

THE FUNDAMENTALS OF TITLE IX AND AREAS IMPACTED BY TITLE IX

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What is Title IX?

- **Title IX** of the Education Amendments Act of 1972 is a federal law that states:

"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 prohibits sex-based discrimination in educational programs and activities.



Discrimination

- Discrimination is the act of treating people differently based on a protected characteristic (or stereotypes based on that characteristic)
 - Focus on access to education opportunities, resources, programs;
 - Disparate treatment in the workplace/school;
 - Disparate impact claims (neutral policies that have discriminatory impacts)





Common Types of Protected Traits

- Race
- Color
- Religion
- Sex (gender)
- Military status
- National origin
- Disability
- Age
- Ancestry
- Marital status
- Pregnancy or
- Genetic information
- Gender Identity
- Sexual Orientation



Title IX and LGBTQ

- On June 16, 2021, the U.S. Department of Education issued guidance stating that Title IX protects individuals from discrimination and harassment based on sexual orientation and gender identity.
- This interpretation comes after the 2020 U.S. Supreme Court ruling in *Bostock v. Clayton County*.
 - In *Bostock*, the Court concluded that treating individuals differently based on sexual orientation and gender identity was discrimination based on sex under Title VII.
 - Courts often rely on interpretations of Title VII to interpret Title IX.
- The Office for Civil Rights (OCR) will now investigate complaints of sex discrimination or harassment based on sexual orientation or gender identity.



Title IX and LGBTQ

- What the new guidance means:
 - The district’s Title IX policy will be applicable and all applicable procedures must be followed, i.e. districts must treat complaints of sexual harassment or sex discrimination based on an individual’s sexual orientation or gender identity in the same manner as any other Title IX complaint
 - School districts cannot discriminate against an individual based on the individual’s sexual orientation or gender identity.
 - This includes issues such as access to restrooms that conform with the individual’s gender identity, use of preferred pronouns and use of preferred name.
 - This is not a change in Ohio as school districts have been bound by the *Board of Education of Highland v. Dep. of Ed* case, which held that students are able to use the restroom that conforms with their gender identity and preferred pronouns, since 2016.



Title IX – Examples of Discrimination

- Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service
 - *“You can’t do that because you’re a woman”*
- Provide different aid, benefits, or services or provide aid, benefits or services in a different manner
- Deny any person any such aid, benefit, or service
 - *“Only men can do that”*
- Subject any person to separate or different rules of behavior, sanctions, or other treatment
 - *“Women have to...but men don’t”*



Sexual Harassment

- Any unwelcome sexual advance, request for sexual favors, or other unwanted verbal or physical conduct of a sexual nature when one or more of the following conditions are present
 - Quid pro quo
 - Hostile environment



wikiHow



Categories of Harassment

- Quid Pro Quo Harassment
- Hostile Environment Harassment
 - Both are prohibited under the law





Quid Pro Quo

- Quid Pro Quo (this for that) Harassment occurs when submission to **OR** rejection of sexual advances/requests is used as the basis for participation in an activity or class

Example: Teacher pressures a student into an intimate relationship by suggesting acquiescence will result in good grades. When teacher's advances are spurned, she issues an "F."

Example: Superintendent requests sexual attention from elementary school principal with a promise that if she goes out with him, he will recommend the issuance of a new employment contract.



Hostile Work Environment

To establish unlawful harassment, one must show that the harassment was:

- A. Based on his/her sex;
- B. Unwelcome; and
- C. Sufficiently severe or pervasive to alter the conditions of employment or education or creates an abusive, intimidating, hostile or offensive working or school environment.



Sexual Harassment

- Example: Teacher routinely tells sexual jokes in class, has a reputation for cornering female students and purposefully brushes up against and touches female students in a sexual manner
- Example: A male high school principal routinely inquires about the new female science teacher’s “chemistry” with her husband, comments about her appearance and how lucky her husband is to be married to her, shares explicit details regarding his own marriage, and asks her to do the same



Hostile Environment

A. Based on protected class status or lack thereof

- Must be based on protected class, i.e. sex.
 - If a principal is mean to a teacher because he does not like the teacher's pink clothes, this is not unlawful harassment under the anti-harassment laws.
- Can be the protected class of either the victim or the harasser.
- Verbally harassing conduct need not explicitly mention the protected class status, i.e. jokes may be chauvinist even if they do not mention "women" (or men) specifically.



Hostile Environment

B. Unwelcome

- Person did not solicit or invite the conduct and regards it as offensive.
- District must evaluate all surrounding circumstances to determine if conduct is unwelcome, i.e. a consensual conversation.
- If the victim complains, that's an obvious indication the conduct is unwelcome, but the district should not wait for a complaint to investigate potentially prohibited conduct.



“Welcomeness” of Conduct

- In order for conduct of a sexual nature to constitute sexual harassment, it must be “unwelcome.”
 - OCR always views sexual conduct between an adult and an elementary student as unwelcome and OCR strongly presumes that sexual conduct between an adult and secondary student is unwelcome.
 - Whether student-to-student sexual conduct is welcome or unwelcome must be determined on a case-by-case basis.



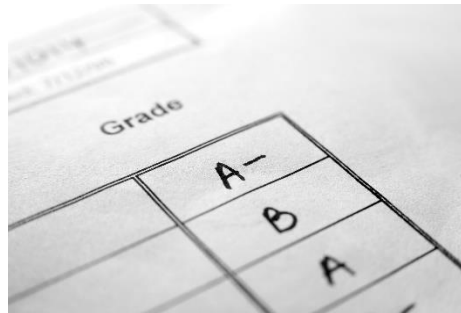
C. “Severe or Pervasive”

- Generally, a single or isolated incident is not enough to create a hostile environment.
- However, a single incident of harassment which is egregious or unusually severe may be sufficient to create a hostile work environment, particularly when the harassment is physical.
 - E.g. Assault.



“Severe or Pervasive” (cont’d)

- Factors to consider include whether the conduct was: abusive, derogatory, frequent, humiliating, or physically threatening.
- Severe or pervasive prong is met if the conditions of an individual’s employment or education are altered.
 - E.g. student’s semester grade hinges on the submission to a sexual advance by a teacher.





Harassment

- The *intent* of a harasser does not matter – the test for harassment is from the viewpoint of a reasonable person and victim – it is an objective standard.
- The prohibition against sexual harassment does **not** extend to legitimate, non-sexual touching (such as a kindergarten teacher’s consoling hug for a child with a skinned knee).





Other Violations of Anti-Harassment Laws

- **Retaliating** against a person who has made a report or filed a complaint alleging harassment, or who has participated as a witness in a harassment investigation;
- Filing a malicious or knowingly false report or complaint of harassment;
- Disregarding, failing to investigate adequately, or delaying investigation of allegations of harassment, when responsibility for reporting and/or investigating harassment charges comprises part of one's supervisory duties.



Policy Requirements

- Statement prohibiting harassment, intimidation, or bullying
- Suspension possible for harassment, intimidation, or bullying by electronic act
- Definition of harassment, intimidation, or bullying (at least as broad as the statute)
- Procedure to be used for reporting incidents
- Procedure for responding and investigating reports



Policy Requirements

- Strategy for protecting victim or other person from new or additional harassment
- Strategy for protecting from retaliation following a report
- Personnel must report incidents
- Parent/guardian must be notified to the extent permitted
- Procedure for documentation
- Means by which a person may report anonymously



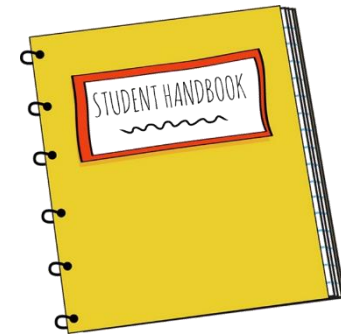
Policy Requirements

- Disciplinary procedure for students found “guilty” of harassment, intimidation, or bullying
- Prohibiting deliberately false reports of these actions and the disciplinary procedures that would follow
- Semiannual reports to Board and on website





Notice of Policy



- Districts must have an anti-harassment policy.
- The policy must be put in:
 - Student handbooks
 - Any publications that set forth comprehensive rules, procedures, and standards of conduct for schools and students in the district
- Train employees
- Train students annually
- Notify parents annually



Applicability of Title IX

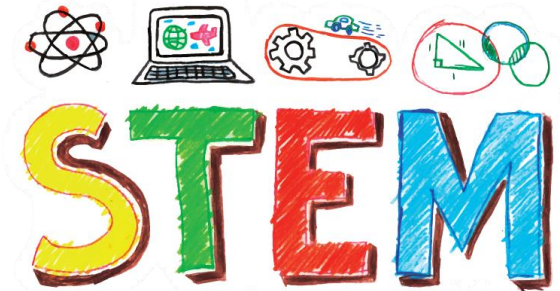
- Title IX impacts **many** aspects of school district operations
 - Not limited to athletics (although this is the context in which most people think of the regulations)
- Also has applicability to:
 - Recruitment, admissions and counseling
 - Funding (including booster groups)
 - Athletics and extra-curricular activities
 - Discipline





Recruitment, Admissions and Counseling

- School districts must be on the lookout for issues related to:
 - vocational schools
 - STEM schools
 - open enrollment
 - assignment of guidance counselors
 - content of counseling (schools, career options)





Funding

- School districts are responsible to ensure
 - “that benefits, services, treatment and opportunities overall, regardless of funding sources, are equivalent for male and female athletes.”
- This is true even if the funds are raised by the student-athletes themselves or by a booster club and then “donated” to the school district.
- “Equivalent” does not mean “identical” per Regulations and OCR Policy Interpretation. Comparable standard.



Funding from Booster Groups

- Booster group donations may result in Title IX liability for a district if the funds are *not* equally distributed among boys' and girls' teams
- Booster groups often generate and designate money for a specific sport, which leads to an imbalance among sexes
- It is the responsibility of the BOE to correct any imbalance, which may entail allocating its own resources





Athletics and Extracurricular Activities

- Sex discrimination prohibited on basis of:
 - student interests and abilities, and
 - benefits and opportunities.
- Standard for non-discrimination based on interests and abilities: equal athletic opportunities for members of both sexes, effectively accommodating interests and abilities.





Athletics and Extracurricular Activities

- OCR 3-part test for assessing nondiscriminatory athletic participation based on interests and abilities:
 - Participation opportunities substantially proportionate to respective enrollments;
 - Members of one sex underrepresented, district shows history and continuing practice of program expansion which is demonstrable and responsive to developing interests;
 - Members of one sex underrepresented, if continuing practice not established, district shows interests and abilities fully and effectively accommodated by present program.



Athletics and Extracurricular Activities

- OCR factors for determining non-discrimination based on benefits and opportunities:
 - Equipment and supplies
 - Scheduling of games and practice times
 - Travel and per diem allowances
 - Coaching and tutoring
 - Compensation of coaches and tutors
 - Locker rooms
 - Practice facilities and training facilities
 - Publicity





Pregnant and Parenting Students

- Discriminating against any student on the basis of pregnancy, child birth, termination of pregnancy or recovery therefore is prohibited
 - This includes **EXCLUDING** any student from an education program (including vocational education) or **ACTIVITY** (including extra-curricular activity)



Discipline

- Separate or different rules of behavior, sanctions, or other treatment based on sex prohibited.
 - Includes: no discipline based on gender identity, or failure to conform to stereotypical notions of masculinity or femininity in behavior OR appearance (dress codes)
- Recommendation: record review for disproportionality, disparate impact, systemic problems/trends.





Classes and Extracurricular Activities

- Narrow categories where intentional separation based on sex **is permitted** under Title IX:
 - Contact sports in PE class
 - Classes or portions of classes on human sexuality
 - Other miscellaneous catch-all category--class/activity based on one of two important objectives: 1) to improve students' educational achievement; or 2) to meet the particular, identified educational needs of students



Employment (Including Student Employment)

- Applies to the following activities:
 - Recruitment
 - Selection
 - Promotion
 - Job classification/structure
 - Compensation
 - Granting of leave
 - Benefits
 - Pregnancy
 - Marital or parental status





When Must A School Respond To Sexual Harassment or Sex Discrimination?

- A recipient with actual knowledge of sexual harassment or sex discrimination 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.





“Actual Knowledge”

- A school with **actual knowledge** of sexual harassment in a program or activity against a person in the United States must respond promptly and in a manner that is not deliberately indifferent
- Notice of allegations to **ANY** K-12 employee is “actual knowledge”
- Deliberate indifference is failure to respond reasonably in light of known circumstances.





Supportive Measures

- Supportive measures are actions that are intended to assist both the complainant and respondent when an allegation of sexual harassment is made.
- Examples:
 - Counseling
 - Course modifications
 - Schedule changes
 - Increased monitoring or supervision





Class Act: Updates in Education Law





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Changes to Title IX Regulations

August 23, 2021 | Title IX Training





What is 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 prohibits sex-based discrimination in educational programs and activities



In case you missed it. . .





Department of Education and Title IX

- U.S. DOE recently released interpretation clarifying its enforcement authority over discrimination based on sexual orientation and gender identity under Title IX.
 - OCR at times has stated that Title IX’s prohibition on sex discrimination does not encompass discrimination based on sexual orientation and gender identity.





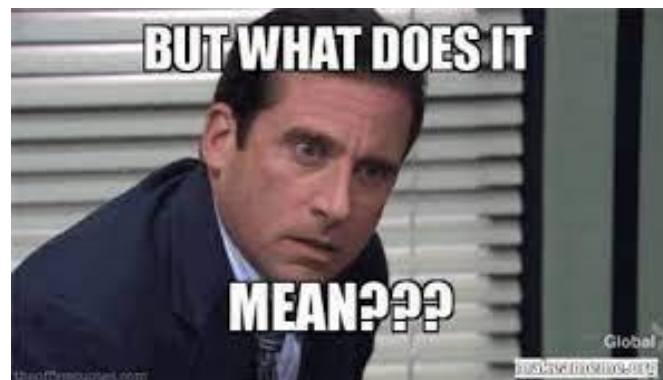
Department of Education and Title IX

- Not anymore (at least according to U.S. DOE)
 - Title IX prohibits discrimination based on sexual orientation and gender identity.
 - Consistent with the Supreme Court’s ruling and analysis in *Bostock v. Clayton County* (2020) in connection with Title VII, the Department interprets Title IX’s prohibition on discrimination “on the basis of sex” to encompass discrimination on the basis of sexual orientation and gender identity.
 - Addressing discrimination based on sexual orientation and gender identity thus fits squarely within OCR’s responsibility to enforce Title IX’s prohibition on sex discrimination.



Department of Education and Title IX

- What the new guidance means . . .
 - The Office for Civil Rights (OCR) will now investigate complaints of sex discrimination or harassment based on sexual orientation or gender identity.





Department of Education and Title IX

- What the new guidance means (continued) . . .
 - School districts cannot discriminate against an individual based on the individual’s sexual orientation or gender identity.
 - This includes issues such as access to restrooms that conform with the individual’s gender identity, use of preferred pronouns and use of preferred name.
 - This is not a change in Ohio as school districts have been bound by the *Board of Education of Highland v. Dep. of Ed* case, which held that students are able to use the restroom that conforms with their gender identity and preferred pronouns, since 2016.



New Title IX Rule

- U.S. Department of Education, Office of Civil Rights (OCR), released the final rule amending Title IX Regulations on May 6, 2020.
- New Final Rule went into effect on August 14, 2020.





Title IX Coordinator

- Each school must designate and authorize at least one employee to coordinate its efforts to comply with its Title IX responsibilities.
 - Must be known as the “Title IX Coordinator”
- Title IX Coordinator job title and stated job duties should now be identified and documented.



Title IX Coordinator's Responsibilities and Authority



- Coordinate the school's compliance with Title IX
 - This includes grievance procedures for resolving Title IX complaints
- Coordinate and oversee the school's responses to all complaints and reports involving possible sex discrimination
- Obtain knowledge of school policies and procedures on sex discrimination
 - Should be involved in the drafting and revision of such policies and procedures



Title IX Coordinator's Responsibilities

- Provide or facilitate ongoing training, consultation, and technical assistance on Title IX for all students, faculty and staff
- Explain complaint procedures to complainants and respondents
- Oversee investigations of reports and complaints of sexual misconduct
 - Recommend whether report/complaint constitutes sexual misconduct
 - Appoint an investigative team
 - Ensure complaints are handled properly
 - Inform all parties of grievance process
 - Maintain information and documentation related to investigation in a secure manner
 - Monitor compliance with timeframes



Title IX Coordinator's Responsibilities

- Recognize the Coordinator is *not* the Decision-maker
- Monitor and advise in ways such as:
 - Regularly reviewing all reports and complaints
 - Conducting an annual climate survey
 - Organize and maintain files
 - Regularly assess the school's compliance with Title IX
 - Regularly consult with the senior leadership to promote awareness and discussion





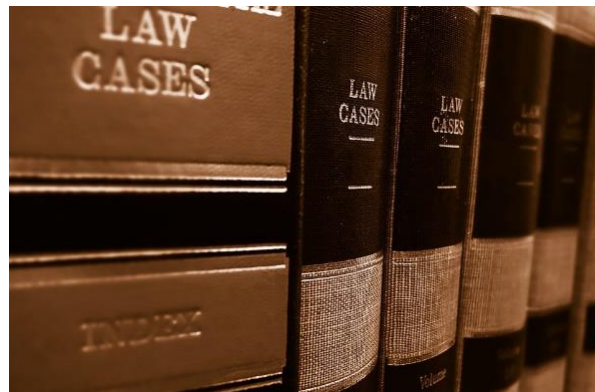
Title IX Coordinator's Responsibilities

- Other Coordinator responsibilities:
 - Identify and address any patterns and/or systemic problems
 - Provide training on policies and procedures on sex discrimination & harassment
 - Conduct constituent surveys for analysis and consideration
 - Monitor students' participation in athletics & extra-curricular activities for disproportionate impact
 - Monitor students' participation in academic programs for disproportionate impact



“Sexual Harassment”

- Title IX Regulations now define the term “sexual harassment”.
- Prior to the final rule, the term was loosely defined by interpretive case law and OCR Dear Colleague Letters.





“Sexual Harassment”

Old Definition (from OCR guidance)	New Definition (Final Rule)
<ul style="list-style-type: none">• Unwelcome conduct• As determined by a reasonable person• To be severe, pervasive, or persistent, and to interfere with or limit a student’s ability to participate in or benefit from school services, activities, or opportunities	<ul style="list-style-type: none">• Unwelcome conduct• As determined by a reasonable person• To be so severe, pervasive, and objectively offensive that it effectively denies a person’s equal access to the recipient’s education program or activity



When Must A School Respond To Sexual Harassment?

- 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.





Reporting Sexual Harassment: Who, How And When?

- Any person may report sex discrimination, regardless of whether the person is the alleged victim of the reported conduct.
 - New Rule expressly recognizes the legal rights of parents and guardians to act on behalf of parties (including by filing formal complaints).
- Reports can be made by mail, by telephone, or by email, using the contact information listed for the Title IX Coordinator.
- Or by any means that results in the Title IX Coordinator receiving the person's 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.



Reporting Sexual Harassment: Formal Complaint

- “Formal complaint” is the 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.
 - Third party reporter is not authorized to file a formal complaint.
 - Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party during a grievance process, and must comply with requirements for all Title IX personnel to be free from conflicts and bias.
 - Title IX Coordinator is authorized to sign a formal complaint which triggers investigation. This includes signing of formal complaints over a complainant’s objections.



Reporting Sexual Harassment: Formal Complaint

- “Document filed by a complainant” means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the school) that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.
- 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.

COMPLAINTS



Actual Knowledge

Old Rule (from OCR guidance)	New Rule (Final Rule)
<ul style="list-style-type: none">A school has a responsibility to respond promptly and effectively if a school knows or should have known about sexual harassment	<ul style="list-style-type: none">A school with actual knowledge of sexual harassment in a program or activity against a person in the United States must respond promptly and in a manner that is not deliberately indifferent



New Rule & Case Law Definition

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

Knowledge: Notice of sexual harassment or allegations of sexual harassment to:

1. A recipient's Title IX coordinator
2. Any official of the recipient who has authority to institute corrective measures on behalf of the recipient
3. **Any employee of an elementary and secondary school**

"Notice" includes, **but is not limited to**, a report of sexual harassment to the Title IX Coordinator as described in the Final Rule.



Deliberate Indifference

- From the *Gebser* Court:
 - “[T]he response must amount to deliberate indifference to discrimination. The administrative enforcement scheme presupposes that an official who is advised of a Title IX violation refuses to take action to bring the recipient into compliance. The premise, in other words, is an official decision by the recipient not to remedy the violation.”





Deliberate Indifference

Old Definition (from OCR guidance)	New Definition (Final Rule)
<ul style="list-style-type: none">The school must take immediate action to eliminate the sexual harassment or sexual violence, prevent its recurrence, and address its effects.	<ul style="list-style-type: none">Failure to respond reasonably in light of known circumstances.



Student Rights - Generally

- **Complainant (victim)** has right to attend school without being subjected to unwelcome sexual conduct, especially conduct so severe, pervasive, and objectively offensive that it denies equal access to education.
- **Respondent (alleged perpetrator)** has right to due process before discipline is imposed and right not to be disciplined at all for activities protected by First Amendment.



Respondent's Due Process Rights

Students accused of misconduct are entitled to **substantive** and **procedural** due process.

- **Substantive:** District cannot arbitrarily or unreasonably deprive students of education. Discipline must be supported by substantial, reliable, and probative evidence in the record. Typically “preponderance of the evidence” standard used for most disciplinary issues.
 - Does the evidence prove that the alleged perpetrator (respondent) sexually harass / sexually assault the victim (complainant)?
- **Procedural:** In deciding whether discipline is warranted, students are entitled to fair procedures. More procedures required for more significant discipline.
 - In answering the above question, did the district provide a fair chance for the alleged perpetrator to prove his or her innocence and respond to the allegations?



What Changed And Why?

- New regulations prompted by parent and student concerns that alleged perpetrators were not given fair chance to prove their innocence and that “preponderance of the evidence” standard was too low to expel a student from university or school.
- New regulations attempt to address both substantive and procedural issues.





Changes To Procedural Due Process Rights

- Single investigator and decision-maker no longer allowed.
- Detailed grievance process with a focus on:
 - Notice of allegations
 - Cross examination
 - Opportunity to review and response to evidence
- Explicit prohibition on conflicted or biased coordinators, investigators, decision-makers.
- Emphasis on equal opportunities for both complainants and respondents to participate in the process.





New: Initial Response **34 C.F.R. 106.44(a), .30(a)**

Must treat complainants and respondents equitably:

- Offer supportive measures to both
- Follow a grievance process before disciplining or sanctioning respondent





New: Initial Response 34 C.F.R. 106.30(a), .44(a)

Title IX Coordinator must promptly, even if no formal complaint is filed:

- Contact the complainant to discuss the availability of “supportive measures”
- Consider the complainant’s wishes with respect to supportive measures
- Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint
- Explain the process for filing a formal complaint





Supportive Measures

Old Term (from OCR guidance)	New Term (Final Rule)
<ul style="list-style-type: none">• Used terms such as “interim measures” or “interim steps” to describe measures to help a complainant maintain equal educational access.• Implied only available during pendency of investigation, did not mandate offering them, not clear if could be punitive or disciplinary, and did not clarify if available to respondents.	<ul style="list-style-type: none">• Non-punitive, individualized services, offered as appropriate and without charge to a complainant or a respondent before or after the filling of a formal complaint, or where no complaint has been filed (34. C.F.R.106.30(a)).• Should be designed to restore or preserve equal access to the education program or activity without unreasonably” burdening the other party.



Supportive Measures

- Examples:
 - Counseling
 - Course modifications
 - Schedule changes
 - Increased monitoring or supervision
- A supportive measure that completely removes a respondent from an activity would likely be considered punitive, except for “emergency removals” for students and “administrative leaves” for employees who pose an imminent threat.





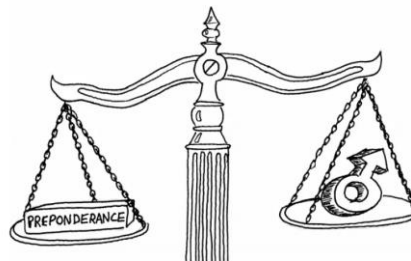
Supportive Measures

- Supportive measures give districts “wide discretion to quickly, effectively take steps to protect student safety, deter sexual harassment, and preserve a complainant’s equal educational access.”
- Actions such as changing a respondent’s class or activity schedule may fall under permissible supportive measures, and supportive measures must be offered without waiting to see if a grievance process is eventually initiated or not.



Complainant Participation Refusal

- District must provide complainant (alleged victim) with access to supportive measures and must provide complainant with written notice of grievance procedure, even if complainant is unwilling to participate.





New: Formal Complaint Response 34 C.F.R. 106.45(b)

- Requires a number of specific steps for investigating, dismissing, and determining responsibility in formal complaint.
- Major shift from previous more deferential stance toward specific policies and practices for complaint resolution.
- A complainant (alleged victim of sexual harassment) must be participating in or attempting to participate in the education program or activity of the district at time formal complaint is filed.



Basic Required Elements

34 C.F.R.106.45(b)(1)

- Treat parties equitably
- Objective evaluation of all evidence
- No conflict of interest for Title IX Coordinator, Investigator or decision makers
- Presumption respondent not responsible
- Reasonably prompt time frames





Basic Required Elements **34 C.F.R.106.45(b)(1)**

- Description or list of possible discipline/other remedies
- Statement of standard used (preponderance or clear/convincing)
- Appeal procedures and bases
- Range of supportive measures available
- No breach of privilege without waiver





More Steps: Written Notice **34 C.F.R. 106.45(b)(2)**

- Written notice to known parties “upon receipt of written complaint”
- In sufficient time to allow respondent to prepare a response before any initial interview.
- Must include:
 - Notice of grievance process, including any informal resolution process
 - Notice of allegations, in sufficient detail to allow respondent to prepare a response (names of known parties, conduct alleged, date and location of conduct, if known)



More Steps: Written Notice

34 C.F.R. 106.45(b)(2)

- Notice must include:
 - Statement that respondent presumed not responsible and that responsibility determined at conclusion of grievance process.
 - Notice of parties' rights to have an attorney or non-attorney advisor and to inspect and review evidence.
 - Notice of any provision in the code of conduct that prohibits knowingly making false statements or providing false evidence during the grievance process.
- Must be supplemented if new allegations opened for investigation.



Dismissals

Mandatory if conduct alleged:

- Not sexual harassment if true.
- Did not occur in the school's program or activity (if there is dispute regarding this, the investigation may be required to determine whether there is jurisdiction).
- Did not occur in the United States.

**can still address under non-Title IX policy





Dismissals

Permissive if:

- Complainant requests to withdraw.
- Respondent's enrollment or employment ends.
- Specific circumstances prevent recipient from gathering evidence sufficient to reach a determine (e.g., passage of time, lack of cooperation by complainant).





Investigation 34 C.F.R.106.45(b)(5)

- Burden of proof (to show discipline is warranted is on the school).
- Certain treatment records cannot be obtained without voluntary, written consent.
- There is no restriction of the rights of parties to discuss allegations or gather or present evidence.
- Same opportunities for others present (e.g., attorney or non-attorney advisor).
- Equal opportunity to present witnesses and evidence at interviews/meetings.





Investigation 34 C.F.R.106.45(b)(5)

- Written notice to parties of date, time, participants, purpose, and location of each that gives sufficient time to prepare before investigative interview.
 - *** Policy 2266 requires minimum 5 days' notice for interviews and other meetings
- All evidence provided to parties and their advisors at least 10 days before the investigator completes a written investigative report to allow time for each party to respond.
- Written investigative report “fairly summarizes the relevant evidence” provided to parties and advisors at least 10 days before hearing or other determination of responsibility – so each party may review and respond (i.e. ask written and relevant questions).



Determinations of Responsibility 34 C.F.R.106.45(b)(6)

- **Live hearing with live cross by party advisors NOT required for K-12.**
 - May not be advisable – remember, it will involve many additional regulations – but is currently referenced in Policy 2266
- Hearings permitted for K-12 (include decision in grievance procedure), with each party allowed to submit written, relevant questions to be asked of another party or witness to the decision maker, who will provide each party with the answers and the opportunity for follow-up questions.
 - Even if there is no hearing, districts must allow each side to question the other, in written form.
- Questions about a complainant’s prior sexual behavior or sexual predisposition only permitted to establish that another person committed the alleged conduct or that the conduct was consensual.



Hearing

- If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility.
- But, the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.





Hearing

- Live hearings may be conducted with all parties physically present in the same geographic location or, at the school's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other.
- Schools must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.



Written Questions Required

- With or without a hearing, **after the school has sent the investigative report to the parties and before reaching a determination regarding responsibility**, the decision maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow up questions from each party.
- The decision-maker(s) must explain to the party proposing the questions any decision to exclude questions as not relevant.





Decision

- The District’s grievance process must state whether the standard of evidence to be used to determine responsibility is:
 - **The preponderance of the evidence standard; or**
 - It is “more likely than not” that the perpetrator committed the action. Used in civil context. Also known as 51% rule.
 - ***Current Policy 2266 identifies use of the preponderance of the evidence standard.
 - The clear and convincing evidence standard (not currently applicable in Canton)
 - It is “substantially more likely to be true that the perpetrator committed the act.”
- Must apply the same standard of evidence for formal complaints against students as for formal complaints against employees.



Determinations of Responsibility

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

- Decision-maker cannot be the investigator or the Title IX Coordinator
- Must issue written determination addressing:
 - Allegations
 - Procedural steps taken
 - Findings of fact
 - Application of code of conduct to facts





Determinations of Responsibility

- Statement of and rationale for result as to each allegation including:
 - Determination of responsibility
 - Any disciplinary sanctions
 - Whether remedies to restore or preserve equal access to the educational program or activity will be provided
- Procedures and bases for appeals
- ❖ Provide to all parties simultaneously
- ❖ Becomes final after appeal time has passed or when appeal result is provided
- ❖ Title IX Coordinator is responsible for ensuring implementation of the remedies.



Appeals: What Changed?

Old Requirements (from OCR guidance)	New Requirements (Final Rule)
<ul style="list-style-type: none">▪ Not required▪ Must be provided equally to both parties, if provided▪ No limitation on basis for appeals, if provided	<ul style="list-style-type: none">▪ Must offer to both parties for dismissals and final determinations in the following circumstances:<ul style="list-style-type: none">– Procedural irregularity– New evidence not reasonably available– Conflict of interest against Title IX Coordinator, Investigator, Decision maker▪ Can offer for other reasons on equal terms



Appeals: What Changed?

Old Requirements (from OCR guidance)	New Requirements (Final Rule)
<ul style="list-style-type: none">▪ No requirement that the decision maker on appeal be different from investigators/decision makers in other phases of the process.	<ul style="list-style-type: none">▪ Different Decision-maker:<ul style="list-style-type: none">▪ May not be the Title IX Coordinator, investigator, or decision-maker▪ Must not have a conflict of interest or bias against complainants and respondents generally or individually.▪ Must receive training.



Informal Resolutions

- District may not:
 - Require an informal resolution.
 - Offer an informal resolution until a formal complaint is filed.
 - Facilitate an informal resolution where allegations are made by a student against employee.





Informal Resolutions

District may facilitate informal resolution after formal complaint filed, but must:

- Provide written notice to both parties with:
 - Allegations
 - Informal resolution process including any provisions that **after** agreeing to a resolution, party cannot withdraw and resume formal grievance process
 - Consequences of participating including records maintained or shared
- Obtain both parties' written and voluntary consent to informal resolution



Emergency Removal

Districts may emergency remove a student if individualized safety and risk analysis determines that sexual harassment allegations pose immediate threat to student physical health or safety such that removal is justified.

- Notice and opportunity to challenge the decision must be provided immediately after removal.
- Comply with all laws and regulations (federal and state) related to emergency removals (RC 3313.66) and students with IEPs and 504 Plans.
- Comply with Board Policy – Emergency Removal of Students





Emergency Removal: Example

- Susie tells a teacher that Robert sexually assaulted her in the bathroom.
- If the administrator's individualized safety and risk analysis shows that Robert's continued attendance creates immediate threat to student health or safety, administrator may:
 - Issue notice of intent to suspend and then provide opportunity to appear in informal hearing to challenge suspension or otherwise explain actions.
 - Issue notice of suspension with intent to expel, plus notice of opportunity to appear to challenge the reason for expulsion w time and place btw 3-5 days. Follow standard procedures for hearing, appeals etc.
 - Don't forget manifestation determination for students with IEP or 504 plan before expulsion hearing or within 10 days of decision to suspend resulting in over 10 cumulative days out of school (change in placement)



First Amendment

- Sometimes sexual harassment complaints are outside the disciplinary process because the alleged conduct is protected by the First Amendment.
 - Ex. Off-campus and using his own equipment, Robert creates a Tiktok page with disrespectful content about Susie. There is no substantial disruption to the school environment as a result, but Susie files a complaint.
- Disciplining Robert may be prohibited by the First Amendment, and the district would need to dismiss any formal complaints against him.
- Particularly in light of Supreme Court's decision, *B.L. v. Mahanoy Area School District*.



First Amendment

- However, the district can and should take non-disciplinary action:
 - Offering both parties counseling, evaluation where appropriate
 - Implementing monitoring, additional supervision
 - Changing alleged perpetrator's class schedule, other separation approaches
 - Anti-harassment speakers, programming, education.
- Consulting with counsel is usually a good idea for any First Amendment issues because the decisions can be very fact-specific.



Retaliation Prohibited

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





Retaliation Prohibited

- Charging an individual with code of conduct violations that do not involve sexual harassment, but arise out of the same facts or circumstances as a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX constitutes retaliation.
- The school must keep confidential the identity of complainants, respondents, and witnesses, except as may be permitted by FERPA, as required by law, or as necessary to carry out a Title IX proceeding.
- Complaints alleging retaliation may be filed according to a school's prompt and equitable grievance procedures.



Not Retaliation

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





Other Requirements: Recordkeeping **34 C.F.R. 106.45(b)(10)**

- Records related to alleged sexual harassment must be maintained for a minimum of 7 years:
 - Investigation records
 - Disciplinary sanctions
 - Remedies
 - Appeals
 - Records of any actions taken, including supportive measures



Other Requirements: Recordkeeping 34 C.F.R. 106.45(b)(10)

- Must document for every instance:
 - Why response was not deliberately indifferent
 - That measures were taken to restore or preserve equal access to the educational program or activity.
 - If no supportive measures provided, why that was not deliberately indifferent.





Other Requirements: Training

- Required for all staff (identify and report sexual harassment).
- Required for Title IX Coordinator, investigators, and decision makers (both decision and appeal).
 - Promoting impartial investigations and adjudication of formal complaints
 - Must not be based on sex stereotypes
- Maintain materials used for trainings for 7 years and post materials on website (or otherwise make available to public if the district does not have a website).



Regulations Not Impacted by New Rule

- Current Title IX regulation provisions governing athletic participation, employment and single-sex education were not impacted by the final rule.





Visibility of Title IX Coordinator

- Must be visible in the school community
 - Notice of nondiscrimination posted
 - Note that questions should be directed to the Title IX coordinator
 - Via bulletins, announcements, application forms, etc.
 - Students and employees must be notified of the name, office address, telephone number, and email address of the current Title IX coordinator
 - Contact information must be widely distributed and easily found on the website or in various publications





Title IX Policy Notice



- District must provide notice of nondiscrimination policy and grievance procedures, including how to file or report sexual harassment and how the recipient will handle such reports.
- Notice must include the Title IX Coordinator's name, title, email address, office address and telephone number.
- Notice must be provided to: applicants for employment, students, parents/guardians, employee unions.
- Notice must be posted on: district website and in any handbook provided to employees, students, parents/guardians, and employee unions.



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Dos and Don'ts of Conducting Investigations

August 23, 2021



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Investigation Standards Reminders

- The burden of proof is on the school, not the parties
- The investigator must be a person without any perceived conflicts of interests and biases for or against any party
- The investigation should remain equitable





Investigation Standards Reminders

- Provide appropriate written notice to parties that gives sufficient time to prepare before investigative interviews
- Ensure all evidence is provided to parties and their advisors within requisite timelines
- Ensure the written investigative report “fairly summarizes the relevant evidence”



Gathering Evidence



- Consider what kinds of evidence may exist
 - Physical – documents, written statements, audio, video, pictures, electronic, digital, etc.
 - Verbal – interviews with individuals who may have knowledge



Conducting Interviews

- **Goal**: get the interviewee to share information with you
 - Start as a discussion, not an interrogation
 - Consider the pros/cons of using a script
 - Consider the order of witnesses
 - Set the tone for the interview
 - Fully address questions





Reporting Findings

- **Goal**: Present a thorough, factual report of your conclusions
 - Follow policy requirements for reporting format
 - Document facts learned
 - Base report on accurate, complete, and clear documentation of evidence



Elements of “Good” Documentation

- Written and dated
- Contemporaneous
- Objective
- Factual and specific
- Consistent



Investigator Dos

- Presume innocence throughout the process
- Be open and receptive to the complaint
- Take the complaint seriously even if it sounds far-fetched or frivolous
- Reserve judgment on whether you believe the complainant
- Follow Board procedures for gathering evidence and conducting interviews
- Respond promptly. Do not wait to undertake an investigation
- Take steps to prevent threats or acts of violence even if the investigation is pending



Investigator Don'ts

- Make light of a complaint
- Show bias when conducting witness interviews
- Promise that all information will be kept confidential. It is appropriate to state that information will be kept as confidential as possible given the obligation to respond to the complaint
- Discuss the investigation with individuals who do not have a “need to know”





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