



Title IX Training

Overview of the Proposed New (Again) Title IX Regulations
and Review of Current Title IX Regulations

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PRESENTED BY THE METRO BUREAU

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Agenda

1. History and Overview of Title IX and when it is applicable
2. Overview of New Proposed Regulations
3. Comparison of New Proposed Regulations with Current Regulations
4. Review of the Current Title IX Regulations
5. Discussion Questions





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Title IX

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

History of Title IX

- **June 23, 1972**

Title IX of the Education Amendments of 1972 is enacted by Congress prohibiting sex discrimination in any educational program or activity receiving any type of federal financial aid.

- **May 27, 1975**

President signs the final version of Title IX.

- **Regulations issued June 1975**



History of Title IX cont.

- **May 4, 1980**

The U.S. Department of Education (ED) begins operating after its creation a year earlier and is given oversight of Title IX through the Office for Civil Rights (OCR).

- **February 26, 1992**

In [*Franklin v. Gwinnett County Public Schools*](#), the Supreme Court rules that monetary damages are available under Title IX.



Title IX History cont.

- **April 4, 2011**

ED [issues a policy guidance](#) which makes clear that Title IX's protections against sexual harassment and sexual violence apply to all students, including athletes.

- **April 24, 2013**

OCR issues [a Dear Colleague letter](#) reminding schools and institutions that retaliation is a violation of federal law.



Title IX History cont.

- **August 14, 2020**

Secretary of Education DeVos enacts several changes to Title IX regarding sexual harassment and misconduct.



Title IX History cont.

- **January 20, 2021**

President Biden releases [Executive Order 13988](#), “Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation,” which states, “All persons should receive equal treatment under the law, no matter their gender identity or sexual orientation.”

- **March 8, 2021**

President Biden releases [Executive Order 14021](#), “Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity.” It states the Biden Administration’s objective to guarantee to all students “an educational environment free from discrimination on the basis of sex, including discrimination in the form of sexual harassment, which encompasses sexual violence, and including discrimination on the basis of sexual orientation or gender identity,” citing Title IX as applicable governing law.



Title IX History cont.

- ***Bostock v. Clayton County*, US Supreme Court Case**
 - Interpreted Title VII in employment context to include prohibition against discrimination based on sexual orientation and gender identity.
 - *Bostock* decision used to support analogous prohibition under Title IX and proposed updates to Title IX regulations.



Bostock v Clayton County **2020 US Supreme Court Case**

Supreme Court concluded that discrimination based on sexual orientation and discrimination based on gender identity inherently involve treating individuals differently because of their sex. It reached this conclusion in the context of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq., which prohibits sex discrimination in employment.



Post-*Bostock* Opinion

- **June 16, 2021**

US Department of Education issues an interpretation to clarify the protection against discrimination based on sexual orientation and discrimination based on gender identity under Title IX in light of the Supreme Court's decision in *Bostock v. Clayton County*.





Guidelines *Always*
Applicable Under Title IX

General Rules for Educators

- Best practices for all educators based on true objective of Title IX, notwithstanding specific regulations in effect ...

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



Responsibilities for Staff and Administrators

- CALL THE TITLE IX COORDINATOR IMMEDIATELY.
- Report all knowledge of sexual harassment or alleged sexual harassment.
- DO NOT start the investigation yourself .
- DO NOT impose discipline for alleged sexual harassment without ensuring that the Title IX process is followed or does not apply.



Responsibilities for Staff and Administrators

- If a report is made to you and you are unable to involve the Title IX Coordinator before details are given by the reporter, immediately pass on all information received from the reporter to the Title IX Coordinator.
- Be familiar with the Title IX definition of sexual harassment.
- Be familiar with the scope of the district's educational program or activity.
- Discuss police involvement with legal and Title IX Coordinator.



Responsibilities for Staff and Administrators

- Assist with emergency removal or administrative leave decisions.
- Assist with supportive measures as requested.
- Assist with any resolutions from informal resolution agreements.
- Assist with remedies as requested.
- Assist with instituting discipline recommended by decision-maker.



Responsibilities for Staff and Administrators

- Keep parties and information confidential, to extent possible.
- Keep documentation of incidents that occur.
- Keep documentation of supportive measures/remedies that are instituted.

Responsibilities for Staff and Administrators

- Notify Title IX Coordinator if a respondent or complainant withdraws or quits.
- Direct students/parents to the Title IX policy and Title IX Coordinator when information is requested.
- Recognize and report acts of retaliation.



Responsibilities for Staff and Administrators

- Report knowledge of allegations of sexual harassment to the Title IX Coordinator EVEN IF the complainant/reporter does not want you to.
- Know that you may not be told what the final decision is after Title IX proceedings conclude—need to know basis.
- Refer parties to the Title IX Coordinator for status updates on pending grievance procedure.



If you are the witness in a Title IX investigation

...

- Be honest.
- What you say is being notated and will be shared with the parties and the decision-maker.
- You cannot be retaliated against for participating in the process. Report any retaliation.
- Provide answers based on personal knowledge. Do not guess or give opinions.





The New 2023 Proposed Title IX Regulations

2018 “New” Regulations Under Prior Administration

- How many pages?
 - 38
- How many comments?
 - 124,190
- Timeframe from proposed, to comments, to enactment:
 - Notice of Proposed Rulemaking (NPRM) posted 11/29/2018
 - Comment period 11/29/2018-1/28/2019
 - Final Rule Published 5/119/2020 (approximately 18 months)



2023 New Title IX Regulations

- How many pages?
 - 190
- How many comments?
 - 238,980
- Timeframe from proposed, to comments, to enactment:
 - NPRM 7/12/2022
 - Comment period 7/12/2022-9/12/2022
 - **Final Rule Published - May???**



Top 9 Proposed Changes

1. Broaden the Definition of Sexual Harassment and Define “Sex-Based Harassment”
2. Expand Implications of Off-Campus Conduct
3. Responding to Sex Discrimination
4. Define All Employees as “Mandatory Reporters”
5. Provide More Flexibility in the Decision Process on Complaints, Including Removing the Requirement for Live Hearings and Cross-Examination
6. Expand the Boundaries of Supportive Services
7. Clarify and Confirm Protection from Retaliation for Students, Employees, and Others who Exercise their Title IX Rights
8. Prohibit Exclusion Based on Sexual Orientation, Gender Identity, and Sex Characteristics
9. Clarify that Recipients Must Protect Students and Employees from Discrimination Based on Pregnancy or Related Conditions



Top Proposed Changes – No. 1

1. Broaden the Definition of Sexual Harassment and Define “Sex-Based Harassment”

- Proposed Sections 106.2 and 106.10 would prohibit all forms of sex discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.
- Proposed Section 106.2 make significant changes to what will be known as “sex-based harassment” that broaden the definition of quid pro quo harassment and broaden the definition for “hostile environment harassment” to, among other things, reach conduct that is “severe or pervasive” rather than “severe and pervasive.”



No. 1 Change in New Proposed Regulations

- §106.10 Scope
- Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.



No. 1 Change in New Proposed Regulations cont.

§ 106.2

• ~~Sexual~~Sex-based harassment prohibited by this part means sexual harassment, harassment on the bases described in § 106.10, and other conduct on the basis of sex that ~~satisfies one or more of the following~~ is:

- ~~(1)~~(1) Quid pro quo harassment. An employee ~~of, agent, or other person authorized by~~ the recipient to provide an aid, benefit, or service under the recipient's education program or activity explicitly or impliedly conditioning the provision of such an aid, benefit, or service ~~of the recipient on an individual~~ on a person's participation in unwelcome sexual conduct;



No. 1 Change in New Proposed Regulations cont.

- ~~(2)(2)~~ *Hostile-environment harassment*. Unwelcome **sex-based** conduct **determined by a reasonable person to be so** that is sufficiently severe, **or** pervasive, **that, based on the totality of the circumstances and evaluated subjectively and objectively** **offensive that it effectively**, denies or limits a person **equal access to**'s ability to participate in or benefit from the recipient's education program or activity (i.e., creates a hostile environment). **Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following:**
 - (i) The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;**
 - (ii) The type, frequency, and duration of the conduct;**
 - (iii) The parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the alleged unwelcome conduct;**
 - (iv) The location of the conduct, the context in which the conduct occurred, and the control the recipient has over the respondent; and**
 - (v) Other sex-based harassment in the recipient's education program or activity; or.**



Top Proposed Changes – No. 2

2. Expand Implications of Off-Campus Conduct

- Proposed Section 106.11 would require colleges and universities to address off-campus conduct that contributes to a hostile environment.
 - The proposed regulations would revive the Obama-era guidance requiring institutions to investigate misconduct that takes place off-campus.
 - Specifically, institutions would have an obligation to address sex-based harassment even if the harassment occurred outside the institution's program or activity, meaning at off-campus locations not under institutional control.
 - The proposed regulations go further than the Obama-era guidance in imposing an obligation to investigate when harassment occurs outside of the United States.



No. 2 Change in New Proposed Regulations

- **§106.11 Application.**

- Except as provided in this subpart, this part ~~106~~ applies to every recipient and to ~~the~~ all sex discrimination occurring under a recipient's education program or activity ~~operated by such recipient which receives Federal financial assistance~~ in the United States. For purposes of this section, conduct that occurs under a recipient's education program or activity includes but is not limited to conduct that occurs in a building owned or controlled by a student organization that is officially recognized by a postsecondary institution, and conduct that is subject to the recipient's disciplinary authority. A recipient has an obligation to address a sex-based hostile environment under its education program or activity, even if sex-based harassment contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States.



Top Proposed Changes – No. 3

3. Responding to Sex Discrimination

- Proposed Section 106.44(a) would require recipients to take prompt and effective action to end any prohibited sex discrimination that has occurred in its education program or activity, prevent its occurrence, and remedy its effects.



No. 3 Proposed Change Responding to Sex Discrimination

- §106.44 ~~Recipient's response to sexual harassment.~~ Action by a recipient to operate its education program or activity free from sex discrimination.
- (a) *General* ~~response to sexual harassment.~~ A recipient ~~with actual knowledge of sexual harassment~~ must take prompt and effective action to end any sex discrimination that has occurred in ~~an~~ its education program or activity ~~of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances. For the purposes of this section, §§ 106.30, and 106.45, "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, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. A recipient's response must treat complainants, prevent its recurrence, and remedy its effects. To ensure that it can satisfy this obligation, a recipient must comply with this section.~~



Top Proposed Changes – No.4

4. Define All Employees as “Mandatory Reporters”

- Proposed Section 106.44(c) would require that recipients require certain employees to notify the recipient’s Title IX Coordinator of conduct that may constitute sex discrimination under Title IX.
- Any employee at an elementary school or secondary school who is not a confidential employee would be obligated to notify the Title IX Coordinator. (Proposed Section 106.44(c)(1)).
- Allegations that a student may have been subjected to sex discrimination under Title IX must be reported to the Title IX Coordinator by not only anyone who has the authority to institute corrective measures, but also by any employee (who is not a confidential employee) who has responsibility for “administrative leadership, teaching or advising.” (Proposed Section 106.44(c)(2)(i)-(ii)).
- All other employees (who are not confidential employees) with information that either a student or employee has been subjected to potential sex discrimination under Title IX must either report such allegations to the Title IX Coordinator or share with the person who told them about the possible discrimination the contact information for the Title IX Coordinator and how to file a complaint, except that confidential employees would not be obligated to notify the Title IX Coordinator about possible sex discrimination. Confidential employees would be obligated only to provide an individual with the Title IX Coordinator’s contact information and information about reporting. (Proposed Sections 106.44(c)(2)(i)-(ii)); 106.44(d)(2)).



No. 4 Proposed Change

Define All Employees as Mandatory Reporters

- **(c) Notification requirements.**
 - (1) An elementary school or secondary school recipient must require all of its employees who are not confidential employees to notify the Title IX Coordinator when the employee has information about conduct that may constitute sex discrimination under Title IX.
 - (2) All other recipients must, at a minimum, require:
 - (i) Any employee who is not a confidential employee and who has authority to institute corrective measures on behalf of the recipient to notify the Title IX Coordinator when the employee has information about conduct that may constitute sex discrimination under Title IX;
 - (ii) Any employee who is not a confidential employee and who has responsibility for administrative leadership, teaching, or advising in the recipient's education program or activity to notify the Title IX Coordinator when the employee has information about a student being subjected to conduct that may constitute sex discrimination under Title IX;
 - (iii) Any employee who is not a confidential employee and who has responsibility for administrative leadership, teaching, or advising in the recipient's education program or activity and has information about an employee being subjected to conduct that may constitute sex discrimination under Title IX to either:



No. 4 Proposed Change

Define All Employees as Mandatory Reporters

- *(c) Notification requirements.*
 - (A) Notify the Title IX Coordinator when the employee has information about an employee being subjected to conduct that may constitute sex discrimination under Title IX; or
 - (B) Provide the contact information of the Title IX Coordinator and information about how to report sex discrimination to any person who provides the employee with the information; and
 - (iv) All other employees who are not confidential employees, if any, to either:
 - (A) Notify the Title IX Coordinator when the employee has information about conduct that may constitute sex discrimination under Title IX; or
 - (B) Provide the contact information of the Title IX Coordinator and information about how to report sex discrimination to any person who provides the employee with information about conduct that may constitute sex discrimination under Title IX.



No. 4 Proposed Change

Define All Employees as Mandatory Reporters

- [\(c\) Notification requirements.](#)
- (3) A postsecondary institution must make a fact-specific inquiry to determine whether the requirements of paragraph (c)(2) of this section apply to a person who is both a student and an employee of the postsecondary institution. In making this determination, a postsecondary institution must, at a minimum, consider whether the person's primary relationship with the postsecondary institution is to receive an education and whether the person learns of conduct that may constitute sex discrimination under Title IX in the postsecondary institution's education program or activity while performing employment-related work.
- (4) The requirements of paragraphs (c)(1) and (c)(2) of this section do not apply when the only employee with information about conduct that may constitute sex discrimination under Title IX is the employee-complainant.



No. 4 Proposed Change

Define All Employees as Mandatory Reporters

- *(d) Confidential employee requirements.*
- (2) A recipient must require a confidential employee to explain their confidential status to any person who informs the confidential employee of conduct that may constitute sex discrimination under Title IX and must provide that person with contact information for the recipient's Title IX Coordinator and explain how to report information about conduct that may constitute sex discrimination under Title IX.



Top Proposed Changes – No. 5

- 5. Provide More Flexibility in the Decision Process on Complaints, Including Removing the Requirement for Live Hearings and Cross-Examination**
- Proposed Section 106.45 would require all recipients to adopt grievance procedures in writing (proposed Section 106.45(a)(1) that incorporate the following:
 - The decision-maker may be the Title IX Coordinator or the investigator (*i.e.*, institutions may re-institute the single investigator model).
 - Parties must be given access to all the relevant evidence or an investigative report that summarizes the relevant evidence.
 - Parties must be allowed to respond to the evidence before a decision is made on the allegations, but it is up to the institution to determine just when and how that response is obtained (in writing, at a hearing, etc.).
 - Education institutions must employ a process that allows the decision-maker to adequately assess the credibility of parties and witnesses to the extent that credibility is both in dispute and relevant to the allegations. That process may take different forms.
 - The proposed regulations allow the decision-maker's report on whether sex-based harassment occurred to be more streamlined than the current regulations allow.



No. 5 Proposed Change

Provide More Flexibility in the Decision Process on Complaints

- §106.45 Grievance ~~process~~procedures for ~~formal~~the prompt and equitable resolution of complaints of ~~sexual harassment~~.
 - (a) *Discrimination on the basis of sex*. A recipient's treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute sex discrimination on the basis of sex under title IX.
 - ~~(b) *Grievance process*~~ (1) *General*. For ~~the purpose~~purposes of addressing ~~formal~~ complaints of ~~sexual harassment~~sex discrimination, a recipient's prompt and equitable grievance ~~process~~procedures must ~~comply with~~be in writing and include provisions that incorporate the requirements of this section. ~~Any provisions, rules, or practices other than those required by this section 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.~~ The requirements related to a respondent apply only to sex discrimination complaints alleging that a person violated the recipient's prohibition on sex discrimination. When a sex discrimination complaint alleges that a recipient's policy or practice discriminates on the basis of sex, the recipient is not considered a respondent.
 - (a)(2) *Complaint*. The following persons have a right to make a complaint of sex discrimination, including complaints of sex-based harassment, requesting that the recipient initiate its grievance procedures:



No. 5 Proposed Change

Provide More Flexibility in the Decision Process on Complaints

- **§106.45 continued**
 - (i) A complainant;
 - (ii) A person who has a right to make a complaint on behalf of a complainant under § 106.6(g);
 - (iii) The Title IX Coordinator;
 - (iv) With respect to complaints of sex discrimination other than sex-based harassment, any student or employee; or third party participating or attempting to participate in the recipient's education program or activity when the alleged sex discrimination occurred.



No. 5 Proposed Change

Provide More Flexibility in the Decision Process on Complaints

- §106.45 continued

- (1b) *Basic requirements for grievance ~~process~~ procedures*. A recipient's grievance ~~process~~ procedures must—:
- (1) ~~(i) Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. Remedies must be designed to restore or preserve equal access to the recipient's education program or activity. Such remedies may include the same individualized services described in § 106.30 as "supportive measures"; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent;~~
- ~~(ii) Require an objective evaluation of all relevant evidence— including both inculpatory and exculpatory evidence— and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness;~~
- ~~(iii)~~



No. 5 Proposed Change

Provide More Flexibility in the Decision Process on Complaints

- §106.45 continued

- (1) Require that any **individual person** designated ~~by a recipient~~ as a Title IX Coordinator, investigator, ~~decision maker, or any person designated by a recipient to facilitate an informal resolution process,~~ **decisionmaker** not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. ~~A recipient must ensure that Title IX Coordinators, investigators, decision makers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment in § 106.30, the scope of the recipient'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 recipient must ensure that decision makers receive training on any technology to be used at a live hearing and on 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, as set forth in paragraph (b)(6) of this section. A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section.~~
- ~~Any materials used to train Title IX Coordinators, investigators, decision makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.~~ **The decisionmaker may be the same person as the Title IX Coordinator or investigator;**



No. 5 Proposed Change

Provide More Flexibility in the Decision Process on Complaints

- §106.45 continued

- ~~(3) (iv)~~ Include a presumption that the respondent is not responsible for the alleged conduct until a determination ~~regarding responsibility~~ **whether sex discrimination occurred** is made at the conclusion of the **recipient's grievance ~~process~~ procedures for complaints of sex discrimination**;
- ~~(4) (v) Include~~ **Establish** reasonably prompt ~~time frames~~ **timeframes** for ~~conclusion~~ **the major stages** of the grievance ~~process~~ **procedures**, including ~~reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes, and a process that allows for the temporary delay of the grievance process or the limited~~ **reasonable extension of time frames** ~~timeframes on a case-by-case basis~~ for good cause with ~~written~~ notice to the ~~complainant and parties that includes~~ the ~~respondent of~~ **reason for the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities. Major stages include, for example, evaluation (i.e., the recipient's determination of whether to dismiss or investigate a complaint of sex discrimination); investigation; determination; and appeal, if any;**
- ~~(vi)~~ Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility;



No. 5 Proposed Change

Provide More Flexibility in the Decision Process on Complaints

- **§106.45 continued**

- ~~○ (vii) 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, and apply the same standard of evidence to all formal complaints of sexual harassment;~~
- ~~○ (viii) Include the procedures and permissible bases for the complainant and respondent to appeal;~~
- ~~○ (ix) Describe the range of supportive measures available to complainants and respondents; and~~
- ~~○ (x) Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information~~



No. 5 Proposed Change

Provide More Flexibility in the Decision Process on Complaints

- §106.45 continued
 - (5) Take reasonable steps to protect the privacy of the parties and witnesses during the pendency of a recipient's grievance procedures, provided that the steps do not restrict the ability of the parties to obtain and present evidence, including by speaking to witnesses, subject to § 106.71; consult with a family member, confidential resource, or advisor; prepare for a hearing, if one is offered; or otherwise defend their interests;
 - (6) Require an objective evaluation of all relevant evidence, consistent with the definition of relevant in § 106.2—including both inculpatory and exculpatory evidence—and provide that credibility determinations must not be based on a person's status as a complainant, respondent, or witness;



Top Proposed Changes – No. 6

6. **Expand the Boundaries of Supportive Services**

- Proposed Section 106.2 regulations define supportive measures to include “temporary measures” that may burden a respondent if the measures are temporary and are designed to protect the safety of the complainant or the institution’s educational environment or deter the respondent from engaging in sex-based harassment.
- The new regulations clarify that supportive measures may include “voluntary or involuntary changes in class, work, housing or extracurricular or any other activity, regardless of whether there is or is not a comparable alternative.”
- Any supportive measures that burden a respondent may only be in place during the pendency of a complaint.
- An educational institution must provide a party with the ability to obtain a timely review of the imposition of supportive measures by “an appropriate, impartial employee.”



No. 6 Proposed Change

Expand the Boundaries of Supportive Services

Supportive measures means non-disciplinary, non-punitive individualized **services measures** offered as appropriate, as reasonably available, **without unreasonably burdening a party**, and without fee or charge to the complainant or the respondent ~~before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to:~~ **(i) restore or preserve equal that party's access to the recipient's education program or activity without unreasonably burdening the other party, including temporary measures that burden a respondent imposed for non-punitive and non-disciplinary reasons and that are designed to protect the safety of all parties the complainant or the recipient's educational environment, or deter sexual the respondent from engaging in sex-based harassment. Supportive measures may include 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. 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. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures; **or (ii) provide support during the recipient's grievance procedures under § 106.45, and if applicable § 106.46, or during the informal resolution process under § 106.44(ak) .****



Top Proposed Changes – No. 7

- 7. Clarify and Confirm Protection from Retaliation for Students, Employees, and Others who Exercise their Title IX Rights**
- Proposed Sections 106.2 and 106.71 would define retaliation as intimidation, threats, coercion, or discrimination against anyone because the person has reported possible sex discrimination, made a sex-discrimination complaint, or participated in any way in a recipient's Title IX process. (Proposed Section 106.2).
 - A recipient would be prohibited from taking action against a student or employee under its code of conduct for the purpose of intimidating, threatening, coercing, or discriminating against someone because they provided information or made a complaint regarding sex discrimination. (Proposed § 106.71(a)).
 - Peer retaliation, which would be defined as retaliation by one student against another student, would also be prohibited. (Proposed §§ 106.2, 106.71(b)).



No. 7 Proposed Change

Clarify and Confirm Protection from Retaliation

- *Retaliation* means intimidation, threats, coercion, or discrimination against any person by a student, employee, person authorized by the recipient to provide aid, benefit, or service under the recipient's education program or activity, or recipient for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the person has reported information, made a complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part, including in an informal resolution process under § 106.44(k), in grievance procedures under § 106.45, and if applicable § 106.46, and in any other appropriate steps taken by a recipient in response to sex discrimination under § 106.44(f)(6).



No. 7 Proposed Change

Clarify and Confirm Protection from Retaliation

- ~~• (a) 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 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. Intimidation, threats, coercion, or discrimination, including charges~~
- A recipient must prohibit retaliation in its education program or activity. When a recipient receives information about conduct that may constitute retaliation, the recipient is obligated to comply with § 106.44. A recipient must initiate its grievance procedures upon receiving a complaint alleging retaliation under § 106.45. As set out in § 106.45(e), if the complaint is consolidated with a complaint of sex-based harassment involving a student complainant or student respondent at a postsecondary institution, the grievance procedures initiated by the consolidated complaint must comply with the requirements of §§ 106.45 and 106.46. Prohibited retaliation includes but is not limited to:
- (a) Initiating a disciplinary process against an individual a person for a code of conduct violationsviolation that de does not involve sex discrimination or sexual harassment, but arisearises out of the same facts orand circumstances as a report or complaint ofor information reported about possible sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with the exercise of any right or privilege secured by titleTitle IX or this part, constitutes retaliation. The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c); or



No. 7 Proposed Change

Clarify and Confirm Protection from Retaliation

~~(b) Specific circumstances.~~

- ~~(1) The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under paragraph (a) of this section.~~
- ~~(2) 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 prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.~~

(b) Peer retaliation.



Top Proposed Changes – No. 8

8. Prohibit Exclusion Based on Sexual Orientation, Gender Identity, and Sex Characteristics

- Proposed regulations § § 106.10, 106.31(a)(2), and 106.41(b)(2) would address discrimination based on sexual orientation, gender identity, and sex characteristics by:
 - Prohibiting recipients from separating or treating any person differently based on sex in a manner that subjects that person to more than minimal harm (unless otherwise permitted by Title IX). This includes policies and practices that prevent a student from participating in a recipient’s education program or activity consistent with their gender identity. This rule would not apply in contexts in which a particular practice is otherwise permitted by Title IX, such as admissions practices of traditionally single-sex postsecondary institutions or when permitted by a religious exemption. (Proposed § 106.31(a)(2)).



No. 8 Proposed Change

Prohibit Exclusion Based on Sexual Orientation, Gender Identity, and Sex Characteristics

- **§106.31 Education programs or activities.**
- (a)(2) In the limited circumstances in which Title IX or this part permits different treatment or separation on the basis of sex, a recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than de minimis harm, unless otherwise permitted by Title IX or this part. Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex.



Top Proposed Changes – No. 9

9. Clarify that Recipients Must Protect Students and Employees from Discrimination Based on Pregnancy or Related Conditions

- Proposed regulations would clarify that recipients must protect students and employees from discrimination based on pregnancy or related conditions.
- Proposed § 106.2 would modernize and clarify Title IX's prohibition against treating parents differently on the basis of sex, including by defining "parental status" to include, e.g., adoptive or stepparents, or legal guardians.
- Proposed § 106.40(b)(2) would require that once a recipient's employee receives notification of a student's pregnancy or related conditions, the employee must provide information on how to contact the Title IX Coordinator for further assistance. The Title IX Coordinator must:
 - Provide the student with the option of individualized, reasonable modifications as needed to prevent discrimination and ensure equal access to the recipient's education program or activity. (Proposed § 106.40(b)(3)(ii) and (b)(4)).
 - Allow the student a voluntary leave of absence for medical reasons and reinstatement upon return. (Proposed § 106.40(b)(3)(iii)).
 - Provide the student a clean, private space for lactation. (Proposed § 106.40(b)(3)(iv)).
- A recipient would be required to provide its employees with reasonable break time for lactation, as well as a clean and private lactation space. (Proposed § 106.57(e)(1)-(2)).



No. 9 Proposed Changes

Clarify that Recipients Must Protect Students and Employees from Discrimination Based on Pregnancy or Related Conditions

§106.40 ~~Marital~~ Parental, family, or ~~parental~~ marital status; pregnancy or related conditions.

(b) *Pregnancy and related conditions.*

Nondiscrimination. A recipient shall not discriminate ~~against any student, or exclude any student from~~ in its education program or activity, ~~including any class or extracurricular activity,~~ against any student based on the ~~basis of such~~ student's current, potential, or past pregnancy, ~~childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily~~ or related conditions. A recipient may permit a student based on pregnancy or related conditions to participate voluntarily in a separate portion of ~~the program or activity of the recipient.~~



No. 9 Proposed Changes

Clarify that Recipients Must Protect Students and Employees from Discrimination Based on Pregnancy or Related Conditions

§106.40 continued

~~(2) A recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.~~

~~(3) A recipient which operates a portion of its education program or activity separately for pregnant students, admittance to which is completely voluntary on the part of the student as provided in paragraph (b)(1) of this section shall ensure~~ **provided the recipient ensures** that the separate portion is comparable to that offered to ~~non-~~ **students who are not pregnant students and do not have related conditions.**

~~(4) A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery~~ **(2) Requirement for recipient to provide information. A recipient must ensure that when any employee is informed of a student's pregnancy or related conditions by the student or a person who has a legal right to act on behalf of the student, the employee promptly informs that person of how the person may notify the Title IX Coordinator of the student's pregnancy or related conditions for assistance and provides contact information for the Title IX Coordinator, unless the employee reasonably believes the Title IX Coordinator has already been notified.**



No. 9 Proposed Changes

Clarify that Recipients Must Protect Students and Employees from Discrimination Based on Pregnancy or Related Conditions

§106.40 continued

(3) *Specific actions to prevent discrimination and ensure equal access.* Once a student, or a person who has a legal right to act on behalf of the student, notifies the Title IX Coordinator of the student's pregnancy or related conditions, the Title IX Coordinator must promptly:

(ii) Provide the student with voluntary reasonable modifications to the recipient's policies, practices, or procedures because of pregnancy or related conditions, under paragraph (b)(4) of this section.

(iii) Allow the student a voluntary leave of absence from the recipient's education program or activity to cover, at minimum, the period of time deemed medically necessary by the student's physician or other licensed healthcare provider. To the extent that a recipient maintains a leave policy for students that allows a greater period of time than the medically necessary period, the recipient must permit the student to take leave under that policy instead if the student so chooses. Upon the student's return to the recipient's education program or activity, the student must be reinstated to the academic status and, as practicable, to the extracurricular status that the student held when the leave began.



No. 9 Proposed Change

Clarify that Recipients Must Protect Students and Employees from Discrimination Based on Pregnancy or Related Conditions

§106.40 continued

(iv) Ensure the availability of a lactation space, which must be a space other than a bathroom, that is clean, shielded from view, free from intrusion from others, and may be used by a student for expressing breast milk or breastfeeding as needed.

(4) Reasonable modifications for students because of pregnancy or related conditions.

Reasonable modifications to the recipient's policies, practices, or procedures for a student because of pregnancy or related conditions, for purposes of this section:

(i) Must be provided on an individualized and voluntary basis depending on the student's needs when necessary to prevent discrimination and ensure equal access to the recipient's education program or activity, unless the recipient can demonstrate that making the modification would fundamentally alter the recipient's education program or activity. A fundamental alteration is a change that is so significant that it alters the essential nature of the recipient's education program or activity;



No. 9 Proposed Changes

Clarify that Recipients Must Protect Students and Employees from Discrimination Based on Pregnancy or Related Conditions

§106.40 continued

(ii) Must be effectively implemented, coordinated, and documented by the Title IX Coordinator; and

(iii) May include but are not limited to breaks during class to attend to related health needs, expressing breast milk, or breastfeeding; intermittent absences to attend medical appointments; access to online or other homebound education; changes in schedule or course sequence; extension of time for coursework and rescheduling of tests and examinations; counseling; changes in physical space or supplies (for example, access to a larger desk or a footrest); elevator access; or other appropriate changes to policies, practices, or procedures.





**Back to our current Title IX
Regulations in Effect . . .**

Title IX

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

Title IX Regulations

- Provide detailed grievance procedure for Title IX sexual harassment allegations and are adopted by district policy.
- Per district policy, allegations of all other forms of sex discrimination should be addressed under the District's applicable non-discrimination or anti-harassment policies.
 - For example: gender identity issues, facilities issues, salary issues, hiring issues
- Focus today is on the Title IX sexual harassment regulations and grievance procedure.



Title IX Sexual Harassment Team Members

Position	Scope of Responsibility	Requirements
Title IX Coordinator	Person designated to coordinate and conduct intake reports and complaints, initiate formal complaints if necessary, and implement supportive measures and remedies, as necessary.	N/A
Investigator	Person designated to investigate, gather evidence, and compile an investigation report. Dismisses if mandatory or permissive.	May be the Title IX Coordinator.
Decision-Maker	Person who conducts an objective evaluation of all relevant evidence, administers question and answer period and rules on relevancy, issues a written determination regarding responsibility, dismisses if required.	Must not be the same person as the Title IX Coordinator or the Investigator.
Appeal Designee	Person designated to handle appeal, if any.	Must not be the same person as the Title IX Coordinator, Investigator, or Decision-Maker.

Title IX Sexual Harassment Parties

Complainant	An individual who is alleged to be the victim of conduct that could constitute sexual harassment
Respondent	An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.
Advisor	An individual that accompanies the complainant or respondent to any related meeting or proceeding in order to offer them support. The reporting party chooses their advisor, who may be, but is not required to be, an attorney.
Witness	An individual that have or could potentially have information related and/or relevant to the alleged incident.



Scope of “Educational Program or Activity”

- “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination **under any education program or activity** receiving Federal financial assistance.”
- Jurisdictional trigger
- “Locations, events, or circumstances over which the recipient [the school/district] exercised substantial control over both the respondent and the context in which the sexual harassment occurs . . .”



- Whether misconduct occurs on campus or off campus is not dispositive
- Title IX obligations for sexual harassment in K-12 institutions include incidents that occur off campus if:
 - the off-campus incident occurs as part of the school’s “operations” or
 - the school exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus.



Definition of “Sexual Harassment”

- Conduct **on the basis of sex** that satisfies one or more of the following:
 - (1) An employee of the school conditioning the provision of an aid, benefit, or service of the school on an individual’s participation in unwelcome sexual conduct (quid pro quo sexual 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 school’s education program or activity; or
 - (3) “Sexual assault”, “dating violence”, “domestic violence”, or “stalking” (as defined under Clery Act)



- Sexual assault” means an offense classified as a forcible or non-forcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.
- “Dating violence” means violence committed by a person—
 - (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and
 - (B) where the existence of such a relationship shall be determined based on a consideration of the following factors:
 - (i) The length of the relationship.
 - (ii) The type of relationship.
 - (iii) The frequency of interaction between the persons involved in the relationship.



- “Domestic violence” includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction.
- “Stalking” means engaging in a course of conduct directed at a specific person that would cause a reasonable person to—
 - (A) fear for his or her safety or the safety of others; or
 - (B) suffer substantial emotional distress.



An employee of the school conditioning the provision of an aid, benefit, or service of the school on an individual's participation in unwelcome sexual conduct (quid pro quo sexual harassment)

- Quid pro quo-#1
 - Encompasses situations where the quid pro quo nature of the incident is implied from the circumstances.
 - Ex: if you do or don't do x, I will or won't do x
 - Applies to all of a school's employees
 - May involve a power differential
 - "Unwelcome," as used in the first and second prongs of the definition of sexual harassment, is a subjective element



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

- “Catch-all”-#2
 - Focus factually on the nature of the misconduct itself – not on the victim’s response to the misconduct.
 - Determinations of severity, pervasiveness, and objective offensiveness depends on a constellation of factors, including the ages and numbers of parties involved, disability status, positions of authority of involved parties, etc.
 - Whether harassing conduct is “objectively offensive” must be evaluated, under a reasonable person standard, as a reasonable person in the complainant’s position.
 - No intent aspect.
 - Does not require that a complainant has already suffered loss of education before being able to report sexual harassment.



“On the Basis of Sex”

- Where conduct is sexual in nature, or where conduct references one sex or another, that suffices to constitute conduct “on the basis of sex.”
- Any individual – irrespective of sexual orientation or gender identity – may be victimized by the type of conduct defined as sexual harassment to which a school must respond under the Title IX regulations.

-
- “If the conduct alleged in the formal complaint would not constitute sexual harassment as defined . . . then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX.”
 - BUT such a dismissal does not preclude action under another provision of the recipient’s code of conduct.

-
- Definition under Title IX is different than interpretation under Title VII—must comply with both.
 - Schools may continue to address harassing conduct that does not meet the new definition of sexual harassment under other provisions of the school's own code of conduct.

Reports of Sexual Harassment

- **The school is deemed to have actual knowledge of sexual harassment allegations if ANY staff member has knowledge.**
- The School is REQUIRED to respond promptly when it has actual knowledge in a way that is not deliberately indifferent.
- 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.
- 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.



Actual Knowledge Responsibilities

- Train ALL staff on what is ACTUAL KNOWLEDGE.
- Notice of sexual harassment or allegations of sexual harassment **to:**
 - The Title IX Coordinator, OR
 - Any official of the recipient who has authority to institute corrective measures on behalf of the recipient, OR
 - **Any employee of an elementary and secondary school**
- **NOTICE IS NOT JUST A REPORT TO THE TITLE IX COORDINATOR**
- REQUIRE that staff report any notice of sexual harassment or allegations of sexual harassment SAME DAY.





Title IX Grievance Process

Grievance Procedure for Sexual Harassment Formal Complaints

1. Report
2. Supportive measures and information on formal complaint
3. Formal complaint
4. Written notice to parties
5. Investigation
6. Inspection and review of evidence
7. Investigative report with review and written response
8. Question and Answer period (and hearing if applicable)
9. Written determination
10. Appeal on certain bases
11. Notice of appeal and opportunity to respond
12. Final written decision on appeal



Overarching Requirements for Sexual Harassment Grievance Procedure

1. Have Presumption that Respondent is Not Responsible.
2. Exclude Privileged Information
3. Follow Grievance Procedure Before Imposing Sanctions
4. No Bias or Conflict of Interest
5. Consider All Relevant Evidence Under Proper Standard (Preponderance or Clear and Convincing)
6. Include Range of Possible Sanctions/Remedies and Describe Supportive Measures
7. Follow Reasonable and Prompt Timelines
8. Removal/Administrative Leave Permitted in Certain Instances
9. Remember Grounds for Dismissal
10. Informal Resolution Process After Formal Complaint is Optional
11. Train Staff
12. Keep Records
13. No Retaliation
14. Maintain Confidentiality



Report Received

Title IX Coordinator must promptly reach out to the individual who is alleged to be the victim of conduct that could constitute sexual harassment (a/k/a the complainant) to:

1. discuss the availability of supportive measures,
2. consider the complainant's wishes with respect to supportive measures,
3. inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and
4. explain to the complainant the process for filing a formal complaint.



Supportive Measures

- *Supportive measures* means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent.
- Such measures are 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 deter sexual harassment.
- Supportive measures may include 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 locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.
- The 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.



Formal Complaint

- “*Formal complaint*” means 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.



Written Notice to Parties

- Upon receipt of a formal complaint (or later as additional allegations become known), the School has to provide the following written notice to the parties who are known:
 1. Notice of the School's grievance process that complies with this section, including any informal resolution process.
 2. Notice of the allegations of sexual harassment potentially constituting sexual harassment, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview.
 3. Notice that the respondent is presumed not responsible for the alleged conduct, and that a determination regarding responsibility is made at the conclusion of the grievance process.
 4. Notice to the parties that they may have an advisor of their choice who may be, but is not required to be, an attorney, and may inspect and review evidence.
 5. Notice of any provision in the School's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.



Conducting the Investigation

- Requirement 1: Trained Investigator
- Requirement 2: Equitable Treatment of Parties
- Requirement 3: Impartial Assessment (no prejudgment, no bias, no conflict of interest)
- Requirement 4: Evidence Review
- Requirement 5: Detailed Written Investigative Report



Investigative Report

- Prior to completion of their investigative report, 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 parties must have at least ten (10) business days to submit a written response, which the investigator will consider prior to completion of the investigative report.
- Create an investigative report that fairly summarizes relevant evidence.
- Send investigative report to each party at least 10 days prior to the determination regarding responsibility.
- All for review and written response.



Timeline and Notices

- “Reasonably prompt” (30 working days to gather the evidence).
- Temporary delays can be granted for good cause.
- Investigation should start immediately.
- If union involved, expect union reps to be present from the start and review any applicable CBA provisions.
- Written notice of the details regarding investigative meetings, including the purpose.



The Duty to Investigate

- The thoroughness of the investigation is critical to the school's ability to determine whether or not misconduct or harassment occurred and which type of disciplinary action, if any, is required as a matter of law or organizational policy.
- Failure to carry out an adequate investigation may contribute to potential liability for the district.

Evidence

- Objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence.
- Credibility determinations may not be based on a person's status as a complainant, respondent, or witness.
- The standard of evidence to be used to determine responsibility must be either the clear and convincing standard or the preponderance of the evidence standard.



Privileged Evidence Excluded

- Precludes a recipient from using information or evidence protected by a legally recognized privilege unless the holder of the privilege has waived the privilege.
 - Medical records
 - Mental health treatment records
 - Attorney-client communications
 - Spousal privilege



When investigating, 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 recipient obtains that party’s voluntary, written consent to do so for a grievance process under this section.”

“A recipient’s grievance process 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 such privilege has waived the privilege.”



Burden of Proof 106.45(b)(5)(i)

- Schools cannot restrict either party's ability to discuss the allegations or gather and present evidence, HOWEVER:
- Burden of proof sufficient to reach a determination regarding responsibility rests on the school.
- Burden of proof is on school to conduct investigation, interview witnesses, gather evidence.



Hearing and Question and Answer Period

- Institutions of higher education must hold a hearing prior to a determination of responsibility.
- **K-12 schools do not have to hold a hearing**, though they may choose to add a hearing to their grievance procedure.
- With or without a hearing, the decision-maker must still 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.



Written Determination

- Provided simultaneously to the parties.
- Identification of the allegations potentially constituting sexual harassment.
- A description of the procedural steps taken from the receipt of the formal complaint through the determination.
- Findings of fact supporting the determination.
- 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:
 - A determination regarding responsibility
 - Any disciplinary sanctions the School imposes on the respondent
 - Whether remedies designed to restore or preserve equal access to the School's education program or activity will be provided by the School to the complainant
- Procedures and permissible bases for appeal.



Appeal Bases

- (A) Procedural irregularity that affected the outcome of the matter;
- (B) 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;
- (C) 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; or
- (D) Any other bases allowed equally to either party.



Appeal

- Different decision-maker.
- Notice to the other party.
- Opportunity for both parties to submit a written statement in support of or challenge outcome.
- Written decision describing the result of the appeal and the rationale for the result and provided simultaneously to the parties.
- Make sure no conflict of interest or bias.
- Train.

Good Cause Delay – With Written Notice

- Good cause may include considerations such as:
 - The absence of a party, a party's advisor, or a witness;
 - Concurrent law enforcement activity; or
 - The need for language assistance or accommodation of disabilities.



Emergency Removal

- BEFORE removal:
 - Undertake an individualized safety and risk analysis; and
 - Determine that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal.
- Provide the respondent with notice and an opportunity to challenge the decision immediately following the removal.
- Follow the IDEA and Section 504 before any removals.



Grounds for Dismissal

- The School MUST investigate the formal complaint.
- If the conduct alleged in the formal complaint:
 1. would not constitute sexual harassment even if proved,
 2. did not occur in the School's education program or activity, or
 3. did not occur against a person in the United States,

Then the School must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under Title IX.

- However, such a dismissal does not preclude action under another provision of the School's code of conduct.



Permissive Grounds for Dismissal

- The School may also dismiss the formal complaint or any allegations therein if at any time during the investigation:
 1. a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein;
 2. the respondent is no longer enrolled or employed by the School; or
 3. special circumstances prevent the School from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.



Informal Resolution

- Cannot require that the student or employee waive their right to the grievance process.
- Cannot go forward with an informal process for sexual harassment allegations prior to there being a formal complaint.
- Obtain voluntary written consent.
- Not permitted for allegations that an employee sexually harassed a student.
- Written notice to the parties is required, disclosing:
 1. the allegations;
 2. 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;
 3. 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
 4. any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.



Recordkeeping

- Keep for 7 years
- Investigation Records
- Appeal Records
- Informal Resolution Records
- Training Materials
- Response to all reports and formal complaints

No Retaliation Provision Added for All Sex Discrimination Complaints

- 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 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.
- Intimidation, threats, coercion, or discrimination, including 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 or 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 or this part, constitutes retaliation.
- Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination complaints not alleging sexual harassment.



Maintain Confidentiality

- The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint or sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by [FERPA], or as required by law, or to carry out the purposes of [Title IX], including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.



Rape Shield Law – Complainants

- Evidence and questions regarding complainants' sexual predisposition or prior sexual behavior are not relevant.
- Unless:
 - Offered to prove someone else committed alleged conduct.
 - Offered to prove past sexual relationship with Respondent to establish consent.





Title IX Coordinator Responsibilities

Title IX Coordinator Responsibilities

- Designations of Title IX team
- Posting notices, contact info, and training docs
- Notice to school community
- Confirm training completion
- Actual knowledge responsibilities
- Review/Update policies and procedures (including CBAs and Handbooks)
- Review form documents
- Timely review/handle reports
- Keep documentation



Title IX Coordinator Responsibilities *Cont.*

- Be available/accessible for reports
- Determine what Policy/Procedure to apply
- Provide details on grievance process and formal complaints
- Discuss availability of and coordinate effective implementation of supportive measures
- Consider signing formal complaint if not filed by Complainant
- Provide Notices to Respondent and Complainant
- Consider Dismissal



Title IX Coordinator Responsibilities *Cont.*

- Consider removal/admin leave
- Informal resolution process management
- Ensure grievance process (as applicable) is followed and all notices provided
- Coordinate the effective implementation of any remedies



Title IX Coordinator *MAY* Also:

- Coordinate notices, party inspection, and review of evidence and investigative report
- Coordinate appeal process
- Perform investigation



Discussion Questions

1. Katie and Sarah are 11th graders who snuck into a party held by Charlie, a 12th grader, on a Friday night. After the party, Katie tells Sarah that Charlie cornered her and touched her in a way that made Katie uncomfortable. Sarah is worried about Katie and, on Monday, tells one of her teachers about the incident.

- What should the teacher do?
- Is this conduct covered by Title IX?
- Should any other actions be taken? If so, what?



2. High school student Tony accuses fellow student Sam of sexual harassment. Tony has a long disciplinary record, multiple suspensions and has, on at least one occasion, falsely accused another student of theft.

- What are some potential concerns that might arise in this scenario?
- What should the Title IX Coordinator do?
- What should the Investigator do?



-
3. 11th grader Emmanuel tells a teacher at his school that he was sexually assaulted by a fellow student. The teacher tells Emmanuel that the offense is a crime, so it must be reported to the police.
- What else, if anything, does the teacher need to do?
 - Does this fall under Title IX?

4. High school principal Lisa overhears teachers discussing an incident where a student inappropriately touched another student while on a school bus. Principal Lisa interviews the students. Both students seem dismissive of the incident and deny that they are bothered or hurt by what occurred.

- Should Principal Lisa investigate further?
- Should Principal Lisa inform the students' parents?
- Is there anything else Principal Lisa should do in reference to this incident?
- Is there anyone else who might have Title IX reporting or investigating responsibilities in this scenario? Who?



Lawyerly Disclaimer ... (we can't help it)

- These training materials are informational in nature and should not be construed as legal advice and are not provided to address specific grievance situations.
- Consult with your legal counsel as necessary to address specific Title IX report and grievance situations and investigations.
- Or email your school law attorney, or Aimee Gibbs. or Angelina Delmastro at:
 - agibbs@dickinsonwright.com
 - adelmastro@dickinsonwright.com

