

FCSD 1 Title IX Training

Provisions

FOR THE SCHOOL YEAR 2020-21

PRESENTED BY

DEIDRE MEYER, TITLE IX COORDINATOR

Attended by FCSD #1 Investigators: Hillary Reisig, Andrew Lanz-Ketchum, and Kevin Ley

Attended by FCSD #1 Decision Makers: Leslie Voxland, Julie Shanley, Brad Neuendorf, and Dr. Barker

Thorough	Reliable	Impartial	INVESTIGATION
Prompt	Effective	Equitable	PROCESS
End the Discrimination	Prevent its Recurrence	Remedy the effects upon the student or employee and community	REMEDIES

Definitions

Sex-Based

Discrimination

- Program Equity

- Recruitment,

Admissions and Access

- Pregnancy

- Athletics

- Employment,

Recruitment & Hiring

- Extra-curricular

activities

- Access to Course

Offerings

- Salaries and Benefits

- Financial Assistance

- Facilities

- Funding

- Sex, Gender, Gender

Identity

- ❖ **You** = Recipient
- ❖ **Various titles** = Next Slide
- ❖ **Reporting Party** = Complainant
- ❖ **Responding Party** = Respondent
- ❖ **Resolution** = Grievance Process
- ❖ **Official with Authority (OWA)**=An employee explicitly vested with the responsibility to implement corrective measures for sexual harassment on behalf of the school.
- ❖ **Responsible Employee:** An employee who is required by school policy to report any sexual harassment that they observe or learn about.
- ❖ **Locations, events, or circumstances where the school exercises substantial control over both:**
 - the Respondent
 - the context in which the alleged sexual harassment or discrimination occurs
 - includes any building owned or controlled by the school or by a student organization that is officially recognized by the school

Title	Responsibilities	Training	Status	FCSD #1 Staff Member
Title IX	Coordinate, Intake Reports & Complaints, T9 analysis, Initiate Formal Complaint, Implement Supportive Measures	Sexual Harassment, Investigation & Grievance Procedure, Hearings, Appeals & Informal Resolution (as applicable); Impartiality, Relevance, Privilege	Must be Employee May Not Serve as Decision-Maker	Deidre
Investigator	Conduct Fair, Objective and Impartial Investigation, Differentiate b/w Related & Relevant Evidence & Privilege	Sexual Harassment; How to Conduct an Investigation, Impartiality, Relevance, Privilege, Report-Writing	Staff or External May Not Serve as Decision-Maker	Deidre Deputies: APs
Decision makers	Evaluate Evidence, Make & Write Decision, "Rule" on Relevancy during CrossExamination	Sexual Harassment, Hearing Process, Technology, Evidence/Relevancy	Staff or External Cannot Serve in Any Other Capacity	Principals
Advisors	Question Opposing Party & Witnesses	None required	Party provided Staff or External	<ul style="list-style-type: none"> • Advisor can be anyone – no restrictions in proposed regulations (though the advisor has a choice in the matter) • Must allow advisor to be present at all meetings, interviews, hearings • May not restrict who may serve as advisor • May restrict advisor participation as long as applied equally to all parties
Appeals				Dr. Barker

Overview of Title IX and Case Law



Title IX

“No person in the US 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.”

Remember Title IX was enacted to prevent discrimination on the basis of sex and sexual harassment is only one form of potential sexual discrimination. Title IX also addresses the treatment of pregnant and parenting students, discipline, single-sex education, athletics, and employment.

What is Sexual Harassment?

- Quid pro quo – a District employee conditioning the provision of an aid, benefit, or service of the District on an individual’s participation in unwelcome sexual conduct.
- Unwelcome conduct to be 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 educational program; or
- “Sexual assault” (as defined by the Clery Act), “dating violence”, “domestic violence”, or “stalking” (as defined in the Violence Against Women Act)

Sexual Harassment, What Changed?

Old Definition (Ch. 8, Sect. 25, OCR Guidance)	New Definition
<ul style="list-style-type: none">• Unwelcome conduct• Determined by a reasonable person• To be severe, pervasive, <u>or</u> persistent, and to interfere with or limit a student's ability to participate in or benefit from school services, activities, or opportunities	<ul style="list-style-type: none">• Unwelcome conduct• Determined by a reasonable person• To be severe, pervasive, <u>and objectively offensive that it effectively denies</u> a person's equal access to the school's education program or activity

Actual Knowledge, What Changed?

Old Rule (Ch. 8, Sect. 25, OCR Guidance)	New Rule (Final Rule)
<ul style="list-style-type: none">• A school has a responsibility to respond promptly and effectively if a school <u>knows or should have known</u> about sexual harassment.• Who – any school official who has authority to institute corrective measures on behalf of the District (principal, Title IX Coordinator, other administrator)	<ul style="list-style-type: none">• A school with <u>actual knowledge</u> of sexual harassment in a program or activity against a person in the United States must respond promptly and in a manner that is not deliberately indifferent.• Who- any school employee including a teacher, teacher’s aide, bus driver, cafeteria worker, counselor, school resource officer, maintenance staff worker, or other school employee

Deliberate Indifference, What Changed?

Old Rule (Ch. 8, Sect. 25, OCR Guidance)

- School must take immediate action to eliminate the sexual harassment, or sexual violence, prevent its recurrence, and address its effects

New Rule (Final Rule)

- Failure to respond reasonably in light of known circumstances
- Discrimination, *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*
- **Mandatory dismissal**
 - Does not constitute sexual harassment (§ 106.30)*
 - *Does not fall within jurisdiction Program or activity inside the United States*
 - *Complainant participating in or attempting to participate in ed program*
 - *Does not preclude action under another policy (General NonDiscrimination Policy, conduct code, etc.)*

Equality



The assumption is that **everyone benefits from the same supports**. This is equal treatment.

Equity



Everyone gets the supports they need (this is the concept of "affirmative action"), thus producing equity.

Justice



All 3 can see the game without supports or accommodations because **the cause(s) of the inequity was addressed**. The systemic barrier has been removed.

When does title IX not apply?

If Title IX jurisdiction is not present, the behavior could still violate:

- ❖ Institutional harassment/discrimination policies.
- ❖ Student Handbook/Conduct policies.
- ❖ Technology/Acceptable Use policies.
- ❖ Employee Handbook/Policies.
- ❖ Professionalism standards.

District should still take steps to:

- ❖ Provide support and resources to the complainant and school community
 - Address any “downstream effects”
- ❖ Determine if there are patterns or institutional variables that contributed to the alleged incident.
- ❖ Take what action it can (e.g.: trespass the person).

Title IX Coordinator Role & Oversight

Title IX Coordinator Oversight

■ Role of the Title IX Coordinator in the investigation process

- Appoints the investigator
- Oversees the investigation process
- Trains the investigators
- Helps strategize the investigation
- Conducts the initial assessment
- Offers supportive measures
- Sends notices to parties
- Facilitates the evidence and report review with parties
- Reviews investigation report
- Audits compliance for timeliness of investigation
- Record keeper of all documents

What is “Notice”?

- Actual knowledge- notice of sexual harassment (or allegations) to appropriate school official
 - Triggers the obligation to offer supportive measures and explain the complaint and investigation process
- Formal complaint- document filed by the complainant to the Title IX Coordinator alleging sexual harassment against a respondent and requesting an investigation
 - Triggers the obligation to investigate
- ***Parents/guardians have the right to make a report/file a complaint for students in elementary or secondary schools.***

Title IX Coordinator needs to be notified regarding all complaints-the TIXC will be the gatekeeper to determine initial assessment of violation of Title IX.

Notice, Cont.

Distinct procedural steps - actual knowledge and formal complaint

- Actual knowledge = notice of sexual harassment [or allegations] to TIXC
- Formal complaint = document filed by a complainant or signed by TIXC alleging sexual harassment against a respondent and requesting investigation
- TIXC is not party when signing formal complaint
- Constructive notice/respondent superior – insufficient under TIX, but can be acted upon discretionarily by a recipient
- Actual knowledge triggers the obligation to offer supportive measures, explain grievance process
- Formal complaint triggers the obligation to investigate
- Multiple reports mandate for TIXC to file complaint – provision removed from final regs

Appropriate School Officials

A report must go to Title IX Coordinator or any official who has the authority to institute corrective measures

- ❖ **Previously referred to as “interim measures”**
- ❖ **Non-disciplinary, non-punitive individualized services for all parties**
- ❖ **Must not unreasonably burden parties, protect the safety of parties and educational environment, and deter harassment**
- ❖ **Must be offered to complainant upon notice of harassment**
- ❖ **Must be available before, after, or in lieu of formal complaint**
- ❖ **May include counseling, extensions of deadlines or other course- related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of campus, etc.**

Jurisdictional Issues

The definition of sexual harassment arguably covers the in-program effects of out-of-program misconduct (though not the misconduct itself)

At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed

OCR adopts in the discussion a fairly broad definition of what could constitute attempting to participate

Emergency Removal

May remove a respondent from a recipient's education program or activity on an emergency basis, provided that the school:

- ❖ Undertakes an individualized safety and risk analysis;
- ❖ Determines that an immediate threat to the physical health or safety of students or employees justifies removal; **and**
- ❖ Provides the responding party with notice and an opportunity to challenge the decision immediately following the removal;
- ❖ May place a non-student employee respondent on administrative leave during the pendency of an investigation.

Initial Assessment and Supportive Measures

The Title IX Coordinator will reach out to the complainant to offer supportive measures

The TIXC will also serve as a gatekeeper on complaints to make the determination whether the complaint falls under Title IX or not

- If unsure, an investigation will take place
- If not related to Title IX, the complaint will be forwarded to the appropriate party, such as the Violence Prevention Officer, the school principal, or supervisor.

FCSD 1 Title IX Decision-Maker Training

FOR THE SCHOOL YEAR 2020-21

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B Report: complainant (Deidre) reported various conversations in her class study group. The conversations have included talk about same-sex marriage, the Defense of Marriage Act and the Supreme Court, and whether religious institutions should be required to perform same-sex marriages in states that recognize such marriages. Deidre, who describes herself as bi-sexual, says she feels like this is sexual harassment given her sexual orientation.

Mandatory & Discretionary Dismissals

- **Mandatory:** doesn't meet definition or jurisdictional requirements.
- **Discretionary:** Complainant wants to withdraw complaint or any allegation therein.
- **Discretionary:** Respondent is no longer enrolled or employed.
- **Discretionary:** specific circumstances prevent school from gathering evidence sufficient to reach a determination.

Serve as Decision Maker Impartially & Objectively

- Require on objective evaluation of all relevant evidence including both inculpatory and exculpatory evidence-and that provides credibility determinations - may not be based on a person's status as a complainant, respondent or witness;
- Presumption of Non-Responsibility 106.45(b)(1)(iv) • Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility at the conclusion of the grievance process.
- Decision-maker makes relevancy determinations during the hearing, after each question, and prior to each answer during cross, will need to provide the rationale for any determination that evidence is not relevant

Live Hearing

- **At the request of either party, the recipient must provide for the entire hearing to occur with the parties located in separate rooms with technology enabling the parties to see and hear each other.**
- **Live hearings may be conducted with all the parties physically present in the same location or, at the school's discretion, any or all parties, witnesses or other participants may appear at the live hearing virtually.**

Live Hearing & Cross-Examination

Cross-examination must be conducted by the party's
Advisor:

- ❖ Directly
- ❖ Orally
- ❖ In real time
- ❖ Never by a party personally
- ❖ The advisor may question the other party and any witnesses
- ❖ May ask follow-up questions including those challenging credibility Questions may not be prescreened or submitted in writing
- ❖ Parties have the right to present evidence and witnesses, including expert witnesses School carries the burden of proof

Technology to be Used at the Hearing

- ❖ At the request of either party, the recipient must provide for the entire hearing to occur with the parties located in separate room with technology enabling the parties to see and hear each other.
- ❖ Live hearings may be conducted with all the parties physically present in the same location or, at the school's discretion, any or all parties, witnesses or other participants may appear at the live hearing virtually.
- ❖ Hearings must be recorded and the recording must be maintained by seven years under the record keeping provision of this rule; additionally, the parties have the right to inspect the recording.

Rules of Order & Decorum

- ❖ May have a hearing officer or facilitator
- ❖ May be more than one decision-maker or panel
- ❖ May adopt rules of order and procedure
- ❖ May also adopt rules regarding appropriate conduct
- ❖ Process is inherently adversarial
- ❖ Any rule that the school adopts can't conflict with the regulations
- ❖ Any rules must apply equally to both parties

Confidentiality

- ❖ The regulations require the school to maintain the confidentiality of the parties
- ❖ Only participants that need to at hearing should be there

Relevancy & Cross-Examination

- ❖ Only relevant evidence is considered at the hearing
- ❖ Decision-maker must make a determination on relevancy after each question is asked, and before the witness/party responds
- ❖ Must provide their rationale for excluding question on relevancy basis
- ❖ Challenge on relevancy determination could be a basis for a party to appeal

No ability to compel participation of parties or witnesses

- ❖ The Rule protects every individual's right to choose whether to participate
- ❖ A party's absence from the hearing cannot be used against that person
- ❖ The decision maker may not make an inference about their exercise of the right not to appear or submit to cross
- ❖ If a party does not show up for a hearing, the hearing cannot be dismissed, but a decision would have to be made on available relevant evidence

Retaliation Prohibited

- ❖ No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege under Title IX, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner.

Non-Cooperating Party or Witness

- ❖ If a party or witness does not submit to cross examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility;
- ❖ However, the decision-maker cannot draw an inference based solely on that party's or witness's absence or refusal to answer questions
- ❖ School has no ability to compel either parties or witnesses to cooperate, appear at the hearing, provide testimony or otherwise participate in the process

Type of Evidence	Definition
Burden of Evidence	Parties have the right present evidence and witnesses, including expert witnesses *School carries the burden of evidence*
Relevancy	Evidence pertinent to proving whether facts material the allegation are more or less likely to be true and that do not relate to complainant's sexual predisposition or prior sexual acts (with two exceptions).
Relevancy, cont.	Decision-maker “rules” on relevancy of every question asked during cross examination during the hearing. If they determine a question is not relevant, they must explain why/or provide the rationale for the decision Schools may adopt rules that the parties may not challenge these findings during the hearing, but exclusions of questions and testimony based on relevance could be appealable as a “procedural irregularity” after the determination has been issued
Related-to vs. Relevant	Related-to Investigator must collect all evidence that is related to the allegations whether or not relevant (excluding evidence subject to privilege, medical records) Relevant Relevant evidence is all evidence related to, except that which is protected under the rape shield provisions (and not otherwise privileged, medical records)
Relevancy, Rape Shield Protections & Exceptions	Questions and evidence about the complainant’s prior sexual behavior are NOT RELEVANT, unless offered to prove “Mistaken Identity” Note that questions about a Complainant’s predisposition are never allowed, they are not subject to the exception

Key Takeaways

- ❖ Definition of sexual harassment and the scope and application of Title IX is significantly narrowed under the revised rules. The formal grievance process is triggered only upon the filing of a formal complaint and only if within the strict definition, scope and jurisdiction of the rule.
- ❖ Decision-makers must be trained under these rules, free of any conflicts of interest or bias and must objectively evaluate the evidence in reaching a determination. Decision-makers may not function in any other Title IX role. And the Decision-maker in any appeal, must be a different individual. The school carries the burden of proof and a respondent is presumed not responsible until application of the grievance process and a determination of responsibility.
- ❖ Live hearings must include cross-examination conducted only by a party's Advisor. Decision-maker "rules" on the relevancy and admissibility of every question asked during cross-examination.
- ❖ The Decision-maker assesses credibility and weighs the evidence, and makes a determination using either the preponderance of the evidence or clear and convincing standard, which is applied consistently across all sexual harassment cases.

Steps 12-14

⋮

Completed
by the
Decision-m
aker:



12. Decision-maker facilitates written questions and follow-up questions from all parties



13. Decision-maker makes a determination of responsibility



14. Appeals- parties have 10 days to file an appeal before the determination is final

A pair of black-rimmed glasses is resting on an open book. The book's pages are visible, and the background is a soft, out-of-focus grey. The text is overlaid on this background.

FCSD 1 Title IX Appeals

FOR THE SCHOOL YEAR 2020-21

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Bases for Appeals

- ❖ Procedural irregularity that affecting outcome
- ❖ New evidence, not reasonably available at the time of determination, that could affect the outcome
- ❖ Title IX Coordinator, Investigator or Decision-maker had a conflict of interest or bias
 - Must offer equitable appeal based on determination or dismissal of any allegations
 - All parties receive notification of any appeal
 - Opportunity for all parties to support or oppose outcome
 - Written decision with rationale delivered simultaneously to the parties
 - Appeal decision-maker cannot have had any other role in the investigation or resolution process
 - “Reasonably prompt” timeframe for producing appeal decision

This training was created by FCSD1 in conjunction with ATIXA and their Civil Rights Investigator Training

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