

McCreary County School District

Title IX Sexual Harassment Training

Monday, March 28, 2022

Thursday, March 31, 2022

Friday, April 1, 2022

by:

Regina A. Jackson

Strength, Knowledge, Experience.

ELPO LAW

English Lucas Priest & Owsley, LLP

1101 College Street
Bowling Green, Kentucky 42101
(270) 781-6500
www.elpolaw.com

A “Lawyerly” Note about the Materials



- 34 CFR 106.45(b)(10)(D) requires that all materials used to train Title IX Coordinators, investigators, decision-makers, and informal resolution facilitators be publicly available on the recipient’s website.
- These materials have been developed by ELPO Law and are proprietary and copyrighted. No third party is authorized or permitted to copy or use them.
- These materials have been developed for training purposes only.
 - We are not giving legal advice.
 - Consult with your legal counsel regarding how best to address a specific situation.

Title IX Training Components Required Pursuant to 34 CFR §106.45

- All members of the Title IX team must receive training on the following:
 - ✓ Definition of sexual harassment
 - ✓ Scope of recipient's education program or activity
 - ✓ How to conduct an investigation
 - ✓ The grievance process including hearings, appeals, and informal resolution processes, as applicable
 - ✓ How to serve impartially, including the avoidance of prejudgment of the facts at issue, conflicts of interest and bias
 - ✓ Issues of relevance of questions and evidence (including when questions and evidence about a complainant's sexual predisposition or prior sexual behavior are not relevant)
 - ✓ Issues of relevance to create an investigative report that fairly summarizes relevant evidence

“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 of the Education Amendments of 1972

Title IX Nondiscrimination Mandate

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

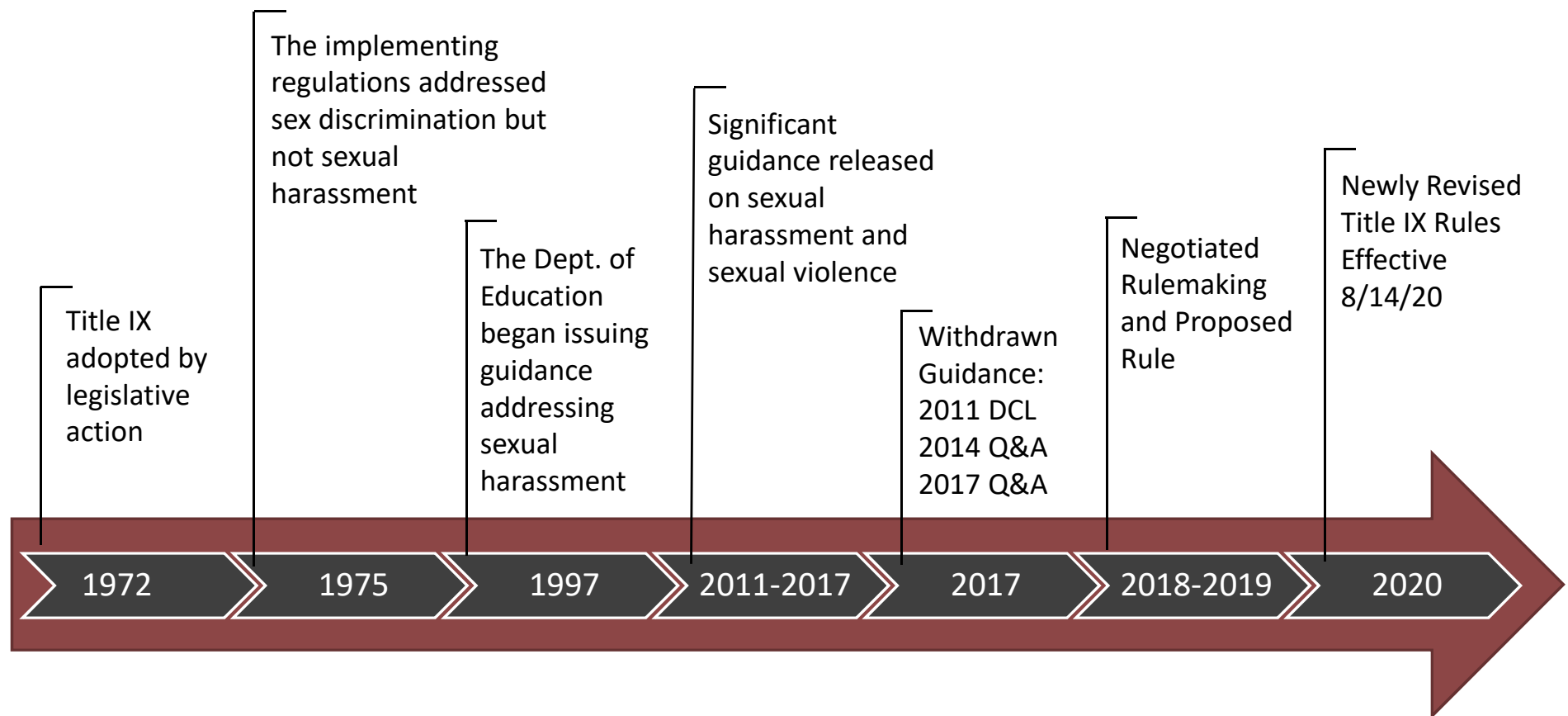
To avoid the use of federal resources to support discriminatory practices

To provide individual citizens effective protection against those practices

Title IX Legal Obligations

- ❖ Promptly respond to individuals who are alleged to be victims of sexual harassment by offering supportive measures
- ❖ Follow a fair grievance process to resolve sexual harassment allegations when a complainant requests an investigation or a Title IX Coordinator decides that an investigation is necessary
- ❖ Provide remedies to victims of sexual harassment

History of Title IX



Secretary DeVos Takes Historic Action to Strengthen Title IX Protections for All Students

New regulation defines sexual harassment, requires supportive measures for survivors, restores due process on campus

New Campus Sexual-Harassment Rule Aims to Boost Rights for Accused

Trump administration's regulation allows for cross-examination and live hearings, and provides some new support for accusers

ACLU sues Betsy DeVos over new campus sexual assault rules

The suit says Title IX changes will make it "more difficult for victims of sexual harassment or sexual assault to continue their educations."



Georgetown Students, Administration Raise Concerns About Title IX Changes

May 12, 2020 by Jaime Moore-Carrillo and Moira Ritter — [Leave a Comment](#)

Published on Friday, May 15, 2020 by Common Dreams

DeVos Sued Over New Title IX Rules That Make It 'Easier for Schools to Sweep Sexual Violence Under the Rug'

validity and... ing that interview, the coachy... signed from the system and

THE HILL

Biden says he'll reverse DeVos rule bolstering protections for those accused of campus sexual assault

BY JONATHAN EDLEY · 05/04/2020 07:00 PM CDT

240 COMMENTS

Two Avenues of Enforcement

- Administrative enforcement by agencies that disburse federal financial assistance to recipients
- Judicial enforcement by courts in private litigation



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

- Supreme Court determined conditions under which a school district will be liable for money damages for an employee sexually harassing a student
- School district violates Title IX when it has actual knowledge of the harassment but responds with deliberate indifference

Davis v. Monroe Co. Bd. of Educ., 526 U.S. 629 (1999)

- Supreme Court determined conditions under which a school district will be liable for money damages for a student sexually harassing another student
- Same standards of actual knowledge and deliberate indifference apply
- Supreme Court also defined sexual harassment to mean conduct so severe, pervasive, and objectively offensive that it denies its victims equal access to education

U.S. Supreme Court Cases

Gebser / Davis Framework

- Actionable sexual harassment
- Actual knowledge
- Deliberate indifference liability standard

U.S. Supreme Court Cases

Final Title IX Regulations

34 CFR PART 106

EFFECTIVE AUGUST 14, 2020



- **Certified**

- Policy: 03.1621 – Title IX Sexual Harassment
- Procedures: refer to Student Procedures

- **Classified**

- Policy: 03.2621 – Title IX Sexual Harassment
- Procedures: refer to Student Procedures

- **Student**

- Policy: 09.428111 – Title IX Sexual Harassment
- Procedures:
 - ❖ 09.428111 AP.1 – Notice to Individuals Regarding Title IX Sexual Harassment / Discrimination
 - ❖ 09.428111 AP.11 – Grievance Procedures
 - ❖ 09.428111 AP.21 – Reporting Form

Title IX Sexual Harassment Policy and Procedures

03.1621 / 03.2621 / 09.428111

The Title IX Team



Title IX Coordinator



Investigator



Decision Maker



**Appellate Decision
Maker**



**Informal Resolution
Facilitator**



Advisors

Title IX Sexual Harassment**INTRODUCTION AND SCOPE**

A United States Department of Education regulation published on May 19, 2020 defines sexual harassment for purposes of Title IX (sometimes referred to in policy and procedure as "Title IX Sexual Harassment"). In addition to numerous other matters, the regulation sets forth grievance procedure requirements that apply (including the initiation of a "formal complaint") before there is a determination that a student is responsible for Title IX Sexual Harassment. The applicable definition of sexual harassment describes serious sexual misconduct. If the alleged actions that are the subject of a formal complaint do not descend to the level of conduct described in the definition of Title IX Sexual Harassment; do not take place in a "program or activity" of the school District within the meaning of Title IX; or do not take place in the United States, the formal complaint must be dismissed.

Such a dismissal does not mean that the alleged offending party cannot be the subject of investigation or discipline on grounds other than "Title IX Sexual Harassment" as addressed in Board policy or law, including conduct allegedly constituting sexual harassment or other sexual misconduct that does fall within the definition of "Title IX Sexual Harassment."¹

PROHIBITION

Title IX Sexual Harassment in educational programs or activities of the District is prohibited.

GRIEVANCE PROCEDURE**Title IX Coordinator (TIXC)**

The TIXC is the individual or individuals designated and authorized to coordinate District Title IX programs. The TIXC is expected to engage in activities intended to provide a fair and neutral process for all parties, including implementation of supportive measures and remedies where appropriate. The District may use co-coordinators and/or deputy coordinators.

"stalking" as defined in 34 U.S.C. 12291(a)(30). For purposes of this definition, "sexual assault" means an offense that meets the definition of rape, fondling, incest, or statutory rape as used in the FBI's Uniform Crime Reporting system. A sex offense is an act directed against another person, without the consent of the second person, including instances where the second person is incapable of giving consent.³

Title IX Sexual Harassment Policy

03.1621 / 03.2621 / 09.428111

SEGREGATION OF FUNCTIONS / CONFLICT OF INTEREST

The TIXC, investigator, decisionmaker(s), and any informal resolution facilitator shall not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. These individuals are to serve impartially without prejudgment of the facts at issue. The investigative, initial decision-making, appellate decision-making, and resolution functions must be performed by different trained individuals, who may be District employees or contractors.

PROHIBITION

Title IX Sexual Harassment in educational programs or activities of the District is prohibited.

GRIEVANCE PROCEDURE

The District shall provide a Title IX Sexual Harassment grievance procedure that treats complainants and respondents equitably as required by Federal Regulation.²

DEFINITIONS

Title IX Sexual Harassment

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

- 1) An employee of the District conditioning the provision of an aid, benefit, or service of the District on an individual's participation in unwelcome sexual conduct (i.e., 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 District's education program or activity;
- 3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30). For purposes of this definition, "sexual assault" means an offense that meets the definition of rape, fondling, incest, or statutory rape as used in the FBI's Uniform Crime Reporting system. A sex offense is an act directed against another person, without the consent of the second person, including instances where the second person is incapable of giving consent.³

Title IX Sexual Harassment Policy

03.1621 / 03.2621 / 09.428111

Notification Requirements



Accessible Reporting to Title IX Coordinator

Notification Requirements

Schools Must Notify

- The following must be notified of the name or title, office address, e-mail address, and telephone number of the Title IX Coordinator:
 - Applicants for admission and employment
 - Parents or legal guardians of elementary and secondary school students
 - All unions

Accessible Reporting to Title IX Coordinator

Notification Requirements

The Notice

- The notice must provide that:
 - The district does not discriminate on the basis of sex in the education program or activity that it operates;
 - The district is required by Title IX and the Title IX regulations not to discriminate in such a manner;
 - The requirement not to discriminate in the education program or activity extends to admissions and employment; and
 - Application of Title IX and the Title IX regulations may be referred to the Title IX Coordinator, the Assistant Secretary, or both.

Accessible Reporting to Title IX Coordinator

Notification Requirements

- Schools must **prominently** display on their websites:
 - The required contact information for the Title IX Coordinator
 - The district's Title IX sexual harassment policy.
- This information must also be included in each handbook or catalog made available to those entitled to notice.
- Title IX training materials must be posted on school websites.

Title IX Sexual Harassment Procedure

Notice to Individuals

09.428111
AP.1

Certified, Classified &
Students

STUDENTS

09.428111 AP.1

Notice to Individuals Regarding Title IX Sexual Harassment/Discrimination

This notice shall be provided to applicants for admission and employment, students, parents or legal guardians of students, employees, and all unions or professional organizations holding collective bargaining or professional agreements.

The District's Title IX Coordinator (TIXC) is _____

Address	City, State, Zip
Email Address	Telephone Number

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 TIXC, or by any other means that results in the TIXC 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 TIXC.

The District must prominently display the contact information required to be listed for the TIXC and Policies 03.113, 03.212 Equal Employment Opportunity, 09.13 Equal Educational Opportunity, 03.1621, 03.2621, 09.428111 Title IX Sexual Harassment and 09.428111 AP.11 Title IX Grievance Procedures on its website, if any, and in each handbook or catalog that it makes available to persons entitled to a notification listed above.

The District must ensure that the TIXC(s), Investigators, Decision Makers, and any person who facilitates an informal resolution process, receive training on the regulatory definition of sexual harassment; the scope of the District's educational program or activities; how to conduct an investigation; the grievance process (including informal resolutions and appeals); and impartial service, conflict of interest, and bias standards.

The District must make these training materials publicly available on its website, or if the District does not maintain a website the District must make these materials available upon request for inspection by members of the public.

REFERENCES:

Title IX of the Education Amendments of 1972 (20 USC § 1681, et seq.); 34 C.F.R. Part 106

RELATED POLICIES:

03.113; 03.1621; 03.212; 03.2621; 09.313; 09.428111

RELATED PROCEDURES:

03.1621; 03.2621; (all procedures)
09.428111 (all procedures)

Review/Revised:8/10/2020

CITATION	SUMMARY
106.45(a)	School's treatment of parties may constitute discrimination
106.45(b)(1)(i)-(x)	Grievance Process Requirements
106.45(b)(2)	Written Notice of Allegations to Both Parties
106.45(b)(3)-(b)(4)	Formal Complaints Must be Investigated, Dismissals, Consolidation
106.45(b)(5)(i)-(vii)	Investigation Requirements
106.45(b)(6)	Cross Examination Conducted by Advisor
106.45(b)(7)	Independent/Neutral Decision-maker, Standard of Evidence Same, Written Determination
106.45(b)(8)	Appeals: Procedural Irregularities, New Evidence, Bias or Conflict of Interest
106.45(b)(9)	Informal Resolution: Voluntary, Written Consent, Not Allowed for Employee Respondent
106.45(b)(10)	Record Keeping, Publication of Training Materials

Procedural Protections

34 C.F.R. 106.45

Definitions

Title IX Rule § 106.30(a)

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

- ❖ Student reports to guidance counselor that she is being sexually harassed by another student.
- ❖ Teacher witnesses another teacher and student kissing in the other teacher's classroom and tells the Principal.
- ❖ Mother of student under 18 reports to the Title IX Coordinator that her son is being sexually harassed by other students on the bus.
- ❖ After reporting sexual harassment to the Title IX Coordinator, student decides she does not want her complaint investigated, and the Title IX Coordinator moves forward with a sexual harassment investigation.

Identifying the Complainant

Examples to Consider

Complainant and Respondent

Applies to parties in both *reports* and *formal complaints* of sexual harassment



Complainant: A person who is alleged to be the victim of conduct that could constitute sexual harassment

NOT third party reporter

NOT Title IX Coordinator who “signs” complaint



Respondent: A person who has been reported to be the perpetrator of conduct that could constitute sexual harassment

Actual Knowledge Triggers District's Duty to Respond

Examples to Consider

One evening after school, the Title IX Coordinator drives to the high school to retrieve an item he had left there earlier in the day. As he is exiting the building, he sees a teacher and student in the teacher's car kissing.



Actual Knowledge?

- What if the person who sees the conduct is the Superintendent?
- A teacher?
- The basketball coach who is not otherwise employed by the District?
- What if the complaint is anonymous and is sent to the Superintendent through the mail?

Definition

Title IX Rule § 106.30(a)

Actual Knowledge

Notice of sexual harassment or allegations of sexual harassment to:

- A recipient's Title IX Coordinator
- Any official of the recipient who has authority to institute corrective measures on behalf of the recipient; or
- To any employee of an elementary and secondary school.

****Standard not met when the only official with actual knowledge is the respondent.**

Title IX Sexual Harassment**INTRODUCTION AND SCOPE**

A United States Department of Education regulation published on May 19, 2020 defines sexual harassment for purposes of Title IX (sometimes referred to in policy and procedure as "Title IX Sexual Harassment"). In addition to numerous other matters, the regulation sets forth grievance procedure requirements that apply (including the initiation of a "formal complaint") before there is a determination that a student is responsible for Title IX Sexual Harassment. The applicable definition of sexual harassment describes serious sexual misconduct. If the alleged actions that are the subject of a formal complaint do not descend to the level of conduct described in the definition of Title IX Sexual Harassment; do not take place in a "program or activity" of the school District within the meaning of Title IX; or do not take place in the United States, the formal complaint must be dismissed.

Such a dismissal does not mean that the alleged offending party cannot be the subject of investigation or discipline on grounds other than "Title IX Sexual Harassment" as addressed in Board policy or law, including conduct allegedly constituting sexual harassment or other sexual misconduct that does fall within the definition of "Title IX Sexual Harassment."¹

PROHIBITION

Title IX Sexual Harassment in educational programs or activities of the District is prohibited.

EMPLOYEES SHALL REPORT

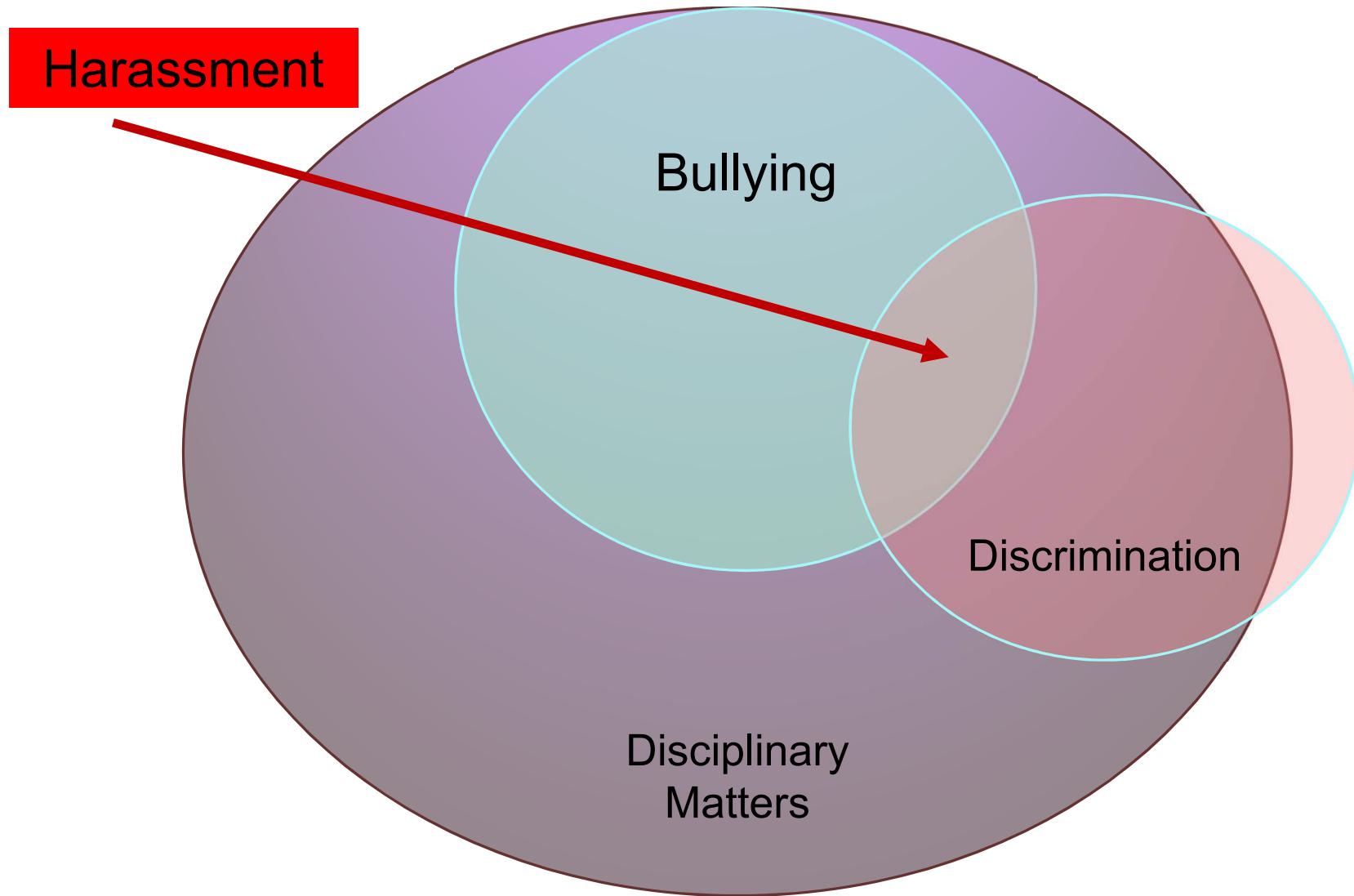
Employees who believe or have been made aware that they or any other employee, student, or visitor has been subject to Title IX Sexual Harassment shall report it to the TIXC. Failure to make such a report shall be grounds for discipline up to and including termination. If the knowledge of the reporting party gives rise to reasonable cause to believe that the reported conduct constitutes child abuse Policy 09.227 or a reportable criminal offense Policy 09.2211, notification of state officials shall be made as required by law.⁶

rape as used in the FBI's Uniform Crime Reporting system. A sex offense is an act directed against another person, without the consent of the second person, including instances where the second person is incapable of giving consent.³

Title IX Sexual Harassment Policy

03.1621 / 03.2621 / 09.428111

Harassment vs. Discrimination vs. Bullying vs. Discipline



Definition of Sexual Harassment

Title IX Rule § 106.30(a)

- The Rule's definition of sexual harassment has **three** components.

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

- 1) Quid pro quo harassment
- 2) Harassment pursuant to the Supreme Court's *Davis v. Monroe Co. Bd. of Ed.* opinion
- 3) Crimes under the Violence Against Women Act (VAWA) and the Clery Act

Definition of Sexual Harassment

Quid Pro Quo

- An **employee** conditions something of value for a sexual favor

Davis
Standard

- Conduct that is **so severe, pervasive, AND objectively offensive** that denies equal access

Clery and
VAWA
Crimes

- Sexual Assault, Stalking, Dating and Domestic Violence

Definition of Sexual Harassment

Scenario to Ponder

***Female student at the
middle school “butt slaps” a
male student.***

Is this behavior sexual
harassment under Title IX that
warrants an investigation?

Three Components of Sexual Harassment Definition

- 1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- 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 recipient's education program or activity; or
- 3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

Quid Pro Quo Sexual Harassment

- Applies only to an employee respondent
- Involves an abuse of authority over another employee or student
- Does not require a showing of severity, pervasiveness or offensiveness
- May involve implied conduct (need not be explicit)



Quid Pro Quo Sexual Harassment

Examples to Consider

- The custodial supervisor tells a night custodian he will consider her for a day shift position if she will go to dinner with him.
- Susie, the smartest girl in 11th grade, tells John she will write his term paper for him if he will date her.
- The Finance Officer asks the payroll clerk to give him a shoulder massage and further comments that if she “plays her cards right,” she can expect to have extended days added to her contract.
- John’s hours were reduced after he refused the sexual advances of his supervisor.



Sexual Harassment – *Davis* Standard

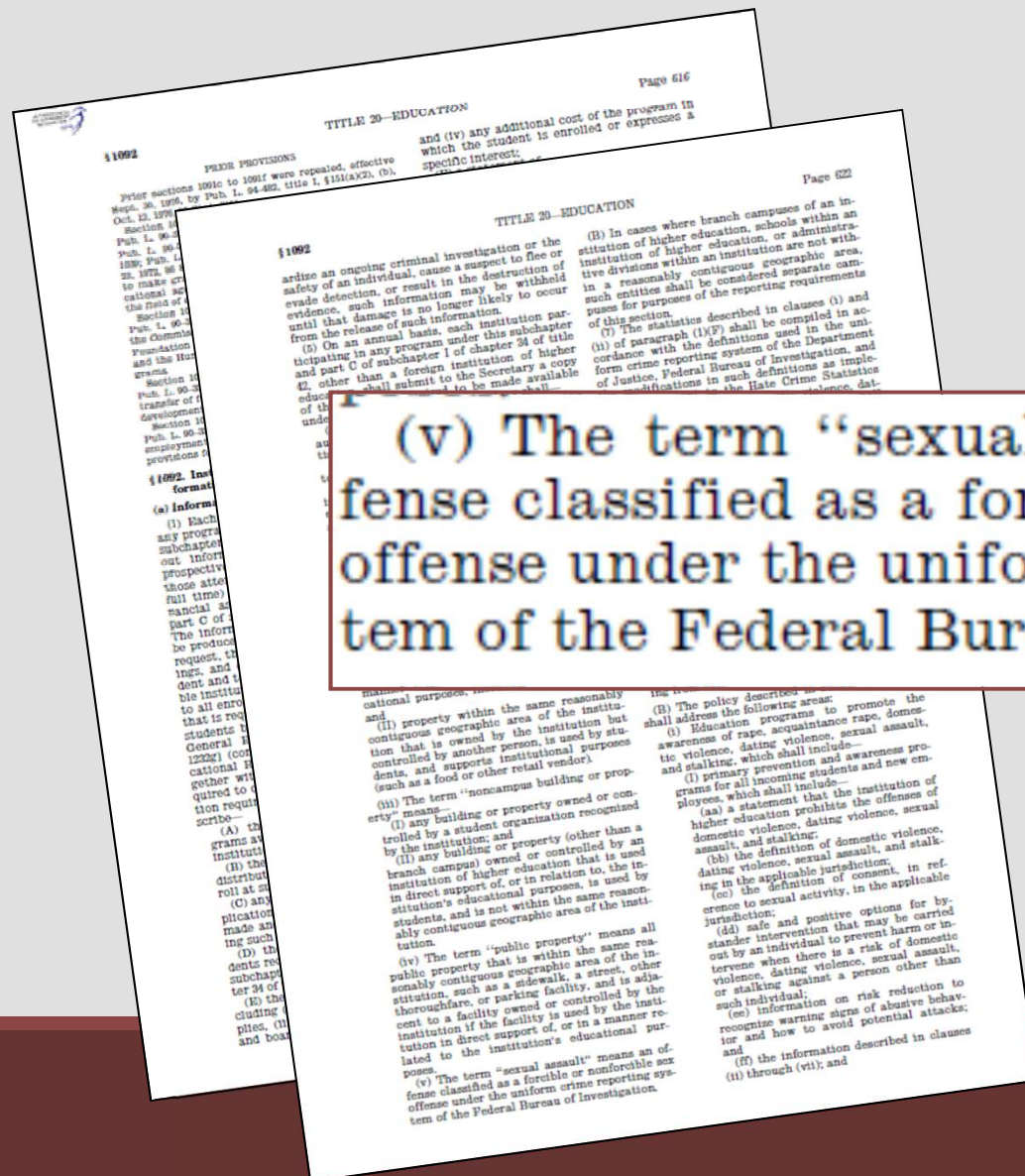
- Evaluated under a “reasonable person” standard that takes into consideration a constellation of facts, including ages of the parties involved, disability status, and positions of authority of the involved parties
- Can involve verbal, nonverbal, or physical conduct
- Must be severe, pervasive, **and** objectively offensive
 - Involves the denial of equal access to education as compared to access of person not subjected to sexual harassment

Words from OCR....

- Only serious situations will be actionable
- Not every instance of subjectively unwelcome conduct meets the sexual harassment definition under Davis standard
- Behavior that does not meet the definition of sexual harassment may still be addressed under other district policies and procedures

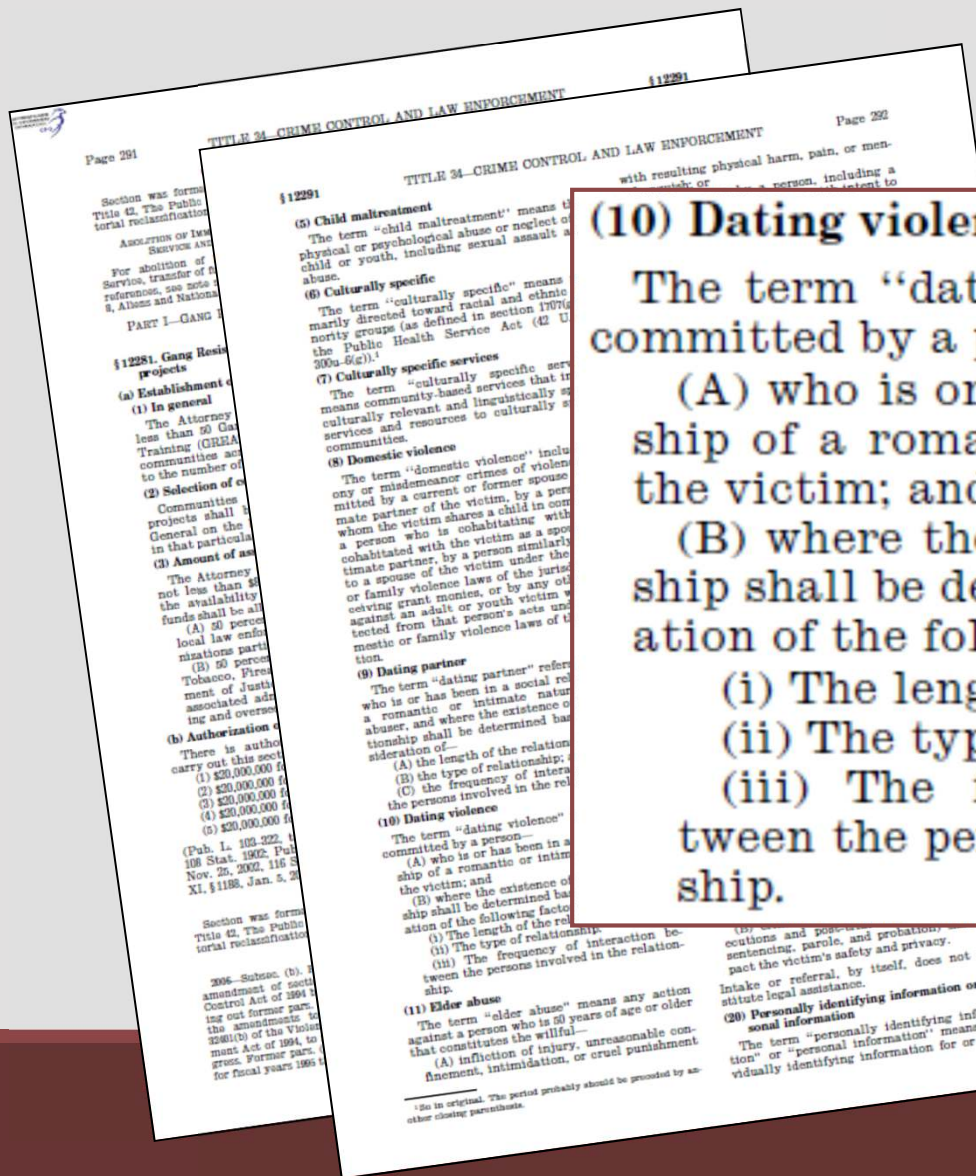
Denial of Equal Access

- Total exclusion of access not required
- Denial is measured against the access of a person who has ***not*** been subjected to sexual harassment
- Examples
 - 3rd grader who starts bedwetting or crying at night
 - High school wrestler who quits team but carries on with other school activities
 - Skipping class to avoid harasser
 - Decline in student's grade point average
 - Difficulty concentrating in class



Sexual Harassment: Clery/VAWA Crimes

Definition of Sexual Assault – 20 U.S.C. 1092(f)(6)(A)(v)



(10) Dating violence

The term “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:

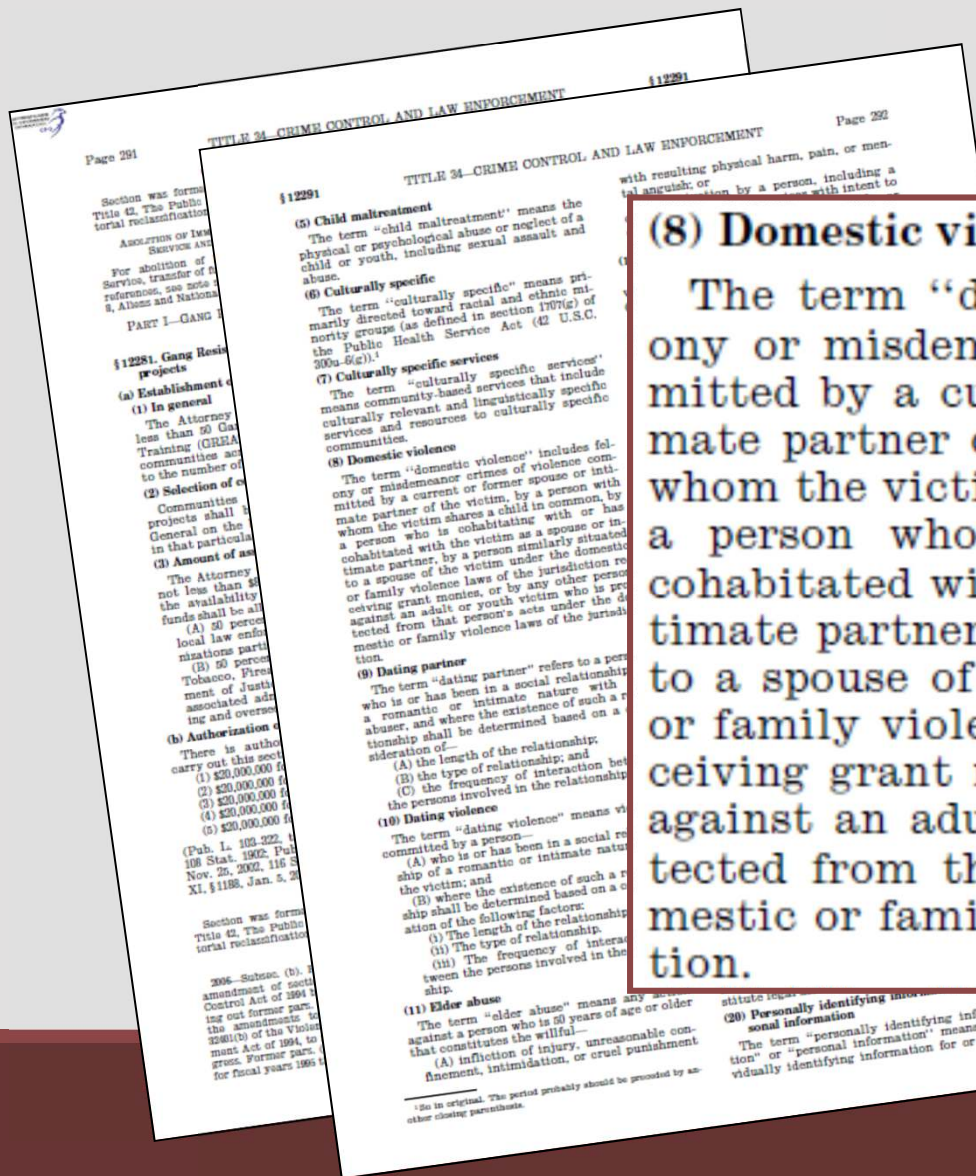
(i) The length of the relationship.

(ii) The type of relationship.

(iii) The frequency of interaction between the persons involved in the relationship.

Sexual Harassment: Clery/VAWA Crimes

Definition of Dating Violence – 34 U.S.C. 12291(a)(10)



(8) Domestic violence

The term “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.

Sexual Harassment: Clery/VAWA Crimes

Definition of Domestic Violence – 34 U.S.C. 12291(a)(10)

The term “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.

Sexual Harassment: Clery/VAWA Crimes

Definition of Stalking – 34 U.S.C. 12291(a)(30)

Sexual Assault

- Includes any sexual act directed against another person without their consent
 - Rape
 - Sodomy
 - Sexual assault with an object
 - Fondling (touching private body parts without consent for the purpose of sexual gratification)
 - Incest
 - Statutory rape

- ❖ The Rules do not provide a definition of consent.
- ❖ Schools must adopt a definition of consent.



Consent

Definition of Consent

Title IX Sexual Harassment Policy

03.1621 / 03.2621 /
09.428111

“Consent means a voluntary expression of willingness, permission, or agreement to engage in sexual activity throughout a sexual encounter. Consent cannot be granted by an individual: who is less than the statutory age of consent under Kentucky criminal law, has a mental or physical condition or incapacity that prevents the giving of consent; or from whom ostensible “consent” is extracted through threat, coercion, or forcible compulsion.”

Revisit “butt slapping” scenario by female student toward male student at the middle school



Consent

Per OCR -

“Where the touching of a person’s private body part occurs for the purpose of sexual gratification, that offense warrants inclusion as sexual assault.”

Consent



Formal Complaint

A document *filed by a complainant* or *signed by the Title IX Coordinator* alleging sexual harassment against a respondent and requesting that the district investigate the allegation.

Formal Complaint

- A formal complaint may be filed with the Title IX Coordinator
 - In person
 - By mail
 - By electronic mail using the contact info required to be listed for the Coordinator under § 106.8(a)
 - By any additional method designated by the recipient



Formal Complaint

- At the time of the filing, a complainant **must be participating in or attempting to participate** in the education program or activity of the recipient with which the formal complaint is filed.

Formal Complaint

- Must almost always be signed by complainant
- Must allege sexual harassment against a respondent and request an investigation
- No requirement of a detailed statement of facts
- District can have actual notice of sexual harassment without a formal complaint
- Title IX Coordinator has discretion to sign formal complaint and initiate the district's grievance process when the Title IX Coordinator believes doing so is necessary to avoid being deliberately indifferent.

What if an alleged victim does not want to file a complaint?

When deciding whether to “sign” a formal complaint, the Title IX Coordinator should consider:

- Pattern of alleged conduct, especially by person with authority
- Involvement of violence, weapons, etc.
- Seriousness of alleged conduct
- Age of student harassed

Decision to sign a Formal Complaint, or not, reviewed for “deliberate indifference”



- Can a third party file a formal complaint for a friend?
- Can an anonymous report constitute a formal complaint?
- Can a parent file a formal complaint on behalf of their child?
- Can a complainant file a formal complaint by telephone?
- Does the complainant have to use the district's form?

Questions about the Formal Complaint

Title IX Sexual Harassment Procedure

Title IX Sexual Harassment Reporting Form

09.428111
AP.21

Certified, Classified &
Students

STUDENTS

09.428111 AP.21

Title IX Sexual Harassment Reporting Form

COMPLAINANT _____
_____ <i>Last Name</i> _____ <i>First Name</i> _____ <i>Middle Initial</i>
STUDENT'S SCHOOL _____ GRADE _____ HOMEROOM/CLASSROOM _____
EMPLOYEE'S WORK SITE _____

INFORMATION CONCERNING SEXUAL HARASSMENT

DATE: _____ TIME: _____ ☐ AM ☐ PM LOCATION: _____

INDIVIDUAL(S) WHO ALLEGEDLY ENGAGED IN TITLE IX SEXUAL HARASSMENT:

DESCRIPTION OF ALLEGATION: _____

NAME OF PERSON FILLING OUT THIS FORM (PLEASE PRINT): _____

SIGNATURE: _____ DATE: _____

Review/Revised: 8/10/2020

Definition

Title IX Rule § 106.44

Educational Program or Activity

- Locations, events, or circumstances where the school exercises substantial control over both:
 - the Respondent
 - the context in which the alleged sexual harassment or discrimination occurs
 - Includes any building owned or controlled by the school or by a student organization that is officially recognized by the school

Jurisdictional Issue

- Fact specific inquiry
- If the alleged sexual harassment did not occur in the district's educational program or activity, Title IX does not apply.
- All on campus activities covered

Off Campus Activities Covered If:

- Off-campus incident occurs as part of district's operations; or
- The District exercised substantial control over both the respondent and the context of the alleged sexual harassment that occurred off campus

If Title IX does not apply, District can still act under its own code of conduct.

Educational Program or Activity

Educational Program or Activity

Questions

- What if some conduct occurs in the district's educational program or activity and some occurs outside the district's program or activity?
- What if a student uses a personal device (*i.e.* cell phone) to perpetrate online sexual harassment during class time?
- What if a student engages in online sexual harassment at home using a personal device?

Definition

Title IX Rule § 106.30(a)

Supportive Measures

- Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, 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
- Designed to restore or preserve equal access to the education program or activity without unreasonably burdening the other party

- May include the following:
 - Counseling
 - Extensions of deadlines
 - Other course-related adjustments
 - Modifications of work or class schedules
 - School escort services
 - Mutual restrictions on contact between the parties
 - Unilateral restrictions on contact that are not unreasonably burdensome on a respondent
 - Changes in work locations
 - Authorized leaves of absence
 - Increased security and monitoring of certain areas of the district

Supportive Measures

Title IX Sexual Harassment Policy 03.1621 / 03.2621 / 09.428111

Supportive Measures

- Every complainant entitled to an offer of supportive measures by Title IX Coordinator upon report of sexual harassment
- KSBA Board Procedure also requires Title IX Coordinator to discuss possible supportive measures with respondent
- Formal complaint not required
- Cannot be designed to punish the respondent
- Must remain confidential unless disclosure needed to implement
- If district determines that a violation of Title IX did not occur, within discretion of district to continue supportive measures
- If supportive measures are not provided, the Title IX Coordinator must document the reasons why the failure was not clearly unreasonable in light of the known circumstances

Serving Impartially and Avoiding Conflicts of Interest and Bias



Impartiality
is vital to
the Title IX
grievance
process.



- Serving **impartially** includes the avoidance of the following:
 - Prejudgment of the facts at issue
 - Conflicts of interest
 - Bias
- **BUT** what does this mean? And how do you avoid them?

Prejudgment of the Facts at Issue

- Prejudgment refers to passing judgment prematurely or without sufficient reflection or investigation
 - Example: Complainant was crying while making her report. You conclude that because she was crying, she must have been telling the truth about the Respondent's conduct.
- Neither the Complainant who reports sexual harassment nor the Respondent defending those allegations should be prejudged.
- Sex stereotypes often lead to prejudgment.
 - Example: Men cannot be sexually assaulted.
 - Example: Women complaining about sexual harassment are just jumping on the #MeToo bandwagon.

How to Avoid Prejudgment of the Facts

- Keep an open mind throughout the process.
- Wait to hear **all** of the facts.
- Seek out additional facts and/or witnesses if you feel you are jumping to conclusions.

How to Avoid Prejudgment of the Facts

- Consider potential responses to trauma
 - Delayed or reluctant reporting
 - Difficulty remembering details
 - Being calm and composed after an assault
- Do not assume that because there **are** signs of trauma, the trauma was caused by the Respondent.
- Do not assume that because there **are not** signs of trauma that nothing bad happened.

He's not
a rapist.
He was
just
drunk.

If he
hadn't
been
drunk....

But she
went back
to him....

She
didn't
even cry.

He bought
her dinner.
She owed
him.

Why didn't
he fight
back?

He didn't
even say
no....

Why
didn't she
yell for
help?

Why
didn't he
run
away?

She led him
on....She
couldn't say
no.

Dressed
like that,
what did
she
expect?

Stories We Tell Ourselves

Conflicts of Interest

- A conflict of interest occurs when personal or private interests compromise one's judgment, decisions, or actions.
- Conflicts of interests can occur as a result of personal relationships (family, friends, faculty, civic organizations, etc.), financial investments, or other social factors.
- There are no *per se* conflicts of interests outlined in the Title IX regulations.
 - **BUT** there may exist the appearance of a conflict or a bias that prevents the investigator from serving.

- A conflict of interest that disqualifies you from the Title IX grievance process is one that prevents you from being able to impartially participate.
- Conflicts of interest can be **actual, perceived, or potential.**

Conflicts of Interest

Conflicts of Interest

- **Actual** conflict of interest - a direct conflict between your official duties and responsibilities and a competing personal interest or obligation.
 - Example: The Title IX decision maker's daughter is the Complainant.
- **Perceived** conflict of interest - a situation where it could reasonably be perceived that a competing interest could improperly influence the performance of your official duties and responsibilities.
 - Example: The Title IX investigator previously had relationship with a family member of the Respondent.
- **Potential** conflict of interest - arises where a personal interest or obligation may conflict with one's official duties and responsibilities in the future.
 - Example: The Title IX Coordinator and Complainant are scheduled to co-chair an upcoming school event.

Conflicts of Interest



- How do you determine if you have a conflict of interest? Ask yourself the following questions:
 - Would I be happy if my colleagues became aware of the conflict?
 - Would I be happy if the conflict was discussed in the media or on Facebook or Twitter?
 - If someone else was in my position, would I think he/she should be barred from participating?
 - If I were the Complainant or the Respondent, would I want someone in my position to investigate the allegations?

Bias

- A bias is a tendency, inclination, or prejudice towards or against someone.
 - Often based on stereotypes, rather than actual knowledge of an individual or a particular circumstance
 - Frequently based on a person's gender, race, or sexual orientation



Examples of Bias

- ❖ **Example:** When talking with Title IX Complainants, the Title IX Coordinator begins the initial interview by asking who the Respondent is and what “he” did to the Complainant (always assuming the Respondent is a male).
- ❖ **Example:** A Title IX Decision-maker finds the Respondent more credible than the Complainant because the Respondent speaks “perfect English” while the Complainant, who only knows English as a second language, does not.

Avoiding Bias

- Let the evidence lead to the conclusion, not the other way around.
- Maintain documentation.
 - Evaluate the source of the information, the content, and the plausibility in light of other evidence.
- Be thorough. Don't limit the investigation to either party's witnesses or evidence.

The Initial Report



What must a school district do to respond?

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

Title IX Sexual Harassment Grievance Procedures

09.428111 AP.11

STUDENTS

09.428111AP.11

Title IX Sexual Harassment Grievance Procedures

THIS PROCEDURE APPLIES TO "TITLE IX SEXUAL HARASSMENT"
UNDER POLICIES 03.1621, 03.2621, AND 09.428111.

REPORTING

1. School employees who have reason to believe that a student has been subjected to Title IX Sexual Harassment are required to promptly make a report to the Title IX Coordinator (TIXC).
2. Students, parents/legal guardians or other individuals who believe a student has been sexually harassed may make a report to the TIXC.
3. If the individual making the report is the alleged victim ("Complainant") as defined in

5. The Superintendent / designee shall be informed of all reports and formal complaints of sexual harassment.

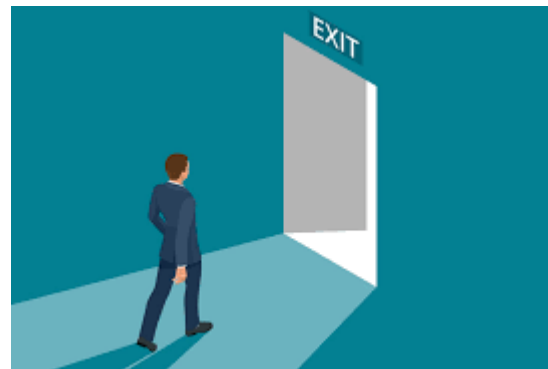
FORMAL COMPLAINT

1. A Complainant and/or their parent/legal guardian may file a formal written complaint requesting investigation of alleged Title IX Sexual Harassment. The written complaint must include basic information concerning the allegation of sexual harassment (i.e., date, time, location, individual(s) who allegedly engaged in sexual harassment, description of allegation).
Students who need assistance in preparing a formal written complaint, may consult with the TIXC.
2. In accordance with the Title IX regulations, the TIXC must dismiss a formal complaint under this Title IX procedure if:
 - a) the conduct alleged in the formal complaint does not constitute sexual harassment as defined under the Title IX regulations and the Title IX Sexual Harassment policy; or
 - b) the conduct alleged did not occur within the scope of the District's education programs and activities; or
 - c) did not occur in the United States.
3. In accordance with the Title IX regulations, the TIXC may dismiss a formal complaint if:
 - a) a Complainant withdraws the formal complaint, or withdraws particular allegations within the complaint;
 - b) the Respondent is no longer employed by or enrolled in the District; or

Page 1 of 9

Emergency Removal / Employee Administrative Leave

- Removal / leave can occur before an investigation into sexual harassment allegations concludes or where no grievance process is pending.
- The Superintendent directs the removal.



Immediate Emergency Removal of Student

Based on an individualized safety or risk analysis (**See KSBA Policy 09.429 Threat Assessment)

To protect a student or other individual from immediate threat to physical health or safety

Notice, opportunity to challenge provided “immediately” after the removal (**See KSBA Policy 09.434 Suspension)

Can place burden of proof on Respondent to show removal decision was incorrect

Consider other laws, e.g., state laws, “change in placement” under IDEA

Employee Administrative Leave

Not prohibited

KSBA Board Policies 03.173 (Certified) and 03.27 (Classified) allow for temporary suspension with pay while awaiting the outcome of a pending investigation

Initial Meeting with Complainant

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

Contact	Upon receipt of actual knowledge, contact the complainant to discuss the availability of “supportive measures”
Consider	Consider the complainant’s wishes with respect to supportive measures
Inform	Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint
Explain	Explain the process for filing a formal complaint

The Formal Complaint



Written Notice Regarding Formal Complaint

Upon receipt of a formal complaint and prior to any interviews, the Title IX Coordinator must provide **the parties** written notice of:

- ✓ The district's grievance process, including any informal resolution process;
- ✓ The allegations of sexual harassment;
- ✓ The identity of the parties;
- ✓ The conduct allegedly constituting sexual harassment;
- ✓ The date and location of the incident;
- ✓ The presumption of nonresponsibility until a determination has been made regarding responsibility at the end of the grievance process;
- ✓ The right to inspect and review evidence;
- ✓ The right to have an advisor during the process; and
- ✓ Any provision in the district's code of conduct that prohibits knowingly making false statements or submitting false information during the grievance process.

Title IX Sexual Harassment**INTRODUCTION AND SCOPE**

A United States Department of Education regulation published on May 19, 2020 defines sexual harassment for purposes of Title IX (sometimes referred to in policy and procedure as "Title IX Sexual Harassment"). In addition to numerous other matters, the regulation sets forth grievance procedure requirements that apply (including the initiation of a "formal complaint") before there is a determination that a student is responsible for Title IX Sexual Harassment. The applicable definition of sexual harassment describes serious sexual misconduct. If the alleged actions that are the subject of a formal complaint do not descend to the level of conduct described in the definition of Title IX Sexual Harassment; do not take place in a "program or activity" of the school District within the meaning of Title IX; or do not take place in the United States, the formal complaint must be dismissed.

Such a dismissal does not mean that the alleged offending party cannot be the subject of investigation or discipline on grounds other than "Title IX Sexual Harassment" as addressed in Board policy or law, including conduct allegedly constituting sexual harassment or other sexual misconduct that does fall within the definition of "Title IX Sexual Harassment."¹

PROHIBITION

Title IX Sexual Harassment in educational programs or activities of the District is prohibited.

GRIEVANCE PROCEDURE

The District shall provide a Title IX Sexual Harassment grievance procedure that treats complainants and respondents equitably as required by Federal Regulation.²

DEFINITIONS**Title IX Sexual Harassment**

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

- 1) An employee of the District conditioning the provision of an aid, benefit, or service of the District on an individual's participation in unwelcome sexual conduct (i.e., quid pro quo sexual harassment);
- 2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and

FALSE REPORTS PROHIBITED

Employees or students who intentionally make false reports related to the District's administration of this policy and the corresponding procedures, are subject to disciplinary sanctions under applicable District policy, law, or the Student Discipline Code, as applicable.

Title IX Sexual Harassment Policy

03.1621 / 03.2621 / 09.428111

Confidentiality

- The District must keep confidential the identity of the following:
 - Any individual who has made a report or complaint
 - Any complainant, respondent, or witness
 - Any individual who has been reported to be the perpetrator
- Exceptions
 - Those permitted by FERPA, by law, or those needed to carry out Title IX purposes, including the conduct of any investigation, hearing or judicial proceeding

Title IX Sexual Harassment Policy

03.1621 / 03.2621 / 09.428111

Confidentiality

- Investigative evidence directly related to the allegations of a formal complaint is subject to inspection and review by the parties
 - **BUT** is not to be disseminated to the public
 - DOE rule commentary: In accordance with FERPA's definition of "education records," a parent of a complainant or a respondent (or eligible student) has a right to inspect and review any witness statement that is directly related to the student **EVEN IF** that statement contains information directly related to another student **IF** the information cannot be segregated or redacted without destroying its meaning.

Title IX Sexual Harassment Policy

03.1621 / 03.2621 / 09.428111

Title IX Scenario

A single teacher brings a complaint against a married administrator alleging learing, glaring, comments about short skirts, etc. There is also an underlying rumor about a physical sexual relationship. The investigation has begun with an interview of the Respondent, and the Complainant has now written an e-mail to the superintendent withdrawing her complaint.

Dismissal of Formal Complaint

- The Title IX Coordinator **must dismiss** a formal complaint if:
 - The conduct alleged does not meet the definition of sexual harassment; or
 - The conduct alleged did not occur within the scope of the district's educational programs and activities; or
 - The conduct did not occur in the United States
- If a formal complaint is dismissed, the Title IX Coordinator **must provide written notice** to the parties explaining the reasons.
- The parties can appeal any dismissal.

Dismissal of Formal Complaint

- The Title IX Coordinator **may dismiss** a formal complaint if:
 - A Complainant withdraws the complaint; or
 - The Respondent is no longer employed or enrolled in the district; or
 - There are specific circumstances that prevent the district from gathering evidence sufficient to reach a determination.

Reasonably Prompt Time Frames

Time frames for grievance process must be **reasonably prompt**, including appeals and internal resolution process

The Investigation

- The investigation shall be concluded within **40 calendar days** from the date of the notice to the parties following a formal complaint
 - **Initial Interviews of the Parties:** Not less than **10** calendar days from the date of the notice to the parties following a formal complaint
 - **Parties Raise Conflict of Interest or Bias Concerns regarding Investigator:** **3** calendar days from the date of the notice to the parties following a formal complaint
 - **Written Response Regarding Evidence:** **10** calendar days
 - **Written Response to Investigative Report:** **10** calendar days

Reasonably Prompt Time Frames

Time frames for grievance process must be **reasonably prompt**, including appeals and internal resolution process

Pre-Determination Matters

- **Written Questions a Party Wants Decision Maker to Ask Other Party or Witness:** **5** calendar days from date Decision Maker Received Investigative Report
- **Follow-Up Questions:** **5** calendar days to submit written follow-up questions after reviewing the responses of the other party and/or witness

- **Determination of Responsibility:** issued by the Decision Maker within **30** calendar days of receipt of the Investigator's report
- **Written Appeal:** Filed within **5** calendar days of receipt of the determination decision
- **Written Response to Appeal:** **5** calendar days upon receipt of notification by the Appellate Decision Maker of a party's appeal



Reasonably Prompt Time Frames

The Determination and Appeals

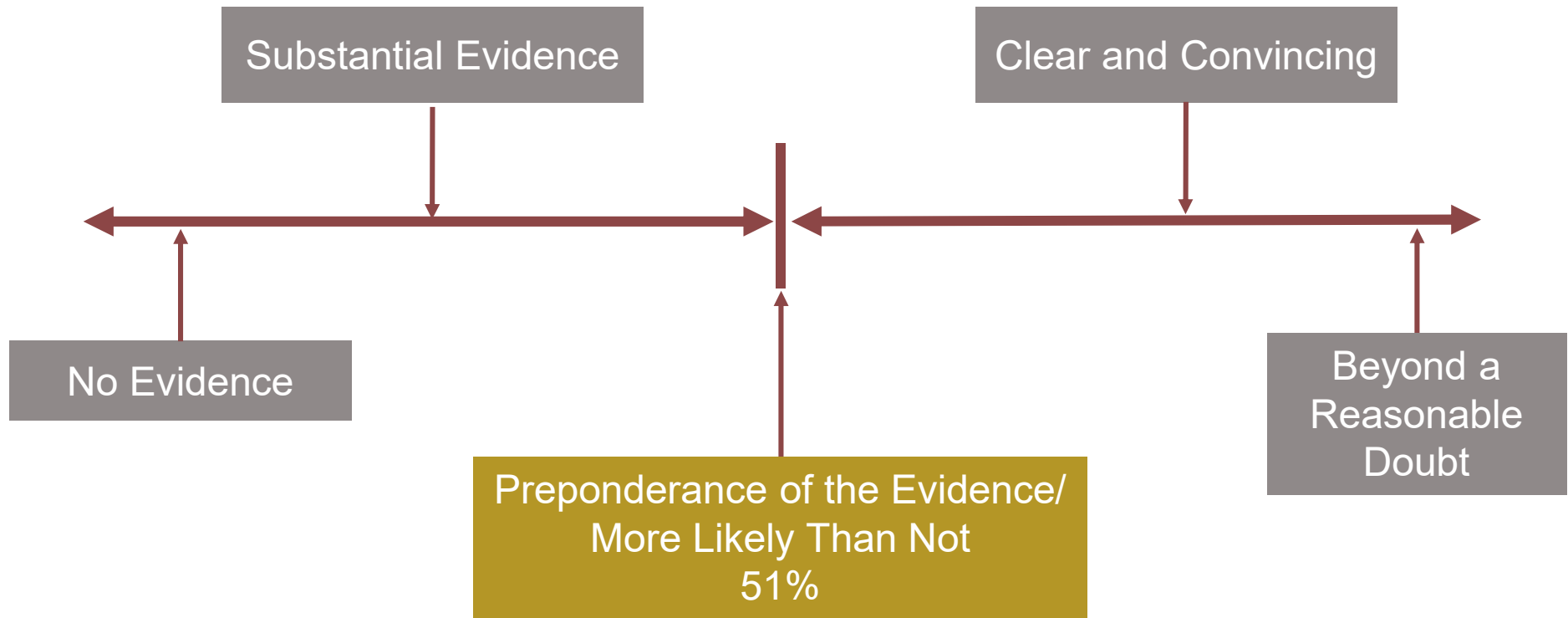
Reasonably Prompt Time Frames

- Limited extensions permitted only for good cause
- A concurrent criminal investigation does not alleviate Title IX investigating requirements but could support short delay
- Must try to accommodate schedules of parties or witnesses but they cannot indefinitely delay the grievance process by failing to cooperate

Conducting the Investigation



Evidentiary Standards



Understanding Evidence Threshold

Standard of Evidence

Districts must adopt a standard of evidence:

- ☐ **Preponderance of the evidence** = concluding that a fact is more likely than not to be true
- ☐ **Clear and convincing evidence** = concluding that a fact is highly probable to be true



Must use the same standard of evidence for **all** complaints against students and employees

STUDENTS

09.428111

Title IX Sexual Harassment

INTRODUCTION AND SCOPE

A United States Department of Education regulation published on May 19, 2020 defines sexual harassment for purposes of Title IX (sometimes referred to in policy and procedure as "Title IX Sexual Harassment"). In addition to numerous other matters, the regulation sets forth grievance procedure requirements that apply (including the initiation of a "formal complaint") before there is a determination that a student is responsible for Title IX Sexual Harassment. The applicable definition of sexual harassment describes serious sexual misconduct. If the alleged actions that are the subject of a formal complaint do not descend to the level of conduct described in the definition of Title IX Sexual Harassment; do not take place in a "program or activity" of the school District within the meaning of Title IX; or do not take place in the United States, the formal complaint must be dismissed.

Such a dismissal does not mean that the alleged offending party cannot be the subject of investigation or discipline on grounds other than "Title IX Sexual Harassment" as addressed in Board policy or law, including conduct allegedly constituting sexual harassment or other sexual misconduct that does fall within the definition of "Title IX Sexual Harassment."¹

PROHIBITION

Title IX Sexual Harassment in educational programs or activities of the District is prohibited.

GRIEVANCE PROCEDURE

The District shall provide a Title IX Sexual Harassment grievance procedure that treats complainants and respondents equitably as required by Federal Regulation.²

DEFINITIONS

Preponderance of the Evidence

"Preponderance of evidence" means evidence that is of greater weight or more convincing that an asserted fact or facts occurred than evidence in opposition to such facts. It is evidence which as a whole shows that an assertion to be proven is more likely than not.

instances where the second person is incapable of giving consent.³

Page 1 of 5

Title IX Sexual Harassment Policy

03.1621 / 03.2621 / 09.428111

Statute of Limitations - Example

When Jane was in 7th grade she was subjected to severe sexual harassment by several boys on the bus which included unwanted verbal taunts and grabbing her body. She never reported their behavior. Jane is now in 11th grade and is aware of the Me Too Movement. She decides to tell her high school guidance counselor about what happened and wants the boys punished.

Is Jane's report too late?

How far back must the district go to fulfill its Title IX obligations?

Burden of Proof

- The burden of gathering evidence and the burden of proof remains on the district throughout the grievance process
- Both parties have the right to provide evidence and witnesses but not required
- The district bears the responsibility of gathering evidence and interviewing witnesses
- The district is neutral during the investigative process
- **Goal** of the investigation is to gather information so the neutral decision maker can make an accurate determination

The Parties' Rights

- Notice and opportunity to prepare
- Right to an advisor
- Opportunity to present evidence (documentation and witnesses)
- Cannot restrict the parties' right to discuss the allegations with others
- Right to review all evidence directly related to the investigation
- Right to review the Investigative Report

Notice and Opportunity to Prepare

Title IX Rule
§ 106.45(b)(5)(v)

“When investigating a formal complaint and throughout the grievance process...a recipient must provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate....”

Right to an Advisor

Title IX Rule §106.45(b)(5)(iv)

- The parties shall have the same opportunity to have an advisor of his/her choice
 - Advisor can be anyone – attorney, friend, parent, another student
- The role of the advisor is to provide support and to accompany the party to meetings and interviews
- The district can establish restrictions regarding the extent to which the advisor can participate in the proceedings BUT any restrictions must apply equally to both parties

Right to an Advisor

KSBA Procedure 09.428111 AP.11

STUDENTS

09.428111AP.11
(CONTINUED)

Title IX Sexual Harassment Grievance Procedures

INFORMAL RESOLUTION PROCESS (CONTINUED)

Informal resolutions can take many forms, depending on the particular case. Examples include, but are not limited to, facilitated discussions between the parties; restorative justice; acknowledgment of responsibility by a Respondent; apologies; disciplinary actions against a Respondent or a requirement to engage in specific services; or supportive measures. Both parties must voluntarily agree in writing to participate in an informal resolution process, and either party can withdraw from the process at any time. The Superintendent/designee must agree to the terms of any informal resolution reached between the parties. If an informal resolution agreement is reached, it must be signed by both parties and the District. Any such signed agreement is final and binding according to its terms.

If an informal resolution process does not resolve the formal complaint, nothing from the informal resolution process may be considered as evidence in the subsequent investigation or determination. The parties will be advised that engagement in the informal resolution process is grounds for extension of the investigation timeline.

INVESTIGATION

1. The complaint will be investigated by a trained internal or external individual designated by the Superintendent, who should consult with District legal counsel concerning the handling and investigation of the complaint.
2. The Investigator may consult with the TIXC as agreed during the investigation process.

b. Allow parties to have their advisor at all meetings related to the complaint, although advisors may not speak on behalf of a party or interfere with the process.

ascertaining facts (site visits, review of documents, etc.).

- e. Consider evidence that is relevant and directly related to the allegations in the formal complaint.
- f. During the course of the investigation, provide both parties with an equal opportunity to inspect and review any evidence that is obtained in the investigation that is directly related to the allegations in the formal complaint (including evidence which the District does not intend to rely upon in reaching a determination of responsibility), and favorable and unfavorable evidence.

Right to Discuss the Allegations

Title IX Rule
§ 106.45(b)(5)(iii)

- The district cannot restrict the parties from discussing the allegations or from gathering evidence.
 - No confidentiality or gag orders
- Some limited exceptions
 - No-contact directive
 - Purpose cannot be retaliatory



The Investigative Process

Formal Complaint is brought

Notice sent regarding the allegations

Plan Investigation

Conduct Interviews and Collect Evidence

Follow-Up

Parties to review, inspect, and comment on the evidence

Complete Investigation Report and recommendation and send to parties for their review and written responses

Distribute Investigation Report and parties' written responses to Decision Maker

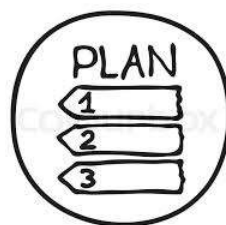
The Investigation

Develop
Gather
Conduct
Provide

- ❖ Develop an investigation plan
- ❖ Gather all relevant evidence
- ❖ Conduct interviews
- ❖ Provide evidence to parties and prepare final Investigative Report and recommendation

Investigation Plan

- Determine the scope of the investigation
- Prepare a chronology of known events with respect to the allegations
- Identify important witnesses to be interviewed and develop a preliminary schedule of interviews
- Identify relevant evidence to be obtained



Conducting Interviews



Interviews of the Parties and Witnesses

- Determine where to conduct the interviews
 - Private location where parties and witnesses will be comfortable
- Explain the investigation process
 - Give expected time frame for completion of investigation
 - Explain what details might be shared with others
- Cover the district's prohibition on retaliation

Interviews of the Parties and Witnesses

Do's and Don'ts

DON'T: Be too formal

DO: Show empathy while maintaining a professional objectivity

DON'T: Refuse to ask a particular question because it may be embarrassing or because it may make you or the witness uncomfortable

DO: Ask questions in a tactful manner in order to obtain all the necessary details

Interviews of the Parties and Witnesses

Do's and Don'ts

DON'T: Ask questions based on what you think might have happened

DO: Ask open-ended questions to obtain the facts and then follow up to clarify the details

DON'T: Interrupt the witness or make assumptions

DO: Allow the witness time to tell his/her story

Interviews of the Parties and Witnesses

Do's and Don'ts

DON'T: Act like a detective on Law & Order and treat the interview like an interrogation

DO: Remember your role as an investigator and remain objective

DON'T: Allow unconscious bias or your personal beliefs to erode your objectivity

DO: Continually remind yourself to keep an open mind and gather all the evidence.

The Evidence



Evidence

- The **district** carries the burden of proof.
- The Investigator must collect **all** of the evidence **related to** the allegations and then evaluate the relevant evidence.
- **Cannot exclude relevant evidence** because it may be unduly prejudicial, concern prior bad acts, or constitute character evidence.
- Privileged evidence is **not** relevant **without consent**.
 - ▶ Attorney-client ▶ Doctor-patient ▶ Spouse
- Medical and counseling records are **not** relevant **without voluntary, written consent**.
- Complainant's prior sexual behavior is **not** relevant with **two exceptions**.
- The parties have the **right to inspect** all the evidence (both related to and relevant).


Evidence pertinent to proving whether facts material to the allegation are more or less likely to be true.



Relevant Evidence

RELATED EVIDENCE RULES SUMMARY

The following rules apply to the District investigation and grievance process under the Title IX Sexual Harassment regulation:

- a) The District shall not require, allow, rely upon, or otherwise use questions or evidence that constitutes or seeks disclosure of information protected under a legally recognized privilege unless the person holding such privilege has waived the privilege.
- b) The District cannot access, consider, disclose, or otherwise use a party's records made or maintained in connection with provision of treatment to the party by medical or mental health professionals or paraprofessionals unless the District obtains written consent from the party.
-  c) Questions and evidence about the complainant's sexual predisposition or prior behavior are not relevant unless such questions and evidence are offered to prove that someone other than the respondent committed the conduct or, such questions or evidence are offered to prove consent.

Relevance, Rape Shield Protections & Exceptions

Excerpt from Title IX Sexual Harassment Policy 03.1621 / 03.2621 / 09.428111

Reviewing the Evidence



Before issuing the Investigative Report, the Investigator must provide the parties and advisors an opportunity to inspect and review the evidence.

- Evidence that is directly related to (both relevant and irrelevant) the allegations raised in the Formal Complaint
- Statements, notes of interviews, and other types of evidence the school plans to use before reaching a determination **and evidence the school doesn't think it will use**
- Provide the evidence in electronic or hard copy format
- Advise the parties that the evidence is not to be publicly disseminated

The parties must be given at least **10 calendar days** to review all the evidence and submit written responses about the evidence to the investigator.

The Investigator **must** consider parties' input prior to completion of Investigative Report.

The Investigative Report



The Investigative Report

- The final investigative report must fairly summarize **relevant** evidence.
- Per KSBA Board procedure 09.428111 AP.11, **must include** the Investigator's recommendation on whether or not the evidence supports a finding that the Respondent engaged in conduct constituting Title IX sexual harassment.
 - **But**, the Decision Maker is under an independent obligation to objectively evaluate the relevant evidence and **cannot defer** to the Investigator's recommendations.
- Investigator must send the final investigative report to the parties and any advisors simultaneously for their review and written responses.
 - Written responses to be filed within 10 calendar days of receipt of the report
 - Investigator must forward the Investigative Report and party responses to the assigned Decision Maker

Determination Regarding Responsibility



Opportunity of Parties to Submit Questions

- Prior to reaching a determination regarding responsibility, the Decision Maker
 - Must immediately inform the parties of the date he/she received the Investigative Report and give each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness
 - Must allow 5 calendar days
 - Must provide each party with answers
 - Must allow for additional, limited follow-up questions from each party within 5 calendar days from receiving the answers
 - Must provide each party with follow-up answers
 - Must explain to the party proposing the questions any decision to exclude a question as not relevant

- The Decision Maker must review the Investigative Report, the parties' responses and other written materials before issuing the determination.
- Preponderance of the evidence standard applies



The Written Determination

Written Determination

Title IX Rule § 106.45(b)(7)(ii)

Written Determination must include the following:

- Identification of the allegations potentially constituting sexual harassment;
- Description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
- Findings of fact supporting the determination;
- Conclusions regarding the application of the district's code of conduct to the facts;
- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the district imposes on the Respondent, and whether remedies designed to restore or preserve equal access to the district's education program or activity will be provided by the district to the Complainant; and
- The district's procedures and permissible bases for the Complainant and Respondent to appeal.

Written Determination

- Written Determination to be issued within **30 calendar days** of the Decision Maker's receipt of the Investigative Report
 - Reasonable extension for good cause allowed
- Decision Maker must provide determination to the parties simultaneously
- Determination becomes final when the district issues a written decision regarding any appeal or, if no appeal is filed, the date when an appeal would no longer be considered timely

- ❖ Required if the determination substantiates that sexual harassment occurred.
- ❖ Designed to restore or preserve equal access to the district's education program or activity.
- ❖ Nature of remedies being offered should not appear in the written determination of responsibility
- ❖ Title IX Coordinator responsible for effective implementation of remedies
- ❖ Can be same as supportive measures and can include other appropriate measures
- ❖ Need not be non-disciplinary or non-punitive and may burden the Respondent

Remedies

Disciplinary Sanctions

Title IX Sexual Harassment Grievance Procedure

09.428111 AP.11

- For students, the non-exhaustive range includes:
 - In or out of school suspension
 - Expulsion
 - Assignment to alternative education programs
 - Requirement to engage in education or counseling program
 - Disqualification or modification of privileges to participate in sports or extracurricular programs
 - Unilateral no-contact orders
 - School assignment alteration or schedule changes
 - Prohibitions or limitations on presence on school property or at school-related events
 - Other disciplinary sanctions and interventions set forth in the district's code of conduct

Disciplinary Sanctions

Title IX Sexual Harassment Grievance Procedure

09.428111 AP.11

- For employees, the non-exhaustive range includes:
 - Requirement to engage in education or counseling program
 - Unilateral no-contact orders
 - School assignment alteration
 - Prohibitions or limitations on presence on school property or at school-related events
 - Private reprimand
 - Public reprimand
 - Suspension without pay
 - Termination

Appeals



Appeals

- Both parties have the right to appeal from a **determination of responsibility** and the **decision to dismiss a formal complaint**, on the following bases:
 - A procedural irregularity that affected the outcome
 - New evidence that could affect the outcome **and** that was not *reasonably available* at the time the determination or dismissal was made
 - The Title IX Coordinator, Investigator, or Decision Maker had a conflict of interest or bias against complainants or respondents in general **or** against the specific Complainant or Respondent that affected the outcome

Appeals

- An appeal must be filed within 5 calendar days of decision
- An appeal must be filed in writing with the Superintendent and state the grounds and arguments for reversal or modification of the decision

The Appeal Process

- The Superintendent may serve as the Appellate Decision Maker **or** submit the appeal to the designated Appellate Decision Maker.
- The Appellate Decision Maker must notify the other party **in writing** when an appeal is filed **and** include copies of the document setting forth the grounds and arguments in support of the appeal.
- The other party has the option of filing written arguments in response to the opposing party's appeal within **5 calendar days** of the appeal document.

The Appeal Process

The Appellate Decision Maker must:

- Conduct an impartial review of the appeal including consideration of arguments of the parties and the written record
- Issue a written decision describing the result of the appeal and rationale for the result
- Provide notice of the written decision simultaneously to the parties

The decision may:

- Affirm the determination
- Reverse the determination
- Modify the determination in whole or in part

Recordkeeping

Records related to sexual harassment reports and the complaint process must be maintained for **a minimum of 7 years.**



Informal Resolution



Informal Resolution



- **School has discretion** to choose to offer and facilitate informal resolution process
 - **Not** required
- **IF** informal resolution offered
 - Can only be utilized when there is a formal complaint
 - Can be used so long as **both** parties **voluntarily** agree
 - Informed, written consent required
- Process can be utilized any time **prior to** reaching a **determination**
- At any time before resolution, a party can withdraw from the informal process and resume the grievance process.
- School may not require a waiver of the right to a formal investigation.

The District may not require Informal Resolution...

As condition of enrollment or continuing enrollment;

As condition of employment or continuing employment; or

As condition of enjoyment of any other rights.

Informal Resolution

Informal Resolution - Considerations

- Cannot be used to resolve allegations that employee sexually harassed a student
- Avoid using in severe situations or with violent incidents
- Title IX Coordinator determines if the informal resolution process should be utilized
- **Remember:** The parties must voluntarily agree to participate. The Title IX Coordinator cannot pressure a party to participate.

Reasons to Consider Informal Resolution

- Parties may be more satisfied with outcomes they reach themselves
- Solutions are tailored to the parties' needs
- Process is less adversarial

Types of Informal Resolution

Mediation

- Informal Resolution Officer
 - Extensive experience needed
 - Private mediation a plus
 - School officer or third party?
 - Ensure no bias or conflicts of interest
- Who pays cost?
- Is result privileged and confidential?

Types of Informal Resolution

Restorative Justice

- Not defined in the regulations
- Purpose is to repair harm through facilitation
- Any requirement to admit responsibility?
- Supportive vs. Punitive

- Acknowledgement of responsibility by a Respondent
- Apologies
- Disciplinary actions against a Respondent or a requirement to engage in specific services
- Supportive Measures

Other Examples of Informal Resolution

Title IX Grievance Procedure 09.428111 AP.11

Requirements for Informal Resolution Process

KSBA Procedure
09.428111 AP.11

- **Both** parties must **voluntarily** agree **in writing**.
- **Either** party can withdraw at any time.
- The Superintendent, or designee, **must agree** to the terms of the informal resolution reached by the parties.
- Any agreement reached **must be signed** by **both** parties and the District.
- The parties must be advised that engagement in the informal resolution process is grounds for an **extension of the investigation timeline**.

- Create ground rules in writing
- Utilize remote technology
- Keep parties apart in mediation



Informal Resolution Recommendations

Retaliation



Retaliation

Title IX Rule § 106.71

Retaliation Prohibited

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

Retaliation



- Any reports of retaliation should be made **immediately** to the Title IX Coordinator.
- Retaliation complaints may be filed under Title IX grievance process.
- The exercise of First Amendment rights does not constitute retaliation.

Retaliation

- Beware of disciplining for a non-harassment code of conduct violation where you learned of the violation via the sexual harassment complaint.
 - It can be done, but should be for an infraction for which you typically would discipline.
 - Someone other than the Investigator or the Decision Maker should process any such discipline and should know as little as possible about the Title IX Complaint.
- Disciplining a student based on a code of conduct violation for making a **materially false statement in bad faith** during the investigation of a complaint does not constitute retaliation.



Regina A. Jackson, Partner
E-mail: rjackson@elpolaw.com

Strength. Knowledge. Experience.



English Lucas Priest & Owsley, LLP

1101 College Street
Bowling Green, Kentucky 42101
(270) 781-6500
www.elpolaw.com