



Fagen Friedman & Fulfroost LLP

2020 Title IX Regulations: Title IX Coordinator Training

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Title IX Coordinator

- Must be called Title IX Coordinator
- Must be identified (with name or title, address, phone, and email) in policy and on website
- Must meet with alleged victims of Title IX Sexual Harassment



Title IX Coordinator

- Informs CP of availability of supportive measures and formal complaint process
- Decides whether to “sign” a complaint when the CP doesn’t want to file
- Coordinates implementation of supportive measures
- Ensures effective implementation of remedies
- Monitors ongoing compliance with Title IX



Deadlines

- Website Posting Required by 8/14
 - Training materials used to train Title IX Team
 - Title IX Coordinator Information
 - Policy Language
 - Nondiscrimination Language
 - Title IX Sexual Harassment Grievance Process



Robin's Report

- Email from AP
- Robin, a first-year soccer player, reported conduct that occurred against Robin's friend, Cameron, also a first-year soccer player



Robin's Report

- Soccer orientation week
- Park across street from the school
- Two experienced student soccer players vs. Cameron



Robin's Report

- Verbal harassment
 - Going to violate your mother
 - Asked to "smoke" (understood to be sexual) in exchange for starting position
- Grabbed Cameron by the neck and bent Cameron over; poked Cameron's anus over the clothes



Robin's Report

- Coaches saw the incident
 - Laughed at first
 - Noticed Cameron looked shaken
 - Sternly reprimanded students in front of Cameron
 - Told Cameron if it happened again to report it
- Nonetheless, incidents kept occurring



Robin's Report

- One (same) coach observed later incident; shook head and walked away
- Last day of orientation
 - Hazing ritual
 - Multiple students grabbed Cameron and two other rookies
 - Pulled down pants, poked anus with broomstick



POLLING

Is the conduct alleged "Title IX Sexual Harassment"?

- Yes – Quid Pro Quo by an Employee**
- Yes – Hostile Environment**
- Yes – Sexual Assault**
- Yes – Hostile Environment & Sexual Assault**
- No**
- Can I get that definition again?**



Title IX Sexual Harassment

- Employee quid pro quo
- Hostile environment (newly defined)
- Clery/VAWA "Big 4"



Title IX Quid Pro Quo

Definition: An employee of the recipient conditioning an aid, service, or benefit of the recipient on an individual's participation in unwelcome sexual conduct

New: Only an employee (not a volunteer, another student, etc.)

Codified: Severity and harm presumed



VAWA “Big Four”

Sexual Assault 20 U.S.C. 1092(f)(6)(A)(v)

Domestic Violence 34 U.S.C. 12291(a)(8)

Dating Violence 34 U.S.C. 12291(a)(10)

Stalking 34 U.S.C. 12291(a)(30)



Sexual Assault under VAWA

■ Sexual Assault:

- Penetration without consent (rape)
- Fondling without consent
- Incest
- Statutory rape



Title IX Sexual Harassment Hostile Environment

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 school's education program or activity**



POLLING

What if the only activity reported was the verbal taunting (nothing physical). Is the alleged conduct "Title IX Sexual Harassment"?

- Yes, severe, pervasive, and objectively offensive + effectively denies equal access**
- No – not severe**
- No – not pervasive**
- No – not objectively offensive**
- No – not effective denial of equal access**
- How the heck should I know? I'm calling the lawyer.**



POLLING

If it's not "Title IX Sexual Harassment," what do you do? (best choice)

- Tell AP she can't do anything further because it is not Title IX Sexual Harassment.**
- Tell AP to consider other policy violations (bullying, code of conduct).**
- Tell AP to follow up with Cameron to seek more information.**
- Ask AP if she's interested in a new position because yours is about to be free.**



POLLING

Thinking back to the original hypo... What do you do next?

- Contact Robin to obtain names of upper-class students to pull from the class**
- Contact Robin to offer an opportunity to file a formal complaint and supportive measures**
- Contact Cameron to offer an opportunity to file a formal complaint and supportive measures**
- Run and hide as fast as I can!**



Title IX Coordinator must promptly, **even if no Formal Complaint is filed:**

- Contact the Title IX Complainant to discuss the availability of “supportive measures”
- Consider the Title IX Complainant’s wishes with respect to supportive measures
- Inform the Title IX Complainant of the availability of supportive measures with or without the filing of a formal complaint
- Explain the process for filing a Formal Complaint

New:
Initial
Response



Cameron's Report

- You tell the AP to meet with Cameron (**WRITE IT DOWN**)
- Cameron confirms all allegations



POLLING

What is the Best Supportive Measure to Offer?

- A mutual no contact order
- Counseling
- A unilateral no contact order
- Removing the students from classes shared with Cameron



Cameron's Report

- Cameron wants the students removed from the team
- Cameron does not want to file a Formal Complaint
- Cameron begs not to named to the students



POLLING

Can you honor Cameron's confidentiality request?

- No, names must always be provided to the Respondent when a Complainant reports Title IX Sexual Harassment.**
- No, because this warrants "signing" a formal complaint and Cameron must therefore be named.**
- Yes, because removing the upper-class students is a supportive measure which must be offered with or without formal complaint.**
- Yes, because confidentiality of a Complainant is always paramount in Title IX matters.**



Signing a Formal Complaint

- Consider:
 - Pattern of alleged conduct
 - Involvement of violence, weapons, etc.
 - Seriousness of alleged conduct
 - Age of student harassed
- Title IX Coordinator does not become Complainant or party
- Decision to sign a Formal Complaint (or not?) reviewed for “deliberate indifference”



Notices – Initial Response

Initial Contact and Meeting with the CP

Notice to
Complainant of
Report of Title IX
Sexual Harassment

Summary of
Supportive
Measures Meeting
with the Title IX
Complainant

Title IX Formal
Complaint



POLLING

You can remove the upper-class students from school during the investigation as an "emergency removal".

- True
- False



Emergency Removals / Admin Leave

Immediate emergency removal

(34 C.F.R. 106.44(c))

- Based on an individualized safety and risk analysis
- Necessary to protect a student or other individual from **immediate threat** to **physical health or safety**
- **Notice, opportunity to challenge** provided “immediately” provided the removal
- Consider other laws, e.g., “change in placement” under IDEA

Employee administrative leave

(34 C.F.R. 106.44(c))

- Not prohibited
Consider state law, board policy, handbooks and bargaining



Remember State & Federal Law

- Additional process may be required for emergency removal to occur
 - Student discipline – state laws (e.g., long term suspension, expulsion)
 - Disability rights – federal and state law
 - Employee rights – law, policy, agreements



Notices – Temporary Removal

Notice of Title IX
Emergency
Removal -
Student

Notice of Title IX
Administrative
Leave -
Employee



POLLING

Cameron presents a court order prohibiting the upper-class students from being at school. What do you do?

- Ignore it, because removing the students from school would be punitive or disciplinary, and that's not possible until after a determination is made.**
- Enforce it and do not get involved – this is between Cameron and the upper-class students.**
- Enforce it and tell the upper-class students that they should raise any concerns with the court.**



POLLING

Cameron suggests that they do a talking circle to address the conduct. Can this be done?

- Yes, because the new Title IX regs now clearly allow informal resolution.**
- Yes, as long as the talking circle facilitator has been trained on Title IX.**
- No, because Cameron has not filed a formal complaint.**
- No, because this severe of sexual misconduct can never be addressed through informal resolution.**



Formal Complaint – Next Steps

- Written notice to all known parties
 - Grievance process
 - Allegations
 - Respondent presumed not responsible
 - Right to advisor
 - Right to inspect/review evidence
 - Notice of provision on false statements



Notice - Allegations

Notice of Allegations

Notice of
Allegations of Title
IX Sexual
Harassment by a
Complainant

Notice of
Allegations Upon
Signing of Formal
Complaint by the
Title IX Coordinator



Notices – Informal Resolution

Informal Resolution Process

Offer of Title IX
Informal
Resolution
Process

Notice of Closure
of Title IX Informal
Resolution
Process



POLLING

Cameron and the upper-class students reach an agreement in informal resolution. Can the Title IX process ever recommence?

- Yes, but only if the upper-class students fail to comply with its terms.**
- Yes, but only for allegations not resolved in informal resolution.**
- No, because you can only recommence an investigation before a resolution is reached.**



Let the investigation begin....

- The Title IX Investigator is ready to investigate
- Must send notice to parties and witnesses



Notices - Interviews

Notice of Interview

Notice of Title IX
Interview or
Meeting with Title
IX Party

Notice of Title IX
Interview or
Meeting with Non-
Party Witness



Witness – Devon

- Devon, witness
- Also on the soccer team, upper class student



Witness – Devon

- Sexual assault by classmate on spring break trip last year
- Sexual harassment by classmate via Snapchat over the summer (off-campus, not on school tech or hours)
- A teacher asked Devon for a naked photo and Devon shared one



POLLING

In which case does the school have jurisdiction?

- None**
- All**
- Spring break conduct**
- Summer Snapchat incident**
- Teacher photo incident**



POLLING

What if Teacher resigns during the investigation?

- Contact the AP and direct them to handle the issue at the building level
- Send both parties a formal dismissal notice
- Meet with Devon to discuss supportive measures for the remainder of time at the school
- All of the above
- None of the above



POLLING

Teacher rescinds resignation, but Devon calls to ask to withdraw the formal complaint. What do you do?

- Respect Devon's autonomy and wishes by dismissing the complaint.**
- Tell Devon you will not dismiss the Complaint because there is an ongoing risk to other students.**
- Require that Devon submit the request in writing and then dismiss the Complaint.**



POLLING

It turns out that the teacher photo incident occurred 3 years ago before Devon was a student in your district. What do you do?

- Dismiss the complaint because it would be impossible to gather enough evidence to reach a determination.**
- Continue with the complaint because Devon is currently a student.**
- Dismiss the complaint because Devon was not a student at the time the conduct occurred**



POLLING

What if the teacher wants to bring a priest to investigation meetings about Devon's complaint?

- The teacher can bring any advisor to any investigatory meeting.**
- The teacher can bring an advisor, but it must be a union rep or a lawyer.**



POLLING

Teacher brings an attorney to the investigative interview, and the attorney jumps in every time a question is asked. Can you kick out the advisor and continues the meeting?

- No, parties in Title IX matters have the right to an advisor at every meeting.**
- No, you should remind the advisor of the rules of decorum in place and warn that the advisor will be removed if the rules are not followed.**
- Yes, because you are allowed to have rules of decorum and if an advisor will not follow them there is no requirement to delay the investigation.**



Notices – Advisor Conduct

Notice to Advisors



Advisor
Conduct
Expectations



POLLING

You're investigating Devon's complaint, when Devon ghosts you completely. Do you have to continue the complaint?

Yes

No



Dismissals



Mandatory if conduct alleged:

- Not sexual harassment, even if true
- Did not occur in the school's program or activity
- Did not occur in the United states

**can still address under non-Title IX policy

Permissive if:

- Complainant requests to withdraw in writing
- Respondent's enrollment or employment ends
- Specific circumstances prevent school from gathering evidence sufficient to reach a determination (e.g., passage of time, lack of cooperation by complainant)



Notices - Dismissal

Notice of Dismissal

Notice of Mandatory
Dismissal of
Allegations of Title IX
Sexual Harassment

Notice of Permissive
Dismissal of
Allegations of Title IX
Sexual Harassment



So the investigation is done....

- Must share evidence with both parties and advisors simultaneously with 10 days to respond before writing the report
 - Review/consider responses
 - Share responses with the other side



Notices – Review of Evidence

Sharing of Evidence

Notice of
Directly Related
Evidence

Notice of Other
Party's Written
Response to
Evidence



Investigative Report

- Must fairly summarize relevant evidence
- Must be provided to both parties and their advisors simultaneously at least 10 days prior to a hearing (if applicable) or other time of determination
- Transmit report and any party written response(s) to the Decisionmaker



Notices – Investigative Report

Investigative Report

Title IX Investigative Report

Notice of Investigative Report

Notice of Other Party's Written Response

Transmittal Cover Letter to Decisionmaker at Conclusion of Investigation



Decision

- Decisionmaker (“written cross”)
- Written determination



Appeal Notice

- Upon receipt of an appeal, the Title IX Coordinator must notify the other party/parties of the appeal
- Both parties must be given an opportunity to submit a written statement for or against the appeal



Back to Robin

Let's assume Cameron doesn't want to file a complaint....



POLLING

Can Robin file a complaint?

- Yes, because Robin's education could have been impacted by the climate of sexual violence on Robin's sports team.**
- No, because Robin would have to have Cameron's permission to file a complaint on Cameron's behalf.**
- No, because there is no allegation of Title IX Sexual Harassment perpetrated against Robin.**



Bias, Conflicts of Interest, and Other Fairness Concerns



Bias, Conflict, Prejudgement

The Title IX Coordinator must not have a conflict of interest or bias for or against Complainants or Respondents generally or for or against any individual Complainant or Respondent. And that they not prejudge any matter before them.



Bias

- Must not rely on sex stereotypes such as:
 - Women are “asking for it” based on actions or clothing
 - Men cannot be sexually assaulted
 - Women only decide they were assaulted after the fact due to regret or embarrassment
 - Men are more likely to be sexual aggressors
- Consider intersection of sex stereotypes with race, ability, sexuality, and gender identity



Conflict of Interest

- Flexibility to choose employees or outsource adjudication functions
- No *per se* prohibited conflicts of interest when using school employees or individuals with histories of working in field of sexual violence as decisionmaker
- Caution against using generalizations to identify conflict of interest



Pre-Judgment

Tips for avoiding pre-judgment of facts:

- Each case is fact-specific
- Keep an open mind
- Listen to facts presented



Recordkeeping/File Maintenance



Recordkeeping Essentials

- Overview of Required Recordkeeping
- File Checklist



Questions?





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Charter School
eMatters
Governance & Leadership
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