Dear Colleague Letter Summary

By

Lee E. Bird, Ph.D.

DEAR COLLEAGUE OUTLINE

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in education programs or activities operated by recipients of federal financial assistance.

Sexual harassment of students, which includes acts of sexual violence, is a form of sex discrimination prohibited by Title IX.

Dear Colleague Letter lays out the specific Title IX requirements applicable to sexual violence.

Sexual violence refers to physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent due to a victim’s use of drugs or alcohol; and intellectual or other disability.

The DCL does not add requirements but provides information and examples to inform recipients how OCR evaluates compliance with their legal obligations.

Sexual harassment includes sexual violence.

Sexual harassment may violate Title IV which prohibits public school districts and colleges from discrimination against students on the basis of sex—(race, etc.). DOJ enforces Title IV.

Sexual violence includes rape, sexual assault, sexual battery, and sexual coercion.

One in Five are victims of completed or attempted sexual assault while in college. 6.1% males are victims of completed or attempted sexual assault during college.

Pg. 2 Title IX requirements related to student on student sexual harassment, including sexual violence and school’s responsibility to take immediate and effective steps to end sexual harassment … see 2001 Sexual Harassment Guidance.

Pg. 3 Sexual harassment is unwelcome conduct of sexual nature. It includes unwelcome sexual advances, requests for sexual favors and other verbal, nonverbal or physical conduct of a sexual nature. Sexual violence is a form of sexual harassment prohibited by Title IX.

Pg. 3—footnote—Title IX also covers gender based harassment based on sex or sex stereotyping.

Title IX protects students in connection with all the academic, educational, extra-curricular, athletic and other programs of the school, whether those programs take place in a school’s facility, on a school bus or at a class or training program or elsewhere.
If a school knows or reasonably should have known about student on student violence, that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence or address its effects.

Schools required to publish a notice of non-discrimination and to adopt and publish grievance procedures.

Employees must be trained so they know how to report harassment and how to respond properly…to any employee likely to witness or receive reports of sexual harassment and violence including teachers, school law enforcement, administrators, school counselors, general counsels, health personnel and RA’s.

Pg. 4 ….regardless of where the conduct occurred the school must process the complaint in accordance with its established procedures.

The school also should take steps to protect a student who was assaulted off campus from further sexual harassment or retaliation from the perpetrator and his/her associates.

Law enforcement investigation does not relieve the school of its independent Title IX obligation to investigate the conduct.

Pg. 5 Investigation may vary

- Nature of allegations
- Age of the student
- Size and administrative structure of the school

School’s inquiry must be prompt, thorough and impartial.

Gain parent permission if claimant is under 18 and does not attend higher education before beginning the investigation.

If complainant insists that his/her name or other identifiable information not be disclosed to the alleged perpetrator, the school should inform the complainant about its ability to respond.

The school should evaluate that request in the context of its responsibility to provide a safe and non-discriminatory environment for all students.

Confidentiality vs. Seriousness of alleged harassment

- Complainant’s age
- Other complaints about the same individual
- Alleged harasser’s rights to receive information about the allegations.
The school should not ensure confidentiality even if the school cannot take disciplinary action against the alleged harasser because complainant insists on confidentiality and should pursue other steps to limit effects of alleged harassment and its recurrence.

Compliance with Title IX

A. Publishing notice of non-discrimination
B. Designating an employee to coordinate Title IX (at least one)
C. Adopting and publishing grievance procedures providing for a prompt and equitable resolution of student and employee sex discrimination complaints.

Notice of Non-Discrimination

- Must state entity does not discriminate on the basis of sex in its education programs and activities.
- Must state where inquiries may be referred:
  - Name or title
  - Office address
  - Office phone number
  - Email address for Title IX coordinator
- Must be widely distributed to all students, parents of elementary and secondary students, employees, applicants for admission and employment; must be prominently posted on school’s websites and locations throughout campus; electronic and printed publications.
- Should clarify what conduct constitutes sexual harassment including sexual violence.

B. Title IX Coordinator

- Must designate person or persons responsible for coordination of Title IX
- Clarify roles—example: who hears student on student cases?

Pg. 7 The recipient should designate one coordinator as having ultimate oversight responsibility.

- Coordinator should have no other duties, responsibilities that may create a conflict of interest.
- Campus law enforcement need to understand law and campus structure—Title IX.
C. Grievance Procedures

- All recipients of federal funds adopt and publish grievance procedures
- Procedures must apply to sex discrimination complaints filed by students against students, school employee or third parties
- Grievance procedure may include voluntary informal mechanisms (mediation) for resolving some types of sexual harassment complaints
  - Improper to tell a student to “work it out’ with the alleged perp
  - Must be notified of the right to end mediation and go to formal hearing.
  - Mediation not appropriate for allegations of sexual assault even on a voluntary basis

Pg. 8 footnote: procedures apply to all students – including athletes. May not be addressed by athletic department.

Pg. 9 Prompt and Equitable Requirements apply to sexual harassment complaints and sexual violence complaints.

- Notice to students, parents of elementary and secondary students including where to file a complaint
- Application of procedures—employees, other students or third parties
- Adequate, reliable impartial investigation of complaints including the opportunity for both parties to present witnesses and other evidence
- Designated and reasonably prompt time frames for major stages of complaint
- Notice to parties of the outcome of the complaint
- Assurances that the school will take steps to prevent recurrence of harassment; correct discriminatory effects on the complainant

Re Investigations:

- Because of standard of proof and other variables police investigations or reports are not determination of whether sexual harassment or violence violates Title IX
- Criminal investigations do not relieve the school of its duty under Title IX to resolve complaints promptly and equitably
- School must notify complainant of right to file a criminal complaint
- Schools should not wait for the conclusion of a criminal investigation or criminal proceeding to begin their own investigation or protect complainant
- Must use preponderance of the evidence standard (use in the Title VII and by the OCR)
- Complainant and alleged perpetrator must be afforded similar and timely access to any information to be used at the hearing
  - Example: pre-hearing meeting should be provided to both complainant and alleged perpetrator
Character witness should be available for both or neither
Both must have access to each other’s statements
Attorneys equally for both
OCR strongly discourages schools from allowing parties to personally question or cross examine each other, (traumatic/intimidating) thereby increasing hostile environment
Appeal (both) of finding and remedy
Maintain documentation of all proceedings including written findings of fact, transcripts or audio recording
All persons trained
- Hearing, investigation
- What constitutes Title IX and sexual violence
Must be impartial (hearing board)
Public schools must provide due process to alleged perpetrator

**Reasonably prompt timeframes.** Timeframe within which the school will:

1. Conduct a full investigation of complaint (typically 60 calendar days).
2. Both parties receive a response regarding the outcome of the complaint.
3. Parties may file an appeal. Both parties should receive updates.

Can be variations due to complexity and severity and extent of harassment

**Notice of Outcome**

- Both parties must be notified in writing about the outcome of both the complaint and any appeal
- OCR recommends final outcome (written determination) to complainant and alleged perpetrator concurrently

*Title IX requirements trump any conflicting FERPA provisions*

Pg. 14 Post-secondary institutions may disclose to anyone, not just the alleged victim, the final results of a disciplinary proceeding if it determines that the student is an alleged perpetrator of a crime of violence or a non-forcible sex offense and, with respect to the allegation mode, the student has committed a violations of the institutions rules or policy.

Clery Act—both accuser and accused must be informed of the outcome.

FERPA limitations on re-disclosure of information do not apply.
Steps to Prevent Sexual Harassment and Sexual Violence and Correct its Discriminatory Effects on the Complainant and Others

Schools should take proactive measures to prevent sexual harassment and violence.

Education and Prevention

1. Orientation programs for new students, faculty, staff and employees
2. Training resident advisors
3. Training student athletes and coaches
4. Assemblies/Take Back the Night events. Include:
   a. What constitutes sexual harassment and violence
   b. School policies and disciplinary procedures and consequences of violating them
   c. Encourage reporting
   d. Discuss alcohol and drug violations in relation to Title IX to encourage reporting
   e. Where to report if they are victims
   f. What to do if they learn about an incident

Remedies and Enforcement

If school identifies discrimination it must take immediate action to eliminate the hostile environment

- Prevent its recurrence
- Address its effects
  o Counseling
  o Disciplinary action
  o Change policy

May need to take interim steps before the final outcome

- Notify complainant of his/her options to avoid contact with allege perpetrator
  o Example: change academic schedule move from resident hall, no contact order

Note:

- Must minimize burden on the complainant. Should not move complainant allowing perpetrator to remain.
- Be sure complainants are aware of counseling, health care, right to file complaint with police
- Notify complainant that retaliation will be addressed and who to report retaliation to

OCR identifies remedies to include:

- Escort between classes and activities
- Change schedule so victim and accused are not in same class
- Moving complainant or respondent to different residential hall
- Providing counseling, mental health care, tutoring or other academic support services
- Withdraw without penalty and retake course. Changes can’t adversely affect student.

**Remedies for the Broader Student Population:**

1. Counseling and Training
   a. Having counselor on-call to assist victims
   b. Train Title IX coordinator
   c. Train police
   d. Train employees who interact with students
   e. Informing students of their right to file on and off-campus (police)

2. Develop material and implementation of policies and procedures
   a. Widely distributed, shared, poster
   b. Tell what to do—how
   c. How school will respond
   d. Have Title IX coordinator review all sexual harassment and violence cases to see if complainant is entitled to a remedy under Title IX that was not available through the disciplinary committee
   e. Campus-wide education advisory group Title IX—climate check activity/survey
   f. Revising grievance procedures used to handle sexual harassment and violence complaints—prompt and equitable.