

Title IX Training

Piper U.S.D. 203



Title IX and Sexual Harassment

Summary of Changes to Title IX

- No changes to existing regulations related to athletic participation, employment, or single-sex education
- Defines sexual harassment
- Provides terminology and definitions for use in Title IX complaints
 - Specific roles of Title IX Coordinator, Investigator, Decision-Maker
 - Requirements of Determination of Responsibility
- Requires response when district has “actual knowledge” of sexual harassment
- Provides due process rights to accusers and accused persons in sexual harassment investigation and decision making, as well as outlining the procedure for response:
 - Mandates provision of supportive measures during investigation process
 - Prohibits retaliation

Sexual Harassment Definition

- Sexual harassment shall include conduct on the basis of sex involving one or more of the following:
 - (1) a district employee conditioning the provision of an aid, benefit, or service of the district on an individual's participation in unwelcomed sexual conduct;
 - Quid pro Quo
 - (2) unwelcomed 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 educational program or activity; or
 - Hostile Environment
 - (3) sexual assault, dating violence, domestic violence, or stalking.
 - VAWA definitions

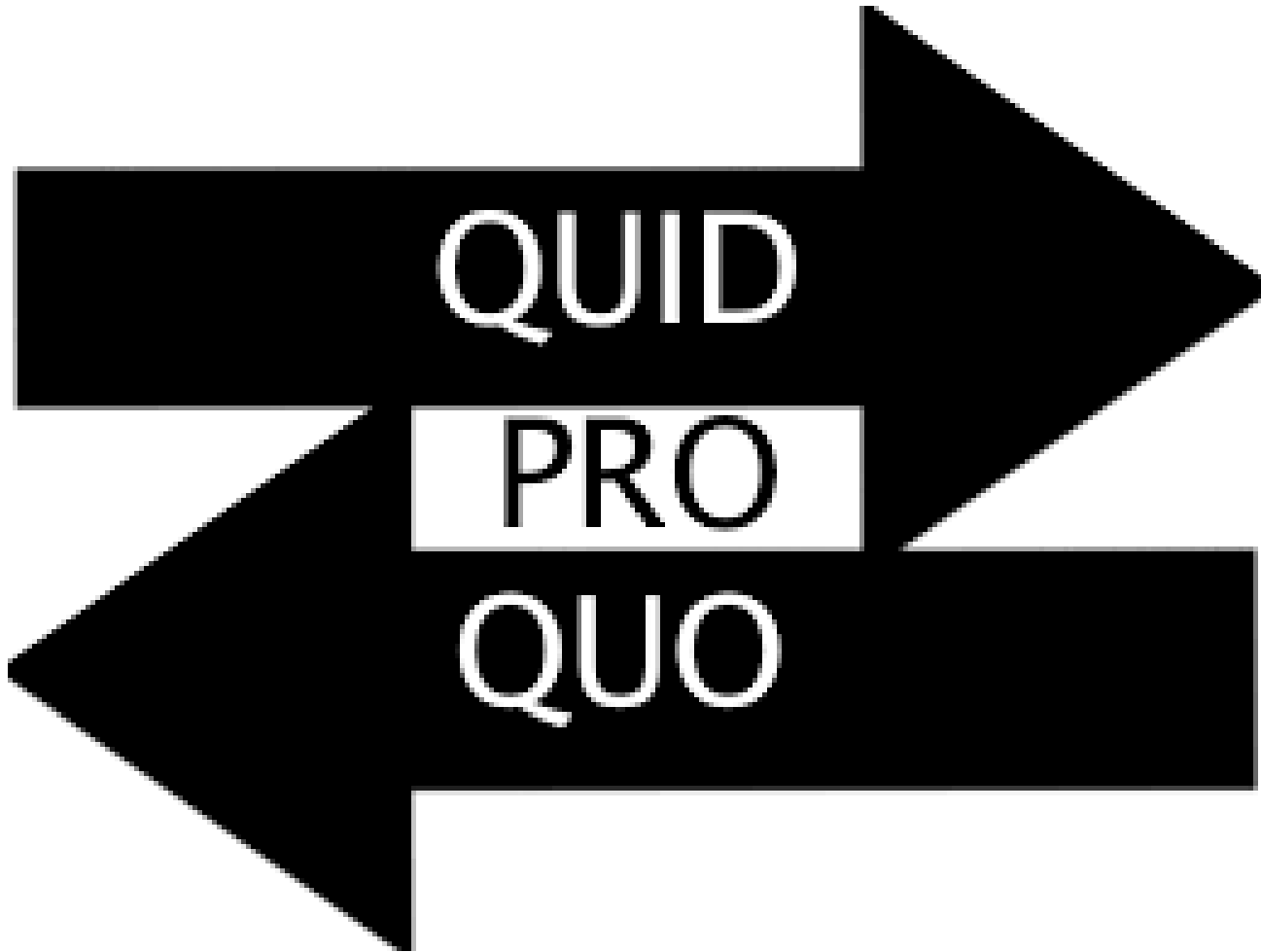
Quid Pro Quo



Something for
something



Only perpetrated
by employee



Quid Pro Quo

Definition:

Submission to the conduct is made a term or condition, explicitly or implicitly, of employment or receipt of education; or

Submission to or rejection of the conduct is used as the basis of employment or educational decisions affecting the individual.

The Hookup Unhook

The female manager for the HS boys basketball team comes to the coach asking for intervention with one of the players that is sending her messages outside of school, such as “you wanna hook up?”

HS basketball coach goes to Assistant Principal/AD. He talks to the girl about it and offers her the option to step down as manager or to take a spot on the girls’ basketball side. She refuses being reassigned and is removed from the boys’ side.

Was this okay?





Hostile Environment

Unwelcome conduct that a reasonable person would determine to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to work/education.

Hostile Working/Learning Environment

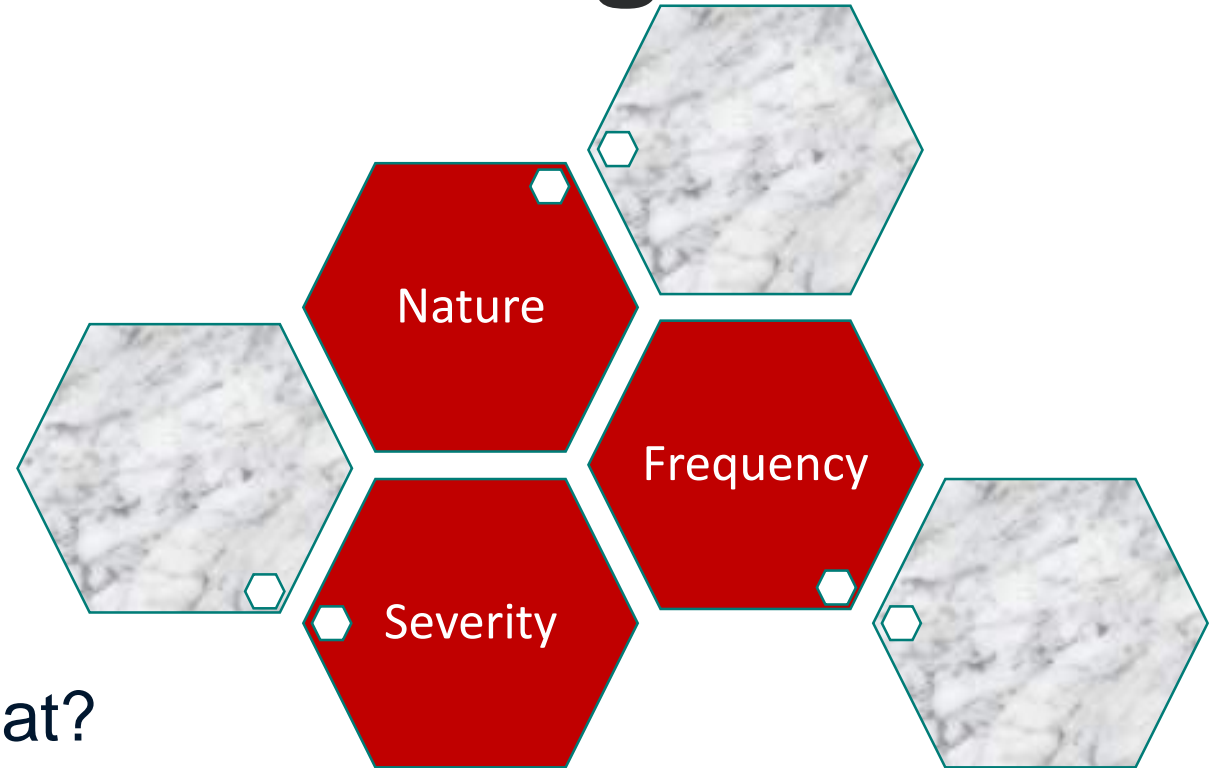
- Definition:
 - The conduct has the purpose or effect of substantially interfering with the individual's employment or education; or
 - The conduct creates an "intimidating, hostile or offensive" working or learning environment.

Hostile Working or Learning Environment

- In determining if harassment has occurred, we look at the victim's interpretation, not the intent of the harasser.
- The victim feels the behavior is sexual harassment; and
- A reasonable person with the victim's perspective would consider it to be sexual harassment as well.
- There is no single test for distinguishing sexual harassment from merely offensive or inappropriate conduct.

Hostile Working or Learning Environment

- Factors to Consider
 - Nature of the conduct:
 - Verbal or Physical?
 - Patently offensive or hostile?
 - Frequency
 - Severity
 - Who was the conduct directed at?
 - Relationship of the Harasser to the Victim
 - A person other than the one the conduct was directed at may be offended by the conduct





Hostile Working or Learning Environment Examples

Making Others Uncomfortable Through Actions

Unwanted Physical Contact

Unwanted Romantic/Sexual Advances

Jokes

Nicknames

Etc.

VAWA “Big Four”

Sexual Assault

- an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.

Dating Violence

- violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim where the existence of such a relationship shall be determined based on a consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved.

Domestic Violence

- includes crimes of violence committed by a person who is a current or former spouse, partner, person with whom the victim shares a child, or who is or has cohabited with the victim as a spouse or partner, by a person similarly situated to a spouse of the victim under Kansas or applicable federal law, or by any other person against an adult or youth victim having protection from such person’s acts by Kansas or applicable federal law.

Stalking

- engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others or to suffer substantial emotional distress.

Other Definitions

- **Complainant:** An individual alleged to be the victim of sexual harassment
 - Not necessarily the individual who reports or who files formal complaint
- **Respondent:** An individual alleged to be the perpetrator of sexual harassment
- **Formal Complaint:** A document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting the school investigate the allegation of sexual harassment
- **Supportive Measures:** Individualized services reasonably available that are non-punitive, non-disciplinary, and not unreasonably burdensome, to the other party while designed to ensure equal educational access, protect safety or deter sexual harassment.

3 Roles in Formal Complaint Investigation Process



Title IX Coordinator

Employee designated to coordinate its efforts to comply with Title IX.

Appointed by board and always serves as Title IX Coordinator, cannot be Investigator or Decision-Maker in any case.



Investigator

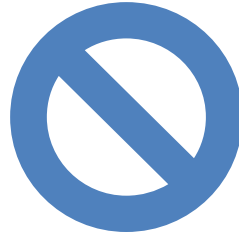
carries out the investigation after the formal complaint is filed and conducts interviews of the witnesses, collects and documents evidence, and drafts an investigative report.



Decision-Maker

reviews all the evidence and prepares an impartial written responsibility determination as to whether the alleged conduct occurred and provides an opportunity for the parties and their representatives to prepare written questions to be answered by the other party.

Title IX Coordinator, Investigator, Decision- Maker, or Facilitator of an Informal Resolution Process



Shall not have a conflict of interest or bias for or against the complainant or respondent (personally or generally).

Will exercise objective evaluation of all available evidence, both inculpatory and exculpatory, and prohibit credibility determinations based on a party's status as complainant, respondent, or witness.



Will receive training to perform their roles

Training:

- The definition of sexual harassment;
- the scope of the education program and activities;
- how to conduct an investigation, including appeals and informal resolution processes;
- and how to serve impartially, including
 - by avoiding prejudgment of the facts,
 - conflicts of interest, and
 - bias.
- Decision-makers shall receive training on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant.
- Investigators shall receive training on issues of relevance of questions and evidence in order for them to create investigative reports that fairly summarize relevant evidence, and how to prepare an investigation report.

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 District where the formal complaint is filed.
- A formal complaint may be filed with the Title IX Coordinator in person, by mail, by email, or by any other means that results in the Title IX Coordinator receiving the report.
- A formal complaint contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint (unless signed by the Title IX Coordinator).
- A complaint should be filed as soon as possible after the conduct occurs, but not later than 180 calendar days after the complainant becomes aware of the alleged violation, unless the conduct forming the basis for the complaint is ongoing.

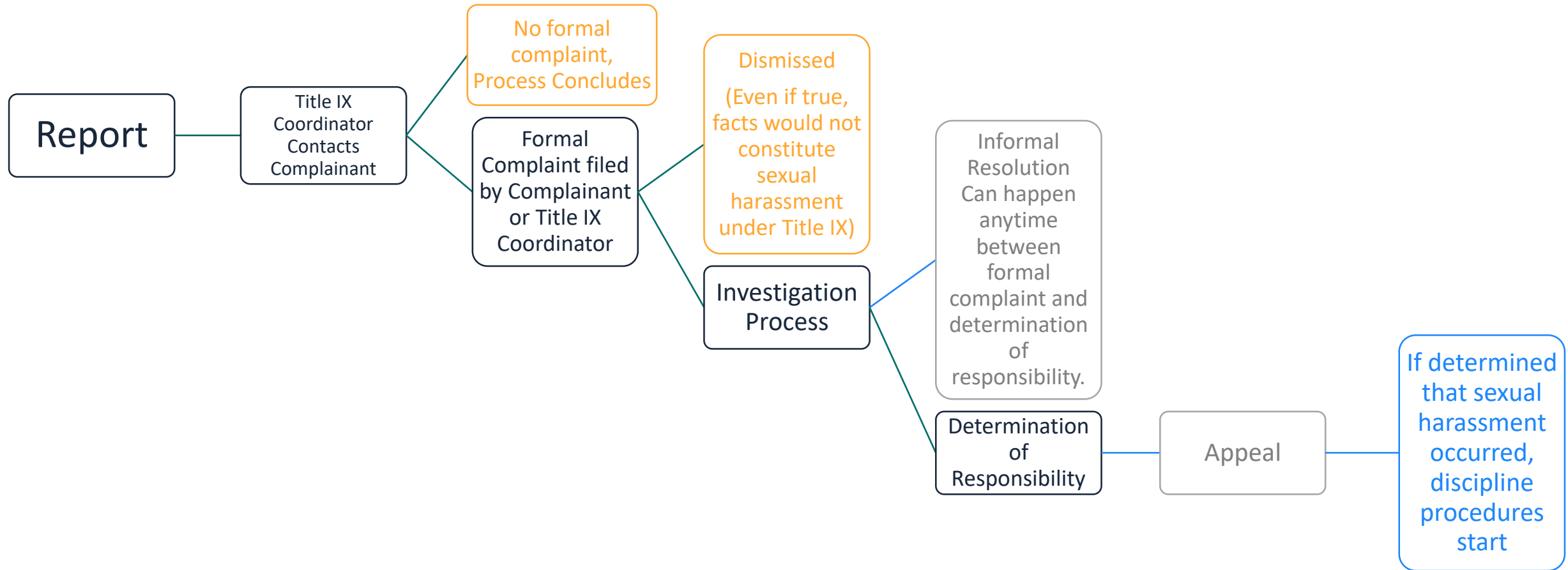
Education Program and Activities



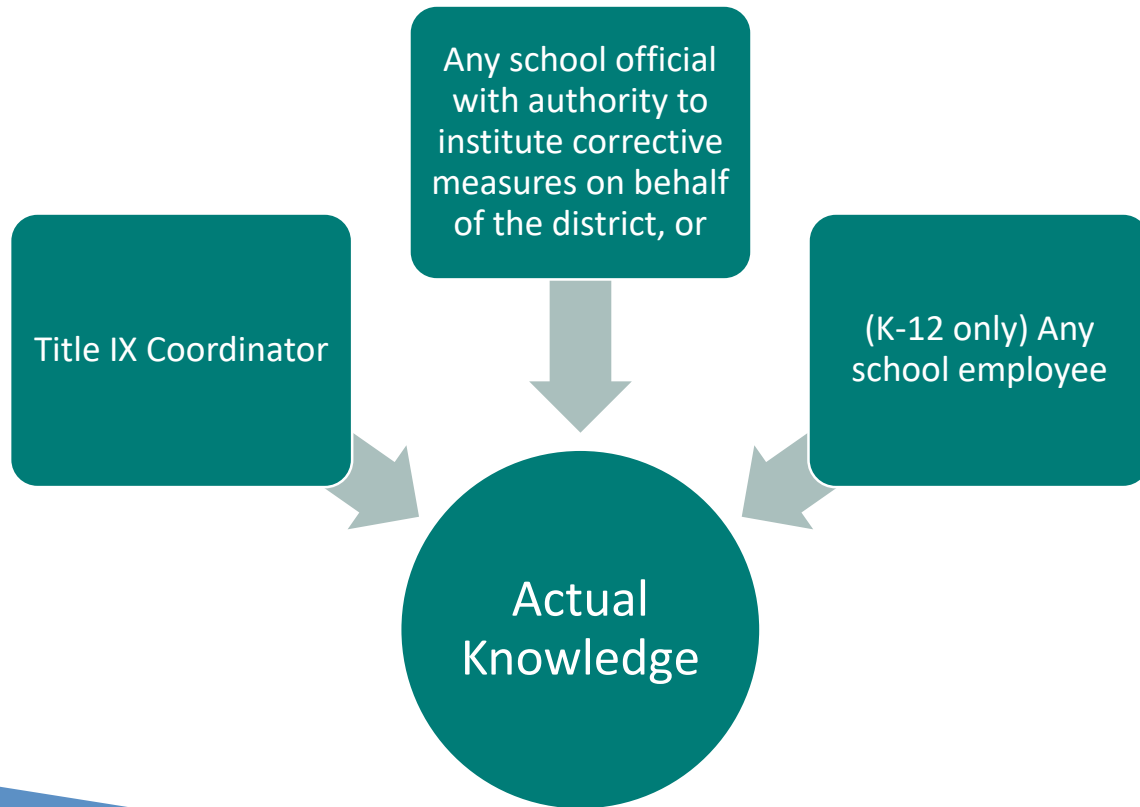
- “locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution”
 - Think similar to “nexus to school” consideration in student discipline.
 - “In the United States”

Overview of Formal Complaint and Investigation Process

Formal Complaint Investigation Process



Report of Sexual Harassment



- District must respond when it has “actual knowledge” of sexual harassment.
- Actual knowledge:
 - Notice of sexual harassment, including claims of sexual harassment
- Other school employees report claims to Title IX Coordinator.

What is “actual knowledge?”

- A male high school student tells his wrestling coach his female high school English teacher has been sending him flirty texts late at night.
- Rumor has it that a parent is telling people in the community her daughter is being harassed by other students for being a lesbian.
- An anonymous letter sent to your board members alleges your high school principal is sexually harassing a building paraprofessional and teacher.

Title IX Coordinator Contacts Complainant

- Response must not be “deliberately indifferent”
 - Clearly unreasonable in light of known circumstances
- Promptly contact complainant, and meet confidentially:
 1. To discuss availability of supportive measures,
 2. Consider the complainant’s wishes with respect to supportive measures,
 3. Inform the complainant of the availability of supportive measures with or without a formal complaint, and
 4. Explain the process for filing a formal complaint.
 - KASB Policy : 10 days, unless good cause for delay.
- Should respect complainant’s wishes regarding whether a school investigates, unless the Title IX Coordinator determines that signing a formal complaint over the wishes of the complainant is not clearly unreasonable in light of the known circumstances.

So, when should the Title IX Coordinator file in absence of a Complainant willing to do so?



- For liability purposes, it matters:
 - What do you know?
 - When did you know about it?
 - What did you do with that information?

Does anyone have a hypothetical, they are willing to share?

Supportive Measures

The district will treat the complainant and respondent equitably by offering supportive measures.

These non-disciplinary and non-punitive measures will be offered as appropriate, as reasonably available, and without cost to the complainant or the respondent.

Supportive measures are designed to restore or preserve equal access to the education program or activity without unreasonably burdening the other party.

“Supportive Measures” shall include, but not be limited to, measures designed to protect the safety of all parties, to protect the district’s educational environment, or to deter sexual harassment.

The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

Possible Supportive Measures

counseling

extensions of deadlines or course related adjustments

modifications of work or class schedules

escort services or increased security and monitoring

mutual restrictions on contact between the parties

changes in work locations

leaves of absence

What if there is no formal complaint?

- Supportive measures may be provided to both parties regardless
- Document what happened
- Close the file



Title IX Coordinator Responsibilities



Investigation Process

Notice

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;

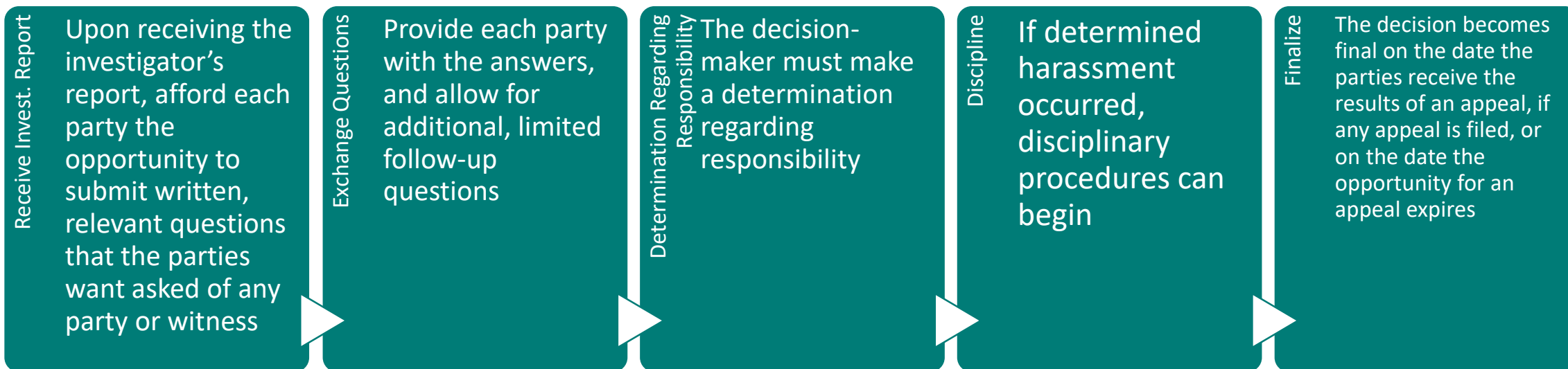
Inspection & Review

Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, a draft of the investigative report and the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report.

Finalize Report

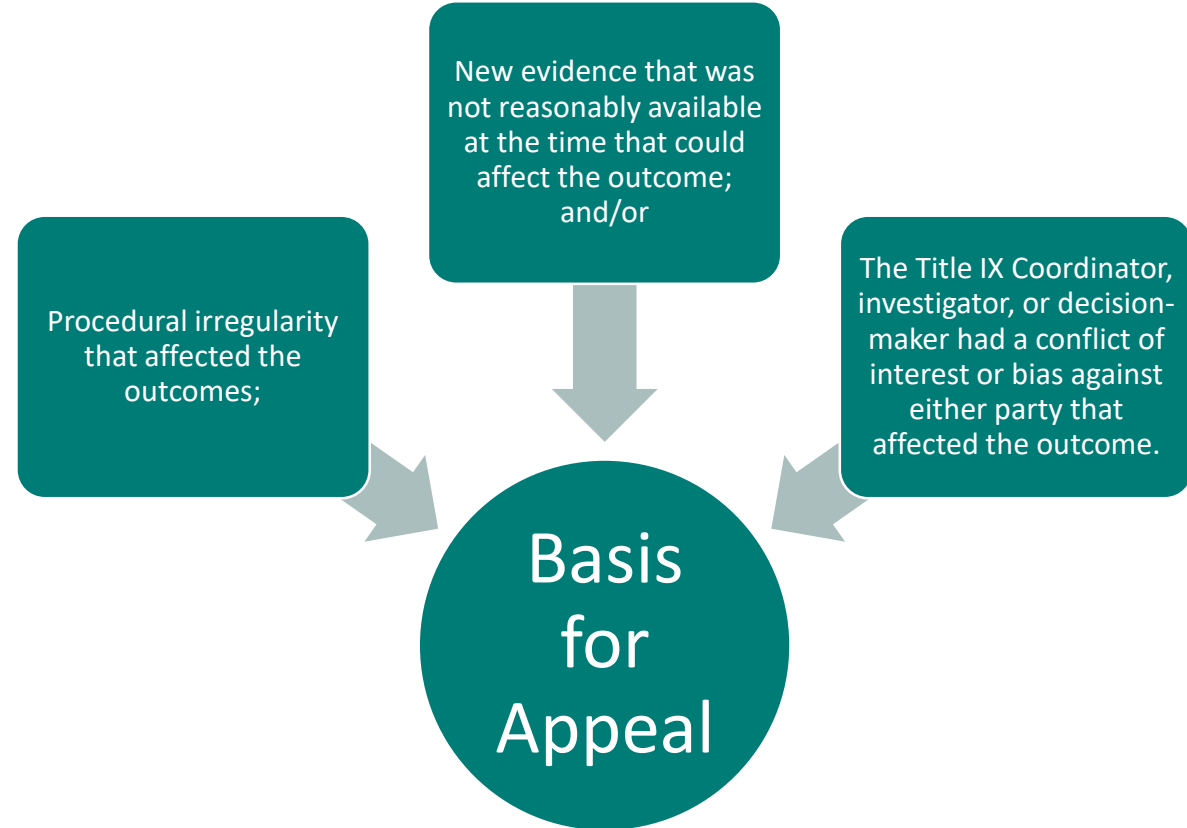
Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.

Decision-Maker Responsibilities



Appeals

- The complainant or respondent may appeal the decision-maker's determination regarding responsibility or a dismissal of a formal complaint.
- Request for appeal shall be made in writing within 10 days after the date of the written determination regarding responsibility.
- Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome
- Provide the written decision simultaneously to both parties



Appeal Decision-Maker Responsibilities



Review the evidence gathered by the investigator, the investigator's report, and the original decision-maker's determination;



Notify both parties in writing of the filing of an appeal and give them 10 days after the appeal is filed to submit further evidence in writing;



Not have a conflict of interest or bias for or against complainant or respondent and receive the required training;



Issue a written decision and the rationale for the decision within 30 days after the appeal is filed;



Describe the result of the appeal and the rationale for the result in the decision; and



Provide the written decision simultaneously to both parties and to the Title IX Coordinator.



Who is the hearing officer on appeal?

Appeals shall be on the record and heard by an attorney, an independent hearing officer appointed by the board, or the board. The appeal decision-maker may not be the Title IX Coordinator, the Investigator, or the decision-maker from the original determination.

Informal Resolution Process

- The informal resolution process may be facilitated by a trained educational professional, consultant, or other individual selected by the Title IX Coordinator under the following conditions:
 - The parties are provided a written notice disclosing the allegations, the requirements of the informal resolution process, information on when it may preclude the parties from resuming a formal complaint arising from the same allegations;
 - At any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the investigation of the formal complaint and be informed of any consequences resulting from participating in the informal resolution process;
 - The parties voluntarily and in writing consent to the informal resolution process; and
 - The informal resolution process cannot be used to resolve allegations that an employee sexually harassed a student.
- If the matter is resolved to the satisfaction of the parties, the facilitator shall document the nature of the complaint and the proposed resolution, have both parties sign the documentation and receive a copy, and forward it to the Title IX Coordinator.
- Title IX Coordinator. Within 20 days after the complaint is resolved in this manner, the Title IX Coordinator shall contact the complainant to determine if the resolution of the matter remains acceptable. If the matter is not resolved, or if the individual does not believe the resolution remains acceptable within 20 days after the informal resolution document is executed, the individual or the Title IX Coordinator may proceed with the formal complaint process.

Beware the unintended consequences of Informal Resolution...



Impartiality

- Avoid Prejudgment of the Facts at Issue
 - Title IX Coordinator's initial determination to dismiss/not dismiss not prejudice
- Conflicts of Interest
 - Family member, etc.
 - Past Dealings
- Bias
 - Personal bias or bias for certain parties, by virtue of their status as complainant/respondent/witness.
- Cannot Rely on Sex-Stereotypes

Investigator Training

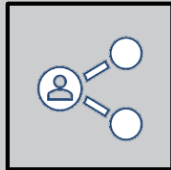
Investigation Tips



Ask open ended questions.



Remain impartial but build rapport and try to create comfortable environment for those you interview.



Remember all evidence must be shared with both parties.

Investigator's Responsibilities in the Process

Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the district and not the parties;

Not restrict either party's ability to discuss the allegations under investigation or to gather and present relevant evidence;

Be impartial and objectively evaluate all relevant evidence without relying on sex stereotypes;

Not have conflicts of interest or bias for or against complainants or respondent;

Not make credibility determinations based on the individual's status as complainant, respondent, or witness.

Investigator's Responsibilities to Participants

Provide an equal opportunity for the parties to present witnesses and evidence;

Allow the parties to be accompanied with an advisor of the party's choice;

Provide written notice of the date, time, location, participants, and purpose of any interview, meeting, or hearing at which a party is expected to participate;

Provide the parties equal access to review all the evidence collected which is directly related to the allegations raised in a formal complaint, including the investigative report, and the opportunity to respond to that evidence before a determination is made

Investigative Report

- The investigator shall prepare an investigative report that fairly summarizes relevant evidence and share the report with the parties and their advisors for review and response.
- The investigator's written report shall include an objective evaluation of all relevant evidence using a preponderance of the evidence standard to determine responsibility.

Relevance

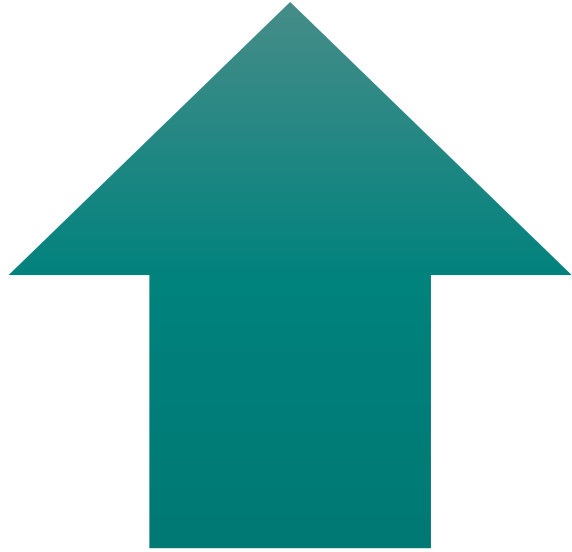
The tendency of a given item of evidence to prove or disprove one of the legal elements of the case, or to have probative value to make one of the elements of the case likelier or not.

Preponderance of the Evidence

Evidence which is more credible and convincing than that presented by the other party or which shows that the fact to be proven is more probable than not.

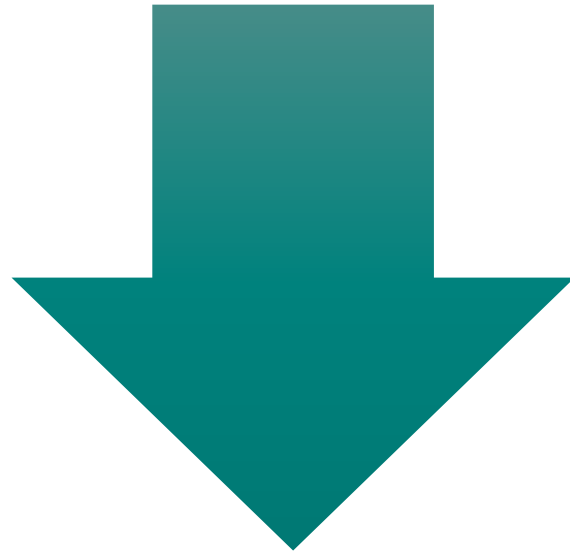


Decision-Maker Training



Relevance

is the tendency of a given item of evidence to prove or disprove one of the legal elements of the case, or to have probative value to make one of the elements of the case likelier or not.



Evidence

any of the material items or assertions of fact that may be submitted to a competent tribunal as a means of ascertaining the truth of any alleged matter of fact under investigation before it

Relevance and Evidence

- Look to initial complaint, review investigation report.
- Consider all information that supports either parties' position, or in contradiction to them.
- Try to focus investigation on the complaint, but if additional issues arise, provide parties with the required notice.
- Be cautious of any evidence related to the sexual predisposition or sexual history of the complainant.
- In questions exchanged by parties in lieu of hearing, all questions must be relevant.

Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

Sexual Predisposition of Complainant

Written Determination of Responsibility



Identify the allegations potentially constituting sexual harassment



Describe the procedural steps taken, including any notifications to the parties, site visits, methods used to gather evidence, and interviews



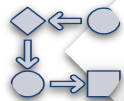
Include the findings of fact supporting the determination



Address any district policies and/or conduct rules which apply to the facts



Address each allegation and a resolution of the complaint including a determination regarding responsibility, the rationale therefor



The procedures and permissible bases for the complainant and/or respondent to appeal the determination



Provided to parties at the same time

Other Requirements of the New Title IX Regulations

Constitutional Considerations and Rights of Participants

- 1st Amendment
- Due Process
- Other Federal Protections
- Parental Rights

Retaliation Protections

- 1st Amendment Considerations

Notice & Publication Requirements

Recordkeeping Requirements

- Timelines

Constitutional Rights

1st Amendment

Free speech – just like outside of school, free speech has limits, but even in school, students and staff retain their constitutional rights.

Due Process

Before a state/government actor can deprive an individual of a right or something that has been guaranteed to that person, the government has to provide a basis for the movement.

Don't forget the rights granted in the investigation process

- Ensure that the preponderance of the evidence burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the district and not the parties;
- Provide an equal opportunity for the parties to present witnesses and evidence;
- Not restrict either party's ability to discuss the allegations under investigation or to gather and present relevant evidence;
- Allow the parties to be accompanied with an advisor of the party's choice;
- Provide written notice of the date, time, location, participants, and purpose of any interview, meeting, or hearing at which a party is expected to participate;
- Provide the parties equal access to review all the evidence collected which is directly related to the allegations raised in a formal complaint, including the investigative report, and the opportunity to respond to that evidence before a determination is made;
- Be impartial and objectively evaluate all relevant evidence without relying on sex stereotypes;
- Not have conflicts of interest or bias for or against complainants or respondent;
- Not make credibility determinations based on the individual's status as complainant, respondent, or witness;
- Providing parties with reports/decisions at the same time.

Retaliation Prohibited

Complaints alleging retaliation may be filed according to the formal complaint investigation procedures for sex discrimination.

- No district or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part.
- Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation.
- The district must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA, as required by law, or to conduct any investigation, hearing, or judicial proceeding arising thereunder.



Retaliation Prohibited

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

Other Federal Protections

- FERPA: Student records and PII may only be shared with consent in most circumstances
 - Clash of required information vs. law in investigations
- Does not relieve obligations created under other federal laws, like Title VII of the Civil Rights Act, etc.

Parental Rights

Parents maintain right to act on behalf of their child, whether complainant, respondent, party, etc.

Recordkeeping Requirements



Caselaw Update

The U.S. Supreme Court Interpreted Title VII Protections to Extend to LGBTQ Workers

The court considered two sets of cases. The first concerned a pair of lawsuits from gay men who said they were fired because of their sexual orientation: Bostock v. Clayton County, Ga., No. 17-1618, and Altitude Express Inc. v. Zarda, No. 17-1623.

The case on gender identity, R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission, No. 18-107, was brought by a transgender woman, Aimee Stephens, who was fired from a Michigan funeral home after she announced in 2013 that she was a transgender woman and would start working in women's clothing.

The question for the justices was the meaning of a statute, Title VII of the Civil Rights Act of 1964, which bars employment discrimination based on race, religion, national origin and sex. They had to decide whether that last prohibition — discrimination based on sex — applies to many millions of gay and transgender workers.

Justice Gorsuch wrote that it did.

“An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex,” he wrote.

“It is impossible,” Justice Gorsuch wrote, “to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”

Transgender Student Cases

Adams v. School Bd. of St. Johns Co.,
968 F.3d 1286 (11th Cir. 2020)

District policy required students to use bathroom of gender assigned at birth. Trans student sued.

“Bostock confirmed that workplace discrimination against transgender people is contrary to law. Neither should this discrimination be tolerated in schools. The School Board’s bathroom policy, as applied to Mr. Adams, singled him out for different treatment because of his transgender status...

A public school may not punish its students for gender nonconformity. Neither may a public school harm transgender students by establishing arbitrary, separate rules for their restroom use. The evidence at trial confirms that Mr. Adams suffered both these indignities. The record developed in the District Court shows that the School Board failed to honor Mr. Adams’s rights under the Fourteenth Amendment and Title IX.”

Grimm v. Gloucester Co. School Bd., 972
F.3d 586 (4th Cir. 2020), cert. denied 2021

A school board policy requiring restroom use based on biological gender violated Equal Protection Clause and Title IX.

Bostock expressly does not answer this sex-separated restroom' question. But ***Grimm was treated worse than similarly situated students because unlike other boys, he had to use either the girls' restroom or a single-stall option.***

The Board's policy is not substantially related to its important interest in protecting students' privacy.

Parents v. Barr, 9th Cir.



- Parents sue school district in Oregon over policy that accommodates transgender students' requests to use restrooms and locker rooms that align with their gender identity. Suit alleged that policy violated the rights of the cisgender students using those restrooms.
- US District court dismissed the case, finding that the rights of those students were not violated. Parents appealed to the US Ct. of Appeal for the 9th Cir., that upheld the earlier dismissal. Parents filed with the US Supreme Ct., and their request for review was denied Dec. 7, 2020. (Binding law in 9th Circuit)
- No fundamental privacy right to avoid all risk of intimate exposure to a transgender individual that was assigned the opposite sex at birth.
- “[T]he Fourteenth Amendment does not provide a fundamental parental right to determine the bathroom policies of the public schools to which parents may send their children, either independent of the parental right to direct the upbringing and education of their children or encompassed by it.”
- Also, not a violation of Title IX, as it sought to avoid discrimination on the basis of sex/gender.

Kluge v. Brownsburg Community School Corporation (Indiana)



- Teacher granted religious accommodation to call students by last names only, to avoid using transgender students first names (did not want to use their preferred names).
- District later created policy that it would affirm gender of students, using their chosen names/pronouns as long as the change was made in PowerSchool, and allowing them to use the restroom that aligns with their gender.
- Teacher continued to use last names only, and several students reported discomfort, including 2 transgender students in his classes.
- Teacher argued that students did well and won awards in music, District argued continuing the accommodation put district on “razor’s edge of liability.”
- Court ruled: “BCSC is a public-school corporation and as such has an obligation to meet the needs of all its students, not just a majority of students or the students that were unaware of or unbothered by Mr. Kluge’s practice of using last names only.”
- “In sum, BCSC has demonstrated as a matter of law that it cannot accommodate Mr. Kluge’s religious belief against referring to transgender students using their preferred names and pronouns without incurring undue hardship.”

Kluge v. Brownsburg Community School Corporation (U.S. District Court, Southern District of Indiana, 2021)



- US District Court in Indiana found that a transgender student's name preference (and the school's risk of a Title IX complaint) was of greater importance than the teacher's sincerely-held religious belief in objection to school policy that required staff to use preferred names of transgender students. Court granted summary judgment to the school.

Pamela Ricard v. U.S.D. 475 Geary County, KS School Board et al., Case No. 5:22-cv-04015-HLT-GEB (U.S. District Court for District of Kansas) (Filed 5/9/22)

- Plaintiff Pamela Ricard brings constitutional claims against Defendants stemming from Plaintiff's opposition to the District's policies that
 - **(1) require her to refer to students by preferred first name and pronouns** ("Preferred Names and Pronouns Policy") **and**
 - **(2) prohibit her from referring to a student by the student's preferred names and pronouns in her communications with the student's parents unless the student requests the administration or counselor to do so** ("Communication with Parents Policy").
- Plaintiff moved for a preliminary injunction on her free speech, free exercise, and due process claims.
- Because the District affirmatively stated that Plaintiff's current practice would not be deemed a violation of the Preferred Names and Pronouns Policy, the Court finds that Plaintiff is unlikely to experience irreparable harm from enforcement of that policy before the Court rules on the merits in this case and denies a preliminary injunction on the Preferred Names and Pronouns Policy on that basis. But the Court finds that Plaintiff has made a sufficient showing that her free exercise claim merits a preliminary injunction of the Communication with Parents Policy, so the Court enjoins Defendants in the manner set forth below.

Pamela Ricard v. U.S.D. 475 Geary County, KS School Board et al., Continued...

Plaintiff was suspended and disciplined for not using one student's preferred name and because both students felt discriminated against based of Plaintiff not using the preferred name. Plaintiff returned from her suspension on April 15, 2021. The principal gave Plaintiff a formal written reprimand for violating three board policies. These policies did not have any specific guidance for handling a social transition for transgender students. But Plaintiff was nevertheless found to have violated those policies because her behavior was "against the guidance provided by building leadership via email on March 31, 2021 and the building's weekly newsletter on April 4, 2021." Six days later, the Principal emailed school staff diversity training on gender identity, gender expression, and guidance on "Use of Preferred Names and Pronouns." Several months later, in September 2021, the board formally amended its policies such that "[s]tudents will be called by their preferred name and pronouns" (i.e., the Preferred Names and Pronouns Policy).

On October 8, 2021, teachers were informed that the superintendent emailed parents and guardians the previous day to tell them that students would be referred to by their preferred name and pronouns, but the District would "not communicate this information to parents unless the student requests the administration or counselor to do so, per Federal FERPA Guidance" (i.e., the Communication with Parents Policy).

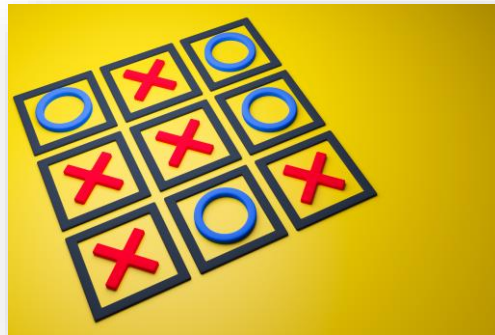
Plaintiff currently has two new transgender students in her class. One student told Plaintiff of a preferred name and preferred pronouns in fall 2021 and the other informed Plaintiff in March 2022. Plaintiff refers to both students by their preferred first names, but she avoids using their preferred pronouns to be consistent with her religious beliefs. Plaintiff does not generally use pronouns in class for any student and avoids the use of pronouns. But she does occasionally use pronouns when referring to students in class. Plaintiff has had to email one of the transgender student's parents regarding that student's performance in school. Because the student has not authorized the district to disclose the student's transgender status to the student's parents, Plaintiff used the student's legal name and biological pronouns in the email. Plaintiff believes that addressing students one way at school and a different way when speaking to their parents is dishonest. Being dishonest violates her sincere religious beliefs.

Pamela Ricard v. U.S.D. 475 Geary County, KS School Board et al., Cont.

- The District counters that its policy does not require Plaintiff to use any student’s name or pronouns in conversations with parents—it merely prohibits Plaintiff from revealing to a student’s parents a preferred name or pronouns the student is using at school if the student has not authorized the parents to know. Thus, argues the District, Plaintiff can simply refer to students in conversation with parents as “your child” or “your student,” never referring to the child by name or pronoun. But Plaintiff has testified to her belief that having a conversation with parents about a child, and not disclosing the name and pronouns used at school, is itself a form of “conceal[ment]”—a material omission if you will—given Plaintiff’s belief that parents have a fundamental right to control the upbringing of their children. Moreover, it is simply unrealistic to suppose that a teacher can communicate with parents about their child and never refer to the child by name or pronoun...
- Like her challenge to the Preferred Names and Pronouns Policy, Plaintiff contends the Communication with Parents Policy violates her free speech and free exercise rights under the First Amendment, and her due process rights under the Fourteenth Amendment. The Court finds that Plaintiff is entitled to a preliminary injunction based on her free exercise rights. Therefore, the Court declines to address Plaintiff’s free speech and due process arguments at this time; it will instead address those matters in the ordinary course of the litigation.

Pamela Ricard v. U.S.D. 475 Geary County, KS School Board et al., Case No. 5:22-cv-04015-HLT-GEB (U.S. District Court for District of Kansas) (Filed 5/9/22)

- THE COURT THEREFORE ORDERS that Plaintiff's motion for a preliminary injunction is GRANTED IN PART and DENIED IN PART. The Court denies a preliminary injunction on the Preferred Names and Pronouns Policy based on statements made by the District that Plaintiff's current practice would not be deemed a policy violation.
- THE COURT FURTHER ORDERS that Defendants are ENJOINED from disciplining Plaintiff for referring to a student by the student's preferred name and pronouns in her communications with the student's parents within the regular course of her duties. The Court relies on Plaintiff's statements that she does not intend to communicate with a parent for the sole purpose of disclosing a student's preferred name and pronouns. This injunction terminates on May 18, 2022, or at the conclusion of Plaintiff's contractual responsibilities to the District, whichever is later.



Executive
Order 13988

- Signed January 25, 2021
- Acknowledges Bostock case, and possible application to other laws, including Title IX.
- Requires the head of each federal agency to review existing orders, regulations, guidance, policies, actions to propose changes to protect individuals from sexual discrimination.

Executive
Order 14021

- Signed March 8, 2021
- Requires Secretary of Education “consider taking additional enforcement actions... to account for the significant rates at which students who identify as lesbian, gay, transgender, and queer are subject to sexual harassment”

OCR Notice of
Interpretation

- June 16, 2021
- “OCR will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that receive Federal financial assistance from the Department.”

Interpretation Station

- On June 22, 2021, the Department published in the Federal Register an “Interpretation” of Title IX.
 - “Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*.” 86 Fed. Reg. 32637 (June 22, 2021).
- The Interpretation took effect upon publication. The Department recognized that the Interpretation represented a change in position, explaining the purpose of the Interpretation was “to make clear that the Department interprets Title IX’s prohibition on sex discrimination to encompass discrimination based on sexual orientation and gender identity” in light of the *Bostock* decision.
- The Interpretation states that the **Department “will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that receive Federal financial assistance from the Department”** and that the Interpretation “will guide the Department in processing complaints and conducting investigations.”

Stop, collaborate, and listen notice



- Subsequently, on June 23, 2021, the Department issued a “Dear Educator” letter to directly notify those subject to Title IX of the Department’s Interpretation.
 - “Letter to Educators on Title IX’s 49th Anniversary” (June 23, 2021)
- The “Dear Educator” letter reiterates that “Title IX’s protection against sex discrimination encompasses discrimination based on sexual orientation and gender identity” and explains that the Department “will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity.”

But...

State of Tennessee v. U.S. Dept. Of Education, 21-cv-308 (E.D. Tenn. July 15, 2022)

Federal District Court case joined by Kansas Attorney General sought an injunction against implementing "Dear Colleague" letter and associated documents.



And, their wish was granted.

- Plaintiffs' Motion for Preliminary Injunction is GRANTED and Defendants' Motion to Dismiss is DENIED. Accordingly, it is hereby ordered that Federal Defendants and all their respective officers, agents, employees, attorneys, and persons acting in concert or participation with them are ENJOINED and RESTRAINED from implementing the Interpretation, Dear Educator Letter, Fact Sheet, and the Technical Assistance Document against Plaintiffs.
- This preliminary injunction shall remain in effect pending the final resolution of this matter, or until further orders from this Court, the United States Court of Appeals for the Sixth Circuit, or the Supreme Court of the United States.



And this means...



Wrapping up...

Let's see if we got this.

What Does it Take to Be Liable for Sexual Harassment?



Harassment By Staff

- Actual Knowledge
- Authority To Correct
- Deliberate Indifference

Harassment by Peers

- Severe, Pervasive, and Objectively Offensive Conduct
- Denial of Educational Benefits
- Actual Knowledge
- Deliberate Indifference

What should we tell employees and students to do if they are harassed?

Inform	Make Your Objections Known!
Report	Report Behavior That Makes You Uncomfortable
Consult	Follow Established Policy

Workplace Relationships Must Be



Professional

Appropriate behavior in any environment based on position and employment



Culturally Appropriate

Established interactions between coworkers that are appropriate based on group culture



Friendly

Individual friendships determine the appropriateness of the interaction

Appropriate Relationships with Students (Parents)



Professional

Appropriate behavior in any environment based on position and employment



Cultural

Established interactions between staff and students that are appropriate based on group culture



NOT NECESSARILY FRIENDLY

Appropriate Relationships with Students

- K.S.A. 21-5503 – Rape
- K.S.A. 21-5504 – Criminal Sodomy
- K.S.A. 21-5505 – Sexual battery
- K.S.A. 21-5506 – Indecent Liberties with a child
- K.S.A. 21-5507 – Unlawful Voluntary Sexual Relations
- K.S.A. 21-5508 – Indecent Solicitation of a Child
- K.S.A. 21-5509 – Electronic Solicitation
- K.S.A. 21-5510 – Sexual Exploitation of a child
- K.S.A. 21-5512 – Unlawful Sexual Relations
- K.S.A. 21-5513 – Lewd and Lascivious Behavior
- K.S.A. 21-5514 – Child Pornography

K.S.A. 21-5512

- (a) Unlawful sexual relations is engaging in consensual sexual intercourse, lewd fondling or touching, or sodomy with a person who is not married to the offender if:...
 - (9) the offender is a teacher or other person in a position of authority and the person with whom the offender is engaging in consensual sexual intercourse, lewd fondling or touching, or sodomy is a person 16 years of age or older who is a student enrolled at the school where the offender is employed. If the offender is the parent of the student, the provisions of K.S.A. 2017 Supp. 21-5604(b), and amendments thereto, shall apply, not this subsection...
- **(b) Unlawful sexual relations** as defined in: **(2)** subsection (a)(1), (a)(2), (a)(3), (a)(4), (a)(6), (a)(7), (a)(8), (a)(9), (a)(10), (a)(11), (a)(12) or (a)(13) is a severity level 5, person felony.

Child Abuse Reporting

- Teachers, school administrators, and other school employees have a statutory duty to report known or suspected child abuse involving students in the school.
 - Includes physical, mental, emotional, sexual abuse or neglect
- Report to DCF, or if DCF is not open, to law enforcement.
- Law provides immunity from civil liability so long as the report was made without malice.
- Failure to report is a class “B” misdemeanor.





Questions?