Southern Oregon ESD

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Federal Law (Title IX) Sexual Harassment Complaint Procedure

Additional Definitions

"Actual knowledge" means notice of sexual harassment or allegations of sexual harassment to the ESD's Title IX Coordinator or any official of the ESD who has authority to institute corrective measures on behalf of the ESD, or to any employee of an elementary or secondary school.[1]

"Complainant" means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.

"Formal complaint" means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent[2] and requesting that the ESD investigate the allegation of sexual harassment.[3]

"Supportive measures" means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the ESD's educational environment, or deter sexual harassment.[4] The ESD must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide supportive measures.

Formal Complaint Procedures

Upon receipt of a formal complaint, the ESD will provide the parties[5] written notice of the following:

1. Notice of the ESD's grievance process, including any informal resolution process.

[1] This standard is not met when the only official with knowledge is the respondent.

[2] "Respondent" means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

[3] A complainant must be participating in or attempting to participate in the education program or activity of the ESD with which the formal complaint is filed.

[4] Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.

[5] Parties include the complainant and the respondent, if known.

2. Notice of the allegations of sexual harassment potentially constituting sexual harassment, including sufficient details[6] known at the time and with sufficient time to prepare a response before any initial interview.

3. That the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility be made at the conclusion of the grievance process.

4. That the parties may have an advisor of their choice, who may be, but is not required to be, an attorney.

5. The parties may inspect and review evidence.

6. A reference to any provision in the ESD's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

The Title IX Coordinator will contact the complainant and the respondent to discuss supportive measures. If necessary, the Title IX Coordinator will arrange for an individualized safety and risk analysis. If necessary, a student or non-student employee may be removed or placed on leave.

Investigation

The Title IX Coordinator will coordinate the ESD's investigation. The investigation must:

1. Include objective evaluation of all relevant evidence, including inculpatory and exculpatory evidence.

2. Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the ESD and not on the parties.[7]

3. Provide an equal opportunity for the parties to present witnesses, and other inculpatory and exculpatory evidence.

4. Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.

5. Provide the parties with the same opportunities to have other present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by

[6] Sufficient details include the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment, and the date and location of the alleged incident, if known.

[7] The ESD cannot access, consider, disclose, or otherwise use a party's records that are made of maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's capacity, and which are maintained in connection with the provision of treatment to the party, unless the ESD obtains the party's (or eligible student's parent's) voluntary, written consent to do so.

the advisor of their choice.[8] The ESD may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.

6. Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate.

7. Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint.9 Prior to completion of the investigative report, the ESD must send to each party and party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report;

8. Create an investigative report that fairly summarizes relevant evidence and is sent to each party and party's advisor in electronic format or hard copy at least 10 days prior to any hearing (if required or provided) or other time of determination of responsibility. The party and advisor will be allowed to review and provide a written response.

After the ESD has sent the investigative report to the parties and before reaching a determination regarding responsibility, the decision maker(s) must afford each party the opportunity to submit written, relevant questions[10] that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party. The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.

Credibility determinations are not based on the person's status as a complainant, respondent or witness.

No person designated as a Title IX Coordinator, investigator, decision-maker, or any person designated by the ESD to facilitate an informal resolution process may have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

If, in the course of an investigation, the ESD decides to investigate allegations about the complainant or respondent that are not included in the notice previously provided, the ESD must provide notice of the additional allegations to the parties whose identities are known.

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[8] In addition to an advisor, complainants and respondents may also be entitled to other accompaniment as required by law or as necessary for conducting of grievance procedures, including but not limited to: translators, services for students with disabilities and parents of minor students.

[9] This includes the evidence upon which the ESD does not intent to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to the investigation. The ESD must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.

[10] Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the question and evidence concern specific incidents of the complainants prior sexual behavior with respect to the respondent and are offered to prove consent.

At no point in the process will the ESD, or anyone participating on behalf of the ESD, require, allow, rely upon, or otherwise use questions or evidence that constitutes, or seeks disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

Determination of Responsibility

The respondent must be deemed to be not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.

The standard to be used for formal complaints in determining whether a violation has occurred is the preponderance of the evidence[11] standard.

The person deciding the question of responsibility (the "decision-maker") must be someone other than the Title IX Coordinator or the investigator(s). The decision-maker must issue a written determination which must include:

1. Identification of the allegations potentially constituting sexual harassment;

2. A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather evidence, and hearings held;

3. Findings of fact supporting the determination;

4. Conclusions regarding the application of the ESD's code of conduct to the facts;

5. A statement of, and rationale for, the result as to each allegation, including:

    a. A determination regarding responsibility;
    b. Any disciplinary sanctions the ESD imposes on the respondent; and
    c. Whether remedies designed to restore or preserve equal access to the ESD's education program or activity will be provided by the ESD to the complainant; and

6. The ESD's procedures and permissible bases for the complainant and respondent to appeal.

The ESD must provide the written determination to the parties simultaneously.

The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

[11] A preponderance of the evidence standard is understood to mean concluding that a fact is more likely than not to be true. U.S. Department of Education, Title IX Regulations commentary, p. 1268, FN 1409.

Remedies

The Title IX Coordinator is responsible for effective implementation of any remedies.

The disciplinary sanctions[12] may include:

1. Discipline up to and including suspension and expulsion;

2. Removal from various activities, committees, extra-curricular, positions, etc.

3. Disqualification for awards and honors;

4. Discipline up to and including termination, in accordance with laws, agreements, contracts, handbooks, etc.[13]

Dismissal of a Formal Complaint

The ESD must dismiss a formal complaint with regard to Title IX sexual harassment if the alleged conduct:

1. Would not constitute sexual harassment, even if proved;

2. Did not occur in the ESD's education program or activity[14]; or

3. Did not occur against a person in the United States.

The ESD may dismiss a formal complaint with regard to Title IX sexual harassment if at any time during the investigation or hearing, if provided:

1. A complainant notifies the Title IX Coordinator in writing that the complaint would like to withdraw the formal complaint or any allegations therein;

2. The respondent is no longer enrolled or employed by the ESD; or

3. Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

Upon dismissal of a formal complaint, the ESD must promptly send written notice of the dismissal and the reason(s) therefor simultaneously to the parties.

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[12] ESDs should review any other disciplinary procedures and requirements prior to imposing any discipline, and should consult legal counsel with questions.

[13] It is important to keep supportive measures separate from disciplinary sanctions. Supportive measures must be "non-disciplinary" and "non-punitive."

[14] Includes locations, events, or circumstances over which the ESD exercised substantial control over both the respondent the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. (Title 34 C.F.R. §106.44(a))

The dismissal of a formal complaint under Title IX does not preclude the ESD from continuing any investigation and taking action under a different process. The ESD may have an obligation to continue an investigation and process under a different process.

Consolidation of Complaints

The ESD may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by one or more complainant against one or more respondents, or by one party against another party, where the allegations of sexual harassment arise out of the same facts or circumstances.

Informal Resolution

If the ESD receives a formal complaint, at any time prior to reaching a determination regarding responsibility, the ESD may offer an optional informal resolution process, provided that the ESD:

1. Provides written notice to the parties disclosing:

    a. The allegations;
    b. The requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing toa resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint; and
    c. Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.

2. Obtains the parties' voluntary written consent to the informal resolution process; and

3. Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

Appeals

Either party may file an appeal from a determination regarding responsibility or from a dismissal of a formal complaint, within 15 days of the decision, on the following bases:

1. Procedural irregularity that affected the outcome of the matter;

2. New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; or

3. The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

4. Additional bases may be allowed, if made available equally to both parties.

When an appeal is filed, the ESD must:

1. Notify the other party in writing;

2. Implement appeal procedures equally for both parties;

3. Ensure the decision-makers(s) for the appeal is not the same person as the decision-maker(s) who reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;

4. Ensure the decision-maker for the appeal is free from conflicts of interest and bias;

5. Give both parties a reasonable equal opportunity to submit a written statement in support of, or challenging the outcome;

6. Issue a written decision describing the result of the appeal and the rationale for the result; and

7. Provide the written decision simultaneously to both parties.

Timelines

The ESD will complete the following portions of the grievance process within the specified timelines:

1. General grievance process (from receipt of formal complaint to determination of responsibility: 90 days;

2. Appeals (from receipt of appeal): 60 days;

3. Informal resolution process: 60 days.

Temporary delays of the grievance process, or limited extensions of time will be allowed for good cause[15] with written notice to the parties.

Records

Records will be created and maintained in accordance with the requirements in 34 CFR 106.45(a)(10).[16]

Training

Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process must receive training on the definition of sexual harassment, the scope of the ESD's education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and information resolution processes. The training must also include avoiding prejudgment of the facts at issue, conflicts of interest and bias.

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[15] Good cause may include considerations such as the absence of a party, a party's advisor or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities. (Title 34 C.F.R. § 106.45(b)(1)(v))

[16] This includes creating a record for each investigation. This record must include:

- Supportive measures, or reasons why the response was not clearly unreasonable under the circumstances;
- Basis for the conclusion that the ESD's response was not deliberatively indifferent; and
- What measures were taken to restore or preserve equal access to the ESD's educational program or activity. (Title 34 C.F.R. § 106.45(a)(10)(ii))

Most records (including training) must be retained for at least seven years.

Decision-makers must receive training on any technology to be used at a live hearing and on issues of relevance of questions and evident, including when questions about evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant.

Investigators must receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence.

Materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes, must promote impartial investigations and adjudications of formal complaints of sexual harassment and must be made publicly available on the ESD's website.