

MIIA VIRTUAL TRAINING

OVERVIEW OF TITLE IX: HANDLING SEXUAL HARASSMENT COMPLAINTS IN SCHOOLS UNDER THE 2020 REGULATIONS

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Judy A. Levenson, Esq.

LAW OFFICE OF JUDY LEVENSON

Judy@judylevensonlaw.com, 857.225.6585

www.judylevensonlaw.com

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Goals and Objectives



OVERVIEW OF 2020 TITLE
IX REGULATORY CHANGES



ISSUE SPOTTING



RESOURCES

Title IX Law

Title IX of Education Amendments Act of 1972 -
federal gender equity law:

“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 educational program or activity receiving federal financial assistance.”

20 U.S.C. § 1681 and 34 C.F.R. Part 106 (1972)

2020 T.IX Regulations

- Effective August 14, 2020
 - 25 pages of regulations
 - 2057 pages of commentary (preamble)
- First new Title IX regulations since 1975
- Prescriptive, legalistic and due process-oriented

School's Basic Title IX Obligations

- ***Investigate*** complaints promptly
- ***Stop*** sexual harassment
- ***Prevent*** recurrence
- ***Remedy*** effects upon person harassed and school community

Scope of 2020 Regulations

- Focus exclusively on Sexual Harassment (SH), new umbrella term that includes:
 - Sexual Harassment
 - Sexual Assault
 - Domestic Violence
 - Dating Violence
 - Stalking
- Applicable to all types of Sexual Harassment in schools
 - Employee-on-student (OCR initiative to combat sexual assault in K-12 schools)
 - Student-on-student
 - Employee-on-employee (overlap with Title VII prohibiting discrimination in employment including based on sex)
 - Student-on-employee
- Title IX covers more than Sexual Harassment (one form of Sex Discrimination)
 - Academic program equity, athletics equity, LGBTQIA+ protections, pregnancy protections

Enforcement of Law and Regulations

- Administrative - U.S. Dept. of Education, Office for Civil Rights (OCR)
 - Civil rights offices of other federal agencies
- Judicial – by courts
 - Noncompliance - lawsuits:
 - Section 1983 actions (against individuals) , Title IX claims (deliberate indifference or disparate treatment), breach of contract, negligence
 - Money damages, interest and attorneys' fees
- Compliance - time-consuming and costly but less so than litigation or OCR compliance action

Key 2020 Regulatory Changes

- New Definitions, especially Sexual Harassment (SH)
- What constitutes Notice to School/Notice to Parties of SH claim
- New Grievance Process & Procedures (Complaint Resolution Process & Procedures)
 - Formal Investigations required for Formal Complaints
 - Investigator and final Decision-Maker must be different individuals
- Mandatory Dismissals of Certain Complaints
- Must incorporate changes into SH Policy & Procedures
 - Best Practice: Adopt *Interim* SH Policy & Procedures to implement for renewable six-month intervals

New Terminology/Definitions (§ 106.30)

OCR Terms/Definitions:

- **Recipient:** a School education program that receives federal funding
- **Formal Complaint:**
 1. Document filed and signed by (a) **Complainant** (person alleging SH) (or student's parent/guardian), *or*
(b) signed by Title IX Coordinator;
 2. Alleging sexual harassment against a **Respondent** (person alleged to have committed SH); *and*
 3. Requesting school investigate allegation(s)
- **Retaliation (Prohibited):**

Includes threats, intimidation or coercion directed against an individual for the purpose of interfering with any right under Title IX or because the individual makes a report or complaint or participates in an investigation or hearing; filing a complaint under another district policy *for the purpose of interfering* with a Title IX right may be considered retaliatory.

Definitions (cont.) - Sexual Harassment

- **Sexual Harassment:** conduct on the basis of sex satisfying one or more of the following conditions:
 1. (a) A School employee conditioning the provision of an aid, benefit, or service of the School on an individual's participation in unwelcome sexual conduct (Quid Pro Quo);

(b) 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* (Hostile Environment);
or
 2. "Sexual Assault" as defined in the Clery Act (20 U.S.C. 1092(f)(6)(A)(v)),
 3. "Dating Violence" as defined in the Violence Against Women Act (VAWA) (34 U.S.C. 12291(a)(10)),
 4. "Domestic Violence" as defined in VAWA (34 U.S.C. 12291(a)(8)),
 5. "Stalking" as defined in VAWA (34 U.S.C. 12291(a)(30))

Potential Overlap – School and Police Investigations

Concurrent law enforcement investigation does NOT relieve school of independent T.IX responsibility to investigate and adjudicate Formal Complaint promptly and fairly.

Distinct purposes

- Criminal investigation – to prosecute violations of state and/or federal criminal law
- School investigation – to provide education program and activities free from sex discrimination

Different burdens of proof

- Criminal – beyond a reasonable doubt
- School T.IX – lower standard (preponderance of evidence or clear and convincing)

Potential Overlap of Investigations (Cont.)

- School grievance process must be completed in “reasonably prompt” time frame.
 - Concurrent law enforcement investigation may constitute “good cause” for *temporary* and *brief* delay of school process until law enforcement fact-finding completed.
- Recommend Memorandum of Understanding (MOU) – school and law enforcement

2022 Model School Resource Officer MOU between Public Schools and Law Enforcement, <https://www.mass.gov/doc/2022-school-resource-officer-memorandum-of-understanding/download>

- Customize Model SRO Agreement or develop new agreement between schools and law enforcement regarding Title IX

Scope/School Jurisdiction

- Schools must respond to Formal Complaints/Reports of S.H. occurring in “**education programs and activities**” in the **United States**, including:
 - Buildings or other locations that are part of school’s operations, *including remote learning platforms*.
 - Preamble to Regulations – definition of “education program or activity” does not distinguish between in-person versus online S.H.
 - . Off-campus settings only *if* school exercised:
 - . “Substantial control” over Respondent ; *and*
 - . “Context” in which alleged S.H. occurred (e.g., school field trip to museum).

- Assessing “Substantial Control” and “Context” requires School to make a fact-specific determination.
 - Factors applied by federal courts – school funding, promotion or support of event or circumstances in which S.H. occurs
- S.H. occurring in setting outside U.S. **not** covered under 2020 amendments.
 - School may still offer supportive measures to Complainant
 - School should consider whether conduct violates other school policy, such as Code of Conduct

Title IX Team – New Roles

Title IX Team Approach – New Roles

- Separation of functions

Title IX Coordinator - oversees implementation of SH Policy and other T.IX compliance issues

- At least one Coordinator (more allowed) – must be at District Level, preferably reports to Superintendent
 - Coordinator for school employee conduct may be Human Resources Director
 - Deputy Coordinator(s) permitted – can be at building/school level (i.e., Principals or Assistant Principals, Human Resource Officer, Athletics Director)
 - Cannot serve as Decision-Maker or Appeals Officer, may serve as Investigator if necessary
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- Investigator(s)
 - Investigator may *not* serve as final Decision-Maker
 - May be Assistant Principal (or Principal)
 - Cannot serve in another Title IX role (unless Coordinator)
 - Identifies and interviews parties and witnesses
 - Collects documentary evidence
 - Writes Investigative Report fairly summarizing all relevant evidence

Title IX Team – New Roles (Cont.)

- Decision-Maker(s) (at least one)
 - Cannot be Title IX Coordinator or Investigator, could be building Principal
 - Reviews Investigator's written report
 - Oversees written questions between parties and must exclude irrelevant ones and state reasons in writing
 - Must make written determination/decision of responsibility or non-responsibility under District SH Policy, including rationale for each determination
- Appeal Officer(s) (at least one)
 - Cannot be Title IX Coordinator, Investigator or Decision-Maker; may be Superintendent or Asst. Supt.
 - Must determine if appeal can move forward based on specific, limited criteria
 - Completes written determination of outcome of appeal and rationale after reviewing Investigation Report, other evidence gathered and statement by parties.
- Informal Resolution Facilitator(s)
 - Cannot be Investigator or Decision-Maker, could be Title IX Coordinator if not the Investigator
 - Facilitates **voluntary** process for informal resolution (not permitted for staff-on-student alleged sexual harassment)

Notice to School of SH (Actual Knowledge)

- **Any person** may make **report** to Title IX Coordinator (not just alleged victim)
 - May be oral or written
- **Actual Knowledge/Notice** (applies only to K-12 schools)
When **any District employee**:
 - Observes, receives notice or has knowledge of actual or alleged
 - Sexual Harassment and/or Retaliation
 - School is deemed to have **actual knowledge**, which triggers School obligations under Regulations
- District must train *all employees* to *immediately* report actual or alleged Sexual Harassment or Retaliation to Title IX Coordinator
 - Includes teachers, staff, administrators, social worker or adjustment counselor, bus drivers, cafeteria workers, etc.
- Contrast: Colleges/Universities – *actual knowledge* only when *Title IX Coordinator* or *official with authority to implement corrective measures* has notice of sexual harassment

School's Mandatory Response Obligations Upon Notice/Actual Knowledge

Upon notice (whether Formal Complaint or Informal Report), School must:

- Respond ***promptly*** in manner that is ***not deliberately indifferent***
 - . Not clearly unreasonable given known circumstances
 - (1) Offer *Supportive Measures* to Complainant (formerly Interim Measures)
 - Non-disciplinary, non-punitive, individualized services
 - Examples: counseling, deadline extensions, schedule adjustments, security measures
 - Discretion to offer Supportive Measures to Respondent
 - Keep confidential to extent possible
 - (2) Explain to Complainant *process for filing a Formal Complaint*
 - (3) Follow *Grievance Process* before imposing disciplinary sanctions on Respondent
- Title IX Emergency Removal permitted following “individualized safety and risk analysis” and determination of “immediate threat to *physical* health or safety” and if no alternative

Mandated School Response to Formal Complaints

Adopt and follow detailed *Grievance Process & Procedures* (§106.45) that include:

- Range of supportive measures
- Possible remedies (for Complainant) and disciplinary sanctions (for Respondent)
- Evidentiary standard to determine responsibility under SH Policy
 - ***Preponderance of the evidence*** (more likely than not; “50% plus a feather”) or ***Clear and convincing evidence*** (substantially more likely to be true than untrue)
 - Must apply same standard to all formal complaints of SH against students and employees, including faculty
 - Check collective bargaining agreement for standard applicable to employees and if conflicts with Title IX, consult with school and labor counsel
 - Preponderance of the evidence standard used in prior school practice and civil rights cases
- Description of Appeal Process and limited criteria: (1) procedural irregularity, (2) newly discovered evidence, and/or (3) T.IX Team Member’s conflict of interest or bias

. Robust Training Requirements for Title IX Team Members:

- Definitions including:
 - Sexual Harassment and School's "education program and activities"
- Detailed Grievance Process for handling complaints including:
 - How to conduct investigations, decision-making, appeals and informal resolutions
- How to serve impartially and avoid conflicts of interest
- Must make training materials available publicly
- *Best Practice*: Train at least annually

Formal Complaints: Grievance Process & Procedure Requirements (Cont.)

- “Reasonably prompt” time frames to complete Grievance Process, including appeals
 - General recommendation is 30 to 60 days [business/school/calendar] after Title IX Coordinator’s receipt of Formal Complaint of SH.
- *Statement about treating Complainants and Respondents equitably.*
- *Presumption Respondent not responsible for alleged conduct until conclusion of Grievance Process.*
- Assurance that Title IX personnel are free from *conflicts of interest* or *bias* for or against Complainants or Respondents.

Formal Complaints: Notice to Parties

Upon receipt of *Formal Complaint*, School must provide written notice to parties that includes:

- Grievance Process & Procedures
- Allegations with sufficient details:
 - Identity of parties, implicated policies, date and location of alleged conduct if known
- Statement: Respondent presumed not responsible until completion of Grievance Process
- Parties may ask to inspect and review relevant evidence

Mandatory Dismissals

Mandatory Dismissals of allegations for Title IX purposes that:

- Do not meet definition of SH even if proved
- Did not occur in School's "**education program or activity**," meaning:
 - Locations, events or circumstances,
 - Over which District exercised "substantial control" of Respondent and "context" of SH.
- Did not occur against person in U.S.
 - School abroad trips do not fall under Title IX
- Were filed by Complainant when not participating in School's education program or activity
- Action under other policies/laws not precluded:

Student Conduct Code, non-discrimination policy, anti-bullying policy, MA state law (G.L. c. 151B (employment), G.L. c. 151C (education)) and federal Title VII (employees).

Informal Resolutions

- School has discretion to offer informal resolution options for *Formal Complaints* only, not informal Reports ; Informal Resolution Facilitator oversees process

Examples: restorative justice, mediation, supportive measures

Exception: Employee-on-student sexual harassment *may not* be resolved informally

- Both parties must give voluntary, written consent
- Allowed any time prior to completion of Grievance Process and issuance of final determination

Investigations of Formal Complaints

School *must*:

- Assign ***Investigator*** to investigate each *Formal Complaint*
- Allow parties to select ***Advisor*** of party's choice at party's expense – may, but need not be, attorney
- Bear burden of proof and burden of gathering evidence; neither party bears this burden
- Send parties/advisors copies of evidence at *least 10 days* before completion of Investigation Report
- Allow written responses to draft Investigation Report before it's finalized
- ***Investigator*** must Issue final written Investigation Report that:
 - “Fairly synthesizes all relevant evidence” and forward copies of underlying evidence
 - Is shared with parties, advisors and Decision-Maker *at least 10 days* before parties meet with Decision-Maker (after Investigation Report is issued, responsibility shifts to Decision-Maker)

Referral to Decision-Maker

Decision-Maker(s):

- May be single individual or panel of individuals, with chair
- Must have had no prior involvement with investigation
- Best Practice Recommendation: three-member panel with Chair (esp. for complex cases)
- Must allow parties at least 10 days after receipt of Investigation Report to:
 - Submit written, *relevant* questions to Decision-Maker to ask of any party or witness;
 - Allow answering party to provide written answers to other parties;
 - Allow parties to submit limited follow-up questions.
- *Must determine and exclude* irrelevant questions
 - Must explain decision(s) to exclude irrelevant questions

Decision-Maker: Required Written Determination

Decision-Maker(s) must review Investigation Report, evidence and responses to written questions and issue Written Determination/Decision that includes:

- Findings of Fact;
- Conclusions re: whether alleged conduct occurred;
- Rationale for conclusion re: each allegation;
- Whether disciplinary sanctions imposed for Respondent if found responsible;
- Whether remedies devised for Complainant if Respondent responsible;
- How to appeal;
- Documentation that School's response was "not deliberately indifferent":
 - Satisfy mandatory steps upon *Informal Notice of Sexual Harassment* (§106.44)
 - Satisfy mandatory steps upon *Formal Complaint* (§106.45)
- **Contrast: Colleges/Universities:** live hearings and cross-examination *required*
 - *K-12 Schools* : live hearings and cross-examination *optional*; not generally recommended
 - Consult with School counsel if hearing necessary under state/federal law for suspensions/expulsions exceeding 10 days.

Scenarios

Scenario 1

- When Sofia left school for the day, she noticed that the word “cunt” was keyed into the rear bumper of her car, which was parked in the high school parking lot. She is convinced that Bruce did this to get back at her because she had recently broken up with him. Sofia reported the incident to the school. (Assume both named individuals are students).
 - a. Could this be sexual harassment? Anything else? Please explain.
 - b. What, if anything, should the school do?

Scenario 2

- Over the next few months, Sofia experienced several other incidents including an on-line anonymous posting giving her the finger; an anonymous voicemail saying, “You’re a bitch”; and a school bathroom stall with markings that read, “Sofia’s a slut” and “Kill Sofia”. Sofia again reported the incidents to the school.
 - a. Could these incidents, combined with the circumstances described in Scenario 1, be sexual harassment? Anything else? Please explain.
 - b. What, if anything, should the school do?

Title IX Staffing/Implementation Options

- Grievance Process Pool (within School District)
Train multiple individuals within district to serve in one or more T.IX Team roles (at different times and regarding different cases)
- Grievance Process Pool (external to School District)
Form regional coalitions/consortia or mutual aid agreements with other districts

Multiple districts pool resources to collectively train group of individuals across districts to serve different T.IX roles in districts within region or consortium
- Outsourcing
Hire external Investigator, Decision-Maker, Appeal Decision-Maker and/or Informal Resolution Facilitator until district can develop internal capacity

Record-Keeping and Documentation

- Certain records must be retained for at least 7 years:
 - Investigations, Appeals, Informal Resolutions, Supportive Measures, Training Materials
- School must document:
 - Rationale for conclusion as to each determination of responsibility/no responsibility (Decision-Maker)
 - Measures to preserve/restore students' access to education programs/activities (Supportive Measures)
 - Long-term remedies if Respondent found responsible intended to:
 - Stop Sexual Harassment and/or Retaliation
 - Remedy effects
 - Prevent recurrences

Prevention Efforts

- OCR encourages schools to undertake SH prevention efforts for students and employees.
- Boston Public Schools, Office of Equity *Free*, “24/7 Respect Program”
 - Teaching students to address and report sexual and bias-based misconduct
 - 13-min. video with discussion questions and implementation guide, <https://www.youtube.com/watch?v=Z2jqbozts1>
- SafeBAE (<https://safebae.org>) – national, student-led non-profit organization working to end sexual harassment and assault in middle and high schools:
 - Consent & healthy relationships curriculum; Student leadership opportunities (Certification of Peer Educators); Accountability training for perpetrators; Faculty & staff response training; Summer Activist Institute for students (4-day)

- Office of Student Protections and Title IX, Chicago Public Schools (www.cps.edu/OSP)
 - Centralized Office responsible for responding to reports of possible Title IX violations or allegations of sexual misconduct.
 - Prevention Programming:
 - Civil Rights Summer Fellowship (25 High School fellows).
 - Group of 20 administrators on Civil Rights tour of south.
 - Develop a Bias-based Harm Action Plan for CPS schools.

Title IX Updates - Biden Administration

- **Executive Order (EO) 14021 (March 11, 2021):**
- *Policy:* Guaranteeing all students an educational environment free from discrimination based on sex, including *sexual orientation* or *gender identity*
- Directs comprehensive review of 2020 regulations, policies and documents that may be inconsistent with Policy
 - Directs revisions to 2020 regulations if necessary to enforce Policy

How Long Will 2020 Regulations Remain Effective?

- Following lengthy review and public hearings, *proposed* new, amended Title IX regulations published on July 12, 2022
 - Public Comments due on September 12, 2022
 - ED/OCR must review comments and make revisions (almost 240,000 comments received)
 - ED/OCR Original Goal: publish amended regulations by May 2023
Revised Goal: publish regulations in October 2023
 - Current status: proposed regulations have not been published, have not been sent to federal Office of Management & Budget for required review before publication (usually takes at least 2-3 months); ED/OCR has not announced future plans.
- **IMPORTANT:** 2020 Regulations govern until new amended regulations adopted and effective

OCR Questions and Answers on Title IX Regulations (July 2021)

- Q & A Guidance - how OCR interprets schools' legal obligations under 2020 amendments (see Resources page at end for link).
- 67 Questions and Answers – more user-friendly than regulations
- Appendix with excerpts of actual school policies and procedures
 - . Look for ones applicable to K-12 schools
- Not legally binding; guidance only

Preview: Anticipated 2023 Amendments to T.IX Regulations

Goals of Proposed Amendments

Streamline Grievance Process & Procedures

More flexibility to schools, esp. K-12

Less administrative burden

Quicker resolutions

Provide Clarifications

Potentially Increased Reporting of T.IX Complaints

Expanded jurisdiction

Preview of Anticipated 2023 Regulations (Cont.)

- **Scope**

- Discrimination on basis of sex includes:

- Sex stereotypes, sex characteristics, pregnancy and/or related conditions, sexual orientation and gender identity.

- Sex discrimination includes sex-based harassment and replaces sexual harassment.

- Hostile Environment Harassment

- Expanded definition and standard

Preview of Anticipated 2023 Regulations (Cont.)

Scope (Cont.)

- U.S. DOE published a ***separate*** proposed rule re: *athletic eligibility based on gender* in early April 2023
 - The Unofficial Version of the Proposed Rule is included in a link at the end of the below Fact Sheet link, on pp. 25-27.
 - <https://www2.ed.gov/about/offices/list/ocr/docs/t9-ath-nprm-factsheet.pdf>
- **Applicability**
 - “Education program or activity” to include certain out-of-school conduct

Preview of Anticipated 2023 Regulations (Cont.)

Intake & Evaluation

- “Complaint” replaces “Formal Complaint”
- Initial Evaluation
 - Latitude for school to gather information before formal grievance process begins
- Dismissals – all will be discretionary vs. mandatory dismissals now
- Informal Resolution – permitted *without* a formal complaint

Preview of Anticipated 2023 Regulations (Cont.)

- **Grievance Process & Procedures**

- Streamlined investigation and decision-making

- No requirement for separate decision-maker and investigator

- Note:** Still recommended by certain T.IX experts (e.g., ATIXA) to minimize claims of bias and/or conflicts of interest.

- Courts may disagree with Regulations.

- Evidence – streamlined/more flexible requirements

- Appeals not required

- Note:** Still recommended by certain T.IX experts (e.g., ATIXA)

Preview of Anticipated 2023 Regulations (Cont.)

- **Pregnancy & Related Conditions for Students and Employees**
(§ 106.40; NPRM* pp. 669-72; 106.57; NPRM pp. 698-99)

Pregnancy Discrimination Prohibited

Reasonable Modifications

Pregnancy Leave

Lactation Space

*This is the abbreviation for Notice of Proposed Rulemaking, which contains the same language as the Unofficial Version of the Proposed Amendments (“Unofficial Version”), listed under Resources at the end of this PowerPoint. The page numbers listed after the NPRM correspond to the page numbers of the Unofficial Version.

Takeaways

- Comply with 2020 Regulations until Amended Regulations are Published and Become Effective.

October 2023 publication of amended regulations did not occur.

- Remember School's Basic Title IX Obligations.

Investigate complaints; ***Stop*** sexual harassment; ***Prevent*** recurrence; ***Remedy*** effects upon person harassed and community.

- Use Codes of Conduct and other school policies to address misconduct outside Title IX.
 - Law and regulations provide a floor, not a ceiling
- Watch for Notices about Amended Regulations.

Takeaways (Cont.)

- Begin Planning for Amendments

- Reassess T.IX Team staffing and budgeting

- Identify areas of Policies & Procedures to Update

- Provide Training Updates

- Pregnancy Protections – identify lactation spaces

- LGBTQIA+ Protections

Resources

2020 Regulations:

34 C.F.R. Part 106 –Title IX Regulations, including 2020 amendments (U.S. Dept of Ed.)

Complete 2020 Final Rule (2082 pages including commentary and regulations, official version)

<https://www.federalregister.gov/documents/2020/05/19/2020-10512/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>

Notice of Interpretation: Enforcement of Title IX re: Discrimination Based on Sexual Orientation and Gender Identity (June 2021)

<https://www2.ed.gov/about/offices/list/ocr/docs/202106-titleix-noi.pdf>

Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021) (OCR)

<https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>

Resources (Cont.)

Free Prevention Resource:

“24/7 Respect” Program, Boston Public Schools, Office of Equity

<https://www.youtube.com/watch?v=Z2jqbozts1E>

2022 Proposed Amendments to Regulations:

FACT SHEET: U.S. Dept. of Ed. 2022 Proposed Amendments to its Title IX Regulations,

<https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm-factsheet.pdf>

The end of this *Fact Sheet* provides links to:

- (1) A Summary of Major Provisions of the Proposed Amendments
- (2) The Unofficial Version of the Proposed Amendments (aka NPRM).

(The proposed Amendments are included in their entirety on pp. 650-700 of this Version. Pages 1–649 contain the Dept. of Ed.’s preamble/commentary.)

Scan QR code with your camera to open evaluation

