



Northern
California ReLiEF

Title IX Training Series

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Excess Fund

NCR's Upcoming Title IX Training



~~Title IX Coordinator Training~~

~~July 12, 2023~~

~~8:30-12:00PM PDT Zoom Training~~

~~Title IX Investigator Training~~

~~July 19, 2023~~

~~8:30-12:00PM PDT Zoom Training~~

Title IX Decision-maker Training

July 26, 2023

8:30-11:30AM PDT Zoom Training

<https://ww2.keenan.com/ncr-titleix-training-series>

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Any comments made by participants will not be shared.



Title IX Decision-Maker Training

K12 School Districts
2023-2024

NCR Training

Disclaimer

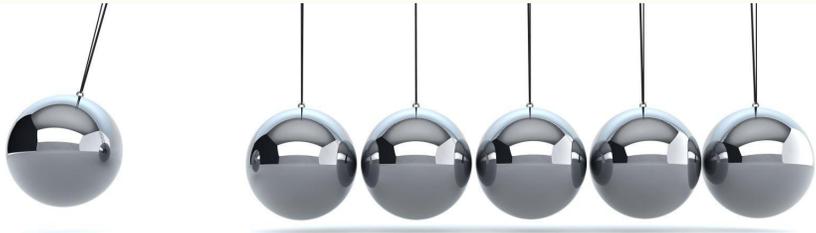


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Title IX Law and Regulation

Title IX Guidance



- Federal Law
- Regulations
- Other sources of mandatory and recommended guidance
 - State law
 - Case law
 - Advocacy
 - Best Practices

Title IX

"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."

- Title IX of the Education Amendments of 1972

Enforced by the Office for Civil Rights (OCR)



Title IX Law & Regulation Timeline



2011

OCR issues Dear Colleague Letter changing how campuses handle Title IX

2017

Department of Ed withdraws guidance and issues Q&As and starts NPRM process

2014

OCR issues additional guidance in response to outcry from schools

2022

Guidance and new NPRM process announced

2020

New regulations issued and effective August 2020 amidst COVID

Title IX Regulatory Guidance



- Regulations 2001
- Dear Colleague Letters
 - 2011 Dear Colleague Letter: Sexual Violence, Background, Summary and Fast Facts
 - 2014 Questions and Answers on Title IX and Sexual Violence
 - 2015 Dear Colleague Letter on Title IX Coordinators
 - 2016 Dear Colleague Letter on Transgender Students
 - 2017 Questions and Answers on Sexual Misconduct
- Regulations 2020
 - March 8, 2022 - Executive Order on Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals
- New regulations will be released in October 2023

Title IX Regulatory Guidance - Report to OCR



- Following a report of sexual harassment to the Office for Civil Rights (OCR)
- OCR initiates an investigation
- OCR may seek an informal resolution
- Negotiated agreement is set forth in a resolution agreement
- OCR may impose fines and penalties against a school if resolution not reached



- Litigation has clarified some of OCR's guidance and in some instances, overturned guidance
 - Examples include use of hearings, cross examination, and exclusion of evidence
- State law addressing specific, and, in some instances, controversial topics related to Title IX enforcement
 - Hearings
 - Transgender rights



Title IX Obligations for K12 School Districts

Title IX Covers



Title IX protects BOTH students and employees of K12 Schools

Sex discrimination

Sexual Harassment

Athletics

Sexual Assault

Pregnant Students

Recruitment/Admissions Programs



Legal Obligation

Educational institutions must respond in a manner that is not **deliberately indifferent** when it has actual knowledge of sexual harassment occurring in the institution's education program or activity against a person in the United States.

Actual Knowledge of Sexual Harassment



- When sexual harassment or allegations of sexual harassment come to the attention of **ANY EMPLOYEE** of a K-12 district:
 - All employees **MUST** report to the **TITLE IX COORDINATOR**
- Failure to report could lead to an inadequate response
 - Proof of deliberate indifference
 - Legal responsibility for sexual harassment



For Title IX to apply, the behavior must occur in the school’s “education program or activity,” further defined as:

locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

Off-campus activities covered if one (1) of three (3) requirements are met:

1. the off-campus incident occurs as part of the school’s operations;
2. the school exercised substantial control over the respondent and the context of alleged sexual harassment that occurred; or
3. the incident of sexual harassment occurs at an off-campus building owned or controlled by a student organization officially recognized by a college



- A licensed mental health professional at the school can maintain confidentiality.
- All other employees are required to report the matter to the Title IX Coordinator.
- In instances of potential sexual harassment, investigators (and other employees) cannot offer to keep the matter confidential.
- A Title IX investigation is completely transparent to both parties:
 - Parties get to know the names of all the people involved, including witnesses.
 - Parties get access to all of the information gathered during the investigation.
 - Parties get the opportunity to request additional investigation and to challenge the investigator prior to the final decision.

Title IX Enforcement and Federal Constitutional Protections



Under Title IX, schools may not restrict the rights afforded under:

- First Amendment (Free Speech)
- Fifth Amendment (Protection against Self-Incrimination)
- Fourteenth Amendment (Due Process)

Title IX Prohibits Retaliation



- Prohibition against retaliation for any participant in the Title IX reporting & investigation process
- Requires some level of school action



Title IX Grievance Process Review



Parties

- Complainant – alleged victim/survivor
- Respondent – responds to the allegation(s)

Other Participants

- Fact Witnesses
- Expert Witnesses

Administration of Claims

- Title IX Coordinator
- Title IX Investigator
- **Title IX Decision-Maker**
- Title IX Appeal Officer
- Title IX Advisor
- Title IX Informal Resolution Officer

Overview of Title IX Grievance Process (TIXGP)



- Respond promptly in a manner that is not deliberately indifferent
- Due process and fundamentally fair procedures to adjudicate the allegations
- Upon notification, supportive measures offered
 - Emergency removal
- Offer of formal process (upon signing of Formal Complaint)
 - Complainant files or Title IX Coordinator may file
- Both parties receive notice of the allegations
- Both parties participate in investigation and can inspect information gathered
- Separate decision-maker(s)
- Completed in a prompt time-frame
- Retaliation prohibited - define the retaliation complaint process



Review Flow Chart

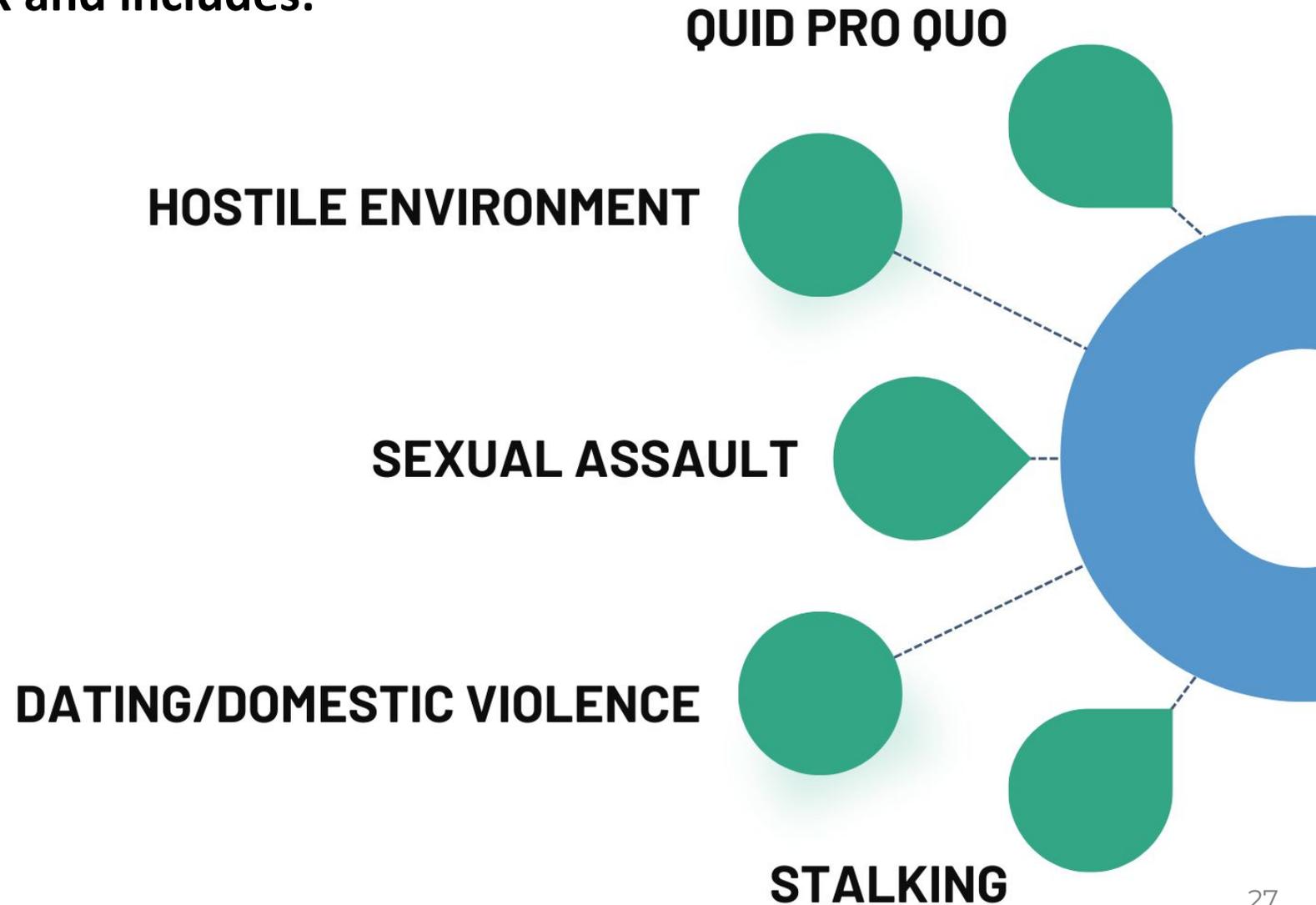


Title IX Sexual Harassment Definitions

Title IX (TIX) Definition of Sexual Harassment



Defined conduct on the basis of sex and includes:





Defines conduct “on the basis of sex” and includes:

- Quid pro quo - An employee of the school conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct;
- Hostile environment - Unwelcome conduct determined by a reasonable person to be so **severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the school’s education program or activity;



The definition includes:

- **Sexual Assault** means any sexual act directed against a Complainant without consent. Sexual Assault includes fondling, incest, rape, sexual assault with an object, sodomy, and statutory rape.
- **Dating violence** means violence committed by a person— (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (B) where the existence of such a relationship shall be determined based on a consideration of the following factors: (i) the length of the relationship. (ii) the type of relationship. (iii) the frequency of interaction between the persons involved in the relationship.



- **Domestic violence** includes felony or misdemeanor crimes committed by a current or former spouse or intimate partner of the victim
 - It includes the use or attempted use of physical abuse or sexual abuse, or a pattern of any other coercive behavior committed to gain or maintain power and control over a victim, including verbal, psychological, economic, or technological abuse that may or may not constitute criminal behavior,
 - By a person who— (A) is a current or former spouse or intimate partner of the victim; (B) is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner; (C) shares a child in common with the victim; or (D) commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction.



- **Stalking** means 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.

State Laws Prohibiting Sexual Harassment



- Aside from obligations under Title IX, K12 schools must also enforce state laws prohibiting sexual harassment
- Definitions of sexual harassment may be different
- In most instances, an incident will be analyzed under both Title IX and state law



Title IX Decision-Maker Role and Responsibilities in Title IX Grievance Process (TIXGP)

TIXGP: Investigator Responsibility



- Gather all information related to a claim
- Analyze factual findings
 - Relevancy
 - Authenticity
 - Credibility
- Factual findings

TIXGP: Separate Investigator and Decision-Makers



- Title IX Coordinator may serve as investigator
- Title IX Coordinator may NOT serve as decision-maker to determine policy violation and discipline
- Hearing panels permitted for K-12s but not required



TIXGP: Investigator Role and Timing



- Conducts investigation
- Provides all information collected to both parties
 - 10 days for review and response by the parties
- Examines the requests/additional information/potential questions presented by the parties
- Drafts the Title IX investigation report
- Provides the report to the parties
 - 10 days for review and response by the parties
- Receives additional questions from parties and makes changes, if necessary
- Finalizes the report and forwards to decision-maker

TIX Decision-Maker: Role and Timing



- Decision-Maker review of final investigation report
 - Decision-Maker outreach to the parties for additional information
 - Paper version of cross-examination
 - 10 days to respond
- Outcome Letter issued by Decision-Maker
 - Details Policy violation and discipline (if necessary)

Decision-Maker Role



- Review all evidence
- Issues decision relying on relevant, credible evidence
 - Policy violation – using policy definitions
 - Sanction/Discipline, if violation found
- Advises of appeal rights

- Can be more than one decision-maker
- Can never be Title IX Coordinator, Investigator, Appeal Officer

- **REVIEWS ALL EVIDENCE, DECIDES WHAT IS DISPUTE, (RE)EXAMINES THE DISPUTES, AND IN THE CONCLUSION, APPLIES THE STANDARD OF PROOF TO FACTS TO REACH A CONCLUSION ON POLICY VIOLATION AND DISCIPLINE**

Decision-Maker Potential Issues in TIXGP



Initial complaint – Title IX Coordinator

- Report of incident
- Formal complaint process offered
- Supportive measures
- Complaint filed/investigation initiated
- Potential dismissal (**Jurisdiction**, Allegation)
- **Notice of allegations**, includes a presumption of innocence

Investigation – TIX Investigator

- Interviews
- Documents reviewed
- Sharing information with both parties and reviewing feedback
- Completing investigative report
- Gathering feedback from parties on report

Decision-making – TIX Decision-Maker

- **Evaluate the evidence**
- **Determine if follow-up questions required**
- **Issue decision on policy violation and discipline**
- **Avoiding bias, conflict of interest, stereotypes**

TIXGP: Jurisdiction Defined

Occurring in the institution's
education program or activity

- includes locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurred

Against a person in the United
States





Mandatory dismissal

- Would not constitute sexual harassment as defined in regulations
- Did not occur in education program or activity
- Did not occur against a person in the U.S.

Permissive dismissal

- Complainant notifies Title IX Coordinator in writing that Complainant would like to withdraw formal complaint or allegations
- Respondent is no longer enrolled or employed by school district
- Specific circumstances prevent the school district from gathering evidence sufficient to reach a determination

Weighing and Challenging Evidence



- Authentication
- Relevance
- Credibility



- RELEVANCE – Applying to the matter in question; affording something to the purpose (Black’s Law Dictionary)
- NOT permitted:
 - Sexual history of Complainant (see Rape Shield exception)
 - Privileged communications
 - Medical documentation
- Not repetitive

Credibility



- Corroboration
- Feasibility
- Motivation for truthfulness/untruthfulness
- Consistent
- Reviewed/coached



Reaching a Conclusion and Issuing Outcome Letter

Decision-Maker Steps



- Receipt of final investigation report
 - *Is it finalized?*
- Outreach to parties to determine if follow-up questions are requested
 - Some discretion about submitting
 - Limited follow-up – facilitated cross-examination
 - Articulate and document decisions restricting this process
- Decision-maker discretion regarding about what follow-up is necessary
 - Decision-maker can ALSO conduct follow-up
- Outreach to parties with follow-up, as designated by decision-maker
- Conclusion and outcome letter

Final Decision Requirements



Under Title IX regulations, decision-maker must issue a written determination regarding responsibility that has to include

- Findings of fact
- Conclusions as to all allegations
- Rationale for reaching the decision
- Sanctions if the respondent is found responsible for policy violations must be included in the written determination
- Right to appeal

Others to consider:

- Allegations and Procedural Steps
- Categories that highlight compliance with state law (UCP)



Title IX

- Findings of fact
- Conclusions as to all allegations
- Rationale for reaching the decision
- Sanctions if the respondent is found responsible for policy violations must be included in the written determination
- Right to appeal

UCP

- Findings of Fact Supporting the Determination
- Conclusions and analysis of each allegations
- Corrective Actions
- Appeal Procedures



Writing the Outcome Letter (Form)



Case Study Facts

Bella has reported to her assistant principal that a fellow student, Grayson grabbed her in the hallway, tried to kiss her on the mouth, grabbed her buttocks and touched her breasts over her clothing. Bella said there was no one in the hallway at the time that this happened.

Findings of Fact



- Assume parties have opposed versions of the factual events
- What facts would be compelling to you as decision-maker in reaching a conclusion?
- Could you articulate these reasons in your outcome letter?

Articulating Your Conclusion in Outcome Letter



- **As to the allegation that _____, I find by a [preponderance of the evidence/clear and convincing standard] that _____.**
 - Address each allegation
 - Reasons why evidence supports the conclusion
 - Address disputed evidence
 - Details any questions raised by parties after reviewing report
- As a result of these determinations of responsibility, disciplinary sanctions will be imposed on Respondent. Specifically,
 - Insert here what discipline will be imposed on Respondent, if any.
- Additionally, remedies designed to restore/preserve equal access to the school's educational program or activity will be provided to Complainant and coordinated by the Title IX Coordinator.
 - *No requirement to specify what those remedies are under Title IX but including will cover UCP requirement.*

Allegation of Hostile Environment Sexual Harassment Under Title IX



Allegation: [pull directly from Notice of Allegations Letter]

DEFINITIONS:

- **Sexual assault/fondling:** “The term `sexual assault’ means any nonconsensual sexual act proscribed by Federal, tribal, or State law, including when the victim lacks capacity to consent.” *See, 35 USC 12291 (35).*

Under California Penal Code, sexual assault includes sexual touching or sexual battery. As set forth in California Penal Code § 243.4(a) – Sexual Battery is defined as:

Any person who touches an intimate part of another person while that person is unlawfully restrained by the accused or an accomplice, and if the touching is against the will of the person touched and is for the purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of sexual battery. *See, California Penal Code § 243.4(a).*

As to the allegation that _____, I find by a preponderance of the evidence/clear and convincing standard that _____.



- **As to the allegation that _____, I find by a preponderance of the evidence that _____.**
- CA DEFINITION: unwelcome sexual advances, unwanted requests for sexual favors, or other unwanted verbal, visual, or physical conduct of a sexual nature made against in the educational setting, under any of the following conditions:
 - The conduct has the purpose or effect of having a negative impact on the student's academic performance or of creating an intimidating, hostile, or offensive educational environment (*definition abbreviated*)

Allegation of Sexual Harassment – Title IX and State Law Analysis



- **Sexual Harassment under Title IX includes sexual assault (sexual battery, fondling, etc.)**
- Sexual Battery is defined as:
Any person who touches an intimate part of another person while that person is unlawfully restrained by the accused or an accomplice, and if the touching is against the will of the person touched and is for the purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of sexual battery. *See, California Penal Code § 243.4(a).*

Hostile environment sexual harassment

- Prohibited sexual harassment includes, but is not limited to, unwelcome sexual advances, unwanted requests for sexual favors, or other unwanted verbal, visual, or physical conduct of a sexual nature made against another person of the same or opposite sex in the educational setting, under any of the following conditions:
...
 3. The conduct has the purpose or effect of having a negative impact on the student's academic performance or of creating an intimidating, hostile, or offensive educational environment.



Other Title IX Obligations and Considerations

Impartiality



- Be neutral – neither pro-Complainant nor pro-Respondent
- Consider the evidence as presented
- Confront and understand bias and not allow it to impact decision
- Maintain open mind as to the potential conclusions

Conflicts of Interest



- Relationship to parties or witnesses
- Professional conflicts
- Personal conflicts
- Actual and perceived

Stereotypes



- “A fixed, over generalized belief about a particular group or class of people.”
(Cardwell, 1996)
- Stereotypes around sexual assault
- Stereotypes around sexual harassment
- Complainant and Respondent



- Conscious/Explicit
 - Discriminatory intent
 - Stated preferences
- Unconscious/Implicit
- For the most part, most people are unaware of these drivers
- Developed over a period time and can influence many factors in hearing
- Short cuts developed by the brain and often play a role in:
 - Immediate response to conflict
 - Often mimics fear responses



Checking for
conflict/stereotype/bias
in your outcome letter



Other Considerations

Appeal



Procedural Review

Procedural irregularity in the Title IX grievance process that materially affected the outcome.

New Information

Newly discovered evidence that was not reasonably available at the time of the determination of responsibility or dismissal that could materially affect the outcome.

Conflict of Interest or Bias

Due to a bias or conflict of interest by the Title IX Coordinator, investigator, or decision-maker that materially affected the outcome.



Title IX Changes on Horizon

Notice of Proposed Rulemaking from Office
for Civil Rights (OCR)

NCR Training from 6/14/23, recording and
slides are available



Final Points

1. Your certificate of completion will be sent to you this week, along with all the other resources shared during the program.
2. Keep and post a copy of slides from the training on your website.
3. Reach out with any follow-up questions:
office@titleixconsult.com

Upcoming Title IX Events from Title IX Consult, LLC



- **Title IX Thursdays –**
 - Thursday, August 3, 2023 12:30-1p Pacific
- **K12 Title IX Coordinator**
 - Friday August 11, 2023 830a-12p Pacific
- **K12 Title IX Investigator**
 - Friday August 18, 2023 830a-12p Pacific
- **K12 Title IX Decision-Maker and Appeal Officer**
 - Friday August 25, 2023 830a-12p Pacific



Thank You!

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**Sign-up for our newsletter
or ALL Title IX Thursdays!**