



Interaction of Title VII and Title IX: The Routing of Sexual Harassment/Discrimination Cases

This Melissa Talks deals with the interaction of Title VII and Title IX under the new regulations and the routing of sexual harassment/discrimination cases, specifically the procedure that **requires all allegations of sexual harassment/discrimination be forwarded to the college or District Title IX Coordinator for initial review**. Yes, that means ALL allegations of sexual harassment/discrimination, regardless of whether it deals with student/student, student/employee, employee/employee, employee/student, or community members/third parties towards or against students or employees. To say it again, **all complaints must be routed to the college or District Title IX Coordinator for initial review**. The rest of the half hour will discuss why this is the case.

NOTE: Even if a complaint does not expressly say sexual harassment/discrimination or does not reference Title IX or Title VII, if the facts of the case implicate sexual harassment/discrimination, it must be routed to the Title IX Coordinator for review.

For purposes of this discussion, we will break things down into three separate mini-discussions and then bring it all together at the end of the half hour.

I. Intersection of Title VII and Title IX under the New Title IX Regulations

The Department of Education (ED) has said there is no inherent conflict between Title IX and Title VII enforcement schemes and has stated it “will construe Title IX and its implementing regulations in a manner to avoid an actual conflict between an employer’s obligations under Title VII and Title IX.” (85 Fed. Reg. 30439). The ED maintains that where a claim may implicate employees as complainants or respondents, recipients (such as MCCCCD) can process complaints through the specific grievance process

in the new Title IX regulations, and also process a claim through an established Title VII grievance process. The key here is that MCCCCD's responsibility—including providing documentation of the steps taken to demonstrate regulatory compliance—must be met. The ED has outlined this option as handling the non-Title IX allegations through “another provision of the recipient's code of conduct...” §106.45(b)(3), but again, **only after the Title IX regulatory compliance has been met.**

The ED stated more specifically: “If a recipient has a code of conduct for employees that goes beyond what Title IX requires (for instance, prohibiting misconduct that does not meet the definition of “sexual harassment” under Section 106.30, or prohibiting misconduct that occurred outside the United States), then a recipient *may enforce its code of conduct even if the recipient must first dismiss a formal complaint (or allegations therein) for Title IX purposes.*

Definition of Sexual Harassment

The Title IX regulations include three types of conduct which may constitute “sexual harassment. First, employee to student “quid pro quo” harassment is identified as per se harassment. Second, four types of sexual misconduct which are addressed by the Violence Against Women Act (VAWA) and the Clery Act, specifically sexual assault, domestic violence, dating violence, and stalking are also identified as per se harassment. However, a meaningful difference with Title VII arises with the third type of conduct, specifically the creation of a hostile work environment. Title IX's definition of what constitutes a “hostile work environment” is much narrower than the definition under Title VII.

Title IX defines sexual harassment which creates a “hostile work environment” as “... (ii) 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 educational institution's education program or activity...” § 106.30(a). Under Title VII, the definition of hostile environment sexual harassment is written as... “severe, pervasive, **or** objectively offensive.” Thus, a respondent could be found to have engaged in sexual harassment under Title VII, but not under Title IX's narrower definition due to the differing definitions of “sexual harassment” in the respective regulations for each statute.

WHAT DOES THIS MEAN?

Essentially, the Title IX regulations do not preclude MCCCCD from enforcing a code of conduct that is separate and apart from what Title IX requires, such as an employee code of conduct that may address

what Title VII requires. However, in order to meet our legal requirement to address complaints of sexual harassment/discrimination in a way that is not deliberately indifferent (as is outlined in the Title IX regulations), a Title IX Coordinator must review the complaint against the Title IX Policy (A.R. 5.1.16) first to ensure the complaint does not need to follow the Title IX grievance process.

Accordingly, MCCCCD may proactively address conduct prohibited under Title VII when the conduct does not meet the definition of sexual harassment in the Title IX regulations (Section 106.30) under employment-related conduct policies because the Title IX grievance process applies only to sexual harassment as defined in Title IX. (85 Fed. Reg. 30205).

II. Actual Knowledge

Section 106.44(a) of the Title IX regulations require MCCCCD to respond promptly in a manner that is not deliberately indifferent, meaning not clearly unreasonable in light of the known circumstances when it has *actual knowledge* of sexual harassment in its education program or activity, against a person in the United States. The Title IX regulations define what exactly constitutes actual knowledge: “Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator *or any official of the recipient who has the authority to institute corrective measures on behalf of the recipient...*” (§ 106.30(a)).

For postsecondary institutions like MCCCCD, **actual knowledge occurs only when there is notice to the Title IX coordinator or an Official with Authority to take corrective measures.** Under the Title IX regulations, MCCCCD retains the discretion regarding whom it empowers to serve as officials authorized to institute corrective measures on its behalf. *MCCCCD has designated the following positions as Officials with Authority:*

Chancellor

Provost

General Counsel and Associate General Counsels

Chief Human Resources Officer *

Chief Executive Officer

College Presidents

College Vice Presidents (at all levels)

Associate Vice Chancellors
Law enforcement
Athletic Directors
Directors (in any administrative area of a college or the District) *

Actual Knowledge results whenever any of the MCCCCD's Title IX Coordinators, or any of the aforementioned Officials with Authority: witnesses sexual harassment; hears about sexual harassment or sexual harassment allegations from a complainant (i.e., a person alleged to be the victim) or a third party (e.g., the complainant's parent, friend, or peer); receives a written or verbal complaint about sexual harassment or sexual harassment allegations or by any other means.

Officials with Authority must refer a complaint to the college or District Title IX Coordinator as MCCCCD has actual knowledge that triggers a legal responsibility. Human Resources Directors and the EEO Director are legally obligated to refer sexual harassment/discrimination complaints to their Title IX Coordinator for review.

The new 2020 Title IX Regulations allow MCCCCD to designate mandated (mandatory) reporters who are expected to report actual or suspected sexual harassment/ discrimination to the Title IX Coordinator. Mandatory Reporter must pass reports/complaints to the Title IX Coordinator who will take action on the report. *The MCCCCD has designated these classifications of employees as Mandated (Mandatory) Reporters:*

Chancellor
Provost
General Counsel
Chief Human Resources Officer
Chief Workforce and Economic Development Officer
Chief Executive Officer
College Presidents
Associate Vice Chancellors
Director of Communications
Associate General Counsels

Supervisors/Managers/Directors (but not including division or department chairs)*
College Vice Presidents, at all levels
Deans, at all levels
Athletic Directors/Coaches/Trainers
Law enforcement

NOTE: *HR professionals across the District are covered either as Officials with Authority or Mandatory Reporters, but so too are Campus Police, and many other employees.

III. Dismissal and Referral

Title IX regulations state that MCCCCD must investigate the allegations in a formal complaint of sexual harassment. If a complainant decides not to file a formal complaint under Title IX, the Title IX Coordinator may refer the case to either HR or Student Affairs for investigation under applicable codes of conduct. Further, Title IX sets forth the specific bases for mandatory and discretionary dismissals under Title IX also requires that MCCCCD to provide the parties with simultaneous, written notice of a dismissal and the reason(s) for the dismissal.

Mandatory Dismissal

Title IX requires MCCCCD dismiss a formal complaint of sexual harassment in three specific circumstances:

1. The alleged conduct would not constitute sexual harassment as defined under the Final Rule § 106.30, even if proved;
2. The alleged conduct did not occur in the recipient's education program or activity; or 3. The alleged conduct did not occur against a person in the United States.

Discretionary Dismissal

Title IX allows a MCCCCD to dismiss a formal complaint of sexual harassment or any allegations therein if at any time during the investigation or hearing:

1. A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein;
2. The respondent is no longer enrolled or employed by the recipient; or

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

HOW DOES THIS WORK IN REAL TIME?

In real time, complaints of sexual harassment/discrimination brought to HR, EEO, or any other Official with Authority/Mandatory Reporter must be referred to the college or District Title IX Coordinator for initial review. The Title IX Coordinator will reach out to the complainant to see if they want to file a formal complaint or if the facts are such that the Title IX Coordinator decides to initiate the complaint themselves. If the complainant decides not to file a formal complaint, the Title IX Coordinator can document such and formally (and in writing) refer the complaint to the appropriate HR/EEO/Student Affairs employee for investigation.

If the complainant decides to file a formal complaint, the Title IX Coordinator will review the facts of the case (after preliminary review) to see if there is the need to dismiss the complaint under either the mandatory or discretionary dismissal process. If dismissal is warranted, the Title IX Coordinator will formally dismiss the complaint, provide for an appeal of the dismissal, and then formally (and in writing) refer the complaint to the appropriate HR/EEO/Student Affairs employee for investigation.

If the complaint survives the dismissal, the Title IX grievance process will begin. After the hearing, the determination will be made on the case and the appropriate HR/EEO/Student Affairs person will assist in the determination of sanctions.

A list of Title IX Coordinators can be found here: <https://district.maricopa.edu/consumer-information/title-ix/title-ix-coordinators>

For more information about Title IX, please visit: <https://district.maricopa.edu/consumer-information/title-ix>

For a flowchart of the Title IX Institutional Response, please visit:
<https://district.maricopa.edu/sites/default/files/documents/Title%20IX%20Regulations.At%20a%20Glance.2020.pdf>

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