

So You've Got A Complaint


Craig Wood and Katie Payne



WALSH GALLEGOS
TREVINO RUSSO & KYLE P.C.



Background

- ❑ The first presentation from our four-part On Demand Webinar Series: Title IX was "Ten Things to Know About the New Title IX Regs" and included an overview of:
 - ❑ Definitions and Terminology
 - ❑ The Duty to Respond
 - ❑ Formal Complaint
 - ❑ Training
 - ❑ Record Keeping
- ❑ New regulations go into effect on August 14, 2020.




Overview

- ❑ In this session we will outline the legal requirements for a school district's response to a sexual harassment complaint with an emphasis on practical application and plenty of time for Q and A.





Definitions and Terminology: 34 CFR 106.30(a)

- ❑ **Sexual Harassment** = quid pro quo, hostile environment, sexual assault, dating violence, domestic violence, stalking
- ❑ **Complainant** = alleged victim of sexual harassment
- ❑ **Respondent** = person accused of sexual harassment
- ❑ **Formal Complaint vs. "Report"** = report is verbal or in writing while a formal complaint must be initiated by complainant or T9C
- ❑ **Actual Knowledge** = when *any* employee finds out
- ❑ **Education program or activity** = any location/event/situation in which the school has substantial control over both the alleged harasser and the context in which the harassment occurred
- ❑ **Supportive Measures** = non-disciplinary, non-punitive measures to support the complainant or Respondent after a report is made.




Practical Question #1: is alleged sexual harassment that has occurred only via text message within an education program or activity?



Role of Title IX Coordinator (T9C) Overview

- ❑ Every district must have at least one, and that person must be designated as and identified as the Title IX Coordinator (T9C).
- ❑ Must have authority to coordinate the school district's compliance efforts.
- ❑ May investigate complaints, but may not be the "decision maker."
- ❑ Must be referred to as the "Title IX Coordinator" in district policies and publications, including website.
- ❑ A district must notify **all potential reporters** of sexual misconduct of the T9C's contact information: name/title, office and email addresses, and telephone number.




Practical Question #2: what constitutes a report of sexual harassment?




Reporting Allegations of Sexual Harassment: 34 CFR 106.8(a)

- Any person can report.
- A report can take any form: in person, mail, phone, email, etc.
- A report can occur at any time, does not have to be during business hours.
- No "magic words" required.
- Although timely reporting is encouraged, a report can be made as long as the complainant or the respondent is enrolled in the district or trying to access the education program.
- Who can receive a report? Next slide.




The Duty to Respond: 34 CFR 106.44

- If the district has "actual knowledge" of "sexual harassment" it "must respond promptly **in a manner that is not deliberately indifferent**"
- Actual knowledge=notice of sexual harassment or allegations of sexual harassment to *any employee*.
- The district's response must not be "clearly unreasonable in light of the known circumstances."
- All employees need to know the designated person to whom they should turn over sexual harassment allegations.
- Child abuse reporting requirement found in state law still applies.




The Duty to Respond: 34 CFR 106.44

- ❑ T9C must promptly contact a complainant to discuss:
 - ❑ The Report
 - ❑ Supportive Measures
 - ❑ Process to file Formal Complaint
- ❑ T9C should determine if the allegations, assuming they are true, meet the definition of sexual harassment.





Practical Question #3: Are you even dealing with a sexual harassment complaint?




2. First Decision: Is It Sexual Harassment?

- ❑ An institution must dismiss a Formal Complaint if it finds that the conduct alleged in the complaint does not constitute sexual harassment under Title IX.
- ❑ Does not preclude action under another provision of the institution's code of conduct.


The Duty to Respond: 34 CFR 106.44

- ❑ If the allegations do not meet the definition of sexual harassment, the T9C must dismiss the complaint.
 - ❑ Dismissal triggers notice to Respondent and Complainant of dismissal and appeal option.
 - ❑ Dismissal notice must state the rationale, why dismissal is not deliberately indifferent, and must be maintained for 7 years.
 - ❑ Even after dismissal, Complainant may still file a Formal Complaint.




Supportive Measures

- ❑ Non-disciplinary, non-punitive, individualized measures to support the Complainant or Respondent after a Report of harassment is made. These measures must:
 - ❑ Be offered at no charge,
 - ❑ Be designed to maintain equal access to educational services, and
 - ❑ Not unreasonably burden either party.
- ❑ The Respondent might be "burdened" but not "unreasonably burdened."
- ❑ School is authorized to offer supportive measures whether or not a formal complaint is filed.



A Note: Emergency Removal

- ❑ School may remove a Respondent from program/activity on an emergency basis, provided that school:
 - ❑ Undertakes an individualized safety and risk analysis;
 - ❑ Determines that an immediate threat to the *physical* health or safety of any student or other individual arising from the allegations of sexual harassment justifies emergency removal; and
 - ❑ Provides the respondent with notice and an opportunity to challenge the decision immediately following removal.
- ❑ Emergency removal of a student with a disability must be coordinated with special education staff to ensure compliance with federal disability statutes.




Respecting the Complainant's Wishes

- While a complainant's wishes regarding filing a Formal Complaint should be considered, **the T9C may need to initiate a Formal Complaint without the complainant's permission to make sure that the district is not responding to sexual harassment with deliberate indifference.**





Formal Complaint Process




Receiving the Formal Complaint

- A "report" is distinguished from a "formal complaint."
- A "formal complaint" is a document or electronic submission filed by a complainant that alleges sexual harassment and requests the recipient school investigate the allegation.
- The T9C may also sign a complaint, which does not make the T9C a party in the grievance process.
- A third party reporter may not file a formal complaint.




Responding: Benchmarks for Response to Formal Complaint of Sexual Harassment

1. Equal Access/Treatment
2. Objective Evaluation
3. Bias Free Training
4. Presumption of Innocence
5. Reasonable Time Frames
6. Description of Possible Outcomes
7. Standard of Evidence
8. Appeal
9. Supportive Measures
10. Protection of Privilege




1. Provide Notice

- Upon receiving a formal complaint, an institution must provide written notice to the known parties, including:
 - Description of the process, including informal resolution process
 - Allegations involved
 - Statement of presumed innocence of the respondent
 - The parties' right to an advisor of their choice (who may be an attorney)
 - Parties' right to inspect evidence relevant to the allegations
 - Notice any provision in the code of conduct that prohibits knowingly making false statements or providing false information.



3. Investigate Formal Complaint

- Investigations of Title IX grievances come with additional requirements. Investigations must:
 - Place the burden of proof and responsibility to gather evidence on the **institution**, not on the parties; and
 - Present an equal opportunity for parties to present witnesses and other evidence.
 - Note: the investigation must provide opportunities for the parties to present evidence, but the burden of proof remains on the institution to gather and present evidence



3. Investigate Formal Complaint (cont.)

- ❑ Permit parties to discuss allegations under investigation and gather relevant evidence.
- ❑ Provide parties with equal opportunity to have others present during any grievance proceeding.
- ❑ Provide advance written notice of all hearings, interviews, or other meetings to any involved party, with sufficient time for the party to prepare.



3. Investigate Formal Complaint (cont.)

- ❑ Provide equal opportunity to both parties to inspect and review evidence obtained as part of the investigation (including evidence which the institution does not intend to rely on), and send to each party the evidence at least 10 days before completion of the investigative report.
- ❑ Create an investigative report summarizing relevant evidence.
- ❑ Must send a copy of the report to each side 10 days prior to the time of determination to permit them an opportunity to send a written response.




4. Live Hearings

- ❑ Postsecondary institutions are required to hold live hearings as a component of the grievance process, **but for K-12, live hearings are optional.**




4. Written Questions

- ❑ Whether or not a hearing takes place, district must:
 - ❑ provide each party the opportunity after the investigation report is completed to submit written questions to be asked of another party or witness;
 - ❑ Provide each party with the answers;
 - ❑ Provide for limited follow-up questions.




A Note: "Rape Shield" Provision

- ❑ Questions and evidence about a complainant's sexual predisposition or behavior are categorically not relevant to a Title IX Investigation, **unless**:
 - ❑ Evidence is offered to prove someone other than the respondent committed the alleged conduct
 - ❑ Evidence concerns the complainant's prior sexual history with the respondent and is offered to prove consent.



Practical Question #4: Which standard of evidence should your District use?



5. Determination of Responsibility

- ❑ The school's decision-maker in a Title IX proceeding cannot be the T9C or any investigator of the allegations.
- ❑ The decision-maker must issue a written determination of responsibility with:
 - ❑ Findings of fact;
 - ❑ Conclusions about whether the misconduct occurred;
 - ❑ Explanations of each conclusion; and
 - ❑ Any disciplinary sanctions or remedies being enacted
- ❑ Written copy of determination must be sent simultaneously with information on filing an appeal.



6. Appeal

- ❑ A school must offer both parties an opportunity to appeal a determination of responsibility based on:
 - ❑ Procedural irregularity that affected the outcome of the matter;
 - ❑ Newly discovered evidence that could affect the outcome of the matter; and/or
 - ❑ Title IX personnel had a conflict of interest or bias, that affected the outcome of the matter
- ❑ A school may offer an appeal on additional bases, as long as the appeal is offered equally to both parties.
- ❑ Requires new decision-maker.




Informal Resolution

- ❑ A school may choose to offer informal resolution options like mediation, as long as both parties give voluntary, informed, written consent to attempt informal resolution.
- ❑ Cannot require a party waive their right to investigation as a condition of enrollment or employment, and also may not require parties to participate in informal resolution.
- ❑ Schools cannot offer informal resolution until a formal complaint is filed and cannot ever offer informal resolution of allegations that an employee sexually harassed.
- ❑ Any party may withdraw from the informal resolution process and resume the grievance process at any point before an agreement is reached.




Retaliation

- ❑ Retaliation is prohibited against any individual for the purpose of interfering with Title IX rights or because an individual has made a complaint or been involved with a Title IX investigation.
- ❑ Cannot charge an individual with a code of conduct violation not involving sex discrimination or sexual harassment but arising out of the same events as a report of sexual harassment, for the purpose of interfering with Title IX rights.
- ❑ An individual's exercise of a First Amendment right will not constitute retaliation.
- ❑ Charging an individual with a code of conduct violation for making a materially false statement in bad faith during a Title IX grievance proceeding does not constitute retaliation.




Protection of Constitutional Rights

- ❑ No requirement under Title IX can require an institution to restrict any person's rights under the First Amendment, the Due Process Clauses of the Fifth and Fourteenth Amendments, or any other rights protected from federal abridgement.
- ❑ The U.S. Constitution
- ❑ Federal laws like FERPA or the Civil Rights Act of 1964




8. Record-Keeping


- ❑ Maintain all documents from the Formal Complaint for seven (7) years:
 - ❑ Dismissal;
 - ❑ Determination;
 - ❑ Any Disciplinary Sanctions issued;
 - ❑ Remedies provided to the Complainant;
 - ❑ Any appeal; and
 - ❑ Any Supportive Measures implemented or if none were provided, the reasons why.



Scenario 1: A paraprofessional tells a teacher that she was offered a promotion by the principal in return for a backrub during a school-sponsored team building retreat.




Scenario 2: A senior high school student confides in his good friend, "the lunch lady" as she's affectionately known, that his girlfriend, a fellow student at the same high school, punches him in the face at football games when he looks at the cheerleaders. This has happened at every football game this season. It's hard for him to watch the games after getting punched. And his vision is usually still a little blurry in classes the next week.



Questions?



Craig Wood and Katie Payne



© Walsh Gallegos 2020

The information in this presentation was prepared by Walsh Gallegos Treviño Russo & Kyle P.C. It is intended to be used for general information only and is not to be considered specific legal advice. If specific legal advice is sought, consult an attorney.

