

Winthrop Public Schools Title IX Training

August 2020

Title IX of the Education Amendments of 1972

Title IX protects people from discrimination based on sex in education programs or activities that receive Federal financial assistance, also known as “Recipients” [of Federal funding].

“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.”

Applies to elementary & secondary schools, post-secondary schools, charter schools, for-profit schools, libraries and museums.

Sexual Harassment

According to Title IX, sexual harassment is conduct on the basis of sex that meets one or more of the following:

- An employee of the District conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- 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 District's education programs or activities; or
- **“Sexual Assault”** or, an offense classified as a forcible or nonforcible sex crime; **“dating violence”** or, violence committed by a person who (a) is or has been in a social relationship of a romantic or intimate nature with the victim; and (b) where the existence of such a relationship shall be determined based on a consideration of the following factors: (i) the length of the relationship; (ii) the type of relationship; (iii) the frequency of interaction between the persons involved in the relationship; or **“stalking”** or 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.

Sexual Harassment

- A school will be liable if it acts in a way that is “deliberately indifferent” or in a manner that is “clearly unreasonable in light of the known circumstances.”
- Title IX applies to locations, events, and activities over which the school exercise substantial control.
- It does not apply to events that occurred outside of the United States.
- Complainant must be participating / attempting to participate in the school or activity at the time of filing.

Examples of Sexual Harassment

While it is not possible to list all circumstances that may constitute sexual harassment, the following are examples of prohibited conduct between students, employees, and obviously employees and students:

- Unwelcome sexual advances -- whether they involve physical touching or not;
- Sexual epithets, jokes, written or oral references to sexual conduct, gossip regarding one's sex life; comment on an individual's body, comment about an individual's sexual activity, deficiencies, or prowess;
- Displaying sexually suggestive objects, pictures, cartoons;
- Unwelcome leering, whistling, brushing against the body, sexual gestures, suggestive or insulting comments;
- Inquiries into one's sexual experiences, and
- Discussion of one's sexual activities
- Taking or posting of photographs, videos or images of a sexual nature without consent

Responding to Sexual Harassment

- Schools must respond to allegations of sexual harassment upon having “Actual Notice” of sexual harassment.
- A school has “Actual Notice” when *any* employee/agent learns of sexual harassment.
- The employee could witness the sexual harassment his/herself, learn of it from the victim, or learn of it through a third party.
- Any District employee with knowledge of an allegation of sexual harassment must report it to their supervisor or the Title IX Coordinator.

Title IX Coordinator

The Title IX coordinator is responsible for:

- Responding to allegations of sexual harassment
- Ensuring compliance with Title IX of the Education Amendments of 1972
- Publication of the policy
- Training of employees and the Title IX Team
- Ensuring compliance with the Grievance Process

The Title IX Coordinator's information must be published in your policy handbook and on your website.

Title IX Coordinator

The Title IX Coordinator must contact the alleged victim, or “the Complainant,” to gather preliminary information, offer “Supportive Measures,” and inform that person of the right to file a “Formal Complaint” against the alleged perpetrator, or “the Respondent.”

Formal Complaint

- Document filed by the Complainant or signed by the Title IX Coordinator requesting that the district investigate the allegation
- Initiates the Grievance Process
- Can be filed in person, by mail, or electronic mail
- Complainant may withdraw formal complaint any time.
- The District may dismiss a Formal Complaint for not qualifying as Sexual Harassment under Title IX.

Supportive Measures

- Non-disciplinary, non-punitive individualized services offered as appropriate and reasonably available
- Without fee or charge to the complainant or respondent
- Available regardless of filing of a Formal Complaint
- Designed to restore / preserve equal access to education and activities
- Protect safety and deter sexual harassment
- Do not *unreasonably burden* any other person
- District must maintain confidentiality of supportive measures to the extent possible

Examples of Supportive Measures

- Counseling
- Deadline extensions
- Course adjustments
- Schedule modifications
- Increased security in areas
- Mutual restrictions on contact

Implementing Supportive Measures

- School must consider the alleged victims requests
- The school must keep the confidential to the greatest extent possible
- Equally available to complainant and respondent
- Title IX Coordinator must document

Informal Resolution

Informal resolutions, such as mediation, may be offered to the Complainant and Respondent, in the discretion of the Title IX Coordinator, but not until after a Formal Complaint is filed and notice has been provided.

- The District must obtain written consent from the Complainant and Respondent to begin informal resolution.
- Either party can withdraw from informal resolution and the Grievance Process will resume.

Grievance Process

- Written Notice is provided to the Complainant and Respondent.
- The Formal Complaint is assigned a Decision-Maker and Investigator
- Decision-Maker, Investigator, and Title IX Coordinator must be properly trained, and free of conflicts and biases

Roles in the Grievance Process

- Title IX Coordinator – Oversees the process
- Investigator – Investigates the incident and writes a report
- Decision-Maker – Assesses the evidence and makes a finding of responsibility
- Appellate Decision-Maker – Decides appeal

Written Notice

- Provided Simultaneously
- Detail the allegations of sexual harassment
- Describe the Grievance Process
- Detail each party's right to:
 - Be presumed not responsible
 - Supportive measures
 - Choose an advisor (who may be an attorney), or have an advisor provided to them, who will accompany them throughout the process
 - Inspect and examine evidence
- Remind them of the prohibition against false statements and retaliation
- You cannot order a party to not discuss the complaint.

Investigations

A properly trained investigator must complete the investigation and author an Investigative report.

- Prior to any interviews with witnesses, the investigator must provide sufficient notice and time to prepare for the interview.
- Both parties and their advisors must have an opportunity to examine and inspect evidence.
- The Investigative Report will summarize the investigation and the relevant evidence discovered.
- Both parties will have 10 days before any hearing or determination of responsibility to respond to the report.

Questions Related to Previous Sexual Behavior

- These are strictly prohibited.
- Questions about a person's previous sexual history are irrelevant unless offered to prove consent or someone other than the Respondent committed the act.

Privileges

- Information protected by a legal privilege or doctor patient privilege is not accessible
- Neither party is allowed to seek, permit about, or allow the introduction of evidence that is protected by a recognized privilege.
- Individuals may waive their privilege, but not doing so must not be held against them.

Conducting an Effective Investigation

- Keep the Formal Complaint as a handy reference
- Plan your interviews (and give proper notice)
 - Who needs to be interviewed?
 - What should the order be?
 - What questions are necessary?
 - Do we need assistive technology / translators?
- Leave time for follow up.
- Avoid promises of confidentiality – you may not be able to keep it.

Conducting an Effective Investigation (cont'd.)

Interviews

- Make the person feel comfortable.
- Ask open ended questions—what, when, who, and where.
- Avoid leading questions.
- Interview one witness at a time.
- Remain engaged and interested, but objective.
 - Be careful not to affirm or reject a statement with your words or body language.

Conducting an Effective Investigation (cont'd.)

- Avoid asking about the allegations right away
- Develop a relationship
- Ask if the witness knows why they are there
- Let the witness finish answering questions
 - Circle back for the necessary details
 - Identification
 - Dates / Times
- Be able to decipher what this persona actually witnessed and what they heard or are speculating about.
- Ask if there is anyone else that you should speak with.
- Give them an opportunity to close out the interview by asking “Is there anything else I need to know?”
- Transition out of interview mode.

Conducting an Effective Investigation (cont'd.)

- Ask for and review documents, electronic records, or other physical evidence.
- It is important to preserve all relevant **physical evidence** or at least take a **photograph** if maintaining it is not practical or appropriate.
- Maintain a “chain of custody.” Document who has handled and examined the evidence and on what date.

Adversarial Process

- Title IX mandates that the District conduct an “adversarial process” or an opportunity for the parties to confront each other and present evidence.
- This can be done by conducting a “Live Hearing” or allowing for the “Submission of Questions.”

Submission of Questions

- The Complainant and Respondent have the opportunity to submit written questions that they want asked of any participant in the investigation.
- The Decision-Maker reviews the question to ensure it is relevant, and then asks it of the participant.
- The Decision-Maker will provide written decision on why he excluded a question for not being relevant.
- Limited follow up questions are allowed.

Live Hearings

- Hearings are optional for K-12 Schools.
- Each party's advisor is allowed to ask witnesses relevant questions.
- Upon request, technology may be used to separate parties during the hearing process to avoid confrontation.
- If a person does not submit to cross-examination, their original statement cannot be considered.
- The decision to not participate shall not be used against that person.
- Schools also have to create an audio or audiovisual recording, or a transcript, of any live hearing, and make it available to the parties for inspection and review.

Assessing the Evidence

- Each party is afforded the same consideration without bias.
- Do not speculate or consider anything that was not presented.
- Consider the presentation of witnesses—candid, guarded, responsive, evasive.
- Were the statements reasonable or unreasonable in light of the other evidence
- Did the witness have a good opportunity to observe?
- Consider potential motives for testimony and statements.
- Excluded questions, statements, answers are not evidence.
- Do not make up your mind until all of the evidence is presented.

Finding of Responsibility

- Any respondent found by a *preponderance of the evidence* to have committed sexual harassment shall be subject to discipline, including:
 - Detention
 - Exclusion of extracurricular activities
 - Suspension
 - Expulsion
 - Termination of employment
- Decision will simultaneously issue a written decision to both parties.

Written Determination

- Describe the allegations
- Procedural steps taken
- Findings of fact
- Conclusion reached
- Statement of rationale on responsibility
- Discipline to be imposed
- Remedial measures designed to restore or preserve equal access to education and access

Appeal

- There are Limited Grounds for Appeal:
 - Procedural irregularity
 - New evidence was not reasonably available at the time of determination
 - Conflict of interest or bias affected outcome
- Both, the Complainant and Respondent, shall have the right to appeal the decision.
- They must notify the Title IX Coordinator in writing.
- Both parties shall have an opportunity to write a statement supporting their position.
- Appeal shall be reviewed by a person that was not the original decision-maker.
- Appellate Decisionmaker shall issue a written decision.

Emergency Removals

- A school can remove a respondent from the school's education programs or activities on an emergency basis if the respondent poses an immediate threat to anyone's physical health or safety. There are additional requirements for emergency removal proceedings that schools should consider if they institute this process.
- If the respondent is a school employee, the final regulations don't prevent a school from placing an employee on administrative leave during the investigation.

Free Speech

- New Title IX regulations explicitly prohibit any sort of suppressions of free speech is not appropriate response to sexual harassment.
- These are protected by the First Amendment.

Training

- Training materials must be preserved and posted on the school's website.
- All Title IX Coordinators, mediators, decision-makers, and investigators must be trained.

Key Take-Aways

- Equal access to education
- Parties are treated equally
- Objective Evaluation of Evidence
- Presumption of Innocence
- Prompt Resolution (with delays for good cause)

Questions?