

Title IX Sexual Harassment What You Need to Know



Michigan School Business Officials

Erin H. Walz

April 26, 2022



THRUN
LAW FIRM, P.C.

THRUN

Caution

- These slides reflect general legal standards for the related presentation and are not intended as legal advice for specific situations.
- This presentation does not satisfy the training requirements under Title IX.
- This document may not be reproduced or redistributed, in whole or in part, without the express written permission of Thrun Law Firm, P.C.

THRUN
LAW
FIRM

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”*

20 USC 1681

Scope of New Regulations

- Went into effect August 14, 2020
- Do not apply to sexual harassment that allegedly occurred before effective date
- Address sexual harassment as subset of sex-based discrimination
- Apply to staff-to-staff, staff-to-student, student-to-staff, and student-to-student sexual harassment occurring **against persons in the U.S.**

W
O
R
L
D

Key Changes

- **All** staff have reporting obligation
- “Single investigator” model eliminated
- Grievance process now includes specific required steps
- Respondent presumed not responsible until responsibility determination is made
- New policy, training, documentation, and record retention requirements
- Due process and constitutional protections emphasized

What is Sexual Harassment?

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

- Employee *quid pro quo*;
- Sexual assault, dating violence, domestic violence, stalking (definitions from Violence Against Women Act); and
- Hostile environment (new stricter definition)

W
D
R
H
H

Employee Quid Pro Quo

- School *employee* conditions a school aid, service, or benefit on an individual's participation in unwelcome sexual conduct.
- For Title IX – only applies to employee-student; not applicable to school volunteer, student, etc.

HERN

Sexual Violence

- Sexual assault, dating violence, domestic violence, and stalking
 - Have specific definitions
- Consent
 - Not defined in regulations
 - District must define term in its policy
- How does your policy define consent?
 - Consider absence or negation of consent, and capacity to consent

Hostile Environment

*“Unwelcome conduct determined by a reasonable person to be so severe, pervasive, **and** objectively offensive that it **effectively denies** a person’s **equal access** to the recipient’s education program or activity.”*

HERN

Hostile Environment

Unwelcome conduct determined by a reasonable person to be:

Old Definition

Severe, pervasive, **or persistent**, and **to interfere with or limit** a student's **ability to participate** in or benefit from school services, activities, or opportunities.

New Definition

To be so severe, pervasive, **and objectively offensive** that it **effectively denies** a person's **equal access** to the recipient's education program or activity.

N
D
R
T
H

“Education Program or Activity”

“Includes locations, events or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs...”

34 CFR 106.44(a)

UN
D
R
H
H

Scope of Education Program or Activity

Consider:

- Location of conduct?
- Relationship to school or school activity?
- Involvement of student, employee, volunteer, contractor?
- Policy/handbook language?
- If no jurisdiction under Title IX, may have jurisdiction to address alleged misconduct under another policy, rule, or law

Off-Campus Sexual Harassment

- Case-by-case analysis
- Investigate if school doesn't know where misconduct occurred?
- Not during school activity? Consider effects of off-campus conduct at school!
- Consider applicable codes of conduct and Revised School Code provisions

Making a Report

- Any person can make a sexual harassment report
- Reports can be made verbally, in writing, or electronically at any time to any school employee or the Title IX Coordinator
- Anonymous reports are permissible
- Report of sexual harassment \neq Formal Complaint

UNIVERSITY OF
MICHIGAN
FLINT

Actual Knowledge

- School's obligation to respond to sexual harassment is triggered when it has "actual knowledge"
- "Actual knowledge" means notice of sexual harassment or allegations of sexual harassment to school's Title IX Coordinator **or any school employee**

N
D
R
H
H

Employee Reporting Obligation

- Check your policy for employee reporting steps and timelines!
- TLF Policy requires any District employee who receives a report of sexual harassment or has actual knowledge of sexual harassment to convey that information to the Title IX Coordinator **by the end of the next business day.**
- If you see something, say something!
- Noncompliance = discipline

Responding to Report

- Title IX Coordinator must, upon receipt of report:
 - Contact Complainant (alleged victim) to discuss “supportive measures”
 - Inform Complainant of “supportive measures” available
 - Explain process for filing Formal Complaint
- Failure to do the above = deliberate indifference

UNIVERSITY OF
MICHIGAN
LAW
SCHOOL

Examples of Supportive Measures

- Counseling
- Work/class schedule changes
- Extensions of deadlines
- Increased supervision or escorts
- Mutual no-contact order
- **But**, school may not impose discipline or other actions that are not supportive measures against Respondent before completing the grievance process

7
D
R
T
H

What Not to Do

Disciplinary sanctions may **not** be imposed against respondents before grievance process concludes except:

- Employee Respondent may be placed on non-disciplinary administrative leave pending completion of grievance process
 - Double check: standard HR letter probably not okay under Title IX
- Student Respondent may be removed from school programs or activities on emergency basis only

Deliberate Indifference

- Schools must not be ***deliberately indifferent*** to sexual harassment
- Deliberate Indifference = failure to respond **reasonably** in light of known circumstances
- School must respond in **reasonably prompt** time frame
- Take complaints seriously. Report and address behavior that may be sexual harassment; do not hope it will “just go away.”

N
D
R
H
H

Retaliation is Prohibited

- Retaliation includes threats, intimidation, coercion against person who makes a report, files a Formal Complaint, participates in, or refuses to participate in a Title IX proceeding
- Exercise of First Amendment rights does not constitute retaliation prohibited by Title IX
- Charges for “collateral misconduct” may be retaliation (e.g., charging Complainant with underage drinking to discourage Complainant from reporting sexual harassment or participating in investigation)

Confidentiality

- Schools must keep confidential the identity of a person who reports sexual harassment or files a Formal Complaint
 - Includes: parties and witnesses
 - Supportive measures must also be kept confidential
- Exception: As permitted or required by law or to carry out any provision of Title IX

N
D
R
H
H

Record Keeping

- Records relating to Title IX reports must be maintained for at least seven years
 - Applies to investigation records, disciplinary sanctions, remedies, appeals, and records of any action taken (i.e. supportive measures)
- Must retain and post on website any materials used to train Title IX Coordinators, Investigators, Decision-Makers, Appeals Officers, and any person designated to facilitate an informal resolution process

Dangerous Mindsets

- *It's just teasing - no big deal.*
- *Just ignore it.*
- *It's a joke. Lighten up.*
- *It's a prank that got out of hand.*
- *If you didn't dress that way....*
- *It's a matter of hormones.*
- *Boys will be boys.*
- *Girls will be girls.*
- *Why can't you accept a compliment?*
- *Maybe you should transfer to another school.*

HERN

Bringing it All Together

- New Title IX Regulations create new mandatory reporting obligation for all employees
- If you see/hear/find out about an allegation of sexual harassment, convey it to the Title IX Coordinator **ASAP**
- Title IX Coordinator will assess allegation and determine next steps
- Protected from retaliation for reporting
- Failure to report will result in discipline, up to and including termination

Every School District Must Have

- A trained and identified Title IX Coordinator
- Multiple individuals formally trained to act in roles of Investigator, Decision Maker, Appeals
- Easily accessible Complaint Form
- A Title IX Board policy that includes all of the requirements for the 2020 regulations
- Materials clearly posted on website – including training materials!!
 - If OCR cannot easily find it, it is not there

7
D
R
T
H

Questions?

#TeamThrun Title IX Attorneys

Rob Dietzel



Michele Eaddy



Tim Gardner



Meg Hackett



Roy Henley



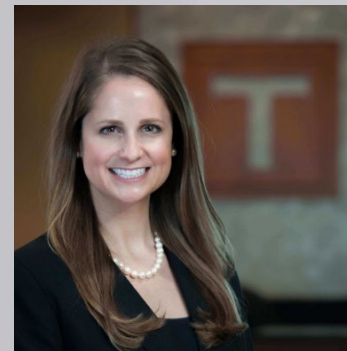
Jessie McNamara



Cristina Patzelt



Jennifer Starlin



Erin Walz



THRUN
ERIN
STARLIN



THRUN

LAW FIRM, P.C.

CELEBRATING **75** YEARS

@THRUNLAW

THRUN