

Title IX

Final regulations from the U.S. Department of Education (DOE) implementing Title IX of the Education Amendments Act of 1972 with respect to sexual harassment went into effect on August 14, 2020.

Actionable Sexual Harassment Under Title IX

Title IX regulations apply to students and employees and the required grievance procedures apply regardless of whether either party, complainant or respondent, is a student or employee.

Sexual Harassment Defined

Three separate types of conduct constitute “sexual harassment” under Title IX to include:

Quid pro quo harassment (by an employee);

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 institution’s education program or activity; and

Sexual assault, dating violence, domestic violence, or stalking.

The Almond-Bancroft School District (the District) may address harassing conduct that does not meet the Title IX definition of “sexual harassment” under other policies, such as a code of conduct and handbooks.

A Title IX coordinator will respond when sexual harassment occurs within an “education program or activity” against a person in the United States.

An “education program or activity” is broadly defined to include locations, events, or circumstances over which the District exercised substantial control as to both the respondent and the context in which the sexual harassment occurred.

Title IX applies only to conduct that occurs in the United States, not to any incident that occurs on foreign soil, including during a school-sponsored activity.

If the alleged conduct does not constitute “sexual harassment,” does not occur within an “educational program or activity,” or does not occur in the United States, the complaint for purposes of Title IX will be dismissed. However, the complaint may be addressed through code of conduct or other disciplinary code, policy or handbook language.

Actual Knowledge

One of the key components triggering an obligation to respond is that the District must have “actual knowledge” of sexual harassment (including allegations of sexual harassment). “Actual knowledge” is defined as notice of sexual harassment or allegations thereof provided to a Title

IX Coordinator, any official who has authority to institute corrective measures on behalf of the District, or any employee of the District other than the respondent.

Mandatory reporting is required for all employees, however, employees may be confidential resources for students to discuss sexual harassment without automatically triggering a report to the Title IX Coordinator if circumstances do not align with Title IX definitions.

The “actual knowledge” standard is not met when the only official with actual knowledge of the alleged sexual harassment is the respondent.

Actual knowledge does not necessarily trigger the obligation to investigate, but it does trigger the obligation to provide supportive measures.

Deliberate Indifference

Under the deliberate indifference standard, upon receiving a report of sexual harassment, at a minimum, a Title IX coordinator will provide supportive measures. The Title IX Coordinator will promptly:

Contact the complainant to discuss the availability of supportive measures;

Let the complainant know that supportive measures are available regardless of whether a formal complaint is filed;

Consider the complainant’s wishes regarding supportive measures; and

Explain to the complainant the process for filing a formal complaint.

The final regulations define “supportive measures” as non-disciplinary, non-punitive individualized services that are reasonably available and provided without fee or charge to the complainant or respondent. Supportive measures are intended to ensure equal access to an education program or activity, protect safety, or deter sexual harassment. Supportive measures may include, but not limited to:

Counseling;

Extending deadlines;

Modifying class or work schedules;

Placing mutual restrictions on contact between the parties;

Providing campus escort services;

Changing work locations; and

Providing a leave of absence.

Supportive measures offered to a complainant will be tailored to each complainant’s unique circumstances. The main focus is to ensure the restoration and preservation of a complainant’s equal educational access, while leaving discretion to district officials to make disciplinary decisions only when respondents are found responsible. Supportive measures cannot be punitive, such as prohibiting participation in athletics or other student organizations.

A grievance process will be available when a “formal complaint” of sexual harassment is received. Requiring a formal complaint before initiating the grievance process ensures the consideration of the wishes of a complainant and only initiates the grievance process against the

complainant's wishes if doing so is not clearly unreasonable in light of the known circumstances. A decision not to investigate when the complainant does not wish to file a formal complaint will be evaluated by a Title IX coordinator.

The response will treat complainants and respondents equitably. The District is not deliberately indifferent with regard to treating students equitably when it offers complainants supportive measures and follows a grievance process before imposing disciplinary sanctions against respondent. The District will not take actions that restrict an individual's rights protected under the U.S. Constitution (including the First Amendment, the Fifth Amendment, and the Fourteenth Amendment) as a means of satisfying the duty not to be deliberately indifferent to Title IX sexual harassment.

Formal Complaint

A "formal complaint" is "a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the District investigate the allegation of sexual harassment."

When filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the District at which the formal complaint is filed. This suggests that complaints from former students and former employees may not trigger an obligation to engage in the grievance process under Title IX if they are not attempting to participate in an education program or activity. Depending on the circumstances, however, the institution may still have an obligation to investigate under Title VII and state and local law.

Once a formal complaint has been filed, a Title IX coordinator will offer supportive measures to the complainant and respondent, provide written notice of the allegations to the known parties, and investigate and adjudicate the complaint using a grievance process that complies with the final regulations. Discipline on a respondent will not be imposed without going through its grievance process.

Title IX Coordinators

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Emergency Removal of Respondents from School

It is permitted for a Title IX coordinator or District official to temporarily remove a student from school on an interim basis during the pendency of a complaint in limited "emergency" circumstances where there is an immediate threat to physical health or safety. Before the District can take this emergency measure, however, the District will do the following:

Undertake an individualized safety and risk analysis to determine whether there is an immediate threat to the physical health or safety of any person arising from the allegations of sexual harassment;

Make an affirmative determination that such an immediate threat exists based on its individualized safety and risk analysis; and

Provide the respondent with notice and an opportunity to challenge the emergency decision immediately following the respondent's removal.

The final regulations do not limit the District's ability to place an employee on administrative leave during the pendency of a complaint. The leave will be paid.

Grievance Process for Formal Complaints

The procedural requirements for investigation and adjudication of formal complaints are intended to provide greater "due process" and fairness to the parties. The District will not discipline individuals accused of sexual harassment in violation of Title IX without complying with the procedural requirements.

Standard of Evidence

The District will determine whether there is "clear and convincing" evidence in adjudicating allegations of sexual harassment. The same evidentiary standard will be applied to claims involving employees, as well as those involving students.

Presumption of Non-Responsibility

The respondent will be presumed not responsible until the conclusion of the grievance process. The preamble makes clear that this presumption is not intended to suggest that a respondent must be considered truthful, or that the respondent's statements must be given any more or less credence, based solely on the respondent's status as a respondent. The presumption itself is intended to buttress the requirement that investigators and decision-makers serve impartially without prejudging the facts at issue.

Time Frame for Completion of Grievance Process

Formal complaints will be investigated and a decision by a Title IX coordinator will be given to the complainant and respondent within forty-five (45) calendar days. The complainant or respondent may appeal the Title IX coordinator's decision to the Board of Education within ten (10) working days of the Title IX coordinator's notification of the decision. The Board of Education will issue a decision within thirty (30) calendar days of the receipt of the appeal. Any delays or extensions of the designated time frames will be "temporary," "limited," and "for good cause," and the parties involved will be notified of the reason for any such short-term delay or extension.

Written Notice of Allegations

Written notice of the allegations will be given to all known parties upon receipt of a formal complaint of sexual harassment.

The written notice will include sufficient detail of the allegations (including the identities of the parties involved, the conduct allegedly constituting sexual harassment, and the date and location of the alleged incident) to permit parties to prepare for an initial interview. It also will inform the parties that they may have an advisor of their choice and inspect and review evidence obtained during the investigation.

The written notice:

Will include a statement “that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process”; and

Will include a statement informing the parties of any provision of the institution’s code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

The Almond-Bancroft School District will not conclude that the allegation was made in bad faith based solely on a finding that the respondent was not responsible.

Investigation

The parties will have an equal opportunity to present witnesses, including both fact and expert witnesses and other witnesses. The District will not restrict the parties’ ability to discuss the allegations or gather and present evidence.

The parties will be allowed to have an advisor of their choosing present at any meeting or grievance proceeding. The District may establish restrictions regarding the extent to which the advisor may participate in the proceedings, so long as the restrictions apply equally to both parties.

The District will provide written notice to the parties in advance of any meeting, interview, or hearing conducted as part of the investigation or adjudication in which they are expected or invited to participate.

The District will not access or rely upon any treatment records maintained by a healthcare provider, including the District’s nurse, unless the party provides consent.

The burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the District, not on either party.

Review of Evidence

Before concluding the investigation, the District will provide the parties and their advisors, if any, equal opportunity to inspect and review any evidence obtained during the investigation that “is directly related to the allegations raised in a formal complaint,” even if the District will not rely on that evidence in reaching a determination. All inculpatory and exculpatory evidence must be included. The evidence must be provided to the parties in an electronic format or a hard copy, and the parties must be given at least ten (10) days to submit a written response, which the investigator will consider before the completion of the investigative report.

Investigative Report

At the conclusion of the investigation, the investigator will create an investigative report that fairly summarizes relevant evidence. The investigator will send to the parties and their advisors, if any, the investigative report in an electronic format or a hard copy for their review and written response. The final investigative report must be provided at least ten (10) days before any hearing so the parties have time to review and provide written responses. The investigative report will be submitted to the District Administrator to render a decision.

Live Hearing

Not all formal complaints will require a live hearing, but if the District investigator determines it necessary for due process, it will hold a live hearing for formal complaints of sexual harassment. The live hearing will be overseen by the District Administrator and/or District Counsel. The decision-maker(s) will be free from conflict of interest or bias and be trained on such topics as how to serve impartially, issues of relevance (including how to apply the rape shield protections provided for complainants), and any technology to be used at the hearing.

The hearings may be conducted with all parties present physically or virtually, so long as the technology enables the participants to see and hear one another in real time. That means parties may not participate solely by telephone. At the request of either party, the District will permit the parties to be in separate rooms during the live hearing.

The District will create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

Cross-Examination by Advisors

Every witness at the hearing will be subjected to cross-examination by the parties’ advisors. The District will require a party’s advisor to directly and in real time present all relevant questions and follow up questions to another party or witness. This expressly includes the ability of an advisor to challenge the credibility of a party. Cross-examination must come from a party’s advisor and may not come directly from a party.

While parties still have the right to have an advisor of their choosing present throughout the entirety of the Title IX process, the final regulations require all parties to have an advisor at the live hearing for the purpose of conducting cross examination. The District may permit advisors to participate in a greater capacity at the live hearing, but, under the final regulations, the only requirement is that advisors be permitted to cross examine the other party and witnesses.

If a party does not have an advisor, the District will provide that party with an advisor at no cost. Advisors provided by the District can be, but are not required to be, attorneys or experienced advocates.

There are not any expectations imposed of skill, qualifications, or competence on individuals serving as advisors. There is also no requirement that an advisor provided by the District have equal competency as the other party's advisor. For example, the District is not required to provide an attorney advisor to a party simply because the other party has an attorney advisor.

If a party or witness does not submit to live cross-examination, the decision-maker cannot rely on any statement made by that party or witness when making the decision about the respondent's responsibility. Only statements that have been tested for credibility through cross-examination at the live hearing may be considered by the decision-maker in reaching a responsibility determination. This includes statements against interest. Thus, if a party makes a statement against interest to the investigator during the investigation, but subsequently declines to participate in the live hearing or otherwise be subject to cross-examination, the statement made to the investigator must not be relied upon in making a determination regarding responsibility.

While the individual's statements may not be relied upon, the decision-maker cannot draw any inference regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.

Questions Must be Relevant

Questions posed to parties and witnesses at the live hearing must be relevant. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker must determine whether the question being asked is relevant and provide an explanation as to any decision to exclude a question as not relevant. Submission of written questions for the purpose of ascertaining the relevance of the question in advance does not comply with the Title IX regulations.

The regulations expressly provide that questions relating to a complainant's prior sexual behavior are deemed not relevant, unless the questions are offered to prove someone else was responsible for the alleged conduct or offered to prove consent.

Written Determination

The District Administrator will issue a written determination. The written determination will include a determination of responsibility, as well as a written finding of facts.

The determination will clearly state its conclusion regarding whether the alleged conduct occurred as alleged or at all and support each conclusion with the rationale relied upon.

The written determination also will indicate the sanctions imposed on the respondent and delineate the remedies provided to the parties.

The determination will be sent simultaneously to the parties, along with information to both parties regarding the process of filing an appeal.

Appeals

The District will offer appeals to the Board of Education equally to both parties from determinations regarding responsibility or from the District's dismissal of a formal complaint or any allegation contained in a formal complaint.

Parties must be permitted to appeal on the following grounds:

Procedural irregularity that affected the outcome;

New evidence that was not reasonably available when the determination of responsibility was made that could affect the outcome; and

The Title IX Coordinator, investigator, or decision-maker had a general or specific conflict of interest or bias against the complainant or respondent that affected the outcome.

The District is permitted to allow additional grounds for appeal but will do so equally for complainant and respondent. The District has the discretion to decide whether the severity or proportionality of sanctions is an appropriate basis for an appeal, but any such appeal must be offered equally to both parties.

Dismissal of Formal Complaints

The District will dismiss a complaint if the conduct alleged in the formal complaint:

Would not constitute sexual harassment even if proven;

Did not occur in the District's education program or activity; or

Did not occur against a person in the United States.

Additionally, the District may dismiss a complaint where:

The complainant notifies the Title IX Coordinator in writing that the complainant wishes to withdraw the formal complaint or allegations;

The respondent is no longer enrolled or employed by the institution; or

Specific circumstances prevent an institution from gathering evidence sufficient to reach a determination regarding responsibility.

The District will provide the parties with written notice of a dismissal, whether mandatory or discretionary, and the reason for the dismissal.

Dismissal of the formal complaint under Title IX does not preclude action under another policy or code of conduct.

Informal Resolution

The District may still utilize informal resolution processes, but only after a formal complaint has been filed.

The District has discretion as to when informal resolution may be offered; however, the District is prohibited from offering or facilitating an informal resolution process where the allegations in the formal complaint allege that an employee sexually harassed a student.

Before proceeding with an informal resolution process, both parties must give voluntary, informed, written consent. Additionally, the District will provide written notice to the parties disclosing the allegation, the requirements of the informal resolution process, and any consequences of participating in the informal resolution process (for example, what information, if any, will be considered confidential).

Any party may withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint at any point.

Retaliation

The District expressly prohibits retaliation against any individual for exercising rights under Title IX, including the participating in or refusing to participate in the filing of a complaint, the investigation, or any proceeding or hearing.

Examples of prohibited retaliation include intimidation, threats, coercion, or discrimination, and specifically include bringing charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same fact or circumstances as a report or complaint of sex discrimination or sexual harassment.

Exercising rights protected under the First Amendment does not constitute retaliation. Similarly, charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding does not constitute retaliation. However, punishing a party for making false statements in the course of the grievance process would constitute retaliation where the conclusion that false statements were made is based solely on the determination regarding responsibility.

Recordkeeping

The District will maintain certain documents relating to Title IX activities for seven years.

The District will maintain records of:

Sexual harassment investigations, including any determination regarding responsibility and any audio or audiovisual recording or transcript, any disciplinary sanctions imposed on the

respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the institution's education program or activity;

Any appeal and the result therefrom;

Any informal resolution; and

All materials used to train Title IX coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.

Furthermore, the District will create, and maintain for seven years, records of any actions (including any supportive measures) taken in response to a report or formal complaint of sexual harassment. In each instance, the institution must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the institution's education program or activity.

If the District does not provide a complainant with supportive measures, the District will document the reasons why such a response was not clearly unreasonable in light of the known circumstances.

Training

Training of Title IX personnel will include:

The definition of sexual harassment;

The scope of the institution's education program or activity;

How to conduct an investigation and grievance process, including hearings, appeals, and informal resolution process, as applicable; and

How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

The nature of the training is left to the District's discretion, as long as it achieves the provision's directive that such training provide instruction on how to serve impartially and avoid prejudgment of the facts at issue, conflicts of interest, and bias, and that materials used in such training avoid sex stereotypes. Trauma-informed training is permitted, insofar as it does not create a bias in favor of complainants.

The District's investigators and decision-makers will receive training on issues of relevance, including how to apply the rape shield protections provided only for complainants. Decision-makers also will receive training on any technology used at a live hearing.

Institutions are required to publish all training materials on their websites. If the institution does not have a website, it must make the materials available for inspection and review by members of the public.