

Title IX Coordinator:

Roles and Responsibilities and Title IX 2023 Regulation Update (What to Expect)

Queen Creek Unified School District

July 10, 2023

Lawton L. Jackson, Esq.

Title IX Coordinators

You are the front line for preventing district liability. You are critical to successful implementation of Title IX regulations



[This Photo](#) by Unknown Author is licensed under [CC BY-ND](#)

Reminder: District Liability

A recipient of federal funds violates Title IX where it has *actual knowledge* of an allegation of sexual harassment experienced by an *individual in the educational program* and the school acts with *deliberate indifference* to that notice.

What is Deliberate Indifference?

A response to notice of sexual harassment that is clearly unreasonable in light of the known circumstances

The new regulations set out the required response to notice within the context of:

- Protecting 1st Amendment rights
- A presumption of non-responsibility of the accused
- Provision of supportive measures

Title IX Coordinators

- Must have the actual title and be authorized to initiate the grievance procedure against a respondent
- Must have authority to provide supportive measures that will restore or preserve “equal access”
- Must be trained and is responsible for ensuring that other relevant individuals are trained

Title IX Coordinators

- Do not have a conflict of interest
 - Must ensure others involved in grievance process do not have a conflict of interest
- Be trained to act impartially throughout the process
- Never prejudge the alleged facts
- Thoroughly understand the definition of sexual harassment under Title IX

Title IX Coordinator

- Receives notice of allegations of sexual harassment
- Fulfills duties related to “notice” obligations of new regulations
- Coordinates implementation of supportive measures
- Helps draft and accepts Formal Complaints

Title IX Coordinator

- Decides whether to sign Formal Complaint where a victim will not
- Issues written notice when there is a Formal Complaint
- Determines whether Formal Complaint must be dismissed or, if dismissal is permitted, whether to dismiss it
- Offers informal resolution where appropriate

Title IX Coordinator

- Possibly does the investigation
- Monitors the implementation of the grievance procedure (track deadlines, maintain records)
- Effectively implements remedies where there has been a determination of responsibility

Impartiality is Required by Regulations

AVOID BIAS AND PREJUDGMENT

Avoiding Bias is Critical to Implementing Regulations

- Following grievance procedure that meets requirements of the regulations is important step to showing non-bias
- Recognize and acknowledge allegations of sexual harassment no matter who the alleged victim is
 - Do not adopt stereotypes about who is, and who is not, subjected to sexual harassment

Avoiding Bias is Critical to Implementing Regulations

- Recognize that no one is free of implicit bias
 - <https://implicit.harvard.edu/implicit/takeatest.html>
 - Take several of the tests looking at race and gender bias
- Suggested that Title IX Coordinator attend an implicit bias training

Notice of allegation of sexual harassment received

TITLE IX COORDINATOR'S FIRST STEP

What is Notice?

- A report to ANY school employee
 - ALL employees must be trained to immediately communicate any report of conduct that would meet the definition of harassment to administration
- Report to the Title IX Coordinator made at any time via any method of communication



All Notice Triggers Responsibility

Contact alleged victim promptly to discuss:

- Whether the Complainant wants **supportive measures**
- Advise Complainant that supportive measures are available regardless of whether Formal Complaint is filed
- Explain the process for filing a Formal Complaint

Supportive Measures

- Designed to restore or preserve **equal access** to education program or activity
- Equal access is the same access that someone who hasn't experienced sexual harassment has
- What does a loss of “equal access” look like?
 - Does NOT require total loss of educational access

Examples of Loss of Equal Access

- Poor attendance, failing or diminished grades
- Quitting an extracurricular/club to avoid respondent
- Dropping a class
- Being unable to concentrate in a class/activity
- Manifestations of stress (bed-wetting, self-harm, hair loss)

Supportive Measures

- Non-disciplinary
- Non-punitive
- Individualized to the person and situation
- Offered as appropriate and without charge
- Must be offered to Complainant
- May be offered to respondent if appropriate
- Do not unreasonably burden either a complainant or respondent

Examples of Supportive Measures

- Counseling
- Course modifications
 - Extend a deadline
 - Allow exam retake
- Schedule changes
 - For complainant or respondent
- Allow student to repeat a course
- Increased monitoring or supervision
- Mutual non-contact order
- One-way no contact order
- Cannot include anything that is listed as a potential disciplinary consequence

Supportive Measures

- Can not sanction or discipline respondent in any way until grievance procedure has been followed
- Must continue to be offered during an investigation and whether an investigation is ever done
- If respondent is an employee, you may send employee home on administrative leave as a supportive measure

Supportive Measures

- Do not completely remove a student respondent from an educational activity as a supportive measure for complainant
- **UNLESS** there is need for an emergency removal, which can only happen if necessary to protect an individual from **IMMEDIATE THREAT TO PHYSICAL HEALTH OR SAFETY**

Accepting the Formal Complaint

TITLE IX COORDINATOR'S SECOND STEP

Formal Complaint

Formal complaint signed by alleged victim or Title IX Coordinator triggers responsibility to conduct investigation that complies with the District's grievance procedure.

Upon receipt of a Formal Complaint, provide the notice described below.

To Sign or Not To Sign

- Regulations seek to give complainants greater agency to make a decision whether to file or not
- Title IX Coordinator may, and should, sign formal complaint in certain instances
- Would the school be deliberately indifferent to the notice of potential sexual harassment if you don't sign?
- Does not make you a witness or a party

To Sign or Not To Sign

- If you choose not to sign, the alleged Respondent may not be disciplined for the conduct

Written Notice Requirements: Formal Complaint

Provide written notice of the District's grievance procedure to both parties, including information about informal resolution process, if the District adopts one

Written notice must:

- Include a statement that the respondent is presumed not responsible for conduct and that a determination will not be made until the conclusion of the grievance process

Written Notice Requirements: Formal Complaint

- inform parties that they may have an advisor of their choice
 - Advisor may be an attorney, but doesn't have to be
- inform parties that they may inspect and review evidence collected during this investigation
- inform parties of any provision of district policy of conduct that prohibits making false statements or knowingly submitting false evidence

Written Notice Requirements: Formal Complaint

Notice of the allegations of sexual harassment provided to the parties must include sufficient details, and be provided in enough time, to allow preparation of a response prior to initial interview

Sufficient notice includes, if known:

- The conduct alleged to constitute sexual harassment
- The date and location of the alleged incident

Written Notice Requirements: Formal Complaint

If, during the course of the investigation, the school decides to investigate additional allegations about complainant or respondent that were not included in initial notice, Title IX Coordinator must provide written notice of the additional allegations to the parties.

Decide Whether Formal Complaint is to be Investigated

TITLE IX COORDINATOR'S THIRD STEP

Mandatory Dismissal of Formal Complaints

- The complaint does not state an allegation of **sexual harassment**, even if all facts are found to be true
- The sexual harassment, even if it did occur, did not occur in the **school's program or activity**
- The sexual harassment did not occur against a **person in the United States**

Sexual Harassment

The regulations use a definition of sexual harassment that is designed to protect 1st Amendment rights of students and teachers by:

- Distinction between physical conduct and speech
- Speech is largely protected unless it rises to high standard-no prior restraint on speech
- Physical conduct is *per se* actionable

Definition of Sexual Harassment

Conduct on the basis of sex that is one or more of the following:

1. A school employee conditions the provision of an aid, benefit, or service of the school on an individual's participation in unwelcome sexual conduct;
2. Unwelcome conduct that a reasonable person would find to be so severe, pervasive, and objectively offensive that it **“effectively denies a person equal access”** to the school's education program or activity;
3. Sexual assault, dating violence, domestic violence, or stalking.

Definition of Sexual Harassment: Element 1

Element 1 is *quid pro quo* harassment

- Does not require a severe, pervasive, and objectively offensive analysis
- By its very terms, it will deny access to the program

Exs: a teacher requires sexual favors for a better grade; a staff member demands sexual favors or s/he will post compromising pictures

Definition of Sexual Harassment: Element 2

Harassment based on conduct

This prong requires the unwelcome sexual conduct to be:

- Severe AND
- Pervasive AND
- Objectively offensive

Such that the victim is denied **equal access** to the school's programs and activities.

Narrowly tailored to protect 1st Amendment rights

Title IX Coordinator Critical Role in Initial Fact Analysis

When you receive an actual knowledge report, you will need to discern whether the allegations, as presented, and if presumed to be true, rise to the level of Title IX.

Definition of Sexual Harassment: Element 3

Offenses based on violence (sexual assault, dating violence, domestic violence, stalking):

- Does not require severe and pervasive analysis
- When it occurs, equal access is denied

Like Element 1, it is *per se* actionable

Element 3 Definitions

- Sexual assault: an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.
- Stalking: means engaging in a course of conduct directed at a specific person that would cause a reasonable person to: 1) fear for his or her safety or the safety of others; or 2) suffer substantial emotional distress

Dating Violence

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 such a relationship shall be determined based on a consideration of the following factors:

- 1) the length of the relationship;
- 2) the type of relationship;
- 3) the frequency of interaction between the persons involved in the relationship

Domestic Violence

Violence committed by a current or former spouse or intimate partner of the victim, a person 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 the domestic or family violence laws of Arizona, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction

Education Program or Activity

Schools are only required to address sexual harassment in the education program or activity, which is

- Any location, event, or circumstance over which the school exhibits **substantial control over both the alleged harasser and the context in which the harassment occurred**

Is It the Education Program or Activity?

- A cheerleader experiences sexual harassment an away game?
- At an overnight trip sponsored by the German Club?
- At a non-school related party held in a private home on a weekend?
- During a distance learning class?

Against a Person in the United States

- This is a jurisdictional requirement for application of Title IX
- Students in a study abroad program are not protected by Title IX outside the U.S.
- Final rule notes that though not required, a school may initiate a student conduct proceeding against a perpetrator or offer supportive measures to a victim

Permissive Dismissal of Formal Complaints

- If the Complainant notifies the Title IX Coordinator that s/he wants to withdraw the complaint
- If the Respondent's employment or enrollment with the school ends
- If circumstances, such as several years between the conduct and the complaint or a complainant's refusal to cooperate, prevents the gathering of evidence sufficient to render a determination

Informal resolution

TITLE IX COORDINATOR'S FOURTH STEP

Informal Resolution

- District is not required to use informal resolution, but if it chooses to use it, then it is appropriate to offer if:
 - Formal Complaint has been filed
 - Both parties voluntarily agree to participate in writing
 - The respondent is NOT an employee and the complainant a student

Informal Resolution

- Cannot be required and either party can withdraw at any time
- Process may include arbitration, mediation, or restorative justice
- Decide what process the District will use and include that information in written notice of Formal Complaint
- Must have reasonably prompt time frame to complete the process

Informal Resolution

- Decide whether confidentiality can be a term of an informal resolution and include that information in written notice
- If the informal resolution facilitator may be called as a witness in investigation, must disclose that possibility to the parties in the written notice
- Facilitator must not have a conflict of interest, must be trained in these regulations, and must be free of bias

Informal Resolution

- Suggested that facilitator be trained in mediating sexual harassment situations
- Be aware of power dynamics when implementing an informal resolution
 - Should there be a face-to-face meeting?
 - Is someone manifesting signs of trauma?
 - Should facilitator press parties on facts?

Informal Resolution

Outcome of a successful informal resolution may include:

- Continuation of supportive measures
- Discipline for a respondent
- Other agreements made between the parties

Informal Resolution

- Terms of resolution should be negotiated in good faith, be in writing, and include language regarding enforceability
- If successful, results in a dismissal of the Formal Complaint without adjudication

Investigation

TITLE IX COORDINATOR'S FIFTH STEP

Assignment to Investigator

- If you are not going to investigate, assign to a trained investigator
- Ensure that investigator does not have a conflict of interest
- Continue to monitor deadlines and be a resource to the investigator re: definition of sexual harassment, course of investigation

Remedies and Wrapping Up

TITLE IX COORDINATOR'S SIXTH STEP

Remedies

- If there was a determination of responsibility, you will play a role in implementing remedies
- If there was a determination of non-responsibility, continue to provide supportive measures as needed
- Continue to be a resource for both parties as needed

Appeals

The Final Regulations require at least three grounds for appeals:

- Procedural irregularity that affected the outcome;
- New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome; and
- The Title IX Coordinator, investigator(s), and/or Hearing Panelists had a conflict of interest or bias for or against Complainants or Respondents generally or the individual Complainant or Respondent that affected the outcome.

Appeals

The Final Regulations require at least three grounds for appeals:

- Schools may offer additional bases for appeal equally to both parties, such as to allow for an appeal on the severity or proportionality of the sanction. §106.45(b)(8)(ii).
- Allowing an appeal to challenge the remedies imposed is not necessary per OCR. (Preamble, p. 940 (Federal Register version)).

Appeals

A school must:

- Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
- Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator or the Title IX Coordinator;-Decision-maker(s) for the appeal can be a single Appeal Officer or an Appeal Panel.

Appeals

- If an appeal is filed, ensure that the appeal decision-maker has no conflict or bias and receives all necessary documents.
- The written determination on responsibility and sanctions, if applicable, are postponed until the decision on the appeal is sent to the parties. §106.45(b)(7)(iii).
 - Keep supportive measures in place during appeal period to maintain status quo between the parties and ensure equal access to education.-Can revisit emergency removal if necessary.
- Monitor timelines and completion of that process and ensure that notices are sent to the parties

Records Retention

- All records related to sexual harassment complaints must be maintained for a minimum of 7 years, including records that substantiate remedies and supportive measures
- Training materials must be posted on the District's website

Proposed Rule

- The proposed rule would require schools to respond to all forms of sex-based harassment.
- In addition to sexual harassment, this includes harassment on the basis of sex, sex stereotypes, sex characteristics, sexual orientation, gender identity, as well as pregnancy or parenting status, and any related conditions whether or not the harassment is sexual in nature.
- Schools' obligations to respond to "quid pro quo" harassment and sexual assault, dating violence, domestic violence, or stalking remain the same.

Hostile Environment (2020)

- The proposed rules broaden the definition of what is often referred to as “hostile environment” harassment, so that it is consistent with the standard that existed prior to the 2020 rules.
- To show that sex-based harassment created a hostile environment, the proposed rules would require only that individuals show the harassment is “sufficiently severe or pervasive” both “objectively and subjectively” such that it denies or limits a person’s ability to participate in or benefit from...the education program or activity.”

Hostile Environment (2020) Con't.

- In assessing whether conduct is severe or pervasive under this standard, the proposed rules identify several factors for schools to consider, such as the frequency of the conduct and the extent to which it impacts a person's ability to learn. This change means that schools will be required to respond to a wider range of sex-based harassment so that more harassed students will be able to receive the help from their schools.

2023 Changes – Scope and Procedures

- Other areas of sexual harassment relative to the requirements that schools will be responsible for are defined in the new rules including:
 - off-campus harassment
 - when a complainant or respondent is not enrolled or employed by the school and
 - notice of harassment.
- Changes will also occur in procedures schools must implement in responding to sex-based harassment, including the standard of care, supportive measures, informal resolutions and retaliation.

Procedures and Training

- Procedures: The new rules set forth a change in the way schools must investigate sex-based harassment relative to timeframe and delays, presumption of non-responsibility, questioning parties and witnesses, evidence of past sexual behaviors, standard of proof and the appeals process.
- Training: Schools continue to be required to train all employees on the school's duties under Title IX to address sex discrimination, what conduct constitutes sex discrimination and their duty to report possible sex discrimination to the Title IX coordinator.

Prevention

- Under the proposed rules, schools would be required to prevent sex discrimination from re-occurring.
- This includes requiring the Title IX coordinator to look for and address the barriers to reporting sex discrimination, including by conducting campus climate surveys to assess how frequently students are experiencing sex discrimination without reporting it or seeking feedback from students and employees about their experiences reporting sex discrimination.

Pregnant and Parenting Students

- The new regulations reinforce that schools cannot discriminate against pregnant and parenting students.
- Some of the proposed language will be changed to better reflect the protections against sex discrimination that students may experience because of their potential to become pregnant.
- The new language would prohibit discrimination based on “current, potential, or past pregnancy or related conditions.”
- The language would also clarify that the term “related conditions” includes childbirth, termination of pregnancy, lactation, and “medical conditions” or “recovery” related to any of these conditions.

Pregnant and Parenting Students

- There is also proposed language defining a school's responsibilities to pregnant and parenting students, Title IX coordinator responsibilities, how schools must treat absences, obtain doctor's notes, and provide services and supports for pregnant and parenting students.

LGBTQ+ Students

- One of the most profound changes that the new rules will include are the protections for LGBTQ+ students from discrimination based on sexual orientation, gender identity and sex characteristics. (This was the “Bostock Interpretation”)
- Title IX’s prohibition on discrimination based on sex applies to discrimination based on sexual orientation and gender identity.
- Preventing someone from participating in school programs and activities consistent with their gender identity would cause harm in violation of Title IX, except in some limited areas set out in the statute or regulations.

LGBTQ+ Students

- Under the new regulations, the Title IX rules would clarify for the first time that “sex discrimination” under Title IX includes discrimination based on sexual orientation, gender identity, sex-related characteristics, status as transgender or nonbinary, or sex stereotypes.
- In addition, LGBTQ+ students must be allowed to participate fully in school.
- Every student has the right to be who they are at school, including using school facilities, dressing, being addressed by staff and students, and otherwise participating in schools in a manner consistent with their gender.
- The proposed rules would make clear that while schools may generally maintain separate restrooms for male and female students and staff, they may not deny student access to facilities that are consistent with their gender.

Equal Opportunity Sports

- In its press release June 23, 2022, the Department of Education indicated that it plans to issue a separate proposed Title IX rule to address equal opportunities to play school sports. No timeline for the issuing of these rules has been announced.

October 2023 Release

- The Title IX federal regulations slated for a May 2023 release have been delayed until October 2023, per a federal Department of Education (DOE).

Questions?



UDALL | SHUMWAY

COUNSELORS AT LAW SINCE 1965

UDALL SHUMWAY PLC
1138 North Alma School Road, Suite 101
Mesa, Arizona 85201
llj@udallshumway.com | 480-461-5331
www.udallshumway.com