

HIGHLIGHTING THE CHANGES AND NEW MANDATES TO TITLE IX

**Molly Kafka, Idaho Coalition Against
Sexual and Domestic Violence**

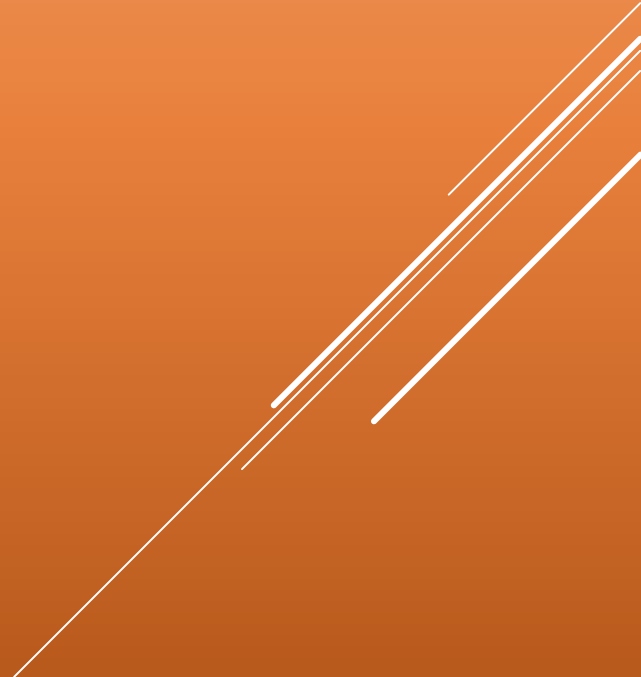
**Elliot Cox, Idaho Office of School Safety
and Security**

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

HISTORY OF GUIDANCE

- ▶ 1975 Regulations, as amended (in effect)
- ▶ 2001 OCR Revised Sexual Harassment Guidance (in effect)
- ▶ 2003 Dear Colleague Letter (DCL): TIX & Free Speech (in effect)
- ▶ 2010 DCL: Harassment & Bullying (in effect)
- ▶ 2011 DCL: Updated Sexual Harassment Guidance (withdrawn)
- ▶ 2013 DCL: Pregnant and Parenting Students (in effect)
- ▶ 2014 Q&A on TIX and Sexual Violence (withdrawn)
- ▶ 2015 DCL: Role of TIX Coordinators (in effect)
- ▶ 2016 DCL: Transgender Students (withdrawn)
- ▶ 2017 Q&A Interim Guidance (still in effect until 8/14/20?)

NEW TITLE IX RULES ON SEXUAL HARASSMENT ISSUED 5/6/20

- ▶ **Have the force of law**
 - ▶ **Go into effect 8/14/20 (9 days from now)**
 - ▶ **Potential impact from lawsuits/administration change**
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TITLE IX COORDINATOR

Contact Information

- ▶ **Name/Title**
- ▶ **Office address**
- ▶ **Email address**
- ▶ **Phone number**



1. **Students**
2. **Parents/legal guardians of students**
3. **Employees**
4. **Applicants for admission/employment**
5. **Unions/professional organizations w/CBA or professional agreements**
6. **All handbooks/catalogues made available to above parties**
7. **On school website**

ALL EMPLOYEES ARE MANDATORY REPORTERS

- ▶ Includes school bus drivers, counselors, etc.
- ▶ NO employee can be a confidential resource for TIX purposes
- ▶ Double mandatory reporters: child abuse and TIX
- ▶ School board members?

NEW DEFINITION OF SEXUAL HARASSMENT UNDER TIX

1. *Quid pro quo* by an employee;
2. Unwelcome conduct that is so severe, pervasive and objectively offensive that it effectively denies a person equal access to a school's education program or activity; and/or
3. Sexual assault as defined by the Clery Act, and dating violence, domestic violence and stalking as defined by the Violence Against Women's Act.

JURISDICTION

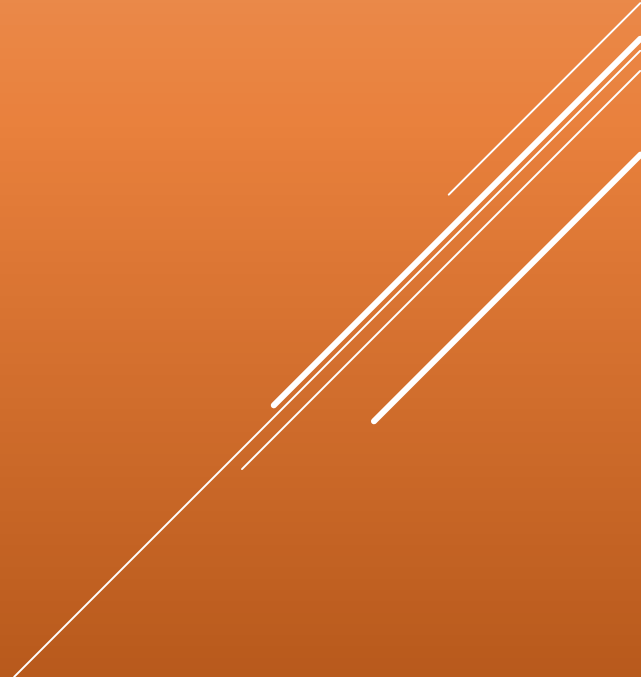
TIX Rules Only Apply If All Are True:

- ▶ **School receives federal funds; and**
- ▶ **Meets the new definition of sexual harassment under TIX; and**
- ▶ **Takes place in school's education program/activity; and**
- ▶ **Takes place in the U.S.; and**
- ▶ **Complainant participating/attempting to participate in education program/activity at time of complaint**

Education Program/Activity:

- ▶ **Locations, events, or circumstances over which the school exercises substantial control over both the Respondent and the context in which the sexual harassment occurs**

GRIEVANCE PROCESS: PLAYERS & PROCEDURES

- ▶ **Set the floor for how schools must address reports of Title IX sexual harassment**
 - ▶ **Designate specific roles, responsibilities, and procedural steps that must be taken**
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PLAYERS: THE TIX TEAM

1. **TIX Coordinator**
 2. **Investigator**
 3. **Decision maker**
 4. **Appellate decision maker**
 5. **Alternative resolution officer**
 6. **Advisors of choice**
- ▶ **Conflicts of interest must be accounted for**
 - ▶ **Must separate all roles, with exception of TIX Coordinator being investigator or informal resolution officer**
 - ▶ **Can outsource all roles except TIX Coordinator**

PROCEDURES: MINIMUM RESPONSE & SUPPORTIVE MEASURES

Upon receipt of report, TIX Coordinator must contact complainant and:

- ▶ **Discuss availability of supportive measures**
- ▶ **Consider complainant's wishes about supportive measures**
- ▶ **Inform complainant measures are available with/without filing a formal complaint**
- ▶ **Explain how to file formal complaint**

Supportive Measures:

- ▶ **Counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of campus, etc.**
- ▶ **Free, non-disciplinary/punitive**

PROCEDURES: FORMAL COMPLAINT

- ▶ **Formal complaint = an assertion by the complainant that a respondent engaged in sexual harassment against them AND are requesting the school to investigate**
- ▶ **If jurisdictional criteria met, formal complaints trigger schools' obligation to investigate, *even if the matter has been referred to law enforcement***
- ▶ **Must contain the complainant's physical or digital signature, or otherwise indicate that the complainant is the person filing the formal complaint**
- ▶ **Must be able to file after business hours**

PROCEDURES: WRITTEN NOTICE – INITIAL AND ONGOING

Upon receipt of formal complaint, school must provide written notice to *both* parties with sufficient details and time to prepare a response before any initial interview that includes:

- ▶ Notice of grievance process, including informal resolution options
- ▶ Allegations of conduct with sufficient details known at time, including:
 - ▶ Identities of parties
 - ▶ Date/location of alleged incident
 - ▶ Statement presuming non-responsibility
 - ▶ Inform parties they may be assisted by *advisor of their choice, including attorneys*
 - ▶ May inspect/review all evidence
 - ▶ Any provision re: prohibiting knowingly providing false statements/information

PROCEDURES: INVESTIGATION

- ▶ **Burden of proof and burden of gathering evidence rests with the school, not the parties**
- ▶ **Both parties must have equal opportunity to present fact/expert witnesses and inculpatory/exculpatory evidence**
- ▶ **Investigator must interview all relevant witnesses and collect evidence**
- ▶ **Produce a written investigation report that fairly summarizes all relevant evidence – inculpatory and exculpatory**

PROCEDURES: INVESTIGATION REPORT

- ▶ **Prior to the completion of the report, all evidence directly related to allegations must be provided to the parties and advisors**
- ▶ **Parties must have at least 10 days to review and submit written responses prior to finalizing investigation report**
- ▶ **After receiving responses, investigator finalizes report**
- ▶ **Parties must receive finalized report to review and submit written responses 10 days prior to the time of the determination of responsibility made by a separate decision maker**
- ▶ **Minimum 25(ish) days to complete investigation now**

PROCEDURES: QUESTIONS POSED BY PARTIES

Live hearing and cross examination not required for K-12, but is permissible if school chooses to do so.

- ▶ With or without a hearing, after the final investigative report has been sent to the parties, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions 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
- ▶ Rape shield protection: 2 exceptions (1) to prove someone else committed the offense, (2) to prove consent
- ▶ Decision maker must explain reasoning for why a question was considered not relevant

PROCEDURES: BURDEN OF PROOF, DECISION AND SANCTIONS

- ▶ **After Q&A process concludes, decision maker makes a finding of responsibility based on either preponderance of evidence or clear and convincing standard, determines sanctions and issues a written determination**
- ▶ **Burden of proof for determining formal complaints of sexual harassment must be the same across the board (students and employees)**

PROCEDURES: WRITTEN DETERMINATION

After a finding is made the decision maker must issue both parties a written determination letter simultaneously that includes:

- ▶ **The allegations**
- ▶ **Procedural steps taken up to that point**
- ▶ **Findings of fact supporting determination**
- ▶ **Determination on, and rationale for, each allegation**
- ▶ **Disciplinary sanctions for respondent**
- ▶ **Remedies for complainant**
- ▶ **Procedures/bases for appeal**

PROCEDURES: APPEALS

- ▶ School must offer both parties an appeal from a determination regarding responsibility, and from a school's dismissal of a formal complaint or any allegations therein, on the following bases: (1) procedural irregularity that affected the outcome of the matter, (2) newly discovered evidence that could affect the outcome of the matter, and/or (3) TIX personnel had a conflict of interest or bias that affected the outcome.
- ▶ May offer an appeal equally to both parties on additional bases (like an appeal about sanctions)
- ▶ All parties receive written notification of any appeal
- ▶ Written appeal decision with rationale delivered simultaneously to both parties by appeal decision maker

RECORDS

The following records must be retained for 7 years:

- ▶ Each sexual harassment investigation, including finding
- ▶ Disciplinary sanctions imposed on respondents
- ▶ Remedies provided to complainants
- ▶ Appeals and their results
- ▶ Informal resolutions and their results
- ▶ All materials used to train TIX team
- ▶ Records of any actions, including supportive measures offered, taken in response to any report/formal complaint of sexual harassment

TRAINING

- ▶ Training of all TIX personnel must include: (1) training on the definition of sexual harassment under the new rules, (2) the scope of the school's education program or activity, (3) how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, (4) and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- ▶ Decision-makers and investigators must receive training on issues of relevance, including how to apply the rape shield protections
- ▶ Materials used to train TIX personnel must be posted on school website

UPCOMING TRAINING

Trauma-Informed Title IX Approach to Gender-Based Violence in K-12

Lindy Aldrich, Esq. • Ladder Consulting

August 12 & 13, 2020 • 9:00-11:00 am

2 Part Webinar Series

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QUESTIONS?

molly@engagingvoices.org

elliott.cox@dbs.idaho.gov