

Training on the Title IX Final Regulations

FOR TITLE IX COORDINATORS, INVESTIGATORS, AND
DECISION-MAKERS

Gina Beltramo, Deputy County Counsel
July 2020

What is Sexual Harassment ?

34 CFR 106.30(a)

Sexual harassment is behavior on the basis of sex that satisfies one or more of the following:

- A school employee conditioning provision of an aid, benefit or service upon a person's participation in unwelcome sexual conduct, a.k.a quid pro quo;
- 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 educational program or activity; or
- Sexual assault, as defined in the Clery Act and Violence Against Women Act.

When is Title IX Triggered?

34 CFR 106.44(a)

Title IX covers sexual harassment that happens:

1. In an educational program or activity
 - Not just “on campus” situations
 - That includes locations, events and circumstances where the school exerts **substantial control** over the context of the alleged harassment and the person alleged to have committed the harassment, i.e. field trip, school bus, academic conferences, as well as any building owned or controlled by a student organization.
2. Against a person in the United States.

A school is obligated to respond when...

34 CFR 106.44(a)

1. It has **actual knowledge** of the sexual harassment or allegations;
and
2. The alleged harassment involves conduct that occurred within the school's own program or activity; and
3. The alleged harassment was perpetrated against a person in the United States.

Actual knowledge

34 CFR 106.30

WHAT IT IS

Notice of sexual harassment or allegations of sexual harassment to:

- The school's Title IX coordinator or any official of the school who has authority to institute corrective measures, or
- Any employee, in the elementary and secondary context.

WHAT IT IS NOT

- Imputation of knowledge or constructive notice – i.e. “should have known”
- When the only official of the school with actual knowledge is also the respondent

When is a School on Notice?

1. In all schools, when the Title IX coordinator has notice.
Reports can be made by mail, phone, or email and be verbal or written.
2. In all schools, whenever any school official with authority to institute corrective measures has notice of sexual harassment.
3. In elementary and secondary schools — telling any employee always puts the school on notice

How must the school respond?

34 CFR 106.44(a)

Without deliberate indifference.

- ❖ A school with actual knowledge of sexual harassment must respond in a manner that is not **deliberately indifferent**.
- ❖ A school is **deliberately indifferent** only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

After Actual Notice the Title IX Coordinator Must:

- Promptly and confidentially advise complainant of available supportive measures;
- Consider complainant's wishes re supportive measures
- Inform complainant that supportive measures are available with or without a formal complaint;
- Explain to complainant the process for filing a formal complaint.

After Actual Notice a School MUST:

34 CFR 106.44(a)

- Respond promptly
- Treat complainant and respondent equitably
- Offer supportive measures to complainant
- Follow a grievance process that complies with 34 CFR 106.45, if a formal complaint is filed

What is a formal complaint?

34 CFR 106.30(a)

- ❑ An official document alleging sexual harassment
- ❑ Filed by a complainant (or parent/guardian) or sometimes by the Title IX coordinator
- ❑ Alleging sexual harassment against a respondent
- ❑ Requesting investigation of the alleged sexual harassment

What are supportive measures?

34 CFR 106.30

Non-disciplinary, non-punitive, free individualized services offered as appropriate, as reasonably available, **to either party** before or after the filing of a formal complaint or where no formal complaint has been filed.

Supportive measures are intended to:

1. Restore or preserve equal access to the school's education program or activity, without unreasonably burdening the other party;
2. Protect the safety of the parties and the school's educational environment;
3. Deter sexual harassment.

Examples of supportive measures:

- 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 class locations
- Leaves of absences
- Increased security and monitoring of certain areas

The school must maintain as confidential any supportive measures provided, to the extent such confidentiality will not impair the ability of the school to provide those measures.

The Title IX Coordinator is responsible for coordinating the implementation of supportive measures.

Emergency Removals

34 CFR 106.44(c)

Nothing in the new regulations prevents a school from removing the respondent from campus or activities if the respondent poses an immediate threat to the safety of themselves or others. Such removal should follow the school's removal process.

Proper Notice of Allegations

34 CFR 106.45(b)(2)

Once there has been a formal complaint..

Written notice must be sent to all parties, which includes notice of:

- ❖ Grievance procedures
- ❖ Allegations
- ❖ Sufficient detail, e.g. identity of the parties, specific section of the school policy allegedly violated, conduct alleged, date and location of alleged conduct
- ❖ Sufficient time to prepare a response before any initial interview

The notice must also...

- ❖ Include a statement that the respondent is presumed not responsible, and that the determination is made at the conclusion of the grievance process;
- ❖ Inform the parties that they may request to inspect the evidence;
- ❖ Inform the parties of their right to an advisor of their choice;
- ❖ Inform the parties of any provision of the school's code of conduct that prohibits knowingly making false statements or submitting false evidence during the process.

This is different from the prior guidelines

The ARs and BPs do not address the notice issue, as addressed by **34 CFR 106.45(b)(2)**, which is detailed and comprehensive.

Mandatory Dismissal of a Formal Complaint

34 CFR 106.45(b)(3)

If alleged conduct, even if true, does not constitute sexual harassment, did not occur at school or school activity, or did not occur against someone in the US, the school **MUST** dismiss the complaint.

Discretionary Dismissal of a Formal Complaint

34 CFR 106.45(b)(3)

A school may dismiss a complaint at any time if:

1. Complainant notifies in writing withdrawal of the complaint, or
2. Respondent no longer a student or employee, or
3. School prevented from gathering evidence sufficient to reach a determination

The new grievance procedure to follow

34 CFR 106.45(b)(1)(i – x)

Previously, 34 CFR 106.8(b) stated that a school must adopt and publish its grievance procedures, which provide for fair and equitable resolution. The new regulation, 34 CFR 106.45(b), adds specific requirements for a grievance procedure.

The Grievance Process Requirement #1: Treat the Parties Equitably

- ✓ Provide remedies once a determination of responsibility has been made
 - Remedy must be designed to restore or preserve equal access to education
 - Remedies can be punitive or disciplinary
- ✓ Follow prescribed grievance process before imposing disciplinary sanctions or other actions against respondent
- ✓ Require an investigation of the allegations and an objective evaluation of all relevant evidence

The Grievance Process Requirement #2: Objective Evaluation of Evidence

- ✓ Consideration of both inculpatory and exculpatory evidence
- ✓ Credibility determinations cannot be based on a person's status as complainant, respondent or witness

The Grievance Process Requirement #3: Training, No Conflicts if Interest

- ✓ Any individual designated as a coordinator, investigator, or decision-maker may not have a conflict of interest or bias;
- ✓ The coordinator and investigator must receive training on sexual harassment, issues of relevance, and how to impartially conduct an investigation and grievance process;
- ✓ Any training materials used must not rely on sex stereotypes and must promote impartial investigation.

The Grievance Process Requirement #4: Presumption of Innocence

- ✓ Include presumption that respondent is not responsible for the alleged conduct until a determination has been made at the conclusion of the grievance process.

The Grievance Process Requirement #5: Prompt Timeframes

- ✓ Include reasonably prompt timeframes for:
 - Conclusion of grievance process
 - Resolving appeals

The OCR does not offer an idea of what “prompt” means. Therefore, what is reasonable and defensible is the best approach.

The Grievance Process Requirement #6: Description of Sanctions and Remedies

- ✓ Describes the range of disciplinary sanctions and remedies that may be implemented at the conclusion

The Grievance Process Requirement #7: Standard of Evidence

- ✓ States whether the standard of proof is
 - 1) Preponderance of the evidence, or
 - 2) Clear and convincing

The same standard must be used for all sexual harassment complaints.

The Grievance Process Requirement #8: Appeal Procedures

- ✓ Include the procedures and bases for appeal

The Grievance Process Requirement #9: Protection of Privileged Information

- ✓ Explain that the investigation and finding may not require, allow or rely upon questions or evidence protected by a recognized privilege

Examples of privileges:

- Attorney-client
- Doctor-patient
- Therapist-patient

Requirements of an Investigation

34 CFR 106.45(b)(5)(i – vii)

- ❑ Burden of proof and burden of gathering evidence rests on the school, not the parties
- ❑ Provide equal opportunity to present witnesses and other evidence
- ❑ Parties may discuss the allegations or gather/present relevant evidence

Requirements of an Investigation, cont.

34 CFR 106.45(b)(5)(i – vii)

- ❑ Parties must have opportunity to have others present during the grievance proceeding
 - Cannot limit the choice of an advisor or presence of an advisor in any meeting or proceeding;
 - However, the school may impose restrictions on participation of the advisor, so long as the restrictions are applied equally.
- ❑ Provide written notice of the date, time, location, participants, and purpose of all hearings, interviews, or other meetings to the party whose participation is invited or expected, with sufficient time for party to prepare.

Requirements of an Investigation, cont.

Inspection of the Evidence

34 CFR 106.45(b)(5)(i - x)

Each party must have the opportunity to review the evidence directly related to the allegations, including evidence the school does not intend to rely upon in reaching its determination.

- ❑ Prior to completion of the investigative report, the school must send to each party the evidence subject to inspection;
- ❑ The parties have at least 10 days to review and submit a written response;
- ❑ The investigator shall consider the response prior to completion of the report;
- ❑ All such evidence shall be made available at every hearing.

Investigative Report

34 CFR 106.45(b)(5)(i - x)

Create an investigative report that summarizes the relevant evidence and, at least 10 days prior to hearing or determination of responsibility, provide a copy to the parties for review and written response.

This is different from the prior guidelines

AR 1312.3 states that the complainant be provided an opportunity to present information contained in the complaint to the compliance officer, and should be notified of his/her opportunity to present evidence or information to support the allegations, but...

nothing in the AR speaks to whether the respondent has similar rights. **34 CFR 106.45** makes clear in numerous subsections that respondent's rights shall mirror those of complainant.

A Party's Chance to Ask Questions

34 CFR 106.45(b)(6)(ii)

Even without a live hearing...

- After the school has incorporated the parties' responses to the investigative report, the decision-maker **must** ask each party and any witnesses any relevant and follow-up questions, including those challenging credibility, **that a party wants asked.**
- The questions must exclude evidence of the complainant's sexual behavior or predisposition, unless
 - (1) it is offered to prove that someone else committed the alleged conduct, or
 - (2) it concerns specific incidents of the complainant's prior sexual behavior with respondent and is offered to prove consent.

This is different from the prior guidelines

AR 5145.7 states that evidence of past sexual relationships of the complainant may not be considered in an investigation except to the extent it may relate to the complainant's prior relationship with the respondent. However, **34 CFR 106.45(b)(3)** states that such evidence may also be used to prove consent or to prove someone else did the action(s) complained of.

What happens once a determination is made?

34 CFR 106.45(b)(7)

The decision-maker (who cannot be the Title IX Coordinator or investigator) must issue a **written** determination regarding responsibility, **simultaneously** to both parties.

The written determination must include:

34 CFR 106.45(b)(7)

- ❑ Identification of the allegations;
- ❑ Description of the procedural steps taken, from receipt of complaint through to hearing;
- ❑ Findings of fact to support the determination;
- ❑ Conclusions regarding application of the school's policies to the facts;
- ❑ A statement of, and rationale for, the result as to each allegation, including:
 - A determination regarding responsibility;
 - Any sanctions to be imposed; and
 - Whether remedies will be provided.
- ❑ The school's procedures and permissible bases for appeal.

This is different from the prior guidelines

AR 1312.3 itemizes what shall be included in a decision, which is not as exhaustive as what is mandated by **34 CFR 106.45(b)(7)**.

Appeals

34 CFR 106.45(b)(8)

Appeal must be offered on the following bases:

- Procedural irregularity that affected the outcome;
- New evidence not previously available that could affect the outcome;
- Conflict of Interest;
- Any other bases established by school.

Appeals Process

34 CFR 106.45(b)(8)

- ❑ Notify the other party in writing;
- ❑ Utilize new decision maker;
- ❑ Give each party an opportunity to submit written statement in support of or challenging the outcome;
- ❑ Issue written decision of appeal, with rationale;
- ❑ Provide decision simultaneously to both parties.

Informal resolution process

34 CFR 106.45(b)(9)

- ❖ May not be offered unless a formal complaint has been filed.
- ❖ At any time prior to reaching determination, the school may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication.
- ❖ May occur as long as the school provides written notice to the parties of:
 - The allegations;
 - The implications of an informal resolution;
 - Any consequences from participating in the informal resolution process.

Keeping the records

34 CFR 106.45(b)(10)

Records must be kept for **7** years.

A school must create, make available to the parties, and maintain for seven years records of:

- The investigation;
- Any appeal and result therefrom;
- Informal resolution, if any;
- All materials used to train coordinators, investigators and decision-makers;
- Actions taken in response to a report or formal complaint.

Keeping the records

34 CFR 106.45(b)(10)

Records of the actions taken in response to a report or formal complaint include:

- ❖ basis for school's conclusion that it's response was not deliberately indifferent
- ❖ documentation that school has taken measures designed to restore or preserve equal access to education/activity
- ❖ if supportive measures were not provided, why this was not clearly unreasonable in light of the known circumstances

This is different from the prior guidelines

1. AR 1312.3 states that the compliance officer shall maintain a record of each complaint and subsequent related actions, including the steps taken during the investigation. Yet there is no specific length of document retention, as there is in new **34 CFR 106.45(b)(10)**.
2. **34 CFR 106.45(b)(10)** is also more specific about the materials to be retained.
3. Nothing in the ARs states that the parties shall have access to all evidence related to the investigation, yet this is mandated by the new regs re the investigation process, and the record keeping regulation.

Notification of Coordinator and Policy

34 CFR 106.8(a - d)

- Each school must designate and authorize at least one Title IX Coordinator.
- The school must notify applicants for employment, students, parents/guardians, employees, and all unions, of the name/title, office address, email address, and telephone number of the employee(s) designated as the Title IX Coordinator.
- Contact information of Title IX Coordinator and the policy must be prominently displayed
 - On website
 - In each handbook

Notification of Policy & Procedure

34 CFR 106.8(a-d)

Each person notified must be told:

1. The school does not discriminate on the basis of sex
2. The requirement not to discriminate extends to admission and employment
3. Notice of the grievance procedure
4. Notice on how to report sexual harassment
5. Notice of how school will respond

Questions?

Any questions please contact Deputy Gina Beltramo
650-363-4789
gbeltramo@smcgov.org