

# Bond

Harley School Training

## Title IX Regulations

Knowledge and Skills required of  
Title IX Coordinators, Investigators and Decision-Makers

# Title IX Rule and Harley School Policy

- Review of Title IX history
- Title IX Rule and what it was intended to achieve
- Harley School Policy
  - We will review key terms in this training
- Training Required by Rule
  - Definition of Sexual Harassment
  - What is within Harley's education programs or activities
  - Avoiding conflict of interest or bias; serving impartially; avoid prejudging
  - How to conduct investigation and grievance process
  - Relevance and relatedness of evidence including rape shield protection and confidential records.

# Who has “knowledge” of potential harassment?

- School liable if it had knowledge and acted with deliberate indifference.
- For K-12 schools, ANY employee who had knowledge means the school had knowledge.
- Harley must ensure that its employees know how to respond to reports of potential sexual misconduct and that Title IX Coordinator must be informed of any such reports.
- **Proposed** Rule Change: specific training required for all employees

# Definition of Sexual Harassment

Sexual Harassment as defined by Title IX Rule:

- An employee conditioning educational benefits on participation in unwelcome sexual conduct (“quid pro quo”).
- Unwelcome conduct that a reasonable person would determine is *so severe, pervasive, and objectively offensive* that it effectively denies a person *equal access to the school’s education program or activities*.
- **Proposed** Rule would change standard to “severe or pervasive”.

# Definition of Sexual Harassment – from VAWA

- Sexual Assault (all in Harley's Policy):
  - Any sexual act directed against another person, forcibly or against that person's will; or not forcibly or against the person's will where the victim is incapable of giving affirmative **consent**. Sexual assault consists of the following specific acts:
    - Rape – the penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the **consent** of the victim.
    - Fondling – The touching of the private body parts of another person for the purpose of sexual gratification, forcible or against the person's will, or not forcibly or against the person's will where the victim is incapable of giving **consent** because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.
    - Incest – sexual intercourse between persons related within the degree where marriage is prohibited by law.
    - Statutory Rape – non-forcible sexual intercourse with a person who is under 17.

# Definition of Sexual Harassment

- Domestic Violence (in Harley's Policy)
  - Violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of NY, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of NY.

# Definition of Sexual Harassment

- Dating Violence (in Harley's Policy):
  - Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.
  - Does not include acts covered under the definition of domestic violence.
  - Considers length of rel'shp, type of rel'shp, frequency of interactions.
- Stalking (in Harley's Policy):
  - Engaging in a course of conduct directed at a specific person on the basis of sex that would cause a reasonable person to (A) fear for their safety or the safety of others, or (B) suffer substantial emotional distress.
    - Course of conduct = two or more acts.
    - Substantial emotional distress – mental suffering or anguish that may, but does not necessarily require, medical or other professional treatment or counseling.

# Must Occur within School Program or Activity

- The sexual harassment must be:
  - Against a person in the United States.
  - Who is currently participating in, or attempting to participate in, a school's educational programs or activities.
  - In the school's education program or activity – includes locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the alleged sexual harassment occurs. Cyber-harassment?
  - These will be important when we talk about mandatory dismissals in a bit.
  - **Proposed** Rule will require schools to investigate any complaint that might result in alleged hostile environment at school.



# Reports and Formal Complaints

- Anyone can make a report – can be verbal, written or electronic but report differs from a formal complaint. All reports made to employees must be conveyed to Title IX Coordinator.
- Upon receipt of report, Title IX Coordinator must contact complainant to discuss supportive measures (irrespective of whether formal complaint is filed) and explain process for filing of formal complaint and complainant's right to decide.
- Formal complaint must be signed by complainant/parent/guardian
  - Alleging sexual harassment and requesting that school investigate the allegation.
- Title IX Coordinator may file formal complaint if failure to initiate an investigation would be unreasonable.

# Supportive Measures

- Offered equally to complainant and respondent.
- Must be non-disciplinary, non-punitive individualized services that are provided without charge.
- Designed to restore or preserve equal access to school's educational program or activity without unreasonably burdening the other party.
- No emergency removal of a student-respondent without first undertaking individualized safety and risk analysis.
- May administratively suspend employee-respondent – using other employment policies as applicable.
- Must keep confidential to extent possibly.

# Supportive Measures

- Range of measures are listed in Policy as required by the Rule. Found in definition of “Supportive measures”.
- Common examples include counseling, class schedule changes, extensions of time on schoolwork, increased monitoring, mutual no-contact orders.
- Remember – available to both parties.
- Document whether and what supportive measures were offered by school and requested by a party.

# First Step in Grievance Process

- Written notice to both parties that includes:
    - Title IX Policy for explanation of procedures
    - What the allegations in the formal complaint say
    - Parties may have advisor of their choice
    - Right to inspect and review evidence
    - Statement that Respondent is presumed not responsible, and determination of responsibility made at conclusion of grievance process.
    - State standard of evidence to be used (preponderance of evidence)
    - Statement that retaliation is prohibited
- These are spelled out in Harley's Policy.

# Mandatory Dismissal

- The school (acting through Title IX Coordinator) **MUST** dismiss a formal complaint if:
  - After reasonable investigation, allegations, even if true, would not constitute sexual harassment under Title IX definition.
  - Not within school program or activity.
  - Did not occur against a person in the United States, but...
  - Mandatory dismissal under the Title IX Policy does not preclude action under another provision of the school's code of conduct or other policy.
  - Be careful here...
  - **Proposed** rule change will require investigation, not dismissal

# Advisor of Choice

- Cannot restrict who – and advisor may be an attorney
- Advisor can accompany party to any meeting.
- CAN establish rules on role of advisor with respect to his/her role in process so long as rules apply equally.
- CAN establish rules of decorum regarding conduct of parties and their advisors (e.g. prohibition on abusive, disruptive behavior or language will not be tolerated, advisors will not interrupt investigator to ask questions of witnesses, etc.).

# Informal Resolution Process

- Harley's Policy allows the school to offer (at its election) an informal resolution process.
- Can't be used for complaints against employees.
- Both parties must consent.
- Must spell out in a written notice the informal resolution process, including what happens if one party wishes to resume the formal grievance process (including what evidence can be used).
- Facilitator in informal resolution process must be sufficiently skilled.

# Investigation

- School has responsibility to gather evidence sufficient to reach a determination within reasonably prompt timeframe.
- Law enforcement involvement or parallel proceedings - can delay but can't be reason to suspend the process.
- Investigator interviews parties and witnesses, gathers info/evidence directly related to the allegations; no gag orders.
- Must give sufficient advance notice of interviews and meetings where that party is invited or expected to appear.
- Interviews ok via telephone, videoconference, in-person, can be recorded by investigator.
- Parties entitled to present any evidence directly related to the allegations (expert witnesses, character witnesses, etc.).
- Rape shield protection. More on this later.



# Investigation Timeline (in Harley's Policy)

- At least 10 days before the investigation report is finalized, parties and their advisors must be permitted to review and respond to ALL evidence directly related to the allegations; responses will be considered by the investigator before preparing the final report.
- At least 10 days before a determination of responsibility is to be made, final investigation report must be provided to the parties and their advisors for their review.
- Training on writing the report will be provided later in this presentation.
- Written responses to the investigation report must be submitted to the decision-maker within the 10-day period.

# Determination

- Decision-maker can be individual or panel but can't include the Title IX Coordinator or investigator.
- After investigation report sent and before reaching determination, decision-maker must afford each party the opportunity to submit written, relevant questions to be asked of any party or witness.
- Decision-maker will often make credibility assessments.
- Each party must be provided with all questions and answers and time must be given for limited and reasonable follow-up questions.
- Decision-maker must explain to the party proposing questions any decision to exclude a question as not relevant .

# Written Determination

- The decision-maker must issue a written determination regarding responsibility, which must include (per Harley's Policy):
  - Identification of allegations;
  - Description of procedural steps taken;
  - Findings of fact;
  - Conclusions regarding the application of facts to the school's policy;
  - Statement of, and rationale for, the results as to each allegation;
  - Disciplinary sanctions imposed on respondent and any remedies afforded complainant; and
  - Procedures for appeals.

Written determination must be given simultaneously to both parties and their advisors.

# Appeals

- Appeals must be offered to both parties on the following bases:
  - Procedural irregularity
  - New evidence not reasonably available at the time the determination was made
  - Title IX Coordinator, investigator or decision-maker had a conflict of interest or bias for or against one of the parties.
- Both parties must be given a reasonable opportunity to submit a written statement in support of, or challenging the outcome.
- Decision-maker for appeal can't be the same person as the original decision-maker and can't be Title IX Coordinator or investigator.
- Decision-maker must issue written decision describing result of appeal and rationale for it.

# Retaliation and Confidentiality

- Retaliation
  - Claims of adverse action, threats, intimidation against any person who makes a report, files a formal complaint, participates in or refuses to participate in a Title IX proceeding.
  - Important to remind all participants that retaliation is prohibited under Harley School policies and disciplinary action will be taken against those who retaliate.
- Confidentiality
  - Schools must keep confidential the identity of reporters, parties, witnesses.
  - Supportive measures must be kept confidential.
  - Exception: as permitted by law or to carry out a provision of the Rule.
  - But: no gag orders and broad disclosures to parties in grievance process.

# Recordkeeping

- Records relating to Title IX reports must be maintained for seven years.
- Applies to supportive measures, investigation records, disciplinary sanctions, decisions and appeal decisions, training.

# Title IX Training

- Required for Title IX Coordinators, Investigators, Decision-Makers and Appellate Decision-Makers.
- Prior slides walking through the grievance process and its many rules is first part of effective training.
- Additional training required:
  - How to conduct an investigation
  - How to serve impartially to avoid bias and conflict of interest
  - Relevance of evidence
  - Applying the Rape Shield protections

# General Tips

- Neutral factfinders, fair and impartial.
- For Title IX Coordinator – you have most interaction with parties at the outset of the investigation. Parties will have confidence in the process if they feel heard by an objective, trustworthy person. Watch words that could unintentionally communicate bias or pre-judgement.
- For Investigators – role is to gather and summarize evidence, not to make credibility determinations. Should be thorough, careful, even-handed and neutral. Watch words that characterize. Your work is also a sign of a fair process.
- For Decision-Makers – you will need to make credibility assessments, but articulation of rationale will be important to show neutrality.
- For all personnel – assume notices, investigation report, determination(s) will be made publicly available by a party.



# Relevance

- General definition – tends to make a fact more or less probable than it would without the evidence.
  - Examples
- Investigators and Decision Makers can assign weight evidence based on relevance.
  - Examples
- Difference highlighted in Title IX regulations *between related to the investigation and relevant*.
  - Examples

# Tips for an Effective Investigation

- Be strategic – use your review of the Policy as a guide to what you need to find out.
- Be consistent – both with respect to how you treat parties and witnesses within an investigation and how you treat different investigations.
- Develop a written list of questions for each interview. Questions should be open-ended.
- Take notes during/immediately after the interview or record.
- Provide interviewee with summary of interview for review.

# Tips for Effective Investigation, Con't

- Determining interviewee's credibility – often most difficult part.
  - Can consider the character, prior inconsistent statements, bias or motive, demeanor, cooperation (or lack thereof) with investigation, corroborating evidence.
- Ask follow-up questions if needed – or ok to re-interview.
- Ask who else might have useful info; did I forget to ask you anything you think might be important.
- Be aware if you have any preconceived ideas that could introduce bias in the investigation.

# Tips for Effective Investigation Report

- Investigation report provides evidence of investigation.
  - Details process used (scope of investigation).
  - Organizes and presents the factual information collected.
  - Comprises a major basis for the determination.
  - Can include conclusions and recommendations – but must be backed by factual findings.
  - Key documents can be attached to the Report.
  - Focus on facts in dispute – use relevant documents and testimony.
  - Try to use facts to convey issues of reliability/credibility.
  - Be objective; do not use subjective characterizations.
  - Remember – provided to both parties and advisors for review.

# For Decision-Maker

- Review investigator report with view to what you will need to decide.
- You decide on what information/evidence/statements are relevant to your determination.
- Must explain rationale for decision to exclude evidence as not relevant. (Relevance – tends to make a fact more or less probable than it would without the evidence.)
- You make credibility determinations – look for consistency, corroboration, motivations to lie.
- Character evidence – relevance and reliability are key to assigning a weight to the evidence.
- Prior sexual misconduct/activity by respondent – how much weight?
- Expert witness – relevance and reliability are also key to assigning weight to the evidence.

# Standard for Determination

- Harley bears “burden of proof” in establishing whether complainant’s allegations show a violation of Harley’s Policy.
- Preponderance of evidence
  - Contract to “clear and convincing” or “beyond reasonable doubt”.
  - Anything that tips a scale weighing evidence beyond 50/50 is a decision based on the preponderance of evidence.
  - If a claim can be demonstrated to be more likely to be true than not true, the burden of proof is met.

# School's Personnel must be free from Conflict of Interest or Bias

- Rule requires that Title IX Coordinators, investigators and decision-makers be free from conflict of interest or bias against complainants or respondents generally or specifically and that these personnel be trained on this requirement.
- Objective, common-sense approach – no specific definition.
- Requires objectivity and neutrality.
- Avoid prejudgment of facts at issue; don't jump to conclusions.
- No sex stereotypes.
- Set aside personal feelings that might influence objectivity.
- Be aware of unconscious bias.
- Examples and discussion

# Rape Shield Protection and Confidential Records

- Rape Shield Protection for Complainant: Evidence related to the complainant's prior sexual behavior is not "related to" or "relevant" unless (1) offered to prove identity of a person other than respondent who may have engaged in the conduct, and (2) offered to prove consent if relates to specific instances of sexual activity between the parties. No same prohibition in Rule for Respondent.
- Confidential Records – School can't access, consider, disclose or otherwise use a party's records that are made by a physician, psychiatrist, psychologist or other professional acting in his/her professional capacity and which are made in connection w/ the provision of treatment to a party unless voluntary consent of party.



# Last Words of Advice

- If you are unsure about how to proceed or what to do at any stage of the process, ok to call for expert advice; it is very hard to be totally up on all these detailed rules.
- Document, document, document at every step.
- It is possible that evidence or witnesses will be offered by a party that will be hard to handle (e.g. polygraph test, forensic rape examination). Again, ok to call for expert advice to assist.
- Don't forget about retaliation. Often this can be a more difficult claim to investigate and determine since standard is pretty broad (would discourage someone from reporting).

# Last Words of Advice

- As always, programs that raise awareness of how to avoid claims of sexual harassment are the best use of school resources.
- Proposed regulations, if finalized in their current form, will require a policy change and updated training.
  - Unlikely to occur during this school year.
  - To some extent, will lessen the technical requirements of the grievance process
  - But will open up what needs to be investigated by the school.

# Questions?

