Sexual Harassment and Title IX

Training for Title IX Coordinators, Investigators and Decision makers

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Special thanks to Cathleen Dooley of Udall Shumway who generously shared her work on Title IX for this presentation.

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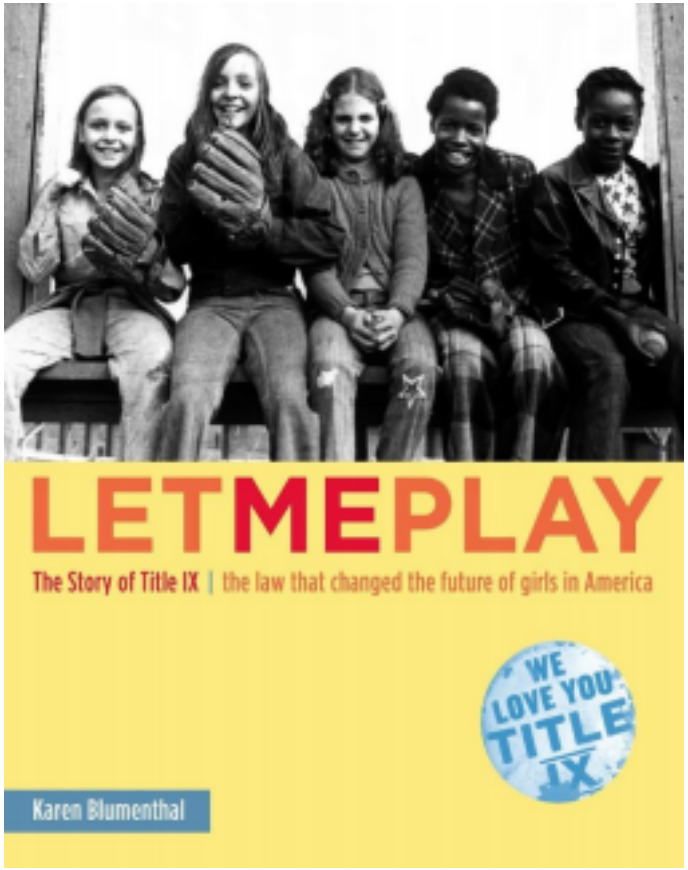
Why are we here?

- USDOE issued new rules amending Title IX regulations that went into effect on August 14, 2020.
- Rules create a framework for equitable and consistent process for sexual harassment complaints to ensure equal access to educational program and activity and the District has adopted new policies to comply with Rules.
- There is pending litigation on these regulations but until that is resolved Coordinators, Investigators and Decision makers should be appointed and trained and Districts should post required information to its websites.

Title IX before and now…


LETMEPLAY
The Story of Title IX | the law that changed the future of girls in America
WE LOVE YOU TITLE IX
Karen Blumenthal

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Rules now include… • Recordkeeping & training requirements are expanded • Notice of sexual harassment to any employee requires notice to Title IX Coordinator

- Decision maker must make a written decision regarding responsibility, remedies and discipline
- Rights of all parties are explicitly defined
- Only a Victim or the Title IX Coordinator can file a Formal Complaint
- Investigation must follow grievance procedure adopted

by district—Policy ACA/ACAA

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Title IX Obligation of the District

It is a violation of Title IX when a District it has ***actual knowledge*** of an allegation of sexual harassment experienced by an ***individual in the educational program/activity*** and the District acts with ***deliberate indifference*** to that notice.

Follow your investigation procedures to avoid an OCR

complaint.

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Reproduced from Title IX NSBA/COSA presentation on 10-21-20.

Title IX parties

- **Complainant** is alleged victim-person filing complaint. Even if Title IX Coordinator files formal complaint, complainant is still alleged victim.
- **Respondent** is the alleged responsible person, person against whom conduct is alleged.

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What is Sexual Harassment?

Conduct on the basis of sex that meets one or more of the following:

1. **Quid pro quo-**-A District employee conditions the provision of an aid, benefit, or service of the district on an individual's participation in unwelcome sexual conduct;

2. **Hostile Environment**-Unwelcome conduct that a reasonable person in the complainant's position would find to be so severe, pervasive, and objectively offensive that it "effectively denies a person equal access" to the District's education program or activity

3. **Criminal acts-**-Sexual assault, dating violence, domestic violence, or stalking.

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Sexual Harassment: Type 1

Conduct is considered *"quid pro quo"* harassment when it requires the provision of sexual conduct in exchange for a benefit to which the victim is otherwise entitled.

The existence of a quid pro quo in and of itself denies access to the educational program or activity to the victim.

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Hostile Environment: Type 2

Requires determination by a reasonable person in complainant's position that:

unwelcome conduct is that it effectively denies a person so severe, pervasive **and** objectively offensive equal access to a District's education program or activity

This type of sexual harassment is crafted to protect a person's 1st Amendment rights to express an opinion or engage in certain conduct.

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Sexual Harassment: Type 3

Violent Offenses of a criminal nature including sexual assault, dating violence, domestic violence, stalking

Does not require serve and pervasive analysis in Type 2

Like Type 1, this conduct is automatically a denial of equal access

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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)

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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)

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Dating Violence

Violence committee 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

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.

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

Education Program or Activity This term is broadly defined and includes:

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**

Athletics, after school programs

What is Actual Knowledge of Harassment?

Title IX obligations are triggered with a report to **ANY** District employee and should be reported to the Title IX Coordinator in writing.

All District employees should be trained.

What happens when District has actual knowledge of potential sexual harassment

Title IX Coordinator must PROMPTLY contact every potential Complainant to engage in an interactive process about

- Available supportive measures even if no complaint is filed
- The process for filing a formal complaint

Title IX process delays other discipline processes

Supportive Measures

Supportive measures are non-disciplinary, non punitive, individualized services, offered as appropriate and without charge to a Complainant or a Respondent.

Intended to restore equal access to educational program or activity

Can be provided even if no formal complaint is filed.

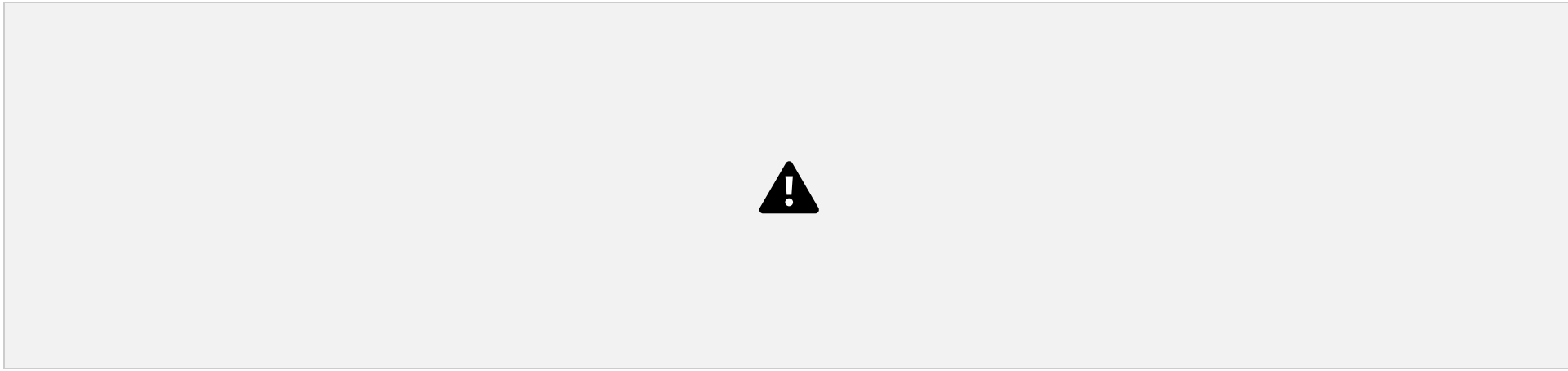
Supportive Measures

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

– Deadline extension
– Restore party to equal access to educational program/activity

YOU HAVE RECEIVED A FORMAL COMPLAINT—NOW

WHAT? TITLE IX COORDINATOR STILL HAS WORK TO DO FOLLOW NEWLY-ADOPTED ACAA



Title IX Coordinator has initial responsibility before investigation

- Issue written notice to parties of formal complaint • Make

Decision on Mandatory and Permissive Dismissal with notice to the Parties

- Make Decision on Emergency Removal/Administrative Leave

Written Notice of Complaint

- Presumption that Respondent is not responsible until Decision is made
- Reasonably prompt investigation and decision (60 or 90 Days)
- Description or list of possible discipline or other remedies

• Preponderance of the evidence (more likely true than not) is used when making a decision on the allegation • Ability to have an advisor

• Range of supportive measures available to both parties

Written Notice of Complaint

- Objectively evaluate all evidence, including allowing the Respondent to prepare a written response before any initial interview.

• The parties do not have to respond/participate in interview and no inference may be made regarding the choice. • Ensure

there is no conflict of interest or bias for the investigator and decision maker to serve impartially without regard to sex of individuals involved or issues raised in the complaint.

Informal Resolution

- **After a formal complaint filed, option provided in written notice to both parties.**
- **Not** allowed for a complaint alleging an employee harassed a student
- Meditated by trained person
- **Allowed** at any time during formal complaint

Emergency Removal/Administrative Leave

- Permitted based on individual risk and safety review to protect a student from immediate threat to health or safety.
- Must provide written notice and opportunity to appeal—show basis for removal.
- Removal still requires compliance with other policies related to student discipline, special ed.

Mandatory Dismissal of Formal Complaints—

• Dismissal requires prompt written notice to all parties + reason for dismissal and appeal rights by any party. • A formal complaint **must** be dismissed if:

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

- The sexual harassment did not occur against a person in the United States
- Other policies may apply to conduct even if it is a not a Title IX problem.

Permissive Dismissal A formal complaint may be dismissed if:

- 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—what about Substitutes??
- 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

HOW TO CONDUCT AN

INVESTIGATION

No Conflict of Interest

- Investigator must be impartial and not have a conflict of interest or bias. . .
  - Against the specific Complainant or Respondent or
  - Against Complainants or Respondents in general

- If investigator has a conflict of interest, notify the Title IX Coordinator immediately and assign a new

investigator

Investigators must

• 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

Written Investigation Report

- Be sure to consider the written responses to the evidence that was provided by the parties when finalizing the written investigative report
- Written report summarizes all procedural steps and evidence collected and received
- **Report does not determine responsibility**
- Sample forms will be made available by District

Decision on Responsibility—

n

Practice tips regarding Decision—use Checklist and Forms

- Decision maker must be different from investigator or Title IX coordinator involved in the formal complaint.
- Decision maker must be impartial and no conflicts of interest/bias

After the Investigation

After the written investigation report is provided and BEFORE a determination of responsibility is made: 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 <u>each</u> party with the answers, AND

c) Allow for limited follow up questions from the parties

Written Questions

- Decision Maker makes determinations on relevance of 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

Basic Premises: Decision Makers

- Objectively evaluate all available evidence and determine what weight to give it.
- Weigh the evidence using a preponderance of the evidence standard--The evidence must show that its

more likely than not that the respondent is responsible for the alleged conduct

Making the Decision

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.) including description of standard of

review

- Findings of fact that support the determination

Making the Decision

- Statement of and rationale for the determination as to <u>each allegation</u>, including:
  - Determination of responsibility including details about why conclusion for each allegation is rendered
  - Any disciplinary sanctions for respondent—can be punitive if respondent is responsible.
  - Remedies should restore or preserve equal access to the

educational program or activity will be provided to complainant •

Include procedures and information regarding the permissible reasons for appeal

3 Grounds for appeal must be offered

- Procedural deficiencies
- Newly discovered evidence
- Bias or conflict of interest by investigator or decision maker •

Other grounds may be offered so long as they are done so on an equal basis.

- Decision maker on appeal is a different person from underlying matter.

Appeal Officer

Appeal officer is different from other roles in process.

No biases or conflicts of interest

Parties are notified of appeal and given opportunity to respond Appeal officer reviews underlying decision to ensure it meets standards for decisions (preponderance of the evidence, procedural requirements, no bias/conflict)

Issues a written decision including reasoning for decision that

that is simultaneously given to both parties. Decision is now final.

Title IX issues—overlap of misconduct

Graphic taken from a NSBA presentation on Title IX, 10-21-20

Title VII vs.

Title VII

Title IX Title IX

Creates an individual cause of action for an employee against public and private employers for discrimination generally.

EEOC/Arizona Civil Rights Division is fact finder.

Remedies are usually monetary.

Policy ACA

District is obligated as a recipient of federal funds to follow process for sexual harassment for complaints of students and employees.

District conducts investigation.

Remedies are non-monetary to restore parties to equal access.

Policy ACAA

Useful Title IX resources

USDOE YouTube Channel:
https://www.youtube.com/watch?v=i-BCnhUsJ4s

Maricopa Community College District Resources

https://district.maricopa.edu/consumer-information/title ix