, it should take immediate and appropriate steps to investigate and take prompt and effective steps.
  - **Interim measures** may be appropriate.
- The school may decide to place the students immediately in separate classes, pending the results of the investigation.



# Conducting Investigations

- The school must conduct a prompt, impartial, and thorough investigation to determine what happened and must take appropriate steps to resolve the situation.
- The school should take all reasonable steps to investigate and respond to the complaint in a manner consistent with a request for confidentiality from a student.
- The specific steps will vary depending upon the nature of the allegations, the source of the complaint, and other factors.
- Due process rights of the accused must also be observed.



# Conducting Investigations and Hearings

- Parties must have an equal opportunity to present witnesses and other evidence.
- Any restrictions or allowances for lawyers must be applied equally.
- Third-party expert testimony must be permitted equally.
- Both parties must be notified in writing of the outcome of both the complaint and any appeal.



# Confidentiality

- A student may request that the his or her name not be disclosed or that the institution not pursue an investigation or disciplinary action.
- If a student requests that the institution not reveal his or her name to the perpetrator, the institution should inform the student that honoring the request may limit its ability to fully respond including disciplining the alleged perpetrator.



# Confidentiality

- If the student still requests that his or her name not be disclosed, an institution needs to evaluate whether it can honor the request and still provide a safe and non-discriminatory environment for all students. Some of the factors that an institution should consider include:
  - Whether the perpetrator threatened further sexual violence
  - Whether the perpetrator has a history of violence
  - The age of the student subjected to the sexual violence
  - Whether the institution possesses other means to obtain relevant evidence (i.e. security cameras)



# Retaliation

- Title IX makes it unlawful to retaliate against an individual for the purpose of interfering with any right or privilege secured by the law.
- When an institution knows or reasonably should know of possible retaliation by other students or third parties, it must take immediate and appropriate steps to investigate or otherwise determine what occurred.
- Title IX requires the institution to protect the complainant and witnesses and ensure their safety as necessary.



# Retaliation

- If an individual brings concerns about possible violations to the attention of the institution, it is unlawful for the school to retaliate against that individual for doing so.
- It is also unlawful to retaliate against an individual because he or she testified or participated in any manner in an OCR or institution's investigation or proceeding.
- Institutions should take steps to prevent any retaliation against the student who made the complaint, the person who filed a complaint on behalf of a student, or those who provided information as witnesses.



# Criminal Investigations

- A Title IX investigation will never result in incarceration.
- An institution should notify complainants of the right to file a criminal complaint.
- An institution should work with law enforcement to learn when the evidence gathering stage of the criminal investigation is complete.



# Informal Mechanisms

- Grievance procedures may include informal mechanisms for resolving sexual harassment complaints to be used if the parties agree to do so.
- It is not appropriate for a student who is complaining of harassment to be required to work out the problem directly with the individual alleged to be harassing him or her.
- The complainant must be notified of the right to end the informal process at any time and begin the formal stage of the complaint process.



# Additional Considerations

- Due Process Rights of the Accused
  - The Constitution guarantees due process to students in public and state-supported schools who are accused of certain types of infractions.
  - Public school employees have certain due process rights.
- The First Amendment
  - In cases of alleged harassment, the First Amendment must be considered if issues of speech or expression are involved.
  - First Amendment rights apply to the speech of students and teachers.



# Title IX Guidance

- In January 2001, the Department issued its *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties*.
- In September 2008, the Department issued its pamphlet, entitled *Sexual Harassment: It's Not Academic*.
- In October 2010, the Department issued a Dear Colleague letter regarding *Harassment and Bullying*.
- On April 25, 2015, the Department issued its *Guidance on Obligation of Schools to Designate a Title IX Coordinator*.



# Title IX Guidance

- On April 4, 2011, the Department issued a Dear Colleague Letter on student-on-student sexual harassment and sexual violence.
- On April 29, 2014, the Department issued *Questions and Answers on Title IX and Sexual Violence* in April 2014.
- On September 22, 2017, the Department issued a Dear Colleague letter and a *Question and Answers on Campus Sexual Misconduct*. The DCL withdrew the 2014 and 2011 letters.



## Trump, OCR and Title IX

- President Trump and Secretary DeVos have clearly indicated that they will be taking a different approach, and likely following the rule-making process.
- Several other guidance documents as well, including the 2014 and 2011 guidance documents related to sexual violence under Title IX.



## Trump, OCR and Title IX

- Withdrawal of the 2014 and 2011 guidance documents and issuance of the 2017 guidance document result in some noteworthy changes, which we will discuss.
- However, most of the restrictions on sexual harassment and sexual violence and requirements of Title IX coordinators remain in place.



# September 2017 Guidance

- Includes 12 questions and answers on issues related to sexual misconduct on campus.
- Subtle changes on matters related to sexual misconduct, including changes in footnotes.
- Must also note changes resulting from withdrawal of other guidance documents.



## Question 1: School's Responsibility to Address Sexual Misconduct

- **What is the nature of a school's responsibility to address sexual misconduct?**
  - Where the school **knows or reasonably should know** of an incident of sexual misconduct, the school must respond appropriately.
  - When sexual misconduct is so **severe, persistent, or pervasive** as to deny or limit a student's ability to participate in or benefit from the school's programs or activities, a hostile environment exists and the school must respond.



## Question 3: Interim Measures

- **What are interim measures and is a school required to provide such measures?**
  - Interim measures are individualized services offered as appropriate **to either or both the reporting and responding parties** involved in an alleged incident of sexual misconduct, prior to an investigation or while an investigation is pending.
  - In fairly assessing the need for a party to receive interim measures, a school **may not rely on fixed rules or operating assumptions** that favor one party over another, nor may a school make such measures available only to one party.



## Question 5: Grievance Procedures and Investigations

- **What time frame constitutes a “prompt” investigation?**
  - There is **no fixed time frame** under which a school must complete a Title IX investigation.
  - OCR will evaluate a school’s **good faith** effort to conduct a fair, impartial investigation in a timely manner designed to provide all parties with resolution.



## Question 6: Grievance Procedures and Investigations

- **What constitutes an “equitable” investigation?**
  - Any rights or opportunities that a school makes available to one party during the investigation **should be made available to the other party on equal terms.**
  - Restricting the ability of either party to discuss the investigation (e.g., through “**gag orders**”) is likely to deprive the parties of the ability to obtain and present evidence or otherwise to defend their interests and therefore is likely inequitable.
  - Training materials or investigative techniques and approaches **that apply sex stereotypes or generalizations** may violate Title IX and should be avoided so that the investigation proceeds objectively and impartially.



## Question 6: Grievance Procedures and Investigations

- **What constitutes an “equitable” investigation?**
  - Once it decides to open an investigation that may lead to disciplinary action against the responding party, a school **should provide written notice to the responding party of the allegations** constituting a potential violation of the school’s sexual misconduct policy, including **sufficient details and with sufficient time** to prepare a response before any initial interview.
  - Each party should receive **written notice** in advance of any interview or hearing with sufficient time to prepare for meaningful participation.



## Question 7: Informal Resolutions of Complaints

- After a Title IX complaint has been opened for investigation, may a school facilitate an informal resolution of the complaint?
  - If (1) **all parties voluntarily agree** to participate in an informal resolution that does not involve a full investigation and adjudication after receiving a full disclosure of the allegations and their options for formal resolution and (2) a school determines that the particular Title IX complaint **is appropriate** for such a process, **then** the school **may** facilitate an informal resolution, including mediation, to assist the parties in reaching a voluntary resolution.



## Question 8: Decision-Making as to Responsibility

- **What procedures should a school follow to adjudicate a finding of responsibility for sexual misconduct?**
  - The findings of fact and conclusions should be reached by applying either a **preponderance of the evidence** standard or a **clear and convincing evidence** standard.
  - The decision-maker(s) must offer each party **the same meaningful access to any information** that will be used during informal and formal disciplinary meetings and hearings, including the investigation report.



## Question 8: Decision-Making as to Responsibility

- **What procedures should a school follow to adjudicate a finding of responsibility for sexual misconduct?**
  - The parties should have the **opportunity to respond** to the report in writing in advance of the decision of responsibility and/or at a live hearing to decide responsibility.
  - **Any process made available to one party** in the **adjudication** procedure should be made equally available to the other party (for example, the right to have an attorney or other advisor present and/or participate in an interview or hearing; the right to cross-examine parties and witnesses or to submit questions to be asked of parties and witnesses).



## Question 8: Decision-Making as to Responsibility

- **What procedures should a school follow to adjudicate a finding of responsibility for sexual misconduct?**
  - A postsecondary institution must “[p]rovide the accuser and the accused with the **same opportunities to have others present** during any institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice.”
  - Schools are cautioned to **avoid conflicts of interest** and biases in the adjudicatory process and to prevent institutional interests from interfering with the impartiality of the adjudication.
  - Decision-making techniques or approaches that **apply sex stereotypes** or generalizations may violate Title IX and should be avoided so that the adjudication proceeds objectively and impartially.



## Question 9: Decision-Making as to Disciplinary Sanctions

- **What procedures should a school follow to impose a disciplinary sanction against a student found responsible for a sexual misconduct violation?**
  - The decision-maker as to any disciplinary sanction imposed after a finding of responsibility **may be the same or different** from the decision-maker who made the finding of responsibility.
  - Disciplinary sanction decisions must be made for the purpose of deciding **how best to enforce the school's code of student conduct** while considering the impact of separating a student from her or his education.
  - Any disciplinary decision must be made as a **proportionate** response to the violation.



## Question 10: Notice of Outcome and Appeals

- **What information should be provided to the parties to notify them of the outcome?**
  - OCR recommends that a school provide written notice of the outcome of disciplinary proceedings to the **reporting and responding** parties **concurrently**.
  - The content of the notice **may vary** depending on the underlying allegations, the institution, and the age of the students.
  - The school should inform the reporting party (1) whether it found that the alleged conduct occurred, (2) any individual remedies offered to the reporting party or any sanctions imposed on the responding party that directly relate to the reporting party, and (3) other steps the school has taken to eliminate the hostile environment, if the school found one to exist.



## Question 11: Notice of Outcome and Appeals

- **How may a school offer the right to appeal the decision on responsibility and/or any disciplinary decision?**
  - If a school chooses to allow appeals from its decisions regarding responsibility and/or disciplinary sanctions, the school **may choose** to allow appeal (i) solely by the responding party; or (ii) by both parties, in which case any appeal procedures must be equally available to both parties.



# Final Thoughts

- Review of policies and procedures for the future.
- Continue to monitor the notice and comment of rules by the Office of Civil Rights.
- Continue to monitor the investigations occurring on other campuses and OCR's response to those.
- OCR is still guidance and there may other outcomes in the court in some cases as well.



# Conclusion

- Please contact me with any questions.
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