

Flagstaff Unified School District

December 15, 2021

**Sexual Harassment Complaints:
Title IX Requirements
Training for Investigators and
Decisionmakers**

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The Law of Sexual Harassment in the School Setting

Sexual Harassment and Retaliation are prohibited by:

- Title VII of the Civil Rights Act of 1964
- The Arizona Civil Rights Act
- Title IX of the Education Amendments of 1972

Title IX

Title IX states that:

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.

“New” Title IX Regulations

- May 6, 2020, U.S. Dep’t of Ed., OCR issued rule amending Title IX regulations
- Final rule went into effect on August 14, 2020

2020 Changes

- Sexual harassment is now expressly defined in Regulation
- Position & Notice requirements for Title IX Coordinator
- Publication of notice in handbooks and on website
- “Notice” v. “Formal Complaint” and how to address each
- All staff must be trained on how to report sexual harassment

Changes Cont'd

- Formal Complaints can only be filed by alleged victim
- But ALL notice triggers certain obligations
- Investigation must follow grievance procedure
- Investigators CAN NOT be decision makers regarding determination of responsibility
- Requirements for Grievance Process (investigation) and Determination of Responsibility

Records Retention Requirements

For each response to a complaint; formal or informal; the District must create and maintain for 7 years, a record that:

1. documents the basis for the District's conclusion that its response was not deliberately indifferent
2. documents that it has taken measures designed to restore or preserve equal access to the District's education program or activity

(Title IX Coordinator responsibility)

Records Retention

If the District did not provide a Complainant with supportive measures, then the District must also document the reasons why such a response was not clearly unreasonable in light of the known circumstances.

(Title IX Coordinator responsibility)

Retaliation

- Do not take any adverse action against any person for the purpose of interfering with rights under Title IX or because the person participated **or refused to participate** in a Title IX investigation process
- Keep the names of all individuals involved confidential except as necessary to investigate (parties have right to know names of one another)

Retaliation

- Beware of disciplining for a non-harassment code of conduct violation where you learned of the violation via the sexual harassment complaint—it can be done, but should be for an infraction which you typically would discipline
- Someone other than the Title IX Coordinator, investigator or decisionmaker should process any such discipline and should know as little as possible about the Title IX Complaint/investigation

Not Retaliation

Disciplining a student based on a code of conduct violation for making a materially false statement in bad faith during the investigation of a complaint does not constitute retaliation.

**WHEN IS THE DISTRICT
LIABLE UNDER TITLE IX?**

The District Will Violate Title IX Where It Has:

- ***Actual knowledge*** of an allegation of sexual harassment;
- Experienced by an ***individual in the District's educational program/activity***; and
- The District acts with ***deliberate indifference*** to that notice.

What is Actual Knowledge of Sexual Harassment?

- A report to ANY elementary or secondary school employee
 - ALL employees must be trained to immediately communicate any report of conduct that would meet the definition of harassment to Title IX Coordinator
- A report to the Title IX Coordinator made at any time via any method of communication
- A report made to any School official who has authority to institute corrective measures

Knowledge: What Do You Do With It?

- The employee in possession of the information must get that information to the designated site person, who then must provide it to Title IX Coordinator immediately (or can report directly to Coordinator)
- This information ALWAYS triggers the Title IX Coordinator's responsibilities so timely reporting is vital

Knowledge: What Don't You Do With It?

- Do not ignore it or fail to recognize that it is notice of possible sexual harassment
- **Do not** interview the person accused of sexual harassment at the time of actual knowledge
 - There are procedural requirements that you cannot meet when you initially receive notice
- Do not make judgements or assumptions or otherwise investigate to determine whether sexual harassment has occurred

DO NOT DISCIPLINE

- Administrators CANNOT discipline a student for sexual harassment until the entire grievance process is complete and he/she has been determined responsible
- Cannot record a conduct violation as sexual harassment unless there was a formal investigation that has been completed and a decision-maker has determined responsibility and identified discipline as a remedy

Education Program or Activity

The District is only required to address sexual harassment in the education program or activity, which is:

- Any location, event, or circumstance over which the District exhibits **substantial control over both the alleged harasser and the context in which the harassment occurred**

What is Deliberate Indifference?

A response to notice of sexual harassment that is clearly unreasonable in light of the known circumstances.

How to Avoid Deliberate Indifference

- Treat Complainants and Respondents equitably
- Offer supportive measures in all cases
- **Investigate every instance of a formal complaint**
- Use procedures set out in the District's regulations
- Provide Complainant remedies if Respondent is found to have responsibility

Avoiding Deliberate Indifference Cont'd

Title IX Coordinator must PROMPTLY contact every Complainant (whether formal complaint or not) to discuss:

- Wishes regarding supportive measures
- That supportive measures are available with or without filing a formal complaint
- The process for filing a formal complaint

In order to investigate and make decisions about sexual harassment, you must

**UNDERSTAND THE “NEW”
REGULATION’S DEFINITION
OF SEXUAL HARASSMENT**

Title IX Definition

The Regulations use a definition of sexual harassment that is designed to protect 1st Amendment rights of students and teachers by:

- Distinction between physical conduct and speech
- Speech is largely protected unless it rises to high standard
- Physical conduct is *per se* actionable

Sexual Harassment = Conduct on the Basis of Sex that is One or More of the Following:

1. A school employee conditions the provision of an aid, benefit, or service of the school on an individual's participation in unwelcome sexual conduct;
2. Unwelcome sexual conduct that a reasonable person would find 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.

Sexual Harassment: Element 1

Element 1 is considered “*quid pro quo*” harassment:

- Does not require a severe, pervasive, and objectively offensive analysis
- By its very terms, it will deny access to the program and is *per se* actionable
- Examples: A teacher requires sexual favors for a better grade; a staff member demands sexual favors or s/he will post compromising pictures

Sexual Harassment: Element 2

- This prong requires the unwelcome sexual conduct to be:
 - Severe AND
 - Pervasive AND
 - Objectively offensive
- Such that the victim is denied **equal access** to the District's programs and activities
- Narrowly tailored to protect 1st Amendment rights

Sexual Harassment: Element 3

Offenses based on violence (sexual assault, dating violence, domestic violence, stalking):

- Does not require severe and pervasive analysis
- When it occurs, equal access is denied
- Like Element 1, it is *per se* actionable

Sexual Assault

An offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation. 20 U.S.C. 1092(f)(6)(A)(v)

- Any sexual act directed against another person, without the consent of the victim including instances where the victim is incapable of giving consent
- Including “forcible fondling” – touching of the private body parts of another person for the purpose of sexual gratification

Stalking

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

- A. Fear for his or her safety or the safety of others;
or
- B. Suffer substantial emotional distress

34 U.S.C. 12291(a)(30)

Dating Violence

Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim and where the existence of such a relationship shall be determined based on a consideration of the following factors:

- 1) the length of the relationship;
- 2) the type of relationship;
- 3) the frequency of interaction between the persons involved in the relationship

34 U.S.C. 12291(a)(10)

Domestic Violence

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 [Arizona], 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 [Arizona].

34 U.S.C. 12291(a)(8)

Informal v. Formal

PROCEDURES UPON RECEIPT OF REPORT OF SEXUAL HARASSMENT

How is it Reported?

- Reports can be made by anyone and by mail, telephone, email to Title IX Coordinator or by any means that results in the Title IX Coordinator receiving the report
- Any report triggers District responsibilities – *Send notice of any report to Title IX Coordinator*
- Only victim, who is student or employee of District, can file a **formal complaint**

Informal vs Formal Complaint

- **Informal complaint** is where notice is made but no written document filed
- **Formal complaint** = a written document filed by a Complainant *or one that is signed by the Title IX Coordinator* alleging sexual harassment against a respondent **and** requesting that the District investigate the allegation of sexual harassment
- Title IX Coordinator can sign a formal complaint where victim will not also triggering investigation

All Notice Triggers Responsibility

Even if no formal complaint filed, Title IX Coordinator MUST initially:

- Contact Complainant to discuss supportive measures
- Consider the Complainant's wishes with respect to supportive measures
- Inform Complainant of the availability of supportive measures with or without the filing of a formal complaint
- Explain the process to file a formal complaint

Supportive Measures

Supportive measures are non-disciplinary, non-punitive, individualized services, offered as appropriate and without charge to a Complainant or a Respondent before or after the filing of a formal complaint or where no formal complaint has been filed.

Examples of Supportive Measures

- Counseling
- Course modifications
- Schedule changes
- Increased monitoring or supervisions
- Designed to restore or preserve equal access to education program or activity
- Do not unreasonably burden either a Complainant or Respondent

Supportive Measures Cautions

Do not sanction or discipline Respondent in any way until grievance procedure has been followed

- Do not completely remove a student Respondent from an activity as a supportive measure for complainant
- UNLESS there is need for an emergency removal; which can only happen if necessary to protect an individual from IMMEDIATE THREAT TO **PHYSICAL HEALTH OR SAFETY**

INFORMAL RESOLUTION IN LIEU OF GRIEVANCE PROCESS

Informal Resolution

- **Not** allowed unless there has been a formal complaint filed
- **Not** allowed for a complaint alleging an employee harassed a student
- **Allowed** at any time during formal complaint process if:
 - Both parties have been provided written notice of their rights
 - Both parties written voluntary consent is obtained

Informal Resolution

- Title IX Coordinator will facilitate the process
- Alternative to the formal grievance procedure (investigation)
- There can be no conditions placed on the parties in exchange for their consent & either party can withdraw consent at any time (revert to the formal grievance procedure)
- Must be equitable process
- Mediated by neutral third party

Informal Resolution

Both parties must be notified, in writing, of the informal resolution process, to include:

- The allegations made in the formal complaint
- The requirements of the informal resolution process
- What elements of the process will remain confidential (or not)

**DISMISSAL PRIOR TO
DETERMINATION**

Mandatory Dismissal of Formal Complaints

- The complaint does not state an allegation of sexual harassment, even if all facts are found to be true
- The sexual harassment, even if it did occur, did not occur in a District program or activity
- The sexual harassment did not occur against a person in the United States

(Title IX Coordinator Responsibility)

Permissive Dismissal of Formal Complaints

- If the Complainant notifies the Title IX Coordinator that s/he wants to withdraw the complaint
- If the Respondent's employment or enrollment with the District ends
- If circumstances, such as several years between the conduct and the complaint or a Complainant's refusal to cooperate, prevents the gathering of evidence sufficient to render a determination

(Title IX Coordinator Responsibility)

INVESTIGATIONS: GENERAL REQUIREMENTS

Formal Complaint Triggers the Investigation

- Formal complaint triggers the responsibility to conduct an investigation that complies with the District's grievance procedure
- Upon receipt of a Formal Complaint, the Title IX Coordinator will provide a written notice to parties explaining basic rights during the process and will assign an investigator

Procedural Requirements

- Title IX Coordinator
 - Parties must be given, in writing, details about what conduct is alleged to constitute sexual harassment, including the date and location of the alleged incident(s)
- If there is a prohibition against making false statements in the code of conduct, a party can be disciplined for doing so during this investigation

Procedural Requirements

- Respondent is presumed not responsible for conduct and a determination will not be made until the conclusion of the grievance process
- Parties may have an advisor of their choice
 - Advisor may be an attorney, but doesn't have to be
 - Parents are not advisors—they have the right to be there if minor child
- Both parties must have equal opportunity to present witnesses and evidence

Procedural Requirements

- Parties will have the opportunity to inspect and review evidence collected during the investigation
 - Sign a non-disclosure agreement before receive the evidence
- Do not restrict either party's ability to discuss the allegations or gather and present evidence
- Burden of proof is on the District

No Conflict of Interest

- Assigned investigator must not have a conflict of interest. . .
 - Against the specific Complainant or Respondent or
 - Against Complainants or Respondents in general
- If a conflict of interest arises during the investigation, notify the Title IX Coordinator immediately

Timelines: Investigations

- Meet the timeline set out in the District's policy (60 school days of receipt of formal complaint)
- If there is a temporary delay for good cause, provide written notice to both parties explaining the reason for the delay
- School administrative needs DO NOT create good cause for a temporary delay

**Non-exhaustive
list of reasons that
may create a good
cause delay in
completion:**

- Concurrent law enforcement activity
- Witness availability
- A pandemic-related reason (illness, unavailability)
- School breaks
- Absence of a party
- Availability of a party's advisor
- Need for language assistance or ADA accommodations

Expanding the Investigation

- If during the course of the investigation, additional allegations are brought forward, that were not included in initial notice, you must notify the Title IX Coordinator
- The Coordinator will then provide written notice of the additional allegations to the parties and determine the course of action for the investigation of the addition allegations

Investigator Reminders

- **Be impartial and avoid bias**
- Presume that the respondent is not responsible for the alleged conduct but do not let this limit the investigation
- Do not make assumptions about who can experience sexual harassment
- Follow the District's grievance procedure and maintain list of the procedural steps that you have taken

CONDUCTING THE INVESTIGATION

Investigating the Complaint

You must gather the relevant evidence:

- Gather as much information as possible!
- Do not require or rely on the parties to provide you evidence
- You may not require a party to provide evidence (documentary or verbal) that would be legally protected under attorney-client privilege, doctor-patient privilege, spousal privilege (e.g., cannot require outside counseling records)

Investigating the Complaint

Both parties must have equal opportunity to present witnesses and evidence

- Interview both parties
- Ask both parties to provide any documents they think are relevant
- Ask both parties who else they think you should talk to and then interview the witnesses identified by the parties

Investigating – Interviews

- Interviewing is often the largest part of an investigation & it drives who else will be interviewed and what evidence should be gathered for the investigation
- Verbal communication needs to be documented: Letter/email follow-up
- Location – away from administrative office; round table or behind a desk; enough room for all
- Remember: goal is to gather as much information as possible

Investigating –Interviews

- **Parties** must be provided with written notice of the date, time, participants, purpose, and location of each investigative interview with sufficient time for them to prepare
- Generally, at least 2 days before you want to interview the parties (watch timeline)
- Only required for the parties, not witnesses you may interview
- Usually best to begin with the Complainant

Investigating – Interviews

- If allowing others to be present during the Complainant or Respondent interview (such as an advisor or attorney), must allow both parties the same opportunity
 - You may restrict the extent to which the advisor/attorney can participate, so long as restrictions apply equally to both parties

Pre-Interview Considerations

- Age
- Disability (special education/504)
- Severity
- Order of interview
- Advisors-adult, lawyer, family friend
- Parents may be present for interview of minor child
- Set ground rules for advisors-keep consistent; offer to both
- Language processing/Interpreter need

Pre-Interview Considerations

Outline your questions:

- Identify the allegations and understand what information will be needed to make a determination and that to guide interviews
- Plan your interview outlines
 - To extent reasonable, ask both parties the same questions
 - Ask witnesses the same or similar questions

Conducting the Interview

- Begin with explaining process and establishing credibility (i.e., Who are you; what is the purpose and your role; background/credentials; you won't decide, just gathering the testimony and evidence to compile to give to the decision maker)
- Need interviewee to be comfortable in order to gather as much information possible/needed. Offer water, watch temperature of the room; privacy; be relatable, etc.

Conducting the Interview

5 steps for questioning:

1. Ask questions
2. Perceiving response
3. Evaluation response
4. Drill down for details
5. Record response accurately

Ask Open-Ended Questions

- Tell me why you are here
- Explain what happened 3rd hour
- Tell me more about... or What are some other details about...

If get stuck...

- Paraphrase/Summarize back
- If interviewee isn't responding, appeal to senses (Do you remember a smell? How did that make you feel? Did you hear any sounds?)

Interview Pitfalls

- Arguing with what is presented
- Becoming angry
- Showing personal prejudice
- Lying
- Hurrying
- Interrupting
- Making assumptions
- Being dismissive
- Making promises
- Degrading
- Putting too much value on inconsistencies
- Getting hung up on irrelevant information
- Accepting one-word responses
- Phrasing things negatively
- Leading questions: “When you touched her arm, did you”

Closing the Interview

- Reassure them regarding any concerns they may have raised
- Contact you later if something comes to mind (give contact information)
- That you may be in touch if you need more information
- Thank and express empathy for their time and cooperation
- ***For Complainant & Respondent only:*** have them sign the non-disclosure agreement

Evidence/Documentation

- Attendance records
- Discipline records
- Class schedules
- Medical or counseling information
- Social media
- Screenshots
- Emails
- Technology records
- Police reports
- Photos, texts*
- Videos
- Reasonable standard

Evidence/Documentation

- Again, you may not require a party to provide evidence (documentary or verbal) that would be legally protected under attorney-client privilege, doctor-patient privilege, spousal privilege
- If they do want to provide it, you must obtain written, voluntary consent (of parent or adult student) allowing District to use that evidence in the investigation
- **Even if the school/district has the medical evidence as part of student records, it may not be used in the investigation without the written consent**

Other Parts of Investigation

- May need to visit the place where conduct alleged to happen if relevant or needed
- May need to speak with additional witnesses as move through the investigation
- Remember: must report any possible crimes to Title IX Coordinator and law enforcement if come up (e.g., death threats, nude photos, etc.)

Preparing the Evidence

- **Must** redact information protected by privilege unless there is written consent
- **May** redact information in the evidence that is not directly related to the allegations
- Decide whether you *should* redact student names and identifying information (but NOT the names of Complainant & Respondent)
- **May not** redact confidential information that is directly related and relevant
- **KEEP A KEY for all redacted information**

Investigation Concluded & Sharing of Evidence

All evidence is provided to the parties, and any attorney/advisor, by sending the evidence to the parties in an electronic or hard copy format and allowing the parties 10 calendar days to submit a written response

- Provide both parties an equal opportunity to inspect and review evidence gathered as part of the investigation that is *directly related* to the allegations raised in the formal complaint
- Including evidence you do not intend to rely on when drafting the investigation report

10-day Waiting Period

- Must wait 10 calendar days after providing evidence before you can finalize the investigation report and move everything to the decision maker
- Consider the written responses to evidence provided by the parties
- Consider additional post evidence shared after disclosure if allowed

Written Investigation Report

- Write investigation report summarizing all steps and evidence (no determination of responsibility)
- Be sure to consider the written responses to the evidence that was provided by the parties when finalizing the written investigative report
- The written investigation report must fairly summarize the relevant evidence and be provided to parties and attorney/advisor at least 10 days before any determination of responsibility is completed

Written Investigation Report

- Relevant and irrelevant information should be included; be comprehensive and transparent
- Be **thorough**
 - Include observations of witnesses-can report on credibility determination
 - Details
 - If you were the decision-maker, what would you NEED to know?

DECISION MAKERS

Basic Premises: Decision Makers

- Decision maker CANNOT be the Title IX Coordinator or the investigator
- Objectively evaluate all available evidence, both favorable to Complainant and Respondent
- Weigh the evidence using a preponderance of the evidence standard adopted by the District (i.e., The evidence must show that its *more likely than not* that the respondent is responsible for the alleged conduct)

After the Investigation

After the written investigation report is provided by the investigator and BEFORE a determination of responsibility is made, 10 days to allow:

- a) Both parties must be given the opportunity to submit relevant written questions that he/she wants asked of any party or witness
- b) Must provide each party with the answers, AND
- c) Allow for limited follow up questions from the parties

Written Questions

- If a question is excluded by the decision maker, the decision maker must explain why the question is not relevant
- Complainant's sexual history or predisposition is NOT RELEVANT unless:
 - Offered to establish that someone else committed the acts complained of
 - Offered to establish consent with the specific respondent

Issuing a Determination

Using the preponderance of evidence standard to review the evidence, issue a written determination that includes the following:

- List of the allegations
- Description of the procedural steps taken from receipt of the formal complaint through determination (include dates of notices, interviews, etc.)
- Findings of fact that support the determination
- Application of the code of conduct to the facts and conclusions of same

Issuing a Determination

- Statement of and rationale for the determination as to each allegation, including:
 - Determination of responsibility
 - Any disciplinary actions
 - Whether remedies to restore or preserve equal access to the educational program or activity will be provided to complainant
- Include procedures and information regarding the permissible basis for appeal

Remedies

- If the determination is that the Respondent is responsible for the conduct, then determine the remedies that will restore or preserve equal access to the education program or activity
 - Same types of things as supportive measures except that they can be punitive toward Respondent once responsibility has been determined

APPEALS

Appeals

- Appeals cannot be heard by the Title IX Coordinator, the investigator, or the decision maker
- Appeals must be offered to both parties equally

Appeals

Appeals are **mandatory** in the following circumstances:

1. A procedural irregularity affected the outcome
2. Availability of new evidence that was not reasonably available at the time of the determination that could affect outcome
3. Conflict of interest on the part of the Title IX Coordinator, investigator, or decision maker that affected the outcome

Appeals

- Appeals may also be heard for other reasons if determined by District Policy
- Written notice that an appeal has been submitted must be provided to both parties
- Both parties must have an equal opportunity to submit a written statement in support of, or challenging, the determination by the decision maker
- Decision by the appeal officer is final