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## Full Staff Training on Obligation to Recognize and Report Title IX Sexual Harassment

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### I. What is Title IX?

A. Title IX of the Education Amendments Act of 1972 is a federal civil rights law that prohibits discrimination on the basis of “sex” in education.

B. Title IX provides:

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.

20 U.S.C. §1681(a). Public school districts receive federal funding and, therefore, school districts are obligated to comply with Title IX.

C. Title IX requires school districts to publish and implement a policy which prohibits discrimination on the basis of “sex.” “Sexual harassment” is a form of sex discrimination.

1. The school district has passed Policy 103 “Discrimination/Title IX Sexual Harassment Affecting Students” and Policy 104 “Discrimination/Title IX Sexual Harassment Affecting Employees.”

2. “Attachment 3” to both of those policies outlines the sexual harassment procedures and grievance process for formal complaints under Title IX.

D. Title IX requires the establishment of a fair and equitable grievance process in which there are a number of key personnel: Title IX Coordinator, Investigator, Initial Decision-Maker, Appeal Decision-Maker, Informal Resolution Facilitator. Those appointed to fill these roles have undergone specialized training on topics outlined in Title IX.

### II. Why is this Title IX Training Necessary for All Employees?

A. A school district violates Title IX if the school district is “deliberately indifferent” (e.g., responds in a “clearly unreasonable” manner) to “actual knowledge” of “sexual harassment.” 34 C.F.R. §106.44(a).

- B. In the K-12 setting, if any employee has actual knowledge of sexual harassment occurring in an education program or activity of the school district, then the school district is deemed to have “actual knowledge” of that potential violation of Title IX.
- C. Proper training of all school district employees on their obligation to (a) be able to identify potential Title IX sexual harassment, and (b) make a prompt report to the Title IX Coordinator is necessary to avoid a finding that *the school district* has been deliberately indifferent to actual knowledge of sexual harassment.

### III. What is “actual knowledge” of Title IX sexual harassment?

- A. Title IX defines “actual knowledge” as “notice of sexual harassment or allegations of sexual harassment” to the school district’s Title IX Coordinator or “to any employee of an elementary and secondary school.”
- B. Some examples of having “notice” or “actual knowledge”:
  - 1. If the employee observed or witnessed sexual harassment (a specific incident or a series of incidences).
  - 2. If the employee is told that sexual harassment has occurred by the Complainant (alleged victim) him/herself, the Complainant’s parents, friends or any other 3<sup>rd</sup> party.
  - 3. If the employee receives a voice mail or email or any other written or verbal communication alleging sexual harassment has occurred.
  - 4. If the employee receiving multiple reports that, taken together, provide a different picture of a person’s conduct than each incident standing alone.
  - 5. If the employee is in receipt of the filing of a formal complaint or report under the school district’s Title IX grievance procedure or grievance process.

### IV. What is “Title IX Sexual Harassment”?

- A. Before addressing the specific types of “sexual harassment,” it useful to understand what “sex” means in the context of Title IX.
  - 1. Title IX does not include a definition of the material term “sex,” which has resulted in a lot of confusion and litigation.
  - 2. On June 15, 2020, the United States Supreme Court issued the Bostock v. Clayton County, Georgia decision, in which the Supreme Court ruled that Title VII’s prohibition on discrimination “because of ... sex” includes discrimination on the basis of gender identity and sexual orientation.
  - 3. There has been significant debate since June 15, 2020 as to whether the Bostock Title VII ruling should be applied in the Title IX context. On January 20, 2021, President Biden issued an “Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation.”
    - a) In that Executive Order, President Biden declared: “Under Bostock’s reasoning, laws that prohibit sexual discrimination – including Title IX ... along with their respective implementing regulations – prohibit discrimination on the basis of gender identity or sexual orientation....”

- b) In June of 2021, the US Department of Education issued a “Notice of Interpretation” explaining that it will enforce Title IX’s prohibition on discrimination on the basis of sex to include discrimination on the basis of sexual orientation and discrimination based on gender identity.
- c) As of today, the US DOE Office for Civil Rights includes the following question in its “Frequently Asked Questions about Sex Discrimination” webpage:

Does Title IX Prohibit Discrimination Based on Sexual Orientation and Gender Identity?

Yes. Title IX prohibits discrimination based on sexual orientation and gender identity in education programs and activities that receive federal financial assistance. This includes situations where individuals are harassed; disciplined in a discriminatory manner; excluded from, denied equal access to, or subjected to sex stereotyping in academic or extracurricular opportunities and other education programs or activities; denied the benefits of a school’s programs or activities; or otherwise treated differently because of their sexual orientation or gender identity.

- 4. Thus, for now, the meaning of “sex” under Title IX includes: biological sex, gender, sex stereotyping and sexual orientation.
- B. As defined in section 106.30(a) of the Title IX regulations, “sexual harassment” means conduct on the basis of sex that satisfies one or more of the following:
- 1. A school employee conditioning the provision of an aid, benefit or service on an individual’s participation in unwelcome sexual conduct. This type of harassment is often called “quid pro quo” sexual harassment.
    - a) This type of harassment is implicated regardless whether the “bargain” was express or implied.
    - b) “Abuse of authority in the form of even a single instance of quid pro quo harassment is inherently offensive and serious enough to jeopardize equal educational access.” OCR Final Rule, 85 F.R. 30026, 30148 (5/19/20).
  - 2. 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. This is typically called “hostile environment” sexual harassment.
  - 3. Sexual assault – which is an offense that meets the definition of rape, fondling, incest or statutory rape as defined in the FBI’s Uniform Crime Reporting System.
  - 4. Dating Violence – which is violence committed by a person who is or has been in a social relationship or a romantic or intimate nature with the victim. Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
  - 5. Domestic Violence – which is a felony or misdemeanor crime of violence committed by:
    - a) A current or former spouse or intimate partner of the victim;
    - b) A person with whom the victim shares a child;

- c) A person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner;
  - d) A person similarly situated to a spouse of the victim; or
  - e) Any other person against an adult or youth victim who is protected from that person's acts under local domestic or family violence laws.
6. Stalking – which 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.
- C. As is true of all allegations of sex discrimination under Title IX, an allegation of sexual harassment under Title IX must have occurred in the school district's "education program or activity" and in the United States.
- 1. In the context of Title IX sexual harassment, an "education program or activity" includes locations, event, or circumstances over which the school district exercised substantial control over both the respondent and the context in which the sexual harassment occurred. 34 C.F.R. §106.44(a). ("Respondent" = alleged perpetrator.)
  - 2. This is a jurisdictional issue which is best left to the Title IX Coordinator and/or the Decision Makers to ultimately decide. It is best to err on the side of reporting the allegations if you are unsure as to whether they took place in an "education program or activity" of the school district.
- D. Retaliation is also prohibited under Title IX.
- 1. Title IX provides that neither the school district nor other persons may "intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX...or because the individual has made a report or complaint, testified, assisted or participated or refused to participate in any manner in an investigation, proceeding or hearing [under Title IX]." 34 C.F.R. §106.71(a).
  - 2. Thus, while retaliation is not "sexual harassment," retaliation as defined above is nonetheless a violation of Title IX and complaints alleging retaliation may be filed according to the grievance procedures for sexual harassment.
  - 3. If any staff member has notice of Title IX retaliation, the staff member should immediately inform and/or file a report with the Title IX Coordinator.
- E. Again – all of these definitions are complicated and often necessitate legal analysis to determine whether the elements are met. You should err on the side of reporting if you are unsure whether the information you have obtained meets the definition of "Title IX sexual harassment" and/or retaliation. It is the job of the Title IX Coordinator and/or the Initial and Appeal Decision Makers to determine whether an actual violation of Title IX occurred.

**V. Discussion of examples of Title IX sexual harassment per US Department of Justice/Civil Rights Division and US Department of Education/Office for Civil Rights.**

**VI. How must you respond if you have notice of potential Title IX sexual harassment?**

- A. Every employee or agent of the school district who has notice of potential Title IX sexual harassment occurring in the school district's education program or activity must report that information to the school district's Title IX Coordinator.
- B. The school district has a "Discrimination/Sexual Harassment/Bullying/Hazing/Dating violent/Retaliation Report Form" that should be used for this purpose.
- C. That Report Form prompts you to identify:
  1. The names of the Complainant and the Respondent;
  2. The conduct you are reporting of potential Title IX sexual harassment, including when and where the reported conduct took place,
  3. The name/s of any person/s who was/were present;
  4. The name/s of any person/s who may have knowledge or related information surrounding the reported conduct.
- D. The use of the Report Form is best practice. However, your inability or failure to find or fill out the Report Form does not excuse a failure to inform the Title IX Coordinator of the information of a potential violation. Even if you do not fill out the Report Form, you must promptly inform the Title IX Coordinator of the information pertaining to a potential Title IX sexual harassment claim through:
  1. Appearing in-person and making a verbal report to the Title IX Coordinator.
  2. Making a telephone call to the Title IX Coordinator.
  3. Sending an email to the Title IX Coordinator.

## **VII. What to do IF:**

- A. A person tells you about prohibited conduct (e.g., potential Title IX sexual harassment)?
  1. Inform the person of your responsibility to report the information to the Title IX Coordinator.
  2. Do not begin "investigating" the matter. You may ask questions to assess the person's well-being and safety but you should not try to investigate what happened. That is the job of other appointed Title IX officials.
  3. Be careful not to use victim-blaming language (e.g., "Well – you shouldn't have been smoking marijuana – it left you in a vulnerable position;" or "Do you think you possibly led him to believe you wanted him to do x, y or z?").
  4. Do not define the reported experience or reach any legal conclusions about the reported experience (e.g., "It sounds as though you were definitely assaulted.")
  5. Set realistic expectations and/or refrain from making promises you cannot keep or assertions over which you have no control (e.g., "That person will definitely be expelled from school for this" or "That person will definitely lose her job over this.")
- B. The person asks you not to tell anyone?

1. Thank the person for sharing the information with you but you must gently, respectfully inform them that federal law obligates you to report this information to the Title IX Coordinator.
  2. You must be careful not to promise confidentiality – because you are legally obligated to report this information to the Title IX Coordinator – but you can assure them that you will carefully guard the privacy of the information (e.g., you will not share this information with anyone who does not have a “need to know” from a legal perspective).
  3. Assure the person that the Title IX Coordinator will provide them access to supportive measures and information about the person’s options with regard to the school district’s Title IX grievance process.
- C. You suspect one of your colleagues or co-workers has engaged in prohibited Title IX misconduct?
1. You are legally required to report the information to the Title IX Coordinator if the conduct about which you have knowledge could fall into one of the categories of “sexual harassment” defined above.
  2. Making this report is difficult if the alleged Respondent is your friend or co-worker but a failure to make this mandatory report could result in adverse employment consequences to you.

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