

TITLE IX TRAINING

September 2021

presented by
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INTRODUCTION



Title IX Training
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September 2021

Speakers

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- Aurora L. Hardin, Esq.

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Training Overview

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TITLE IX OVERVIEW



Title IX – the Law

Title IX of the Education Amendments of 1972 provides the following:

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

20 U.S.C. §1681(a).



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Evolution of Title IX

- Title IX has evolved since its original enactment.
- Note the original statutory language makes no reference to prohibiting “sexual harassment.”
- The 1990s was a pivotal time for the development of “sexual harassment” theory pursuant to three seminal cases by the United States Supreme Court:

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Evolution of Title IX

- Franklin v. Gwinnett County Schools (1992) – SCOTUS first recognizes that “sexual harassment” constituted “sex discrimination” and that a student-victim has the private right to sue and collect money damages for sexual harassment.

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Evolution of Title IX

- Gebser v. Lago Vista Indep. Sch. Dist. (1998) – SCOTUS holds a school district itself can be liable for money damages under Title IX for teacher-on-student sexual harassment.
- Gebser established the premise that school districts can be held liable under Title IX when there “is an official decision by the recipient *not* to remedy the violation.”

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Office of Civil Rights Guidance

- Battle of Presidential Administrations:
 - 2001 OCR Sexual Harassment Guidance – created a higher standard than established by SCOTUS.
 - Instituted a “knew or reasonably should have known” standard instead of actual notice.
 - Allows sexual harassment to simply “deny or limit” a student’s ability to participate in or receive services or opportunities, a lower standard than the “severe, pervasive and objectively offensive” to the extent they “effectively deny” access to the opportunities and services offered by the school district.
 - Required school districts to “eliminate the hostile environment and prevent its recurrence.”

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Office of Civil Rights Guidance

- April 4, 2011 OCR “Dear Colleague Letter” – among other things, lowered the standard to determine responsibility for allegations of sexual harassment. Resulted in many accused students asserting denial of fair and due process.
- September 2017 – OCR rescinds 2011 DCL and announces new rulemaking (e.g., process for updated Title IX regulations).

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Office of Civil Rights Guidance

- November 2018 – OCR issued proposed new regulations for notice and comment. US Department of Education received over 124,000 comments.
- May 2020 – new Title IX regulations issued, effective date August 14, 2020.
- On March 8, 2021, President Biden issued an Executive Order requiring a comprehensive review of the Title IX regulations. During that review, the 2020 amendments remain in effect.

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TITLE IX SEXUAL HARASSMENT



What is “Sex”?

- Title IX does not define “sex.”
- Bostock v. Clayton County, Georgia (June 15, 2020)
 - The Supreme Court ruled that the prohibition against employment discrimination “because of... sex” under **Title VII** included discrimination on the basis of gender identity and sexual orientation.
- President Biden’s “Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation.” (January 20, 2021)
 - “Under Bostock’s reasoning, laws that prohibit sexual discrimination – including Title IX... prohibit discrimination on the basis of gender identity or sexual orientation.”



What is “Sex”?

- DOE “Notice of Interpretation” (June 2021)
 - DOE intends to enforce Title IX’s prohibition on discrimination on the basis of “sex” to include discrimination on the basis of sexual orientation and discrimination on the basis of sexual orientation and discrimination based on gender identity.
- For purposes of Title IX “sexual harassment”, sex includes all of the following:
 - Biological sex
 - Gender identity
 - Gender expression
 - Sex-based stereotyping
 - Sexual orientation

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What is “Harassment”?

- Harassment is a form of unlawful discrimination in that it is characteristic-based treatment that adversely affects the school program or activity and/or the workplace.
- School districts have a legal duty to take steps reasonably calculated to prevent and stop harassment, including having anti-harassment policies, providing training to employees, and addressing complaints.
- Any acceptance or perceived tolerance of harassment presents significant risk to school districts under state and federal laws, including Title IX.

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What is “Harassment”?

- Harassment can include actions, words, jokes, or comments based on or because of an individual’s protected characteristic(s).
- Harassment also can include passive acts, such as alienating someone through omission or withholding necessary information or assistance.

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What is “Title IX Sexual Harassment”?

“Title IX Sexual Harassment” means conduct on the basis of sex that satisfies one or more of the following:

1. A school employee conditioning the provision of an aid, benefit, or service on an individual's participation in unwelcome sexual conduct (i.e. *quid pro quo* harassment); or
2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school’s education program or activity; or
3. Sexual assault, dating violence, domestic violence, or stalking (as defined by the Clery Act and Violence Against Women Act)

34 C.F.R. §106.30 (Definitions)

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Title IX Sexual Harassment First Prong: Quid Pro Quo Harassment

- A school employee conditioning the provision of an aid, benefit, or service on a student's participation in unwelcome sexual conduct
 - “Making educational benefits or opportunities contingent on a person's participation in unwelcome conduct on the basis of sex strikes at the heart of Title IX's mandate that education programs and activities remain free from sex discrimination.”

[OCR Final Rule, 85 FR 30026, 30148 \(5/19/2020\)](#)

Title IX Sexual Harassment First Prong: Quid Pro Quo Harassment

- Applies whether the “bargain” was express or implied.
- Need not be “severe or pervasive”
 - “Abuse of authority in the form of even a single instance of *quid pro quo* harassment is inherently offensive and serious enough to jeopardize equal educational access.”

[OCR Final Rule, 85 FR 30026, 30148 \(5/19/2020\)](#)

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Title IX Sexual Harassment Second Prong: Hostile Environment

- “Hostile environment” claims are very familiar in the employment context
 - Title VII of the Civil Rights Act of 1964 (Title VII)
Prohibits employment discrimination based on race, color, religion, sex, or national origin.
 - Title IX of the Education Amendments of 1972 (Title IX)
Prohibits discrimination on the basis of sex, including sexual harassment, in education programs and activities. Applies to public and private education institutions that receive federal funds.

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Title IX Sexual Harassment Second Prong: Hostile Environment

- Title IX Standard: Unwelcome conduct determined by a reasonable person to be so **severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the school’s education program or activity

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Title IX Sexual Harassment Second Prong: Hostile Environment

- **“Severe, pervasive, and objectively offensive”**
 - Differs from the Title VII “severe *or* pervasive” standard.
 - “[S]chools are unlike the adult workplace and ... children may regularly interact in a manner that would be unacceptable among adults... The Department does not wish to apply the same definition of actionable sexual harassment under Title VII to Title IX because such an application would equate workplaces with educational environments.”

[OCR Final Rule, 85 FR 30025, p. 30037 \(5/19/2020\)](#)

Title IX Sexual Harassment Second Prong: Hostile Environment

- **Objectively Offensive**
 - To meet the second prong definition of Title IX sexual harassment, conduct must be so severe, pervasive, ***and objectively offensive*** that it effectively denies a person equal access to the school’s education program or activity.
 - Reasonable Person Standard
 - Does the conduct create an environment that a **reasonable person** would find hostile or abusive?”
 - “[T]he objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position, **considering all the circumstances.**” *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998)

Title IX Sexual Harassment Second Prong: Hostile Environment

- **Examples** – When is conduct so “severe, pervasive, and objectively offensive that it *effectively denies a person equal access to the school’s education program or activity*”?
 - Skipping class to avoid a harasser;
 - Decline in GPA;
 - Difficulty concentrating in class;
 - Quitting a sports team to avoid the harasser;
 - Bed-wetting and crying at night.

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Title IX Sexual Harassment Second Prong: Hostile Environment

- Denial of “equal access” to education does not require “that a person’s total or entire educational access has been denied.”
- “No concrete injury is required” to prove an effective denial of equal access.
- Complainants do not need to have “dropped out of school, failed a class, had a panic attack, or otherwise reached a ‘breaking point’” or exhibited specific trauma symptoms to be effectively denied equal access.

U.S. Department of Education, *Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021)*

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Title IX Sexual Harassment Third Prong: Sexual Assault, Etc.

▪ Sexual Assault

- The Clery Act defines sexual assault as a forcible or nonforcible offense that meets the definition of rape, fondling, incest, or statutory rape as defined in the FBI's Uniform Crime Reporting System
- Includes any sexual act “directed against another person without the consent of the victim, including instances where the victim is incapable of giving consent.”
- Includes statutory rape as a “nonforcible” sex offense.

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Title IX Sexual Harassment Third Prong: Sexual Assault, Etc.

▪ Dating Violence

- Definition from the Violence Against Women Act (VAWA)
- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.
 - The existence of a relationship is determined based on consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.
- Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.

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Sexual Assault, Dating Violence, Domestic Violence, or Stalking

▪ **Domestic Violence**

- As defined by VAWA
- A felony or misdemeanor crime of violence committed by:
 - A current or former spouse or intimate partner of the victim;
 - A person with whom the victim shares a child;
 - A person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner;
 - A person similarly situated to a spouse of the victim; or
 - Any other person against an adult or youth victim who is protected from that person's acts under local domestic or family violence laws.

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Sexual Assault, Dating Violence, Domestic Violence, or Stalking

▪ **Stalking**

- As defined by VAWA
- A course of conduct directed at a specific person that would cause a reasonable person to fear for the person's safety or the safety of others or suffer substantial emotional distress.
- Includes "cyber-stalking" – stalking that occurs online or through messaging platforms – when it occurs in the school's education program or activity

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RETALIATION



Retaliation Prohibited

- No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX ... or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under [Title IX].

34 C.F.R. §106.71(a)



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Retaliation

- Retaliation based on the exercise of rights under Title IX is prohibited.
- Filing charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination or sexual harassment for the purpose of interfering with any right or privilege secured by Title IX, constitutes retaliation.
- Complaints alleging retaliation may be filed according to the grievance procedures for sexual harassment.

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Retaliation

- Specific circumstances
 - The exercise of rights protected under the First Amendment does not constitute “retaliation.”
 - Charging an individual with a code of conduct violation for making a materially false statement in bad faith does not constitute “retaliation.”
 - Note, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

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Compliance with Title IX Mandates



Underlying Intent of New Regulations: a Balance of Interests

- The new regulations attempt to ensure a fair process for both the “Complainant” (alleged victim) and “Respondent” (alleged perpetrator).
 - Complainants are assured every report of sexual misconduct will be taken seriously, that they have the ability to trigger the use of a fair and unbiased grievance process through the filing of a “formal complaint,” and that they will have prompt access to supportive measures regardless of whether they pursue the formal process.
 - Respondents are also entitled to supportive measures and are assured they will not be subjected to discipline for any alleged Title IX violation unless they are found “responsible” after the implementation of a fair and unbiased grievance process.



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Underlying Intent of New Regulations: a Balance of Interests

- School districts are held accountable for failure to respond equitably and promptly to sexual misconduct reports.
 - School districts are only liable under Title IX if the school district is “deliberately indifferent” (e.g., responds in a “clearly unreasonable” manner) to “actual knowledge” of sexual harassment. §106.44(a).
 - Remember Gebser’s premise: that school districts can be held liable under Title IX when there “is an official decision by the recipient *not* to remedy the violation.”
 - It would be highly unlikely for a school district’s response to be deemed “clearly unreasonable” if it provides supportive measures to the Complainant and Respondent, properly trains its employees, and implements and follows a Title IX compliant grievance process.

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Underlying Intent of New Regulations: a Balance of Interests

- OCR “will not deem a [district’s] determination regarding responsibility to be evidence of deliberate indifference by the [district], or otherwise evidence of discrimination under Title IX by the [district], solely because [OCR] would have reached a different determination based on an independent weighing of the evidence.” 34 C.F.R. §106.44(b)(2).

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Compliance with Title IX Mandates

In order to comply with Title IX, school districts must:

- Designate a Title IX Coordinator.
 - Must “prominently display” Title IX Coordinator’s name/title, office address, email address and telephone number on district’s website.
- Notify applicants, students, employees, parents, guardians, unions, etc., that the school district does not discriminate on the basis of sex, which policy must be prominently displayed on the district’s website.

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Compliance with Title IX Mandates

- Publish a Title IX compliant policy which establishes grievance procedures that provide for the prompt and equitable resolution of student and employee complaints.
- Ensure all employees of school district are trained to identify sexual harassment and understand they have a duty to report it to the Title IX Coordinator or building level Title IX designee.

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Compliance with Title IX Mandates

- Ensure Title IX Coordinators, investigators, decision-makers and informal resolution facilitators receive training on the following topics:
 - Definition of Title IX sexual harassment
 - The scope of the school district’s “education program or activity”
 - How to conduct an investigation and grievance process including hearings, appeals and informal resolution processes
 - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest and bias
 - Technology to be used at a live hearing
 - Issues of relevance of questions and evidence, including when questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant
 - Issues of relevance to allow decision-makers to create an investigative report that fairly summarizes the relevant evidence
 - All training materials must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment

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Compliance with Title IX Mandates

- NOTE: All training materials used to train the Title IX officials must be posted on the District’s publicly accessible website.

§106.45(b)(10)(i)(D).
- Failure to do any of the above would likely support a finding that the school district’s response to a report of sexual harassment is clearly unreasonable (or deliberately indifferent) or – in other words – be in violation of Title IX.

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Roles of Title IX Appointees

- The new Title IX regulations create very specific roles for those individuals who are responsible for implementing the Title IX due process protections and grievance process.
 - Who is appointed to fulfill what role depends on the size and the make-up of individual school districts.
 - Note that individuals who have received comprehensive Title IX training can act in more than one role.
 - It is advisable to appoint multiple individuals to fill multiple roles to enable the school district to avoid conflicts of interest and/or bias.

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Title IX Coordinator

TITLE IX COORDINATOR

- Has the main responsibility for ensuring district compliance with Title IX regulations.
- Must be authorized to coordinate compliance efforts.
- School districts can appoint more than one Title IX Coordinator. (ex: responsibility for student complaints vs. employee complaints)
- Must identify name/title, office address, email address and telephone number on website and in all handbooks and policies.
- CAN be an investigator but CANNOT be an initial or appeal decision-maker.
- Our recommendation is for the Title IX Coordinator NOT to be the Superintendent, if possible, so the Superintendent can act in the role of appeal decision-maker.

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Title IX Coordinator

- Upon the district's receipt of a report of sexual harassment, must promptly contact the Complainant (alleged victim of Title IX sexual harassment) to discuss the availability of "supportive measures" with or without the filing of a formal complaint and explain the process for filing a formal complaint.
- Must consider the Complainant's wishes regarding supportive measures.
- Must offer supportive measures to the Respondent.
- Responsibility for coordinating the effective implementation of supportive measures.

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Title IX Coordinator

- Must ensure the school district treats Complainants and Respondents "equitably." With regard to the Respondent, this means the Title IX Coordinator must ensure the school district follows a Title IX compliant grievance process *before* the imposition of any sanctions or other actions that are not supportive measures against the Respondent.
- Has the ability to initiate the Title IX formal complaint process even if the Complainant decides not to proceed with a formal complaint.
- Is responsible for the effective implementation of any remedies.

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Title IX Officials

INVESTIGATOR

- May be the Title IX Coordinator, if necessary, but we recommend keeping those roles separate.
- School districts should have more than one investigator.
- Must receive training on how to conduct an investigation and on issues of relevance to create an “investigative report” that fairly summarizes the evidence.
- Depending on the size of the school district, Assistant Principals or Building Principals are good choices as investigators.
- Strongly recommend the use of Human Resource Director in cases involving employees.

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Title IX Officials

INITIAL DECISION-MAKER

- May NOT be the Title IX Coordinator nor the investigator. Possibly the Building Principal or central Administrative employee.
- Is responsible for reviewing the “investigative report.”
- Is responsible for sending the investigative report to the Complainant and Respondent and allow for the exchange of relevant questions.
- Must draft a “written determination regarding responsibility.”
- Must ensure s/he is free from conflicts of interest and bias.

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Title IX Officials

APPEAL DECISION-MAKER

- May NOT be the Title IX Coordinator, the investigator nor the initial decision-maker.
 - It makes the most sense for the Superintendent to be the Appeal Decision-Maker.
 - We do not recommend using your Solicitor as the Appeal Decision-Maker because it would preclude counsel's involvement in the process leading up to that point.
 - School boards likely will not have had appropriate Title IX training to act in role of Appeal Decision-Maker.
 - If your Superintendent is the Title IX Coordinator – consider using a Superintendent from a neighboring school district who has had Title IX training as the Appeal Decision-Maker.

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Title IX Officials

APPEAL DECISION-MAKER, cont.

- Is responsible for giving both parties a reasonable, equal opportunity to submit written statements in support of or challenging the outcome articulated in the initial decision.
- Must issue a written decision describing the result of the appeal and the rationale for the result.
- Must ensure s/he is free from conflicts of interest and bias.

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Title IX Officials

INFORMAL RESOLUTION FACILITATOR

- Must be free from conflicts of interest, bias and trained to be impartial.
- Must have completed the Title IX training.
- Should be adept at facilitating or mediating between students.
- Consider utilizing Assistant Principals, Principal, Guidance Counselors and Mental Health Specialists for this role.

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When Must a School Respond to Title IX Sexual Harassment?



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Actual Knowledge

- If any employee in a K-12 school district has “actual knowledge” of conduct that could constitute “sexual harassment” in an “education program or activity” against “a person in the United States” the district must respond promptly and in a manner that is not deliberately indifferent.
- Per “Q&As on the Title IX Regulations on Sexual Harassment” issued by the USDOE OCR in July of 2021 (“July 2021 Guidance”), once any employee “receives notice of alleged facts *that, if true, could be considered sexual harassment* under the 2020 amendments,” even if the employee is not certain whether the harassment occurred, the district is required to respond. (Q. 18).

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Actual Knowledge

- “Any school employee” includes: teachers, teacher’s aides, bus drivers, cafeteria workers, counselors, school resource officers, maintenance staff, coaches, athletic trainers and any other school employee! (July 2021 Guidance, Q.14.) (Importance of training....)
- An employee would have “actual knowledge” of sexual harassment if s/he “has notice of sexual harassment or allegations of sexual harassment.”

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Actual Knowledge – “notice”

Examples of “notice” include:

- If the employee observed or witnessed sexual harassment (a specific incident or a series of incidences)
- If the employee is told that sexual harassment has occurred by the Complainant, the Complainant’s parents or friends or another 3rd party
- If the employee receives a voice mail or an email or any other written or verbal complaint alleging sexual harassment has occurred
- If the employee receives multiple reports that, taken together, provide a different picture of a person’s conduct than each incident standing alone

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Actual Knowledge

The school district does not have “actual knowledge” if the only official of the school district with actual knowledge of the sexual harassment is the Respondent (the alleged perpetrator).

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Jurisdictional Issues – “person in United States”

Remember the standard: The school district must respond in conformance with Title IX if any employee in a K-12 school district has “actual knowledge” of conduct that could constitute “sexual harassment” in an “education program or activity” against “a person in the United States.”

- The “against a person in the U.S.” is a “jurisdictional” issue.
- If the incident occurs on a school field trip to Canada, Title IX is not implicated.
- But, remember, school districts must analyze whether other laws and/or other provisions of your Student Code of Conduct would apply.

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Jurisdictional Issues – “education program or activity”

The second jurisdictional issue is whether the alleged harassment occurred in an “education program or activity” of the school district. §106.44(a), §106.30, §106.45

- Title IX Coordinator must analyze whether the reported incident occurred in the context of an “education program or activity” which includes “locations, events or circumstances over which the school district exercised substantial control over both the Respondent and the context in which the sexual harassment occurred.”

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Jurisdictional Issues – “education program or activity”

Examples of “education program or activity” include:

- Buildings or other locations that are part of the school’s operations, including remote learning platforms. This includes property or locations either owned or leased or rented by the school district.
- Off-campus settings if the school exercised substantial control over the Respondent in the context in which the alleged sexual harassment occurred – such as during school-sponsored events, such as athletic events or field trips, even if they occur off school property (but inside the United States).
- Computer/internet networks or computer hardware/software owned or operated or used by the school district in the course of its educational services or programs.
- But remember: even if Title IX does not apply, analyze the application of other laws and school district policies to the behavior at issue.

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Jurisdictional Issues – “education program or activity”

- What about when a student is using a personal device to perpetrate online sexual harassment during class time?
 - The USDOE Office of Civil Rights stated in the July 2021 Guidance the above scenario “may constitute a circumstance over which the school exercises substantial control” but, as with in-person harassment, “the factual circumstances of online harassment must be analyzed to determine if it occurred in circumstances over which a school exercised substantial control over the respondent and the context.” (Q. 12)

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Jurisdictional Issues – Is It “Title IX Sexual Harassment?”

- Does the alleged conduct trigger one of the three prongs of the definition of “Title IX sexual harassment”?
 - Quid pro quo
 - Hostile environment
 - Sexual assault, dating violence, domestic violence, stalking
- If the conduct as alleged could not meet the definition of Title IX sexual harassment, schools may proceed outside of the Title IX framework.

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Reporting Sexual Harassment: Who, How and When?



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Reporting Sexual Harassment: Who?

- **Who?** Any person may report sex discrimination:
 - the harassed student or employee i.e alleged victim (Complainant)
 - the Complainant's parent
 - a 3rd party (friends of the Complainant; a staff person who witnessed the harassment or was told about the harassment; etc.), including individuals who are not associated with the school in any way

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Reporting Sexual Harassment: How?

- **How?** Reports can be made many ways:
 - In person
 - By mail, telephone or email using the contact information to the Title IX Coordinator
 - By any means that results in the Title IX Coordinator receiving the person's report (e.g., all employees must be trained to notify the Title IX Coordinator of reports they have received or actual knowledge they have attained)

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Reporting Sexual Harassment: When?

- **When?** Reports can be made at any time:
 - Through use of the telephone number, email address or mail to the Title IX Coordinator
 - School districts must ensure individuals have the capability to make complaints at any time

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School District's Response After Receiving the Report



Initial School District Response After Receiving the Report

- One of the most unique procedural differences imposed by the new regulations is that school districts must engage in a bifurcated response when they receive a report of sexual harassment:
 - Initial response after actual knowledge of a “report,” which may include ongoing supportive measures and/or emergency removal
 - Grievance process after the filing of a “formal complaint”

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Receiving the Report

- When a school district receives a report of conduct that could constitute Title IX sexual harassment, either the reporter him/herself or the school employee who has the “actual knowledge” should fill out the school district’s Title IX report form.
 - Review Policy 103/104 “Discrimination/Sexual Harassment/Dating Violence/Retaliation Report Form,” part one.
- The report can be received from anyone.
- The reporter is prompted to include known details of the conduct that could constitute sexual harassment.
- Listen and document – do not interrogate.

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Receiving the Report

- Best Practice: Report form completed jointly by person receiving report and person making report
- If form not readily available, person receiving report should get as much information as possible and complete form at earliest opportunity
- If the reporter is not the Complainant, the Complainant must be identified in the form.

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Title IX Coordinator Initial Interview



Title IX Coordinator Initial Interview

- The report form must be immediately submitted to the Title IX Coordinator.
- Upon receiving the report, Title IX Coordinator must promptly contact Complainant to:
 - Discuss the report
 - Offer “supportive measures,” regardless of whether a formal complaint is filed
 - Describe the process for filing a “formal” complaint
 - Describe the grievance procedure
 - Explain and discuss confidentiality issues
- **REMEMBER:** This is not an investigatory interview.
- Review Policy 103/104 Report Form, part two.

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Title IX Coordinator Initial Interview

- Documentation is key
 - Provide a written summary of discussions with Complainant
 - Internal notes should reflect dates and times of contact and decisions on supportive measures and confidentiality
 - This is a key component of Title IX Coordinator’s role
- Title IX Coordinator must consider all facts communicated by Complainant as true

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Title IX Coordinator Initial Interview

- Decision on Formal Complaint
 - If Complainant wishes to move forward with a formal complaint, Title IX Coordinator must conduct the jurisdictional analysis to determine if the grievance process will begin.
 - Even if the Complainant does not want to move forward with formal complaint, the Title IX Coordinator may decide formal complaint process is necessary
 - Title IX Coordinator may decide not to proceed with formal complaint

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Supportive Measures



What Are “Supportive Measures”?

Title IX Coordinator must offer supportive measures to both the Complainant and Respondent. 34 C.F.R. §106.30(a)

- Supportive measures are non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the Complainant or Respondent before or after the filing of a formal complaint or where no formal complaint has been filed.
- Supportive measures are designed to restore or preserve equal access to the school district’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the school district’s educational environment or deter sexual harassment.

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What Are “Supportive Measures”?

- Supportive measures may include the following:
 - 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 the campus
 - Other similar measures

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What Are “Supportive Measures”?

- School district 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 school district to provide the supportive measures.”
- Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.
- Title IX Coordinator should document:
 - that supportive measures were offered
 - if supportive measures were not given, why that result or response is not “clearly unreasonable in light of the known circumstances”
 - if supportive measures requested by the Complainant were not granted, indicate why the refusal was not “clearly unreasonable in light of the known circumstances”

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EMERGENCY REMOVALS



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September 2021

Emergency Removal Process

Even though school districts are precluded from imposing any “disciplinary sanctions” on Respondents before the completion of the grievance process, school districts are authorized to remove a Respondent from the school district’s education program or activity on an emergency basis if:

- The school district undertakes an individualized safety and risk analysis; and
- As a result of that analysis, the school district determines that an immediate threat to the physical health or safety of any students or other individual arising from the allegations of sexual harassment justifies removal; AND

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Emergency Removal Process

- The school district provides the Respondent with notice and an opportunity to challenge the decision immediately following the removal.
 - We recommend utilizing the informal hearing process outlined in 22 Pa. Code §12.8(c) to comply with this mandate. You already use this procedure when you suspend students for more than three consecutive days.

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Emergency Removal Process

ISSUE: While the Title IX regulations, at 34 C.F.R. §106.44(c), authorize the emergency removal of the respondent under certain circumstances, Pennsylvania law precludes school districts from excluding students from school for more than ten consecutive days unless they provide that student with due process, including an expulsion hearing before the school board. Expulsion hearings are inherently “disciplinary” in nature, but engaging that process is the only way to effectuate the Title IX authorized emergency removal process.

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Emergency Removal Process & Interplay with State Disciplinary Due Process Requirements

In an effort to effectuate Title IX’s emergency removal provisions with underlying state law requirements regarding student removal from school, we recommended the insertion of detailed procedures into Board Policy 103, Attachment 3 pertaining to how to respond when/if the Title IX Coordinator believes emergency removal of the respondent is necessary, summarized below. *This suggested procedure is subject to change upon receipt of future guidance from OCR or future judicial rulings.*

Summary of Procedure:

- If possible, the district should refrain from pursuing disciplinary action pursuant to the Student Code of Conduct until such time the Title IX grievance process has concluded.

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Emergency Removal Process & Interplay with State Disciplinary Due Process Requirements

- If, after having taken an individualized safety and risk analysis, the district and Title IX Coordinator determine that supportive measures and other non-punitive actions *voluntarily agreed to* by the parties (mutual no contact agreements; agreeing to participate in virtual education options offered by the district, etc.) do not alleviate the immediate threat to the physical health or safety of individuals, then the district should take the following steps:

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Removal Steps:

- If the duration of the emergency removal is between 1 – 10 school days, the school district should ensure the respondent is provided with the level of due process outlined in 22 Pa. Code §12.8(c) pertaining to “informal hearings.”
 - At the informal hearing, the school district should provide the Respondent an opportunity to challenge the determination that his/her emergency removal is necessary to address an immediate threat to the physical health or safety of any student/individual arising from the allegations of Title IX sexual harassment.

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Removal Steps, cont.

- If the duration of the emergency removal shall exceed ten consecutive schools days:
 - The district shall provide the respondent with the opportunity to participate in an “informal hearing” as set forth in 22 Pa. Code §12.8(c).
 - At the informal hearing, the school district shall provide the Respondent an opportunity to challenge the determination that his/her emergency removal is necessary to address an immediate threat to the physical health or safety of any student/individual arising from the allegations of Title IX sexual harassment.
 - At this informal hearing the school district should also address the underlying Student Code of Conduct violations for which the student is being referred to the Board for an expulsion hearing.

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Removal Steps, cont.

- If after the informal hearing the district believes evidence exists to justify a referral for expulsion (e.g., removal from school for more than ten consecutive days), the district shall comply with the district’s expulsion policy and the due process procedures outlined in 22 Pa. Code §12.8(b).
- At the expulsion hearing held pursuant to 22 Pa. Code §12.8(b):
 - The Board shall make a determination of whether the student shall be expelled for Student Code of Conduct violations.

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Removal Steps, cont.

- At the “consequence” stage of the expulsion hearing, presuming the Board determines the student has violated provisions of the Student Code of Conduct justifying expulsion, the Board should be informed there is a pending Title IX grievance procedure involving the Respondent and that the student be expelled for a period of time necessary to avoid identified health and safety risks associated with the alleged Title IX violation.
- The Board’s written adjudication of expulsion should address the pending Title IX process and the impact of the outcome of the Title IX process on a student’s emergency removal status.

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Removal Steps, cont.

- The Board should be informed that the expulsion hearing will be re-convened at the conclusion of the Title IX grievance process to determine what appropriate disciplinary consequences, if any, should be imposed on the student/respondent pursuant to the outcome of the Title IX grievance process and/or the Student Code of Conduct violations which were the subject of the underlying expulsion hearing.

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Removal Steps – Special Education

- If the Respondent is an identified student with a disability, or thought to be disabled, the Title IX Coordinator should contact the Director of Special Education to coordinate the required actions in accordance with Board policy.
- The district must comply with applicable law pertaining to the discipline or change of placement of a student with a disability where applicable, pursuant to the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act and the Americans with Disabilities Act.

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Employee Removals: Administrative Leave

- When the respondent is a **non-student employee**, a school may place the employee on **administrative leave** pending the outcome of the grievance process.
 - A school need not identify an immediate threat similar to the “emergency removal” provision for students.

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Title IX Coordinator's Determination About Whether to Proceed



Formal Title IX Complaint – Signed by Complainant vs. Title IX Coordinator?

- Formal complaints alleging Title IX sexual harassment can be signed by the Complainant or by the Title IX Coordinator. 34 C.F.R. §106.30(a).
- A signature by either triggers the initiation of the Title IX grievance process
- Difficult issue: When should a Title IX Coordinator ignore a Complainant's request not to proceed with the Title IX grievance process and sign the formal complaint despite the Complainant's wishes otherwise?

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Formal Title IX Complaint – Signed by Complainant vs. Title IX Coordinator?

- Title IX Coordinator must engage in an analysis of whether the school district's failure to proceed with the Title IX grievance process is "clearly unreasonable in light of known circumstances."
- Should consider *why* the Complainant does not want to proceed. Wants to retain confidentiality? Fears retaliation? Is recanting on facts initially reported?
- Should analyze whether the district's failure to proceed with the Title IX investigation and grievance process precludes the district from pursuing disciplinary sanctions against the Respondent for inappropriate behavior that the district believes should be addressed if found to be true.
- Should analyze whether the failure to proceed with the Title IX investigation and grievance process leaves the district uncertain as to whether there is an ongoing threat to the health or safety of other students or individuals.

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Documentation of Decision Not to Proceed with Formal Complaint

- Documenting the rationale underlying the decision not to proceed with a formal complaint is extremely important.
 - Include written summary of issues discussed with Complainant and/or parents
 - Articulate why declining to proceed with a formal complaint does not jeopardize the health or safety of the Complainant or others
 - Retain this information with the file to prove school district was not "clearly unreasonable" in reaching this conclusion

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Consequences of Deciding Not to Proceed with a Formal Complaint

- CAUTION – If the Title IX Coordinator concludes that the reported conduct meets the definition of Title IX sexual harassment, the decision *not* to proceed with a formal complaint effectively eliminates the possibility of discipline against the Respondent.
 - “A recipient’s response [to Title IX sexual harassment] must treat complainants and respondents equitably by... following a grievance process that complies with §106.45 before the imposition of any disciplinary sanctions.” – 34 C.F.R. §106.44(a).

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Title IX Investigation: Report Through Appeal



Formal Complaint

- Review “Formal Notice” letter template
- Provides notice to Complainant and Respondent of Title IX grievance process
- This is the first formal notice to the Respondent of the report of Title IX sexual harassment

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Notice to Parties and Title IX Coordinator’s Continuing Role

Upon the filing of a formal complaint, the Title IX Coordinator must give ALL PARTIES written notice, which must include

- Notice of the grievance process, including identity of the parties, if known
- The identity of appointed Title IX officials
- The conduct that allegedly constitutes sexual harassment
- The date and location of the incident, if known
- A statement that the respondent is presumed not responsible for the alleged conduct and that determination of responsibility is made at the conclusion of the grievance process
- Confidentiality obligations
- The parties’ right to have any advisor of their choosing, who may be, but is not required to be, an attorney

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Notice to Parties and Title IX Coordinator's Continuing Role

- Inform the parties of any provision of the schools code/policies that prohibit knowingly making false statements or knowingly submitting false information during the grievance process.
- Identify and describe the procedures that will be followed including investigation, the parties' right to inspect and review evidence, the decision making process and appeals – include the permissible bases for an appeal
- Establish reasonably prompt time frames for the conclusion of the process

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Title IX Coordinator Meets with Respondent

- In addition to the written notice to Complainant, the Title IX Coordinator should promptly notify the Respondent and Respondent's Parents/advisor of the filing of the Complaint and;
 - Discuss availability of supportive measures
 - Discuss Grievance Process
 - Discuss any no contact orders
 - This meeting is not in lieu of the formal written notice and is not an investigatory interview.

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Title IX Coordinator's Obligations

Title IX Coordinator must:

- Require that all individuals filling the relevant roles have training
- Not permit the use of questions or evidence that constitute or seek disclosure of information protected by a legally recognized privilege, unless the person holding that privilege has waived it.

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Title IX Coordinator's Obligations

The Title IX Coordinator will then turn the investigation over to the Title IX Investigator, however, the Title IX Coordinator stays involved in the process:

- Regular contact with Complainant and Respondent regarding the status of the process and supportive measures
- Transmitting the investigative report, responses to that report, the determination and any appeal decisions to the parties
- Staying available to the parties for questions
- Ultimately implement any remedies designed to restore or preserve the Complainant's equal access to education programming and activities.
- Preserve all materials related to the investigation, determination and appeal for a minimum of 7 years.

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Informal Resolution Process



Informal Resolution

- A school **may**, but is not required to, offer the parties an “**informal resolution**” to resolve a complaint when:
 - After a formal complaint has been filed;
 - The school determines that an informal resolution would be appropriate under the circumstances; and
 - Both parties are provided fully informed written consent for informal resolution.



Informal Resolution

- A school may **not** :
 - Initiate or offer informal resolution of a Title IX sexual harassment report prior to the issuance of a formal complaint.
 - Require either the Complainant or the Respondent to waive the right to an investigation or adjudication of a formal complaint or to participate in an informal resolution process.
 - Offer or facilitate informal resolution to resolve allegations that an employee sexually harassed a student.

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Informal Resolution Process

At any time after a formal complaint is issued, but before a determination is reached, a school may facilitate an informal resolution process, such as mediation, by:

- Providing written notice to the parties disclosing:
 - The allegations involved;
 - The requirements of the informal resolution process, including the circumstances under which it would preclude a party from resuming a formal complaint; and
 - The consequences of participating in the informal resolution process, including the records that will be maintained or could be shared.
- Obtaining the parties' voluntary written consent

Review “Informal Resolution Letter” and “Informal Resolution Consent Form.”

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Informal Resolution Process

If the formal complaint is not issued, the parties cannot receive the benefits of the Informal Resolution Process.

Reaching informal resolution through Informal Resolution Process terminates the grievance process and may prevent the parties from “resuming a formal complaint arising from the same allegations.” 34 CFR § 106.45(b)(8)

Grievance Process/Investigation

Grievance Process

The Grievance Process is the procedure used to investigate and make a final determination about responsibility relating to the allegations of the formal complaint.

It is essential that the process be fair to Complainants, by providing an efficient method to address claims of sexual harassment, and to Respondents, by providing a fair process in which they are presumed not responsible until a final determination is made.

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Requirements of Grievance Process

Once a Formal Complaint is issued, the Grievance Process begins with investigation of the allegations of the Complaint.

Requirements of grievance process:

- Treat Complainants and Respondents equitably
- Require an objective evaluation of all relevant evidence – this includes inculpatory and exculpatory evidence

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Requirements of Grievance Process

Requirements of grievance process, cont.:

- Require that credibility determinations may not be based on a person's status as complainant, respondent, or witness.
 - Making credibility determinations involves
 - Unbiased observation of witness's demeanor
 - Considering of internal and external inconsistencies
 - Witness's opportunity to observe and provide the information they are giving
 - Witness's bias or motive.
- Require that all appointed officials (Coordinator, Investigator, Decision-Maker, Facilitator) have training
- Require that no one filling a required role (Coordinator, Investigator, Decision-Maker, Facilitator) have any conflict of interest.

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Standard of Evidence

- The recipient must establish a consistent standard of evidence to be used in all Title IX Grievance Process investigations and determinations.
 - “Clear and Convincing Evidence”
 - “concluding that a fact is highly probable to be true”
- OR**
- “Preponderance of the Evidence”
 - “a fact is more likely true than not”
- We are recommending the use of a “preponderance of the evidence” standard, which is the standard generally used in other school based decision making processes (e.g. expulsion hearings).

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Investigation

Once the Title IX Coordinator issues the formal notice of complaint, the Title IX Investigator begins the investigation

- The burden to gather evidence and of proof rests on the school, not on either party
 - The school is not simply an arbiter of the issue, it must actively and objectively investigate and develop a record of all relevant evidence upon which a decision can then be made. This is different than traditional investigations.
- Title IX Investigator must provide equal opportunity for parties to present/identify witnesses
 - Follow up on all identified witnesses who may have relevant evidence
 - Review Non-Party Witness letter template

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Investigation

- Investigator does not have subpoena power – can only review documents if parties/witnesses cooperate
- Must allow the parties to have an advisor of their choosing present at any interviews or meetings
- Medical Records
- Privileged Information
 - Note: If a party submits Medical Records and/or Privileged Information to the Investigator, they must provide voluntary written consent that it will be disclosed to opposing party in order for the information to be considered by Investigator and/or Decision Maker
- Review “Notice of Extension of Grievance Process Deadlines” template

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Investigative Techniques

- Open ended questioning (“What happened?” vs. “Isn’t it true that _____ happened?”)
- Asking follow-up questions to seek to get a complete understanding of the relevant facts and information.
- Questions designed to uncover other evidence (“Who else saw that?”, “Has anyone else discussed this incident with you?” etc.)
- Take detailed, objective, and accurate notes. Avoid extraneous commentary.
- Pursuing all inquiries that may lead to relevant information, but avoiding questions that will necessarily invite the introduction of irrelevant or inadmissible evidence.

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Relevance



Relevance

“(1) Basic requirements for grievance process. A recipient's grievance process must—
... (ii) Require an objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence—and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness;” § 106.45 Grievance process for formal complaints of sexual harassment., 34 C.F.R. § 106.45(b)(1)(ii)

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Relevance

“The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied.” p.811, n. 1018

- **Federal Rule of Evidence 401:**
 - Evidence is relevant if:
 - (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
 - (b) the fact is of consequence in determining the action.
- **Merriam-Webster’s Dictionary defines “relevant” as**
 - **1a: having significant and demonstrable bearing on the matter at hand**
 - **b: affording evidence tending to prove or disprove the matter at issue or under discussion**

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Relevance

Only Exceptions:

- Rape Shield
- Evidence protected by a legally recognized privilege, unless the person holding the privilege has waived the privilege

Decision maker must explain why something is deemed irrelevant

- “The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.” § 106.45 Grievance process for formal complaints of sexual harassment., 34 C.F.R. § 106.45(b)(6)(ii).
- Relevance determination can provide a basis for appeal

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Rape Shield

“With or without a hearing, 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 [1] to prove that someone other than the respondent committed the conduct alleged by the complainant, or [2] if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.”
34 C.F.R. § 106.45(b)(6)(ii).

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Rape Shield

Complainant's "sexual predisposition"

- Never relevant

Complainant's "prior sexual behavior"

- **ONLY** Relevant if

1. offered to prove that someone besides the respondent committed the alleged sexual harassment

2. evidence of prior sexual behavior between complainant and respondent if offered to prove consent

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Application to Complainants

The Rape Shield language only applies to Complainants, not Respondents.

- Evidence of a Respondent's sexual predisposition or prior sexual behavior is admissible if relevant.

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Consent

The regulations and guidance do not provide a definition for “consent” but authorize the recipient to adopt a definition.

- Evaluation of consent is very fact intensive

The issue of consent *is* relevant and something on which the Investigator will likely need to develop facts, because the issue is whether the Respondent’s conduct was “unwelcome” to the Complainant.

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Impartiality and Conflicts of Interest

Impartiality is deeply embedded in the United States System of Justice – the Sixth Amendment to the US Constitution provides a criminal defendant the right to “an impartial jury.”

Key Elements of Impartiality

- Preventing Sympathy, prejudice, fear or public opinion to influence a decision.
- Reviewing all of the evidence before reaching a decision
- Giving due regard to the positions of all parties and considering those positions when arriving at a decision.

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Conflicts of Interest

Conflicts of Interest arise when one could obtain a personal or unrelated benefit from actions or decisions made in an official or neutral capacity.

Knowing the parties or witnesses or working together does *not* automatically mean an individual has a conflict of interest if the individual is able to make an unbiased evaluation of the evidence.

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Conflicts of Interest

Avoiding Conflicts of Interest, or the appearance of them, is critical in Title IX investigations. The following issues should be considered when determining individuals who are appointed to the relevant roles:

- Does the person have any relationship with either party (e.g. current or former teacher, coach, advisor).
- Does the person have any relationship with either party's family.
- Does the individual have any history related to the alleged conduct (e.g. former victim or respondent, involvement in any aspect of the facts related to the allegations)
- Has any party or other individual raised a concern regarding conflict of interest or bias.

The evaluation of conflict of interest must be on-going and regularly reviewed as the investigation proceeds.

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Potential Dismissal of Complaint

- During the Investigation, events can develop that require dismissal of the Complaint:
 - A determination that the alleged conduct would not meet Title IX’s jurisdictional requirements:
 - Events occurred outside of United States
 - Conduct did not involve educational program or activity
 - Conduct as alleged does not rise to Title IX’s definition of sexual harassment.

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Potential Dismissal of Complaint

- The Investigation can also lead to developments that allow, but do not require, dismissal:
 - The Complainant withdraws, in writing, his or her Formal Complaint
 - The Respondent is no longer enrolled in or employed by the District
 - Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination

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Transmission of Evidence/Evidence Appendix

The Title IX Investigator must provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is related (not necessarily relevant) to the allegations raised in the formal complaint

- This includes evidence that the investigator does not intend to rely upon.
- This includes both inculpatory and exculpatory evidence.
- The parties must be given at least 10 calendar days to review and provide a written response to this evidence prior to the completion of the investigative report.
 - Review template letter regarding “Review of Evidence Appendix”
- The Title IX Investigator must consider the parties’ responses prior to finalizing the investigative report.

The Investigative Report

The culmination of the investigator’s work is the creation of an investigative report. That report must include a fair summary of all relevant evidence.

We recommend that the report:

- Provide detailed summaries of all relevant interviews
- Provide detailed summaries of all relevant documentary or other tangible evidence
- For any credibility determinations made by the investigator, an explanation of the basis of such determination that cannot be related to the witnesses status as a complainant, respondent or witness.

The Investigative Report

- Review of “Title IX Investigative Report” template
- The investigative report is then sent to the parties.
- The written decision drafted by the initial-decision maker cannot be finalized under at least 10 days after the date the parties receive the investigative report from the investigator.

Determination Regarding Responsibility

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Determination Regarding Responsibility

- Once the Investigative Report is complete, it is provided to each party for their review and any written response they wish to make. The Investigative Report and Evidence Appendix are also provided to the Initial Decision Maker.
- Review “Opportunity to Submit Relevant Questions” letter template

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Written Exchange of Questions

- The Initial Decision Maker then must:
 - Provide the parties with a reasonable period of time to submit written, relevant questions that they would like to have asked of any party or witness.
 - This is the process we are recommending in the K-12 environment.
 - Provide all parties with the responses to any such questions, and the opportunity for the parties to submit limited, follow-up questions.
 - If the Initial Decision Maker decides to exclude a proposed question as not relevant or otherwise inadmissible, he or she must explain to the party proposing the question that decision.

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Determination Regarding Responsibility

Once the written questioning is complete, the Initial Decision Maker then makes a determination regarding responsibility through a written determination that must be simultaneously provided to the parties and must include:

- An identification of the allegations potentially constituting sexual harassment
- A detailed description of the procedural steps followed from receipt of the formal complaint through determination, this includes
 - All notifications of the parties
 - All interviews that were conducted
 - Any site visits that occurred
 - And a description of the methods used to gather evidence

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Determination Regarding Responsibility

- Findings of fact supporting the determination
- An explanation of all credibility and relevance determinations.
- Conclusions regarding the application of the school's code of conduct to the facts
- A statement of, and rationale for, the results as to each allegations, including determination of responsibility, disciplinary sanctions imposed, and whether remedies designed to restore or preserve equal access to the education program will be provided to the Complainant
- The procedures for an appeal.
- Review "Written Determination" template.

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Appeal



Appeal

Either party must be permitted the opportunity to appeal a Determination on the following bases:

- A procedural irregularity that affected the outcome of the matter
- New evidence that was not reasonably available at the time of the determination regarding responsibility or dismissal, and that could affect the outcome of the matter.
- That the Title IX Coordinator, Investigator, or Initial Decision-Maker had a conflict of interest or bias for or against Complainants or Respondents generally, or the individual Complainant or Respondent that affected the outcome.
 - This may be the first time conflict of interest or bias is raised.

Review “Notice of Appeal of Title IX Written Determination” template.



Appeal

The appeal process must include the following:

- Notifying the other party, in writing, when an appeal is filed
 - Review “Notice of Appeal” letter template
- Ensure that the Appeal Decision Maker is not the same person as the Title IX Coordinator, Investigator, or Initial Decision-Maker.
- Give both parties a reasonable and equal opportunity to submit a written statement in support of, or challenging, the outcome
- Issue a written decision, simultaneously to both parties, describing the result of the appeal and the rationale for the result.
- Review “Appeal Determination” template.

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LIVE HEARINGS & TECHNOLOGY



Live Hearing vs. Written Exchange of Evidence

- Live Hearings
 - Mandatory in the post-secondary setting but *optional* in K-12 settings.
 - Career and technical schools with adult education programs must provide a live hearing
 - Occurs after the Title IX Coordinator has sent the investigative report to the parties.
 - May occur in-person or virtually.
 - In lieu of a live hearing, we recommend that K-12 institutions opt for the written exchange of evidence previously reviewed.

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Live Hearing - Advisors

- If a live hearing is held, the recipient education institution **must** provide an advisor of the recipient's choice for each party, without fee or charge to the party.
- This advisor may, but is not required to, be an attorney.
- Parties also have the right to an advisor of their choosing, but the recipient must be prepared to provide an advisor if the party's advisor cannot be present.

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Conducting a Live Hearing

- The Initial Decision Maker (not the Title IX Coordinator or the Investigator) conducts the hearing and makes relevance determinations.
- Advisors to the parties, not the actual parties, may question and cross-examine parties and witnesses on relevant issues and evidence.
 - Note that a party or witness may opt not to participate in the live hearing, and the recipient may not threaten, coerce, intimidate, or discriminate against that individual in an attempt to secure their participation in the live hearing.
 - The Decision Maker also must not draw a negative inference regarding responsibility based solely on a party or witness' non-participation.

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IMPORTANT UPDATE

Evidence at the Live Hearing

- As originally issued, the 2020 amendments prohibited a Decision Maker from relying on any statement of a party or witness in reaching a determination if that party or witness opted not to participate in or submit to cross-examination at the live hearing.
- However, a federal district court in Massachusetts recently vacated that portion of the regulations and remanded it to the DOE for further consideration.
- In an August 24, 2021 letter, OCR noted that, as a result of the court's decision, it would no longer enforce that portion of the regulations.
 - “In practical terms, a decision-maker ... may now consider statements made by parties or witnesses that are otherwise permitted under the regulations, even if those parties or witnesses do not participate in cross-examination at the live hearing, in reaching a determination regarding responsibility in a Title IX grievance process.”

– DOE Letter to Students, Educators, and other Stakeholders re *Victim Rights Law Center et al. v. Cardona*, (August 24, 2021).

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Conducting a Live Hearing

- The live-hearing may be held in-person or virtually.
- At the request of either party, the recipient must provide for the live hearing to occur with the parties and their advisors located in separate rooms. The recipient must provide for technology enabling the parties and the decision maker(s) to simultaneously see and hear the parties and/or witnesses.
 - The recipient must train the decision-maker in the technology used for the live hearing.
 - Technology must allow for observation of body language and demeanor simultaneous with answers to questions.

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Conducting a Live Hearing

- Recipients may adopt other rules that govern conduct at the live hearing so long as they are applied equally to all parties and otherwise comply with the Title IX regulations.
- An audio or audiovisual recording or transcript of any live hearing must be created and be available to the parties for inspection and review.

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CONFIDENTIALITY



Confidentiality

- Anonymous reports
 - The final regulations do not prohibit anonymous reporting.
 - Notice conveyed by an anonymous report may convey actual knowledge and trigger a response obligation.



Confidentiality

- Schools must keep confidential the identities of any:
 - Complainants or other individuals who have made a report or complaint of sex discrimination;
 - Respondents or any individuals who has been reported to be the perpetrator of sex discrimination; and
 - Witnesses.
- Confidentiality will not apply when disclosure is permitted by FERPA or is otherwise required by law or to carry out a Title IX sexual harassment investigation, hearing, or judicial proceeding

34 C.F.R. §106.71

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Confidentiality

- A “complainant” (i.e. the alleged victim of sexual harassment) cannot remain anonymous if a formal complaint is filed.
- The final regulations require a school to send written notice of the allegations to **both** parties upon receipt of a formal complaint. 34 C.F.R. §106.45(b)(2)
 - This applies irrespective of whether the formal complaint is signed by the complainant or by the Title IX Coordinator.
 - If the complainant’s identity is known it must be disclosed in the written notice of allegations.

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Confidentiality

- Schools may not impose “gag rules” on participants in investigations:
 - Exercise of First Amendment rights is not “retaliation”
 - “A recipient should not, under the guise of confidentiality concerns, impose prior restraints on students’ and employees’ ability to discuss the allegations under investigation, for example with a parent, friend, or other source of emotional support, or with an advocacy organization.”
 - Parties must also be free to discuss allegations in order to “gather and present evidence.”

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RECORDKEEPING



Recordkeeping

- The following must be maintained for a period of seven (7) years:
 - Records of each Title IX sexual harassment investigation, including:
 - Any determinations regarding responsibility;
 - Any audio or audiovisual recording or transcript;
 - Any disciplinary sanctions imposed on the respondent; and
 - Any remedies provided to the complainant.
 - Records of any appeals;
 - Records of informal resolutions; and
 - All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.

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Training Materials

- Training materials must also be published on a publicly accessible website or, if one is not maintained, must be made available for inspection by members of the public upon request.

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Recordkeeping

- Recipients also are required to **create** and **maintain** for a period of seven (7) years:
 - Records of any actions taken in response to a **report or formal complaint** of Title IX sexual harassment.
 - Records should include documentation of supportive measures offered to the complainant.
 - If no supportive measures are offered, recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances.
 - Documentation of the basis for concluding that the recipient's response was not deliberately indifferent.

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Thank You!

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