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# **EVERYTHING A BOARD MEMBER *MIGHT* NEED TO KNOW ABOUT SCHOOLS' RESPONSES TO TITLE IX COMPLAINTS**

## **MSBA LEADERSHIP CONFERENCE January 12, 2023**

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*Title IX prohibits discrimination based on sex by entities that receive federal funding. Under the regulations to Title IX that took effect August 14, 2020, public schools are required to adopt a grievance procedure that satisfies various federal regulations. The purpose of this roundtable is to provide a brief overview of the process*

**I. DEFINITIONS**

**A. Sexual Harassment.** Sexual harassment is now defined, by regulation, as conduct on the basis of sex that also satisfies one or more of the following conditions:

1. A school employee conditioning the provision of an aid, benefit, or service of school on an individual’s participation in unwelcome sexual conduct;
2. 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; or
3. Sexual assault dating violence, domestic violence, or stalking, as those terms are defined by federal law.
  - a. “Sexual Assault” means any sexual act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent. *See* 20 U.S.C. 1092(f)(6)(A)(v). Sexual acts range from groping and fondling to forcible penetration.
  - b. “Dating Violence” means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. Whether such a relationship exists depends on the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. *See* 34 U.S.C. § 12291(a)(10).
  - c. “Domestic Violence” means felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim

who is protected from that person's acts under the domestic or family violence laws of the jurisdiction. *See* 34 U.S.C. § 12291(a)(8).

- d. "Stalking" means engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others; or suffer substantial emotional distress. *See* 34 U.S.C. § 12291(a)(30).

34 C.F.R. § 106.30(a). In June 2021, the U.S. Department of Education's Office for Civil Rights issued a Notice of Interpretation clarifying that it currently interprets "conduct on the basis of sex" to include conduct on the basis of sexual orientation or gender identity.

- B. Actual Knowledge.** Actual knowledge, which triggers a school or district's duty to respond in a manner that is not deliberately indifferent, means, in relevant part, "notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, *or to any employee of an elementary and secondary school.*" 34 C.F.R. § 106.30(a) (emphasis added). "This standard is not met when the only official of the recipient with actual knowledge is the respondent." *Id.*
- C. Complainant.** "Complainant means an individual who is alleged to be the victim of conduct that could constitute sexual harassment." 34 C.F.R. § 106.30(a).
- D. Respondent.** "Respondent means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment." 34 C.F.R. § 106.30(a).
- E. Party.** The term "party" refers to a complainant or a respondent. The term "parties" refers to both. Some reports of sexual harassment may involve multiple complainants or multiple respondents, or both. For purposes of clarity, these materials use the singular form. However, these regulations apply equally to both single- and multi-complainant or respondent complaints.
- F. Supportive Measures.** The terms "supportive measures" or "interim supportive measures" mean "non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed." 34 C.F.R. § 106.30(a). Supportive measures "are designed to restore or preserve equal access to the recipient's

education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment, or deter sexual harassment.” *Id.* Examples include “counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.” *Id.*

Supportive measures are coordinated by the Title IX Coordinator, and should be kept confidential, to the extent that maintaining confidentiality does not otherwise interfere with the provision of supportive measures.

- G. Education Program or Activity.** “Education program or activity” includes locations, events, or circumstances over which the school or district exercised substantial control over both the respondent and the context in which the sexual harassment occurs. 34 C.F.R. § 106.44(a).

## **II. GENERAL RESPONSIBILITIES**

- A. Designation of Title IX Coordinator.** Every school or school district must designate at least one Title IX Coordinator. 34 C.F.R. § 106.8(a). The Title IX Coordinator receives complaints of sexual harassment and sex discrimination, either by telephone, e-mail, mail to their office, or in person. *Id.* Accordingly, the identity of the Title IX Coordinator and that person’s contact information must be provided to (1) applicants for admission and employment, (2) students, (3) parents or legal guardians, (4) employees, and (5) all unions and professional organizations that have collective bargaining or professional agreements with the school or district. *Id.*

*Key Point:* The Title IX Coordinator must be a school employee, per the regulations. All other roles can be contracted out.

- B. Dissemination of Policy.** Schools and school districts must provide notice to the persons listed in Paragraph A above that the school or district does not discriminate on the basis of sex in its education program or activities, including in employment, that it is required by Title IX not to discriminate in such a manner, and that questions regarding Title IX may be referred to the Title IX Coordinator. 34 C.F.R. § 106.8(b)(1).

This notice must be listed on the school or school district’s website, and in each handbook or catalog that it makes available to students, parents, employees, applicants for employment or admission, and unions. 34 C.F.R. § 106.8(b)(2).

- C. Grievance Procedure.** The new regulations establish the guidelines for a grievance procedure. *See* 34 C.F.R. § 106.45. All schools and/or school districts who receive federal funding are required to adopt a grievance procedure that complies with the regulations. 34 C.F.R. § 106.8(c).

### **III. STANDARD FOR RESPONDING TO A REPORT OF SEXUAL HARASSMENT**

When a school or district has actual knowledge of an allegation of sexual harassment, it has a duty to respond to that complaint in a manner that is not deliberately indifferent. 34 C.F.R. § 106.44(a). “Deliberate indifference” means a response that is “clearly unreasonable in light of the known circumstances.” *Id.*

It is the responsibility of the Title IX Coordinator to contact the complainant promptly, discuss supportive measures that are available with or without the filing of a formal complaint, consider the complainant’s wishes with respect to supportive measures, and explain the process for filing a formal complaint to the complainant. *Id.*

The response must treat the complainant and respondent equitably, by offering supportive measures to the complainant, and by following the grievance process if a formal complaint is filed. *Id.*

### **IV. OVERVIEW OF THE ROLES OF TITLE IX PERSONNEL**

**A. The Title IX Coordinator.** As already mentioned, the Title IX Coordinator is responsible for receiving the formal complaint, initiating the grievance procedure, and coordinating supportive measures. The Title IX Coordinator must be an employee of the school or school district. Many schools and school districts designate their Superintendent, their Human Resources Director, or another district-office-level administrator as the Title IX Coordinator. The Title IX Coordinator also has the authority (and, in some cases, the obligation) to dismiss formal complaints under certain limited circumstances set forth by federal regulation. Other than the complainant (or the parents of a minor complainant) themselves, the Title IX Coordinator is the only person who can file a formal complaint and initiate the grievance process.

**B. The Investigator.** The Investigator is a neutral individual designated by the Title IX Coordinator to gather evidence related to the formal complaint. This can include witness interviews, review of documents and communications, and review of surveillance footage. The parties are given the opportunity to review and respond to the evidence before the investigator finalizes an investigation report. The report must fairly summarize the relevant evidence, and the parties also are given the opportunity to respond to the report.

- C. **The Decision-Maker.** This is a separate individual from the investigator or Title IX Coordinator who makes the determination regarding responsibility. The decision-maker coordinates the transmission of relevant cross-examination questions from the parties' advisors to the other parties or witnesses, and issues a written determination that includes factual findings and conclusions regarding the application of school or district policy to those findings. Until the written determination regarding responsibility is issued, a respondent is presumed to not be responsible for the alleged conduct.
- D. **The Appeal Decision-Maker.** This is a fourth separate individual who is sometimes, but not always, involved in the process. A written determination regarding responsibility or a dismissal may be appealed on limited grounds set forth by regulation and by school or district policy. The appeal decision-maker's role is limited to considering only the grounds for appeal, not necessarily the full evidence gathered by the investigator.

**V. POTENTIAL BOARD MEMBER INVOLVEMENT WITH EACH STEP OF THE PROCESS**

- A. **Receipt of Complaint and the Role of the Title IX Coordinator.** Other than designating a Title IX Coordinator, Board members' involvement with the Coordinator is likely to be limited on a day-to-day basis. One area where Board members may be involved is if an allegation of sexual harassment is made at a Board meeting, including during public comment. Board members should keep in mind that private data on students and employees cannot be discussed in an open meeting, but should also be prepared to direct this sort of commenter to the Title IX Coordinator, and should follow up with the Coordinator to make sure contact is made with the reporting individual. As with other complaints, a complaint against a high-level administrator may require board involvement to avoid allegations of collusion or a conflict of interest.
- B. **The Role of the Investigator.** Board members are unlikely to have interactions or involvement with the Investigator as part of the Title IX grievance process. It is possible, however, that a Board member might be identified as a potential witness who the Investigator may ask to interview. Interviews are voluntary, and there is no obligation to meet with the Investigator. However, it is important to note that the school or district bears the burden of proof on the allegations, not either of the parties, and so the Board member may want to consider the optics of declining to participate as well as the optics of participating.
- C. **The Board Member as Decision-Maker.** Some schools have a board member serve as the decision-maker.

**1. Standard of Review**

- a. The decision-maker is responsible for reviewing the Investigator’s report and determining whether the respondent is responsible for the conduct alleged.
- b. In determining whether the conduct occurred, the decision-maker must use one of the following the standards of evidence selected by the school or school district:
  - i. “Preponderance of the evidence” is understood to mean a conclusion that a fact is more likely than not to be true.”
  - ii. “Clear and convincing evidence” means that a fact is highly probable to be true.
- c. It is suggested in the preamble to the regulations that when the evidence is truly 50/50, the determination should be non-responsibility on the part of the respondent.
- d. The same standard of proof shall apply regardless of whether the respondent is a student or a staff member.

**2. Opportunity for Parties to Respond to Report**

- a. The decision-maker is responsible for receiving the response of the parties or their advisors to the investigation report.
- b. The response must be delivered to the decision-maker within ten (10) calendar days from the day that the investigation report is provided to the parties.

**3. Notification of Rights to a Hearing/Written Questions**

When the investigation report is provided to the parties and the decision-maker, either the Title IX Coordinator or the decision-maker should notify the parties of their rights to submit written questions, and/or the scheduling of a hearing and their rights during the hearing, if applicable.

#### **4. Submission of Written Questions**

- a. All schools must allow for an exchange of written questions, between the parties, regardless of whether a live hearing is also offered.
- b. After the investigation report has been sent to the parties, and before the decision-maker makes a determination regarding responsibility, the parties must be permitted to submit written, relevant questions to be asked of any other party or witness.
- c. Upon receipt of the written questions, the decision-maker makes determinations as to what is relevant and may exclude irrelevant questions as long as the party asking the question receives an explanation as to why the question is not relevant.
- d. The Title IX regulations do not contain a definition or standard by which relevancy determinations are to be made other than noting that the ordinary meaning of the word should be understood and applied.
- e. Evidence is relevant if “it has any tendency to make a fact more or less probable than it would be without the evidence” and when “the fact is of consequence in determining the action.” Fed. R. Evid. 401.
- f. The only type of evidence that is never relevant in a Title IX investigation is evidence relating to the complainant’s sexual predisposition or prior sexual behavior, unless:
  - i. such questions and evidence about prior sexual behavior are offered to prove that someone other than the respondent committed the alleged conduct; or
  - ii. if the questions and evidence concern a specific incident so the complainant’s prior sexual behavior with respect to the respondent are offered to prove consent.

**5. Privileged Information**

The decision-maker, similar to the investigator, also cannot require, allow, rely upon, or use evidence that either constitutes or seeks disclosure of any information protected by a legally recognized privilege, unless the person holding such privilege has waived the privilege.

**6. Time Limitations**

The Regulations do not contain a specific time limitation for the written question process but require that the process must include sufficient time for follow-up questions.

**7. Live Hearings are Optional**

- a. K-12 schools have the option to allow for a live hearing as part of the grievance process, but are not required to do so.
- b. There is no specific time frame as to when a hearing must be held. The decision-maker must provide the parties with notice of the hearing and sufficient time for the parties to prepare to participate.

**8. Contents of the Determination**

After reviewing the investigation report, the parties' submissions in response to the investigation report, the written cross-examination questions and answers, and any live hearing testimony (if any), the decision-maker must issue a written determination simultaneously to all parties. The determination must contain the following information:

- a. Identification of the allegations potentially constituting sexual harassment;
- b. A description of the procedural steps taken under this process, including any notifications, interviews, hearings, and other methods used to gather evidence, if applicable;
- c. Findings of fact supporting the determination;
- d. Conclusions applying the school or school district's code of conduct or policies to the facts found by the decision-maker;
- e. A statement of the result as to each allegation, including:

- i. a determination regarding responsibility;
  - ii. the rationale for the result;
  - iii. any disciplinary sanctions imposed on the respondent, and
  - iv. any remedies designed to restore or preserve the complainant's equal access to the school or school district's education program or activity.
- f. The procedure for appealing the determination of responsibility.

**9. Referral of the Determination**

A copy of the report should be forwarded to the Title IX Coordinator who is responsible for implementing any remedies.

**10. Finality of the Determination**

The determination of the decision-maker only becomes final when the appeal period expires or any appeal is adjudicated.

**D. The Board Member as Appeal Decision-Maker.** The opportunity to appeal a dismissal or a determination of responsibility must be equally available to both parties. 34 C.F.R. § 106.45(b)(8)(i). The school or district may set the length of the appeal period. 34 C.F.R. § 106.45(b)(1)(v).

- 1. There are three grounds for appeal that the school or District is required to recognize:
  - a. A procedural irregularity affected the outcome of the matter;
  - b. New evidence that was not reasonably available at the time of the determination or dismissal and that could affect the outcome of the matter; or
  - c. The Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent, and the conflict of interest or bias affected the outcome of the matter.

34 C.F.R. § 106.45(b)(8)(i). The school or district may designate additional bases as it deems appropriate, so long as the basis for appeal is equally available to complainants and respondents. 34 C.F.R. § 106.45(b)(8)(ii).

2. For all appeals, the school or district's process must include the following:
  - a. Notify the other party in writing when an appeal is filed.
  - b. Use a different, adequately trained, decision-maker than the decision-maker who made the additional determination. This decision-maker cannot be the Title IX Coordinator or the investigator.
  - c. Give both parties a reasonable, equal opportunity to submit written statements in support of, or challenging, the determination or dismissal.
  - d. Issue a written decision describing the result of the appeal and the rationale for the result simultaneously to both parties.