



# Title IX

## Guidance for School Leaders

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# Definition of Sexual Harassment

- Sexual harassment is:
  - Conditioning an aid, benefit, or service on an individual's participation in unwelcome sexual conduct (*quid pro quo*)
  - Unwelcome sexual behavior determined by a reasonable person to be **so severe, pervasive, and objectively offensive** that it *effectively denies a person equal access to a program or activity* offered by the district
  - “Sexual assault,” “dating violence,” “domestic violence,” or “stalking,” as defined by federal statutes known as the Clery Act and the Violence Against Women Act (VAWA)

# Quid Pro Quo



- Generally, conditioning a benefit or aid offered by the district on acquiescence to a sexual advance
- Examples
  - A teacher who conditions a grade on a sexual favor
  - An administrator who conditions a promotion on continuing a dating relationship
  - A school board member who conditions his or her vote on allowing sexual advances

# Effective Denial of Equal Access

- Unwelcomed sexual behavior a reasonable person determines is:
  - So “severe,” “pervasive,” and “objectively offensive”
  - That it effectively denies a person equal access to a program or activity offered by the district

This definition needs to be unpacked

# Effective Denial of Equal Access

- Does this mean a person's "total or entire educational access has been denied?"
  - No. Complainants need not have "dropped out of school, failed a class, had a panic attack or otherwise reached a "breaking point" or exhibited trauma symptoms.
  - Schools cannot turn away a complainant because they are "not traumatized enough."

# Effective Denial of Equal Access

- Examples may include:
  - Skipping class to avoid the harasser
  - Decline in GPA
  - Difficulty concentrating in class
  - Quitting a team or other extracurricular activity
- Complainant need not have “already suffered loss of education before being able to report sexual harassment” and while examples are illustrative, “no concrete injury is required” to provide an effective denial of equal access

# Effective Denial of Equal Access - Hypotheticals

- A teacher who:
  - Asks a female student who is in a bad mood if “it’s that time of the month”
    - Inappropriately touches a female student’s upper inner thigh
- A female student or group of female students:
  - Who, daily, tease a male student about his sexual orientation in the cafeteria, causing the student to avoid lunch
  - Who frequently squeeze a male student’s bottom and call him sexy. It bothers him and he’s told them to stop, but it hasn’t really impacted his daily life or education
- A male student snaps a female student during class, telling her she “looks hot today” and asking her on a date. The female student is deeply uncomfortable because she has a history of trauma and starts skipping class.



# Clery Act and VAWA

- “**Sexual Assault**” is an offense, classified as forcible or nonforcible sex offense by the FBI’s uniform crime reporting system
- **Forcible Sex Offenses**
  - Forcible Rape, including where victim is incapable of giving consent because of age, or temporary or permanent mental or physical incapacity
  - Forcible Sodomy, similarly-defined
  - Sexual Assault with an Object, similarly-defined
  - Forcible Fondling, defined as forcibly touching of private body parts of another for sexual gratification, similarly-defined
- **Nonforcible Sex Offenses**
  - Incest
  - Statutory Rape. In Michigan, the age of consent is 16. However, statutory rape is defined to include consensual sex between teachers and students who are younger than 18.

# Clery Act and VAWA

- **“Dating Violence”** is 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 the relationship is determined by considering the following factors:
    - The length of the relationship
    - The type of relationship
    - The frequency of interactions

# Clery Act and VAWA

- **“Domestic Violence”** includes 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 Michigan domestic or family violence laws, or by any other person against an adult or “youth” victim who is protected from that person’s action under Michigan domestic or family violence laws
- **“Stalking”** is engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others; or, suffer substantial emotional distress

# Key Terms

- *Complainant* = an individual who is alleged to be the victim of conduct that could constitute sexual harassment
- *Respondent* = an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment

# Actual Notice - Definition

- A school district is deemed to have actual notice of alleged sexual harassment if *any* school district employee has reason to believe an employee or student has been sexually harassed
- This standard is **significantly broader** than the actual notice standard established in previous court cases involving Title IX

# The Title IX Coordinator

- Every school district is required to appoint a Title IX Coordinator, whose job title includes the words “Title IX Coordinator”
- Every district is required to post the Title IX Coordinator’s contact information (i.e., office location, telephone number, and email address) on its website, to publish the contact information in all catalogues and handbooks
- Districts are also required to post Title IX training on their websites



# Title IX Coordinator's Duties

- To oversee the District's compliance with Title IX
  - Respond to any report of sexual harassment against any District employee or student
  - Identify and offer appropriate supportive measures to **both** Complainant and Respondent
  - Oversee and/or participate in the resolution of any formal complaint of sexual harassment according to the District's grievance procedure
  - Ensure appropriate training has been provided and documented

# Responding to Reports of Sexual Harassment

- Reports of sexual harassment may be verbal or written and may be received at any time
- Any employee who has independent knowledge or receives a report of conduct that qualifies as sexual harassment (or discrimination) is required to report that information to a Title IX Coordinator
- Upon receiving a report, the Title IX Coordinator must:
  - Contact Complainant as soon as practicable
  - Notify Complainant of his/her/their right to file a formal complaint and explain the grievance process
  - Discuss and implement “**supportive measures**”



# Supportive Measures

- Title IX was enacted to prevent sex discrimination and harassment from adversely affecting access to educational opportunities
- Supportive measures should restore or ensure continued access to educational opportunities, must be free to Complainant, and may not be punitive or unreasonably burden Respondent
- Non-exclusive examples of supportive measures include: **no-contact orders, referrals to victim advocacy resources, counseling, or health services; academic support; course modifications; schedule changes; transfers; housing changes; increased security and monitoring**
- The Title IX Coordinator must consider, *but is not bound by*, Complainant's wishes

# Temporary Removal



- The temporary removal of a Respondent-student is **not** a supportive measure
  - A Respondent-student may be removed based on an individualized assessment that he/she poses an **immediate** threat to the *physical* **health or safety** of Complainant or others
  - Due process must follow immediately
- A Respondent-employee may be placed on a temporary administrative leave
- If a special education student or 504 student, they may be subject to additional protections

# Formal Complaint Response

- “Formal Complaint” may be filed by Complainant or Title IX Coordinator
- The District must use grievance procedure to resolve *every* formal complaint
- Specific steps for investigating, dismissing, and determining responsibility in formal complaint

# Dismissals

- The Title IX Coordinator *must* dismiss a formal complaint if:
  - The allegations do not establish sexual harassment even if they are true
  - The allegations did not occur in connection with the District's programs or activities
  - The allegations did not occur in the United States
    - Need to document basis for dismissal
- The Title IX Coordinator *may* dismiss a formal complaint if:
  - Complainant requests dismissal
  - Respondent's employment with or enrollment in the district ends
  - Specific circumstances prevent the district from gathering sufficient relevant evidence to reach a final decision (e.g., passage of time, unavailability of witnesses or other information)

# Dismissals – Settings that Fall Within Ida’s Program or Activities

- The following settings are considered “within the education programs or activities” of Ida Public Schools
  - Buildings or other locations that are part of the school’s operations, including remote learning platforms;
  - Off-campus settings if the school exercised substantial control over the respondent and the context in which the alleged sexual harassment occurred;
    - Did the District fund, promote or sponsor the event or circumstance where the harassment occurred?
  - Off-campus buildings owned or controlled by a student organization officially recognized by a post-secondary school, such as a building owned by a recognized fraternity or sorority

# Dismissals - Hypotheticals

- Female student offended after male student told her in class that she looked “sexy”
- Student sexually assaulted by another student over the weekend at a party
- After teacher resigns, current student complains that the teacher told her that he would “help her out” on her grade if she went out with him

# Dismissals - Other Remedial Measures

- If Complaint is dismissed before investigative resolution, consider whether there are other remedial measures that would be appropriate to remedy the effects of harassment or prevent recurrence;
  - Climate checks
  - Sexual Harassment Training
  - Increased security or monitoring
  - Policy/procedure revision
  - Redress educational impact
  - Investigate under other Board Policy or Code of Conduct

# Informal Resolution

- Informal resolution may consist of the following, as well as other informal resolution procedures:
  - A written agreement, facilitated by the Title IX Coordinator or others
  - Restorative practices
  - Facilitated mediation
- Once a formal complaint is filed, the District may not informally resolve allegations of sexual harassment unless:
  - Complainant and Respondent have been advised of their rights and the circumstances in which informal resolution may preclude resumption of a formal complaint investigation
  - Complainant and Respondent have voluntarily consented to informal resolution, in writing
  - The Complaint is not against an employee



# Formal Complaint Response – General Requirements

- **Required elements for grievance procedures:**
  - Treat parties equitably - No bias or conflict of interest for Title IX Coordinator, Investigator or Decision-maker
  - Reasonably prompt timeframes
  - Notice to Parties
    - Information about charge and grievance procedure, including informal resolution
    - Presumption Respondent is not responsible
    - Right to an “advisor of choice”
    - Consequence for knowingly making false statement

# Formal Complaint Response - Investigation

- **Required elements for grievance procedures:**
  - Investigation
    - Burden is on the Investigator, not the parties
  - **Objective** evaluation of all evidence
    - Each party has equal opportunity to present witnesses and evidence
    - Interview parties and relevant witnesses
      - Advance written notice to parties required
    - Gather **relevant** evidence
  - No breach of privilege without waiver
  - Parties have opportunity to review and respond to evidence “directly related” to the allegations raised in formal complaint 10 days before Investigation Report
  - Prepare and distribute written Investigation Report that fairly summarizes the evidence at least 10 days before determination of responsibility

# Formal Complaint Response - Determination

- **Required elements for grievance procedures (cont):**
  - Determination of Responsibility
  - Opportunity to submit written **relevant** questions to other party and witnesses
    - Includes limited follow up
  - Rape Shield – sexual history only “relevant” in limited circumstances
    - Sexual behavior with Respondent to prove consent
    - Prove that someone other than Respondent committed complained of conduct
  - The standard of evidence Ida applies is “a preponderance of the evidence”
    - Evidence on one side of a question is more convincing than the evidence on the other side
    - This concept must be distinguished from the quantity of the evidence. For a variety of reasons, one witness may be more convincing than two others
  - Written Determination of Responsibility

# Formal Complaint Response - Appeal

- **Required elements for grievance procedures (cont):**
  - Appeal Process
    - Complainant or Respondent may appeal the Decision-Maker's Decision within three days
  - Bases for Appeal:
    - Procedural irregularity affecting the outcome
    - Newly acquired evidence not previously available
    - Bias or conflict of interest on the part of the Investigator or Decision-Maker

# Retaliation

- Retaliation is broadly prohibited by the new regulations
- “For the purpose of interfering with Title IX rights” or “because the person has participated or refused to participate in any manner in a proceeding under Title IX regulations”

# Confidentiality

- All information connected with a report must be treated as confidential and only shared with individuals as necessary for conducting the investigation, providing supportive measures, or otherwise carrying out appropriate District functions
- CANNOT prohibit parties from discussing complaint allegations
- If individual requests no investigation/discipline, Title IX Coordinator should provide information/supportive measures and evaluate whether request may be honored without threat to educational environment
- If Title IX Coordinator proceeds, individual has no obligation to participate

# Recordkeeping



- Records related to alleged sexual harassment must be maintained for a minimum of seven (7) years
  - All records ... investigation records, disciplinary sanctions, remedies, appeals, supportive measures, etc.
  - Training records

# Hypothetical





# Hypothetical

Harmony High School marching band camp is a week-long event that takes place at a privately owned facility near Jackson, Michigan. The camp is voluntary, but the band director encourages members to participate. The cabins are segregated by sex.

Jake, who plays trumpet, and Emily, a percussionist, are 16 year old Juniors. They dated for two years but broke up two weeks before camp started.

The third night, several students, including Jake and Emily, get high after the adults go to sleep. Emily gets higher than she intended. Jake and Emily walk into the woods, hand-in-hand. The other kids go back to their cabins.

Emily returns to her cabin disheveled and sobbing, claiming she was raped by Jake. One of her cabin-mates reports this to the band director who reports to the Title IX Coordinator, as required by School District policy. The band director also takes Emily to the hospital.

# Hypothetical

The Title IX Coordinator contacts Emily to ascertain appropriate supportive measures and determine whether she wants to file a formal complaint. She does. The Title IX Coordinator also contacts Emily's parents. Emily's parents, livid, insist that Jake be removed from the marching band and expelled from school. The Title IX Coordinator removes Jake from school and marching band pending investigation of Emily's complaint.

The Title IX Coordinator decides to do the investigation herself. The Title IX Coordinator interviews Emily.

# Hypothetical

Emily states:

- She was high and doesn't remember everything that happened;
- She remembers:
  - Walking into the woods with Jake;
  - Making out with Jake;
  - Telling Jake to stop because they had broken up;
  - Jake on top of her, engaging in intercourse against her will; and,
  - Going to the hospital.
- She does not remember returning to her cabin.

# Hypothetical

The Title IX Coordinator also interviews Jake. Jake states:

- He was high but remembers what happened;
- Emily was also high, but acting normal;
- They made out;
- She started to perform oral sex on him then stopped, saying it was wrong because they had broken up;
- They laid next to each other for a while and talked;
- Without saying anything, she leaned over, kissed him and they started making out again;
- Making out led to sex without another word being spoken;
- The sex was no different than dozens of times when they were dating; and,
- Suddenly, she pushed him off, jumped up, grabbed her clothes, and starting running toward her cabin.
- He started to follow her but changed his mind and walked back to his cabin.

# Questions – Hypothetical

- Does the Title IX Coordinator have the authority to investigate this case, which occurred off School District premises and on private property? If so, why?
- Can/should the Title IX Coordinator report this matter to the police? Does a CPS report need to be made?
- Should the Title IX Coordinator have removed Jake from school or marching band?
- Is Jake's statement about previous sexual experiences with Emily relevant?
- The School District has adopted a “preponderance of the evidence” standard for Title IX investigations. If, at the end of the day, the Decision-Maker determines the evidence is perfectly balanced what should be her conclusion?

# Questions – Hypothetical

- How can the Decision-Maker resolve a case when Claimant says one thing and Respondent says another (i.e., he said – she said)? What factors may the Decision-Maker not take into account when making a credibility determination?
- Assume the Decision-Maker concludes Jake is responsible for sexual harassment.
  - What is the appropriate penalty?
- Assume the Decision-Maker concludes Jake is not responsible for sexual harassment. How should the Title IX Coordinator address the inevitable concerns that will be raised by Emily and her parents?

# Questions?



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