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• This training is intended for educational purposes only and does not contain sample forms for use in Title IX investigation and/or decision-making process.
Overview of Training

• Overview of Title IX

• Title IX Investigation Process

• Important Considerations

• Case Study
Title IX 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 education program or activity receiving Federal financial assistance.
- Enforced through the Department of Education, Office for Civil Rights (OCR)
GUIDANCE ON TITLE IX

1998-1999
Supreme Court decisions on Title IX

2001
Regulations on Title IX

Title IX Coordinator

2015
Rescinded Guidance from OCR under Obama administration

2017
Q&A on Campus Sexual Misconduct

2020
Final Rules on Title IX (effective 8/14/20)

2021
Notice of Interpretation – sexual orientation/gender identity

Q & A
Educational institution must respond in a manner that isn’t deliberately indifferent when it has actual knowledge of sexual harassment occurring in the institution’s education program or activity against a person in the United States.

In K-12 institutions, **ALL EMPLOYEES** have obligation to report
Title IX – Parties and Administrators

**Parties**

- Complainant – alleged victim/survivor
- Respondent – responds to the allegation

**Administration of Claims**

- Title IX Coordinator
- **Title IX Investigator**
- Title IX Decision-maker
- Title IX Appeal Officer
- Title IX Advisor
- Title IX Informal Resolution Officer
Investigator Responsibility

• Serve objectively, impartially, without bias
  • Conflicts
  • Stereotypes
• Gather all information related to a claim
• Analyze
  • Relevancy
  • Authenticity
  • Credibility
• Connect to parties and witnesses
• Assist in maintaining legitimacy of the process
• Policy should define the INVESTIGATOR role
Impartiality

• Be neutral – neither pro-Complainant nor pro-Respondent

• Consider the evidence as presented

• Confront and understand bias and not allow it to impact decision

• Maintain open mind as to the potential conclusions
Conflicts of Interest

- Relationship to parties or witnesses
- Professional conflicts
- Personal conflicts
- Actual and perceived
Stereotypes

• “A fixed, over generalized belief about a particular group or class of people.” (Cardwell, 1996)

• Stereotypes around sexual assault

• Stereotypes around sexual harassment

• Complainant and Respondent
Bias

- Conscious/Explicit
  - Discriminatory intent
  - Stated preferences

- Unconscious/Implicit
  - For the most part, most people are unaware of these drivers
  - Developed over a period time and can influence many factors in hearing
  - Short cuts developed by the brain and often play a role in:
    - Immediate response to conflict
    - Often mimics fear responses
  - Poll
Displaying Bias
Types of Claims Under Title IX

• Athletics, access, parity
• Sex discrimination
• Sexual harassment
• Covers students and employees
Types of Sexual Harassment

Under new regulations
Definition of Sexual Harassment

Conduct on the basis of sex:

- **Quid pro quo** - An employee who conditions the receipt of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct.

- **Hostile environment** sexual harassment, defined as unwelcome conduct determined by a reasonable person to be so severe, pervasive and objectionably offensive that it effectively denies a person equal access to the school's education program or activity (emphasis added).
Definition of Sexual Harassment, continued

Sexual Assault
- Rape
- Fondling
- Incest
- Statutory Rape

Dating/Domestic Violence

Stalking
Question of Consent

• Age of consent in California

• Affirmative consent laws

• Important elements of consent
  • Freely given
  • Ongoing
  • Manifested
Jurisdiction Issues

• Occurring in the institution’s education program or activity includes locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs

• Against a person in the United States
Dismissal - Mandatory and Permissive

**Mandatory dismissal**
- Would not constitute sexual harassment as defined in regulations
- Did not occur in education program or activity
- Did not occur against a person in the U.S.

**Permissive dismissal**
- Complainant notifies Title IX Coordinator in writing that Complainant would like to withdraw formal complaint or allegations
- Respondent is no longer enrolled or employed by school district
- Specific circumstances prevent the school district from gathering evidence sufficient to reach a determination
2021 Questions and Answers – Loss of Equal Access

• Skipping class to avoid a harasser
• Declining GPA
• Having difficulty concentrating in class
• Crying at night due to sexual harassment
• Quitting a team due to harassment
• Does not require “entire denial of access”
• Poll 2
Overview of Grievance Process

OBLIGATION: Respond promptly in a manner that is not deliberately indifferent

Initial complaint
- Notice
- Formal complaint
- Supportive measures
- Notice of allegations
- Presumption of innocence

Investigation
- Interviews
- Document review
- Sharing information and reviewing feedback
- Investigative report

Decision-maker
- Evaluate the evidence
- Determine if follow-up questions required
- Issue decision on policy violation and discipline
When sexual harassment or allegations of sexual harassment come to the attention of any employee of a K-12 district, all employees must report.
Formal Complaint

• Schools are required to investigate formal complaints - filed by a complainant alleging sexual harassment against a respondent and requesting that the school investigate the allegation
  • a complainant must be participating in or attempting to participate in the education program or activity of the school to file formal complaint

• If the complainant does not file a formal complaint, the wishes of the complainant should be respected.
  • Unless the Title IX Coordinator decides to initiate the complaint and it is “is clearly not unreasonable in light of the known circumstances”
  • Title IX Coordinator may file and sign a formal complaint
  • Title IX Coordinator does NOT become complainant
Supportive Measures

• Mandatory obligations include offering “supportive measures” to complainant that must be non-punitive, non-disciplinary, and not unreasonably burdensome on the other party
  • GOAL - provide both parties with equal access to their education, protect safety, and deter sexual harassment.
• No action can be considered “disciplinary” against a respondent at this stage.
• Appropriate supportive measures counter allegations of deliberate indifference
• Supportive measures must be revisited frequently and properly documented
Student Removal

Safety Review
Notice of Allegations

• Notice of the allegations of sexual harassment including sufficient details known at the time including the identities of parties, the conduct alleged, and date and location of the incident
• Provided before Respondent’s interview
• Allow for sufficient time to prepare a response before any initial interview
• Includes policies alleged to have been violated and must be supplemented if additional allegations arise
• Notice of informal resolution process
• Must include:
  • Respondent is presumed not responsible for the allegation
  • Parties may have an advisor of their choice
Presumptions

- Not responsible until proven to be responsible
- Stereotypes and bias
Burden of Proof

- Preponderance of the evidence
- Clear and convincing
Conducting Investigations

Basics
Information Gathering

• Types of information

• Background

• Request information from parties

• Proactively seek information

• Requests and refusals

• Information sharing
Initial Review

- Formal complaint
- Notice to both parties
- Supportive measures
- Timelines
- Parties (and parents) understand the process
- Other complaints?
  - Criminal matters
  - Similar complaints – consolidation
- Concurrent or parallel investigations
- Record-keeping requirements
- **Documentation at every step!!**
Preliminary Information Gathering

- Documents shared with the parties
- Other records
What Is Next?

Organizing the Investigation
Conducting Interviews

• Introduction
• Questioning – time, space, and effect of silence
• Open-ended versus leading questions
• Direct versus indirect evidence
• Sensory recollection
• Note-taking versus audio/video-recording
• Advisors’ role
• Investigator should maintain the control the interview
  • Decorum
  • Responses
  • Concluding the interviews
  • “Anything else”
Gathering Documents and Other Evidence

• Emails, texts, photos

• Legal implications

• Support or contradict testimony

• Character evidence
Weighing and Challenging Evidence

• Authentication

• Relevance

• Credibility
Evidentiary Review

• RELEVANCE – Applying to the matter in question; affording something to the purpose (Black’s Law Dictionary)

• NOT permitted:
  • Sexual history of Complainant (see Rape Shield exception)
  • Privileged communications
  • Medical documentation

• Not repetitive
Rape Shield Protections

• Questions and evidence about a complainant’s prior sexual behavior are prohibited unless:
  • offered to prove that someone other than the respondent committed the alleged misconduct, or
  • offered to prove consent.
Factual Analysis of Consent

• Important elements of consent
  • Freely given
  • Ongoing
  • Manifested
Credibility

• Corroboration
• Feasibility
• Motivation for truthfulness/untruthfulness
• Consistent
• Reviewed/coached
Impact of Trauma

• Many Title IX causes of action involve trauma

• Investigators and decision-makers must understand the impact of trauma on:
  • Reaction to trauma
  • Ability to capture memories
  • Recollection of memories

• Expectations around trauma victim
Writing the Report
Investigation Report

- Convey relevant information about the allegations to the parties and their advisors

- The Department of Education takes no position on the elements required in the report beyond what is required by final regulations

- The investigative report must fairly summarize relevant evidence
Decision-maker must issue a written determination regarding responsibility that has to include

- Findings of fact
- Conclusions as to all allegations
- Rationale for reaching the decision
- Sanctions if the respondent is found responsible for policy violations must be included in the written determination.
Organizing the Report

- Covering required categories
- Providing the relevant information
- Including applicable policy provisions
- Staying within the parameters of the investigation report (as set forth in policy)

- 20-20 Hindsight
Title IX Report and Information Sharing

Before investigation report issued, all evidence shared

Opportunity to question and provide feedback

Investigation report issued and shared

Opportunity to question and provide feedback on investigation report

Final outcome letter issued by decision-maker(s)
Decision-Maker Role

• Review all materials in investigation report
  • Consider challenges/questions submitted by parties

• Question investigation and report

• Respond to questions on report itself from parties
  • Relevancy

• Conclude whether policy violation occurred and determine discipline, if necessary
Other Considerations

Appeal and Non-retaliation
Grounds for Appeal

- Procedural irregularity in the Title IX grievance process affected the outcome;

- Newly discovered evidence that was not reasonably available at the time of the determination of responsibility or dismissal that could affect the outcome; or

- Due to a bias or conflict of interest by the Title IX Coordinator, investigator, or decision-maker that affected the outcome.
Other Important Provisions

• Non-retaliation

• Record-keeping
Title IX hostile environment sexual harassment - unwelcome conduct determined by a reasonable person to be so severe, pervasive and objectionably offensive that it effectively denies a person equal access to the school's education program or activity (emphasis added).

CA Ed Code hostile environment sexual assault
Prohibited sexual harassment includes, but is not limited to, unwelcome sexual advances, unwanted requests for sexual favors, or other unwanted verbal, visual, or physical conduct of a sexual nature made against another person of the same or opposite sex in the educational setting, under any of the following conditions:
1. Submission to the conduct is explicitly or implicitly made a term or condition of a student's academic status or progress.
2. Submission to or rejection of the conduct by a student is used as the basis for academic decisions affecting the student.
3. The conduct has the purpose or effect of having a negative impact on the student's academic performance or of creating an intimidating, hostile, or offensive educational environment.
4. Submission to or rejection of the conduct by the student is used as the basis for any decision affecting the student regarding benefits and services, honors, programs, or activities available at or through any district program or activity.
Title IX Board Policies California

Employee policies
Sexual Harassment, BP 4119.11, 4219.11, 4319.11
Nondiscrimination, BP 4030

Student Policies
Sexual Harassment, BP 5145.7
Nondiscrimination, BP 5145.3
Title IX Administrative Regulation

Employees
   Sexual Harassment, AR 4119.11, 4219.11, 4319.11
   Nondiscrimination, AR 4030

Students
   Sexual Harassment, AR 5145.71
   Nondiscrimination, AR 5145.3

Uniform Complaint Process
   BP 1312.3
   AR 1312.3