

TITLE IX TRAINING

PART III

presented by
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Formal Title IX Complaint – Signed by Complainant vs. Title IX Coordinator?

- Formal complaints alleging Title IX sexual harassment can be signed by a complainant or by the Title IX Coordinator. 34 C.F.R. §106.30(a).
- A signature by either triggers the initiation of the Title IX grievance process, including written notice to the respondent.
- Difficult issue: When should a Title IX Coordinator ignore a complainant's desire not to proceed with the Title IX grievance process and sign the formal complaint despite the complainant's wishes otherwise?

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Formal Title IX Complaint – Signed by Complainant vs. Title IX Coordinator?

- Title IX Coordinator must engage in an analysis of whether the school district's failure to proceed with the Title IX grievance process is "clearly unreasonable in light of known circumstances."
- Should consider *why* the complainant does not want to proceed. Wants to retain confidentiality? Fears retaliation? Is recanting on facts initially reported?
- Should analyze whether the district's failure to proceed with the Title IX investigation and grievance process precludes the district from pursuing disciplinary sanctions against the respondent for inappropriate behavior that the district believes should be addressed if found to be true.
- Should analyze whether the failure to proceed with the Title IX investigation and grievance process leaves the district uncertain as to whether there is an ongoing threat to the health or safety of other students or individuals?

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EMERGENCY REMOVALS

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Emergency Removal Process

Even though school districts are precluded from imposing any “disciplinary sanctions” on respondents before the completion of the grievance process, school districts are authorized to remove a respondent from the school district’s education program or activity on an emergency basis if:

- The school district undertakes an individualized safety and risk analysis; and
- As a result of that analysis, the school district determines that an immediate threat to the physical health or safety of any students or other individual arising from the allegations of sexual harassment justifies removal; and

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Emergency Removal Process

- The school district provides the respondent with notice and an opportunity to challenge the decision immediately following the removal.
 - We recommend utilizing the informal hearing process outlined in 22 Pa. Code §12.8(c) to comply with this mandate. You already use this procedure when you suspend students for more than three consecutive days.

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Emergency Removal Process

ISSUE: While the Title IX regulations, at 34 C.F.R. §106.44(c), authorize the emergency removal of the respondent under certain circumstances, Pennsylvania law precludes school districts from excluding students from school for more than ten consecutive days unless they provide that student with due process, including an expulsion hearing before the school board. Expulsion hearings are inherently “disciplinary” in nature, but engaging that process is the only way to effectuate the Title IX authorized emergency removal process.

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Emergency Removal Process & Interplay with State Disciplinary Due Process Requirements

In an effort to effectuate Title IX’s emergency removal provisions with underlying state law requirements regarding student removal from school, we inserted detailed procedures into PSBA’s Policy 103, Attachment 3 pertaining to how to respond when/if the Title IX Coordinator believes emergency removal of the respondent is necessary, summarized below. *This suggested procedure is subject to change upon receipt of future guidance from OCR or future judicial rulings.*

Summary of Procedure:

- If possible, the district should refrain from pursuing disciplinary action pursuant to the Student Code of Conduct until such time the Title IX grievance process has concluded.

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Emergency Removal Process & Interplay with State Disciplinary Due Process Requirements

- If, after having taken an individualized safety and risk analysis, the district and Title IX Coordinator determine that supportive measures and other non-punitive actions *voluntarily agreed to* by the parties (mutual no contact agreements; agreeing to participate in virtual education options offered by the district, etc.) do not alleviate the immediate threat to the physical health or safety of individuals, then the district should take the following steps:

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Removal Steps:

- If the duration of the emergency removal is between 1 – 10 school days, the school district should ensure the respondent is provided with the level of due process outlined in 22 Pa. Code §12.8(c) pertaining to “informal hearings.”
 - At the informal hearing, the school district should provide the respondent an opportunity to challenge the determination that his/her emergency removal is necessary to address an immediate threat to the physical health or safety of any student/individual arising from the allegations of Title IX sexual harassment.

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Removal Steps, cont.

- If the duration of the emergency removal shall exceed ten consecutive schools days:
 - The district shall provide the respondent with the opportunity to participate in an “informal hearing” as set forth in 22 Pa. Code §12.8(c).
 - At the informal hearing, the school district shall provide the respondent an opportunity to challenge the determination that his/her emergency removal is necessary to address an immediate threat to the physical health or safety of any student/individual arising from the allegations of Title IX sexual harassment.
 - At this informal hearing the school district should also address the underlying Student Code of Conduct violations for which the student is being referred to the Board for an expulsion hearing.

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Removal Steps, cont.

- If after the informal hearing the district believes evidence exists to justify a referral for expulsion (e.g., removal from school for more than ten consecutive days), the district shall comply with the district’s expulsion policy and the due process procedures outlined in 22 Pa. Code §12.8(b).
- At the expulsion hearing held pursuant to 22 Pa. Code §12.8(b):
 - The Board shall make a determination of whether the student shall be expelled for Student Code of Conduct violations.

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Removal Steps, cont.

- At the “consequence” stage of the expulsion hearing, presuming the Board determines the student has violated provisions of the Student Code of Conduct justifying expulsion, the Board should be informed there is a pending Title IX grievance procedure involving the respondent and that the student be expelled for a period of time necessary to avoid identified health and safety risks associated with the alleged Title IX violation.
- The Board’s written adjudication of expulsion should address the pending Title IX process and the impact of the outcome of the Title IX process on a student’s emergency removal status.

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Removal Steps, cont.

- The Board should be informed that the expulsion hearing will be re-convened at the conclusion of the Title IX grievance process to determine what appropriate disciplinary consequences, if any, should be imposed on the student/respondent pursuant to the outcome of the Title IX grievance process and/or the Student Code of Conduction violations which were the subject of the underlying expulsion hearing.

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Removal Steps – Special Education

- If the respondent is an identified student with a disability, or thought to be disabled, the Title IX Coordinator should contact the Director of Special Education to coordinate the required actions in accordance with Board policy.
- The district must comply with applicable law pertaining to the discipline or change of placement of a student with a disability where applicable, pursuant to the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act and the Americans with Disabilities Act.

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Employee Removals: Administrative Leave

- When the respondent is a **non-student employee**, a school may place the employee on **administrative leave** pending the outcome of the grievance process.
 - A school need not identify an immediate threat similar to the “emergency removal” provision for students.

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TECHNOLOGY



Technology

- Live Hearing vs. Written Exchange of Evidence



CONFIDENTIALITY



Confidentiality

- Anonymous reports
 - The final regulations do not prohibit anonymous reporting.
 - Notice conveyed by an anonymous report may convey actual knowledge and trigger a response obligation.



Confidentiality

- Schools must keep confidential the identities of any:
 - Complainants or other individuals who have made a report or complaint of sex discrimination;
 - Respondents or any individuals who has been reported to be the perpetrator of sex discrimination; and
 - Witnesses.
- Confidentiality will not apply when disclosure is permitted by FERPA or is otherwise required by law or to carry out a Title IX sexual harassment investigation, hearing, or judicial proceeding

34 C.F.R. §106.71

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Confidentiality

- A “complainant” (i.e. the alleged victim of sexual harassment) cannot remain anonymous if a formal complaint is filed.
- The final regulations require a school to send written notice of the allegations to **both** parties upon receipt of a formal complaint. 34 C.F.R. §106.45(b)(2)
 - This applies irrespective of whether the formal complaint is signed by the complainant or by the Title IX Coordinator.
 - If the complainant’s identity is known it must be disclosed in the written notice of allegations.

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Confidentiality

- Schools may not impose “gag rules” on participants in investigations:
 - Exercise of First Amendment rights is not “retaliation”
 - “A recipient should not, under the guise of confidentiality concerns, impose prior restraints on students’ and employees’ ability to discuss the allegations under investigation, for example with a parent, friend, or other source of emotional support, or with an advocacy organization.”
 - Parties must also be free to discuss allegations in order to “gather and present evidence.”

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RECORDKEEPING



Recordkeeping

- The following must be maintained for a period of seven (7) years:
 - Records of each Title IX sexual harassment investigation, including:
 - Any determinations regarding responsibility;
 - Any audio or audiovisual recording or transcript;
 - Any disciplinary sanctions imposed on the respondent; and
 - Any remedies provided to the complainant.
 - Records of any appeals;
 - Records of informal resolutions; and
 - All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.

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Training Materials

- Training materials must also be published on a publicly accessible website or, if one is not maintained, must be made available for inspection by members of the public upon request.

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Recordkeeping

- Recipients also are required to **create** and **maintain** for a period of seven (7) years:
 - Records of any actions taken in response to a **report or formal complaint** of Title IX sexual harassment.
 - Records should include documentation of supportive measures offered to the complainant.
 - If no supportive measures are offered, recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances.
 - Documentation of the basis for concluding that the recipient's response was not deliberately indifferent.

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Hypotheticals



Hypothetical One

- Student-on-student sexual harassment at school-sponsored event
 - Jurisdictional analysis
 - Process
 - Supportive Measures
 - Relevance/Rape Shield Considerations

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Hypothetical Two

- Co-worker sexual harassment
 - Process
 - Title IX sexual harassment vs. Title VII or employee work rules
 - Relevance
 - Employee Discipline Implications – Union and Non-Union

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Thank You!

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