



Fagen Friedman & Fulfroft LLP

# 2020 Title IX Regulations: Title IX Coordinator Training

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- **Technical Issues:** If you experience technical issues, please let us know in the chat.
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# Title IX Coordinator

- Must be called Title IX Coordinator
- Must be identified (with name or title, address, phone, and email) in policy and on website
- Must meet with alleged victims of Title IX Sexual Harassment



# Title IX Coordinator

- Informs CP of availability of supportive measures and formal complaint process
- Decides whether to “sign” a complaint when the CP doesn’t want to file
- Coordinates implementation of supportive measures
- Ensures effective implementation of remedies
- Monitors ongoing compliance with Title IX



# Deadlines

- Website Posting Required by 8/14
  - Training materials used to train Title IX Team
  - Title IX Coordinator Information
  - Policy Language
  - Nondiscrimination Language
  - Title IX Sexual Harassment Grievance Process



# Robin's Report

- Email from AP
- Robin, a first-year soccer player, reported conduct that occurred against Robin's friend, Cameron, also a first-year soccer player



# Robin's Report

- Soccer orientation week
- Park across street from the school
- Two experienced student soccer players vs. Cameron



# Robin's Report

- Verbal harassment
  - Going to violate your mother
  - Asked to "smoke" (understood to be sexual) in exchange for starting position
- Grabbed Cameron by the neck and bent Cameron over; poked Cameron's anus over the clothes





# Robin's Report

- Coaches saw the incident
  - Laughed at first
  - Noticed Cameron looked shaken
  - Sternly reprimanded students in front of Cameron
  - Told Cameron if it happened again to report it
- Nonetheless, incidents kept occurring



# Robin's Report

- One (same) coach observed later incident; shook head and walked away
- Last day of orientation
  - Hazing ritual
  - Multiple students grabbed Cameron and two other rookies
  - Pulled down pants, poked anus with broomstick



# POLLING

**Is the conduct alleged "Title IX Sexual Harassment"?**

- ☐ **Yes – Quid Pro Quo by an Employee**
- ☐ **Yes – Hostile Environment**
- ☐ **Yes – Sexual Assault**
- ☐ **Yes – Hostile Environment & Sexual Assault**
- ☐ **No**
- ☐ **Can I get that definition again?**





# Title IX Sexual Harassment

- Employee quid pro quo
- Hostile environment (newly defined)
- Clery/VAWA "Big 4"





# Title IX Quid Pro Quo

**Definition:** An employee of the recipient conditioning an aid, service, or benefit of the recipient on an individual's participation in unwelcome sexual conduct

**New:** Only an employee (not a volunteer, another student, etc.)

**Codified:** Severity and harm presumed



# VAWA “Big Four”

Sexual Assault 20 U.S.C. 1092(f)(6)(A)(v)

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

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

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



# Sexual Assault under VAWA

## ■ Sexual Assault:

- Penetration without consent (rape)
- Fondling without consent
- Incest
- Statutory rape



# Title IX Sexual Harassment Hostile Environment

Unwelcome conduct determined by a reasonable person to be **so severe, pervasive, and objectively offensive that it effectively denies a person's equal access to the school's education program or activity**





# POLLING

**What if the only activity reported was the verbal taunting (nothing physical). Is the alleged conduct "Title IX Sexual Harassment"?**

- ☐ **Yes, severe, pervasive, and objectively offensive + effectively denies equal access**
- ☐ **No – not severe**
- ☐ **No – not pervasive**
- ☐ **No – not objectively offensive**
- ☐ **No – not effective denial of equal access**
- ☐ **How the heck should I know? I'm calling the lawyer.**



# POLLING

**If it's not "Title IX Sexual Harassment," what do you do? (best choice)**

- ☐ **Tell AP she can't do anything further because it is not Title IX Sexual Harassment.**
- ☐ **Tell AP to consider other policy violations (bullying, code of conduct).**
- ☐ **Tell AP to follow up with Cameron to seek more information.**
- ☐ **Ask AP if she's interested in a new position because yours is about to be free.**



# POLLING

**Thinking back to the original hypo... What do you do next?**

- ☐ **Contact Robin to obtain names of upper-class students to pull from the class**
- ☐ **Contact Robin to offer an opportunity to file a formal complaint and supportive measures**
- ☐ **Contact Cameron to offer an opportunity to file a formal complaint and supportive measures**
- ☐ **Run and hide as fast as I can!**



## Title IX Coordinator must promptly, **even if no Formal Complaint is filed:**

- Contact the Title IX Complainant to discuss the availability of “supportive measures”
- Consider the Title IX Complainant’s wishes with respect to supportive measures
- Inform the Title IX Complainant of the availability of supportive measures with or without the filing of a formal complaint
- Explain the process for filing a Formal Complaint

***New:***  
**Initial  
Response**



# Cameron's Report

- You tell the AP to meet with Cameron (**WRITE IT DOWN**)
- Cameron confirms all allegations



# POLLING

## What is the Best Supportive Measure to Offer?

- ☐ A mutual no contact order
- ☐ Counseling
- ☐ A unilateral no contact order
- ☐ Removing the students from classes shared with Cameron



# Cameron's Report

- Cameron wants the students removed from the team
- Cameron does not want to file a Formal Complaint
- Cameron begs not to named to the students



# POLLING

**Can you honor Cameron's confidentiality request?**

- ☐ **No, names must always be provided to the Respondent when a Complainant reports Title IX Sexual Harassment.**
- ☐ **No, because this warrants "signing" a formal complaint and Cameron must therefore be named.**
- ☐ **Yes, because removing the upper-class students is a supportive measure which must be offered with or without formal complaint.**
- ☐ **Yes, because confidentiality of a Complainant is always paramount in Title IX matters.**





# Signing a Formal Complaint

- Consider:
  - Pattern of alleged conduct
  - Involvement of violence, weapons, etc.
  - Seriousness of alleged conduct
  - Age of student harassed
- Title IX Coordinator does not become Complainant or party
- Decision to sign a Formal Complaint (or not?) reviewed for “deliberate indifference”



# Notices – Initial Response

## Initial Contact and Meeting with the CP

Notice to  
Complainant of  
Report of Title IX  
Sexual Harassment

Summary of  
Supportive  
Measures Meeting  
with the Title IX  
Complainant

Title IX Formal  
Complaint



# POLLING

**You can remove the upper-class students from school during the investigation as an "emergency removal".**

- ☐ True
- ☐ False



# Emergency Removals / Admin Leave

## Immediate emergency removal

(34 C.F.R. 106.44(c))

- Based on an individualized safety and risk analysis
- Necessary to protect a student or other individual from **immediate threat** to **physical health or safety**
- **Notice, opportunity to challenge** provided “immediately” provided the removal
- Consider other laws, e.g., “change in placement” under IDEA

## Employee administrative leave

(34 C.F.R. 106.44(c))

- Not prohibited  
Consider state law, board policy, handbooks and bargaining



# Remember State & Federal Law

- Additional process may be required for emergency removal to occur
  - Student discipline – state laws (e.g., long term suspension, expulsion)
  - Disability rights – federal and state law
  - Employee rights – law, policy, agreements



# Notices – Temporary Removal

Notice of Title IX  
Emergency  
Removal -  
Student

Notice of Title IX  
Administrative  
Leave -  
Employee



# POLLING

**Cameron presents a court order prohibiting the upper-class students from being at school. What do you do?**

- ☐ **Ignore it, because removing the students from school would be punitive or disciplinary, and that's not possible until after a determination is made.**
- ☐ **Enforce it and do not get involved – this is between Cameron and the upper-class students.**
- ☐ **Enforce it and tell the upper-class students that they should raise any concerns with the court.**



# POLLING

**Cameron suggests that they do a talking circle to address the conduct. Can this be done?**

- ☐ **Yes, because the new Title IX regs now clearly allow informal resolution.**
- ☐ **Yes, as long as the talking circle facilitator has been trained on Title IX.**
- ☐ **No, because Cameron has not filed a formal complaint.**
- ☐ **No, because this severe of sexual misconduct can never be addressed through informal resolution.**





# Formal Complaint – Next Steps

- Written notice to all known parties
  - Grievance process
  - Allegations
  - Respondent presumed not responsible
  - Right to advisor
  - Right to inspect/review evidence
  - Notice of provision on false statements



# Notice - Allegations

## Notice of Allegations

Notice of  
Allegations of Title  
IX Sexual  
Harassment by a  
Complainant

Notice of  
Allegations Upon  
Signing of Formal  
Complaint by the  
Title IX Coordinator



# Notices – Informal Resolution

## Informal Resolution Process

Offer of Title IX  
Informal  
Resolution  
Process

Notice of Closure  
of Title IX Informal  
Resolution  
Process



# POLLING

**Cameron and the upper-class students reach an agreement in informal resolution. Can the Title IX process ever recommence?**

- ☐ **Yes, but only if the upper-class students fail to comply with its terms.**
- ☐ **Yes, but only for allegations not resolved in informal resolution.**
- ☐ **No, because you can only recommence an investigation before a resolution is reached.**



# Let the investigation begin....

- The Title IX Investigator is ready to investigate
- Must send notice to parties and witnesses



# Notices - Interviews

## Notice of Interview

Notice of Title IX  
Interview or  
Meeting with Title  
IX Party

Notice of Title IX  
Interview or  
Meeting with Non-  
Party Witness



# Witness – Devon

- Devon, witness
- Also on the soccer team, upper class student



# Witness – Devon

- Sexual assault by classmate on spring break trip last year
- Sexual harassment by classmate via Snapchat over the summer (off-campus, not on school tech or hours)
- A teacher asked Devon for a naked photo and Devon shared one





# POLLING

**In which case does the school have jurisdiction?**

- ☐ **None**
- ☐ **All**
- ☐ **Spring break conduct**
- ☐ **Summer Snapchat incident**
- ☐ **Teacher photo incident**



# POLLING

## What if Teacher resigns during the investigation?

- ☐ **Contact the AP and direct them to handle the issue at the building level**
- ☐ **Send both parties a formal dismissal notice**
- ☐ **Meet with Devon to discuss supportive measures for the remainder of time at the school**
- ☐ **All of the above**
- ☐ **None of the above**



# POLLING

**Teacher rescinds resignation, but Devon calls to ask to withdraw the formal complaint. What do you do?**

- ☐ **Respect Devon's autonomy and wishes by dismissing the complaint.**
- ☐ **Tell Devon you will not dismiss the Complaint because there is an ongoing risk to other students.**
- ☐ **Require that Devon submit the request in writing and then dismiss the Complaint.**



# POLLING

**It turns out that the teacher photo incident occurred 3 years ago before Devon was a student in your district. What do you do?**

- ☐ **Dismiss the complaint because it would be impossible to gather enough evidence to reach a determination.**
- ☐ **Continue with the complaint because Devon is currently a student.**
- ☐ **Dismiss the complaint because Devon was not a student at the time the conduct occurred**



# POLLING

**What if the teacher wants to bring a priest to investigation meetings about Devon's complaint?**

- ☐ **The teacher can bring any advisor to any investigatory meeting.**
- ☐ **The teacher can bring an advisor, but it must be a union rep or a lawyer.**



# POLLING

**Teacher brings an attorney to the investigative interview, and the attorney jumps in every time a question is asked. Can you kick out the advisor and continues the meeting?**

- ☐ **No, parties in Title IX matters have the right to an advisor at every meeting.**
- ☐ **No, you should remind the advisor of the rules of decorum in place and warn that the advisor will be removed if the rules are not followed.**
- ☐ **Yes, because you are allowed to have rules of decorum and if an advisor will not follow them there is no requirement to delay the investigation.**



# Notices – Advisor Conduct

## Notice to Advisors



Advisor  
Conduct  
Expectations



# POLLING

**You're investigating Devon's complaint, when Devon ghosts you completely. Do you have to continue the complaint?**

☐ **Yes**

☐ **No**





# Dismissals



## **Mandatory if conduct alleged:**

- Not sexual harassment, even if true
- Did not occur in the school's program or activity
- Did not occur in the United states

\*\*can still address under non-Title IX policy

## **Permissive if:**

- Complainant requests to withdraw in writing
- Respondent's enrollment or employment ends
- Specific circumstances prevent school from gathering evidence sufficient to reach a determination (e.g., passage of time, lack of cooperation by complainant)



# Notices - Dismissal

## Notice of Dismissal

Notice of Mandatory  
Dismissal of  
Allegations of Title IX  
Sexual Harassment

Notice of Permissive  
Dismissal of  
Allegations of Title IX  
Sexual Harassment



# So the investigation is done....

- Must share evidence with both parties and advisors simultaneously with 10 days to respond before writing the report
  - Review/consider responses
  - Share responses with the other side



# Notices – Review of Evidence

## Sharing of Evidence

Notice of  
Directly Related  
Evidence

Notice of Other  
Party's Written  
Response to  
Evidence



# Investigative Report

- Must fairly summarize relevant evidence
- Must be provided to both parties and their advisors simultaneously at least 10 days prior to a hearing (if applicable) or other time of determination
- Transmit report and any party written response(s) to the Decisionmaker



# Notices – Investigative Report

## Investigative Report

Title IX Investigative  
Report

Notice of  
Investigative Report

Notice of Other  
Party's Written  
Response

Transmittal Cover  
Letter to  
Decisionmaker at  
Conclusion of  
Investigation



# Decision

- Decisionmaker (“written cross”)
- Written determination



# Appeal Notice

- Upon receipt of an appeal, the Title IX Coordinator must notify the other party/parties of the appeal
- Both parties must be given an opportunity to submit a written statement for or against the appeal





# Back to Robin

Let's assume Cameron doesn't want to file a complaint....



# POLLING

## Can Robin file a complaint?

- ☐ **Yes, because Robin's education could have been impacted by the climate of sexual violence on Robin's sports team.**
- ☐ **No, because Robin would have to have Cameron's permission to file a complaint on Cameron's behalf.**
- ☐ **No, because there is no allegation of Title IX Sexual Harassment perpetrated against Robin.**



# **Bias, Conflicts of Interest, and Other Fairness Concerns**



# Bias, Conflict, Prejudgement

The Title IX Coordinator must not have a conflict of interest or bias for or against Complainants or Respondents generally or for or against any individual Complainant or Respondent. And that they not prejudge any matter before them.



# Bias

- Must not rely on sex stereotypes such as:
  - Women are “asking for it” based on actions or clothing
  - Men cannot be sexually assaulted
  - Women only decide they were assaulted after the fact due to regret or embarrassment
  - Men are more likely to be sexual aggressors
- Consider intersection of sex stereotypes with race, ability, sexuality, and gender identity



# Conflict of Interest

- Flexibility to choose employees or outsource adjudication functions
- No *per se* prohibited conflicts of interest when using school employees or individuals with histories of working in field of sexual violence as decisionmaker
- Caution against using generalizations to identify conflict of interest



# Pre-Judgment

Tips for avoiding pre-judgment of facts:

- Each case is fact-specific
- Keep an open mind
- Listen to facts presented



# Recordkeeping/File Maintenance





# Recordkeeping Essentials

- Overview of Required Recordkeeping
- File Checklist



# Questions?





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