



OCTOBER 20, 2020

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The History of Title IX, How We Got to Today, and What Tomorrow May Hold

Presented by:
Dennis J. Eichelbaum

October 20, 2020

The History of Title IX, How We Got to Today, and What Tomorrow May Hold



Dennis J. Eichelbaum
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Title IX June 23, 1972

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education programs or activity receiving federal financial assistance.”

2

Female high school sports participation grew from less than 300,000 to 1.3 million in 1974 (within 2 years of passage)

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Cannon v. University of Chicago 441 U.S. 677 (1979)

Supreme Court recognized a right to sue using Title IX

“Title IX presents the atypical situation in which all of the circumstances that the Court has previously identified as supportive of an implied remedy are present. We therefore conclude that petitioner may maintain her lawsuit, despite the absence of any express authorization for it in the statute.”

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North Haven Board of Education v. Bell 456 U.S. 512 (1982)

The Court upheld the ruling of the Court of Appeals that Title IX prohibited employment discrimination.
(nothing in the statute that excludes employment)

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education programs or activity receiving federal financial assistance.”

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Grove City College v. Bell 465 U.S. 555 (1984)

Supreme Court held that: (1) the college was the **recipient of federal financial assistance** and thus subject to the statute prohibiting sex discrimination where some of its students received basic education opportunity grants even though the **college did not receive any direct federal financial assistance**, and; (2) the **receipt of grants by some of the college’s students did not trigger institution wide coverage but only coverage for its financial aid program.**

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4 years later...Congress steps in

In 1988, Congress passed the **Civil Rights Restoration Act**, which in part reversed the Supreme Court's decision, mandating that any program in an institution that receives federal financial aid, no matter how specific the purpose or program for which that aid is given, must follow the guidelines of the Rehabilitation Act, **meaning that once an institution accepts federal funds it falls within Title IX.**

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Shift

- Pre-1990's, Title IX was mostly challenges to following the law, as well as what the law covers.
- In the 1990's, people started using Title IX to sue for personal damages as the courts expanded its interpretation of types of causes of action that could be brought under Title IX.

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Franklin v. Gwinnet County Public Schools 503 U.S. 60 (1992)

- Supreme Court declares that students can sue school for monetary damages for sexual harassment by a teacher.
- SIDENOTE: One cannot sue an employee under Title IX, only an institution.

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Doe v. Taylor ISD 15 F.3d 443 (5th Cir. 1994)

1. The person learned of facts or a pattern of inappropriate sexual behavior by a subordinate pointing plainly toward the conclusion that the subordinate was sexually abusing a student.
2. The person demonstrated deliberate indifference toward the constitutional rights of the student by failing to take action that was obviously necessary to prevent or stop the abuse.
3. Such a failure caused injury to the child.

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Gebser v. Lago Vista Indep. Sch. Dist. 524 U.S. 274 (1998)

- Gebser was a high school student having a sexual relationship with one of her teachers, and the school district had failed to implement a proper grievance procedure as provided in the guidance.
- The Supreme Court found that a school district may be liable for damages under Title IX where it is deliberately indifferent to known acts of teacher-student sexual harassment, but that there is *no respondeat superior* in Title IX.

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The Test

- Actual Notice
- Deliberate Indifference

"Until Congress speaks directly on the subject, however, we will not hold a school district liable in damages under Title IX for a teacher's sexual harassment of a student absent actual notice and deliberate indifference."

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What is *not* Deliberate Indifference

- “Actions and decisions by officials that are merely inept, erroneous, ineffective, or negligent do not amount to deliberate indifference...”
- “Officials may avoid liability under a deliberate indifference standard by responding to a risk of harm, ‘even if the harm ultimately was not averted.’”
- *Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d 211, 219 (5th Cir. 1998); *Doe v. Dallas Indep. Sch. Dist.*, 220 F.3d 380, 384 (5th Cir. 2000)

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Davis v. Monroe County Board of Ed. 526 U.S. 629 (1999)

- Fifth grade student was repeatedly subjected to vulgar comments by fellow student.
- Told three different teachers repeatedly. Mother also complained to teachers.
- Was told by teacher the principal had been informed.
- Mother spoke to principal, who said “I guess I’ll have to threaten him a little bit harder” (but student was never disciplined for misconduct)
- Student was refused ability to move seats away from harasser for three months. Grades went down; father found suicide note.
- Same student rubbed up against student, repeatedly tried to touch her. Other students also victim of same student
- Ended after six months when student pled guilty to sexual battery
- Principal refused to speak with complaining students

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The Test (Student to Student)

1. Actual knowledge
2. Deliberate indifference
3. If school knew and the response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances
4. Conduct by student must be so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.

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What type of litigation do we need to be watching for in the future?

Bullying? No liability under § 1983 (Covington), but under Title IX (if due to gender preference)

Transgender issues – dress, use of restroom and locker room (plus bullying plus sexual harassment)

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G.G. v. Gloucester County Sch. Bd 4th Circuit (4/19/16)

- G.G has gender dysphoria, had hormone treatment, living as a boy
- For 7 weeks no issue with him using HS boys restroom
- Community member raised issue
- Policy: restroom usage based on biological gender, “students with gender identity issues shall be provided an alternative appropriate private facility.”

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G.G. CONTINUED

DOE’S regs:

- “separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities for students of the other sex.” 34 C.F.R. § 106.33.

DOE Op. Ltr:

- “When a school elects to separate or treat students differently on the basis of sex . . . a school generally must treat transgender students consistent with their gender identity.”

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G.G. CONTINUED

Majority: “[w]e conclude that the Department’s interpretation of how § 106.33 and its underlying assumptions should apply to transgender individuals is not plainly erroneous or inconsistent with the text of the regulation.”

Dissent: While G.G. challenges the definition and application of the term “sex” with respect to separate restrooms, acceptance of his argument would necessarily change the definition of “sex” for purposes of assigning separate living facilities, locker rooms, and shower facilities as well.

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Dear Colleague (May 13, 2016)

Paraphrase: Gender identification is how we should read the term sex in Title IX.

- Documents (Names?), Pronouns
- Activities
- Restrooms and Locker Rooms(have optional additional privacy)
- Athletics (UIL?)
- Single Sex Classes/Schools/Overnight accommodations

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TX, Harrold ISD, et al., v. USA

- U.S. did not go through notice-and-comment rulemaking as required under APA. Also “arbitrary and capricious,” lack of notice
- 10th Amendment: “new rules ... unlawfully attempt to preempt State law regarding rights of privacy because historic powers reserved to the States, such as civil privacy protections, cannot be superseded by federal act, ‘unless that was the clear and manifest purpose of Congress.’”
- Equal Protection: “But if the right or ability to use the intimate facilities of one’s choosing extends only to those who self-identify as the opposite sex then the new rules, regulations, guidance and interpretations treat unequally students and employees that require access to intimate areas.”

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Next Stop?

In fact...STOP, in the name of love!

8/3/16
Supreme Court issues stay on enforcing court of appeals decision.

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Supreme Court accepts G.G.

- 8/3/16
- Supreme Court issues stay on enforcing court of appeals decision.

BUT THEN...

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G.G. v. Gloucester County Sch. Bd. 4th Circuit (8/26/20)

- Court of Appeals affirmed trial court granting of summary judgment based upon the Fourteenth Amendment and equal protection and Title IX.
- On September 22, 2020, Court denied petition for en banc consideration
- Will it go to the Supremes? 90 days to “appeal” ...
December 21, 2020

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August 14, 2020

New Regulations from OCR take effect for Title IX

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Contact Us



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Title IX Coordinator Responsibilities

Presented by:
Holly Boyd Wardell


October 20, 2020

Title IX Coordinator Responsibilities

from the 2020 Sexual Harassment Regulations



Holly Dayd Wardell
Oct. 20, 2020



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New Regulations

- Published May 19, 2020
- Effective August 14, 2020
- 34 C.F.R. Part 106
- 25 pages of new regulations
- 2000 pages of commentary

By the Numbers



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T9 Coordinator Responsibilities Under New Regulations

- The new regulations pertain to reports and formal complaints of sexual harassment.
- They do not affect responsibilities pertaining to equity in athletics, inequities, or discrimination in course selections, etc.
- This session focuses on the 2020 regulations on sexual harassment.



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Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the "Title IX Coordinator."

Designation of coordinator, dissemination of policy, and adoption of grievance procedures. 34 C.F.R. § 106.8(a).



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Title IX Coordinator Responsibilities

- Ensure policies reflect current information about T9 Coordinator
- Ensure website and publications contain proper notices
- For all reports of sexual harassment, contact alleged victims (complainant) to discuss the availability of supportive measures
- Consider a complainant's wishes re supportive measures
- Inform complainants of the right to file formal complaint and right to supportive measures with or without a formal complaint
- Decide whether to file a formal complaint when the complainant does not

*Many of these tasks can be delegated but must be overseen by the Title IX Coordinator.



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Title IX Coordinator Responsibilities

- Decide whether to dismiss a formal complaint (or who should decide dismissal)
- Assist with emergency removal and administrative leave decisions
- Provide notice to parties of grievance process in case of formal complaints
- Post all training materials to district's website
- Ensure proper record keeping


*Many of these tasks can be delegated but must be overseen by the Title IX Coordinator.



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All of these individuals must be informed of the Title IX Coordinators...




Name or Title

Applicants for admission and employment




Office address

Students and parents or legal guardians of elementary and secondary students



E-mail address

Employees



Telephone number




All unions or professional organizations holding collective bargaining or professional agreements with the recipient

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Reporting sexual harassment...

Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment)...

Using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report.

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Reporting sexual harassment...

Such report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator.

34 C.F.R. § 106.8(a).

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Dissemination of policy

- District does not discriminate on the basis of sex in the education program of activity that it operates
- It is required by Title IX to not discriminate in this manner
- Requirement not to discriminate extends to admission and employment
- Inquiries about the application of Title IX to the district may be referred to the Title IX Coordinator, the Assistant Secretary for Education (USDOE), or both

Applicants for admission and employment

Students and parents or legal guardians of elementary and secondary students

Employees

All unions or professional organizations holding collective bargaining or professional agreements with the recipient

www.edlaw.com 34 C.F.R. § 106.8(b).

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August 2010

Sample Notice of Non-discrimination

The following sample notice of non-discrimination meets the minimum requirements of the regulations enforced by OCR:

The (Name of Recipient) does not discriminate on the basis of race, color, national origin, sex, disability, or age in its programs and activities and provides equal access to the Boy Scouts and other designated youth groups. The following person has been designated to handle inquiries regarding the non-discrimination policies:



Name and/or Title
Address
Telephone No.

<https://www2.ed.gov/about/offices/list/ocr/docs/nondisc.html>
Accessed 2020-10-11

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Publications

Must promptly display Title IX Coordinator's contact information:

- On district's website 
- In each handbook or catalog 

www.edlaw.com 34 C.F.R. § 106.8(b).

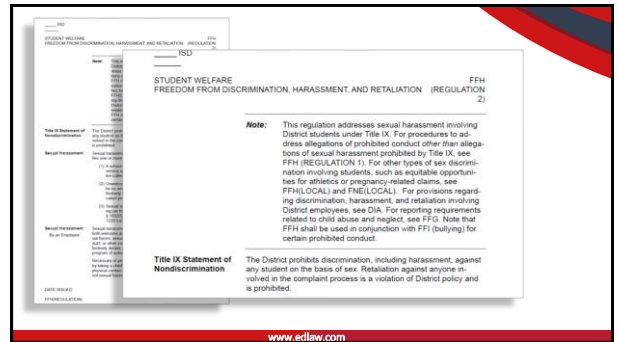
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District must adopt and publish grievance procedures and provide notice of process including...

1. How to report or file a complaint of sex discrimination;
2. How to report or file a formal complaint of sexual harassment; and
3. How the district will respond.

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The new regulations...

Seek to create a separation between the investigation and decision-making of formal complaints.

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While it is best to separate roles...

- **The Title IX Coordinator can also be the investigator and the informal resolution facilitator.**
- **The Title IX Coordinator cannot also serve as the decision-maker on a formal complaint or on appeal.**
- **All roles can be outsourced, except the Title IX Coordinator (e.g., investigator, decision-maker, informal resolution facilitator, appellate decision maker).**

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Remember that anyone serving as a Title IX Coordinator, investigator, decision-maker, or any person designated to facilitate an information resolution process must not have a **conflict of interest or bias** for or against **complainants or respondents generally** or an **individual complainant or respondent**.

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The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures... consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without filing a formal complaint, and explain to the complainant the process for filing a formal complaint."

- Respond to every report of sexual harassment
- Must not be deliberately indifferent
- For OCR purposes, actual knowledge is imputed to the district if any employee is aware of sexual harassment.

34 C.F.R. § 106.44(a).

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- Respond to every report of sexual harassment
- Must not be deliberately indifferent
- For OCR purposes, actual knowledge is imputed to the district if any employee is aware of sexual harassment.

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CONTACTING THE COMPLAINANT

Regulations do not dictate the medium of contact.

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CONTACTING THE COMPLAINANT

K-12 SETTING

- Phone call, followed by email/letter.
- In person parent conference, followed by email/letter.

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DISTRICT LETTERHEAD

"This letter may be sent to adult students or parents of minor students after initial verbal contact by school officials about a report of alleged sexual harassment involving their child gives no Formal Complaint to file."

[Date]
[Adult Student Complainant/Parent/Guardian]
[Address]

Re: Title IX Complaint – Response to Sexual Harassment Report
Supportive Measures

Dear Mr./Ms. _____:

This letter is to confirm receipt of a report of alleged sexual harassment involving your child. It is our understanding that, at this time, you do not wish to file a Formal Complaint and pursue this matter further. If you change your mind, please contact my office immediately.

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Even though you have not filed a Formal Complaint, the District is implementing the following supportive measures for your child, because school board policy FFH prohibits discrimination on the basis of sex, including sexual harassment and other prohibited conduct, against students in all of its educational programs. Supportive measures are non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, without fee or charge to students, when a report of alleged sexual harassment is made.

Supportive Measures: *(Select only those that apply and provide details. Delete the options below that will not be implemented.)*

- Counseling of students regarding appropriate behavior expectations
- Review of district and code of conduct expectations with student by administrator
- Change of class schedule/lunch schedule/locker location
- Campus/class escort
- Increased school monitoring of [location] for [time period e.g., next 9 weeks]
- School counseling
- Stay away agreement/No contact directives
- Limitation on extracurricular activities
- Training
- Other: _____

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“The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.”

34 C.F.R. § 106.30.

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Supportive Measures means...

- Non-disciplinary, non-punitive individualized services
- Offered as appropriate, as reasonably available
- Without fee or charge to the complainant or respondent
- Before or after filing of a formal complaint or where no formal complaint has been filed
- Designed to restore or preserve equal access to the district's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the educational environment or deter sexual harassment

34 C.F.R. § 106.30

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Supportive Measures examples

- 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

34 C.F.R. § 106.30

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- Counseling of students regarding appropriate behavior expectations
- Review of district and code of conduct expectations with students by administrator
- Change of class schedule/lunch schedule/locker location
- Campus/class escort
- Increased school monitoring of [location] for [time period e.g., next 9 weeks]
- School counseling - # sessions
- No contact/no communication agreements
- No contact/communication directives
- Limitation on extracurricular activities
- Social Skills Training
- Staff Training
- Other: _____

Add the term of supportive measures (e.g., pending resolution of the grievance process; four weeks; end of semester; end of the school year).

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Supportive Measures means...

The recipient must maintain as confidential any supportive measures provided to the complainant or respondent—to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures.

34 C.F.R. § 106.30

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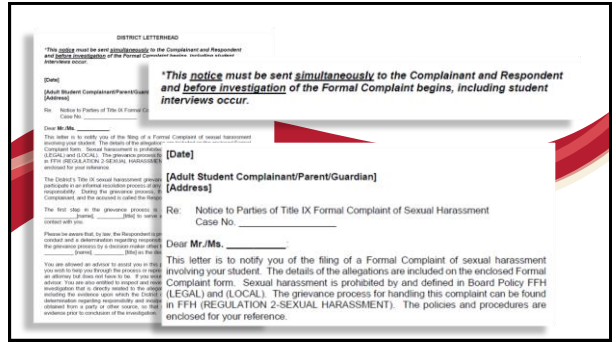
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Keep documentation of supportive measures (e.g., no contact/communication agreements, log of counseling sessions, copies of social skills stories/trainings, summary of schedule changes, summary of campus escorts).

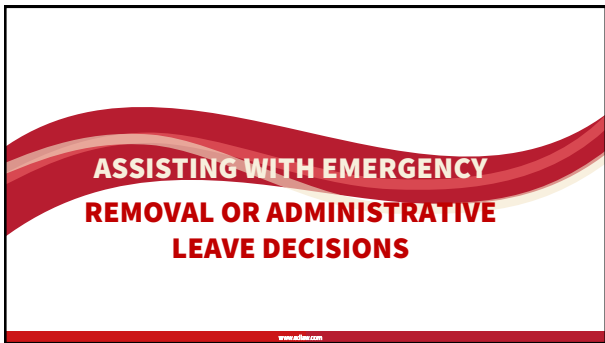
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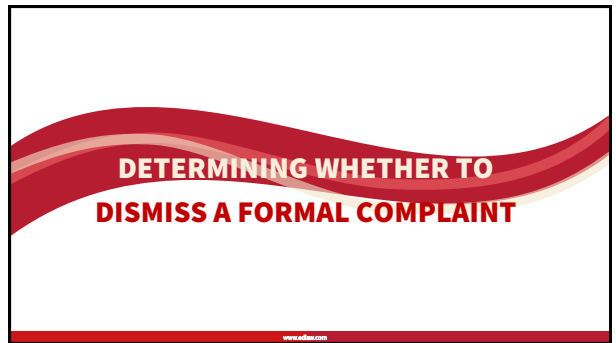
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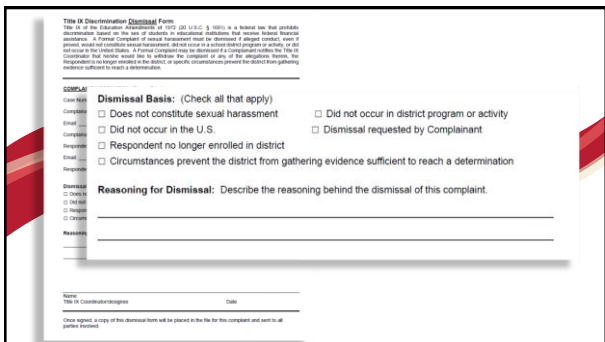
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What are examples of remedies?

- Not defined in Title IX
- No list of examples in regulations
- Money damages were removed as possible remedy in final rules

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Remedies - Purpose

Designed to restore or preserve the complainant's equal access to education

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Remedies for Complainants

- Supportive measures
- Counseling
- Opportunity to make up work, retake exams
- Change of class, lunch period, campus
- Escort on campus
- Increase security
- Training efforts

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Remedies for Complainants

- Disciplinary sanctions against respondent per the Student Code of Conduct (e.g., OSS, DAEP, expulsion)
- Removal of respondent from extracurricular activity/activities
- Unilateral no-contact order on respondent
- Other sanctions applicable to respondent

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Selection of Remedies Not Appealable

The Department believes that a complainant entitled to remedies should not need to file an appeal to challenge the recipient's selection of remedies; instead, we have revised [the rules] to require that Title IX Coordinator be responsible for effective implementation of remedies. This permits a complainant to work with the Title IX Coordinator to select and effectively implement remedies designed to restore or preserve the complainant's equal access to education."

p. 940 = Commentary

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Selection of Remedies Not Appealable

Bases for Appeal of Decisions

- Procedural irregularity
- Bias or conflict of interest
- That affected the outcome

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Written Determination must include



- any sanctions the recipient imposes on the respondent; and
- **whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided to the complainant**

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REMEDIES



- Shared with complainant – complainant's remedies and respondent's sanctions
- Shared with respondent – sanctions and whether remedies were provided to complainant (not details of the remedy, unless the sanctions overlap with remedies)

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POSTING TRAINING MATERIALS

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What to post:

- Notice of non-discrimination policy
- Title IX Coordinator's contact information
- **Links to FFH and DIA – LEGAL, LOCAL, EXHIBIT, REGULATIONS**
- **Training materials used to train T9 Coordinator, Investigators, Decision-Makers, Facilitators**

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Permission from the copyright holder should be obtained, but failure to obtain permission does not relieve a district from the requirement to post.

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Where to post:



- Non-discrimination policy and Title IX Coordinator's contact information must be prominently displayed.
- **There is no requirement that the materials be on the homepage or linked to the homepage.**

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Where to post:

- There is no requirement to have a section of the website dedicated to Title IX requirements.
- There is no requirement that Title IX information be located on multiple pages of a district's website.
- Title IX information could be added as a drop-down option in any of the following areas: Required Notices, Public Information, Departments, Students, Employees, Community

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RECORD KEEPING

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DISTRICT LETTERHEAD

Title IX Record Keeping Cover Sheet

All records related to a report of sexual harassment must be kept for a period of seven (7) years from the date of conclusion of the grievance process.

DISTRICT LETTERHEAD

Title IX Record Keeping Cover Sheet

*All records related to a report of sexual harassment must be kept for a period of seven (7) years from the date of conclusion of the grievance process.

Date of Initial Complaint: _____

Date of Final Decision: _____

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DISTRICT LETTERHEAD

Title IX Record Keeping Cover Sheet

All records related to a report of sexual harassment must be kept for a period of seven (7) years from the date of conclusion of the grievance process.

DISTRICT LETTERHEAD

Title IX Record Keeping Cover Sheet

*All records related to a report of sexual harassment must be kept for a period of seven (7) years from the date of conclusion of the grievance process.

Date of Initial Complaint: _____

Date of Final Decision: _____

Initial Intake Report
 Response to Sexual Harassment Report – Supportive Measures
 Formal Complaint, if any
 Notice to Parties
 Emergency Removal, if applicable
 Administrative Leave – Personnel, if applicable
 Informal Resolution Paperwork
 Notices to Parties of Interviews
 Evidence Submitted to Parties, including witness statements, photographs, electronic communications
 Draft Investigative Report and Notice of Opportunity to Submit Response Sent to Parties
 Final Investigation Report
 Notice of Opportunity to Submit Questions
 Questions Submitted and Answers
 Determination of Responsibility
 Documentation of Supportive and Other Measures Imposed After Determination of Responsibility
 Appeals Documentation, if any
 Decision on Appeal

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U.S. Department of Education - 2020

- Overview of New Rule
- Fact Sheet
- Summary of New Rules
- Comparison to Proposed Rules

2020 Resources for Title IX Coordinators

- 2020-8-31 OCR - T9 & Bostock
- 2020-9-24 Q&A

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OPEN@ed.gov

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Note: This regulation addresses sexual harassment involving District students under Title IX. For procedures to address allegations of prohibited conduct *other than* allegations of sexual harassment prohibited by Title IX, see FFH (REGULATION 1). For other types of sex discrimination involving students, such as equitable opportunities for athletics or pregnancy-related claims, see FFH(LOCAL) and FNE(LOCAL). For provisions regarding discrimination, harassment, and retaliation involving District employees, see DIA. For reporting requirements related to child abuse and neglect, see FFG. Note that FFH shall be used in conjunction with FFI (bullying) for certain prohibited conduct.

Title IX Statement of Nondiscrimination

The District prohibits discrimination, including harassment, against any student on the basis of sex. Retaliation against anyone involved in the complaint process is a violation of District policy and is prohibited.

Sexual Harassment

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- (1) A school employee conditioning an educational benefit or service upon a student's participation in sexual conduct (often called "quid pro quo" harassment);
- (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 District's education programs or activities; or
- (3) Sexual assault, dating violence, domestic violence, or stalking (as those offenses are defined in the Clery Act, 20 U.S.C. § 1092(f), and the Violence Against Women Act, 34 U.S.C. § 12291(a)).

**Sexual Harassment
By an Employee**

Sexual harassment of a student by a District employee includes both welcome and unwelcome sexual advances; requests for sexual favors; sexually motivated physical, verbal, or nonverbal conduct; or other conduct or communication of a sexual nature that effectively denies a student equal access to the District's education program of activity.

Necessary or permissible physical contact such as assisting a child by taking a child's hand, comforting a child with a hug, or other physical contact not reasonably construed as sexual in nature is not sexual harassment.

However, romantic or inappropriate social relationships between students and District employees are strictly prohibited. Any sexual relationship between a student and a District employee is always prohibited, even if consensual. [See DH]

By Others

Sexual harassment of a student includes harassment committed by another student, unwelcome sexual advances; requests for sexual favors; sexually motivated physical, verbal, or nonverbal conduct when the conduct is severe, pervasive, and objectively offensive to the point it denies a student equal access to the District's education programs or activities.

Gender-Based Harassment

Gender-based harassment includes physical, verbal, or nonverbal conduct based on the student's gender, the student's expression of characteristics perceived as stereotypical for the student's gender, or the student's failure to conform to stereotypical notions of masculinity or femininity. For purposes of this policy, gender-based harassment is considered prohibited sexual harassment if the conduct is so severe, pervasive, and objectively offensive that the conduct effectively denies a student equal access to the District's education programs or activities.

Dating Violence

Dating violence occurs when a person in a current or past dating relationship uses physical, sexual, verbal, or emotional abuse to harm, threaten, intimidate, or control the other person in the relationship. Dating violence also occurs when a person commits these acts against a person in a marriage or dating relationship with the individual who is or was once in a marriage or dating relationship with the person committing the offense.

For purposes of this policy, dating violence is considered prohibited harassment if the conduct is so severe, pervasive, and objectively offensive that the conduct effectively denies a student equal access to the District's education program or activity.

Dating violence is defined as "an act, other than a defensive measure to protect oneself, by an actor that:

(1) is committed against a victim or applicant for a protective order:

(A) with whom the actor has or has had a dating relationship; or

(B) because of the victim's or applicant's marriage to or dating relationship with an individual with whom the actor is or has been in a dating relationship or marriage; and

(2) is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the victim

or applicant in fear of imminent physical harm, bodily injury, assault, or sexual assault.

Tex. Family Code section 71.0021.

Retaliation

The District prohibits retaliation by a student or District employee against an individual alleged to have experienced sexual harassment, an individual who makes a good faith report of sexual harassment, serves as a witness, or participates or refuses to participate in an investigation.

Any person who believes he or she has been retaliated against may file a complaint in accordance with the grievance process described in this regulation.

False Claim

A student or employee who intentionally makes a false claim or provides a materially false statement shall be subject to appropriate disciplinary action as defined in this regulation.

Prohibited Conduct

The term “prohibited conduct” includes sex discrimination, harassment, sexual assault, dating violence, domestic violence, stalking, and retaliation as defined by this regulation, even if the behavior does not rise to the level of unlawful conduct.

Reporting Procedures

Student Report

Any student who believes that he or she has experienced prohibited conduct or believes that another individual has experienced prohibited conduct should immediately report the alleged acts to a teacher, school counselor, principal, assistant principal, or the Title IX Coordinator/designee.

Employee Report

Any District employee who suspects or receives notice that a student, group of students, or other individual in the school has or may have experienced prohibited conduct shall promptly notify a campus administrator or the Title IX Coordinator.

Definition of District Officials

For the purposes of this regulation, District officials are the Title IX Coordinator/designee and campus administrators.

Title IX Coordinator

Reports of discrimination based on sex, including sexual harassment or gender-based harassment, may be directed to the designated Title IX coordinator for students. [See FFH(EXHIBIT)]

STUDENT WELFARE
FREEDOM FROM DISCRIMINATION, HARASSMENT, AND RETALIATION (REGULATION 2) FFH

Definition of Complainant	A complainant is an individual who is alleged to be the victim of prohibited conduct under this policy.
Definition of Respondent	A respondent is the person who has been reported to be the perpetrator of prohibited conduct under this policy.
Definition of Formal Complaint	A formal complaint means a document filed by a complainant (or complainant's parent/guardian) or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the District investigate the allegation of sexual harassment.
Alternate Reporting Procedures	A student shall not be required to report prohibited conduct to the person alleged to have committed the conduct. Reports concerning prohibited conduct, including reports against the Title IX coordinator, may be directed to the Superintendent. A report against the Superintendent may be made directly to the Board. If a report is made directly to the Board, the Board shall appoint an appropriate person to conduct an investigation.
Timely Reporting	Reports of prohibited conduct shall be made as soon as possible after the alleged act or knowledge of the alleged act. A failure to promptly report may impair the District's ability to investigate and address the prohibited conduct.
Notice to Parents	Upon receipt of a formal complaint, the District official or designee shall promptly notify the parents of any student alleged to have experienced prohibited conduct and the parents of a student who is alleged to have engaged in prohibited conduct with notice in compliance with the Written Notice section below. [For parental notification requirements regarding an allegation of educator misconduct with a student, see FFF.]
Supportive Measures	The District shall offer the parties supportive measures. Supportive measures may include individualized services that are non-punitive, non-disciplinary, and do not unreasonably burden the other party yet are designed to restore or preserve a student's equal access to education. Supportive measures may include but are not limited to counseling, extensions of deadlines or other class-related adjustments, modifications of class schedules, campus escort services, mutual restrictions on contact between the parties, increased monitoring of certain areas of the campus, and other similar measures. The District must maintain as confidential any supportive measures provided to the parties to the extent this would not impair the ability of the District to provide supportive measures.

**Grievance
Procedure:**

A formal complaint alleging prohibited conduct under this policy shall be in writing. A formal complaint may be made by the complainant-student, a parent, or legal guardian. In cases where an alleged victim doesn't file a formal complaint, the Title IX Coordinator may initiate grievance procedures where warranted (e.g., allegations of sexual assault or abuse, improper relationship between employee and student). The grievance process shall be engaged with all deliberate speed for resolving formal complaints of sexual harassment. Temporary delays shall be permitted only for good cause. Good cause can include but is not limited to law enforcement activities, the absence of a party or witness, the absence of a party's advisor of choice, or the need to provide language assistance or accommodation of disabilities.

Equitability and
Objectivity

Both the complainant and the respondent are to be treated equitably in the grievance process. The District must ensure an objective evaluation of all relevant evidence including inculpatory and exculpatory evidence.

Credibility and
Presumption of
Innocence

Credibility determinations shall not be made on the basis of a person's status as a complainant, respondent, or witness. The respondent is presumed not responsible, and any finding of responsibility comes only at the conclusion of a grievance process.

No Conflicts of
Interest

The individuals directly involved in the grievance process (Title IX Coordinator or designee, investigator, decision-maker, and facilitator of informal resolution efforts) must not have any bias or conflict of interest. These individuals shall also be trained. The materials used to train Title IX personnel may not rely on sex stereotypes, must promote impartial investigations and adjudications, and must be posted on the District's website.

Standard of
Evidence

The standard of evidence the District will use to reach a determination regarding responsibility shall be the preponderance of the evidence standard *[or clear and convincing evidence standard]*.

STUDENT WELFARE
FREEDOM FROM DISCRIMINATION, HARASSMENT, AND RETALIATION (REGULATION 2) FFH

Privileges	No information protected by a legal privilege, such as the attorney-client privilege or the doctor-patient privilege, can be used during an investigation unless the person holding that privilege has waived it. Neither a party nor the District is allowed to seek, permit questions about, or allow the introduction of evidence that is protected by a recognized privilege. Individuals can always opt to waive their own privileges.
Emergency Removals	<p>The District may remove a respondent from the District's education programs or activities on an emergency basis if the District undertakes an individualized safety and risk analysis and determines that an immediate threat, arising from the allegations of sexual harassment, to anyone's physical health or safety justifies removal. The District must provide the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision does not override or modify the rights of individuals under the Individuals with Disabilities Education Act, Section 504, or the Americans with Disabilities Act.</p> <p>If the respondent is a District employee, the employee may be placed on administrative or other district initiated leave during the investigation.</p>
Initial Assessment Dismissal Option	<p>Upon receipt of a formal complaint, the District official or designee shall determine whether the allegations, if proven, would constitute prohibited conduct as defined by this policy. The District official/designee <u>must</u> dismiss a complaint:</p> <ol style="list-style-type: none">(1) that does not describe conduct that meets the definition of sexual harassment;(2) that alleges sexual harassment that did not occur in the District's education program or activity;(3) that alleges sexual harassment that did not occur in the United States. <p>Such dismissal does not preclude the District taking disciplinary action under the Student Code of conduct for non-sexual harassment misconduct.</p> <p>The District <u>may</u> dismiss a complaint:</p> <ol style="list-style-type: none">(1) if the complainant notifies the Title IX Coordinator in writing that he/she wishes to withdraw the formal complaint or any allegations therein;(2) if the respondent is no longer enrolled in the District; or(3) if circumstances prevent the District from gathering evidence sufficient to reach a determination about the allegations.

STUDENT WELFARE
FREEDOM FROM DISCRIMINATION, HARASSMENT, AND RETALIATION (REGULATION 2) FFH

Such dismissal does not preclude the District taking disciplinary action under the Student Code of conduct for non-sexual harassment misconduct.

If the District official dismisses a formal complaint or any allegations in it, the District official shall promptly send written notice of the dismissal and the reasons to the parties. Both parties have the right to appeal a dismissal decision.

The District will not dismiss a complaint involving an alleged improper relationship between an employee and student.

If the District official determines that the allegations, if proven, would not constitute prohibited conduct as defined by this policy but might constitute bullying, the District official shall refer the complaint for consideration under FFI.

STUDENT WELFARE
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Written Notice

When an investigation begins, the parties will receive written notice. Included in the notice shall be a copy of this regulation and policy FFH. Written notice shall also include:

- (1) The actual allegations and facts that would constitute sexual harassment, including the date and location of the alleged incident(s), if known.
- (2) A statement that the respondent is presumed to be innocent and that a determination regarding responsibility is made at the conclusion of the grievance process.
- (3) A statement that the parties are entitled to an advisor of their choice who may be a parent/guardian or who may be, but is not required to be, an attorney.
- (4) A statement that the parties can inspect and review relevant evidence
- (5) Information from the District's code of conduct about making false statements.
- (6) *Information about the opportunity to engage in informal resolution.*

This written notice must be provided to allow the parties sufficient time to prepare a response before any initial interview.

If, in the course of the investigation, the District decides to investigate allegations about the complainant or respondent that were not included in the original notice, the District must provide notice of the additional allegations to the parties.

Informal Resolution

The District may offer informal resolution in appropriate cases except where the respondent is an employee of the District. Informal resolution may be attempted only if each party enters the process completely voluntarily. The District shall never force, threaten, or require any party to participate in an informal resolution process.

The District shall provide a specially trained facilitator who is free from conflicts of interest or bias. All parties shall be provided with notice of the allegations, notice of their rights, information about whether an informal process is confidential, and about withdrawing from the process.

The District may abate the investigation for two weeks for the parties to engage in informal resolution or longer if by agreement of the parties.

District Investigation
The Investigator

DATE ISSUED:

ADOPTED:

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FFH(REGULATION)

STUDENT WELFARE
FREEDOM FROM DISCRIMINATION, HARASSMENT, AND RETALIATION (REGULATION 2)

FFH

The investigation may be conducted by a trained District official or a designee, such as a principal, an assistant principal, a central administrator, or by a third party designated by the District, such as an attorney. When appropriate, the principal shall be involved in or informed of the investigation.

The District shall provide an equal opportunity for the parties to present witnesses to be interviewed and evidence to be considered, including information from fact and expert witnesses, as well as inculpatory or exculpatory evidence.

The District cannot restrict the ability of a party to discuss the allegations under investigation or to gather and present relevant evidence.

Representation

Both parties shall have the opportunity to have an advisor of choice accompany them to any meetings [or hearings] throughout the grievance process. A parent/guardian may serve as a student's advisor. A student may also have an advisor in addition to his/her parent present at meetings in the grievance process. However, parents and advisors cannot interfere with interviews. Advisors may only observe.

The Investigation

The District shall provide written notice of the date, time, location, participants, and purpose of all [hearings,] interviews, or other meetings with sufficient time for the party to prepare.

The District shall provide equal opportunities for the parties and their advisors to inspect and review the evidence obtained as part of its investigation, if the information is directly related to the allegations raised in the formal complaint.

Every party has the right to choose to participate, or not participate, in any part of a grievance process. No party shall be forced, threatened, coerced, discriminated against, or retaliated against for choosing not to be part of the grievance process.

The investigation may consist of personal interviews with the person making the report, the complainant, the respondent, and others with knowledge of the circumstances surrounding the allegations. The investigation may also include analysis of other information or documents related to the allegations.

Prior to the completion of the investigative report, the District shall send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy. The District may use an electronic format that prevents the parties from being able to download or copy the evidence in order to ensure confidentiality. The parties must have at least 10 days to

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submit a written response, which the investigator will consider prior to completing the investigative report.

If a response is submitted, the investigator shall consider that response before finalizing the investigative report. The investigative report can then be finalized and provided to the parties.

That report shall be circulated to the parties at least another 10 days before any determination of responsibility [*, or 10 days before a hearing*].

Before making a determination of responsibility, the parties shall be given an opportunity to submit relevant, written questions to each other. The decision maker may establish a deadline for a party to respond to questions posed by another party. Responses may be verbal or written at the decision-maker's discretion. Parents/guardians may respond in writing for their children. The decision maker may ask additional questions of the parties and witnesses before making a determination of responsibility.

Questions and evidence about a complainant's prior sexual history are not relevant with two limited exceptions: to prove someone other than the respondent committed the alleged misconduct or to prove consent.

If a law enforcement or regulatory agency notifies the District that a criminal or regulatory investigation has been initiated, the District shall confer with the agency to determine if the District investigation would impede the criminal or regulatory investigation. The District shall proceed with its investigation only to the extent that it does not impede the ongoing criminal or regulatory investigation. After the law enforcement or regulatory agency has finished gathering its evidence, the District shall promptly resume its investigation.

Hearing

The District may offer the parties a hearing as part of the grievance process. Any hearing must give the parties an equal opportunity to present evidence and witnesses. The parties shall be entitled to an advisor of their choice. The parties shall be given an opportunity to submit relevant, written questions to each other. Questions and evidence about a complainant’s prior sexual history are not relevant, with two limited exceptions: to prove someone other than the respondent committed the alleged misconduct or to prove consent.

The District may hold the entire live hearing virtually or the District may allow some participants to appear virtually, with technology that allows everyone to see and hear each other.

Disability
Accommodations

The District shall ensure that individuals with disabilities who participate in a District grievance process are appropriately accommodated, including with respect to the use of technology and reliance on visual, auditory, or written modes of communication.

Concluding the
Investigation

Absent extenuating circumstances, such as a request by a law enforcement or regulatory agency for the District to delay its investigation, the investigation should be completed with all deliberate speed from the date of the formal complaint; the investigator shall take the time necessary to complete a thorough investigation.

The investigator shall prepare a final written report of the investigation. The report shall not include a determination of whether prohibited conduct occurred but may include recommended findings of fact. The report shall be filed with the Title IX Coordinator and the decision-maker.

*Written
Determination of
Responsibility
and Notification of
Outcome*

Decision-maker

Notification of the outcome of the investigation shall be provided to both parties in compliance with FERPA.

The decision-maker shall objectively evaluate the relevant evidence and reach conclusions about whether the respondent is responsible for the alleged sexual harassment. The decision-maker shall use independent judgment and shall not be the same person who conducted the investigations or the Title IX Coordinator.

Decision-makers shall be free from conflicts of interest or bias for or against complainants or respondents and shall have received special training about how to be impartial and how to decide what evidence is relevant. The decision-maker will weigh the relevant evidence and decide whether it meets the District’s standard of evidence for sexual harassment allegations.

After the evidence has been weighed, the decision-maker shall issue a written decision. It shall include:

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- (1) Identification of the allegations potentially constituting sexual harassment.
- (2) A description of the procedural steps taken from the formal complaint through determination of responsibility, including notifications to parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held, if any.
- (3) Findings of fact supporting the determination.
- (4) Conclusions regarding the application of the District's code of conduct to the facts.
- (5) A statement and rationale for the ultimate determination of responsibility.
- (6) Any disciplinary sanctions that will be imposed on the respondent and state whether the District will provide remedies to the complainant.
- (7) A statement and rationale for any remedies for the complainant, addressing how those remedies will restore or preserve equal access to District activities.
- (8) A statement of the District's procedures, a statement that the parties have a right to appeal the initial determination regarding responsibility, and the permissible bases for appeal.

The District shall send the written determination to the parties simultaneously, along with information about how to appeal the determination.

The Title IX coordinator is responsible for implementing the remedies contained in the written decision if there is no timely appeal or once the appeal process is completed.

*Corrective
Action/Remedies*

The District's remedies are to be designed to restore or preserve equal access to the District's education programs or activities. Disciplinary sanctions for students will range from a verbal warning to expulsion. Examples of corrective action may include a training program for those involved in the complaint, a comprehensive education program for the school community, counseling to the complainant and the respondent who engaged in prohibited conduct, follow-up inquiries to determine if any new incidents or any instances of retaliation have occurred, involving parents and students in efforts to identify problems and improve the school climate, increasing staff monitoring of areas where prohibited conduct has occurred, and reaffirming the District's policy against

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discrimination and harassment. Respondents who are employees may be subject to a range of discipline from a written warning up to and including termination of employment.

Bullying

If the results of an investigation indicate that bullying occurred, as defined by FFI, the District official shall refer to FFI for appropriate notice to parents and District action. The District official shall refer to FDB for transfer provisions.

Improper Conduct

If the investigation reveals improper conduct that did not rise to the level of prohibited conduct or bullying, the District may take disciplinary action in accordance with the Student Code of Conduct or other corrective action reasonably calculated to address the conduct, if it has not already done so.

Confidentiality

To the greatest extent possible, the District shall respect the privacy of the complainant, respondent, and witnesses. Limited disclosures may be necessary in order to conduct a thorough investigation, comply with applicable law, and to implement supportive measures. The District shall maintain the identities of parties and witnesses as confidential, unless disclosure of someone's identity is required under other laws or is necessary in order to conduct the grievance process, including the implementation of supportive measures.

Appeal

An appeal must be in writing (on a form provided by the District) and filed with the Title IX Coordinator within ten calendar days of issuance of the determination of responsibility. Appeals can be taken from two different points in the process: after a dismissal of a complaint (whether mandatory or discretionary) or after the issuance of the determination of responsibility. Grounds for appeal are limited to:

- (1) A procedural irregularity that affected the outcome of the matter.
- (2) New evidence was discovered that was not reasonably available at the time of the determination of responsibility or dismissal.
- (3) A conflict of interest on the part of a Title IX Coordinator, an investigator, or a decision-maker that affected the outcome.

The person who decides the appeal shall not be the same person who reached the determination regarding responsibility, the investigator, or the Title IX Coordinator.

After considering the parties' written statements, the decision-maker on appeal shall issue a written decision and send it to the parties simultaneously.

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The District's determination about whether the respondent is responsible for the sexual harassment allegations becomes final after appeal. A respondent who is an employee may be subject to disciplinary actions pursuant to the District's employment policies.

A student or parent/guardian shall be informed of his or her right to file a complaint with the United States Department of Education Office for Civil Rights.

SBEC and Do Not Hire Registry

Respondent employees who are found to have engaged in Reportable Misconduct under DFB shall be reported to the State Board of Educator Certification or the Texas Education Agency for the Do Not Hire Registry consistent with state regulations.

Records Retention

The District shall retain copies of each sexual harassment investigation, including the allegations; witness statements; relevant evidence relied upon; investigation reports; any appeal and the materials associated with an appeal; records of any informal resolution process; all materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution; records of the supportive measures taken in response to a report or complaint of sexual harassment; and related records regarding any prohibited conduct in accordance with the District's records retention schedules for no less than 7 years. [See CPC]

Access to Procedures

Information regarding this regulation shall be included in the employee and student handbooks.

DISTRICT LETTERHEAD

****This letter may be sent to adult students or parents of minor students after initial verbal contact by school officials about a report of alleged sexual harassment involving their child when no Formal Complaint is filed.***

[Date]

[Adult Student Complainant/Parent/Guardian]
[Address]

Re: Title IX Complaint – Response to Sexual Harassment Report
Supportive Measures

Dear **Mr./Ms.** _____:

This letter is to confirm receipt of a report of alleged sexual harassment involving your child. It is our understanding that, at this time, you do not wish to file a Formal Complaint and pursue this matter further. If you change your mind, please contact my office immediately.

Even though you have not filed a Formal Complaint, the District is implementing the following supportive measures for your child, because school board policy FFH prohibits discrimination on the basis of sex, including sexual harassment and other prohibited conduct, against students in all of its educational programs. Supportive measures are non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, without fee or charge to students, when a report of alleged sexual harassment is made.

Supportive Measures: ***(Select only those that apply and provide details. Delete the options below that will not be implemented.)***

- Counseling of students regarding appropriate behavior expectations
- Review of district and code of conduct expectations with students by administrator
- Change of class schedule/lunch schedule/locker location
- Campus/class escort
- Increased school monitoring of [location] for [time period e.g., next 9 weeks]
- School counseling
- Stay away agreement/No contact directives
- Limitation on extracurricular activities
- Training
- Other: _____

The District's goal is for you/your child to feel safe and comfortable on campus. If you have questions about the District's Title IX grievance process or supportive measures, please contact the Title IX Coordinator's Office at **(XXX) XXX-XXXX** or **[email]**.

Sincerely,

[Name]
Title IX Coordinator/designee

Enclosure: FFH(LOCAL)

DISTRICT LETTERHEAD

****This notice must be sent simultaneously to the Complainant and Respondent and before investigation of the Formal Complaint begins, including student interviews occur.***

[Date]

[Adult Student Complainant/Parent/Guardian]
[Address]

Re: Notice to Parties of Title IX Formal Complaint of Sexual Harassment
Case No. _____

Dear **Mr./Ms.** _____:

This letter is to notify you of the filing of a Formal Complaint of sexual harassment involving your student. The details of the allegations are included on the enclosed Formal Complaint form. Sexual harassment is prohibited by and defined in Board Policy FFH (LEGAL) and (LOCAL). The grievance process for handling this complaint can be found in FFH (REGULATION 2-SEXUAL HARASSMENT). The policies and procedures are enclosed for your reference.

The District's Title IX sexual harassment grievance process includes an opportunity to participate in an informal resolution process at any time prior to a determination regarding responsibility. During the grievance process, the filer of the complaint is called the Complainant, and the accused is called the Respondent.

The first step in the grievance process is an investigation. I have appointed _____[name], _____[title] to serve as investigator, and he/she will be in contact with you.

Please be aware that, by law, the Respondent is presumed not responsible for the alleged conduct and a determination regarding responsibility is made only at the conclusion of the grievance process by a decision-maker other than the investigator. I have appointed _____ [name], _____ [title] as the decision-maker in this complaint.

You are allowed an advisor to assist you in this process. This may be any adult whom you wish to help you through the process or represent your student. This person may be an attorney but does not have to be. If you would prefer, you may proceed without an advisor. You are also entitled to inspect and review all evidence obtained as part of the investigation that is directly related to the allegations raised in the Formal Complaint, including the evidence upon which the District does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that you can meaningfully respond to the evidence prior to conclusion of the investigation.

Please also be aware that provision **XX** of the District's code of conduct prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

If you have any questions regarding this information, please let me know. Thank you for your cooperation during this grievance process to ensure that our students experience an education environment free from discrimination on the basis of sex.

Sincerely,

[Name],
Title IX Coordinator/designee

Enclosures: FFH(LEGAL) & (LOCAL)
FFH(Regulation 2)
Formal Complaint Form

DISTRICT LETTERHEAD

Title IX Record Keeping Cover Sheet

*All records related to a report of sexual harassment must be kept for a period of seven (7) years from the date of conclusion of the grievance process.

Date of Initial Complaint: _____

Date of Final Decision: _____

- Initial Intake Report
- Response to Sexual Harassment Report – Supportive Measures
- Formal Complaint, if any
- Notice to Parties
- Emergency Removal, if applicable
- Administrative Leave – Personnel, if applicable
- Informal Resolution Paperwork
- Notices to Parties of Interviews
- Evidence Submitted to Parties, including witness statements, photographs, electronic communications
- Draft Investigative Report and Notice of Opportunity to Submit Response Sent to Parties
- Final Investigation Report
- Notice of Opportunity to Submit Questions
- Questions Submitted and Answers
- Determination of Responsibility
- Documentation of Supportive and Other Measures Imposed After Determination of Responsibility
- Appeals Documentation, if any
- Decision on Appeal

* The Title IX Coordinator must also retain copies of materials used to train the Title IX Coordinator, investigators, decision makers, and facilitators for seven (7) years.

U.S. Department of Education Title IX Final Rule Overview

GUIDING PRINCIPLES

- **Historic Recognition of Sexual Harassment as Sex Discrimination**

For the first time, the Department’s Title IX regulations recognize that sexual harassment, including sexual assault, is unlawful sex discrimination. The Department previously addressed sexual harassment only through guidance documents, which are not legally binding and do not have the force and effect of law. Now, the Department’s regulations impose important legal obligations on school districts, colleges, and universities (collectively “schools”), requiring a prompt response to reports of sexual harassment. The Final Rule improves the clarity and transparency of the requirements for how schools must respond to sexual harassment under Title IX so that every complainant receives appropriate support, respondents are treated as responsible only after receiving due process and fundamental fairness, and school officials serve impartially without bias for or against any party.

- **Supporting Complainants & Respecting Complainants’ Autonomy**

Under the Final Rule, schools must offer free supportive measures to every alleged victim of sexual harassment (called “complainants” in the Final Rule). Supportive measures are individualized services to restore or preserve equal access to education, protect student and employee safety, or deter sexual harassment. Supportive measures must be offered even if a complainant does not wish to initiate or participate in a grievance process. Every situation is unique, and individuals react to sexual harassment differently. Therefore, the Final Rule gives complainants control over the school-level response best meeting their needs. It respects complainants’ wishes and autonomy by giving them the clear choice to file a formal complaint, separate from the right to supportive measures. The Final Rule also provides a fair and impartial grievance process for complainants, and protects complainants from being coerced or threatened into participating in a grievance process.

- **Non-Discrimination, Free Speech, and Due Process**

The Final Rule reflects core American values of equal treatment on the basis of sex, free speech and academic freedom, due process of law, and fundamental fairness. Schools must operate free from sex discrimination, including sexual harassment. Complainants and respondents must have strong, clear procedural rights in a predictable, transparent grievance process designed to reach reliable outcomes. The Final Rule ensures that schools do not violate First Amendment rights when complying with Title IX.

A SCHOOL’S RESPONSE TO SEXUAL HARASSMENT

- Under the Final Rule, any of the following conduct on the basis of sex constitutes sexual harassment:
 - A school employee conditioning an educational benefit or service upon a person’s participation in unwelcome sexual conduct (often called “*quid pro quo*” harassment);
 - 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
 - Sexual assault, dating violence, domestic violence, or stalking (as those offenses are defined in the Clery Act, 20 U.S.C. § 1092(f), and the Violence Against Women Act, 34 U.S.C. § 12291(a)).

U.S. Department of Education Title IX Final Rule Overview

- Consistent with Supreme Court precedent and the text of Title IX, a school must respond when: (1) the school has actual knowledge of sexual harassment; (2) that occurred within the school's education program or activity; (3) against a person in the United States. The Final Rule expands "actual knowledge" to include notice to any elementary or secondary school employee, and states that any person (*e.g.*, the alleged victim or any third party) may report to a Title IX Coordinator in person or by e-mail, phone, or mail. The Final Rule also specifies that a school's "education program or activity" includes situations over which the school exercised substantial control, and also buildings owned or controlled by student organizations officially recognized by a postsecondary institution, such as many fraternity and sorority houses.
- Consistent with Supreme Court precedent, a school violates Title IX when its response to sexual harassment is clearly unreasonable in light of the known circumstances, and the Final Rule adds mandatory response obligations such as offering supportive measures to every complainant, with or without a formal complaint.
- Schools must investigate every formal complaint (which may be filed by a complainant or by a school's Title IX Coordinator). If the alleged conduct does not fall under Title IX, then a school may address the allegations under the school's own code of conduct and provide supportive measures.

A FAIR GRIEVANCE PROCESS

The Final Rule requires schools to investigate and adjudicate formal complaints of sexual harassment using a grievance process that incorporates due process principles, treats all parties fairly, and reaches reliable responsibility determinations. A school's grievance process must:

- Give both parties written notice of the allegations, an equal opportunity to select an advisor of the party's choice (who may be, but does not need to be, an attorney), and an equal opportunity to submit and review evidence throughout the investigation;
- Use trained Title IX personnel to objectively evaluate all relevant evidence without prejudice of the facts at issue and free from conflicts of interest or bias for or against either party;
- Protect parties' privacy by requiring a party's written consent before using the party's medical, psychological, or similar treatment records during a grievance process;
- Obtain the parties' voluntary, written consent before using any kind of "informal resolution" process, such as mediation or restorative justice, and not use an informal process where an employee allegedly sexually harassed a student;
- Apply a presumption that the respondent is not responsible during the grievance process (often called a "presumption of innocence"), so that the school bears the burden of proof and the standard of evidence is applied correctly;
- Use either the preponderance of the evidence standard or the clear and convincing evidence standard (and use the same standard for formal complaints against students as for formal complaints against employees);
- Ensure the decision-maker is not the same person as the investigator or the Title IX Coordinator (*i.e.*, no "single investigator models");
- For postsecondary institutions, hold a live hearing and allow cross-examination by party advisors (never by the parties personally); K-12 schools do not need to hold a hearing, but parties may submit written questions for the other parties and witnesses to answer;
- Protect all complainants from inappropriately being asked about prior sexual history ("rape shield" protections);

U.S. Department of Education Title IX Final Rule Overview

- Send both parties a written determination regarding responsibility explaining how and why the decision-maker reached conclusions;
- Effectively implement remedies for a complainant if a respondent is found responsible for sexual harassment;
- Offer both parties an equal opportunity to appeal;
- Protect any individual, including complainants, respondents, and witnesses, from retaliation for reporting sexual harassment or participating (or refusing to participate) in any Title IX grievance process;
- Make all materials used to train Title IX personnel publicly available on the school's website or, if the school does not maintain a website, make these materials available upon request for inspection by members of the public; and
- Document and keep records of all sexual harassment reports and investigations.

SEX DISCRIMINATION REGULATIONS

Relating to sex discrimination generally, and not only to sexual harassment, the final regulations also:

- Affirm that the Department may require schools to take remedial action for discriminating on the basis of sex or otherwise violating the Department's Title IX regulations;
- Expressly state that in response to any claim of sex discrimination under Title IX, schools are never required to deprive an individual of rights guaranteed under the U.S. Constitution;
- Account for the interplay of Title IX, Title VII, and FERPA, as well as the legal rights of parents or guardians to act on behalf of individuals with respect to exercising Title IX rights;
- Update the requirement for schools to designate and identify a Title IX Coordinator, disseminate their non-discrimination policy and the Title IX Coordinator's contact information to ensure accessible channels for reporting sex discrimination (including sexual harassment), and notify students, employees, parents, and others of how the school will respond to reports and complaints of sex discrimination (including sexual harassment); and
- Clarify that an institution controlled by a religious organization is not required to submit a written statement to the Department to qualify for the Title IX religious exemption.

PRESIDENT DONALD J. TRUMP IS WORKING TO PROTECT STUDENTS FROM SEXUAL MISCONDUCT AND RESTORE FAIRNESS AND DUE PROCESS TO OUR CAMPUSES

"With today's action and every action to come, the Trump administration will fight for America's students." – President Donald J. Trump

TAKING HISTORIC ACTION: President Donald J. Trump is ensuring that all students are safe to learn and achieve without facing sexual harassment and sexual assault in our Nation's schools.

- Today, the Department of Education is issuing a final regulation to strengthen Title IX protections for survivors of sexual misconduct and fight sex misconduct in schools.
- For the first time in history, the new regulation will codify that sexual harassment, including sexual assault, dating violence, domestic violence, and stalking, is prohibited under Title IX.
- This new regulation will hold schools accountable for failures to respond equitably and promptly to incidents of sexual misconduct.
 - The action also empowers survivors to make decisions about how a school responds to incidents of sexual harassment.
- This rulemaking follows years of wide-ranging research, careful deliberation, and careful input from stakeholders – including survivors – and over 124,000 public comments.

ENSURING EVEN-HANDED JUSTICE: The President's new rules will also ensure that schools can no longer inflict longstanding harm against students before providing basic, fair procedures.

- Today's final regulation will also provide due process protections to students facing accusations of sexual misconduct.
 - Bureaucracy created in our Nation's institutions of higher education have often stacked the deck against the accused, failing to offer protections such as a presumption of innocence or adequate ability to rebut allegations.
- The regulation prescribes a transparent grievance process that treats the accused as innocent until proven guilty, requires the school to state a standard of evidence, and requires the school to provide a written decision and rationale.
- Recognizing that colleges often fail to provide due process, Federal courts reviewing campus adjudications have stepped in to issue more than 100 decisions favorable to the accused.
- Today's protections will legitimize the process and support survivors, including by ensuring that final findings of responsibility are credible.

MAKING OUR SCHOOLS SAFER: The Trump Administration is working every day to protect America's students and survivors of sexual misconduct.

- Under the President's leadership, the Department of Education has aggressively worked to hold schools accountable for sexual harassment in their education programs and activities.
 - Already, the Trump Administration has required sweeping reforms at educational institutions, including Michigan State University, Pennsylvania State University, the University of Southern California, and Chicago Public Schools.
- The Department of Education has led implementation of Every Student Succeeds Act rules that prohibit elementary and secondary school district administrators from shifting from one school to another employees who sexually abuse students.
- Over the last three years, the Department of Education's Office for Civil Rights has closed a total of 172 sexual violence cases with change, a 375 percent increase over the prior 8 years.

Summary of Major Provisions of the Department of Education’s Title IX Final Rule

Issue	The Title IX Final Rule: Addressing Sexual Harassment in Schools
<p><i>1. Notice to the School, College, University (“Schools”): Actual Knowledge</i></p>	<p>The Final Rule requires a K-12 school to respond whenever <i>any</i> employee has notice of sexual harassment, including allegations of sexual harassment. Many State laws also require all K-12 employees to be mandatory reporters of child abuse. For postsecondary institutions, the Final Rule allows the institution to choose whether to have mandatory reporting for all employees, or to designate some employees to be confidential resources for college students to discuss sexual harassment without automatically triggering a report to the Title IX office.</p> <p>For all schools, notice to a Title IX Coordinator, or to an official with authority to institute corrective measures on the recipient’s behalf, charges a school with actual knowledge and triggers the school’s response obligations.</p>
<p><i>2. Definition of Sexual Harassment for Title IX Purposes</i></p>	<p>The Final Rule defines sexual harassment broadly to include any of three types of misconduct on the basis of sex, all of which jeopardize the equal access to education that Title IX is designed to protect: Any instance of <i>quid pro quo</i> harassment by a school’s employee; any unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it denies a person equal educational access; any instance of sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA).</p> <ul style="list-style-type: none"> - The Final Rule prohibits sex-based misconduct in a manner consistent with the First Amendment. <i>Quid pro quo</i> harassment and Clery Act/VAWA offenses are <u>not</u> evaluated for severity, pervasiveness, offensiveness, or denial of equal educational access, because such misconduct is sufficiently serious to deprive a person of equal access. - The Final Rule uses the Supreme Court’s <i>Davis</i> definition (<i>severe and pervasive and objectively offensive</i> conduct, effectively denying a person equal educational access) as one of the three categories of sexual harassment, so that where unwelcome sex-based conduct consists of speech or expressive conduct, schools balance Title IX enforcement with respect for free speech and academic freedom. - The Final Rule uses the Supreme Court’s Title IX-specific definition rather than the Supreme Court’s Title VII workplace standard (<i>severe or pervasive</i> conduct creating a hostile work environment). First Amendment concerns differ in educational environments and workplace environments, and the Title IX definition provides First Amendment protections appropriate for educational institutions where students are learning, and employees are teaching. Students, teachers, faculty, and others should enjoy free speech and academic freedom protections, even when speech or expression is offensive.

Summary of Major Provisions of the Department of Education’s Title IX Final Rule

<p><i>3. Sexual Harassment Occurring in a School’s “Education Program or Activity” and “in the United States”</i></p>	<p>The Title IX statute applies to persons in the United States with respect to education programs or activities that receive Federal financial assistance. Under the Final Rule, schools must respond when sexual harassment occurs in the school’s education program or activity, against a person in the United States.</p> <ul style="list-style-type: none"> - The Title IX statute and existing regulations contain broad definitions of a school’s “program or activity” and the Department will continue to look to these definitions for the scope of a school’s education program or activity. Education program or activity includes locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurred, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution (such as a fraternity or sorority house). - Title IX applies to all of a school’s education programs or activities, whether such programs or activities occur on-campus or off-campus. A school may address sexual harassment affecting its students or employees that falls outside Title IX’s jurisdiction in any manner the school chooses, including providing supportive measures or pursuing discipline.
<p><i>4. Accessible Reporting to Title IX Coordinator</i></p>	<p>The Final Rule expands a school’s obligations to ensure its educational community knows how to report to the Title IX Coordinator.</p> <ul style="list-style-type: none"> - The employee designated by a recipient to coordinate its efforts to comply with Title IX responsibilities must be referred to as the “Title IX Coordinator.” - Instead of notifying only students and employees of the Title IX Coordinator’s contact information, the school must also notify applicants for admission and employment, parents or legal guardians of elementary and secondary school students, and all unions, of the name or title, office address, e-mail address, and telephone number of the Title IX Coordinator. - Schools must prominently display on their websites the required contact information for the Title IX Coordinator. - Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by e-mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person’s verbal or written report. - Such a report may be made at any time, including during non-business hours, by using the telephone number or e-mail address, or by mail to the office address, listed for the Title IX Coordinator.
<p><i>5. School’s Mandatory Response Obligations: The Deliberate Indifference Standard</i></p>	<p>Schools must respond promptly to Title IX sexual harassment in a manner that is not deliberately indifferent, which means a response that is not clearly unreasonable in light of the known circumstances. Schools have the following mandatory response obligations:</p> <ul style="list-style-type: none"> - Schools must offer supportive measures to the person alleged to be the victim (referred to as the “complainant”).

Summary of Major Provisions of the Department of Education’s Title IX Final Rule

	<ul style="list-style-type: none"> - The Title IX Coordinator must promptly contact the complainant confidentially to discuss the availability of supportive measures, consider the complainant’s wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. - Schools must follow a grievance process that complies with the Final Rule before the imposition of any disciplinary sanctions or other actions that are not supportive measures, against a respondent. - Schools must not restrict rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment, when complying with Title IX. - The Final Rule requires a school to investigate sexual harassment allegations in any formal complaint, which can be filed by a complainant, or signed by a Title IX Coordinator. - The Final Rule affirms that a complainant’s wishes with respect to whether the school investigates should be respected unless the Title IX Coordinator determines that signing a formal complaint to initiate an investigation over the wishes of the complainant is not clearly unreasonable in light of the known circumstances. - If the allegations in a formal complaint do not meet the definition of sexual harassment in the Final Rule, or did not occur in the school’s education program or activity against a person in the United States, the Final Rule clarifies that the school must dismiss such allegations <i>for purposes of Title IX</i> but may still address the allegations in any manner the school deems appropriate under the school’s own code of conduct.
<p>6. <i>School’s Mandatory Response Obligations:</i> <i>Defining</i> <i>“Complainant,”</i> <i>“Respondent,”</i> <i>“Formal Complaint,”</i> <i>“Supportive Measures”</i></p>	<p>When responding to sexual harassment (e.g., by offering supportive measures to a complainant and refraining from disciplining a respondent without following a Title IX grievance process, which includes investigating formal complaints of sexual harassment), the Final Rule provides clear definitions of complainant, respondent, formal complaint, and supportive measures so that recipients, students, and employees clearly understand how a school must respond to sexual harassment incidents in a way that supports the alleged victim and treats both parties fairly.</p> <p>The Final Rule defines “complainant” as an individual <i>who is alleged to be the victim</i> of conduct that could constitute sexual harassment.</p> <ul style="list-style-type: none"> - This clarifies that any third party as well as the complainant may report sexual harassment. - While parents and guardians do not become complainants (or respondents), the Final Rule expressly recognizes the legal rights of parents and guardians to act on behalf of parties (including by filing formal complaints) in Title IX matters. <p>The Final Rule defines “respondent” as an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.</p>

Summary of Major Provisions of the Department of Education’s Title IX Final Rule

	<p>The Final Rule defines “formal complaint” as a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment and states:</p> <ul style="list-style-type: none"> - At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the school with which the formal complaint is filed. - A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under the Final Rule, and by any additional method designated by the school. - The phrase “document filed by a complainant” means a document or electronic submission (such as by e-mail or through an online portal provided for this purpose by the school) that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint. - Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or a party during a grievance process, and must comply with requirements for Title IX personnel to be free from conflicts and bias. <p>The Final Rule defines “supportive measures” as individualized services reasonably available that are non-punitive, non-disciplinary, and not unreasonably burdensome to the other party while designed to ensure equal educational access, protect safety, or deter sexual harassment.</p> <ul style="list-style-type: none"> - The Final Rule evaluates a school’s selection of supportive measures and remedies based on what is not clearly unreasonable in light of the known circumstances, and does not second guess a school’s disciplinary decisions, but requires the school to offer supportive measures, and provide remedies to a complainant whenever a respondent is found responsible.
<p>7. <i>Grievance Process, General Requirements</i></p>	<p>The Final Rule prescribes a consistent, transparent grievance process for resolving formal complaints of sexual harassment. Aside from hearings (see Issue #9 below), the grievance process prescribed by the Final Rule applies to all schools equally including K-12 schools and postsecondary institutions. The Final Rule states that a school’s grievance process must:</p> <ul style="list-style-type: none"> - Treat complainants equitably by providing remedies any time a respondent is found responsible, and treat respondents equitably by not imposing disciplinary sanctions without following the grievance process prescribed in the Final Rule. - Remedies, which are required to be provided to a complainant when a respondent is found responsible, must be designed to maintain the complainant’s equal access to education and may include the same individualized services described in the Final Rule as supportive measures; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent. - Require objective evaluation of all relevant evidence, inculpatory and exculpatory, and avoid credibility determinations based on a person’s status as a complainant, respondent, or witness.

Summary of Major Provisions of the Department of Education's Title IX Final Rule

- Require Title IX personnel (Title IX Coordinators, investigators, decision-makers, people who facilitate any informal resolution process) to be free from conflicts of interest or bias for or against complainants or respondents.
- Training of Title IX personnel must include training on the definition of sexual harassment in the Final Rule, the scope of the school's education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.
- A school must ensure that decision-makers receive training on any technology to be used at a live hearing.
- A school's decision-makers and investigators must receive training on issues of relevance, including how to apply the rape shield protections provided only for complainants.
- Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.
- Recipients must post materials used to train Title IX personnel on their websites, if any, or make materials available for members of the public to inspect.
- Include reasonably prompt time frames for conclusion of the grievance process, including appeals and informal resolutions, with allowance for short-term, good cause delays or extensions of the time frames.
- Describe the range, or list, the possible remedies a school may provide a complainant and disciplinary sanctions a school might impose on a respondent, following determinations of responsibility.
- State whether the school has chosen to use the preponderance of the evidence standard, or the clear and convincing evidence standard, for all formal complaints of sexual harassment (including where employees and faculty are respondents).
- Describe the school's appeal procedures, and the range of supportive measures available to complainants and respondents.
- A school's grievance process must not use, rely on, or seek disclosure of information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.
- Any provisions, rules, or practices other than those required by the Final Rule that a school adopts as part of its grievance process for handling formal complaints of sexual harassment, must apply equally to both parties.

Summary of Major Provisions of the Department of Education’s Title IX Final Rule

<p><i>8. Investigations</i></p>	<p>The Final Rule states that the school must investigate the allegations in any formal complaint and send written notice to both parties (complainants and respondents) of the allegations upon receipt of a formal complaint. During the grievance process and when investigating:</p> <ul style="list-style-type: none"> - The burden of gathering evidence and burden of proof must remain on schools, not on the parties. - Schools must provide equal opportunity for the parties to present fact and expert witnesses and other inculpatory and exculpatory evidence. - Schools must not restrict the ability of the parties to discuss the allegations or gather evidence (e.g., no “gag orders”). - Parties must have the same opportunity to select an advisor of the party’s choice who may be, but need not be, an attorney. - Schools must send written notice of any investigative interviews, meetings, or hearings. - Schools must send the parties, and their advisors, evidence directly related to the allegations, in electronic format or hard copy, with at least 10 days for the parties to inspect, review, and respond to the evidence. - Schools must send the parties, and their advisors, an investigative report that fairly summarizes relevant evidence, in electronic format or hard copy, with at least 10 days for the parties to respond. - Schools must dismiss allegations of conduct that do not meet the Final Rule’s definition of sexual harassment or did not occur in a school’s education program or activity against a person in the U.S. Such dismissal is only for Title IX purposes and does not preclude the school from addressing the conduct in any manner the school deems appropriate. - Schools may, in their discretion, dismiss a formal complaint or allegations therein if the complainant informs the Title IX Coordinator in writing that the complainant desires to withdraw the formal complaint or allegations therein, if the respondent is no longer enrolled or employed by the school, or if specific circumstances prevent the school from gathering sufficient evidence to reach a determination. - Schools must give the parties written notice of a dismissal (mandatory or discretionary) and the reasons for the dismissal. - Schools may, in their discretion, consolidate formal complaints where the allegations arise out of the same facts. - The Final Rule protects the privacy of a party’s medical, psychological, and similar treatment records by stating that schools cannot access or use such records unless the school obtains the party’s voluntary, written consent to do so.
<p><i>9. Hearings:</i></p>	<p>The Final Rule adds provisions to the “live hearing with cross-examination” requirement for postsecondary institutions and clarifies that hearings are optional for K-12 schools (and any other recipient that is not a postsecondary institution).</p>

Summary of Major Provisions of the Department of Education’s Title IX Final Rule

<p>(a) <i>Live Hearings & Cross-Examination (for Postsecondary Institutions)</i></p>	<p>(a) For postsecondary institutions, the school’s grievance process must provide for a live hearing:</p> <ul style="list-style-type: none"> - At the live hearing, the decision-maker(s) must permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. - Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party’s advisor of choice and never by a party personally. - At the request of either party, the recipient must provide for the entire live hearing (including cross-examination) to occur with the parties located in separate rooms with technology enabling the parties to see and hear each other. - Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker must first determine whether the question is relevant and explain to the party’s advisor asking cross-examination questions any decision to exclude a question as not relevant. - If a party does not have an advisor present at the live hearing, the school must provide, without fee or charge to that party, an advisor of the school’s choice who may be, but is not required to be, an attorney to conduct cross-examination on behalf of that party. - If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions. - Live hearings may be conducted with all parties physically present in the same geographic location or, at the school’s discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually. - Schools must create an audio or audiovisual recording, or transcript, of any live hearing.
<p>(b) <i>Hearings are Optional, Written Questions Required (for K-12 Schools)</i></p>	<p>(b) For recipients that are K-12 schools, and other recipients that are not postsecondary institutions, the recipient’s grievance process may, <i>but need not</i>, provide for a hearing:</p> <ul style="list-style-type: none"> - With or without a hearing, after the school has sent the investigative report to the parties and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions 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.
<p>(c) <i>Rape Shield Protections for Complainants</i></p>	<p>(c) The Final Rule provides rape shield protections for complainants (as to all recipients whether postsecondary institutions, K-12 schools, or others), deeming irrelevant questions and evidence about a complainant’s prior sexual behavior unless offered to prove that someone other than the respondent committed the alleged misconduct or offered to prove consent.</p>

Summary of Major Provisions of the Department of Education’s Title IX Final Rule

<p><i>10. Standard of Evidence & Written Determination</i></p>	<p>The Final Rule requires the school’s grievance process to state whether the standard of evidence to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard. The Final Rule makes each school’s grievance process consistent by requiring each school to apply the same standard of evidence for all formal complaints of sexual harassment whether the respondent is a student or an employee (including faculty member).</p> <ul style="list-style-type: none"> - The decision-maker (who cannot be the same person as the Title IX Coordinator or the investigator) must issue a written determination regarding responsibility with findings of fact, conclusions about whether the alleged conduct occurred, rationale for the result as to each allegation, any disciplinary sanctions imposed on the respondent, and whether remedies will be provided to the complainant. - The written determination must be sent simultaneously to the parties along with information about how to file an appeal.
<p><i>11. Appeals</i></p>	<p>The Final Rule states that a 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: procedural irregularity that affected the outcome of the matter, newly discovered evidence that could affect the outcome of the matter, and/or Title IX personnel had a conflict of interest or bias, that affected the outcome of the matter.</p> <ul style="list-style-type: none"> - A school may offer an appeal equally to both parties on additional bases.
<p><i>12. Informal Resolution</i></p>	<p>The Final Rule allows a school, in its discretion, to choose to offer and facilitate informal resolution options, such as mediation or restorative justice, so long as both parties give voluntary, informed, written consent to attempt informal resolution. Any person who facilitates an informal resolution must be well trained. The Final Rule adds:</p> <ul style="list-style-type: none"> - A school may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to a formal investigation and adjudication of formal complaints of sexual harassment. Similarly, a school may not require the parties to participate in an informal resolution process and may not offer an informal resolution process unless a formal complaint is filed. - At any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint. - Schools must not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

Summary of Major Provisions of the Department of Education's Title IX Final Rule

<p><i>13. Retaliation Prohibited</i></p>	<p>The Final Rule expressly prohibits retaliation.</p> <ul style="list-style-type: none">- Charging an individual with code of conduct violations that do not involve sexual harassment, but arise out of the same facts or circumstances as a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX constitutes retaliation.- The school must keep confidential the identity of complainants, respondents, and witnesses, except as may be permitted by FERPA, as required by law, or as necessary to carry out a Title IX proceeding.- Complaints alleging retaliation may be filed according to a school's prompt and equitable grievance procedures.- 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 in the course of a Title IX grievance proceeding does not constitute retaliation; however, a determination regarding responsibility, alone, is not sufficient to conclude that any party made a bad faith materially false statement.
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Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM

Issue	Provisions in Final Rule (Bold typeface indicates language added in the Final Rule, responsive to public comment)	Provisions in NPRM (Bold typeface indicates language not included in the Final Rule, responsive to public comment)
<p>1. <i>Notice to Schools, Colleges, Universities, and other Recipients of Federal Funds (“Schools”):</i></p> <p>Actual Knowledge</p>	<p>Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a school’s Title IX Coordinator or any official of the school who has authority to institute corrective measures on behalf of the school, or to any employee of an elementary and secondary school.</p> <p>- “Notice” includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator as described in the Final Rule.</p>	<p>Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a school’s Title IX Coordinator or any official of the school who has authority to institute corrective measures on behalf of the school, or to a teacher in the elementary and secondary context with regard to student-on-student harassment.</p>
<p>2. <i>Definition of Sexual Harassment for Title IX Purposes</i></p>	<p>Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:</p> <p>(i) A school employee conditioning education benefits on participation in unwelcome sexual conduct (i.e., <i>quid pro quo</i>); or</p> <p>(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 school’s education program or activity; or</p> <p>(iii) Sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA).</p>	<p>Sexual harassment means:</p> <p>(i) A school employee conditioning education benefits on participation in unwelcome sexual conduct (i.e., <i>quid pro quo</i>); or</p> <p>(ii) Unwelcome conduct on the basis of sex, that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school’s education program or activity; or</p> <p>(iii) Sexual assault (as defined in the Clery Act regulations).</p>

Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM

<p>3. <i>Sexual Harassment Occurring in a School’s “Education Program or Activity” and “in the United States”</i></p>	<p>Schools must respond when sexual harassment occurs in the school’s education program or activity, against a person in the United States. Education program or activity includes locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.</p>	<p>School must respond when sexual harassment occurs in the school’s education program or activity, against a person in the United States.</p>
<p>4. <i>Accessible Reporting to Title IX Coordinator; Adoption & Publication of Title IX Procedures</i></p>	<p>The Final Rule expands a school’s obligations to ensure its educational community knows how to report to the Title IX Coordinator by stating:</p> <ul style="list-style-type: none"> - Each school must designate and authorize at least one employee to coordinate its efforts to comply with its Title IX responsibilities, which employee must be referred to as the “Title IX Coordinator.” - The school must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions, of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator. - Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person’s verbal or written report. 	<p>The NPRM stated:</p> <ul style="list-style-type: none"> - Each school must designate at least one employee to coordinate its efforts to comply with its Title IX responsibilities. - The school must notify all its students and employees of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated pursuant to this paragraph.

Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM

	<ul style="list-style-type: none"> - Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator. - Schools must prominently display on their websites the required contact information for the Title IX Coordinator. 	
<p>5. <i>School’s Mandatory Response Obligations:</i></p> <p>Deliberate Indifference Standard</p>	<p>A school must respond promptly to Title IX sexual harassment in a manner that is not deliberately indifferent, which means in a way that is not clearly unreasonable in light of the known circumstances.</p> <p>A school’s mandatory response must include:</p> <ul style="list-style-type: none"> - Offering supportive measures to the complainant (i.e., the person alleged to be the victim). - The Title IX Coordinator promptly contacting the complainant to discuss the availability of supportive measures, consider the complainant’s wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. - Following a grievance process that complies with the Final Rule before the imposition of any disciplinary sanctions or other actions that are not supportive measures, against a respondent. - Must not restrict rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment, as a way of responding in a non-deliberately indifferent manner. 	<p>A school must respond to Title IX sexual harassment in a manner that is not deliberately indifferent, which means in a way that is not clearly unreasonable in light of the known circumstances.</p> <p>The NPRM offered postsecondary institutions a “safe harbor” against a finding of deliberate indifference where, in the absence of a formal complaint, a postsecondary institution implemented supportive measures for the complainant. This “safe harbor” has been removed in the Final Rule. The Final Rule requires all schools to offer supportive measures to every complainant, eliminating the need to incentivize supportive measures through a safe harbor.</p>

Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM

<p>6. <i>School’s Mandatory Response Obligations:</i></p> <p>Investigating a Formal Complaint</p>	<p>The Final Rule requires schools to investigate formal complaints of sexual harassment and does not offer schools any safe harbors against the Department finding that a school responded deliberately indifferently or otherwise in a manner that constitutes sex discrimination or violates Title IX or Title IX regulations. In response to a formal complaint, a recipient must follow a grievance process that complies with the Final Rule. With or without a formal complaint, a recipient must comply with all the mandatory response obligations described in Issue #5 above.</p>	<p>The NPRM required schools to investigate and adjudicate formal complaints of sexual harassment consistent with the grievance procedures described in § 106.45.</p> <ul style="list-style-type: none"> - The NPRM offered schools a “safe harbor” against a finding of deliberate indifference (or other finding that the school committed sex discrimination) if schools followed procedures consistent with § 106.45 in response to a formal complaint. This “safe harbor” has been removed in the Final Rule. - The NPRM required a school’s Title IX Coordinator to file a formal complaint any time the school had notice of multiple reports of sexual harassment against a particular respondent (and then offered a “safe harbor” for following procedures consistent with § 106.45). This mandate for the Title IX Coordinator to file a formal complaint, and corresponding “safe harbor,” have been removed in the Final Rule.
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Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM

<p>7. <i>School’s Mandatory Response Obligations:</i></p> <p>Defining “Complainant,” “Respondent,” “Formal Complaint” and “Supportive Measures”</p> <p>“Complainant”</p> <p>“Respondent”</p> <p>“Formal Complaint”</p>	<p>When responding to sexual harassment (e.g., by offering supportive measures to a complainant, refraining from disciplining a respondent without following a Title IX grievance process, or investigating formal complaints of sexual harassment), the Final Rule clarifies the definitions of complainant, respondent, and formal complaint so that schools, students, and employees clearly understand how a school must respond to sexual harassment incidents in a way that supports the alleged victim and treats both parties fairly.</p> <p>The Final Rule defines “complainant” as an individual who is alleged to be the victim of conduct that could constitute sexual harassment. - The Final Rule expressly recognizes the legal rights of parents and guardians to act on behalf of parties (including by filing formal complaints) in Title IX matters.</p> <p>The Final Rule defines “respondent” as an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.</p> <p>The Final Rule defines “formal complaint” as a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment. - At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the school with which the formal complaint is filed.</p>	<p>The NPRM defined complainant, respondent, formal complaint, and supportive measures as follows:</p> <p>The NPRM defined “complainant” as an individual who has reported being the victim of conduct that could constitute sexual harassment, or on whose behalf the Title IX Coordinator has filed a formal complaint. For purposes of this definition, the person to whom the individual has reported must be the Title IX Coordinator or another person to whom notice of sexual harassment results in the school’s actual knowledge.</p> <p>The NPRM defined “respondent” as an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.</p> <p>The NPRM defined “formal complaint” as a document signed by a complainant or by the Title IX Coordinator alleging sexual harassment against a respondent about conduct within its education program or activity and requesting initiation of the school’s grievance procedures consistent with § 106.45.</p> <p>The Final Rule expands the definition of the kind of document that may constitute a formal complaint, and expands the ways in which a formal complaint may be</p>
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Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM

<p>“Supportive Measures”</p>	<ul style="list-style-type: none"> - A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under the Final Rule, and by any additional method the school designates. - The phrase “document filed by a complainant” means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the school) that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint. - Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party during a grievance process, and must comply with requirements for all Title IX personnel to be free from conflicts and bias. <p>The Final Rule retains the NPRM’s definition of “supportive measures” but clarifies that the purpose of supportive measures is equal access to education.</p> <ul style="list-style-type: none"> - The Final Rule clarifies that a school must treat a person as a complainant any time the school has notice that the person is alleged to be the victim of conduct that could constitute sexual harassment (regardless of whether the person themselves reported, or a third party reported the sexual harassment), and irrespective of whether the complainant ever chooses to file a formal complaint. - There is no time limit or statute of limitations on a complainant’s decision to file a formal complaint. - When a Title IX Coordinator signs a formal complaint, such action is not taken on behalf of a complainant, and the Title IX Coordinator does not become a party. 	<p>filed, so that the school and complainant clearly understand when a complainant desires the school to investigate sexual harassment allegations, and complainants (including parents and guardians, as applicable) have accessible options for filing a formal complaint.</p> <p>The NPRM defined “supportive measures” to mean:</p> <ul style="list-style-type: none"> - Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, 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. - Such measures are designed to restore or preserve access to the recipient’s education program or activity, without unreasonably burdening the other party; protect the safety of all parties and the recipient’s educational environment; and deter sexual harassment. - Supportive measures may include counseling, course-related adjustments, modifications of work or class schedules, campus escort services, increased security and monitoring of certain areas of campus, and mutual restrictions on contact between the parties.
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Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM

<p>8. <i>Investigations</i></p>	<p>Similarly to the NPRM, the Final Rule states that the school must investigate the allegations in any formal complaint, send written notice to both parties of the allegations upon receipt of a formal complaint.</p> <p>The Final Rule adds the following privacy protection for parties during a Title IX sexual harassment investigation: - The Final Rule states that the school cannot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the school obtains that party’s voluntary, written consent to do so.</p>	<p>The NPRM required school to investigate the allegations in a formal complaint, send written notice of the allegations to both parties upon receipt of a formal complaint, and investigate under specified procedures. The Final Rule retains those required procedures and adds protection against using a party’s treatment records during a grievance process.</p>
<p>9. <i>Hearings:</i></p> <p>(a) Live Hearings & Cross-Examination (for Postsecondary recipients)</p>	<p>The Final Rule adds provisions to the “live hearing with cross-examination” requirement for postsecondary institutions, and clarifies that hearings are optional for K-12 schools (and any other recipient that is not a postsecondary institution).</p> <p>(a) For postsecondary institution recipients, the school’s grievance process must provide for a live hearing: - At the live hearing, the decision-maker(s) must permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. - Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the</p>	<p>Under the NPRM, adjudication of formal complaints differed for postsecondary institution recipients, and K-12 schools. The Final Rule retains this approach with clarifications.</p> <p>(a) For institutions of higher education the school’s grievance procedure must provide for a live hearing: - At the hearing the decision-maker must permit each party to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. - Such cross-examination must be conducted by the party’s advisor of choice; if a party does not have an advisor present at the hearing, the school must provide that party</p>

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	<p>party’s advisor of choice and never by a party personally.</p> <ul style="list-style-type: none"> - At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party answering questions. - Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker must first determine whether the question is relevant and explain any decision to exclude a question as not relevant. - If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the school’s choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party. - If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions. - Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the school’s discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with 	<p>an advisor aligned with that party to conduct cross-examination.</p> <ul style="list-style-type: none"> - At the request of either party the recipient must provide for cross-examination to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party answering questions. <p>The Final Rule removes the “aligned with that party” language. If a school must provide a party with an advisor, such a provided advisor need not be an attorney providing legal representation to the party. No training or qualification is necessary for a person to serve as a provided advisor. Parties retain the opportunity to select their own advisor of choice. If a party does not exercise that opportunity then the school must provide an advisor of the school’s own choosing, to that party, merely for the purpose of relaying the party’s cross-examination questions to the other party and witnesses so that a party never personally conducts cross-examination.</p> <ul style="list-style-type: none"> - If a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility.
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Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM

<p>(b) Hearings are Optional, Written Questions Required (for K-12 schools)</p>	<p>technology enabling participants simultaneously to see and hear each other.</p> <p>- Schools must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.</p> <p>(b) For recipients that are elementary and secondary schools, and other recipients that are not postsecondary institutions, the school’s grievance process may, but need not, provide for a hearing:</p> <p>- With or without a hearing, after the school has sent the investigative report to the parties and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions 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.</p> <p>- The decision-maker(s) must explain to the party proposing the questions any decision to exclude questions as not relevant.</p>	<p>(b) For recipients that are elementary and secondary schools the school’s grievance procedure may require a live hearing:</p> <p>- With or without a hearing, the decision-maker must, after the school has incorporated the parties’ responses to the investigative report, ask each party and any witnesses any relevant questions and follow-up questions, including those challenging credibility, that a party wants asked of any party or witness. If no hearing is held, the decision-maker must afford each party the opportunity to submit written questions, provide each party with the answers, and allow for additional, limited follow-up questions.</p> <p>- The decision-maker must explain to the party proposing the questions any decision to exclude questions as not relevant.</p>
<p>(c) Rape Shield Protections for Complainants</p>	<p>(c) The Final Rule keeps the rape shield protections for complainants (as to all recipients whether postsecondary, K-12 or others), clarified to state: Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the</p>	<p>(c) The NPRM provided rape shield protections for complainants in postsecondary institutions and K-12:</p> <p>All questioning must exclude evidence of the complainant’s sexual behavior or predisposition, unless such evidence about the complainant’s sexual behavior is offered to prove someone other than the respondent committed the conduct alleged by the complainant, or if the evidence concerns specific incidents of the complainant’s</p>

Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM

	complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.	sexual behavior with respect to the respondent and is offered to prove consent.
<i>10. Standard of Evidence</i>	<p>The Final Rule requires the school’s grievance process to state whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty.</p> <p>- The Final Rule removes the NPRM’s restriction on use of the preponderance of the evidence standard.</p>	<p>The NPRM proposed that to reach the determination regarding responsibility, the decision-maker must apply either the preponderance of the evidence standard or the clear and convincing evidence standard, although the recipient may employ the preponderance of the evidence standard only if the school uses that standard for conduct of code violations that do not involve sexual harassment but carry the same maximum sanction.</p>
<i>11. Appeals</i>	<p>The Final Rule states that a 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: procedural irregularity that affected the outcome of the matter; new evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and/or the Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias that affected the outcome of the matter.</p> <p>- A school may offer an appeal equally to both parties on additional bases.</p>	<p>The NPRM provided that a school may choose to offer an appeal:</p> <p>- If a school offers an appeal, it must allow both parties to appeal.</p> <p>- Although a complainant may appeal on the ground that the remedies are not designed to restore or preserve the complainant’s access to the school’s education program or activity, a complainant is not entitled to a particular sanction against the respondent.</p> <p>- The Final Rule removes the NPRM’s restriction on complainants appealing the severity of sanctions.</p>
<i>12. Informal Resolution</i>	<p>The Final Rule retains a school’s discretion to choose to offer informal resolution options, if both parties give voluntary, informed, written consent. The Final Rule adds:</p> <p>- A school may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints.</p>	<p>The NPRM allowed schools to choose to offer informal resolution options, only with the voluntary, informed, written consent of all parties.</p>

Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM

	<ul style="list-style-type: none"> - A school may not require the parties to participate in informal resolution and may not offer informal resolution unless a formal complaint is filed. - At any time prior to agreeing to a resolution, any party has the right to withdraw from informal resolution and resume the grievance process with respect to the formal complaint. - Schools must not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student. 	
<p><i>13. Retaliation Prohibited</i></p>	<p>The Final Rule expressly prohibits retaliation against any individual for exercising Title IX rights:</p> <ul style="list-style-type: none"> - No school or 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 a Title IX investigation, proceeding, or hearing. - 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 a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX, constitutes retaliation. - The school must keep confidential the identity of complainants, respondents, and witnesses, except as may be permitted by FERPA, or as required by law, or as necessary to carry out a Title IX proceeding. - Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination that schools must adopt and publish. 	

**Summary of Major Provisions of the Department of Education's Title IX Final Rule
and Comparison to the NPRM**

	<ul style="list-style-type: none">- 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 in the course of a grievance proceeding under this part does not constitute retaliation; provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a bad faith materially false statement.	
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UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION IV

61 FORSYTH ST., SOUTHWEST, SUITE 19T10
ATLANTA, GA 30303-8927

REGION IV
ALABAMA
FLORIDA
GEORGIA
TENNESSEE

August 31, 2020

By U.S. Mail & E-mail

[REDACTED]

Re: OCR Complaint No. 04-20-1409
Letter of Notification

Dear [REDACTED]:

On June 11, 2020, the U.S. Department of Education (Department), Office for Civil Rights (OCR), received your complaint against Shelby County Schools (District). You (Complainant) allege that the District discriminated against your [REDACTED] (the Student), a rising [REDACTED] School (School), on the basis of her sex. Specifically, you allege that the School denied the Student the [REDACTED] for the 2020-2021 school year due to “homophobic bigot[ry]” and because the Student “didn’t date guys” and “likes girls.” You also allege that the head coach of the [REDACTED] discriminated against the Student by selecting someone else [REDACTED] “that isn’t gay.”

OCR enforces Title IX of the Education Amendments of 1972 (Title IX), as amended, 20 U.S.C. §§ 1681 *et seq.*, and its implementing regulation at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex in any education program or activity receiving Federal financial assistance from the Department. Because the District receives Federal financial assistance from the Department, OCR has jurisdiction over it pursuant to Title IX.

Title IX does not mention discrimination on the basis of a student’s sexual orientation. However, the U.S. Supreme Court recently held that discrimination on the basis of an individual’s status as homosexual constitutes sex discrimination within the meaning of Title VII of the Civil Rights Act of 1964. *See Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1741 (2020) (“[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”).

The Department does not enforce Title VII. Indeed, Congress specifically designed Title VII to apply only to workplaces. *Bostock*, 140 S. Ct. at 1737 (“[I]n Title VII, Congress outlawed discrimination in the workplace.”). By contrast, in cases addressing educational environments

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by fostering educational excellence and ensuring equal access.*

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[OCR-000119]

under Title IX, the U.S. Supreme Court has recognized the significant differences between workplaces and schools. It has held that courts “must bear in mind that schools are unlike the adult workplace.” *Davis v. Monroe*, 526 U.S. 629, 651 (1999). In *Bostock* itself, the Court firmly rejected the idea that its holding would sweep across all statutory or regulatory provisions that prohibit sex discrimination. *Bostock*, 140 S. Ct. at 1753 (“[N]one of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today.”). Thus, *Bostock* does not control the Department’s interpretation of Title IX.

However, with respect to complaints that a school’s action or policy excludes a person from participation in, denies a person the benefits of, or subjects a person to discrimination under an education program or activity, on the basis of sex, the *Bostock* opinion guides OCR’s understanding that discriminating against a person based on their homosexuality or identification as transgender generally involves discrimination on the basis of their biological sex.¹

The Department has determined that it possesses jurisdiction over your complaint that the Student was discriminated against on the basis of her biological sex, by reason of her sexual orientation.² Because OCR has determined that it has jurisdiction and that the complaint was timely filed, OCR is opening the complaint for investigation of the issue set forth below. Please note that opening the complaint for investigation in no way implies that OCR has made a determination on the merits of the complaint. During the investigation, OCR is a neutral fact-finder, collecting and analyzing relevant evidence from you, the District, and other sources, as appropriate. OCR will ensure that its investigation is legally sufficient and fully responds to the allegations in accordance with the provisions of the *Case Processing Manual*, available at <http://www.ed.gov/ocr/docs/ocrcpm.html>.

Accordingly, OCR will investigate whether the District discriminated against the Student on the basis of sex in violation of Title IX and its implementing regulation at 34 C.F.R. Part 106.

Please be advised that the District must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a retaliation complaint with OCR.

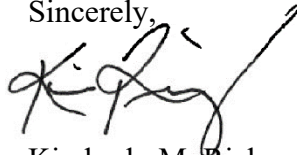
Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, we will seek to protect personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released, to the extent provided by law.

¹ By contrast, *Bostock* does not impact OCR’s regulations or enforcement of Title IX regarding schools that separate students by biological sex in the context of intimate facilities—such as locker rooms and bathrooms—or sports teams, athletic opportunities, or other substantive areas for which Title IX includes specific statutory and regulatory exemptions outlining when consideration of biological sex is permitted. Additionally, educational institutions controlled by a religious organization are exempt from Title IX to the extent that the organization’s religious tenets conflict with applications of Title IX. Of course, recipients need not locate a specific exception in Title IX or its implementing regulations in order to establish that their conduct which considers sex does not constitute discrimination under Title IX.

² We note that *Bostock* is based on the express assumption that sex is defined by reference to biological sex. See *Bostock*, 141 S. Ct. at 1739.

If you have any questions, please contact the assigned investigator, [REDACTED], at [REDACTED], or [REDACTED], or me at [REDACTED].

Sincerely,

A handwritten signature in black ink, appearing to read "Kimberly M. Richey". The signature is fluid and cursive, with a long, sweeping flourish extending upwards and to the right.

Kimberly M. Richey
Acting Assistant Secretary for Civil Rights



September 4, 2020

Questions and Answers Regarding the Department's Final Title IX Rule

The Department of Education's Office for Civil Rights, through its new Outreach, Prevention, Education and Non-discrimination (OPEN) Center, issues the following technical assistance document to support institutions with meeting their obligations under the Title IX Rule, which was announced on May 6, 2020, and which became effective on August 14, 2020. Many of the questions were derived from questions posed to the OPEN center through e-mail.

OCR may periodically release additional Question and Answer documents addressing the Title IX Rule.

All references and citations are to the unofficial version of the Title IX Rule, which is available [here](#). A link to the official version of the Rule published in the Federal Register is [here](#).

Disclaimer: Other than statutory and regulatory requirements included in the document, the contents of this guidance do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

Effective Date of the Final Rule

Question 1: Can you please clarify whether the new Title IX rules that went into effect on August 14, 2020, will be applied retroactively?

Answer 1: The Title IX Rule will not be enforced retroactively. In the Preamble to the Rule at page 127, the Department states unambiguously that the Department will not enforce these final regulations retroactively. The Department also notes, in footnote 290 of the Rule, the general principle that:

Federal agencies authorized by statute to promulgate rules may only create rules with retroactive effect where the authorizing statute has expressly granted such authority. *See* 5 U.S.C. 551 (referring to a "rule" as agency action with "future effects" in the Administrative Procedure Act); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.").

Consistent with the Department’s statements in the preamble to the Title IX Rule regarding non-retroactivity, the Rule does not apply to schools’ responses to sexual harassment that allegedly occurred prior to August 14, 2020. The Department will only enforce the Rule as to sexual harassment that allegedly occurred on or after August 14, 2020. With respect to sexual harassment that allegedly occurred prior to August 14, 2020, OCR will judge the school’s Title IX compliance against the Title IX statute and the Title IX regulations in place at the time that the alleged sexual harassment occurred. In other words, the Rule governs how schools must respond to sexual harassment that allegedly occurs on or after August 14, 2020.

Title IX Coordinator and Other Personnel Issues

Question 2: Does the Title IX Rule specify whether each recipient must have a Title IX Coordinator, or is each school required to have a separate Title IX Coordinator, or both?

Answer 2: The Title IX Rule states in § 106.8(a): “Each *recipient* must designate and authorize *at least one employee* to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the “Title IX Coordinator.” (emphasis added).

Question 3: The Title IX Rule allows schools to continue to address misconduct that does not meet the definition of sexual harassment. Can Title IX personnel still review these complaints, and follow procedures similar to those allegations that do meet the definition of sexual harassment?

Answer 3: Yes. The Title IX Rule does not preclude a recipient from using the same Title IX personnel (including the Title IX Coordinator, who must be an employee of the recipient, and Title IX investigators and decision-makers, who may be a recipient’s employees or the employees of a third-party, such as a consortium of schools) to review and investigate allegations of misconduct that fall outside the scope of Title IX. Similarly, the Rule does not preclude a recipient from using a grievance process that complies with § 106.45 with respect to allegations that fall outside the scope of Title IX. In the Preamble to the Rule at pages 481-82, for example, the Department states:

In response to commenters’ concerns, the final regulations revise § 106.45(b)(3)(i) to clearly state that dismissal for Title IX purposes does not preclude action under another provision of the recipient’s code of conduct. Thus, if a recipient is required under State law or the recipient’s own policies to investigate sexual or other misconduct that does not meet the § 106.30 definition, the final regulations clarify that a recipient may do so. Similarly, if a recipient wishes to use a grievance process that complies with § 106.45 to resolve allegations of misconduct that do not constitute sexual harassment under § 106.30, nothing in the final regulations precludes a recipient from doing so. Alternatively, a recipient may respond to non-Title IX misconduct under disciplinary procedures that do not comply with § 106.45. The final regulations leave recipients flexibility in this regard, and prescribe a particular grievance process only where allegations concern sexual harassment covered by Title IX.

The Definition of Sexual Harassment

Question 4: One form of sexual harassment is conduct on the basis of sex that constitutes “[u]nwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity.” In this sentence, does “reasonable person” modify only “severe, pervasive, and objectively offensive” only, or the effective denial clause as well? To clarify, can an “effective denial” be something that a reasonable person would experience, even if there is not evidence to show that the Complainant was in fact effectively denied?

Answer 4: The “reasonable person” standard in the second prong of the definition of sexual harassment under § 106.30(a) applies to each of the elements drawn from the U.S. Supreme Court’s decision in *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629 (1999). These elements include: severity, pervasiveness, objective offensiveness, and the effective denial of equal educational access. In the Preamble to the Rule, at page 515, the Department states: “The *Davis* standard ensures that all students, employees, and recipients understand that unwelcome conduct on the basis of sex is actionable under Title IX when a reasonable person in the complainant’s position would find the conduct severe, pervasive, and objectively offensive such that it effectively denies equal access to the recipient’s education program or activity.”

With respect to the denial of the equal access element in particular, in the Preamble to the Title IX Rule, at page 525, states:

Neither the Supreme Court, nor the final regulations in § 106.30, requires showing that a complainant dropped out of school, failed a class, had a panic attack, or otherwise reached a “breaking point” in order to report and receive a recipient’s supportive response to sexual harassment. The Department acknowledges that individuals react to sexual harassment in a wide variety of ways, and does not interpret the *Davis* standard to require certain manifestations of trauma or a “constructive expulsion.” Evaluating whether a reasonable person in the complainant’s position would deem the alleged harassment to deny a person “equal access” to education protects complainants against school officials inappropriately judging how a complainant has reacted to the sexual harassment. The § 106.30 definition neither requires nor permits school officials to impose notions of what a “perfect victim” does or says, nor may a recipient refuse to respond to sexual harassment because a complainant is “high-functioning” or not showing particular symptoms following a sexual harassment incident.

Similarly, the Preamble to the Title IX Rule, at pages 526-27, states:

With respect to the denial of equal access element, neither the *Davis* Court nor the Department’s final regulations require complete exclusion from an education, but rather denial of “equal” access. Signs of enduring *unequal* educational access due to severe, pervasive, and objectively offensive sexual harassment may include, as commenters suggest, skipping class to avoid a harasser, a decline in a student’s

grade point average, or having difficulty concentrating in class; however, *no concrete injury is required to conclude that serious harassment would deprive a reasonable person* in the complainant's position of the ability to access the recipient's education program or activity on an equal basis with persons who are not suffering such harassment.

(emphasis added).

Filing of a Formal Complaint

Question 5: The Title IX Rule states: "At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the school with which the formal complaint is filed." If a complainant either withdraws from school because of sexual harassment and then files a complaint, or files a complaint but then withdraws as a result of the sexual harassment or stress of the grievance process, how would the regulations affect the complainant's ability to pursue a formal complaint?

Answer 5: Under the Title IX Rule, recipients must promptly respond to a report that an individual has been allegedly victimized by sexual harassment, whether the alleged victim is presently a student or not, in a manner that is not "deliberately indifferent," or clearly unreasonable in light of known circumstances. Students and others who are participating or attempting to participate in the school's program or activity also have the right to file a formal complaint.

In the Preamble to the Title IX Rule, at pages 411-12, the Department further explains:

A complainant who has graduated may still be 'attempting to participate' in the recipient's education program or activity; for example, where the complainant has graduated from one program but intends to apply to a different program, or where the graduated complainant intends to remain involved with a recipient's alumni programs and activities. Similarly, a complainant who is on a leave of absence may be 'participating or attempting to participate' in the recipient's education program or activity; for example, such a complainant may still be enrolled as a student even while on leave of absence, or may intend to re-apply after a leave of absence and thus is still 'attempting to participate' even while on a leave of absence. *By way of further example, a complainant who has left school because of sexual harassment, but expresses a desire to re-enroll if the recipient appropriately responds to the sexual harassment, is 'attempting to participate' in the recipient's education program or activity.*

(emphasis added). Additionally, the Rule permits Title IX Coordinators to sign a formal complaint, regardless of whether a complainant is "participating or attempting to participate" in the school's education program or activity. A Title IX Coordinator's decision to sign a formal complaint (or not) is evaluated under the deliberate indifference standard: whether the decision was clearly unreasonable in light of the known circumstances.

Conducting an Investigation Hearing

Question 6: May a recipient delegate many of the functions required by the Title IX Rule to an outside entity, such as a Regional Center or consortium of schools?

Answer 6: Yes. In particular, many of the elements of the investigation and hearing processes lend themselves to delegation. The recipient itself remains ultimately responsible for ensuring compliance with the legal obligations under the Title IX Rule.

At page 273 of the Preamble to the Title IX Rule, the Department expressly contemplates and encourages recipients to consider innovative approaches such as consortiums and regional centers:

The Department appreciates commenters' recommendations for using regional center models and similar models involving voluntary, cooperative efforts among recipients to outsource the investigation and adjudication functions required under the final regulations. The Department believes these models represent the potential for innovation with respect to how recipients might best fulfill the obligation to impartially reach accurate factual determinations while treating both parties fairly. The Department encourages recipients to consider innovative solutions to the challenges presented by the legal obligation for recipients to fairly and impartially investigate and adjudicate these difficult cases, and the Department will provide technical assistance for recipients with questions about pursuing regional center models.

To be sure, there are limitations on the extent to which a recipient may delegate certain responsibilities to other entities. For instance, each recipient must itself employ a Title IX Coordinator. *See* § 106.8 (“Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the “Title IX Coordinator.”). Similarly, each recipient is responsible for ensuring that its grievance procedures satisfy the Title IX Rule. *See* § 106.8(c) (“A recipient must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part and a grievance process that complies with § 106.45 for formal complaints as defined in § 106.30”). Still, despite these limitations, the Title IX Rule offers ample opportunity for recipients to find efficiencies in cooperation with other recipients, particularly with respect to investigation and adjudication.

Question 7: What are the rules of evidence at a hearing? Do courtroom rules like the Federal Rules of Evidence apply to a hearing under Title IX?

Answer 7: The Title IX Rule does not adopt the Federal Rules of Evidence for hearings conducted under Title IX. For instance, with respect to which evidence may be introduced, the Rule uses “relevance” as the sole admissibility criterion. *See* § 106.45(b)(1)(ii) (the recipient’s grievance process must provide for objective evaluation of all relevant evidence, including evidence that is inculpatory and exculpatory).

The Title IX Rule also deems certain evidence and information to be not relevant or otherwise precludes the recipient from using it: (i) a party’s treatment records, without the party’s prior

written consent [§ 106.45(b)(5)(i)]; (ii) information protected by a legally recognized privilege [§ 106.45(b)(1)(x)]; (iii) questions or evidence about a complainant’s sexual predisposition, and questions or evidence about a complainant’s prior sexual behavior unless it meets one of two limited exceptions [§ 106.45(b)(6)(i)-(ii)]; and, for postsecondary institutions, the decision-maker cannot rely on the statements of a party or witness who does not submit to cross-examination [§ 106.45(b)(6)(i)].

In the Preamble to the Title IX Rule, at pages 980-82, the Department explains:

These final regulations require objective evaluation of relevant evidence, and contain several provisions specifying types of evidence deemed irrelevant or excluded from consideration in a grievance process; a recipient may not adopt evidentiary rules of admissibility that contravene those evidentiary requirements prescribed under § 106.45. For example, a recipient may not adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice; although such a rule is part of the Federal Rules of Evidence, the Federal Rules of Evidence constitute a complex, comprehensive set of evidentiary rules and exceptions designed to be applied by judges and lawyers, while *Title IX grievance processes are not court trials and are expected to be overseen by layperson officials of a school, college, or university rather than by a judge or lawyer*. Similarly, a recipient may not adopt rules excluding certain types of relevant evidence (e.g., lie detector test results, or rape kits) where the type of evidence is not either deemed “not relevant” (as is, for instance, evidence concerning a complainant’s prior sexual history) or otherwise barred from use under § 106.45 (as is, for instance, information protected by a legally recognized privilege). However, the § 106.45 grievance process does not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by a recipient’s decision-maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with § 106.45 and apply equally to both parties.

Question 8: Do recipients have latitude to define relevance on their own?

Answer 8: In the Preamble to the Title IX Rule, at page 811, footnote 1018, the Department states: “The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied.” At page 812 of the Preamble, the Department states:

Relevance is the standard that these final regulations require, and any evidentiary rules that a recipient chooses must respect this standard of relevance. For example, a recipient may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence. A recipient may adopt rules of order or decorum to forbid badgering a witness, and may fairly deem repetition of the same question to be irrelevant.

However, there is a difference between the admission of relevant evidence, and the weight, credibility, or persuasiveness of particular evidence. At pages 981-82 of the Preamble, the Department further explains:

However, the § 106.45 grievance process does not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by a recipient's decision-maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with § 106.45 and apply equally to both parties. In response to commenters' concerns that the final regulations do not specify rules about evaluation of evidence, and recognizing that recipients therefore have discretion to adopt rules not otherwise prohibited under § 106.45, the final regulations acknowledge this reality by adding language to the introductory sentence of § 106.45(b): "Any provisions, rules, or practices other than those required by § 106.45 that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment, as defined in § 106.30, must apply equally to both parties." A recipient may, for example, adopt a rule regarding the weight or credibility (but not the admissibility) that a decision-maker should assign to evidence of a party's prior bad acts, so long as such a rule applied equally to the prior bad acts of complainants and the prior bad acts of respondents. Because a recipient's investigators and decision-makers must be trained specifically with respect to "issues of relevance," any rules adopted by a recipient in this regard should be reflected in the recipient's training materials, which must be publicly available.

(emphasis added) (internal footnotes omitted).

Question 9: The Title IX Rule states that at the postsecondary level, if a party does not appear at a live hearing, or chooses to not answer cross examination questions, that party's statement must not be relied upon "in reaching a determination regarding responsibility." If a complainant opts not to answer cross-examination questions, how does that impact that complainant's statements in an investigative report? Does it mean all statements provided by that party before the hearing—including statements made to an investigator and summarized in the investigation report—are excluded?

Answer 9: The Title IX Rule, at § 106.45(b)(6)(i), requires postsecondary institutions to hold a live hearing with the opportunity for each party's advisor to conduct cross-examination of parties and witnesses.

At page 1179 of the Preamble to the Rule, the Department explains:

Because party and witness statements so often raise credibility questions in the context of sexual harassment allegations, *the decision-maker must consider only those statements that have benefited from the truth-seeking function of cross-examination.* The recipient, and the parties, have equal opportunity (and, for the recipient, the obligation) to gather and present relevant evidence including fact and expert witnesses, and face the same limitations inherent in a lack of subpoena power

to compel witness testimony. The Department believes that the final regulations, including § 106.45(b)(6)(i), strike the appropriate balance for a postsecondary institution context between ensuring that only relevant and reliable evidence is considered while not over-legalizing the grievance process.

(emphasis added). And at page 1181 of the Preamble to the Title IX Rule, the Department states:

The prohibition on reliance on “statements” applies not only to statements made during the hearing, *but also to any statement of the party or witness who does not submit to cross-examination.* “Statements” has its ordinary meaning, but would not include evidence (such as videos) that do not constitute a person’s intent to make factual assertions, or to the extent that such evidence does not contain a person’s statements. Thus, *police reports, SANE reports, medical reports, and other documents and records may not be relied on to the extent that they contain the statements of a party or witness who has not submitted to cross-examination.* While documentary evidence such as police reports or hospital records may have been gathered during investigation and, if directly related to the allegations inspected and reviewed by the parties, and to the extent they are relevant, summarized in the investigative report, the hearing is the parties’ first opportunity to argue to the decision-maker about the credibility and implications of such evidence. Probing the credibility and reliability of *statements* asserted by witnesses contained in such evidence requires the parties to have the opportunity to cross-examine the witnesses making the statements.

(emphasis added) (footnotes omitted). For a further discussion of this topic and how it relates to unprotected speech that itself constitutes sexual harassment under the Title IX Rule, readers are invited to review OCR’s blog post on this topic [here](#).

Question 10: When a post-secondary institution holds a live hearing, is the questioning limited to certain subjects?

Answer 10: The Rule requires that schools provide the opportunity for cross-examination, and that party advisors must be permitted to ask *all* relevant questions (including follow-up questions), and *only* relevant questions.

Question 11: At the postsecondary level, are party advisors expected to cross-examine witnesses?

Answer 11: The Title IX Rule, at § 106.45(b)(6)(i), states that a postsecondary institution must hold a live hearing. At the hearing, each party’s advisor of choice must be “permitted” to cross-examine witnesses. (Note that the same provision requires the recipient to provide a party with an advisor of the recipient’s choice, if the party appears at the hearing without an advisor of the party’s choice.)

Question 12: If a party’s advisor fails to cross-examine another party on a key statement related to credibility, what is the effect of this on the statement made by the complainant? May the decision-maker consider the key statement?

Answer 12: The Title IX Rule, in § 106.45(b)(6)(i), states: “At the live hearing, the decision-maker(s) must permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.”

In the Preamble to the Rule at page 1181, the Department states (emphasis added):

Probing the credibility and reliability of statements asserted by witnesses contained in such evidence requires the parties to have *the opportunity* to cross-examine the witnesses making the statements.

The Department appreciates the opportunity to clarify here that to “submit to cross-examination” means answering those cross-examination questions that are relevant; the decision-maker is required to make relevance determinations regarding cross-examination in real time during the hearing in part to ensure that parties and witnesses do not feel compelled to answer irrelevant questions for fear of their statements being excluded.

(emphasis added).

Thus, the decision-maker is obligated to “permit” each party’s advisor to ask all relevant questions. However, this provision provides only an “opportunity” for each party (through an advisor) to conduct cross-examination; this provision does not purport to require that each party conduct cross-examination or will conduct cross-examination to the fullest extent possible. If a party chooses not to conduct cross-examination of another party or witness, that other party or witness cannot “submit” or “not submit” to cross-examination. Accordingly, the decision-maker is not precluded from relying on any statement of the party or witness who was not given the opportunity to submit to cross-examination. The same is true if a party’s advisor asks some cross-examination questions but not every possible cross-examination question; as to cross-examination questions *not asked* of a party or witness, that party or witness cannot be said to have submitted or not submitted to cross-examination, so the decision-maker is not precluded from relying on that party’s or witness’s statements.

Conversely, if a party or witness answers one, or some, but not all, relevant cross-examination questions asked by a party’s advisor at the live hearing, then that party or witness has not submitted to cross-examination and that party’s or witness’s statements cannot be relied on by the decision-maker. *See* Preamble at page 1183 (“the Department declines to allow a party or witness to “waive” a question because such a rule would circumvent the benefits and purposes of cross-examination as a truth-seeking tool for postsecondary institutions’ Title IX adjudications”).

Question 13: Does an advisor or party have an opportunity to provide input about how evidence should be weighted by the decision-maker?

Answer 13: Yes. The parties must have an equal opportunity to inspect, review, and respond to evidence directly related to the allegations (see § 106.45(b)(5)(vi)), and an equal opportunity to review and respond to the recipient’s investigative report (see § 106.45(b)(5)(vii)), allows each party the opportunity to provide input and make arguments about the relevance of evidence and

how a decision-maker should weigh the evidence. In the Preamble to the Rule at p. 1015, the Department states that the Rule:

... balances the recipient's obligation to impartially gather and objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence, with the parties' equal right to participate in furthering each party's own interests by identifying evidence overlooked by the investigator and evidence the investigator erroneously deemed relevant or irrelevant and making arguments to the decision-maker regarding the relevance of evidence and the weight or credibility of relevant evidence.

Note that Sections 106.45(b)(5)(vi) and (vii) require the recipient to "send to each party and the party's advisor, if any" the evidence and the investigative report, so that a party's advisor can advise the party in exercising the party's right to review and respond to the evidence and to the investigative report.

Question 14: Are all witnesses expected to appear at a hearing, or do decision-makers have the flexibility to request witnesses as they deem necessary?

Answer 14: The Title IX Rule does not require that all witnesses appear at a hearing, although it does provide the parties an equal right to present witnesses. At page 1176 of the Preamble of the Title IX Rule, the Department acknowledges that recipients do not have subpoena powers to compel attendance of parties or witnesses at a hearing:

The Department understands that complainants (and respondents) often will not have control over whether witnesses appear and are cross-examined, because neither the recipient nor the parties have subpoena power to compel appearance of witnesses. Some absences of witnesses can be avoided by a recipient thoughtfully working with witnesses regarding scheduling of a hearing, and taking advantage of the discretion to permit witnesses to testify remotely.

Furthermore, § 106.71(a) protects parties and witnesses against retaliation for deciding to participate or not to participate in a Title IX grievance process. Thus, a witness cannot be compelled to appear at a hearing, and cannot be intimidated, threatened, coerced, or discriminated against if the witness chooses not to appear. However, the parties must have an equal opportunity to "present" witnesses, so the decision-maker cannot request the presence only of witnesses the decision-maker has deemed necessary. The decision-maker has discretion to permit witnesses to testify at the hearing remotely, using technology. *See* § 106.45(b)(6)(i).

Question 15: Some recipients divide hearings between a "responsibility" phase and a "sanctions" phase. Is that bifurcation possible under Title IX?

Answer 15: Yes. The Rule does not preclude a recipient from using one decision-maker to reach the determination regarding responsibility, and having another decision-maker determine appropriate remedies or a complainant or appropriate disciplinary sanctions for the respondent. However, the end result must be that the written determination regarding responsibility includes

the remedies and disciplinary sanctions decided upon in the written determination issued under § 106.45(b)(7).

That provision, at § 106.45(b)(7), requires a recipient's decision-maker(s) to issue a written determination that must include, among other items, the result as to each allegation and rationale for the result, any disciplinary sanctions imposed by the recipient against the respondent, and whether remedies will be provided by the recipient to the complainant. The issuance of a written determination cannot be a piecemeal process that is broken down into chronologically occurring sub-parts.

Recipients should also remain aware of their obligation to conclude the grievance process within the reasonably prompt time frames designated in the recipient's grievance process, under § 106.45(b)(1)(v). Additionally, each decision-maker—whether an employee of the recipient or an employee of a third party such as a consortium of schools—owes an individual and ongoing duty not have a conflict of interest or bias for or against complainants or respondents generally, or with respect to an individual complainant or respondent, pursuant to § 106.45(b)(1)(iii).

If you have questions for the Office for Civil Rights (OCR), want additional information or technical assistance, or believe that a school is violating federal civil rights law, visit OCR's website at www.ed.gov/ocr, or the Department's Title IX page at www.ed.gov/titleix. You may contact OCR at (800) 421-3481 (TDD: 800-877-8339), ocr@ed.gov, or contact OCR's Outreach, Prevention, Education and Non-discrimination (OPEN) Center at OPEN@ed.gov, or e-mail the OPEN Center with additional questions about the Title IX Final Rule at T9questions@ed.gov. Additional information regarding the Title IX Final Rule is available [here](#). You may also fill out a complaint form online at <https://www2.ed.gov/about/offices/list/ocr/complaintintro.html>.



U.S. Department of Justice
Civil Rights Division



U.S. Department of Education
Office for Civil Rights

Dear Colleague Letter
Notice of Language Assistance

If you have difficulty understanding English, you may, free of charge, request language assistance services for this Department information by calling 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), or email us at: Ed.Language.Assistance@ed.gov.

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給英語能力有限人士的通知: 如果您不懂英語, 或者使用英語有困難, 您可以要求獲得向大眾提供的語言協助服務, 幫助您理解教育部資訊。這些語言協助服務均可免費提供。如果您需要有關口譯或筆譯服務的詳細資訊, 請致電 1-800-USA-LEARN (1-800-872-5327) (聽語障人士專線: 1-800-877-8339), 或電郵: Ed.Language.Assistance@ed.gov。

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Уведомление для лиц с ограниченным знанием английского языка: Если вы испытываете трудности в понимании английского языка, вы можете попросить, чтобы вам предоставили перевод информации, которую Министерство Образования доводит до всеобщего сведения. Этот перевод предоставляется бесплатно. Если вы хотите получить более подробную информацию об услугах устного и письменного перевода, звоните по телефону 1-800-USA-LEARN (1-800-872-5327) (служба для слабослышащих: 1-800-877-8339), или отправьте сообщение по адресу: Ed.Language.Assistance@ed.gov.



U.S. Department of Justice
Civil Rights Division



U.S. Department of Education
Office for Civil Rights

February 22, 2017

Dear Colleague:

The purpose of this guidance is to inform you that the Department of Justice and the Department of Education are withdrawing the statements of policy and guidance reflected in:

- Letter to Emily Prince from James A. Ferg-Cadima, Acting Deputy Assistant Secretary for Policy, Office for Civil Rights at the Department of Education dated January 7, 2015; and
- Dear Colleague Letter on Transgender Students jointly issued by the Civil Rights Division of the Department of Justice and the Department of Education dated May 13, 2016.

These guidance documents take the position that the prohibitions on discrimination “on the basis of sex” in Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681 et seq., and its implementing regulations, see, e.g., 34 C.F.R. § 106.33, require access to sex-segregated facilities based on gender identity. These guidance documents do not, however, contain extensive legal analysis or explain how the position is consistent with the express language of Title IX, nor did they undergo any formal public process.

This interpretation has given rise to significant litigation regarding school restrooms and locker rooms. The U.S. Court of Appeals for the Fourth Circuit concluded that the term “sex” in the regulations is ambiguous and deferred to what the court characterized as the “novel” interpretation advanced in the guidance. By contrast, a federal district court in Texas held that the term “sex” unambiguously refers to biological sex and that, in any event, the guidance was “legislative and substantive” and thus formal rulemaking should have occurred prior to the adoption of any such policy. In August of 2016, the Texas court preliminarily enjoined enforcement of the interpretation, and that nationwide injunction has not been overturned.

In addition, the Departments believe that, in this context, there must be due regard for the primary role of the States and local school districts in establishing educational policy.

In these circumstances, the Department of Education and the Department of Justice have decided to withdraw and rescind the above-referenced guidance documents in order to further and more completely consider the legal issues involved. The Departments thus will not rely on the views expressed within them.

[OCR-000108]

Please note that this withdrawal of these guidance documents does not leave students without protections from discrimination, bullying, or harassment. All schools must ensure that all students, including LGBT students, are able to learn and thrive in a safe environment. The Department of Education Office for Civil Rights will continue its duty under law to hear all claims of discrimination and will explore every appropriate opportunity to protect all students and to encourage civility in our classrooms. The Department of Education and the Department of Justice are committed to the application of Title IX and other federal laws to ensure such protection.

This guidance does not add requirements to applicable law. If you have questions or are interested in commenting on this letter, please contact the Department of Education at ocr@ed.gov or 800-421-3481 (TDD: 800-877-8339); or the Department of Justice at education@usdoj.gov or 877-292-3804 (TTY: 800-514-0383).

Sincerely,

/s/

Sandra Battle
Acting Assistant Secretary for Civil Rights
U.S. Department of Education

/s/

T.E. Wheeler, II
Acting Assistant Attorney General for Civil Rights
U.S. Department of Justice



How to Use Facilitators to Resolve Title IX Disputes

Presented by:
Rob Eichelbaum

October 20, 2020

What to Expect When You are Facilitating

HOW TO FACILITATE A TITLE IX CLAIM
PRESENTED BY: ROB EICHELBAUM

2020 TEXAS TITLE IX ADMINISTRATOR CONFERENCE
EICHELBAUM WARDELL
HANSEN POWELL & MUÑOZ, P.C.

1

TITLE IX FACILITATION - AUTHORIZATION

§ 106.45(b)(9): Informal Resolutions

- A recipient may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section. Similarly, a recipient may not require the parties to participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed. However, at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient –

2

TITLE IX FACILITATION - LIMITATIONS

§ 106.45(b)(9): Informal Resolutions

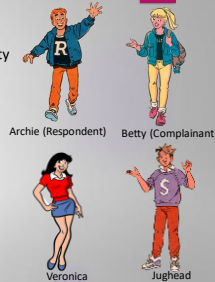
- (i) Provides to the parties a written notice disclosing: the allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;
- (ii) Obtains the parties' voluntary, written consent to the informal resolution process; and
- (iii) Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

3

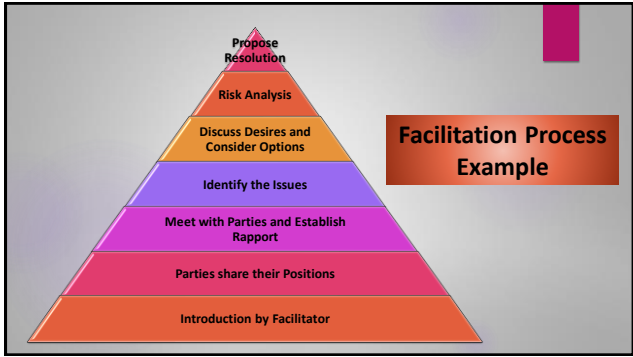
FACILITATION EXERCISE - FACT PATTERN

Betty and Archie have been dating for about 4 months. For the last week, Archie has been sending Betty texts asking that she send him some sexy (topless) pictures. Betty has declined so far, but Archie has been relentless, stating that "you said you loved me."

Veronica overheard Archie tell Jughead that he would share the pictures (just with him) as soon as he gets them. Veronica told Betty and convinced her to tell one of her teachers, who immediately reported the situation to the Title IX Coordinator. Betty agreed to sign the formal complaint but immediately requested an informal session and Archie agreed.



4



5

What to Expect When You are Facilitating

CHALLENGE 1

- Parties will be reluctant to begin the Facilitation.

WHY ?

- Title IX cases deal with sexual harassment, gender identification, relationships, and other subjects that students do NOT want to discuss with adults (Facilitators)
- Students may not understand the facilitation process.

WHAT TO DO...

- Facilitator should begin by presenting an opening statement and explain the facilitation process.

6



FACILITATION – OPENING STATEMENT

-  A NEUTRAL THIRD PARTY, CALLED THE FACILITATOR, BRINGS THE PARTIES TOGETHER TO CLEAR UP MISUNDERSTANDINGS, FIND OUT CONCERNS, AND REACH RESOLUTION.
-  THE FACILITATION IS CONFIDENTIAL AND EACH PARTY WILL HAVE THE OPPORTUNITY TO DISCUSS THIS MATTER WITH THE FACILITATOR IN PRIVATE.
-  THE FACILITATOR EXPLAINS TO THE PARTIES THAT INFORMAL RESOLUTION IS NOT ADVERSARIAL AND DOES NOT REQUIRE A "WINNER" AND "LOSER"
-  INFORMAL RESOLUTION FOCUSES ON THE ISSUES AND HELPS THE PARTIES FIND RESOLUTION.

7

FORMAL GRIEVANCE PRECEEDING VS. FACILITATION

- ▶ INVESTIGATION THAT INCLUDES A DETERMINATION OF GUILT
- ▶ DOES NOT REQUIRE A DETERMINATION OF GUILT
- ▶ REQUIRES OPPORTUNITY FOR CROSS-EXAMINATION OF PARTIES VIA WRITTEN QUESTIONS
- ▶ PARTIES ARE NOT NECESSARILY ADVERSARIAL
- ▶ FINAL REPORT MUST INCLUDE DISCIPLINARY ACTION
- ▶ PARTIES WORK TOWARD RESOLUTION THAT IS MUTUALLY BENEFICIAL

8

What to Expect When You are Facilitating

CHALLENGE 2

- ▶ Parties will not want to talk about the conflict.

WHY ?

- ▶ They may be embarrassed by the sensitive topic.
- ▶ Even though it is a facilitation, students may be afraid they are being judged on their comments and behaviors.

WHAT TO DO...

- ▶ Facilitator should build rapport prior to addressing the conflict.
- ▶ Facilitator should ask open ended questions and follow-up that encourages communication.

9

Building Rapport

Start Simply

Get the parties to talk about subjects that are non-controversial and easy for them to discuss.

Have the parties share their likes and dislikes.

Listen Closely

Have the parties do the majority of the talking by asking open-ended questions.

Use follow up questions, like "Tell me more" or "Please explain"

Pay close attention to the word selection of the parties.


Acknowledge

Show the students you have been listening by confirming their statements and using their language

Pick appropriate times to encourage further exchange by demonstrating reciprocity.

10

Building Rapport – Facilitator Talks to Archie



If the first question from the Facilitator is "Why did you ask Betty to take topless pictures?" you can expect Archie to become either confrontational or non-responsive.

Instead, the Facilitator says, "I'd like to get to know you a little better. What do you like to do after school?" This question is simple and does not threaten Archie.


Archie replies, "I like going to the diner with my friends. I like eating cheeseburgers."

Facilitator follows up, "Tell me more about the diner."

Archie responds, "I like seeing my friends. The diner is awesome! It has these cool, red leather booths and steel tables. The staff all wear blue jerseys and there is a bright colored jukebox. The cheeseburgers are always perfect. The buns are golden brown, and the French fries come out in this plastic basket."

11

Building Rapport – Facilitator Talks to Archie



If the first question from the Facilitator is "Why did you ask Betty to take topless pictures?" you can expect Archie to become either confrontational or non-responsive.

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12

Building Rapport – Facilitator Talks to Archie



When we talk freely and openly (building rapport) we are less guarded and share more information than we realize.

Archie's responses indicate the importance of his friends in his life.

This could be an important fact later as we discuss the circumstances that lead to the Complaint. Would it surprise you to discover that Archie was feeling pressured by his friends to ask Betty for the pictures?

Look for repetitive phrases that indicate a person's interests or things that are important to the person.

- Friendship
- Family
- Value
- Religion
- Adventure

13

Building Rapport – Facilitator Talks to Archie



If the first question from the Facilitator is "Why did you ask Betty to take **topless pictures?**" you can expect Archie to become either confrontational or non-responsive.

Instead, the Facilitator says, "I'd like to get to know you a little better. What do you like to do after school?" This question is simple and does not threaten Archie.

Archie replies, "I like going to the diner with my friends. I like eating cheeseburgers."

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14

Building Rapport – Understanding Processing

People comprehend information through three main learning types - auditory, visual, and kinesthetic.

Moreover, each person has a preferred learning style that resonates most clearly. When engaged in informal discussion, we demonstrate our preferred learning style by our selection of words and phrases as well as by identifying certain details.



Auditory – Comprehends via listening.

Will use words & phrases related to talking "I hear" or "She said"
Will reference sounds instead of images. "I like going to the beach to listen to the waves crashing along the shore."



Visual – Processes information better when they can see it.

Selects words related to images and visual cues "Did you **see** the way she **looked** at me?"
Paint visual pictures using colors and textures.



Kinesthetic – Understand best by actually doing.

Tactile words and phrases "I feel" or "He did..."
Describe movement in their stories (often with lots of non-verbal motion). "I like to dip the fries in ketchup."

15

Building Rapport – Facilitator Talks to Betty

Your turn to practice

- Facilitator : "I'd like to get to know you a little better. What do you like to do when you're not at school?"
- Betty: "I like to travel with my family. Last summer we went on an amazing rafting trip. We flew through the rapids and slept under the stars. It was great."
- Facilitator: "Sounds like a fun time. Tell me more."
- Betty: "I was with my parents and my sister. I was a little scared at first but by the second day I really enjoyed feeling the rapids crash into my face as we went forward. The guide was really cool. She showed me how to make this cool bracelet and we went on a hike through the canyons and discovered this big cave. At night we made dinner and S'mores. I would toast the marshmallow and when you put it on the graham cracker the chocolate would melt all over."



16

Building Rapport – Facilitator Talks to Betty

Your turn to practice

- Facilitator : "I'd like to get to know you a little better. What do you like to do when you're not at school?"
- Betty: "I like to **travel with my family**. Last summer we went on an amazing rafting trip. We flew through the rapids and slept under the stars. It was great."
- Facilitator: "Sounds like a fun time. Tell me more."
- Betty: "I **was with my parents and my sister**. I was a little scared at first but by the second day I really enjoyed feeling the rapids crash into my face as we **went forward**. The guide was really cool. She showed me **how to make** this cool bracelet and we went on a hike through the canyons and **discovered this big cave**. At night we made dinner and S'mores. I would toast the marshmallow and when you put it on the graham cracker the chocolate would melt all over."



17

Building Rapport – Facilitator Talks to Betty

Initial Hypothesis about Betty?

- ▶ Family is important
- ▶ Likes adventure / trying new things
- ▶ Kinesthetic Processor

Follow up Question:

"What are some of your favorite activities at school?"

Betty: "I like dance team. I like working on the routines. I also like Chemistry. The labs are fun."



18

Building Rapport - Time Reference

Just like each person has a preferred learning style, we all have a preference to relate conversation to a time reference.

Go out to dinner and have a conversation about the food.

- ▶ Example 1 – The Salmon is delicious. It reminds me of the time we ate on the Pier in Seattle. That was a fun vacation. I would really like to go back to visit the Pacific Northwest.
- ▶ Example 2 – Look over there. That chicken dish they are bringing out looks delicious. I can't wait to come back and order that next time.

19

Building Rapport - Linear vs Circular Conversation

- ▶ Witness 1 – I was on my way to work. I work for Ace Hardware. It's a good job and I enjoy my co-workers; my boss can be demanding, but I understand because he says his father was always demanding of him. I was talking to my daughter about school, which was nice because she is 14 and she doesn't always want to talk to me about things that are important to her. I was telling her that I thought she should try out for the main role in the school play when I looked up and noticed that the red car, which I really like and hope to one day own a red car because red is my favorite color. Anyway, the red car crossed to the left to avoid hitting a kitten. I feel bad for the drivers but thank goodness they didn't hit that kitten. It may be a stray, but that kitten may also belong to some child and that child would be devastated to come home from school and find out that her kitten had been injured.
- ▶ Witness 2 – The red car crossed lanes and hit the grey car.



20

Building Rapport - Conclusion



We build Rapport not only to help the Facilitator understand the parties but also to allow the Facilitator to serve as a Translator between the participants.

- ▶ Visual learners have a hard time understanding Kinesthetic processors
- ▶ Future tense thinkers may not appreciate Past tense thinkers
- ▶ Circular Speakers may assume Linear Talkers are not interested in the conversation or are trying to hide something.

21

What to Expect When You are Facilitating

CHALLENGE 3

- ▶ Parties will use vague, subjective language to talk about issues and propose resolution.

WHY ?

- ▶ They rely on subjective reasoning and don't realize words may have different meanings.
- ▶ It is easier to advocate a position from the subjective as opposed to the objective.

WHAT TO DO...

- ▶ Facilitator should remove bias and allow students to look at language without pre-conceived notions. Parties should agree on use of terms or definitions.
- ▶ Facilitator should affirm subjective feelings and argue objective positions.

22

JAWS



Ocean

SUBJECTIVE REASONING

23

Subjective Reasoning - Understanding Word Selection

If we have different feelings for a word like "OCEAN", think how different our interpretation of words that are more nuanced could be.

- ▶ Respect
- ▶ Fairness
- ▶ Overreacting
- ▶ Emotional
- ▶ Judgmental

24

Subjective Reasoning - Understanding Word Selection

1. Ask for clarification. Your understanding of a word may not be the same as the other participants.
2. Set aside your opinion or feelings. The conflict belongs to the parties and it is their perception that matters.
3. Allow the parties to discuss subjective feelings to vent and process information but use objective facts to look for common interests and points for possible resolution.

25

Subjective Reasoning – Facilitator Talks to Betty



Ask for clarification. Your understanding of a word may not be the same as the other participants.

Betty: I like Archie, but his texts make me feel uncomfortable.

Facilitator: How so?

Betty: You know His request for pictures seem inappropriate.

Facilitator: I know what I think is and is not appropriate, but why don't you explain to me why you think the request is inappropriate.

26

Subjective Reasoning – Facilitator Talks to Archie

Set aside your opinion or feelings. The conflict belongs to the parties and it is their perception that matters.

Archie: Betty is being such a prude. Just because I asked her for some sexy pictures, she has blown this whole thing out of proportion.

Facilitator: Your request may not seem unreasonable to you, but do you understand why Betty might find it offensive?

Archie: My friends talk about swapping pics all the time and I wasn't going to post them on the internet or anything. I think Betty is being oversensitive.

Facilitator: Perhaps your friends are comfortable taking pictures. You know each of us reacts differently to things. Have you ever been in a situation where other people are comfortable with something that made you uncomfortable. What if Betty feels that way about taking pics?



27

Subjective Reasoning



Allow the parties to discuss subjective feelings to vent and process information but use objective facts to look for common interests and points for possible resolution.

There is NO reason to debate whether or not Archie's request made Betty uncomfortable or even if it is reasonable (according to Archie).

The question is whether this constitutes sexual harassment or is a violation of Title IX or other school rules.



28

Subjective vs. Objective Discussion The Movie Test

- ▶ **Ask someone what is their favorite movie and why?**
 - ▶ The answers you get are often: The acting is good. It's a great story. I love the subject. It makes me happy. I've always loved that movie.
 - ▶ Now try arguing with that person and convincing them that they are wrong with their selection. GOOD LUCK.
- ▶ **Ask someone what the best movie is and why?**
 - ▶ How do we judge the best movie? Oscar nominations? Film critics? Ticket sales?
 - ▶ It is easy to debate and discuss these standards. Ticket prices are higher. Some film critics are better than others.



29

What to Expect When You are Facilitating

CHALLENGE 4

- ▶ Parties will be reluctant to present possible solutions to a conflict.

WHY ?

- ▶ Students have not considered possible solutions to the conflict.
- ▶ Students are afraid that offering solutions will be an admission of guilt.
- ▶ Students generally are risk taking, focusing on the immediate results versus long term consequences.

WHAT TO DO...

- ▶ Facilitator should work with students to brainstorm possible settlement options and individually help participants review their BATNA.
- ▶ Facilitator should apply Risk Analysis with students to determine conflict resolution.

30

Types of Resolutions Available

- ▶ **Determinations of Responsibility**
 - ▶ Finding that a party was guilty of inappropriate behavior.
- ▶ **Disciplinary Measures**
 - ▶ Notation in School Record
 - ▶ Removal from Extracurricular Activities / Events
 - ▶ Suspension / Expulsion
- ▶ **Non-Disciplinary Measures**
 - ▶ Apology (Written or Verbal)
 - ▶ Retraction
 - ▶ Change in Behavior / Procedures
 - ▶ Education Programs for Parties and/or entire School.
- ▶ **Supportive Measures (non-disciplinary and non-punitive)**
 - ▶ Counseling
 - ▶ Course Modifications
 - ▶ Campus Escort Services
 - ▶ Mutual Restrictions on Contact

31

Facilitation - BATNA



Alternatives are acts you can do unilaterally.






Options require the agreement and/or assistance of another party.

BATNA* - Best Alternative to a Negotiated Agreement


32

Facilitation - BATNA

 <p>Example I'm thirsty!</p>	 <p>Alternatives I can get a glass of water I can go to the store and buy a soda</p>	 <p>Options Can I have a glass of water? While you are out, can you pick me up something to drink?</p>
--	---	---

33

BATNA – Facilitator Talks to Betty



Facilitator: What do you think is the best way to handle this situation?

Betty: I want Archie to stop asking me for disgusting pictures.

Facilitator: That is an option. Of course, that requires Archie to agree. Are there any alternatives – things you can do regardless of Archie's choices?


Betty: I can refuse to give him pictures I don't want to take.

Facilitator: Is this something you can agree to do even if it has consequences (i.e. – breaking up with Archie)?

Betty: I am going to stand up for myself and not give into pressure.

34

Risk Analysis – Facilitator Talks to Archie



Facilitator: Betty (with permission) has told me that no matter how often you ask, she is not going to send you pictures that she does not feel comfortable taking. What is your reaction to that?

Archie: Whatever.

Facilitator: Do you still want to date Betty now that she has made this decision?


Archie: Yes, I like her. I just wanted the pictures because some of the guys were calling me out and saying I couldn't get them.

Facilitator: Let's look down the road – say two months from now. How do you think you would feel if Betty did send you a picture but somehow someone else got a hold of it and then shared it around school? How would Betty feel?

Facilitator: Now let's consider another option. If you would like to still date Betty and show her you have feelings for her, what can you do?

35

Risk Analysis – Facilitator Talks to Archie



Sometimes Risk Analysis is more concrete and deals with the process itself

Facilitator: Betty is pretty upset right now. If we do not resolve this situation today, what happens next with this Title IX claim?

Archie: I don't know

Facilitator: Explain to Archie the formal grievance process. Is this something you want to go through?

36

Facilitation Exercise - Conclusion

Archie: Look. I want this to be over. I didn't mean to upset Betty and I'm sorry. Can we just finish this and move forward? That's what I'd like to see happen."

- ▶ Facilitator – Archie is a Linear communicator, future tense and visual processor.



37

Facilitation Exercise - Conclusion

- ▶ Facilitator – Betty is a Circular communicator, past tense and kinesthetic learner.

Facilitator: From what you've explained to me you still want to maintain your relationship with Archie and build upon what you have had in the past. However, it is also important to you that Archie learn to respect you and not ask you again for pictures that you do not want to take. Archie has shared with me that he understands how you feel and is sorry for his previous request for inappropriate pictures. Does having Archie apologize to you and also promise to not ask for pictures in the future make you feel more comfortable and help you to move on from the past in a way that you feel both safe and confident to talk to Archie if he accidentally returns to his previous behaviors and asks you to do something with which you are not comfortable?"



38

Facilitation Exercise - Conclusion

Facilitator: Archie, Betty still has feelings for you. However, she would like you to apologize for asking for photos and also agree not to pressure her anymore about photos, or anything else that she may not want to do. Are you willing to agree to this?

- ▶ Facilitator – Proposal to be evaluated based upon objective criteria and risk analysis.



39

Facilitation Exercise - Conclusion

Facilitator: I am glad the two of you were able to work things out and are satisfied with the outcome.

You have given me an idea to prepare a school assembly to address the pressures of dating and explain the dangers of providing online pictures that could somehow be accessed by others.

I hope everything works out OK for you. I am here if either the two of you ever need to talk.

- ▶ Facilitator – Verifies terms of the resolution and congratulates the parties on a successful facilitation.



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Any Questions

How to Facilitate a Title IX Claim

41



Decision-Makers and Appeals

Presented by:
Jennifer A. Powell

October 20, 2020

DECISION-MAKERS AND APPEALS

Jennifer A. Powell



EICHELBAUM WARDELL
HANSEN POWELL & MUÑOZ, P.C.



1

ASSIGN A DECISION-MAKER

- Someone other than Title IX Coordinator, Investigator, or Facilitator of Voluntary Resolution
- Central administrators
- Must have training - train more than one
- Must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

2

IMPARTIALITY

- Unbiased, disinterested
- No conflict of interest: a real or seeming incompatibility between one's private interests and one's public duties

3

STANDARDS FOR RECUSAL OF JUDGES

1. Personal bias or prejudice concerning a party
2. Personal knowledge of disputed evidentiary facts
3. Material witness in the matter in controversy
4. Spouse or minor child residing in household has a financial interest in the subject matter in controversy or in a party
5. Any other interest that could substantially affect the outcome of the proceeding
6. Relative is a party

4

STANDARDS FOR RECUSAL OF JUDGES

Recusal is required when, objectively speaking, the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.

Rippo v. Baker, 137 S.Ct. 905 (2017).

5

DETERMINATION OF RESPONSIBILITY

34 C.F.R. 106.45(b)(7)

6

DECISION = DETERMINATION OF RESPONSIBILITY

- Decision-maker makes determination of responsibility on a formal complaint
- Must provide the written determination to the parties simultaneously
- Title IX Coordinator is responsible for effective implementation of any remedies

7

DECISION BASED ON WHAT?

Investigator will provide decision-maker with an investigative report that "fairly summarizes relevant evidence"

- Assume this will occur when the parties receive the report
- Which must be at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided, which we don't recommend) or other time of determination regarding responsibility
- The parties have the opportunity to provide a written response to the report, which the decision-maker will also review.

8

HEARING V. QUESTIONS

Opportunity for Parties to Submit Questions

- Live hearing with live cross by party advisors required for higher ed, optional for K-12
- We recommend NO live hearing.
- With or without a hearing, after the investigative report has been sent and before reaching a determination regarding responsibility, 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.
- Questions about a complainant's prior sexual behavior or sexual predisposition only possible to establish that another person committed the alleged conduct or that the conduct was consensual.

9

THE QUESTIONS

- Who asks the questions of the parties?
- If the decision-maker refuses to ask a question because it is improper or not relevant, he/she must provide written rationale to the party proposing the question why the question is being excluded.

10

THE QUESTIONS

- The decision-maker may not draw any inference from a party's or witness's refusal to answer the questions.
- Where a party or witness refuses to answer the questions, the decision-maker must disregard statements of that party or witness but must reach a determination without drawing any inferences regarding responsibility based on the party or witness's refusal to answer.

11

THE QUESTIONS

For example, where a Complainant refuses to answer the questions but video evidence exists showing the underlying incident, a decision-maker may still consider the available evidence in making a determination.

12

**IT'S IMPORTANT NOT TO
PRE-JUDGE THE FACTS UNTIL YOU
HAVE SEEN ALL THE EVIDENCE!**

13

STANDARDS OF EVIDENCE

- The degree or level of proof demanded in a specific case.
- District choice: preponderance of evidence, clear and convincing evidence

14

STANDARDS OF EVIDENCE

The burden of proof and the burden of gathering evidence sufficient to reach a determination of responsibility rests on the District and not on the parties.

15

PREPONDERANCE OF EVIDENCE

The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

16

CLEAR AND CONVINCING EVIDENCE

Evidence indicating that the thing to be proved is highly probably or reasonably certain.

This is a greater burden than preponderance of evidence, the standard applied in most civil trials, but less than evidence beyond a reasonable doubt, the norm for criminal trials.

17

EVIDENCE: INCULPATORY & EXCULPATORY

Inculpatory evidence: showing or tending to show one's involvement in a crime or wrong

Exculpatory evidence: tending to establish a person's innocence

18

EVIDENCE: DIRECT & CIRCUMSTANTIAL

Direct evidence: Evidence that, if believed, proves the fact without inference or presumption.

Circumstantial evidence: Circumstantial evidence, on the other hand, refers to evidence that requires an inference to be made.

Circumstantial evidence and direct evidence can be equally probative, and responsibility can be established by circumstantial evidence alone.

19

EVIDENCE: CREDIBILITY

The investigator should provide information about the credibility of the parties and witnesses.

20

EVIDENCE: HEARSAY

An out-of-court statement offered for the truth of the matter asserted

There are multiple exceptions, e.g., statement of then-existing state of mind.

This isn't a court, and the Rules of Evidence don't apply.

But remember, hearsay may be less probative than a non-hearsay statement made directly to the investigator.

21

EXPERT WITNESSES

A person who, through education or experience, has developed skill or knowledge in a particular subject, so that he or she may form an opinion that will assist the fact finder.

E.g., medical doctor, psychologist, law enforcement officer/investigator

22

PRIVILEGED INFORMATION

Cannot be used unless the party agrees to waive the privilege

23

ELEMENTS OF DECISION

The decision-maker must issue a written determination simultaneously to the parties addressing:

- Allegations
- Procedural steps taken
- Findings of fact
- Application of code of conduct to facts

24

ELEMENTS OF DECISION

The decision-maker must issue a written determination addressing:

- Statement of and rationale for result **as to each allegation** including:
 - Determination of responsibility
 - Any disciplinary sanctions
 - *Whether* remedies to restore or preserve equal access to the educational program or activity will be provided
- Procedures and permissible bases for either party to appeal.

25

FERPA – SANCTIONS AND REMEDIES

The result at the end of a grievance process under § 106.45, including any sanctions and whether remedies will be provided to a Complainant, impact both parties and can (and should) be part of the written determination simultaneously sent to both parties. The Complainant should know what sanctions the Respondent receives because knowledge of the sanctions may impact the Complainant's equal access to the school district's education program and activity.

26

FERPA – REMEDIES TO COMPLAINANT

The final decision must state *whether* remedies will be provided to the Complainant but not what remedies will be provided. Thus, the decision may note in the written determination only that a Complainant will receive remedies but should not note in the written determination that the district, for example, will change the Complainant's housing arrangements as part of a remedy. A Respondent should know whether the district will provide remedies to the Complainant because the Respondent should be aware that the Respondent's actions denied the Complainant equal access to the district's education program or activity. Similarly, the parties should both know the rationale for the result as to each allegation, including a determination regarding responsibility because due process principles require the district to provide a basis for its determination.

27

POSSIBLE REMEDIES

- Remedies are required after a Respondent has been determined responsible under the grievance process
- No list of appropriate remedies in regulations
- Left to discretion of educators
- Designed to restore or preserve the right to equal access to education
- Remedies need not be non-disciplinary or non-punitive and need not avoid burdening the Respondent

§ 106.45(b)(1)(i)

28

POSSIBLE REMEDIES

- Remedies may include the same individualized services described as "supportive measures."
- **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 the campus and other similar measures
- **Other possibilities:** tutoring for student, removal of student from class/team/campus, policy/procedure changes, staff or student training

§ 108.48(b)(1)(i)

29

APPEALS

34 C.F.R. 106.45(b)(8)

30

APPEALS - MUST OFFER BOTH PARTIES AN APPEAL FROM A DETERMINATION REGARDING RESPONSIBILITY, AND FROM A DISTRICT'S DISMISSAL OF A FORMAL COMPLAINT OR ANY ALLEGATIONS THEREIN ON THE FOLLOWING BASES:

- **Procedural irregularity** that affected the outcome of the matter;
- **New evidence** that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter
- The Title IX Coordinator, investigator(s), or decision-maker(s) had a **conflict of interest** or **bias** for or against Complainants or Respondents generally or the individual Complainant or Respondent that affected the outcome of the matter.

31

APPEALS

- May offer for other reasons equally to both
- Must have a different decision-maker, but still cannot be investigator or Title IX Coordinator, and same rules about bias apply
- Must give other party reasonable, equal opportunity to submit written statement
- Appellate decision-maker must issue decision in writing and provide simultaneously to both parties

32

APPEALS

The District should establish a deadline for filing an appeal and may require appeals be filed on a form provided by the District.

33

OCR REVIEWS

The Department assures schools that when enforcing these new regulations, it will refrain from second-guessing a school district's determination regarding responsibility based solely on whether the Department would have weighed the evidence differently.

34

A WORD ABOUT DISMISSALS

- A recipient may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing:
 - a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein;
 - the respondent is no longer enrolled or employed by the recipient; or
 - specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.
- So, a decision-maker could recommend dismissal if one of these circumstances is met.

35

QUESTIONS?

CONTACT US



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Master Investigations and Investigative Techniques

Presented by:
Dennis J. Eichelbaum

October 20, 2020

Master Title IX Investigations & Investigative Techniques



Dennis J. Eichelbaum



1

Terms

- **Complainant** is an individual alleged to be the victim of conduct that could be sexual harassment.
- **Respondent** is an individual alleged to have engaged in conduct that could be sexual harassment against the Complainant.
- **Formal Complaint** is a document filed by a Complainant (or parent/guardian) or signed by a Title IX Coordinator alleging sexual harassment against a Respondent and requesting that the school investigate the allegation.
- The **Grievance Process** applies "irrespective of whether the complainant or respondent is a student or employee."

2

Have Your Procedures in Place

Investigation procedures should be developed prior to receipt of complaint

- Identify Investigator(s)
- Have Investigators trained
- Know what you will do when you receive a complaint
- Are you ready if witness needs translating? What if they have a disability (auditory)? Plan for all possibilities.

3

After you have...

- Reported to CPS/Police
- Determined complaint meets requirements under Title IX
- Offered supportive measures
- Decided if emergency removal is appropriate
- Notice to the parties, discussed confidentiality with parties and supplied Respondent with copy of the complaint
- Gotten past Facilitator efforts, if any

4

Confidentiality

- Prior OCR guidance instructed schools to investigate even when the Complainant did not want the school to investigate.
- The new regulations obligate schools to initiate the grievance process when a Complainant files or a Title IX Coordinator signs a formal complaint, so that the Title IX Coordinator takes into account the wishes of a complainant and only initiates a grievance process against the complainant's wishes if doing so is not clearly unreasonable in light of the known circumstances.

5

What are you looking for? Sexual Harassment*

1. Quid pro quo
2. Hostile environment
3. Sexual assault, dating violence, domestic violence, stalking



Severe, pervasive, and objectively offensive

*In a school program or activity in the United States

6

Should I Investigate?

- Do I have an axe to grind with the Complainant or Respondent?
- Do I have any bias?
- Am I trained?
- Have I been involved in any incidents that prompted the investigation?
- Am I related to or under the supervision of the Respondent, if employee?
- Will my being the investigator be perceived as a problem?

7

What is the Local Standard of Evidence?

- The degree or level of proof demanded in a specific case.
- District choice: preponderance of evidence, clear and convincing evidence

8

Preponderance of Evidence

The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

9

Clear and Convincing Evidence

Evidence indicating that the thing to be proved is highly probably or reasonably certain.

This is a greater burden than preponderance of evidence, the standard applied in most civil trials, but less than evidence beyond a reasonable doubt, the norm for criminal trials.

10

Remember: Equitable Treatment of Parties

- Providing remedies to Complainant where a determination of responsibility for sexual harassment has been made
- Following a grievance process before the imposition of any disciplinary sanctions or other actions that are not supportive measures against a Respondent
- Presumption that Respondent is not responsible for the alleged conduct until the conclusion of the grievance process

11

Equitable Treatment of Parties

- Not making credibility determinations based on a party's status as a Complainant, Respondent, or Witness
- Not restrict the ability of either party to discuss "the allegations under investigation" or to gather and present relevant evidence

12

Equitable Treatment of Parties

- Equal opportunity to review evidence
- Equal opportunity to present witnesses and other evidence
- Considering inculpatory and exculpatory evidence
- Objective evaluation of evidence

13

Evidence: Inculpatory & Exculpatory

Inculpatory evidence: showing or tending to show one's involvement in a crime or wrong

Exculpatory evidence: tending to establish a person's innocence

14

Expert Witnesses

A person who, through education or experience, has developed skill or knowledge in a particular subject, so that he or she may form an opinion that will assist the fact finder.

E.g., medical doctor, psychologist, law enforcement officer/investigator

15

Legal Privileges

The new regulations ensure that the grievance process respects information protected by legally recognized privilege (e.g., attorney-client, doctor-patient, spousal privilege, priest-penitent).

16

Legal Privileges

The District cannot require, allow, rely upon, or otherwise use questions or evidence that constitute or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

17

Law Enforcement Investigation

- The District may abate* its investigation temporarily, if request by law enforcement officials.
- Document the request.
- Get a timeframe.
- Check with law enforcement on a weekly basis to determine status of investigation.
- Do not want obstruction of justice charge against you.



18

Investigation Timelines

- The regulations do not dictate any timelines for initiating or completing investigations.
- They should be initiated and completed **promptly**.
- It will depend on the nature of the allegations and scope of the investigation.

19

Notice of Interviews

Parties are entitled to written notice of the following for any meeting in the grievance process, including interviews, with sufficient time to prepare:

- Date
- Time
- Location
- Participants
- Purpose of meeting



20

Notice of Interviews

- Parties may be accompanied by an advisor to interviews/any meeting in the grievance process that they are expected to participate.
- Students may have a parent and an additional advisor.

21

Role of Advisors in Interviews

The District may establish rules limiting the participation and role of advisors in interviews and other meetings in the grievance process, as long as any restrictions are applied equally to both parties.

22

Role of Advisors in Interviews

- **Advisors may observe but cannot answer questions for the student.**
- **Make advisor sit behind student.**
- **Advisors may not question students or staff at interviews.**

23

Confidentiality of Process - Parties

- Schools cannot prohibit parties from discussing the “allegations under investigation” or from gathering their own evidence.
- This does not apply to information that does not consist of “the allegations under investigation,” (e.g., the evidence provided to the parties or the investigative report).

24

Party Evidence

- Parties have the right to submit their own evidence (e.g., text messages, photographs, medical reports, psychological reports).
- Parties should be told that any evidence submitted will be shared with the other party.

25

Interviewing Witnesses

- No one can be required to participate in an investigation.
- The regulations prohibit retaliation against any person for participating or refusing to participate in a Title IX proceeding.

26

Witnesses

Witnesses are not entitled to written notice before being interviewed or to be accompanied by a parent/advisor.

But have parent permission to tape record.

27

Research Before Interviewing

- Review the policy and be familiar with the burden of proof and definition of sexual harassment
- Who are the parties?
- Employee? History...time with the District?
- Student disciplinary history?
- Relationship between the parties?
- Prior complaints?
- Prior claims made by others?

28

Look at Documents You Have

- Discipline records
- Academic records
- Personnel records
- Correspondence between Complainant and Respondent

29

Make Decisions on Note-taking and Recording

- Who takes the notes?
- Do we sign the notes?
- Do we want to record?
- Be consistent.
- Test your equipment.

30

Be Observant



31

Count the # of Passes by White Shirted Students



32

Sherlock Holmes

"You see, but you do not observe."



33

Ask the Right Questions



34

The Key to Lie Detecting

- **Comfort.** You must always begin with benign get-to-know-you questions and observe their mannerisms when relaxed (or at least semi-relaxed). This is seen as rapport building. Once you recognize how they answer relaxing non-challenging questions (weather, where they went to high school or grew up, sports, or other unrelated topics), it is time to truly begin.
- Your demeanor must always be calm.

35

Your Role: Neutral

- You are there to find facts; the verbal and nonverbal cues or tells we are discussing may help you evaluate who you believe and who you think is less credible.
- There is no such thing as a perfect lie detector – THERE IS NO SINGLE BEHAVIOR THAT IS INDICATIVE OF DECEPTION.

36

Sometimes the Goal of Questions is to Elicit Nonverbal Responses

If you had sexually harassed this person, would you have called her...

- a queer?
- a lesbian?
- a dyke?
- butch?

Observe eyes to see if they avoid you when you use "their term."

37

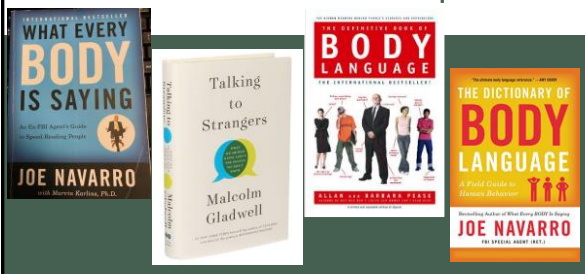
Nonverbal Communications that indicate discomfort in a question or subject*

- Eye-blocking
- Facial expressions
- Gestures
- Touching (haptics)
- Physical Movements (kinesics)
- Posture
- Tone

In Poker We Call These Nonverbal Actions "Tells"

38

To Learn About these Techniques...



39

Navarro v. Pease v. Gladwell

- Navarro spent 25 years at the FBI, working both as an agent and supervisor in the areas of counterintelligence and counterterrorism. He says there are no tell signs for lying; there are tell signs for stress, and stress *may* be lying.
- Gladwell's emphasis was not lie detection but trying to understand other people
- The Pease book (written by Mr. and Mrs. Pease) opines as if it is definitive based upon their experience having written 11 other books on communication and body language.

40

According to Pease...

"Eight of the Most Common Lying Gestures"

1. The Mouth Cover
2. The Nose Touch
3. What about itchy noses? That results in a rub or scratch, as opposed to a touch
4. The Eye Rub
5. The Ear Grab
6. The Neck Scratch
7. The Collar Pull
8. Fingers-in-the-Mouth

41

Back to the FBI: Rules for Observing

Get to Know People's Baseline Behaviors

- Get to know how your friends look normally, how they sit, where they place their hands, how they position their feet, their posture, tilt of head, where they generally place their possessions (e.g., purse).
- By examining what is normal, we more easily recognize what is not normal.
- Do they stutter, ticks, shake, have a disease or condition that causes atypical baseline mannerisms?

42

Rules for Observing

Be a competent observer of your environment

- DON'T MAKE IT OBVIOUS YOU ARE OBSERVING THEM FOR NONVERBAL CLUES!!! **DO NOT STARE!**
- Becoming aware of your world is not a passive act – effort, concentration, and constant practice
- Do things look normal, smell normal?
- *“My wife just filed for divorce. I never had a clue she was unhappy with our marriage.”*

43

Rules for Observing

Observe in context helps to understand

- What would the normal reaction be to a situation?
- After auto accident – we expect shock and dazed, hands trembling, disorientation, nervousness, discomfort, making poor decisions
- Job interview – nervousness should dissipate along the way

Begin with friendly questions to put subject at ease so you recognize their at ease nonverbal cues. Do not start on interview until you have observed.

44

Rules for Observing

Recognize and Decode Universal Behaviors

- Pursing lips is a sign of someone troubled/something is wrong
- Eyebrows knitted – troubled or concentrating hard
- Face contorted, forehead furrowed
- Tense or Intense looking
- Voice crack, dry throat
- Chatter is not truth; truth is revealed in verification of facts, not volume of information spewed by witness

45

Rules for Observing

Recognize and Decode Idiosyncratic Nonverbal Behaviors

- By observing at-ease behavior you can more easily recognize behavioral patterns.
- Talk about an interest and observe their mannerisms when they get excited about something
- Some people stick out their tongue or move to corner of mouth when concentrating harder
- Eyes may open wider on topics they prefer to discuss

46

Rules for Observing

Look for Multiple Tells

- When negotiating with someone if they appear stressed you know they are bargaining from a position of weakness
- When the person is nonplussed or indifferent it could mean it is not important to them or they don't feel the need to compromise



47

Rules for Observing

Changes in Behavior Can Signal Changes in Thoughts, Emotions, Interest, or Intent

- A child that hugs all their aunts and uncles but then hesitates with one relative
 - Could have been a disagreement
 - Could have been something worse

48

Rules for Observing

Distinguish Between Comfort and Discomfort

- Comfort Behavior (e.g., relaxation)
- Discomfort Behavior (e.g., stress, anxiety, tension)
 - Nostrils flaring, eyes fixed on something



49

The Three F's of Nonverbals

Freeze Flight Fight



Playing Dead/Possum

50

Freeze Response

- Hold breath, try to be invisible
- Turtle look – shoulders up, lower head – like dejected team after football game walking to locker room
- Arms not moving freely when walking



51

Flight Response

- Leaning Away
- Eye Blocking with hands
- Placing objects between oneself and threat (purse in lap)
- Feet – are they turned away?

52

Fight Response

- Aggression
- Insults, sarcasm
- Posture, puffing our chest, stern eyes, violating one's personal space



53

Discomfort Signals



People under stress give tells:

- Rubbing neck when asked a question, pulling on collar
- Touches hair
- Touches mouth
- Looks away
- Touching neck dimple
- Presses or strokes legs or arms, tapping
- Chew gum, play with objects, jewelry, play with pencil
- Yawning can be a sign of stress –dry mouth

54

Discomfort Signals

People under stress give tells:

- Tightening of jaw muscles
- Flaring of nose wings
- Crinkle of nose
- Squinting of eyes
- Quivering of the mouth
- Stiff neck, no head tilt



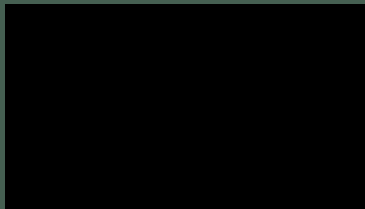
55

Video Example



56

Video Example 2: The Serial Killer



57

Eyes – the Other Pupils We Worry About

- When we like something we see, our pupils dilate; when we don't, they constrict
- When surprised, or suddenly confronted, our eyes open up – not only do they widen but pupils quickly dilate to let maximum amount of available light, thus sending max amount of visual info to brain

58

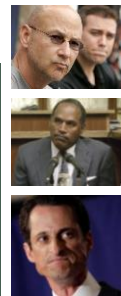
Eyes – the Other Pupils We Worry About

- Do not make assumptions based upon eye aversion. Some people avert eyes from authority, others when thinking. Do not presume it is a sign of deception.
- However, blinking can be a sign of trouble, nervousness, or concern. A sudden series of rapid eye links could be a sign of stress or surprise, but you must base that on the base eye blinking when relaxed.
- Eye rolling can be a sign of contempt

59

The Lips

- Lip compression or disappearance of lips can mean someone is being less than truthful. A good question to ask is "Are you hiding something from me?" and watch their lips. If the lips disappear or compress, they probably are hiding something.
- People also purse their lips when reading something with which they might disagree



60

The Feet Can Lead to Defeat

- Happy feet is an example of high confidence – child excited to go on Disney ride or to see Mickey
- Could be nervous behavior, so make them at ease to see what “normal is” – it could also be impatience, or a disease (e.g., Parkinson’s)
- Moving feet or torso in direction other than straight can mean discomfort, disengagement – watch for shifts – sign for wanting to depart

61

The Feet Can Lead to Defeat, Part II

- People in confrontational situations do not cross their legs – that would take away their balance
- When one’s feet go from being together to being spread apart it can mean increasingly unhappy – managing and protecting space.
- If you wish to lessen tension, cross your legs or pull them together
- Crossing leg toward someone shows comfort, away or toward door can mean less comfort/fleeing response
- Interlocked feet (ankle lock) below chair – discomfort or insecurity

62

Hands can be Handy

- Stress and nervousness can often be seen in hands.
- Hidden hands is a sign of discomfort, hiding sweating, quivering
- Give them a piece of paper or pen to hold (perhaps have them read something aloud) to see if hand is shaking
- Remember context – Parkinson’s or excitement can cause quivering, too (think Beatles with fans shaking in excitement)



63

There are phrases that should also alert you to possible lying

- “Believe me when I tell you...”
- “Honestly, ...”
- “To tell you the truth...”



64

Silence is Golden

- Do not feel you must fill the void
- Silence is an opportunity to observe their mannerisms
- Do not let them off the hook through silence – wait them out for an answer to your question.
- Questions like “I don’t understand” and “Can you explain how that happened again?” will help in sorting between deceit and truth.

65

Words Matter – Analyzing What they Say

66

Statement Analysis

The Letter "I"

- Truthful people give statements using the pronoun "I"
- Any change in the use of a pronoun is significant
- Lack of pronoun should tell the investigator that the statement has become devoid of personal involvement

67

Statement Analysis

"I" versus "We" when asked a direct question

- Look for the overuse of the pronoun "We"
- Ask yourself, why is there no individual involvement?
- Perhaps the person is trying to conceal something or avoid sole responsibility for some act

68

Statement Analysis

The Pronoun "We" when talking about other people

- "We" denotes togetherness; it indicates a relationship between two persons.
- Omission of the word "we" is significant, particularly if the two individuals are spouses.
- The lack of the word "we" reveals distance.
- Use of the word "we" reveals personal involvement .

69

Statement Analysis

Possessive Pronouns

- Possessive pronouns reveal the attachment that the writer/speaker acknowledges toward a person or object.
- Investigators should look for the exact point at which the owner stops taking possession by failing to use the pronoun "my."

70

Statement Analysis

Nouns

- Look for changes in noun usage.
- Ask yourself what makes this point in the narrative significant?

Verbs

- In truthful statements the use of the past tense is normal.
- A change to present tense could indicate deception.

71

Statement Analysis

Extraneous Information

- A truthful person with nothing to hide will reveal the events chronologically and concisely.
- Extraneous information should be a clue to possible deception.

72

Statement Analysis

Lack of Conviction

- Look for feigned memory
- Look for phrases like “I think” or “I believe”
- Avoiding commitment should send up red flags

73

Statement Analysis

Balance

A truthful statement has three parts:

- 1) what happened before the event occurred;
- 2) the occurrence itself;
- 3) what happened after the event, including actions and emotions

The more balanced the 3 parts, the more likely the statement is true

74

Statement Analysis

- 1) Start with innocent questions

Name age address employment etc.

The purpose of this is to acclimate the accused to the interrogation environment, while at the same time affording the interviewer an opportunity to evaluate the suspect's normal verbal and non-verbal behavior.

75

Statement Analysis

- 2) Ask a “know why” question

Do you know why we are here?

Do you know why you are here?

If the suspect is vague, naïve or evasive in his reply, that should suggest guilt.

“I suppose you want to talk about ...”

A blunt response is more characteristic of an innocent person.

“You’re trying to find out who stole the money”

76

Statement Analysis

- 3) Provide an opportunity for confession

We have interviewed a lot of people, the pieces are falling together quickly. If you had anything to do with this, you should tell me.

In the absence of an admission of guilt, the interviewer's question will nonetheless serve the purpose of inducing a display of behavior response suggestive of guilt or innocence.

Compare both verbal and nonverbal behavior.

77

Statement Analysis

- 4) Ask questions about the event

Why do you think someone would do this?

The guilty will be faced with a dilemma when asked this because he is in essence having to reveal why he committed the crime; he may hesitate or repeat the question as a stall tactic. The guilty are more likely to provide a possible motive. Watch for body language.

78

Statement Analysis

- 5) Invite the accused to assist in the investigation
Of the other custodians you know, who would be above suspicion?

If he is being truthful, he will rapidly name specific individuals who he feels would be above reproach or for whom he would vouch for as not being involved.

The guilty usually do not want to eliminate anyone from suspicion b/c that would tend to narrow the search down to them. Again, watch for shifting body language.

79

Statement Analysis

6. Ask the accused to assess proper punishment

What do you think should happen to the person who stole this money?

80

Listen CAREFULLY to Answers

- Did they answer your question?
- Did they equivocate so they can deny later?
- Remind them that if they do not understand a question to ask to tell you so you can clarify.
- If you do not have a clear answer to your question either ask it again or ask it in a different way.
- Do not let them answer the questions they want, make them answer your questions. However, letting them talk sometimes will give you more questions, so be cautious about cutting them off.

81

Interviewing

- Generally, meet with the Complainant first.
- Provide enough time.
- Make it a neutral area.
- Do not rush. Remember this may be embarrassing.
- You want as much detail as possible. Provide time to think and opportunity to return.
- Tell them there will be no retaliation and to report any retaliation to you immediately.

82

Written Statement

Determine whether age/developmentally appropriate to obtain a written statement from a student.

Written statements:

- Shows seriousness
- Helps assure later testimony
- Solidifies testimony
- Helps determine requested outcome

83

Questions for the Complainant

- What happened – exactly?
- When – date and time?
- Where – specific (room, trip, outdoor)?
- Happen online?
- Why were you and this other person together?
- What happened or was said just before?

84

Questions

- What exactly was said?
- What was the tone?
- Expression when said?
- Gestures or motions?
- Touch you in anyway?
- Did you touch them?

85

Questions

- Can you describe the type of touching?
- What did you say in response to any touching?
- How did the words or conduct make you feel?
- Have you had conversations or interactions with this person before?
- Was the tone or atmosphere different?

86

Questions

- How long have you known the person?
- Was anyone else present?
- Who?
- Have you told anyone else about this?
- Who, and when, and what did you say?
- Has anything similar happened before?
- If yes, ask the same type of questions about each prior incident.

87

Questions

- Do you have any written documentation?
- Anything on social media such as Instagram, Snapchat, Facebook, Twitter, or other evidence for me to review?
- Are there any other individuals you would like me to interview?

88

Remember:

Do not ask about prior sexual behavior or sexual predisposition unless to establish that another person committed the alleged conduct or that the conduct was consensual.

89

Thoroughness

- **Do not interview only the Complainant and the Respondent.**
- Who else was there? [Corroboration]
- Who else knows about this? How? [Contemporaneous discussions]
- Is there anyone else you would like me to interview about this? [Thoroughness; other victims]
- Are there any other documents you would like me to review?
- Must thoroughly document procedures

90

Questions for Corroborating Witnesses

- Where were you at on (fill in the date and time of the incident as alleged)?
- If online – have you seen the online material?
- Who else was there at the time, or does anyone else know about this?
- Did you see the parties in that place or at that time?
- Did you see or hear any interactions/conversations between the parties?

91

Questions for Corroborating Witnesses

- Please tell me in your own words what you saw or heard.
- What exactly did you hear – the precise words?
- What exactly did you see and from how far/angle/obscured?
- How did alleged victim look?
- Did the subject make any motions or gestures?
- What response did you see or hear from the alleged victim?

92

Questions for Corroborating Witnesses

- What impressions do you have about what you saw or heard?
- Do you have personal knowledge of prior interactions?
- Do you know either party? How well and in what capacity?
- How long have you known either?
- Is there any current or former relationship with either?
- Do you have opinions about trustworthiness? What led you to that opinion?

93

Questions for Corroborating Witnesses

- Do you know either of the parties?
- How well do you know them?
- How do you know?
- Is there an official relationship?
- Description of their character, personality, nature.
- Know of any similar past events?

94

Questions for Corroborating Witnesses

- Have you observed either or both interact with persons of different (sex, race, age, size, religion)?
- What were your observations or impressions?
- Do you know if either is generally truthful or deceptive?
- Do you know anyone else that may know about any of these issues?
- Have you heard others talking about it – who?

95

Issues for Students

- Do not need parental consent to interview
- Written consent is needed when recording (A/V) a student interview related to an investigation. See Tex. Educ. Code § 26.009.

*Including recording a video conference that is not related to a regular classroom purpose.

96

Issues for Students

- Consider interviewing in environment comfortable to them
- Classroom or library, other than office
- Who will be present?

97

Issues for Students

- Involve the professionals on campus when appropriate and able.
- Do not ask leading questions: Isn't it true that you did X because of Y?
- What did you do? Why did you do it?
- Consider audio recording with consent if child cannot write statement.

98

Issues for Students

- Never interview together
- Always take students one at a time – protects against duplication, false memories
- Provides a clearer picture of events
- If parents present, set the ground rules – silent observer, cannot lead.

99

Issues for Students

- Start with small talk* – developing trust.
- Learn what the student has told others about incident.
- Determine how others have reacted.
- Ask questions many times in different ways.
- Don't have an agenda. Students often say what they think you want to hear.

*The Investigator should assess the credibility of witnesses, so observe how witnesses respond to simple questions to learn the baseline of behavior of a witness.

100

Interviewing Respondents

- Do you know the Complainant?
- How and for how long?
- What type of relationship, conversations, interactions in the past?
- Where were you on the date and time alleged?
- Why were you there?
- Who else was there?

101

Interviewing Respondents

- Was the Complainant there?
- Did you do or say anything in relation to the alleged victim?
- What exactly did you say or do?
- Tone of voice?
- Did you make any gestures or motions while speaking? What type? Show me.

102

Interviewing Respondents

- What did the Complainant say or do then?
- Did they make any gestures or motions? What? Demonstrate.
- Did they say or do anything in response to your statements or actions? What?
- Expression on his/her face?
- Did you touch them in any way? Demonstrate how.

103

Interviewing Respondents

- How did the words or conduct overall make you feel?
- Have you talked to anyone else about this matter?
- Who, when, where? Do you mind if I talk to them?
- Do you have anything else that you feel is important for me to know?
- Would you do the same thing if you were in front of your parent/grandparent/the principal?
- How would you feel if something similar happened to your younger sister/brother?

104

Things To Tell All Witnesses*

We will try to keep this confidential, but we cannot guarantee. You should not speak to others about what we have discussed.

Remind all about the anti-retaliation provisions.

*Remember that parties cannot be prohibited from discussing the allegations raised in the Complaint.

105

Dealing With Hostile People



- People become hostile or confrontational when talking about uncomfortable things.
- Appreciate and respect hostility – especially in parents.
- Understand where their concern comes from.
- Also understand that such behavior is ultimately counter-productive.

106

Dealing With Hostile People

- Do not respond in kind
- Think and talk positively
- First impressions are critical
- Show you are listening by repeating
- Speak softly, and they may do the same
- Give praise where you can

107

Dealing With Hostile People

- Acknowledge frustration
- Take time-outs
- Don't allow things to get personal
- Walk away when you need to

108

Evidence & Investigative Report

Parties' opportunity to inspect and review evidence and draft investigative report

109

Right to Inspect Evidence

Prior to completion of the investigative report, the investigator must send an electronic or hard copy of the relevant evidence* gathered to the parties and the parties' advisors, if any. The parties must be provided at least 10 days to submit a written response that the investigator must consider before completing the investigative report.

*Includes evidence not relying on for determination.

110

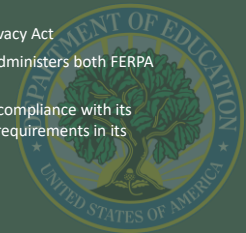
Right to Review Draft Investigative Report

The parties also have the right to see a draft of the investigative report and 10 days to provide a written response before it is finalized and sent to the Decision-Maker.

111

FERPA

- The Family Educational Rights & Privacy Act
- The U.S. Department of Education administers both FERPA and Title IX.
- The Department does not interpret compliance with its regulations under Title IX to violate requirements in its regulations under FERPA.



112

FERPA –Mixed Records

- The Department does not think that evidence obtained as part of an investigation pursuant to these final regulations that *is directly related to the allegations raised in a Formal Complaint can be segregated and redacted* because the evidence directly relates to allegations by a Complainant against a Respondent and, thus, constitutes an education record of both the Complainant and a Respondent.
- A Formal Complaint that raises allegations against a Student-Respondent is directly related to that student. The Department is bound by the U.S. Constitution and must interpret Title IX and FERPA in a manner that does not violate a person's due process rights, including notice and an opportunity to respond.

113

FERPA –Sharing Sensitive Records

- If a Complainant or Respondent provides sensitive records such as medical records as part of an investigation, then the parties must have an equal opportunity to inspect and review information that constitutes evidence directly related to the allegations raised in a Formal Complaint.
- If some of the information in the medical records is not directly related to the allegations raised in a Formal Complaint, then these final regulations do not require a school to share the information that is not directly related to the allegations raised in the Formal Complaint.

114

FERPA – Medical Records

Accordingly, a school would not have access to a party's medical records unless that party gave the recipient voluntary, written consent to do so for a grievance process under § 106.45(b).

115

FERPA – IEP/504 Plan

When a party offers an IEP or Section 504 plan as part of the evidence that a school should consider or has granted the school consent to use those records in a Title IX grievance process, then the other party should be able to inspect and review this evidence, if that evidence is directly related to the allegations raised in a Formal Complaint.

116

Right to Review Draft Investigative Report

The district can provide the evidence and investigative report using a platform that prevents copying and downloading to protect confidentiality.

117



Writing Investigative Reports

118

Grievance Process: Investigative Reports 34 C.F.R. 106.45(b)(5)

Written investigative report “fairly summarizes the relevant evidence” provided to parties and advisors at least 10 days before hearing or other determination of responsibility

119

Investigative Reports

- Can include proposed findings of fact
- **Should follow format of requirements for decision**

120

Record Keeping

34 C.F.R. 106.45(b)(10)

121

At least 7 years. Check your FB(LOCAL).

Records related to alleged sexual harassment must be maintained for a minimum of 7 years.

- Investigation records
- Disciplinary sanctions
- Remedies
- Appeals
- Records of any actions taken, including supportive measures

122

At least 7 years.

Must document for every instance:

- why response was not deliberately indifferent
- that measures were taken to restore or preserve equal access to the educational program or activity
- if no supportive measures provided, why that was not deliberately indifferent

123

QUESTIONS?

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