

When it Happens at School: Sexual Harassment in the #MeToo Era

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Title IX (20 USC § 1681 et seq.)

No person in the United States shall on the basis of sex be excluded from participation in, be denied the benefit of or be subjected to discrimination under any education program or activity receiving federal financial assistance.

Title IX

Programs and Activities



“All the operations of ...” the Board are covered.

TITLE IX

More than just sports...

- ▶ Most often identified with women's sports
- ▶ Much more broad-prohibits gender discrimination
- ▶ Like with Title VII, has been expanded to include sexual harassment
- ▶ Even though it was enacted as regulatory enforcement statute, private lawsuits are permitted
- ▶ Applies to both students and employees

TITLE VII

42 USC § 2000E

“It shall be an unlawful employment practice for an employer -

- ▶ (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals race, color, religion, sex, or national origin; or
- ▶ (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual’s race, color, religion, sex, or national origin.

WHAT IS THE #METOO MOVEMENT?

The **#MeToo** movement is a movement against sexual harassment and sexual assault.

According to metoomvmt.org, it was founded by Tarana Burke in 2006 to help survivors of sexual violence.



#METOO MOVEMENT

- In 2017, #MeToo gained notoriety due to its use by celebrities on Twitter.
- The hashtag brought forth a national discussion about sexual violence.
- Goal: reframe and expand the global conversation around sexual violence.



Why does it matter?

Sexual harassment affects our greatest assets:



Students



Employees

Before #MeToo - Student Stats

In 2011, the American Association of University Women (AAUW) released a research report that examined public schools in grades 7-12

(www.aauw.org/research/crossing-the-line/)

- 48% of students surveyed experienced some form of it
- 58% (of those who reported) were girls
- 9 in 10 stated that it had a negative impact

In 2017, the AAUW revisited 2013-14 data collected by the Civil Rights Data Collection (CRDC) to study the differences in reported rates by state, and differences in rates at which girls and boys report

(www.aauw.org/article/schools-report-zero-incidents-of-sexual-harassment)

- 79% of all public schools reported 0 incidents of sexual harassment
- 78% of Alabama's public schools reported 0 incidents
 - Shows that sexual harassment is **extremely underreported**
- 67% of schools with an anti-harassment/bullying policy had 0 reported incidents, compared to 80% of schools without policies
- 67% of schools with a Title IX Coordinator had 0 reported incidents, again compared to 80% of schools without a coordinator

Before #MeToo— Employee Stats

In 2015, EEOC received over 28,000 charges of harassment

www.eeoc.gov/task_force/harassment/upload/report.pdf

- 45% alleged sexual harassment
- Between 25% to 85% of women experienced sexual harassment in the workplace
- 75% of harassment victims experienced retaliation after reporting
- Somewhere between 87 and 94 percent of employees who experienced harassment did not file a formal complaint



After #MeToo - Student Stats

- ▶ In 2018, the CRDC released its data report for 2015-2016 (www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf)
- ▶ 135,200 individual allegations of harassment
- ▶ 41% were based on sex
- ▶ 16% were based on sexual orientation
- ▶ 63% were reported by girls
- ▶ 37% were reported by boys



After #MeToo - Employee Stats

- ▶ In 2018, EEOC noted 12% increase from 2017 in sexual harassment discrimination charges (www.eeoc.gov)
- ▶ 50% increase in EEOC-filed lawsuits
- ▶ Recovered more than \$70 Million for victims
- ▶ More individuals and employers (9,000) sought information on how to deal with workplace harassment by participating in the EEOC's "Respectful Workplaces" training program since its launch in 2017.



Sexual Harassment

- **Title IX** protects students from harassment connected to any of the academic, educational, extracurricular, athletic, and other programs or activities of schools, regardless of the location.
- **Title VII** protects employees from sex-based (and other forms of) harassment in the workplace.

Sexual Harassment

- Sexual harassment is conduct that:
 - is sex-based/sexual in nature;
 - is unwelcome; and
 - denies or limits a student's ability to participate in or benefit from a school's education program. (TIX)
 - is severe or pervasive enough to alter the terms, conditions, or privileges of employment. (TVII)

Nature of Conduct

- ▶ making sexual propositions or pressuring students for sexual favors;
- ▶ touching of a sexual nature;
- ▶ writing graffiti of a sexual nature;
- ▶ displaying or distributing sexually explicit drawings, pictures, or written materials;
- ▶ Performing sexual gestures or touching oneself sexually in front of others;
- ▶ telling sexual or dirty jokes;
- ▶ spreading sexual rumors or rating other students as to sexual activity or performance;
- ▶ circulating or showing e-mails or Web sites of a sexual nature.

Sexual Harassment

- Can take different forms
- Can be carried out by school employees, other students, & non-employee third parties
- Both males & females can be victims
- Harasser & victim can be of the same sex
- Can occur in any school program or activity
- Can take place in school facilities, on a bus, or at other off-campus locations, such as a school-sponsored field trip or a training program

Sexual Harassment

OCR Enforcement

- OCR requires that educational institutions take measures to prevent sexual harassment and violence and respond appropriately to reports of violations.
- The Title IX officer is charged with coordinating compliance with the statute's requirements.



Sexual Harassment

OCR Enforcement

- Policies must specifically address sexual harassment and include grievance procedures for prompt, equitable resolution of student and employee complaints
- Clearly publicize the grievance procedure & where to file complaints
- Provide training opportunities & educational materials to students & employees
- Take immediate action to eliminate the sexual harassment, prevent its reoccurrence & address any effects upon the victim and the community

Sample Complaint Procedure (students)

A student who believes he or she has been or is being subjected to any form of sexual harassment shall immediately report the matter to a teacher, school counselor, principal, or the Superintendent/designee.

A student's request to make his or her report of sexual harassment to someone of the same sex as the student shall be granted.

No student alleging sexual harassment shall be required to present the matter to the person who is the subject of the complaint.

Sample Complaint Procedure (students)

If the complaint is received by someone other than the school principal, the person receiving the complaint shall promptly inform the school principal. The principal shall start an immediate investigation into the matter. The custodial parent(s)/guardian of the student will be informed of the complaint. The completed investigation shall be reviewed by the Superintendent/designee for prompt and appropriate action, if warranted. A written response to the student's complaint will be provided to the custodial parent(s)/guardian of the student and the student within forty-five (45) days* of the date the student first registered the complaint.

Sample Complaint Procedure (students)

The student or the custodial parent(s)/guardian of the student may appeal the decision within ten (10) days of receipt of the decision by filing a written notice of appeal with the Superintendent. The Superintendent shall present the decision and notice of appeal to the Board at the next scheduled meeting of the Board. The Board shall make a final decision and notify the student and the custodial parent(s)/guardian of the student in writing of the Board's decision.

Sample Complaint Procedure (employees)

The Superintendent is responsible for receiving and investigating formal complaints regarding sexual harassment. The Superintendent may designate another official to conduct the investigation. The Director of Human Resources is an additional official to which formal complaints can be reported. If the Superintendent is unavailable or is the subject of the complaint, the individual should report the complaint to the Director of HR.

Formal complaints should be made in writing, signed by the complainant, and fully describe the circumstances surrounding the alleged harassment. Harassment complaints that cannot be made in writing should be memorialized by the Superintendent, the HR Director, or the designee, as appropriate.

Sample Complaint Procedure (employees)

The Superintendent will promptly investigate the complaint, review the results of any investigation with legal counsel or other appropriate officials, make any findings that are supported by the investigation, and recommend appropriate action based on the findings. The complainant will be informed of any such action that is taken as a result of the investigation.

A complainant who is not satisfied with the investigation or resolution of the complaint may request the Superintendent take additional or different action or present the complaint to the Board for its review and action. In such case, the Board will render a final decision as soon as practicable.

Sexual Harassment Investigations

- Elements of an investigation:
 - No one-size-fits-all: will vary depending on allegations, age of students, size of school, etc.
 - Any process necessary to determine:
 - Whether or not the conduct occurred;
 - If so, what actions the school will take to eliminate the harassment and prevent its recurrence
 - Rule of thumb: More severe the conduct, more intensive and multilayered the investigation should be

Sexual Harassment Investigations

Think about the gender of complainant / accused and relationships of the parties (i.e., potential for case under Students First, Expulsion Hearing, Due Process rights)

- Do you need to include another administrator in the process?
- Do you need to hire an independent Title IX investigator?

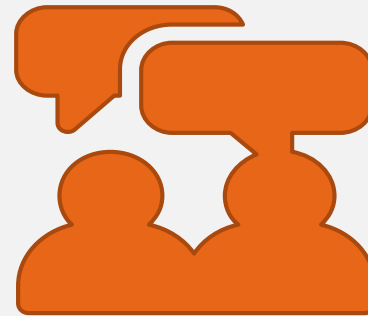


Sexual Harassment Investigations

- Review Board policy and procedure before beginning.
 - Note required steps and timelines.
- Determine what the allegations are.
 - Get the complainant to provide a written account/explanation of what happened.
 - If they would rather do it in person, that is OK too.
 - Reduce their account to writing and have them sign it.

Sexual Harassment Investigations

- Interview the complainant:
 - Be compassionate, assure complainant that they are not in trouble.
 - Ask open ended questions first.
 - Allow complainant to tell story.
 - Listen for consistency.
 - Get complainant to identify potential witnesses.
 - Has anything like this happened before?



Sexual Harassment Investigations

- Interview the complainant:
 - Any other evidence? Texts? E-mails? Photos? Social Media? Etc.
 - Advise the complainant to come to you if anyone threatens/harasses them.
 - Advise the complainant to contact you if they think of anything else.
 - Request that the complainant not talk to potential witnesses.
 - Reinforce the Board's commitment to address harassment.

Sexual Harassment Investigations

- Interview witnesses identified by complainant:
 - What does the witness know about complaint? Ask open ended questions.
 - Does the witness know of other incidents?
 - Is the witness aware of any other evidence? Texts, e-mails, etc.
 - Who else might have information?
 - Does the witness know other witnesses?
 - Ask witness not to talk to other potential witnesses.

Sexual Harassment Investigations

- Interview witnesses identified by complainant:
 - Don't share "confidential" information unless you have to, as discretion is important
 - Reinforce the Board's commitment to address harassment.
 - Tell students to contact you if they are intimidated or harassed by anyone involved.
 - NOTE: If a student reports sexual harassment to you "in confidence," you cannot keep that secret!
 - If a colleague discloses sexual harassment to you and you are not an official designated to receive complaints, you can keep their confidence.

Sexual Harassment Investigations

- Once you are clear on what the allegation is then meet with the accused:
 - Let them know about allegation.
 - Ask them to give their side of what happened.
 - If witness statements conflict with their story, ask about the facts in those statements.
 - Ask if they have any witnesses or documentary evidence (e.g., e-mails/texts) - if so, interview them.
 - Instruct them not to retaliate against complainant.

Sexual Harassment Investigations

- Tips for Interviews:
 - Don't lead
 - Ask open-ended questions
 - “What happened then?”
 - “then what happened?”
 - “what did [s]he say?”
 - “what did you see?”
 - “who else was there?”
 - Have a note-taker in the room with you



Sexual Harassment Investigations

- Tips for Interviews:
 - Listen for consistency
 - But ask clarifying questions when needed (e.g., when you say ‘she’ who do you mean?”)
 - Once you complete an interview, have the student write out a statement, go over it with him/her, and have the student add the significant details he/she will have left out.
 - Reinforce the Board’s commitment to address harassment.

Sexual Harassment Investigations

- Tips for Interviews: INVESTIGATION NOTES
 - What about written statements ahead of time?
 - What about recording devices?
 - If possible, have a second person in the interview as the designated “note taker”.
 - If that not possible, go as soon as possible to your computer to write up a summary of what the witness relayed to you while the conversation is fresh.
 - Send your summary of the interview to the witness to have them confirm the information you collected, or have them come back in to review and sign the summary.

Sexual Harassment Investigations

➤ General Tips:

- Investigate as quickly as possible.
 - Prevent loss of relevant information through fading memories, unavailability of witnesses, etc.
- Try to schedule witness interviews at a time and place when the witness is likely to be cooperative



Sexual Harassment Investigations

➤ General Tips:

- Once you start interviewing witnesses, complete the interviews as quickly as possible.
 - If possible, speak to witnesses before they speak to each other
- Tell them to contact you if they are intimidated or harassed by anyone involved.



Sexual Harassment Investigations

- Written report: This step must be undertaken with delicacy - if investigation ends up in litigation or an administrative hearing, your report will likely be **Exhibit A**
 - Sift through the relevant evidence
 - Include the facts (including important dates) and what conclusions you are reasonably able to draw from them
 - Back up your credibility determinations
 - Use clear and concise language

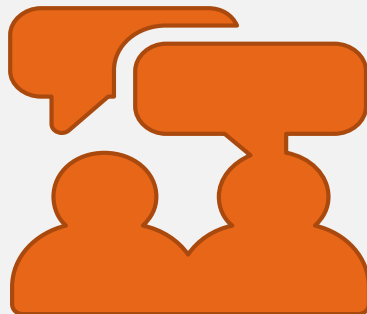
Sexual Harassment Investigations

- Written report (continued):
 - Proofread. Then proofread again...and again.
 - If you have not already, it is advisable to call your school board attorney at this stage for help in crafting your report (depending on the situation)
 - Date and sign it
 - Be mindful of timelines!

Peer Harassment

A balancing act requiring judgment & sensitivity

- ❖ How old are the students?
- ❖ How serious is the conduct?
- ❖ How persistent is the conduct?
- ❖ What is the reaction to the conduct?
- ❖ Could it interfere with education?



Sexual Harassment

OCR Enforcement

- Possible remedies?
 - Ensuring complainant and perpetrator do not share classes
 - Counseling
 - Disciplinary action against perpetrator
 - Remediating any negative effects to complainant
 - Ounce of prevention...

Sexual Harassment

Interim Measures

Interim measures are “individualized services” offered as appropriate to either or both the reporting and responding parties involves in an alleged incident of sexual misconduct prior to an investigation or while an investigation is pending.

Sexual Harassment Interim Measures

Consider whether to offer:

- counseling,
 - extensions of time or other course-related adjustment, modifications of class schedules,
 - campus escort services,
 - restrictions on contact between the parties,
 - leaves of absence,
 - increased security and monitoring of certain areas of campus,
 - other similar accommodations
- Most important—keep complainant & accused separated. Provide complainant with information regarding who to contact if they are threatened or harassed for reporting incident.

Sexual Harassment

Interim Measures (Employment Context)

- ▶ DO NOT move the complaining party unless he/she requests it; or
- ▶ If you offer to relocate complainant and they want to be moved, get a voluntary statement in writing, AND
- ▶ Make sure the pay, benefits, title, prestige of position are unchanged.
- ▶ Relocating the complainant as an interim measure can be construed as an adverse employment action under Title VII and is a trap for the unwary.
- ▶ Better practice is to put the accused on paid administrative leave pending the outcome of the investigation; and
- ▶ Maintain confidentiality of the investigation to protect the accused's reputation until all facts are known.

Sexual Harassment Interim Measures

According to OCR:

It may be appropriate for a school to take interim measures during the investigation of a complaint. In fairly assessing the need for a party to receive interim measures, a school may not rely on fixed rules or operating assumptions that favor one party over another, nor may a school make such measures available only to one party. Interim measures should be individualized and appropriate based on the information gathered by the Title IX Coordinator, making every effort to avoid depriving any student of her or his education. The measures needed by each student may change over time, and the Title IX Coordinator should communicate with each student throughout the investigation to ensure that any interim measures are necessary and effective based on the students' evolving needs.

United States Dep't of Educ. Office for Civil Rights, Q&A on Campus Sexual Misconduct, p .3 (September 2017).

OCR Enforcement

If OCR is asked to investigate or otherwise resolve incidents of sexual harassment of students, including incidents caused by employees, other students, or third parties, OCR will consider whether--

- the school has a policy prohibiting sex discrimination under Title IX & effective Title IX grievance procedures;
- the school appropriately investigated or otherwise responded to allegations of sexual harassment;
- the school has taken immediate and appropriate corrective action responsive to quid pro quo or hostile environment harassment.

Peer Harassment

Legal Liability Standard:

- ❖ Student-on-student sexual harassment rises to the level of actionable Title IX discrimination only if the harassment is “**sufficiently severe, pervasive and objectively offensive**” that it bars the victim’s access to educational opportunity;
- ❖ School has some control over the harassment, but was “deliberately indifferent” to it.
- ❖ And, the harassment **must be based on sex -- not personal animus.**

3 Questions

To determine deliberate indifference, courts will ask the school:

1. What did you know?
2. When did you know it?
3. What did you do about it?

Peer Harassment

The Supreme Court has set such a high standard for peer-on-peer sexual harassment “to guard against the imposition of sweeping liability” and in recognition that:

“...unlike the adult workplace...children may regularly interact in a manner that would be unacceptable among adults. Indeed, at least early on, students are still learning how to interact appropriately with their peers. It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing and gender-specific conduct that is upsetting to the students subjected to it.”

Some risk of sexual harassment is inherent to the enterprise of public education, in particular, because public schools must educate even the most troublesome and defiant students.

Peer Harassment

1. The defendant must be a Title IX funding recipient.
2. An “appropriate person” must have actual knowledge of the alleged discrimination or harassment.
3. The discrimination or harassment—of which the funding recipient had actual knowledge—must be “severe, pervasive, and objectively offensive.”
4. The plaintiff must prove “the funding recipient act[ed] with deliberate indifference to known acts of harassment in its programs or activities.”
5. The plaintiff must demonstrate the discrimination or harassment “effectively barred the victim's access to an educational opportunity or benefit.”

Peer Harassment

The plaintiff's second-guessing of the school system's response, is not actionable under Title IX:

- ❖ For a school to be liable under Title IX, its response, or lack thereof, to the harassment must be clearly unreasonable in light of the known circumstances.
- ❖ That is a high bar, and neither negligence nor mere unreasonableness is enough.
- ❖ Schools are not required to remedy the harassment or accede to a parent's remedial demands and “courts should refrain from second-guessing the disciplinary decisions made by school administrators.”

Peer Harassment

- ❖ Pay attention
- ❖ Use common sense
- ❖ Know who to go to - Title IX Compliance Officer
- ❖ Communicate expectations to students and be consistent
- ❖ Take reports seriously - don't minimize concerns
(Don't brush off: "boys will be boys")
- ❖ Increase supervision

Harassment by School Employee

- ❖ The Supreme Court established the standard of liability for teacher-on-student sexual harassment in *Gebser v. Lago Vista Independent School District* in 1998.
- ❖ In *Gebser*, the court held that when a teacher has allegedly sexually harassed a student, “damages may not be recovered ... unless an official of the school district who at a minimum has authority to institute corrective measures on the district’s behalf has actual notice of, and is deliberately indifferent to, the teacher’s misconduct.”

Harassment by School Employee

- ❖ In addition, to establish a prima facie case, a plaintiff must also prove they were subject to either *quid pro quo* sexual harassment or a sexually hostile educational environment.
- ❖ The Supreme Court held that a school district's liability for teacher on-student sexual harassment is not based on respondeat superior or vicarious liability, but rather is based on the district's own intentional conduct in remaining idle after receiving actual notice of sexual harassment

Harassment by School Employee

Other considerations when dealing with school employee's accused of sexual harassment:

- Coordinating with Human Resources.
- Reporting to DHR.
- Reporting to ALSDE if teacher is placed on leave or other disciplinary action is taken “for cause.”

QUESTIONS . . . ?

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