

TITLE IX TRAINING

March 2026

presented by
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INTRODUCTION



Title IX Training
Jennifer E. Gornall and Julia M. Herzing
March 2026

Speakers



Jennifer E. Gornall, Esq.



Julia M. Herzing, Esq.

3



Training Overview

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| <ul style="list-style-type: none">▪ Title IX▪ Compliance with Title IX Mandates<ul style="list-style-type: none">– Policy & Grievance Procedure– Roles of Title IX Appointees– Training Requirements▪ Discrimination On the Basis of Sex<ul style="list-style-type: none">– Title IX Sexual Harassment– Retaliation– Jurisdictional Issues▪ Required Response to Discrimination<ul style="list-style-type: none">– Actual Knowledge | <ul style="list-style-type: none">▪ Initial Evaluation Stage<ul style="list-style-type: none">– Initial Interview– Determination Whether to Proceed with a Formal Complaint<ul style="list-style-type: none">• Complainant Initiated• Title IX Coordinator Initiated– Supportive Measures– Informal Resolution– Emergency Removal Process– Dismissal of Complaint▪ Investigation Stage<ul style="list-style-type: none">– Witnesses/Evidence– Relevance– Evidence Appendix– Investigative Report– Investigative Techniques | <ul style="list-style-type: none">▪ Determination Stage<ul style="list-style-type: none">– Written Exchange of Evidence– Live Hearings & Technology (when applicable)– Standard of Evidence– Determination Regarding Responsibility▪ Appeal Stage▪ Recordkeeping |
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4



TITLE IX

Title IX – The Law

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

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

- 20 U.S.C. §1681(a)

- The statutory text of Title IX has not changed.



USDOE Regulations

- In 2020, the United States Department of Education issued changes to the Title IX regulations which went into effect August 14, 2020.
 - Under the Biden Administration, the Department published new regulations which went into effect August 1, 2024.
 - On January 9, 2025, a federal court issued a decision vacating the 2024 Final Rule.
 - Consistent with the court's order, the 2024 Title IX regulations are not effective in any jurisdiction.



7

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Compliance with Title IX Mandates

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Compliance with Title IX Mandates

In order to comply with Title IX, schools must:

- ✓ **Designate at least one Title IX Coordinator** to coordinate its efforts to comply with its responsibilities under Title IX and its regulations;
- ✓ Adopt, publish, and implement a **nondiscrimination policy** and **grievance procedures**;
- ✓ Provide students, parents/guardians, employees, applicants, and unions **notice of nondiscrimination**; and
- ✓ Ensure that all designated Title IX officials receive **training** related to their duties under Title IX.

34 CFR §106.8, 106.45

9



Policy & Notice Requirements

▪ **Nondiscrimination Policy**

- Each school must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the school, that the school **does not discriminate on the basis of sex and prohibits sex discrimination** in any education program or activity that it operates, as required by Title IX and its regulations.

34 CFR §106.8(a)-(b)(1)

10



Policy & Notice Requirements

▪ Grievance Procedures

- Each school must adopt, publish, and implement Grievance Procedures that provide for the **prompt and equitable resolution** of complaints made by students or employees alleging any action that would be prohibited by Title IX or its regulations.

34 CFR §106.8(c)

- Each school must adopt a grievance process for the purpose of addressing Formal Complaints of sexual harassment.

34 CFR §106.8(c), §106.45

11



Grievance Procedure

▪ Basic Requirements:

- ✓ Treat Complainants and Respondents equitably;
- ✓ Require an objective evaluation of all evidence that is relevant – both inculpatory and exculpatory – and provide that credibility determinations must not be based on a person’s status as a Complainant, Respondent, or witness
- ✓ Require that any Title IX officials involved not have a conflict of interest or bias for or against Complainant(s)/Respondent(s);
- ✓ Include a presumption that Respondent is not responsible until a determination at the end of the Grievance Procedures;



12



Grievance Procedure

- Basic Requirements (continued):
 - ✓ Establish reasonably prompt timeframes, including allowing for reasonable extension of timeframes;
 - ✓ Describe the range of supportive measures as well as the range of potential disciplinary sanctions and remedies;
 - ✓ Apply the same standard of evidence to all Formal Complaints of Title IX sexual harassment;
 - ✓ Include the procedures and permissible bases for appeal; and
 - ✓ Not 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.

34 CFR §106.45(b)

13



Policy & Notice Requirements

NOTICE

- **Notice of nondiscrimination** – Each school must provide a notice of nondiscrimination to:
 - Students;
 - Parents, guardians, or other authorized legal representatives of elementary or secondary school students;
 - Employees;
 - Applicants for admission and employment; and
 - All unions and professional organizations holding collective bargaining or professional agreements with the school.

34 CFR §106.8(a) & (b)(1)

14



Notice of Nondiscrimination: Contents

- The notice of nondiscrimination must include the following elements:
 - ✓ A statement that the school does not discriminate on the basis of sex and prohibits sex discrimination in its education programs and activities;
 - ✓ A statement that inquiries about the application of Title IX and its regulations to the school may be referred to the school's Title IX Coordinator, the Office for Civil Rights, or both;
 - ✓ The name or title, office address, email address, and telephone number of the school's Title IX Coordinator;
 - ✓ Notice of the school's Grievance Procedures and grievance process; and
 - ✓ How to report or file a complaint of sex discrimination or sexual harassment and how the school will respond.

34 CFR § 106.8(a), (b)(1), (c)

15



Notice of Nondiscrimination: Publication

- **Both** of the following must be *prominently displayed* on the school's website **and** in each handbook or catalog that it makes available to the individuals to whom notice is owed:
 - Notice of nondiscrimination; **and**
 - The name or title, office address, email address, and telephone number of the employee or employees designated as the school's Title IX Coordinator(s).

34 CFR §106.8(b)(2)(i)



16



TITLE IX ROLES



Title IX Officials

- Title IX Coordinator
- Informal Resolution Facilitator
- Investigator
- Decisionmaker
- Appeal Decisionmaker



Avoiding Conflicts of Interest/Bias

- Title IX officials may not have a conflict of interest or bias for or against Complainant(s)/Respondent(s).

34 CFR §106.45(b)(1)(iii)

- *Conflicts of interest* arise when one could obtain a personal or unrelated benefit from actions or decisions made in an official or neutral capacity.
- The fact that the Title IX official knows the parties or witnesses or has worked with them does **not** automatically mean an individual has a conflict of interest if the individual is able to make an unbiased evaluation of the evidence.

19



Conflicts of Interest

- Avoiding Conflicts of Interest, or the appearance of them, is critical in Title IX investigations. The Title IX Coordinator should consider the following factors when appointing Title IX officials:
 - Does the person have any relationship with any party (e.g. family or close friend)?
 - Does the person have any relationship with a party's family?
 - Does the individual have any history related to the alleged conduct (e.g. fact witness)?
 - Has any party or other individual raised a concern regarding conflict of interest or bias?
- **The evaluation of conflict of interest must be on-going and regularly reviewed as the investigation proceeds.**

20



Lack of Bias / Impartiality

- A Title IX official may not be biased, for or against, an individual Complainant or Respondent or complainants or respondents generally.
- In order to fulfill a Title IX role in an unbiased and impartial manner, a Title IX official must be able to:
 - Prevent sympathy, prejudice, fear, or public opinion to influence their approach.
 - Approach the Title IX Grievance Procedures with an open mind and without preconceived notions of what may have occurred.
 - Review all evidence before reaching a determination.
 - Give due regard to the positions of all parties and consider all relevant and not otherwise impermissible evidence, whether inculpatory or exculpatory, when arriving at a decision.

21



Title IX Officials – Title IX Coordinator

- **Title IX Coordinator: General Obligations**
 - Respond promptly in a manner that is not deliberately indifferent (34 CFR §106.44(a));
 - Coordinate the school's compliance with its obligations under Title IX and its regulations (34 CFR §106.8(a));
 - Coordinate the effective implementation of supportive measures (34 CFR §106.30(a)); and
 - Coordinate the effective implementation of any remedies (34 CFR §106.45(b)(7)(iv)).

22



Title IX Officials – Title IX Coordinator

Once/if the [Title IX Coordinator](#) receives a report of alleged Title IX sexual harassment, they must do the following:

- | | |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <ul style="list-style-type: none">▪ Respond promptly in a manner that is not deliberately indifferent (e.g., not “clearly unreasonable in light of the known circumstances”);▪ Ensure Complainant and Respondent are treated equitably;▪ Offer Complainant supportive measures and consider Complainant’s wishes with respect to supportive measures; | <ul style="list-style-type: none">▪ Explain to Complainant the process for filing a Formal Complaint;▪ Consider whether to file a Formal Complaint even if Complainant decides not to proceed with a Formal Complaint;▪ Ensure the school follows the Title IX Grievance Procedure <i>before</i> the imposition of any sanctions or other actions that are not supportive measures against the Respondent. |
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23

34 C.F.R. § 106.44 – 106.45



Title IX Officials – Title IX Coordinator

If the [Title IX Coordinator](#) receives or initiates a Formal Complaint of alleged Title IX sexual harassment, they must do the following:

- | | |
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| <ul style="list-style-type: none">▪ Notify Complainant and Respondent of the filing of a Formal Complaint and provide information of the school’s Grievance Procedures;▪ Offer supportive measures to Complainant and Respondent;▪ Designate Title IX officials to carry out the Grievance Procedures;▪ Determine if emergency removal of Respondent is necessary during the pendency of the Grievance Procedures; | <ul style="list-style-type: none">▪ Consult with members of the Complainant’s or Respondent’s IEP and/or 504 Team to determine how to comply with IDEA/Section 504 through the Grievance Procedures; (not in Title IX regulations)▪ Consider dismissal of Formal Complaint where appropriate. |
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24

34 C.F.R. § 106.44 – 106.45
unless indicated otherwise



Title IX Officials – Title IX Coordinator

- The [Title IX Coordinator](#) is also responsible for coordinating a school's efforts to comply with the school's responsibilities under Title IX and its regulations in the following areas:

- Training
 - Recordkeeping

- A school may have more than one Title IX Coordinator. It is recommended that, should a school elect to have multiple Title IX Coordinators, **one** Title IX Coordinator should be designated as having the ultimate authority over the school's Title IX compliance.

34 CFR §106.8(a)

Title IX Officials – Informal Resolution Facilitator

The [Informal Resolution Facilitator](#) must:

- Must be free from conflicts of interest, bias and trained to be impartial.
- Must have completed the Title IX training.
- Must not be the same person as the Investigator or the Decisionmaker, **but** may be the Title IX Coordinator.

Title IX Officials – Investigator

The Title IX **Investigator**:

- May be the Title IX Coordinator but cannot be the Informal Resolution Facilitator, Decisionmaker, or the Appeal Decisionmaker.
- Must have an understanding of investigative techniques and issues of relevance.
- Is the drafter of an “investigative report” that fairly summarizes the evidence collected during the investigation.

34 CFR §106.45(b)(1)

27



Title IX Officials – Decisionmaker

The Title IX **Decisionmaker**:

- May NOT be the Title IX Coordinator, Investigator or Informal Resolution Facilitator.
- Is responsible for reviewing the investigative report.
- Is responsible for sending the investigative report to the Complainant and Respondent and oversee the exchange of relevant questions.
- Must draft a “written determination regarding responsibility.”

34 CFR §106.45(b)(7)

28



Title IX Officials – Appeal Decisionmaker

Title IX Appeal Decisionmakers:

- May not be the same person as the Title IX Coordinator, Decisionmaker, or Investigator.
- Must issue a written decision describing the result of the appeal and the rationale for the result.

34 CFR §106.45(b)(8)(iii)

TRAINING REQUIREMENTS

Training Requirements: Title IX Officials

- Schools must ensure that **ALL** Title IX Officials receive training on the following topics:



- Definition of Title IX sexual harassment;
- The scope of the school’s “education program or activity;”
- How to conduct an investigation and grievance process, including hearings, appeals, and information resolution process; and
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

34 CFR §106.8(b)(1)(iii)

31



Training Requirements: Title IX Officials

- In addition to the training requirements for **all Title IX officials**, Title IX Investigators and Decision-Makers must receive training on specific enumerated topics related to their duties under Title IX.
 - We recommend providing the **full training** to all Title IX officials to allow for greater flexibility.
- In all cases, training materials **must not** rely on sex stereotypes and must instead promote impartial investigations and adjudications of Formal Complaints of sexual harassment.

34 CFR §106.8(b)(1)(iii)

32



Training Requirements: Title IX Officials

Title IX Coordinator and Informal Resolution Facilitator

- Definition of Title IX sexual harassment;
 - The scope of the school’s “education program or activity;”
 - How to conduct an investigation and grievance process, including hearings, appeals, and information resolution process;
 - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias;
- ~~Technology to be used at a live hearing;~~
 - ~~Issues of relevance of questions and evidence, including when questions and evidence about the Complainant’s sexual predisposition or prior sexual behavior are not relevant; and~~
 - ~~Issues of relevance to allow investigators to create an investigative report that fairly summarizes the relevant evidence.~~

34 CFR §106.45(b)(1)(iii)

Training Requirements: Title IX Officials

Investigator

- Definition of Title IX sexual harassment;
 - The scope of the school’s “education program or activity;”
 - How to conduct an investigation and grievance process, including hearings, appeals, and information resolution process;
 - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias;
- ~~Technology to be used at a live hearing;~~
 - ~~Issues of relevance of questions and evidence, including when questions and evidence about the Complainant’s sexual predisposition or prior sexual behavior are not relevant; and~~
 - Issues of relevance to allow decision-makers to create an investigative report that fairly summarizes the relevant evidence.

34 CFR §106.8(b)(1)(iii)

Training Requirements: Title IX Officials

Decisionmakers

- Definition of Title IX sexual harassment;
- The scope of the school’s “education program or activity;”
- How to conduct an investigation and grievance process, including hearings, appeals, and information resolution process;
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias;
- Technology to be used at a live hearing;
- Issues of relevance of questions and evidence, including when questions and evidence about the Complainant’s sexual predisposition or prior sexual behavior are not relevant; and
- ~~Issues of relevance to allow investigators to create an investigative report that fairly summarizes the relevant evidence.~~

34 CFR §106.8(b)(1)(iii)

35



Training for All Employees

- The Title IX regulations do not expressly mandate training of all employees. 85 FR 30114.
- **However**, as discussed at greater length later in this training, once *any* school employee receives notice of alleged facts that, if true, *could* constitute Title IX sexual harassment, the school is considered to have “actual knowledge” and the duty to respond in a manner which is not deliberately indifferent is triggered.

36



Training for All Employees

“*Any* employee of an elementary and secondary school may receive notice through an oral report of sexual harassment by a complainant or anyone else, a written report, through personal observation, through a newspaper article, through an anonymous report, or through various other means. The Department will not permit a recipient to ignore sexual harassment if the recipient has actual knowledge of such sexual harassment in its education program or activity against a person in the U.S., and such a recipient is required to respond to sexual harassment” as required under the regulations.
85 FR 30115

We strongly recommend that schools regularly train *all employees* on their obligations to report any incidents of alleged Title IX sexual harassment regardless of how that school employee was put on notice.

37



DISCRIMINATION ON THE BASIS OF SEX



What is “Sex”?

Title IX does not define “sex.”

39

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What is “Sex”?

2024
Regulations

2020
Regulations
Revisited

- In *Bostock v. Clayton Cty.* (June 15, 2020), the Supreme Court interpreted **Title VII’s** prohibition against discrimination “because of... sex” to include gender identity and sexual orientation.
- Under the Biden Administration, the now-defunct 2024 Title IX regulations adopted the *Bostock* interpretation of “sex.”
- On January 20, 2025, President Trump issued an Executive Order directing all federal agencies and Executive Branch departments to “enforce all sex-protective laws” to recognize “two sexes, male and female.”
- OCR issued a February 4, 2025 “Dear Colleague” letter consistent with the Executive Order.

40

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What is “Sex Discrimination”?

- Discrimination on the basis of “sex” – i.e. sex characteristics, sex stereotypes and pregnancy or pregnancy-related conditions.
 - Complaints of “sex discrimination other than sexual harassment” include all complaints of sex discrimination that do not involve sexual harassment. For example:
 - Allegations of retaliation.
 - Allegations that a school refused to allow pregnant students to participate in gym class.
 - Allegations that a school’s policy or procedures discriminate on the basis of sex.

41



What Is “Harassment?”

- Harassment is a form of unlawful discrimination in that it is characteristic-based treatment that adversely affects the school program or activity and/or the workplace.
 - Harassment can include actions, words, jokes, or comments based on or because of an individual’s protected characteristic(s).
 - Harassment also can include passive acts, such as alienating someone through omission or withholding necessary information or assistance.
- Sexual harassment is a form of sex discrimination and means harassment on the basis of sex.” 34 C.F.R. §106.30

42



What is “Title IX Sexual Harassment”?

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

1. **Quid pro quo harassment:** A school employee conditioning the provision of an aid, benefit, or service on an individual's participation in unwelcome sexual conduct; or
2. **Hostile environment 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
3. **Specific offenses:** Sexual assault, dating violence, domestic violence, or stalking (as defined by the federal Clery Act and Violence Against Women Act (“VAWA”))

34 C.F.R. §106.30

43



Sexual Harassment – Quid Pro Quo Harassment

Quid pro quo harassment – “An employee of the recipient conditioning the provision of an aid, benefit, or service on an individual’s participation in unwelcome sexual conduct.”

34 CFR §106.30

- **Employee of the school.**
Quid pro quo harassment “applies to all of a recipient’s employees [and] includes situations where, for instance, a teacher, faculty member, or coach holds authority and control over a student’s success or failure in a class or extracurricular activity.” 85 FR 30148.
- **Conditioning an aid, benefit, or service.**
The definition of *quid pro quo* harassment “applies whether the ‘bargain’ proposed by the recipient’s employee is communicated expressly or impliedly.” 85 FR 30147.
- **Unwelcome conduct.**
“[W]hen a complainant acquiesces to unwelcome conduct in a *quid pro quo* context to avoid potential negative consequences... does not necessarily mean that the sexual conduct was not ‘unwelcome.’” 85 FR 30148.

44



Sexual Harassment – Quid Pro Quo Harassment

Quid pro quo harassment need not be “severe or pervasive.”

- “Abuse of authority in the form of even a single instance of *quid pro quo* harassment is inherently offensive and serious enough to jeopardize equal educational access.”
85 FR 30148

45



Sexual Harassment – Hostile Environment

Hostile Environment 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 recipient’s education program or activity. 34 C.F.R. §106.30

Conduct must be “unwelcome” = fact-based inquiry

- Was unwelcomeness of conduct communicated to Respondent?
- Was previously-given consent withdrawn?
- Acquiescence does not always equate to “welcomeness.”
- Did Complainant have capacity to give consent?

46



Sexual Harassment – Hostile Environment

Severe and Pervasive (not “or”!)

- “[S]chools are unlike the adult workplace and ... children may regularly interact in a manner that would be unacceptable among adults... The Department does not wish to apply the same definition of actionable sexual harassment under Title VII to Title IX because such an application would equate workplaces with educational environments.”
- If conduct is sexually inappropriate but does not meet the “severe and pervasive” standard – non-Title IX policies may nonetheless be applicable.

47



Sexual Harassment – Hostile Environment

Objectively Offensive

- The “Reasonable Person” Standard
- Does the conduct create an environment that a **reasonable person** would find hostile or abusive?”
- “[T]he objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position **considering all the circumstances.**” *Oncale v. Sundower Offshore Services, Inc.*, 523 U.S. 75 (1998).

48



Sexual Harassment – Hostile Environment

Effectively Denies.

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

Q&A on the Title IX Regulations on Sexual Harassment (July 2021)

- A fact-specific inquiry. Evidence may include, for example:
 - Skipping class to avoid a harasser.
 - Eating lunch in the library to avoid the harasser in the cafeteria.
 - Quitting a sports team to avoid the harasser.
 - Decline in GPA.

49



Sexual Harassment – Hostile Environment

- **Hostile Environment Factors to Consider:** According to the preamble to the 2020 regulations, “the burden is on recipients to evaluate reports of sexual harassment in a common sense manner with respect to whether the facts of an incident constitute one (or more) of the three types of [Title IX sexual harassment].” This analysis includes considering the following factors:

1. A Complainant’s age;
2. A Complainant’s disability status; and
3. Other factors that may affect how an individual complainant describes or communicates about a situation involving unwelcome sex-based conduct.

85 FR 30156

50



Hostile Environment – Technology

When does online harassment create a “hostile environment” at school?

- A school’s “‘education program or activity’ includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs.” 34 CFR §106.44(a)
 - The regulations require that “the factual circumstances of online harassment [] be analyzed to determine if it occurred in an education program or activity.” 85 FR 30202.

51



Hostile Environment – Technology

When does online harassment create a “hostile environment” at school?

- A school’s “programs or activity” includes “all of the operations” of that school (34 CFR §106.2) and “may certainly include computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of, the [school].” 85 FR 30202.
- Example: A student using a personal device to perpetrate online sexual harassment during class time.

52



Sexual Harassment – Specific Offenses

Sexual Assault

- Defined as a **forcible or nonforcible sex offense** under the uniform crime reporting system of the Federal Bureau of Investigation.
34 C.F.R. §106.30; 20 U.S.C. 1092(f)(6)(A)(v) (“Clery Act”).
- The FBI UCR currently... defines sex offenses as “any sexual act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent.” *FBI, Uniform Crime Reporting Program: National Incident-Based Reporting System (“NIBRS”) (2025)*.
- NIBRS currently includes the following as “sex offenses”: **Rape, Sodomy, Sexual Assault With An Object, Criminal Sexual Contact; also unlawful sexual intercourse** [i.e. statutory rape and incest].”

53



Sexual Harassment – Specific Offenses

Sexual Assault

- The new term (as of 2025) “criminal sexual contact” replaces the previously used term “fondling.”
- “Criminal sexual contact” is defined in the 2025 NIBRS as follows:

“The intentional touching of the clothed or unclothed body parts without consent of the victim for the purpose of sexual degradation, sexual gratification, or sexual humiliation.

The forced touching by the victim of the actor’s clothed or unclothed body parts, without consent of the victim for the purpose of sexual degradation, sexual gratification, or sexual humiliation.

This offense includes instances where the victim is incapable of giving consent because of age or incapacity due to temporary or permanent mental or physical impairment or intoxication for the purpose of sexual degradation, sexual gratification, or sexual humiliation.”

54



Sexual Harassment – Specific Offenses

Dating Violence

- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim; and
- Where the existence of a relationship is determined based on consideration of the following factors:
 - length of the relationship,
 - the type of relationship, and
 - the frequency of interaction between the persons involved in the relationship.

34 CFR §160.30; 34 USC §12291(a)(10)(“VAWA”)

55



Sexual Harassment – Specific Offenses

Domestic Violence

- A felony or misdemeanor crime of violence committed by a person who:
 - Is a current or former spouse or intimate partner of the victim; or a person similarly situated to a spouse of the victim;
 - Is a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner;
 - Is a person with whom the victim shares a child in common; or
 - Commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction.

34 CFR §160.30; 34 UCS §12291(a)(8)(“VAWA”)

56



Sexual Harassment – Specific Offenses

Stalking

- A course of conduct directed at a specific person that would cause a reasonable person to fear for the person’s safety or the safety of others or suffer substantial emotional distress.

34 CFR §160.30; 34 USC §12291(a)(30)(“VAWA”)

57

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RETALIATION

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Retaliation Prohibited

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

34 C.F.R §106.71(a)

59



Retaliation

- Definition of Retaliation
 - **WHAT** - *intimidation, threats, coercion, or discrimination* against any person
 - **WHO** - by the *recipient or any other person*
 - **WHY** - for the purpose of *interfering with* any right or privilege secured by Title IX or this part, *or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate* in any manner in an investigation, proceeding, or hearing under this part.

34 C.F.R. §106.71(a)

60



Peer Retaliation

Loser!

Everyone
hates you!

If you testify, I
will make sure
you don't make
the team.

- Retaliation by “any other person” includes peer retaliation undertaken for the purpose of interfering with Title IX rights or because the person participated in some way in the Title IX Grievance Procedures.
- Schools are obligated to respond to and address retaliation as you would any instance of Title IX sexual harassment.

61

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Retaliation – Discipline Outside Title IX

- A school may **not** initiate discipline against a student or employee “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.*”

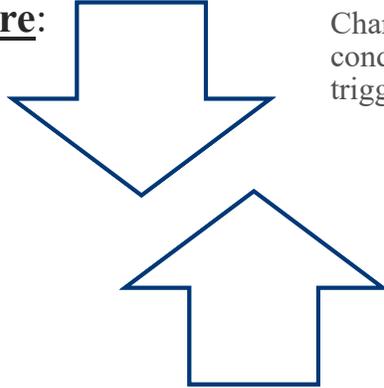
34 CFR §106.71

62

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Retaliation – Discipline Outside Title IX

▪ **Compare:**



Characterizing inappropriate sex-based conduct as “bullying” to avoid having to trigger the Title IX Grievance Procedures.

versus

Pursuing discipline of respondent for possessing a weapon at school, when respondent used that weapon to threaten and coerce complainant into acquiescing to sexual advances, when the school always take a zero tolerance approach to weapon possession. *see, 85 FR 30537*

BE CAREFUL: Consider using supportive measures and Title IX emergency removal process instead of discipline until the grievance process is complete to protect against retaliation claims.

63



Retaliation – “Specific Circumstances”

Title IX provides the following “specific circumstances” are not Title IX retaliation:

- The exercise of rights protected under the First Amendment does not constitute “retaliation.” 34 C.F.R. §106.71(b)(1)
 - Example: A student has a First Amendment right to speech and association and does not have to remain friends with a complainant, respondent or witness. However, that student may not bully or harass the complainant, respondent or witness.

64



Retaliation – “Specific Circumstances”

Title IX provides the following “specific circumstances” are not Title IX retaliation:

- A school may discipline a student or employee for making a “materially false statement in bad faith” in connection with a Title IX report, complaint, or investigation, provided, however, that such a determination is not based solely on the Decisionmaker’s determination regarding responsibility for sex discrimination, alone, is not sufficient to conclude that any party made a materially false statement in bad faith. 34 C.F.R. §106.71(b)(2)

JURISDICTIONAL ISSUES

“Person in the United States”

- The requirements of the Title IX regulations, with respect to the response to reports of sexual harassment and to the Grievance Procedures, apply only to sexual harassment occurring “in an education program or activity of the recipient *against a person in the United States.*” 34 CFR §106.44(a)
 - If the incident occurs on a school field trip outside of the United States, Title IX is **not** implicated.
 - But, remember, schools must analyze whether other laws and/or your Student Code of Conduct would apply.

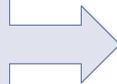
67



“Education Program or Activity”

- The requirements of the Title IX regulations, with respect to the response to reports of sexual harassment and to the Grievance Procedures, apply only to sexual harassment occurring “*in an education program or activity of the recipient* against a person in the United States.” 34 CFR §106.44(a)
 - The Title IX Coordinator must analyze whether the reported incident occurred in the context of an “education program or activity” which includes:

- Locations;
- Events; or
- Circumstances



“over which the school [] exercised substantial control over both the Respondent and the context in which the sexual harassment occurred.”

68



“Education Program or Activity”

Examples: Buildings or other locations that are part of the school’s operations, including remote learning platforms, whether owned, leased, or rented by the school.

Off-campus settings if the school exercised substantial control over the Respondent in the context in which the alleged sexual harassment occurred (e.g. school-sponsored events, athletic events, or field trips), even if they occur off school property (but inside the United States).

Computer / internet networks or computer hardware / software owned or operated or used by the school in the course of its educational services or programs.

69



Is it “Title IX Sexual Harassment?”

- Remember, not all complaints of harassment will trigger Title IX. The Title IX Coordinator must evaluate this as a jurisdictional issue before proceeding.
- The Title IX Coordinator must consider whether the alleged conduct triggers one of the three prongs of the definition of “Title IX sexual harassment.”
 - Quid pro quo
 - Hostile environment
 - Sexual assault, dating violence, domestic violence, or stalking
- If the conduct as alleged could not meet the definition of Title IX sexual harassment, schools may proceed outside of the Title IX framework.

70



REQUIRED RESPONSE TO ACTUAL KNOWLEDGE OF CONDUCT THAT COULD CONSTITUTE SEXUAL HARASSMENT



Definitions of “Complainant” and “Respondent”

“Complainant” in the Title IX context means:

- “An individual who is alleged to be *the victim* of conduct that could constitute sexual harassment.”
- Regardless of who makes a report or files or initiates a formal complaint, the alleged victim of the harassment is always “the Complainant.”

“Respondent” in the Title IX context means:

- “An individual who has been reported to be *the perpetrator* of conduct that could constitute sexual harassment.”

34 CFR §106.30



Actual Knowledge

A school with “**actual knowledge**” of conduct that could constitute sexual harassment in its education program or activity must respond promptly and in a manner that is not deliberately indifferent.

34 CFR §106.44(a)

How does a school gain “**actual knowledge**?”

- When any K-12 school employee has notice of alleged facts *that, if true, could be considered sexual harassment*, even if the employee is not certain whether harassment actually occurred.
- When a report of alleged sexual harassment is submitted to the Title IX Coordinator. 34 CFR §106.8(a), §106.30(a)

73

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Actual Knowledge

- School “employee” includes: teachers, teacher’s aides, bus drivers, cafeteria workers, counselors, school resource officers, maintenance staff, coaches, athletic trainers and any other school employee.

USDOE July 2021 Guidance, Q.14

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

34 CFR §106.30(a)

74

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When Does an Employee Have Actual Knowledge?

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

75



Actual Knowledge = Notification Requirement

- Once/if any employee has **notice** (e.g., actual knowledge) about conduct that **could constitute** sexual harassment, they must immediately notify the Title IX Coordinator.
 - Employee should fill out the school’s Title IX report form (“Report Form”) or prompt the individual who reported the conduct to the employee to fill out the Report Form.
 - The individual filling out the Report Form (“Reporter”) is not the Complainant unless the Reporter is the victim of the alleged sexual harassment.
 - If the Reporter is not the Complainant, the Complainant must be identified in the Report Form.

76



Actual Knowledge via Formal Complaint

A “formal complaint” is defined as

- “a document filed by the 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.”

34 CFR §160.30

77



Who Can File a Formal Complaint?

The Complainant:

- ...by submitting to the school 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.

The Title IX Coordinator:

- ...after making the determination to proceed without the signature of the Complainant (discussed in greater detail below).
- When the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a Complainant or otherwise a party within the meaning of Title IX.

34 CFR §106.30

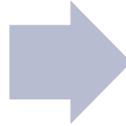
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Title IX Coordinator Response to Actual Knowledge

Once the Title IX Coordinator has “*actual knowledge*” of conduct that could constitute Title IX sexual harassment by receipt of:

- a report in any form alleging conduct that could constitute Title IX sexual harassment;
- a completed Report Form;
- or a Formal Complaint*,



The Title IX Coordinator must engage in an *Initial Evaluation* of the reported conduct to determine how to proceed and whether to trigger the Title IX grievance process for Formal Complaints.

79

Title IX Coordinator Response to Actual Knowledge

- Think of the Title IX Grievance Procedures as breaking down into four conceptual stages which are triggered upon obtaining actual knowledge of possible sexual harassment:



80

INITIAL EVALUATION STAGE



Initial Evaluation Stage

- Once the Title IX Coordinator obtains actual knowledge of conduct that could constitute Title IX sexual harassment, the Title IX Coordinator must engage in an initial evaluation of whether to dismiss or investigate the report of sexual harassment through the Title IX grievance process.



- This evaluation includes:
 - Initial Interview of Complainant
 - Receipt/Initiation of Formal Complaint
 - Consolidation of Complaints
 - Supportive Measures
 - Emergency Removal analysis
 - Potential Dismissal
 - Appointment of Title IX Officials



Title IX Coordinator Initial Interview

- Upon receiving any report of conduct that could constitute Title IX sexual harassment (via any report, through submission of the Report Form or through the filing of a Formal Complaint by the Complainant), the Title IX Coordinator must promptly contact Complainant to:
 - Discuss the report
 - Offer “supportive measures,” regardless of whether a Formal Complaint is filed
 - Describe the process for filing a Formal Complaint
 - Describe the school’s Title IX Grievance Procedure
 - Explain and discuss confidentiality issues

83



Confidentiality

- Schools must keep confidential the identity of:
 - any individual who has made a report or complaint of sex discrimination, including sexual harassment;
 - the Complainant;
 - the Respondent or any individuals who has been reported to be the perpetrator of sex discrimination; and
 - Witnesses,

except as may be permitted by the Family Educational Rights & Privacy Act (“FERPA”) or is otherwise required by law or to carry out a Title IX sexual harassment investigation, hearing, or judicial proceeding

34 C.F.R. §106.71(a)

84



Confidentiality – FERPA v. Title IX

Title IX provides that the school’s obligation to comply with Title IX “is not obviated or alleviated by FERPA.” 34 CFR §106.6(e)

- “...FERPA continues to apply in the context of enforcing Title IX, but if there is a direct conflict between FERPA’s requirements and Title IX’s requirements, such that enforcing FERPA would interfere with Title IX’s primary purpose to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions.” 85 FR 30424 (2020).

85



Confidentiality

- A Complainant cannot remain anonymous if a Formal Complaint is filed and the Grievance Procedures triggered.
- Title IX requires a school to send written notice of the allegations to **both** parties upon receipt of a Formal Complaint.
 - This applies irrespective of whether the Formal Complaint is signed by the Complainant or by the Title IX Coordinator.
 - If the Complainant’s identity is known it must be disclosed in the written notice of allegations.

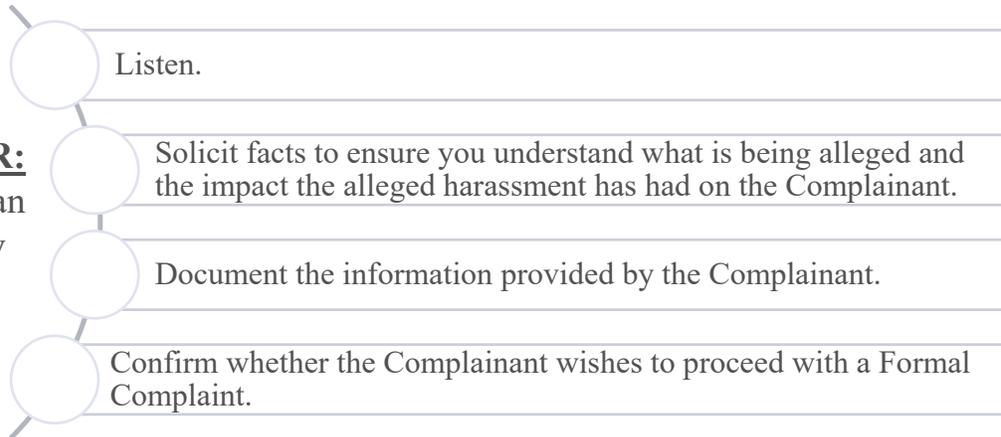
34 C.F.R. §106.45(b)(2)

86



Title IX Coordinator Initial Interview

REMEMBER:
This is **NOT** an
investigatory
interview!



At this point, the Title IX Coordinator must consider all facts alleged to be true.

87



Decision to Proceed with Formal Complaint

- After the initial interview with Complainant, Title IX Coordinator must decide whether to proceed with a Formal Complaint and initiate the Grievance Procedures.
 - If Complainant wishes to move forward with a Formal Complaint, the Title IX Coordinator must conduct the jurisdictional analysis (*see “Jurisdictional Issues” section earlier in this training*) to determine if Title IX applies.
 - If the Complainant does not want to move forward with Formal Complaint, the Title IX Coordinator must conduct an analysis to decide whether proceeding with a Formal Complaint is necessary.

88



Determination Whether to Initiate a “Formal Complaint” without Complainant Agreement

In the absence of a Formal Complaint initiated by the Complainant, the **Title IX Coordinator** must decide **whether to initiate a “Formal Complaint”** by performing a fact-specific determination, including consideration of factors such as:

- The Complainant’s request not to proceed;
- The Complainant’s reasonable safety concerns;
- The risk of additional sexual harassment occurring if school cannot pursue disciplinary sanctions against the Respondent;
- The severity of the alleged sexual harassment;
- The age and relationship of the parties;
- The scope of the alleged sexual harassment;
- The availability of evidence; and
- Whether the school could end the alleged sexual harassment without initiation of the Grievance Procedures.

34 CFR §106.30(a), 106.44(a)

89



Determination Whether to Initiate “Formal Complaint” without Complainant Signature

If, after considering the above and other relevant factors, the Title IX Coordinator determines that the failure to proceed with the Title IX Grievance Procedures is “clearly unreasonable in light of known circumstances,” the Title IX Coordinator may proceed with a Formal Complaint without the request/signature of the Complainant.

34 CFR §106.44(a), 106.45(b)(10)(ii)

90



Determination Whether to Initiate “Formal Complaint” without Complainant Signature

Decision to Proceed with Formal Complaint

- Title IX Coordinator must notify the Complainant of decision and appropriately address safety concerns, including by providing supportive measures.
- Title IX Grievance Procedures are triggered.

Decision Not to Proceed with Formal Complaint

- Title IX Coordinator should provide supportive measures to Complainant.
- Title IX Coordinator must take other appropriate and effective steps to ensure that sexual harassment does not continue or recur.
- Title IX Coordinator should document the rationale underlying the decision not to proceed with a Formal Complaint to prove decision was not “clearly unreasonable.”

91



Consolidation of Complaints

- A Title IX Coordinator may consolidate complaints of Title IX sexual harassment arising out of the same facts or circumstances:
 - By one Complainant against more than one Respondent;
 - By more than one Complainant against one or more Respondents; or
 - By one party against another party.

34 CFR §106.45(b)(4)

92



Initiation of Grievance Procedures

- If a Formal Complaint is made/initiated (and if the conduct, as alleged, could constitute Title IX sexual harassment), the Title IX Coordinator must:
 - Offer and coordinate supportive measures, as appropriate, for the Complainant and Respondent;
 - Notify the Complainant or, if the Complainant is unknown, the individual who reported the conduct and the Respondent of the school’s Title IX Grievance Procedures and the informal resolution process, if available and appropriate; and
 - Initiate the grievance procedures or the informal resolution process, if available and appropriate and requested by all parties.

34 CFR §106.44(f)(1)(ii)-(iii)

Notice of Allegations

Upon initiation of the Grievance Procedures, the Title IX Coordinator must provide written notice to the parties, including all of the following information:

Notice of the school’s grievance procedures and the informal resolution process, if available.	Notice of the allegations, including <u>sufficient details</u> * known at the time to allow the parties to respond to the allegations.	A statement that retaliation is prohibited.	A statement that the parties are entitled to an equal opportunity to access the relevant and not otherwise impermissible evidence.
------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------

*Sufficient details include “the identities of the parties involved in the incident, if known; the conduct allegedly constituting [Title IX] sexual harassment. . .; and the date and location of the alleged incident, if known.”

34 CFR §106.45(b)(2)(i)

Supportive Measures



What Are “Supportive Measures”?

The Title IX Coordinator must offer supportive measures to *both* the Complainant and Respondent.

Supportive measures are:

- Individualized services offered as appropriate and reasonably available.
- Non-disciplinary and non-punitive;
- Offered without fee or charge to the Complainant or Respondent
- Designed to:
 - Restore or preserve equal access to the school’s education program or activity, without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the school’s educational environment; or
 - Provide support during the Grievance Procedures or informal resolution process.

34 C.F.R. §106.30(a)



What Are “Supportive Measures”?

Supportive measures may include the following:

- Counseling
- Extensions of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Campus escort services
- Mutual restrictions on contact between the parties
- Leaves of absence
- Increased security and monitoring of certain areas of the campus
- Other similar measures

34 C.F.R. §106.30(a)

97



What Are “Supportive Measures”?

- A school must maintain as confidential any supportive measures provided to the Complainant or Respondent “to the extent that maintaining such confidentiality would not impair the ability of the [school] to provide the supportive measures.” 34 C.F.R. §106.30(a)
- The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.
- The Title IX Coordinator should document:
 - When supportive measures have been offered;
 - If supportive measures have not been provided, or if a Complainant’s specific request for a supportive measure was not granted, why that response is not “clearly unreasonable in light of the known circumstances.”

34 C.F.R. §§106.30(a); 106.45(b)(10)(ii)

98



Informal Resolution Process



Informal Resolution

- A school **may**, but is not required to, offer the parties an “**informal resolution**” to resolve a complaint of sexual harassment:
 - ✓ Only after a Formal Complaint has been filed;
 - ✓ If the school determines that an informal resolution would be appropriate (e.g., not “clearly unreasonable”) under the circumstances; and
 - ✓ Both parties voluntarily provide fully informed written consent for informal resolution.



Informal Resolution

- A school may **not** :
 - **Initiate or offer** informal resolution of a Title IX sexual harassment report **prior to** the issuance of a Formal Complaint.
 - **Require or pressure** the parties to participate in an informal resolution process or to waive the right to an investigation and determination of a Formal Complaint.
 - Offer or facilitate informal resolution **to resolve allegations that an employee sexually harassed a student.**

34 CFR §106.45(b)(9)

101



Informal Resolution Process

At any time after a Formal Complaint is filed, but before a final determination is reached at the conclusion of the grievance process, a school may facilitate an informal resolution process (such as mediation), by:

- Providing written notice to the parties; and
- Obtaining the parties' voluntary written consent.

34 CFR §106.45(b)(9)

102



Informal Resolution Process – Written Notice

Written notice to both parties regarding informal resolution must disclose:

- The allegations involved;
- The requirements of the informal resolution process;
- The circumstances under which it would preclude a party from resuming a Formal Complaint arising from the same allegations;
- That either party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the Formal Complaint; and
- The consequences of participating in the informal resolution process, including the records that will be maintained or could be shared.

103



Informal Resolution Process



Schools should develop uniform forms to ensure compliance with informal resolution process requirements:

1. Informal Resolution Notice Letter (required)
2. Informal Resolution Consent Form (required)
3. Informal Resolution Written Agreement (recommended)

104



Outcome of Informal Resolution Process

If resolution is reached:

- The Title IX grievance process does not resume.
- The Complainant is precluded from resuming a Formal Complaint against the Respondent arising from the same allegations.

If resolution is not reached:

- The Title IX grievance process resumes at the point it was suspended during the informal resolution process.

EMERGENCY REMOVALS

Emergency Removal

Schools must follow the Title IX grievance process “before the imposition of any disciplinary sanctions or other actions that are not supportive measures” against a Respondent.”

34 CFR §106.44(a), 106.45(b)(1)(i)

Schools **may** initiate an “**Emergency Removal**” of Respondent during the pendency of the Grievance Procedures if the school (we read this to mean the Title IX Coordinator):

- ✓ Undertakes an individualized safety and risk analysis.
- ✓ Determines that an “immediate threat” to the *physical* health or safety of any students or other individuals arising from allegations of sexual harassment justifies removal.
- ✓ Provides the Respondent with notice and an opportunity “to challenge” the decision immediately following the removal. 34 CFR §106.44(c)

107



Emergency Removal

If, after having taken an individualized safety and risk analysis, the school and Title IX Coordinator determine that supportive measures and other non-punitive actions *voluntarily agreed to* by the parties (mutual no contact agreements; agreeing to participate in virtual education options, etc.) do not alleviate the threat to the physical health or safety of individuals, then the Title IX Coordinator/school may remove the Respondent from school.

108



Emergency Removal Process – Challenge Process

- Schools must offer the Respondent an emergency removal “challenge” process immediately after the removal.
- USDOE: “The Department does not require that a recipient use the [Title IX] grievance process to address an emergency removal and will defer to a recipient’s process as long as the recipient provides the respondent with notice and an opportunity to challenge the decision immediately following the removal.” 85 FR 30517
- Suggested process: Since students already have a right to “challenge” removals (i.e., suspensions) from school under Pennsylvania law, we recommend utilizing the informal hearing process outlined in 22 Pa. Code §12.8(c) to comply with the Title IX “challenge” requirement mandate. Schools already use this procedure when you suspend students for more than three consecutive days.

34 CFR §106.44(c)

109



Emergency Removal Process – Disabled Students

Any proposed emergency removal is still subject to IDEA and Section 504 – and, thus, an emergency removal may not be imposed if the threat posed by the Respondent is determined to be a manifestation of the Respondent’s disability.

34 CFR §106.44(c)



110



Emergency Removal Process & Interplay with State Disciplinary Due Process Requirements

REMEMBER:

- If the emergency removal results in the Respondent being suspended, transferred to alternative education or referred for expulsion, the school still must provide the Respondent with the level of due process otherwise required to be afforded to students who are being suspended, transferred to an alternative placement and/or expelled under:
 - Applicable Pennsylvania and federal law, including but not limited to 22 Pa. Code §12.6 (regarding exclusions from school) and §12.8 (regarding hearings);
 - The school’s Student Handbook and Code of Conduct;
 - Applicable board policies; and
 - IDEA and Section 504.

111



Emergency Removal Process & Interplay with State Disciplinary Due Process Requirements

If the length of the emergency removal results in the necessity to refer the student for expulsion (e.g., removal for more than 10 consecutive school days), the school board should be informed at the expulsion hearing:

- There is a pending Title IX Grievance Procedure involving the Respondent; and
- The Respondent should be *temporarily* expelled for a period of time necessary to avoid identified health and safety risks associated with the alleged Title IX violation through the pendency of the Title IX Grievance Procedure.

112



Emergency Removal Process & Interplay with State Disciplinary Due Process Requirements

The Board’s written adjudication of expulsion must address the pending Title IX process and the impact of the outcome of the Title IX process on the student’s emergency removal status and the ultimate length of expulsion.

113



Employee Removals: Administrative Leave

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

114



DISMISSAL OF COMPLAINT



Dismissal of Complaint

During the Investigation, facts could be uncovered that either *require* or *allow* the school (practically speaking, the Title IX Coordinator) to dismiss the Formal Complaint.



Dismissal of Complaint

Required Dismissal:

- When the alleged conduct would not meet Title IX jurisdictional requirements:
 - Events occurred outside of United States;
 - Conduct did not occur in the school’s educational program or activity; or
 - Conduct, even if true/proved, would not constitute Title IX sexual harassment.

34 CFR §106.45(b)(3)(i)

Discretionary Dismissal:

- When the Complainant withdraws, in writing, the Formal Complaint (or specific allegations therein);
- When the Respondent is no longer enrolled in or employed by the school entity; or
- When specific circumstances prevent the school from gathering evidence sufficient to reach a determination.

34 CFR §106.45(b)(3)(ii)

117



Post-Dismissal Considerations

- If the school (i.e. Title IX Coordinator) dismisses the Formal Complaint, the Title IX Coordinator should consider:
 - ✓ Whether to offer or continue the provision of previously implemented supportive measures to Complainant or Respondent;
 - ✓ Whether to address the alleged misconduct under other provisions of the school’s code of conduct;
 - ✓ Whether it is appropriate to take other prompt and effective steps to ensure that sexual harassment is not likely to occur in the future.

34 CFR §106.45(b)(3)(i); 85 FR 30093

118



Notice of Dismissal

- If a Formal Complaint is dismissed, the school (Title IX Coordinator) must promptly send written notice to both parties.
- The written notice of dismissal:
 - must include the basis for the dismissal; and
 - should inform the parties of their right to appeal the dismissal.

34 CFR § 106.45(b)(3)(i), 106.45(b)(8)

119



Appeal of Dismissal

- Both parties have the right to appeal a dismissal of a Formal Complaint or specific allegations therein on the following bases:
 - Procedural irregularity that would change the outcome;
 - New evidence was not reasonably available at the time the dismissal was made that could affect the outcome; and/or
 - The Title IX Coordinator or investigator had a conflict of interest or bias for or against Complainant or Respondent that would change the outcome.
- The appeal process is the same as that used for an appeal of a final determination.

34 C.F.R. §106.45(b)(8)

120



INVESTIGATION STAGE

Title IX Grievance Process

Remember:

- A school must adopt a grievance process which requires an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence.” 34 CFR §106.45(f)

Investigation of a Formal Complaint

Once the Title IX Coordinator issues notice of a Formal Complaint, the designated **Title IX Investigator must:**

- ❑ **Conduct an investigation** that gathers sufficient evidence to reach a determination regarding responsibility for Title IX sexual harassment.
- ❑ Provide an equal **opportunity for the parties to present witnesses and** other inculpatory and exculpatory **evidence**.
- ❑ Provide parties to an investigation **notice** of all investigative interviews or other meetings and an opportunity to have an **advisor** present.
- ❑ Provide both parties an equal opportunity to **inspect and review** evidence obtained as part of the investigation (the “**evidence appendix**”) and an opportunity to respond.
- ❑ **Create an investigative report** that fairly summarizes relevant evidence and provide both parties time for review and written response.

34 CFR §106.45(b)(5)

123



Investigation Stage – 1. Conduct Investigation

- The **burden** to conduct an investigation that gathers sufficient evidence to determine whether sex discrimination occurred is on the Title IX Investigator and **not** the parties.
 - The Investigator is not a passive recipient of information.
 - The Investigator must actively and objectively gather evidence, both inculpatory and exculpatory, upon which a decision can be made.

124



Investigation Stage – 2. Opportunity to Present Witnesses/Evidence

- The Investigator must provide the parties with an equal opportunity to present fact witnesses and other inculpatory and exculpatory evidence.
 - Inculpatory
 - Exculpatory
- Even if a witness has not been identified by either party, remember that it is the *school's burden* to gather sufficient evidence from which a determination can be made. Follow up on all witnesses who may have relevant evidence.

125



Investigation Stage – 3. Free Speech

- The Title IX Investigator must “not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.” 34 C.F.R. §106.45(b)(5)(iii)
 - Schools may not impose “gag rules” on participants in investigations.
 - The exercise of First Amendment rights is not “retaliation.”
 - “A recipient should not, under the guise of confidentiality concerns, impose prior restraints on students’ and employees’ ability to discuss the allegations under investigation, for example with a parent, friend, or other source of emotional support, or with an advocacy organization.” 85 FR 30295

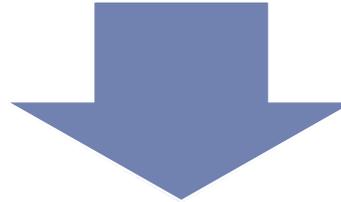
126



Investigation Stage – 3. Free Speech

Distinguish

A party's protected right to discuss the allegations or to gather and present evidence...



From

Unprotected speech, such as defamation or retaliation – speech undertaken for the purpose of *intimidating, threatening, coercing, or discriminating* against another individual *for the purpose of* interfering with their Title IX rights or because they participated or did not participate in Title IX proceedings.

127

85 FR 30295



Investigation Stage – 4. Notice and Right to Advisor

- **Notice.** The Title IX Investigator must provide the parties and/or any other witness “whose participation is invited or expected, *written notice* of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, *with sufficient time for the party to prepare to participate.*” 34 C.F.R. §106.4(b)(5)(v).
 - Note – The Title IX Investigator does *not* have subpoena power.
 - The Title IX regulations prohibit retaliation and specifically protect “an individual’s right to participate or not participate in a grievance process.” 85 FR 30324
- **Advisor.** The Title IX Investigator must allow parties equal opportunity to have others present, “including the opportunity to be accompanied... by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor.” 34 C.F.R. §106.4(b)(5)(iv).

128



Investigation Stage – 5. Review of Evidence

- The Title IX Investigator is required to provide the parties with equal access to inspect and review “any evidence obtained as part of the investigation that is directly related to the allegations raised in a Formal Complaint.”
- This includes:
 - Evidence the Investigator does not intend to rely upon in its Investigative Report.
 - Inculpatory and exculpatory evidence.
 - Evidence obtained from the parties or another source.

34 C.F.R. §106.45(b)(5)(vi)

129



Investigation Stage – 5. Review of Evidence

- Equal access to the evidence is most easily accomplished through the creation of an *evidence appendix* which can be sent to the parties and should include, for example:
 - The Title IX Investigator’s notes from investigatory interviews.
 - Copies of any emails, documents, photographs, videos, or other evidence gathered during the Investigation.
- The parties must be given at least 10 calendar days to review and provide a written response to the evidence.
- The Title IX Investigator must consider the parties’ responses prior to finalizing the Investigative Report.

130



Investigation Stage – 6. The Investigative Report

- The culmination of the Investigation Stage is the Title IX Investigator’s creation of an *investigative report* which “fairly summarizes *relevant* evidence.”
- When is evidence “relevant?”
 - “The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied.” 85 FR 30247, fn 1018

131



Relevance

- The “ordinary meaning” of the word “relevance.”
 - Federal Rule of Evidence 401 provides that evidence in a legal proceeding is relevant if:
 - It has any tendency to make a fact more or less probable than it would be without the evidence;
 - The fact is of consequence in determining the action.
 - Merriam-Webster’s Dictionary defines “relevant” as
 - Having significant and demonstrable bearing on the matter at hand; or
 - Evidence tending to prove or disprove the matter at issue or under discussion.

132



Relevance - Exceptions

“Rape Shield” - Evidence Related to the Complainant’s Sexual Interests/Prior Sexual Conduct

- “With or without a hearing, questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant’s prior sexual behavior are offered [1] to prove that someone other than the respondent committed the conduct alleged by the complainant, or [2] if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.”

133



Relevance – The Rape Shield Exception

- Complainant’s “sexual predisposition” is **never** relevant.
- Complainant’s “prior sexual behavior” is **only** relevant **if**:
 - Offered to prove that someone other than the Respondent committed the alleged conduct; or
 - Is evidence of specific incidents of prior sexual conduct between Complainant and Respondent if offered to prove consent.*
 - *Note – The fact of prior consensual sexual conduct does not, by itself, demonstrate or imply consent or preclude a determination that Title IX sexual harassment occurred.

134



Relevance – The Rape Shield Exception

Note that the “rape shield” language only applies to Complainants and not Respondents.

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

135



Relevance – Exceptions

- Recall that a school’s grievance procedure must “not 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 the privilege has waived the privilege.” 34 C.F.R. §106.45(b)(1)(x)
 - Examples:
 - Attorney-client privilege;
 - Doctor-patient privilege;
 - Spousal privilege.

136



Investigation Stage – 6. The Investigative Report

- The Investigative Report should:
 - Provide detailed summaries of all relevant investigatory interviews;
 - Provide detailed summaries of all relevant documents and/or other tangible evidence gathered during the investigation;
 - Provide the Title IX Investigator’s assessment on credibility, including an explanation of the basis of that assessment that cannot be related to an individual’s status as a Complainant, Respondent, or witness.
- The Investigative Report is then sent to the parties and to the Decisionmaker. The parties must be given at least 10 calendar days to review the report.

137



Investigative Techniques

- Prepare for the Investigation
 - Have a plan.
 - What are the allegations to be investigated?
 - What are the elements of the alleged violation? What information may be relevant to proving or disproving each element?
 - What evidence do you know about? What other potentially relevant evidence might be available? (e.g. surveillance video, text messages, emails, etc.)
 - Who are the known witnesses to be interviewed?
 - Consider the order and location of interviews.



138



Investigative Techniques

Do



Opt for open-ended questions (e.g. “What happened?”; “Who else was present?”)



Ask questions which elicit a chronological series of events; these are typically most helpful.



LISTEN. Ask the follow-up questions.



Consider whether tough or embarrassing questions should be saved until the end.

139

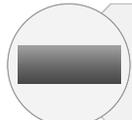


Investigative Techniques

Do Not



Do not use accusatory and compound questions (e.g. “Isn’t it true that ___?”).



Do not be aggressive or deliberately confusing; this is not an interrogation.



Do not set out to prove something – just gather information. Be open to exculpatory and inculpatory evidence and treat both as equally important.

140



Investigative Techniques

- Always ask for identities of others who were present or who may have knowledge of relevant information, whether inculpatory or exculpatory.
 - Do not stop with only those witnesses identified by the Complainant and/or Respondent.
 - The universe of potential witnesses is not limited to the school setting. Witnesses may include former students or employees or other third parties.
- Always ask if there is anything else they think you should know. Be open to witnesses providing you with information you did not know about.

141



Investigative Techniques

- The art of the follow-up.
 - Ask the difficult / uncomfortable questions.
 - Ask the follow-up questions – who, what, when, where, how.
 - Be open to follow-up interviews. It is often necessary to re-interview a Complainant, Respondent, or witness as new information comes to light.

142



Investigative Techniques

- Take detailed notes on witness interviews which record:
 - Questions asked and answers given.
 - Evidence related to each element of the alleged violation, inculpatory and exculpatory.
 - Evidence needed to assess credibility:
 - Witness's behavior / demeanor during the interview;
 - Any information which may suggest a motive to lie or other biases;
 - Inconsistencies; or
 - Information regarding the source and strength of evidence (first hand observations vs. rumor).

143



DETERMINATION STAGE



Determination Stage

- Once the investigative report is complete, the Title IX Coordinator or Investigator must:
 - provide a copy of the investigative report to the Complainant and Respondent (and their advisor) “for their review and written response;” and
 - provide a copy of the investigative report and evidence appendix to the Decisionmaker.
- The investigative report must be sent to both parties at least 10 days prior to when the Decisionmaker makes the determination regarding “responsibility” (e.g., whether the complained of conduct constitutes Title IX sexual harassment).

34 CFR §106.45(b)(5)(vii)

145



Written Exchange of Questions

- Once the parties receive the investigative report, the Decisionmaker must:
 - Provide the parties with a reasonable period of time to submit written, relevant questions that they wish to ask any party or witness.
 - This is the process we are recommending in the K-12 environment (as opposed to a live hearing).
 - Provide all parties with the responses to any such questions, and the opportunity for the parties to submit limited, follow-up questions.
 - If the Decisionmaker decides to exclude a proposed question as not relevant or otherwise inadmissible, they must explain to the party proposing the question of that decision.

34 CFR §106.45(b)(6)(ii)

146



Live Hearing Option

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

147



Live Hearing Option - Advisors

- If a live hearing is held, the school **must** provide for an advisor for each party.
 - The parties have the right to an advisor of their choosing, *but* if a party does not select their own advisor or that advisor cannot be present, the school must be prepared to provide an advisor.
 - A school-provided advisor may be selected by the school.
 - The advisor may, but is not required to, be an attorney.

34 C.F.R. §106.45(b)(6)(i)

148



Live Hearing Option

- The Initial Decisionmaker conducts the hearing and makes relevance determinations.
- Advisors to the parties, not the actual parties, may question and cross-examine parties and witnesses on relevant issues and evidence.
 - Note – A party or witness may opt *not* to participate in the live hearing.
 - A school may not threaten, coerce, intimidate, or discriminate against an individual in an attempt to secure their participation in the live hearing.
 - The Decisionmaker must not draw a negative inference regarding responsibility based solely on a party or witness' non-participation.

149



Live Hearing Option

- If held in person, and at the request of either party, the school must provide for the live hearing to occur with the parties and their advisors located in separate rooms.
- The school must provide for technology enabling the parties and the Decisionmaker to simultaneously see and hear the parties and/or witnesses.
 - The school must train the Decisionmaker on the technology used for the live hearing.
 - Technology must allow for observation of body language and demeanor simultaneous with answers to questions.
- Schools may adopt other rules that govern conduct at the live hearing so long as they are applied equally to all parties and otherwise comply with the Title IX regulations.

34 C.F.R. §106.45(b)(6)(i)

150



Live Hearing – Record Keeping

- An audio or audiovisual recording or transcript of any live hearing must be created and be available to the parties for inspection and review.

34 C.F.R. §106.45(b)(6)(i)

151



Standard of Evidence

- Title IX requires schools, in their Grievance Procedures, establish a consistent “standard of evidence” to be used in the grievance process.
- Schools can choose between two different standards:
 - **Preponderance of the Evidence** - “a fact is more likely true than not.”
 - **Clear and Convincing Evidence** – “concluding that a fact is highly probable to be true”
- We recommend using the “**preponderance of the evidence**” standard, which is the standard generally used in other school decisions (e.g. expulsion hearings).



34 CFR §106.45(b)(1)(vii)

152



Determination Regarding Responsibility

- Following the investigation, after the parties have been given the opportunity to exchange questions and upon evaluation of all relevant and not otherwise impermissible evidence:
 - The Decisionmaker must evaluate the facts using the standard of evidence (i.e. preponderance of the evidence) to determine whether sexual harassment occurred.
 - In doing so, the Decisionmaker must evaluate all relevant and not otherwise impermissible evidence for its persuasiveness.
 - If the Decisionmaker is not persuaded that sex discrimination occurred (apply the standard of evidence), regardless of the quantity of evidence, the Decisionmaker must not determine that sex discrimination occurred.
 - The Decisionmaker must issue a written decision regarding whether the Respondent is “responsible” for engaging in Title IX sexual harassment.

34 CFR §106.45(b)(7)(i)

153



Written Determination Regarding Responsibility

The written determination, which must be provided to the parties simultaneously, must include:

- An identification of the allegations potentially constituting sexual harassment.
- A description of the procedural steps followed from receipt of the Formal Complaint through the making of the determination. This description includes:
 - All notifications sent to the parties;
 - All interviews that were conducted of the parties and witnesses;
 - Descriptions of any site visits that occurred; and
 - A description of the methods used to gather evidence.

154



Written Determination Regarding Responsibility

- Components of written determination, cont'd.:
 - Findings of fact supporting the determination.
 - An explanation of all credibility and relevance determinations.
 - Conclusions regarding the application of the school's code of conduct to the facts.
 - A statement of, and rationale for:
 - the results as to each allegation, including determination of responsibility,
 - disciplinary sanctions imposed, and
 - whether remedies designed to restore or preserve equal access to the education program will be provided to the Complainant
 - The procedures and permissible bases for appeal of the written determination.

155

34 CFR §106.45(b)(7)(ii)



Determination Regarding Responsibility

The Title IX Coordinator is responsible for ensuring the “effective implementation” of any remedies set forth in the written determination, including coordinating the imposition of disciplinary sanctions.

34 CFR §106.45(b)(7)(iv)

156



APPEAL STAGE



Appeals

A school **must** offer both parties an opportunity to appeal the written determination regarding “responsibility” (and any earlier dismissal of a Formal Complaint) on the following bases:

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

NOTE: A school **may** offer equally to both parties additional bases for appeal.

34 CFR §106.45(b)(8)



Appeals

The school's appeal process must include the following:

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

34 CFR §106.45(b)(8)(iii)

RECORDKEEPING

Recordkeeping

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

161



Recordkeeping

- Schools also are required to **create** and **maintain** for a period of seven (7) years:
 - Records of any actions taken in response to the school's receipt of a **report or Formal Complaint** of Title IX sexual harassment.
 - Records should include documentation of supportive measures offered to the Complainant.
 - If no supportive measures are offered, the school must document the reasons why such a response was not clearly unreasonable in light of the known circumstances.

162



Recordkeeping

- The documentation regarding each “action” described above must include the basis for [the school’s] conclusion that:
 - its response was not “deliberately indifferent,” and
 - that it has “taken measures designed to restore or preserve equal access to the school’s education program or activity.”

34 CFR §106.45(b)(10)(ii)

163



Training Materials

- The training materials used to train the school’s Title IX officials must be published on a publicly accessible website or, if one is not maintained, must be made available for inspection by members of the public upon request.

34 CFR §106.45(b)(10)(i)(D)

164



Thank You!

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165



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166

