

Title IX for Investigators

Part 1: Title IX Investigations

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Today's To Do List:

- ▶ Overview of Title IX regulations
- ▶ Discuss District's obligation under TIX
- ▶ Define Sex Discrimination per TIX
- ▶ Discuss Investigator Role and Conflicts of Interest
- ▶ **CCSD TIX Standard Operating Procedures**
- ▶ Case Study

2020 Title IX Regulation Changes

- ▶ Released on May 6, 2020, by Department of Education.
- ▶ **2083 pages of regulations and guidance to review.**
- ▶ Extremely prescriptive changes focusing primarily on due process for Respondents through “grievance process requirements”.
- ▶ Regulations took full effect on August 14, 2020.
- ▶ Regulations amend the Code of Federal Regulations and are enforceable by OCR.
- ▶ Obama administration changes to Title IX were “guidance” from OCR.
- ▶ 2020 changes are codified - have the force of law.

Major Impact of Regulation Changes on School Districts

- ▶ Revision of policies
 - ▶ Title IX specifically defined as cases alleging sexual harassment, sexual assault, stalking, dating/domestic violence.
 - ▶ Extensive training required of investigators, Title IX Coordinators and decision-makers.
 - ▶ Training must be posted on the District's website.
 - ▶ Must adopt the newly codified definition of sexual harassment.
 - ▶ Must conduct investigation based on prescriptive requirements in the regulations.

Title IX of the Education Act

- ▶ “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.”

Sexual Discrimination/Harassment under new TIX Regs

- ▶ Any District employee engages in ***Quid Pro Quo*** harassment;
- ▶ Any instance of **sexual assault** (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA);
- ▶ Any unwelcome conduct that a reasonable person would find so **severe, pervasive, and objectively offensive** that it denies a person equal educational access.
- ▶ **Retaliation is strictly prohibited by the regulations.**

Quid Pro Quo

- ▶ **“This for that”**
- ▶ Submission or rejection, explicitly or implicitly, as a term, condition or basis for academic, employment or activity or program participation, i.e. you scratch my back, I scratch yours...
- ▶ Examples of this type of harassment can include:
 - ▶ **A supervisor requesting sexual favors as a condition for hiring, promotion, advancement, or opportunities.**
 - ▶ **A manager threatening to terminate, transfer, demote, or otherwise adversely affect an employee’s work life if sexual favors are not given or continued.**
 - ▶ **A teacher promising or giving a student a higher grade because of real or expected sexual favors.**
 - ▶ **A Coach benching a student for refusing to engage in sexual conduct.**
- ▶ NM House Bill 128 requires mandatory reporting of sexual abuse and other requirements.

Elements of Sexual/Gender-Based Harassment

- ▶ Unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it denies a person equal educational access. **See Hostile Environment.**
- ▶ Reasonable Person is a hypothetical individual who approaches any situation with the appropriate amount of caution and then takes sensible action. It is an objective test used in deciding whether a person's actions are appropriate under the circumstances.
- ▶ Hostile Environment is created by unwelcome conduct determined by a reasonable person, placed in a substantially similar situation, to be so severe, pervasive, **and/or** objectively offensive that it effectively denies a person equal access to the District's education program or activity.
- ▶ **Currently, Title IX requires that the conduct meet all three factors - severe, pervasive and persistent - in order to be considered discriminatory conduct.**

Sexual Assault

Sexual Assault is any attempted or actual sexual act directed against another person, **without consent** of the complainant, including instances where the complainant is incapable of giving consent.

- ▶ Any attempted or actual sexual act directed against another person, **without consent**, including instances where the complainant is incapable of giving consent. i.e. intellectual disability
- ▶ Rape is the penetration, no matter how slight, of the vagina or anus, with any body part or object, or oral penetration by a sex organ of another person, **without the consent** of the complainant.
- ▶ Fondling is the touching of the private body parts of another person for the purpose of sexual gratification, **forcibly and/or against that person's will** (without the consent of the complainant), including instances where the complainant is **incapable of giving consent** because of the complainant's age or youth or because of the complainant's permanent or temporary mental incapacity.
- ▶ Incest is sexual intercourse between person who are related to each other within the degrees wherein marriage is prohibited by law.
- ▶ Statutory Rape is sexual intercourse with a person who is under the statutory age of **consent**.
- ▶ All offenses are applicable to all genders.

Dating & Domestic Violence

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 complainant; and where the existence of such relationship shall be determined based on a consideration of the length of the relationship, the type of relationship, frequency of interaction between the persons involved in the relationship.

Domestic Violence is violence committed:

- ▶ By a current or former spouse or intimate partner of the complainant;
- ▶ By a person with whom complainant shares a child in common;
- ▶ By a person who is or has cohabitating with complainant, as a spouse or intimate partner;
- ▶ By a person similarly situated to a spouse of complainant under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred; or
- ▶ By any other person against an adult or youth complainant who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.

Stalking

Stalking is a course of conduct directed at a specific person that would cause a reasonable person to:

- ▶ Fear for the person's safety or the safety of others; or
- ▶ Suffer substantial emotional distress.

For the purposes of this definition:

- ▶ Course of conduct means two or more acts.
- ▶ Reasonable person means a reasonable person under similar circumstances and with similar identities to the complainant.
- ▶ Substantial emotional distress means significant mental suffering or anguish that may, but does not necessarily require medical or other professional treatment or counseling.

CCDS's Obligation/Response Under TIX

- ▶ The District must respond promptly to Title IX sexual harassment in a manner that is **not deliberately indifferent**, which means in a way that is not clearly unreasonable in light of the known circumstances.

CCSD's Obligation under TIX

- ▶ **Stop** the Reported Conduct
- ▶ **Prevent** it Recurrence
- ▶ **Remedy** its Effects
- ▶ **Hold Accountable** through
Corrective or Disciplinary
Action

Privacy & Confidentiality

- ▶ These cases may not be discussed outside your role as an investigator.
- ▶ Title IX trumps FERPA, so information/evidence/sanctions is required to be shared among the Parties.
- ▶ Investigators must recuse if they have a real or perceived conflict of interest.
 - ▶ Perceived conflicts may be worse - you can work around real conflicts.

What is a conflict of interest?

- ▶ Any time that an Investigator has a personal interest (whether actual, potential or perceived) that conflicts with the interests of the Parties.
- ▶ A conflict of interest challenge to the investigation is avoided by not having a conflict or the appearance of a conflict.
- ▶ Be honest about any conflicts or perceived conflicts from the beginning of the process.

CCSD Title IX Process must include:

- ▶ Receiving & processing reports/complaints of unlawful discriminatory conduct.
- ▶ Offering supportive measures, discussing options and wishes of **Complainant** to file a formal complaint and contact/assistance contacting law enforcement when requested/necessary.
- ▶ Functioning as neutral, objective fact finders.
- ▶ Conducting investigations or facilitating informal resolutions, when warranted.
- ▶ Ensuring the investigation is prompt and equitable to all parties.
- ▶ Ensuring a determination is rendered by a neutral and objective decision-maker.
- ▶ Implementing any sanctions rendered, post determination/appeal.
- ▶ Continuing supportive measures as needed.

What is Actual Knowledge?

- ▶ The District has “actual knowledge” of discriminatory conduct when notice of sexual harassment or allegations of sexual harassment are made to the Title IX coordinator or any District official/employee who has the authority to institute corrective measures.
- ▶ All CCSD employees are mandated reporters for the purposes of Title IX.

Supportive Measures

- ▶ Offered to both Complainant and Respondent
- ▶ Referral to Counseling and/or medical
- ▶ No Contact Orders issued
- ▶ Academic Accommodations
- ▶ Transfer classes/schools
- ▶ Job Modification
- ▶ Increased Monitoring, Supervision, Security

What about Special Education Students?

- ▶ Special Education students can be found responsible under Title IX.
- ▶ IDEA and Title IX are two voluminous and parallel running federal laws.
- ▶ Always check to see if the student is a special education student.
- ▶ If a student has an IEP, notify the case manager that the student is a party to a Title IX investigation.
- ▶ Determine if accommodations are required for the student to meaningfully participate in the investigation.
- ▶ Proceed with investigation.
- ▶ If special education student found responsible, must conduct an MDR prior to the administration of sanctions.

Investigation Process

Procedures include:

- ▶ Complaint;
- ▶ Intake;
- ▶ Dismissals of complaints/allegations, *if/when warranted*;
- ▶ Written Notice of Allegations;
- ▶ Interviews;
- ▶ Informal resolution process, *if/when warranted*;
- ▶ Inspection of evidence/records & draft report;
- ▶ Process draft report to parties for inspection, questions and response;
- ▶ Final report and evidence;
- ▶ Appeals.
- ▶ **Implementation of Sanctions.**
- ▶ **Implementation of Remedies.**

Determining Title IX Jurisdiction

Two-pronged test:

- ▶ Does the District have control over the harasser; and
- ▶ Does the District have control over the context of the harassment (on our property, in our programs, on land we lease or control, or at events we sponsor).

The District reserves the option to take jurisdiction of off-campus misconduct when deemed necessary due to the involvement and/or impact on students and/or employees.

Notice of Allegations

- ▶ Must be in writing and state all rights afforded to the Parties. (use template)
- ▶ Provided simultaneously to both parties.
- ▶ Parties may respond to the allegations in writing (not mandatory).
- ▶ Notifies parties of right to present relevant witnesses and evidence.
- ▶ Notify parties that the Respondent is presumed not responsible.

What is Informal Resolution?

- ▶ An option for resolving a formal complaint that does not involve a full investigation.
- ▶ Methods (*mediation, restorative justice, facilitation, etc.*) used vary depending on circumstances and wishes of the Parties.
- ▶ In some cases, it may be used as an alternative to proceeding with investigation and determination.
- ▶ Cases involving a student *Complainant vs an Employee Respondent* are not eligible for informal resolution.

Informal Resolution

Informal Resolution

- ▶ May be offered in certain matters
- ▶ Both parties must agree in writing to participate.
- ▶ May include training, restrictions, etc.
- ▶ Be sure Parties understand that Informal Resolution concludes their case, but supportive measures may be ongoing.
- ▶ Talk it over with Title IX Coordinator.

Standard of Evidence

The **PREPONDERANCE OF EVIDENCE** standard in reviewing evidence and determining if a violation of District Policy has occurred.

“More likely than not”

Relevant Evidence

- ▶ "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
- ▶ Does the evidence provide information that will aid the Decision-Maker in reaching a determination?
- ▶ Who/what is the source of the evidence? It is important to determine the credentials of the person/group responsible for the evidence.
 - ▶ Is the source of the evidence credible.
 - ▶ Does the evidence corroborate a version of events that makes sense?

Prior Sexual Behavior or Sexual Predisposition Rape shield protections & exceptions defined in 34 C.F.R. § 106.45(b)(6)(i).

Evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless:

- ▶ are offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant, or
- ▶ if they concern specific incidents of the Complainant's prior sexual behavior and are offered to prove consent.

Credibility Determinations

- ▶ **The most reliable credibility factors** (Gold Standard) when you're struggling to decide who is telling the truth:
 - ▶ **Corroboration** - witness testimony, text message or email exchanges, video or photo evidence, also assessing reliability of testimony with a witness's recollection of events
 - ▶ **Consistency** - Is there witness testimony or physical evidence that is consistent with the complainant's testimony? Or are there inconsistencies that make you doubt credibility?
 - ▶ **Inherent plausibility** - Does the testimony make sense? Which version of the events seems more plausible? Is there a plausible reason for inconsistencies (ex., a student has left out part of the story to protect a friend from getting in trouble)?
 - ▶ **Motive to falsify** - Is there motivation to lie (fear of retaliation, a witness who wants to protect someone, etc.)?
 - ▶ **Material omission** - Did someone omit something that was important, despite having an opportunity to provide the information?

Credibility Pitfalls

- ▶ **Confirmation bias** - you know the parties, or you stop investigating because of investigator bias - you've decided that you think something happened in a certain way. There may also be internal bias to get the investigation completed.
- ▶ **Making a determination** - then conducting your investigation in a manner that supports your determination.
- ▶ **Incomplete Investigation** - you have not talked to all the witnesses or obtained enough information. You will need to ask more questions or talk to more witnesses.

Review of Report & Inspection of Evidence

- ▶ An Investigation Report will be drafted and sent electronically to the Parties, accompanied by relevant evidence.
- ▶ Parties have **ten (10)** school days to respond to the Report in writing, and provide additional evidence, should they choose to do so. Any responses will be included in the final report.
- ▶ Parties may pose questions in writing to the other Party to be submitted with any response to the draft report.
 - ▶ Questions and answers, if provided, will be included as appendices in the final report.
- ▶ The final report/evidence submitted to the parties.

Privileged Information

- ▶ In NM, individuals with legal privilege may include **medical providers, attorneys, psychologists, clergy, counselors, and social workers.**
- ▶ Privileged information may not be used as evidence **unless** the Party (or parent of minor) has given voluntary, written consent for use of those records.
- ▶ Information about any Party's medical, psychological, and similar records are **irrelevant** unless the Party has given voluntary, written consent.

Responsibility Determinations & Sanctions

The Decision-Maker should be provided with documentation of the Respondent's conduct history, prior to the Decision-Maker issuing a decision.

The Decision-Maker will issue a written decision to include:

- ▶ A determination that a violation of policy has or has not occurred; and
- ▶ A list of the allegations; and

Responsibility Determinations & Sanctions cont.

- ▶ A description of the procedural steps taken from the receipt of the formal complaint through determination; and
- ▶ Findings of fact supporting the determination; and
- ▶ Conclusions regarding application of policies to the facts; and
- ▶ A statement of and rationale for the results of each allegations, including sanctions to be imposed on Respondent; and any remedies afforded to the Complainant, and
- ▶ Notice of the right to appeal the determination.

SANCTIONS, if policy violation is found:

- ▶ **Employees:**

- ▶ Reprimand/Warning (oral/written) through
- ▶ Suspension, demotion, or involuntary termination/dismissal.

- ▶ **Students:**

- ▶ Warning (verbal or written),
- ▶ Disciplinary Probation,
- ▶ Restricted Privileges or Activities,
- ▶ Community Service,
- ▶ Counseling,
- ▶ **Suspension, Expulsion**

REMEDIES, if policy violation is found:

- ▶ District must implement any steps or actions designed to restore or preserve equal access to the District's educational programs.
- ▶ May including individualized services.
- ▶ Imposed as deemed appropriate to the individual facts and circumstances of each case.

Can Parties Appeal?

▶ YES

- ▶ When a Title IX complaint or allegation in a complaint is dismissed; and/or
- ▶ From the Decision-Maker's determination;
- ▶ Both Parties have the right to appeal.

Time periods & requirements specified in SOPs.

Allowable Basis for Appeal

- ▶ New facts and evidence, not reasonably available at the time of the determination, which may impact the outcome of the investigation.
- ▶ Evidence that the Investigator or Decision-Maker had a **conflict of interest or bias** for, or against a party, which affected the outcome of the investigation.
- ▶ Evidence that **investigation procedures** were not followed during the course of the investigation.

BREAK



Standard Operating Procedures for Title IX Investigations

Case Study

1. What concerns do you have with this investigation report?
2. Has the investigator followed Title IX procedures in the course of this investigation?
3. Is the investigation neutral/objective?
4. Is the investigation thorough?
5. What steps would you take with this investigation?

Homework

- ▶ Before we meet for Part 2, go to
- ▶ <https://implicit.harvard.edu/implicit/takeatest.html>
- ▶ Take 3-4 tests and record your results.
- ▶ We will talk about how to work around bias in investigations in Part 2.



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thank you!