

INVESTIGATIONS



FAIR AND
IMPARTIAL
INVESTIGATION

- OCR Requires a **fair** and **impartial** investigation into each allegation of sexual discrimination/harassment

FIRST THINGS FIRST

- A fair, impartial and thorough investigation cannot take place without the following:
 - A clear, simple reporting procedure that is publicly available;
 - A knowledge of the institutional policies alleged to have been violated (i.e., civil rights and/or sexual harassment policies);
 - An understanding of the internal grievance procedures to ensure allegations are investigated as promised by the organization;

KNOW YOUR POLICY

School Policy

Under Title IX, a school is required to have and distribute a policy against sex discrimination, particularly one that addresses sexual harassment. Such a policy lets students, parents, and employees know that sexual harassment will not be tolerated. A school is also required to adopt and publish grievance procedures for resolving sex discrimination complaints, including complaints of sexual harassment. This provides an effective means for promptly and appropriately responding to sexual harassment complaints.



POLICY

- Clear reporting processes
- Timelines for completing investigation, and possibly for each investigation step
 - OCR recommends a maximum of 60 days, but preK-12 generally doesn't have that much time
- Appeal procedures

INVESTIGATIVE STRUCTURE

- Which employees will investigate claims at each site?
 - Although the Title IX coordinator should be available for assistance and guidance, many districts are too large for that individual to conduct the investigations.
 - It is recommended that a site principal or assistant principal be designated as the investigator for each site.
 - If a complaint is made against the designated investigator, the Title IX coordinator can assign a substitute investigator.

WHEN IS TITLE IX IN PLAY?

GEOGRAPHY (I.E., PHYSICAL LOCATIONS)

Geographically, Title IX applies to events occurring:

On school district property;

At school-sponsored events; and

Even to some off-campus actions, if the "downstream effects" cause a discriminatory/harassing impact on school grounds or at school activities.

OFF-CAMPUS ACTIONS

- Is there a nexus between the off-campus conduct and school activities.
 - Is the conduct materially and substantially disrupting the good order of the school (e.g., distracting students, placing individuals in fear, etc.)?
 - Is the conduct causing physical or emotional harm to an individual at school (e.g., hostile environment, other students “making fun” of the individual, a forced to be near the harasser during school time, affecting grades and emotional well-being, etc.)?
 - Is the offending individual using a school device or committing behavior at school sponsored events?

PROGRAMS

- Title IX applies to
 - all programs ran or offered by a school district;
 - All programs using school district facilities (e.g., sports camps);

PEOPLE

Students (including dual enrollment students)

All employees

Vendors

Contractors or subcontractors

Guests and visitors

A WORD ABOUT INDIVIDUALS THAT THE DISTRICT HAS NO CONTROL OVER

- “Disciplinary jurisdiction”: If the responding party is not a student or employee of the district, then the district will not have “disciplinary jurisdiction”. In other words, the district will not be able to discipline the individual. However, the district must still:
 - investigate the allegation, to the extent possible;
 - notify law enforcement, if necessary;
 - take remedial and preventative steps; and
 - take other steps necessary to ensure the safety of the victim and other students/staff (e.g., ban individual from campus property and events).

A WORD ABOUT INDIVIDUALS THAT THE DISTRICT HAS NO CONTROL OVER

- Individuals included in this category are:
 - Guests and visitors
 - Former students
 - Former employees (if teacher, should notify the state department for possible revocation of certification)
 - Students from other districts (e.g., athletes, band members, etc.)
 - Employees of contractors and vendors

SUBJECT MATTER

Title IX applies to conduct within the following categories:

Unwelcome sex-based and gender-based conduct;

Unwelcome conduct of a sexual nature (i.e., sexual harassment);

Discrimination on the basis of sex or gender;

Discrimination on the basis of a student's status as pregnant or parenting

DEFINING SEXUAL HARASSMENT

TYPES

- The law recognizes three types of sexual harassment:
 - Hostile environment
 - Quid pro quo
 - Retaliatory harassment

TYPE I: HOSTILE ENVIRONMENT

1

A hostile environment on the basis of sex is created when an individual is subjected to conduct that is **sufficiently severe, persistent or pervasive, and objectively offensive** that it unreasonably interferes with, denies, or limits someone's ability to participate in or benefit from the program offered by the district.

2

The district must evaluate claims from both:

- A subjective perspective (the alleged victim's), and
- An objective perspective (a reasonable person's)



ALL RELEVANT
CIRCUMSTANCES

- Must consider all relevant circumstances, including:
 - Degree to which conduct affected one or more students' education
 - Type, frequency and duration of the conduct
 - Relationship between alleged harasser and victim(s)
 - Number of individuals involved
 - Age and sex of the alleged harasser and victim(s)
 - Size of the school, location of the incidents, and context in which they occurred
 - Other similar incidents not involving the same individuals
 - Incidents of gender-based, but nonsexual harassment



SEVERE

- “The more severe the conduct, the less the need to show a repetitive series of incidents; this is particularly true if the harassment is physical.”
- Non-consensual sexual contact or intercourse almost always sufficiently severe.
- Was it conduct accompanied by threats of violence?



PERVASIVE

- ”Harassment is pervasive when it ‘occurs either in concert or with regularity.’”
- Pattern or practice
- Widespread
- Well-known among students and employees (Source – ATIXA: PreK-12 Title IX Course)
- Occurring in public spaces



PERSISTENT

- Frequency of conduct (Is it repetitive?)
- Intensity of the conduct
- Continues despite requests to stop



OBJECTIVELY OFFENSIVE

- To determine whether conduct is objectively offensive, many factors may be considered, including:
 - Age and relationships of the claimant and respondent;
 - Number of persons involved
 - Frequency
 - Severity
 - Humiliation
 - Intimidation
 - Abuse
 - Etc.

TYPE 2: QUID PRO QUO HARASSMENT (“SOMETHING FOR SOMETHING”)

- “[A] teacher or other employee conditions an educational decision or benefit on the student’s submission to unwelcome sexual conduct.”
 - Power or authority over another
 - Submission to sexual conduct is explicitly or implicitly a condition of receiving certain benefits or gaining access to educational program

TYPE 3: RETALIATORY HARASSMENT

- Title IX prohibits institution's from taking adverse actions against individuals for engaging in protected activities (i.e., reporting sex discrimination or harassment, assisting an individual in reporting such conduct, or participating in an investigation of such conduct).
- Do not institute discipline, or deny an educational benefit, simply because an individual is exercising their rights under Title IX!

INVESTIGATION STEPS

OVERVIEW OF INVESTIGATION STEPS

- Allegation
- Preliminary Inquiry
- Reports to law enforcement or DHS, if necessary
- Gatekeeping
- Notice to parties
- Interim measures
- Strategize investigation (e.g., determine the scope, possible witnesses, evidence requests, etc.)
- Investigate (interview witnesses, obtain statements, request or obtain evidence, etc.)
- Analysis
- Finding
- Notice of outcome and due process

EVIDENTIARY STANDARD

- 2017 Q& A allows districts to choose between “preponderance of the evidence” and “clear and convincing evidence”
- **Most use “preponderance of the evidence”**
 - More likely than not
 - 50.1%
- “Clear and convincing” is a higher burden (i.e., substantially more likely than not)

THE PROCESS

01

Incident/Notice

02

Preliminary
Inquiry

03

Formal
Investigation &
Report

04

Finding/Sanction

05

Appeal

STEP I

Incident & Notice

- Receive allegations (complaint)
- Actual notice or constructive notice
- Once notice exists, the duty to investigate is absolute
 - Small “i” preliminary inquiry
 - Big “I” comprehensive investigation

NOTICE

ACTUAL

- Files grievance
- Verbally notifies responsible employee
- Complains to campus police or security
- Staff member witnesses conduct
- Indirect notice (i.e., social media postings, video, media, etc.)

CONSTRUCTIVE

- Pervasiveness enough to conclude that school should have known
- Widespread, openly visible, well-known to students and/or staff
- Report to employee that failed to report to supervisor

STEP 2

Preliminary Inquiry & (if necessary) DHS/Law Enforcement Reports

- Small “i” inquiry
 - What type of complaint is this?
 - Is there any possibility that it’s valid?
- If so, do I need to make an immediate report to DHS or law enforcement?
 - 10A O.S. 1-2-101(B)
 - 70 O.S. 1210.163



LAW ENFORCEMENT

- A report to law enforcement does not relieve the district of the responsibility to investigate under Title IX.
- Districts are required to determine whether Title IX has been violated (whereas law enforcement investigate pursuant to criminal statutes)
- Title IX has a lower standard of proof (“preponderance of the evidence” v. “beyond a reasonable doubt”) and requires remedial action
- **Develop a process with local law enforcement that allows your district to continue the investigation with a timeframe acceptable under Title IX.**

DIFFERING ROLES

LAW ENFORCEMENT

Police Investigator

- Trying to establish probable cause for arrest
- Uses a wide lens
- Employs a variety of tactics
- Works for society in the interest of justice

SCHOOL DISTRICT

Administrative Investigator

- Determining violation of civil rights statute using civil standard of evidence (i.e., lower standard than criminal)
- Looks at only the reported case
- Generally straight forward approach
- Works for campus to ensure civil rights law and local policy compliance

STEP 3

GATEKEEPING

- Is the allegation actually a Title IX issue, simply a violation of school rules, or something else?
 - Remember, for Title IX to be in play it must be sex discrimination or sexual harassment (i.e., hostile environment, quid pro quo or retaliation).
 - If Title IX is not in play, either send it to the individual responsible for investigating the proper claim, treat as a non-civil rights disciplinary decision, or close it.
 - Does the allegation seem to have any merit?
 - **If Title IX is in play, and there is merit, it's time to move forward with more serious steps.**



STEP 4

NOTICE TO PARTIES

- Prepare and deliver the notice of investigation (and possibly notice of allegation, if appropriate) on the basis of the initial inquiry.
- Notice of allegation & investigation should be shared **verbally** and **sent in writing** to both the reporting party and the responding party.

STEP 5

INTERIM MEASURES

- Individualized services offered as appropriate to either or both the reporting and responding parties, prior to an investigation or while an investigation is pending.
 - Interim measures include counseling,
 - extensions of time or other course-related adjustments,
 - modifications of work or class schedules,
 - campus escort services,
 - restrictions on contact between the parties,
 - increased security and monitoring of certain areas of campus, and other similar accommodations.

STEP 6

STRATEGY

- Develop an investigation plan
 - Witnesses to be interviewed
 - Interview claimant and other witnesses first, followed by respondent's witnesses and the respondent, or
 - Interview claimant, respondent, claimant's witnesses, then respondent's witnesses
 - Documents to be reviewed
 - Evidence to be preserved
 - Computer, text messages, emails, social media posts, documents, etc.
- Develop a timeline not to exceed district policy

STEP 7

INTERVIEWS

- Interview basics
 - Find a proper location for the interview (if the witness is the opposite sex from the questioner, should have a same-sex witness)
 - Explain the purpose of the interview, to the degree possible
 - Confidentiality: inform witness that you will do your best to preserve confidentiality, but absolute privacy cannot be guaranteed.
 - Witness instructions (e.g., take your time; if you don't understand a question, say so; if you have a question, ask it; if you remember something later, come back and tell me; if you need a break, let me know; be truthful and accurate)



INTERVIEWS

- Interviewer behavior
 - Remain calm and use a measured tone
 - Make the witness feel at ease
 - Be neutral, objective and open-minded
 - Let them tell their story
 - Be cognizant of body language and demeanor witnesses fill out a statement, if possible



INTERVIEWS

- Interviewer techniques
 - **Get the who, what, where, how, when and, if possible, why?**
 - Start with broad questions and then move to narrower questions
 - Question the witnesses, in depth
 - Take detailed notes (including time, date, location, individuals present)
 - Recording: if you want to record the interview, get the witness' permission



INTERVIEWS

- Interviewer techniques
 - Ask necessary follow-up questions
 - Ask for supporting documentation and evidence
 - Ask for corroborating witnesses



INTERVIEWS

- Do NOT:
 - Be unprepared
 - Do all the talking
 - Rush to judgment
 - Create a hostile or unwelcoming environment
 - Be argumentative or accusatory (this does not mean you shouldn't point out contradictions)



INTERVIEWS

- Interviewing young children
 - Young children often have yet to develop the capacity to record and recall an event like adults can:
 - Use simple sentences
 - Age-appropriate language

ANALYZE

After all interviews are completed and evidence obtained, it's time to analyze the evidence and make a finding.