

# **The New Title IX: What Principals Need to Know**

# What We Will Cover

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- **I. What is Title IX?**
- **II. Overview of the New Sexual Harassment Rule**
- **III. New Definition of Sexual Harassment**
- **IV. Conducting an Investigation**
- **V. Emergency Removal**
- **VI. What to Do When You Receive a Report – the Real World**
- **VII. Handling Other Title IX Issues**

# **I. What is Title IX?**

# Title IX

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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, Public Law 92-318 of the Education Amendments of 1972

# How is Title IX Enforced?

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- U.S. Department of Education Office for Civil Rights
- Assurances associated with receipt of federal funding
- Private lawsuits for money damages

# What could be meant by “discrimination”?

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- Any act that differentiates in a negative way based on sex
- Unequal access to opportunities including athletics
- Different treatment in a class or grading
- Refusal to hire or promote because of sex
- Bullying, Harassment or Mistreatment Based on Sex
- “Sexual harassment”

Discrimination based on sex

Harassment based on sex

Bullying based on sex

Sexual harassment



# How Title IX is layered on top of other obligations related to sexual harassment

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- Mandatory Reporting of Sexually Violent Crime
- Mandatory Reporting of Child Abuse
- State Law Prohibiting Bullying
- Other federal laws prohibiting bullying, harassment, and discrimination based on other characteristics

# What is New?

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- Title IX now has a very specific way that one specific kind of sexual harassment must be handled.
- All other sexual harassment should be addressed through normal bullying/harassment processes.
- All other types of discrimination based on sex should still be addressed and handled through existing processes.
- All sex offenses and child abuse should still be reported.

## **II. Overview of the New Sexual Harassment Rule**

# The sexual harassment rule in a nutshell:

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A recipient with actual knowledge of sexual harassment in an education program or activity against a person in the United States must respond promptly and in a manner that is not deliberately indifferent.

# “A Recipient with Actual Knowledge”:

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Actual knowledge means notice of sexual harassment or allegations of sexual harassment to any employee of an elementary and secondary school.

- EVERYONE who knows is responsible for reporting
- Create a culture of reporting
- Allegations count! The test is not whether the allegations can be proven at the time they are heard; the test is whether the allegations if true are sexual harassment at the time they are heard.

# Examples of Actual Knowledge

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- The child nutrition manager at your school hears the kids discussing how a teacher and a student are having sex.
- The department chair learns from his mentee that the assistant principal has sent her a picture of his penis.
- A student confides in a teacher that another teacher has sent her inappropriate text messages.

# “In An Education Program or Activity”

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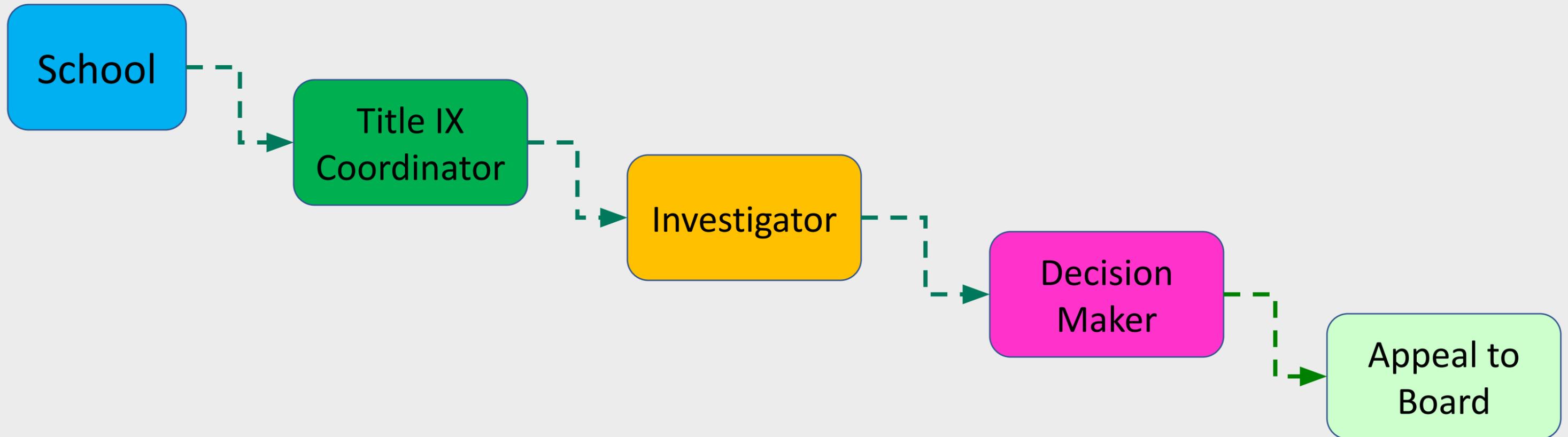
- New rule only covers conduct at “locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs.”
- Conduct must have occurred in the United States.
- Conduct occurring outside of the school context is not Title IX, but it could have an impact.

# **“Must Respond Promptly and in a Manner that is Not Deliberately Indifferent.”**

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- REPORT ALLEGATIONS OF SEXUAL HARASSMENT TO TITLE IX COORDINATOR.
- Follow the grievance process to demonstrate no deliberate indifference.
- Alleviate the hostile environment so that any alleged victim can access education.

# Flowchart



# The Cast – Roles in Title IX

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- **Complainant:** person who is the alleged victim of sexual harassment
- **Respondent:** person who is the alleged perpetrator of sexual harassment
- **Title IX Coordinator:** person who keeps the process on track
- **Investigator:** person designated to conduct an unbiased investigation
- **Decision-Maker:** person who makes the decision about whether sexual harassment occurred

# Title IX Terms

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- **Report:** the initial statement made to the Title IX Coordinator, which can come from any person
- **Formal Complaint:** a document that can only be filed by the complainant, parent/guardian of complainant, or Title IX Coordinator that starts the formal grievance process
- **Supportive Measures:** non-punitive steps that can be taken to help a complainant and/or respondent
- **Punitive Measures:** discipline for sexual harassment which may only be imposed after a formal grievance process
- **Emergency Removal:** process for removing a student from school or activity if a substantial threat to safety exists

# **III. Definition of “Sexual Harassment” under Title IX**

# 3 Types of “Sexual Harassment”

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- 1) Quid pro quo: An employee conditions a benefit on unwelcomed sexual conduct
  
- 2) Hostile Environment
  
- 3) Four Criminal Offenses:
  - Sexual Assault
  - Dating Violence
  - Domestic Violence
  - Stalking

# Type 1: Quid Pro Quo

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- An employee conditioning a benefit on sexual favors or attention
- Includes the threat of poor treatment if the victim will not consent to sexual favors
- The "sexual conduct" may be verbal or physical, and the "asking" may be done either openly or implied; regardless, it must be unwelcome.
- Can only be perpetrated by an employee
- Look out for with Supervisor-subordinate relationships; coach-athlete relationships

# Example of Quid Pro Quo Harassment

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A new teacher shares with you that the assistant principal has been calling her “Beautiful” as a nickname, texting her in the evenings, and mentioned “I’ll arrange it so that I’m the one who evaluates you” while at the same time grabbing her around the waist.

# Example of Quid Pro Quo Harassment

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A student tells you that his coach has asked him for pictures of his “junk” and said something to the effect of “if you want to keep your playing time, you’ll help me out.”

# Type 2: The New Hostile Environment Standard

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- A hostile environment occurs when unwelcome conduct is so severe, pervasive, **AND** objectively offensive that it effectively denies a person access to education or employment.
  - Severe could be a single incident
  - Pervasive could be a myriad of small incidents which standing alone would not be harassment
  - Both severity and pervasiveness depend on circumstances, age, maturity, and roles

# Example of Hostile Environment Harassment

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Parent of male student reports that other boys threw water on their son and said that he urinated himself on overnight trip. Then, teacher reports to you that a group of 9th grade girls referred to this child as a derogatory word, because he complained about the water incident. Finally, a student reports that the other kids are telling this child that their older brother is going to beat him up because he's gay

# Example of Hostile Environment Harassment

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A student comes forward and reports to you that the social studies teacher is constantly making jokes about the kids' sex lives. The teacher has started pulling the student aside during class and complimenting the student. In one case, the teacher mentioned the size of his penis. This teacher then pulled the student aside during class and showed the student a text message that read "will you blow me?"

# Example of Hostile Environment Harassment

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A teacher assistant in your elementary school comes to you because the teacher with whom he is working is making him feel uncomfortable. While working together, the teacher has grabbed his buttocks and alluded to having sex in the closet of the classroom. The teacher assistant has told the teacher that he is not interested, but the teacher has continued every day to comment on what he is wearing, compliment his butt, and stare at him during class.

# Example of Hostile Environment Harassment

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Female student reports that another student raped her over holiday break. The friends of the alleged perpetrator spread rumors that the alleged victim is a slut and a liar. The alleged victim shows you text messages from three friends calling her a “snitch” and a “ho.” When she walks to class, these students throw their trash from lunch at her and yell that she “belongs in the trash.”

# Type 3: The Four Crimes

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- **Sexual assault** -> any forcible or non-forcible sex offense
- **Dating violence** -> violence committed by a person who is or has been in a romantic or intimate relationship with the victim
- **Domestic violence** -> violence committed by a person who is the spouse or similarly situated relationship to the victim, cohabitating with the victim, or shares a child with the victim
- **Stalking** -> conduct directed at a specific victim that would cause a reasonable person to fear for their safety or suffer emotional distress

# Example of Sexual Assault

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Student alleges that another student pulled him into the bathroom and put her hand down his jeans and touched his penis without consent.

# Example of Dating Violence

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Two students are a romantic couple for what has appeared to be a consensual relationship. One student alleges however that during the basketball game last Friday night, while they were just outside of the gym, they were making out and then he pulled down her pants and penetrated her. The student states that she told her boyfriend that she did not want to have sex.

# Example of Domestic Violence

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One of the bus drivers and a child nutrition staff member at your school are married. The child nutrition worker comes to you because she is terrified of her husband, claiming that he has come into the cafeteria and pushed her into one of the refrigerators in the back.

# Example of Stalking

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A student tells you that another student has been sending him messages constantly. At first it was a joke, but he has asked it to stop and the other student has refused. In the locker room, this student appeared out of nowhere while the alleged victim was changing. He has been in the library and seen this person just staring at him from a distance.

# **IV. Conducting an Investigation**

# Initial Steps

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- Receive notice from Title IX Coordinator that you are the investigator.
- Review formal complaint.
- Send notices setting up meetings.

## NOTICE OF INVESTIGATORY MEETING

This notice is to inform you that you are scheduled to meet with me regarding a formal complaint of sexual harassment on **[Insert Date and Time]**. The meeting will take place **[insert location]**. The purpose of this meeting is to discuss the allegations of the formal complaint and your knowledge regarding the events. **[Insert name of other individual]** will also be present at this meeting to assist me.

You may have an advisor present at this meeting. Your advisor will be limited to advising you and will not be permitted to speak for you. Your advisor will be asked to leave if this policy is not followed. If you wish to bring an attorney as your advisor, please notify me at least 24 hours before your scheduled meeting time so that arrangements can be made for the school system to have an attorney present.

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Title IX Investigator

Date

# Conducting an Interview

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- Parties may bring an advocate to the interview.
- The advocate may not speak on behalf of the interviewee.
- If the party plans to bring an attorney to the interview, notify Title IX Coordinator before the meeting.
- Explain to the interviewee that their statements will be included in an investigative report.

# Conducting an Interview (Cont'd)

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- Ask open-ended questions and then drill into specifics.
- Ask for details and explanations.
- Take notes with the understanding that they will become part of the evidence.
- Ask for any documentation (text messages, emails, videos, etc.).
- Always ask if there is anyone else with whom you should speak.

# Gather Additional Information

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- Gather any information that can be acquired without interviews.
- If necessary, invite parties to return for follow-up interviews.
- Notice is still required.

# Opportunity to Review Evidence

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- Before finalizing the investigative report, provide the parties a chance to review all “direct evidence” gathered.
- Redact names of other students but provide a key (for internal use).
- Parties have 10 days to review evidence and submit any additional evidence/statements to the investigator before investigative report may be finalized.
- Provide a hard copy of the evidence. Information should not be emailed.

## TITLE IX INVESTIGATION EVIDENCE

The evidence relevant to the formal complaint of sexual harassment to which you are a party is enclosed. If you would like to provide any additional information or make any further statement for my consideration and inclusion in the final investigative report, you must provide these written documents to me no later than 3:00 p.m. on **[10 calendar days away]**. These additional materials must be submitted to me via e-mail at: **[insert email address]**.

Title IX Investigator

Date

# Elements of the Investigative Report

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- Date [Formal Complaint](#) Received
- List of Interviews
- List of Documents Gathered
- List of Any Site Visits
- Date Parties were provided Evidence and Right to Submit Statement:  

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- Description of Events Established by Evidence
- List each allegation from the Title IX Formal Complaint. Indicate if the allegation was substantiated by the evidence.

# Key Components for Investigator

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- Remain unbiased.
- Monitor and check assumptions about alleged victims and perpetrators.
- Understand the role of the Investigator is to gather facts (Fact Gatherer) and not make decisions (not a Decision-Maker).
- Gather as much information as possible and compile it in a logical manner so the decision-maker can make an informed decision based on facts and evidence.

# After the Investigation:

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- Superintendent or designee is the decision-maker and will manage the process from here.
- Either party may request a hearing and/or submit written questions. Both parties have the right to submit written statements.
- Superintendent or designee makes a decision about responsibility and determines long-term suspension.
- Appeal is available to both parties to the Board of Education.

# V. Emergency Removal

# What is Emergency Removal?

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- Suspension is a punitive measure which may not be imposed for sexual harassment (though it may be imposed for other conduct).
- Emergency removal is allowed if a student's continued presence at school or a particular activity poses a demonstrable threat to health or safety.
- Removal includes exclusion from particular classes or teams if the student cannot be placed in an equivalent program.
- The scope of the removal must be tailored to the safety concern, not discipline.

# How Does Emergency Removal Work?

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- There must be evidence to demonstrate the health or safety concern (not the justification for discipline).
- A school-level team must assess the evidence presented that justifies the removal.
- Automatic appeal is directed to the hearing officer.

# Where is the location for removal?

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- Removal can be assignment to alternative school, alternative placement, or from a particular activity.
- Emergency removal is **NOT** a suspension.
- If not “Title IX Sexual Harassment,” then there is no need to follow this process.

# **VII. What to Do When You Receive a Report of Harassment – the Real World**

# Step 1: Always Report

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- Your mandatory reporting obligations to law enforcement and social services are still in place.
  - Sexually violent crimes against children
  - Child Abuse
- These reports are made regardless of where conduct occurred or whether it meets the definition of Title IX sexual harassment.
- NCCASA training will help you to identify ,when to report, and inform you of what to do.

# Determine if Title IX Applies

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- Did this incident occur in the education program?
- Do the allegations, if true, meet one of the three sexual harassment definitions?
  - Quid pro quo (employees only)
  - Hostile environment
  - Crimes: sexual assault, dating violence, domestic violence, stalking
- If yes to both questions, report to Title IX Coordinator.
- If you are not sure, report to Title IX Coordinator.
- If “no” to Question #1, determine how you can support the alleged victim at school.
- If “no” to question #2, refer to the bullying/harassment policy for students or report to Human Resources for employees.

# Title IX Coordinator: Share Specific Support Measures

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- Title IX Coordinator works with complainant and other school officials to determine “supportive measures” regardless of whether a formal complaint is filed.
- Title IX Coordinator determines if additional steps are necessary to not be deliberately indifferent.

# Behind the Scenes with the Title IX Coordinator

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- The Title IX Coordinator is explaining the rights to the complainant and respondent.
- The Title IX Coordinator is evaluating whether the allegations meet the definition of sexual harassment under Title IX. If not, the matter may be referred to school or HR.
- The complainant may opt not to file a complaint. At that point, the Title IX Coordinator must decide whether to file a complaint anyway.
- Once the complaint is filed, the Title IX Coordinator must determine whether to dismiss the complaint or proceed with an investigation.
- The process may stop at any point for the parties to hold an informal resolution (information resolution coordinated by Title IX Coordinator, not investigator).

Marie was late to Math I Class. When she arrived, she seemed upset. Marie reports to her teacher that she and her boyfriend went to a part of the school campus where they were making out. There were no cameras in the area where she and her boyfriend were located.

Marie further shared that her boyfriend pulled down her pants and penetrated her from behind. Marie also shared that she told her boyfriend to stop.

The teacher informs the principal who reports the incident to law enforcement and the Title IX Coordinator.

The Title IX Coordinator contacts you, the principal, to say that a formal complaint has been filed and that you are the Investigator.

**What do you do?**

# What do you do?

- Set up interviews.
- Record information on the [Notice of Investigatory Meeting](#) document.
- Gather documents, including , but not limited to the following:
  - Video footage near the area
  - Text messages from either party
- Interview other witnesses.
- Interview parties.
- Each subsequent interview of complainant or respondent must be preceded by a meeting notice.
- Take notes during the interview.
- Type written notes from the interview.

# Key Facts Revealed from the Investigation:

- The video shows the students going on and off camera exactly where Marie alleged, they did.
- Marie was interviewed twice and the only discrepancy in her story was that she did not mention she went into the bathroom after the incident in the first interview, but said she did the second time (confirmed by the video).
- Boyfriend's interviews were consistent except Boyfriend says he was wearing jeans, but Marie and video show he was wearing athletic shorts.
- Marie and Boyfriend agree on other facts except that Boyfriend says that the penetration did not occur, and Marie never told him she wanted him to stop.

# What do you do?

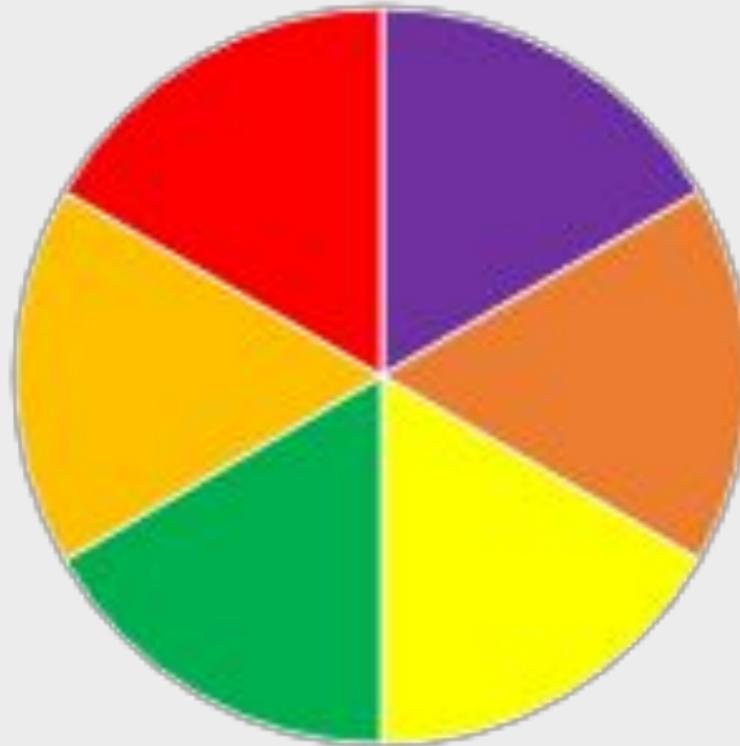
1. Compile the evidence. Interview notes should be typed, and names redacted with a key.
2. Give the compiled evidence from both parties and wait for any additional information. You must wait 10 days.
3. Using the compiled evidence and anything additional provided, complete the investigative report form.
4. If needed, complete a long-term suspension letter.

# VII. Handling Other Title IX Issues



# What could be meant by “discrimination”?

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- Equal Opportunities
- Freedom from Harassment and Bullying
- Freedom from “Title IX Sexual Harassment”
- Fair Treatment in Sexual Harassment Disputes
- Right to Know District Policies, Practices, and Records
- Equal Access

# Access = Open Doors to All

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ALL children should be able to come to school.

Consider whether a policy creates a barrier to a child being able to come to school

Consider whether the policy is excluding children based on their innate characteristics

# What is “sex” Discrimination?

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## Title VII

- *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75 (1992); *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007)
  - Sex has the same definition under Title VII and Title IX
- *Price Waterhouse v. Hopkins* (SCOTUS 1989)
  - Sex stereotyping is sex discrimination
  - Failing to promote until a woman decided to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry” was sex discrimination
- *Macy v. Dep’t of Justice* (EEOC 2012)
  - Discrimination against trans\* workers is sex discrimination
- *Bostock v. Clayton* (SCOTUS 2020)
  - “For an employer to discriminate against employees for being . . . transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII's plain terms—and that should be the end of the analysis.”

## Title IX

- Department of Justice Guidance
- Office of Civil Rights Guidance
- OCR Resolution Agreements
  - Arcadia Unified School District (CA, 2013)
  - Downey Unified School District (CA, 2014)
  - Township High School District 211 (IL, 2015)
- *Grimm v. Gloucester County School Board* (4<sup>th</sup> Cir. 2020, SCOTUS cert. denied 2021)

# *Grimm v. Gloucester County School Board (4<sup>th</sup> Cir. 2020)*

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- Facts:
- transgender student who underwent transition and changed birth certificate from female to male used male bathroom without incident for 7 weeks
- School board adopted policy that transgender students were required to use an “alternative appropriate facility”
- School board also refused to change the sex on his transcript
- Question:
- whether school board violated Title IX and/or equal protection clause
- Answer from 4<sup>th</sup> Circuit in August 2020:
- “We join a growing consensus of courts in holding that the answer is resoundingly yes.”
- Petition to Supreme Court denied on June 28, 2021

# *Grimm v. Gloucester County School Board (4<sup>th</sup> Cir. 2020)*

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- Title IX
  - Bathroom policy: excluding a student because they are transgender, their sex is a but-for cause for the district's actions. No justification for different treatment, and bathroom is necessary to access school.
  - Records: district violated Title IX when it refused to update his records based on his corrected birth certificate
- Equal protection
  - Determined trans\* discrimination is sex discrimination and trans\* individuals constitute a quasi-suspect class, both of which require government policy to be "substantially related to a sufficiently important governmental interest"
  - Bathroom policy: not substantially related to student privacy – trans\* kids, like all kids, use the bathroom "by entering a stall and closing the door"; no incidents by Gavin; based on "sheer conjecture and abstraction" and "misconception and prejudice"
  - Records: district violated equal protection when it refused to update his records based on his corrected birth certificate; no justification for this treatment
- "The proudest moments of the federal judiciary have been when we affirm the burgeoning values of our bright youth, rather than preserve the prejudices of the past. . . . How shallow a promise of equal protection that would not protect Grimm from the fantastical fears and unfounded prejudices of his adult community. It is time to move forward."

# Common Issues in Providing Equal Access to Transgender Students

- Records: right to change records when inaccurate or misleading; use “preferred name” option in PowerSchool
- Facilities: provide access based on gender identification, develop plan and protect privacy
- Parents: collaborate, be honest, report abuse

## PowerSchool

- NC DPI PowerSchool update: call name (“preferred name”) vs. legal name now default for non-legal documents, such as report cards and grade books
  - Legal name still used for student ID, NC transcript, ECATS, diploma, and other places
  - **PREFERRED NAME CAN BE CHANGED AT STUDENT’S REQUEST – parent/guardian consent not needed**

# Common Issues (Cont'd)

- Dress Code Issues: Student dress can be considered a form of speech protected by the First Amendment; Sex-based dress codes can present concerns that they discriminate based on gender

# Right to Privacy

- FERPA
  - Names are directory information, but is a change of name or preferred name?
  - Sex/change of sex is not directory information
  - Medical records maintained by a school district are education records
    - Education records cannot be disclosed without consent except in limited circumstances
    - Rarely would a child's gender identity meet such an exception
- Constitutional right to privacy – proving gender?
  - *Whalen v. Roe* (SCOTUS 1977) - substantive due process right to informational privacy in “avoiding disclosure of personal matters,” and in “making certain kinds of important decisions
  - *Sterling v. Borough of Minersville* (3<sup>rd</sup> Cir. 2000) - police officer's disclosure of a citizen's sexual orientation gave rise to constitutional claim for the violation of privacy
  - *Powell v. Schriver* (2d Cir. 1999) - compelling interest in privacy that individuals who have transitioned possess: transgender individuals “understandably might desire to conduct their affairs as if such a transition was never necessary”
- Harassment concerns

# Equal Opportunity in Academics

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- Courses and academic programs must be offered equally to all genders
- Grading policies or qualifications criteria cannot be based on gender-related factors
- - Supportive services, tutoring, and extra help must be offered equally

# When Single-Sex Programming is Permitted

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- **Single-sex nature of activity is substantially related to the compelling objective of improving student achievement OR to meet the particular needs of students**
- **Objective must be implemented in an even-handed manner and be completely voluntary**
- **Substantially equal opportunity is provided to members of the opposite sex**

# Record-Keeping Requirements

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- SEVEN YEARS:
- Records of each sexual harassment investigation
- Records of any appeal and results
- Records of any informal resolution and results
- All materials used to train Title IX coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.