



Title IX Overview

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Berks County Intermediate Unit (BCIU)
July 18, 2023

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Today's Schedule

- 9:00 - 11:00: Title IX Overview
- 11:00 – 11:15: Break
- 11:15 - 12:15: Investigator Training
- 12:15 - 1:00: Decision-Maker and Appeals Officer Training
- Opportunities for Discussion & Questions throughout

Introduction

- Wisler Pearlstine
 - Full-Service Law Firm
 - 40+ attorneys practicing in multiple fields
 - Alternative Dispute Resolution
 - Banking
 - Business/Corporate/Tax
 - Commercial Litigation
 - Condominium and Community Associations
 - Construction Law and Litigation
 - Data Privacy and Cybersecurity
 - Education Law
 - Employment and Labor
 - Estate Planning, Trusts and Wills
 - Family Law
 - Intellectual Property
 - Municipal Law
 - Personal Injury
 - Real Estate, Zoning and Land Development
 - Surety Litigation



Wisler Pearlstine's School Law Practice

- Representing Public School Districts since 1945
- Serve as Solicitor for:
 - 13 public school districts
 - 2 career and technical centers
 - 1 Intermediate Unit (Chester County)
- Special counsel for public school districts and other educational entities for whom we are not Solicitor in matters involving:
 - Special education
 - Technology integration and implementation
 - Student discipline
 - Tax assessment appeals
 - Land acquisition and development
 - Construction
 - Litigation
- 20 attorneys, 5 paralegals, and 3 education specialists

Title IX Practice

- Counsel Title IX Coordinators and administrators
 - Daily questions
 - Assistance in grievance process
- Serve as Investigator in Title IX matters
- Write and edit policy
- Track Title IX trends and developments
- Conduct trainings



What is Title IX?

- Federal law
- Signed into law in 1972
- Part of a Higher Education Act
 - “Title IX of the Education Amendments of 1972”
- Backdrop
 - Civil Rights Act of 1964 – prohibits discrimination on the basis of race, color, religion, sex, or national origin
 - Title VI (any program or activity that receives Federal funds or other Federal financial assistance)
 - Title VII (employers, including private employers)
- Around this time – advocacy for women’s rights
 - Talk of adding more protections to the Civil Rights Act
 - Attempt to pass the Equal Rights Amendment



History of Title IX

- Intent – strengthen women's rights in the college admissions process & employment
 - Admissions, scholarships, financial aid, tenure
- Passed with little fanfare
- Product of Women's Rights Movement and Civil Rights Movement (60s and 70s)



Who Enforces Title IX?

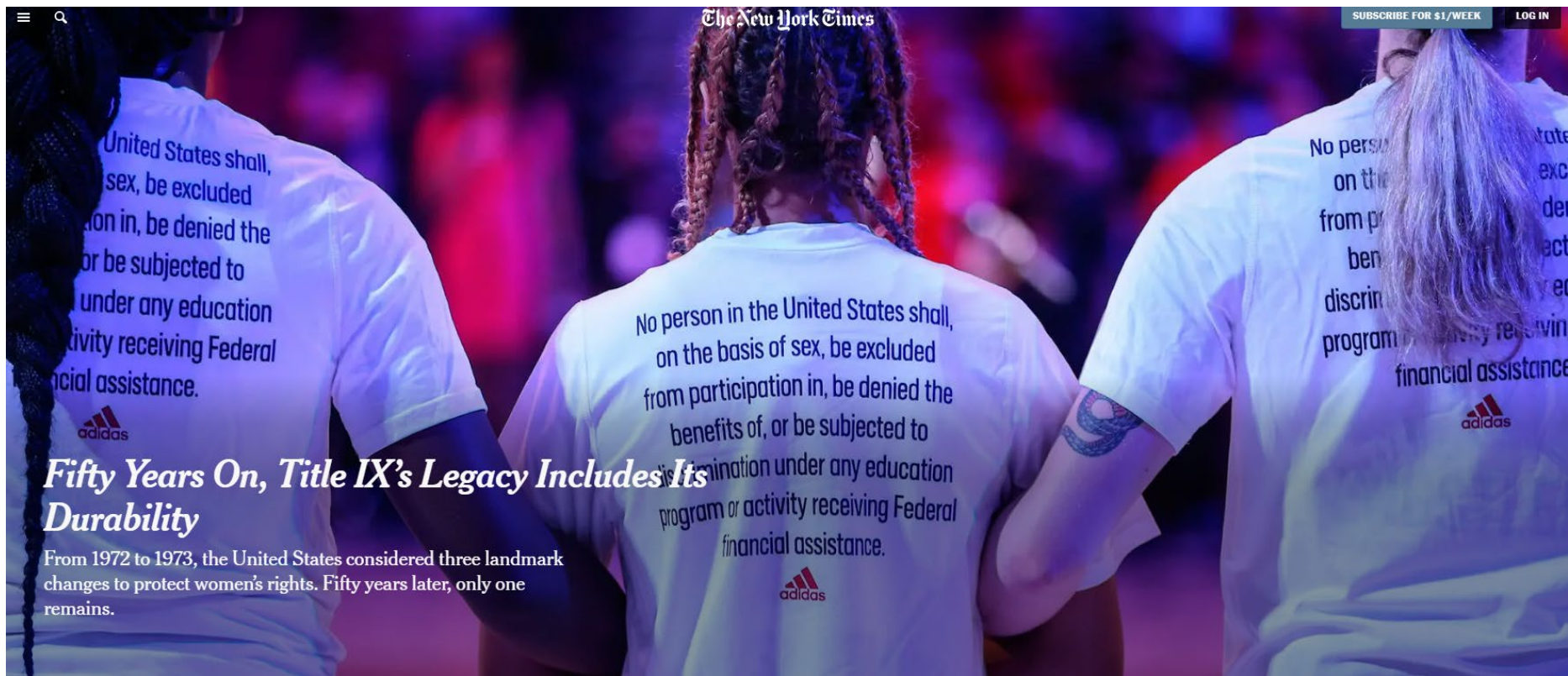
- The Executive Branch
- U.S. Department of Education, Office for Civil Rights



Text – 37 words

- ***“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 Celebrated 50 Years!



Sports Impact

- Sports
 - 1971
 - 30,000 women played college sports
 - 294,000 girls played high school sports v. 3.7 million boys
 - 2019
 - 219,000 women play college sports (44% total college athletes)
 - 3.4 million high school girls v. 4.5 million boys

Source: https://www.nytimes.com/2022/04/28/sports/title-ix-anniversary-womens-sports.html?action=click&pgtype=Article&state=default&module=style-title-ix&variant=show®ion=MAIN_CONTENT_1&block=storyline_top_links_recirc



Additional Federal Law

- College Campus Sexual Assault
 - Backdrop – 1986 - rape & murder of Jeanne Clery at Lehigh University
 - Parents said university failed to have proper security and provide information about crime
 - Passage of Clery Act – 1990 - federal law requiring universities to report crime statistics, issue an annual report, issue campus-wide safety alerts



Guidance

- College Campus Sexual Assault & Title IX
 - 2011 – Department of Education Issues a “Dear Colleague Letter”
 - Sets parameters for a disciplinary process/procedure for allegations of sexual harassment
 - Arguments that it was too friendly to complainants and deprived respondents of due process rights
 - Lawsuits filed from respondents, claiming wrongful discipline (in college context)
 - **Rescinded in 2017**

2020 Rules and Regulations

- In 2020 – the Department of Education issued intensive regulations
 - Changed definition of Title IX Sexual Harassment
 - Requires colleges and K-12 to undergo a grievance process to address claims of Title IX Sexual Harassment
 - **Stated Purpose** – to ensure due process rights of respondent before discipline is enacted and to support the complainant in terms of safety

Terminology Used in 2020 Regulations

- “Complainant” reports a Title IX violation
 - victim
 - survivor
 - accuser
 - plaintiff – in litigation
- “Respondent” is the individual against whom the Title IX report was made
 - perpetrator
 - accused
 - assailant
 - defendant – in litigation
- Recipient
 - Educational institution receiving federal financial assistance

Purpose

- “A recipient’s response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 **before the imposition of any disciplinary sanctions** or other actions that are not supportive measures as defined in § 106.30, **against a respondent**.” See § 106.44 (a)



Title IX

Title IX Sexual Harassment

Schools must respond to these complaints in accordance with the Title IX regulations, which includes a specific grievance process (2020 regulations)

Sexual Discrimination

Sex*

Sexual Orientation*

Gender Identity &
Expression*

Pregnancy*

Schools must respond to these complaints using the “prompt and equitable” grievance procedures that schools have been required to adopt and publish since 1975, when the original Title IX regulations were issued.

*alleged facts may constitute Title IX sexual harassment and warrant proceeding under the 2020 grievance process

Changes in the Future?

- In May 2022, the Department of Ed announced new, proposed rules
- Current status
 - They are still undergoing the federal rulemaking process
 - They are **NOT in effect**
- Release Date
 - Previous Anticipated Release – May 2023
 - New Anticipated Release – October 2023
 - Release date ≠ in effect
 - Compliance Date likely will be issued

2020 Regs

Title IX

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*alleged facts may constitute sexual harassment and warrant grievance process

Proposed Regs

Title IX

Title IX Sexual
Harassment

Sexual
Discrimination

Sex*

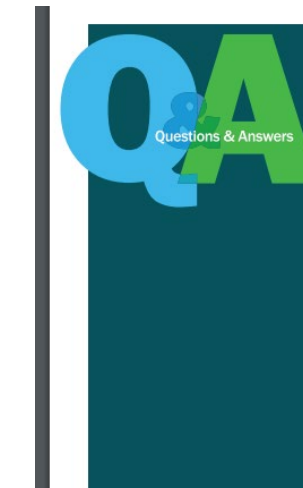
Sexual
Orientation*

Gender Identity &
Expression*
Pregnancy*

All Subject to Proposed Procedure

Focus of Today's Training

- 2020 Regulations
- Compliance Deadline – August 2020
 - Adopt Grievance Process
 - Ensure Training
 - Appointment of a Title IX Coordinator
- Guidance Issued Thus Far
 - Commentary in Regulations
 - Department of Ed Guidance and FAQs
- Developing Area of the Law



Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021)
(Updated June 28, 2022)



30026

Federal Register / Vol. 85, No. 97 / Tuesday, May 19, 2020 / Rules and Regulations

DEPARTMENT OF EDUCATION

34 CFR Part 106

[Docket ID ED-2018-OCR-0064]

RIN 1870-AA14

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

AGENCY: Office for Civil Rights, Department of Education.

ACTION: Final rule.

SUMMARY: The Secretary of Education amends the regulations implementing Title IX of the Education Amendments of 1972 (Title IX). The final regulations specify how recipients of Federal financial assistance covered by Title IX, including elementary and secondary schools as well as postsecondary institutions, (hereinafter collectively

Room 4E308, Washington, DC 20202. Telephone: (202) 453-6639. Email: Alejandro.Reyes@ed.gov.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

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Training Requirements

- A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on:
 - the definition of sexual harassment in § 106.30
 - the scope of the recipient's education program or activity
 - how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable
 - how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- Decision-Maker Training
 - training on any technology to be used at a live hearing
 - issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section
- Investigator Training
 - A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence

*Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.

Guiding Principles

- Ensuring the safety of students, employees, and others (i.e., visitors, independent contractors) is **CRUCIAL!**
 - Responding to and stopping reported behavior
- Communication / Reporting
- Asking questions
 - Title IX Attorneys are here to help!

Definition of Sexual Harassment

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

- 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;
- 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
- "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).



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION IX
CALIFORNIA

June 8, 2023

VIA ELECTRONIC MAIL

Michael R. McCormick
Superintendent, Val Verde Unified School District
975 West Morgan Street
Perris, California 92571
mmccormick@valverde.edu

Re: **Val Verde Unified School District**
OCR Case No. 09-15-5001

Dear Superintendent McCormick:

This letter notifies you of the resolution of the U.S. Department of Education, Office for Civil Rights' (OCR) compliance review of the Val Verde Unified School District's response to complaints and reports of sexual harassment, including sexual violence. This compliance review, opened on September 21, 2015, examined whether the District responded to such complaints and reports, regarding allegations against employees as well as students, as required by Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681-1688, and its implementing regulation at 34 C.F.R. Part 106. This examination included evaluating whether the District provided prompt and equitable grievance procedures and responses to possible sexual harassment under 34 C.F.R. §§ 106.31 and 106.8(b); whether the District fulfilled its obligation to have a Title IX coordinator who coordinated its efforts to comply with Title IX during investigations of sexual

Background on Val Verde

- Val Verde is a public school district in Southern California with about 20,000 students enrolled
 - 13 elementary schools
 - 6 middle schools
 - 5 high schools
- OCR Compliance Review – began in 2015
 - Focused on 6 schools where most incidents were reported
 - Incidents ranged from “sexually explicit comments or name-calling to unwanted sexual touching.”

Val Verde Description of Sexual Harassment

- “Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature, such as sexual assault or acts of sexual violence.”
- “Sexual harassment can create a hostile educational environment based on sex when the harassment is sufficiently serious to deny or limit the individual’s ability to participate in or benefit from the recipient’s education program or activity.”

Val Verde Examples of “Title IX Violations”

- A female student reported being raped by a male student, at night, on campus in an unsupervised classroom during a game.
- A male student admitted to telling a female student multiple times that he was going to rape her even after she told him to stop.
- Students reported that a high school teacher was making inappropriate comments, touching them inappropriately and making them feel uncomfortable. Examples included:
 - Complimenting the physical appearance of female students (collectively and individually)
 - Leaning in to whisper to female students
 - Looking at the chest rather than the eyes of female students
 - Awarding grades differently to female students
- A male high school teacher hugged female students, calling female students “gorgeous” on social media, touching female students on their lower backs, hugging a female student and touching her bottom.

Val Verde Examples of Conduct “that could constitute” student sexual harassment

- A female student reported that a male student fondled her breast on a school bus
- A male security guard told a student “you know, strippers wear those” and gave her a dress code violation
 - *OCR redacted what the student was wearing
- A female student reported that a male student touched her and was sexually harassing her
- A male student pulled his pants down and exposed his underwear and genitals to students and a teacher/admin
- A female student reported that a male student extended his arms to hug her and touched her bottom

Additional Examples that May Trigger Title IX *Not to be construed as an exhaustive list or checklist*

- Physical Contact
 - Including sexual acts
- Conduct related to a student-on-student romance or relationship
 - Texting
 - Contact in school or out of school contact infiltrating into school
- Comments or slurs based on sex, gender, sexual orientation or gender, including bullying
 - “Creepy” comments or jokes from an employee

When is Title IX Triggered?

- Prior guidance held educational entities responsible for incidents they “reasonably should” have been aware of.
- 2020 Regulations require educational entities to respond when they have “actual knowledge” of a complaint of sexual harassment, which can include a report to any employee of an elementary or secondary school.

When is Title IX Triggered? (Cont'd)

- Actual knowledge required
 - 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
 - any employee of an elementary and secondary school
 - Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient.
 - *Older guidance – when a reasonable person should have been aware*
 - This standard is not met when the only official of the educational entity with actual knowledge is the respondent (alleged perpetrator).

What programs are we concerned about?

- Educational entities are required to respond when sexual harassment occurs “in the [entity]’s education program or activity.” The definition of “program or activity” is expanded to include “locations, events, or circumstances over which the [educational entity] exercised substantial control over both the respondent and the context in which the sexual harassment occurs.”
- Both employees and students can file complaints
 - What about visitors, independent contractors, and others?

FAQs Guidance

III. Where Sexual Harassment Occurs

Question 9: Which settings are covered by the 2020 amendments?

Answer 9: The 2020 amendments apply to reports of sexual harassment in education programs and activities in the United States, including in the following settings:

1. Buildings or other locations that are part of the school's operations, including remote learning platforms;
2. Off-campus settings if the school exercised substantial control over the respondent and the context in which the alleged sexual harassment occurred (e.g., a school field trip to a museum); and
3. Off-campus buildings owned or controlled by a student organization officially recognized by a postsecondary school, such as a building owned by a recognized fraternity or sorority.²⁶

Hypothetical Situation Part 1

- You are a high school principal in the fictional Swift Area School District. A guidance counselor tells you that a female student (Sarah) reported that a male student (David) continues to send her harassing messages during school and after school hours. You remember that David put his arm around Sarah on the school bus a few weeks ago.
 - What additional information (if any) do you want to know?
 - Is Title IX triggered?
 - Does the Swift Area School District have actual knowledge of a potential Title IX Violation?

Required Response

- A recipient's response must:
 - Treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and
 - By following a grievance process that complies with § 106.45 **before the imposition of any disciplinary sanctions** or other actions that are not supportive measures as defined in § 106.30, **against a respondent.**” See § 106.44 (a)

Basic Requirements / Guiding Principles for Grievance Process

- Treat complainants and respondents equitably
- Require objective evaluation of evidence
- Ensure no conflicts
- Proper training
- Presumption of respondent innocence
- Prompt time frames

Highlights of Required Response

- Must respond:
 - Promptly and not deliberately indifferent
 - i.e., clearly unreasonable in light of known circumstances
 - OCR won't equate deliberate indifference with disagreement over determination

Role of Title IX Coordinator

- A recipient must designate at least one **employee** to coordinate its efforts to comply with its responsibilities under Title IX, and to notify all persons identified above of the name or title, office address, email address, and telephone number of the employee(s) designated as the Title IX Coordinator.
- A recipient must provide to persons entitled to a notification under 34 C.F.R. § 106.8(a) notice of the recipient's grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond.

Title IX Coordinator Responsibilities for Initial Response

- Title IX Coordinator must promptly contact the complainant to:
 1. Discuss the availability of supportive measures as defined in § 106.30
 2. Consider the complainant's wishes with respect to supportive measures
 3. Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint
 4. Explain to the complainant the process for filing a formal complaint

Constitutional Protections / Restriction of Other Rights

- Protects:
 - 1st Amendment rights
 - Due process rights
- Other restrictions:
 - FERPA does not preempt
 - State and local law do not preempt
 - Title VII not preempted

Section 106.6

State Reporting Requirements to Consider

- Child Line Reporting Requirements
 - Child-on-child exceptions
 - rape
 - involuntary deviate sexual intercourse
 - sexual assault
 - aggravated indecent assault
 - indecent assault
 - indecent exposure
- Educator Discipline Act
 - Mandatory reporting for sexual abuse and exploitation

Supportive Measures

- Supportive measures must be provided to complainant:
 - 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.
 - Such measures are designed to restore or preserve equal access to the educational entity's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the educational entity's educational environment, or deter sexual harassment.
 - Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, mutual restrictions on contact between the parties, changes in work locations, leaves of absence, increased security and monitoring and other similar measures.
 - Must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the educational entity to provide the supportive measures.

Supportive Measures for Respondents?

- “There is no corresponding obligation to offer supportive measures to respondents; rather, recipients may provide supportive measures to respondents and under § 106.45(b)(1)(ix) the recipient’s grievance process must describe the range of supportive measures available to complainants and respondents.”
 - *See commentary p. 30,267*



Implementation of Supportive Measures

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



Emergency Removal

- Requires:
 - Individualized safety and risk analysis
 - An immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment
 - Respondent has notice and an opportunity to challenge the decision immediately following the removal
 - Must comply with IDEA, Section 504 and the Americans with Disabilities Act

Administrative Leave

- Applies only to non-student employees
- Still must comply with ADA



Tips for Title IX Coordinators

- Schedule a meeting with parent and/or student as appropriate in writing
- Connect with building admin to discuss what supportive measures are available
 - The school should be able to implement the measure
- Invite others to meeting as appropriate (building admin, counselor, familiar face for student)
- Document summary of meeting in writing
- Document supportive measures (including time parameters) in writing
- Follow up as appropriate
 - Document whether or not they want to file a complaint

Hypothetical Situation Part 2

You are the Title IX Coordinator for the Swift Area School District. You receive the following email:

Dear Title IX Coordinator,

Today, I suspended David for two days. He used to date Sarah. While returning from a field trip, David tried to make romantic gestures to Sarah on the bus, including putting his arm around her. She pushed him away. She claims he intentionally touched her breast on the bus. He claims it was an accident, thought Sarah was still romantically interested in him, and wanted him to put his arm around her. Today, Sarah's mom emailed me saying she wants to file a Title IX Complaint. Isn't this matter handled? Please advise!

*Sincerely,
High School Building Principal*

Are there any issues with the principal's handling of the situation?
How do you respond?

Lessons Learned from Val Verde

- Involvement of Title IX Coordinator
 - The Coordinator is responsible for overseeing compliance.
- In Val Verde, the Coordinator did not participate in any of the 41 incidents OCR reviewed.
 - “The evidence revealed that the District had no system in place to monitor whether schools’ responses complied with Title IX requirements or to identify emergent patterns or systemic problems by school or Districtwide.”
 - “School administrators generally handle sexual harassment incidents unless a parent is unhappy with a school’s response. As a result, the Title IX coordinator is not notified of sexual harassment incidents unless the school administrators need assistance or a parent is unhappy and chooses to escalate the issue to the District level. The District’s inadequate coordination of its schools’ responses to complaints of sexual harassment leaves its Title IX coordinator without the information needed to identify repeat harassers or patterns of harassment or to address such issues to ensure the District’s Title IX compliance.”

Lessons Learned from Val Verde (Cont'd)

- “First, the District’s present approach of only notifying the parent about the formal Title IX complaint process if they are not satisfied with the school’s initial response does not comply with the Title IX regulation, which requires school districts to notify complainants about how to file a formal Title IX complaint of sexual harassment whenever an employee has actual notice of sexual harassment or allegations thereof, regardless of whether the complainant expresses dissatisfaction with the initial response from the school.”

Best Practices

- Develop a reporting system in which Title IX Coordinators are notified of situations that may trigger Title IX.
- Title IX Coordinator should conduct outreach within a prompt time.

Formal Complaint

- Document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the educational entity investigate the allegation of sexual harassment

Formal Complaint

- Includes locations, event and circumstances over which the educational entity exercises substantial control over both respondent and context in which sexual harassment occurs

Attachment B

Formal Complaint of Sexual Harassment under Title IX

Date: _____

I am making a formal complaint of sexual harassment under Title IX

Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the District investigate the allegation of sexual harassment (defined below).

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 with which the formal complaint is filed.

A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator below.

As used in this paragraph, the phrase "document filed by a complainant" means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the District) that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.

Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party.

The following is the information pertinent to the complaint:

Complainant(s) _____

Respondent(s) _____

Date of alleged incident: _____

Location of alleged incident: _____

Allegations: _____

(use additional sheets if necessary)

Submitted by:

Complainant

Title IX Coordinator (only if Complainant does not sign)

Assigned Complaint No. _____

Enclosure: Title IX Grievance Process

How to File a Formal Complaint

- A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator and by any additional method designated by the educational entity.
- Where the Title IX Coordinator signs a formal complaint:
 - Cannot be complainant, respondent or fact witness
 - Cannot have conflict of interest

When should a Title IX Coordinator File a Complaint?

- “...We believe that respecting a complainant’s autonomy to the greatest degree possible means that an investigation against a complainant’s wishes or without a complainant’s willingness to participate, should happen only when the Title IX Coordinator has determined that the investigation is necessary under the particular circumstances.”
See p. 30,130.

When should a Title IX Coordinator File a Complaint? (Cont'd)

- “If a recipient has actual knowledge of a pattern of alleged sexual harassment by a perpetrator in a position of authority then a response that is not deliberately indifferent or clearly unreasonable may require the recipient’s Title IX Coordinator to sign a formal complaint...” (p. 30,089)
- “The Title IX Coordinator may consider a variety of factors, including a pattern of alleged misconduct by a particular respondent, in deciding whether to sign a formal complaint...” (p. 30,2017)
- For allegations against employees, a coordinator may sign if the school “wishes to investigate allegations in order to determine whether the recipient has probable cause of employee sexual misconduct that affect the recipient’s ESSA obligations.” (p. 30,192)
- The coordinator may consider situations involving “threats, serial predation, violence, or weapons.” (p. 30,218).

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 educational entity with which the formal complaint is filed.



Required Dismissal of Formal Complaint

- Complaint must be dismissed (but can still be addressed under other student code of conduct) if:
 - Conduct would not constitute Title IX sexual harassment *even if proved*
 - Did not occur in the school's educational program or activities
 - Did not occur against person in the United States

Permissible Dismissal of Complaint

- May be dismissed at school's discretion if:
 - Complainant notifies Title IX Coordinator of desire to withdraw formal complaint or any allegation
 - Respondent is no longer enrolled at or employed by the school
 - Circumstances prevent the educational entity from gathering evidence sufficient to reach a determination as to allegations of complaint

What if a Respondent withdraws?

Question 27: Is a school required to dismiss a formal complaint if a respondent leaves the school?

Answer 27: **No.** Although a school may dismiss a formal complaint if, at any time during the grievance process, the respondent is “no longer enrolled or employed” by the school, dismissal is not required.⁹⁰ The preamble explains that a school has discretion to assess the facts and circumstances of a case before deciding whether to dismiss the complaint because the respondent has left the school.⁹¹

A school may consider, for example, “whether a respondent poses an ongoing risk to the [school’s] community,” or “whether a determination regarding responsibility provides a benefit to the complainant even where the [school] lacks control over the respondent and would be unable to issue disciplinary sanctions, or other reasons.”⁹²

Proceeding with the grievance process could potentially allow a school to determine the scope of the harassment, whether school employees knew about it but failed to respond, whether there is a pattern of harassment in particular programs or activities, whether multiple complainants experienced harassment by the same respondent, and what appropriate remedial actions are necessary.

What if a Complainant withdraws?

Question 24: If a complainant has not filed a formal complaint and is not participating in or attempting to participate in the school's education program or activity, may the school's Title IX Coordinator file a formal complaint?

Answer 24: Yes. A Title IX Coordinator may file a formal complaint even if the complainant is not associated with the school in any way.⁸⁴

In some cases, a school may be in violation of Title IX if the Title IX Coordinator does not do so.⁸⁵ For example, the preamble explains that if a school “has actual knowledge of a pattern of alleged sexual harassment by a perpetrator in a position of authority,” OCR may find the school to be deliberately indifferent (i.e., to have acted in a clearly unreasonable way) if the school's Title IX Coordinator does not sign a formal complaint, “even if the complainant . . . does not wish to file a formal complaint or participate in a grievance process.”⁸⁶ Put simply, there are circumstances when a Title IX Coordinator may need to sign a formal complaint that obligates the school to initiate an investigation regardless of the complainant's relationship with the school or interest in participating in the Title IX grievance process. This is because the school has a Title IX obligation to provide all students, not just the complainant, with an educational environment that does not discriminate based on sex.

Consolidation of Formal Complaints

- May consolidate allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances.

Tips for Title IX Coordinators

- At initial meeting, you can explain how your entity will proceed
 - If complainant files a complaint
 - If complainant does not wish to file a complaint
- After initial supportive measures meeting, confirm whether a family is going to file a complaint in writing.
- If verbal reports are made to you, still request that an individual complete a written complaint.
- Document, document, document!

Hypothetical Situation Part 3

- You are the Title IX Coordinator for Swift Area School District. You reach out to Sarah's family and schedule a meeting to discuss supportive measures and their ability to file a Complaint. At the meeting, she tells you she wants David expelled and hands you a completed Complaint. She tells you she doesn't want anyone at the District speaking to Sarah about this.
- What do you do?

Before (or as soon as) a Complaint is filed

- Call a Title IX Attorney!

Title IX Coordinator Duties

- Make a preliminary determination – whether complaint is required to be dismissed.
- Provide Required Written Notices to the known parties:
 - Notice of Grievance Process
 - Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in § 106.30, including **sufficient details** known at the time and with sufficient time to prepare a response before any initial interview.
 - Sufficient details include:
 - the identities of the parties involved in the incident, if known
 - the conduct allegedly constituting sexual harassment under § 106.30, and the date and location of the alleged incident, if known

Additional Written Notice Requirements

- The written notice must include:
 - a statement that the respondent is presumed not responsible for the alleged conduct and
 - that a determination regarding responsibility is made at the conclusion of the grievance process.
 - must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section and
 - may inspect and review evidence under paragraph (b)(5)(vi) of this section.
 - inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

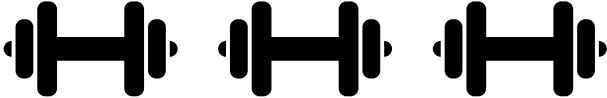

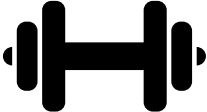
Identification of Title IX Personnel for a Grievance Process

- Three Roles
 - Investigator
 - Decision-Maker
 - Cannot be the Title IX Coordinator
 - Appeals Officer
 - Cannot be Title IX Coordinator, investigator, or decision-maker
- Title IX Coordinator responsible to move process forward
- Different considerations for selection of individuals

Consideration 1: Conflict of Interest and Bias

- Investigator, Decision-maker, Appeal Body/Officer, Informal Resolution Facilitator must be free from conflict of interest and bias
- Conflict of interest:
 - Relatives, school activities, close pre-existing relationship to student or family member
- Bias:
 - Impartial to perform duties based solely on facts and evidence gathered during investigation
 - No prejudgment of the parties or evidence or making assumptions (e.g., “trusted teacher,” “good student”)
 - Avoid sex stereotypes
 - Avoid judgments based on status as respondent or complainant
 - Cannot objectively evaluate evidence
- School districts are free to use their own employees or to outsource the investigation and adjudication functions.

Consideration 2: Practical Considerations

- Serving in a role is a time intensive, heavy lift
 - Investigator – 
 - Decision-Maker – 
 - Appeals Officer – 
- In the future – may be reviewed in litigation or by OCR

Hypothetical Situation Part 4

You are the building principal for the Swift Area High School. You receive the following email.

Dear Building Principal,

We are implementing the following supportive measures for Sarah: access to a counselor, change to her lunch schedule (as requested by her mother), and an escort to the bus at dismissal. Please ensure these are implemented. By the way, I need to assign an investigator to the Title IX Complaint. Can you do the Title IX Investigation?

*Sincerely,
Title IX Coordinator*

You are very busy, and in addition, you have been fielding calls and having frequent meetings with Sarah and her family about the situation. You've also been having frequent meetings with David's family about this report and other unrelated disciplinary incidents. You intend on giving David another suspension for a non-sexual physical altercation.

What do you do?
Should the Title IX Coordinator assign you as investigator?

Investigation

- Investigator will be assigned
 - Collect evidence (interviews, review documentation)
 - Produce relevant evidence to parties, which they can respond to
 - Review party responses
 - Complete an investigative report that fairly summarizes the relevant evidence
- Considerations
 - Burden is on the educational entity to collect evidence
 - Parties can collect and present evidence, which impacts confidentiality
 - Equitable treatment of both parties
 - Treatment of attorneys and advisors

Objective Evaluation of All Relevant Evidence

- Including both inculpatory and exculpatory evidence
- Credibility determinations may not be based on a person's status as a complainant, respondent, or witness

No Requirement of Confidentiality for Parties

- May not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence



Confidentiality

- Except as may be permitted by FERPA, the educational entity 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
 - Any witness

Retaliation Prohibited



- The educational entity may not 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.
- Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).

Specific Circumstances

- The exercise of rights protected under the First Amendment does not constitute retaliation
- Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part 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

Respecting Legal Privileges

- May not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege

Medical Records

- The educational entity cannot access, consider, disclose, or otherwise use a party's medical records made and maintained in connection with the provision of treatment to the party, unless the educational entity obtains that party's voluntary, written consent to do so.

Sexual Predisposition / Prior Sexual Behavior

- With or without a hearing, 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.

Decision-Maker

- Decision-maker will:
 - Consider written responses to evidence & allow parties to ask relevant questions
 - Objectively evaluate all relevant evidence, including both inculpatory and exculpatory evidence
 - Credibility determination cannot be based on a person's status as complainant, respondent, or witness
 - Prepare a written determination regarding:
 - Responsibility
 - Whether Title IX harassment occurred
 - What facts support or do not support this determination
 - Recommend discipline in accordance with code of conduct or other policies
 - Determination must adhere to other regulation requirements
 - List procedural steps
 - Provide to parties

Hearings

- Grievance process may, but need not, provide for a hearing.
- With or without a hearing, after the educational entity has sent the investigative report to the parties and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.

Written Determination

- Must include:
 - Identification of the allegations potentially constituting sexual harassment;
 - A description of the procedural steps taken from the receipt of the formal complaint through the determination, 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 educational entity'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 educational entity imposes on the respondent, and whether remedies designed to restore or preserve equal access to the educational entity's education program or activity will be provided by the educational entity to the complainant; and
 - The educational entity's procedures and permissible bases for the complainant and respondent to appeal.

Equitable Treatment

- Remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent
 - Designed to restore or preserve equal access to the educational entity's education program or activity
 - May include supportive measures
 - May be disciplinary, punitive and burden the respondent
 - Must follow a grievance process that complies with the new regulations before the imposition of any disciplinary sanctions or other actions that are not supportive measures against a respondent

Implementation of Remedies

- The Title IX Coordinator is responsible for effective implementation of any remedies.

Appeals

- The educational entity may offer an appeal equally to both parties on additional bases.



Appeals

- The educational entity must offer both parties an appeal from a determination regarding responsibility, and from the educational entity's dismissal of a formal complaint or any allegations limited to the following bases:
 - Procedural irregularity that affected the outcome of the matter;
 - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made that could affect the outcome of the matter; and
 - The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

Notification of Appeal

- As to all appeals, the educational entity must:
 - Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
 - Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;
 - Ensure that the decision-maker(s) for the appeal is trained and has no conflict of interest;
 - Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
 - Issue a written decision describing the result of the appeal and the rationale for the result; and
 - Provide the written decision simultaneously to both parties.

Informal Resolution

- The educational entity may not:
 - Require waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this grievance process
 - Require the parties to participate in an informal resolution process
 - Offer an informal resolution process unless a formal complaint is filed

Informal Resolution

- However, at any time prior to reaching a determination regarding responsibility, the educational entity may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the educational entity –
 - Provides to the parties a written notice disclosing:
 - The allegations
 - The requirements of the informal resolution process, including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations
 - Provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint
 - Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared

Informal Resolution



- The educational entity must also obtain the parties' voluntary, written consent to the informal resolution process
- The educational entity may **not** offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student

Adoption of Grievance Process

- Policy should include grievance process, as required by the 2020 regulations
- Notification about how to file a Complaint
- Grievance process is required to be disseminated to:
 - Applications for admission and employment
 - Students
 - Parents / Legal Guardians
 - Employees
 - Unions or professional orgs with collective bargaining agreements

Dissemination of Policy and Notification

- Required notification that a recipient does not discriminate on the basis of sex
- Required publication of contact information for the Title IX Coordinator
 - on website
 - “each handbook” that it makes available

Training Materials

- Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment

Prompt Time Frames

- Must have reasonably prompt time frames for conclusion of the grievance process, including:
 - Reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the educational entity offers informal resolution processes.
 - A process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action.

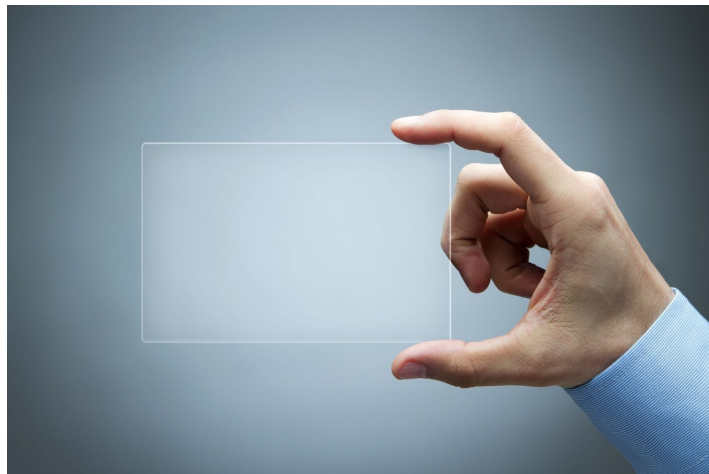
Good Cause for Extension

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



Transparency – Remedies

- Describe the range of possible disciplinary sanctions and remedies, or list the possible disciplinary sanctions and remedies that the educational entity may implement following any determination of responsibility



Transparency – Standard of Evidence

- State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard:
 - Apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty
 - Apply the same standard of evidence to all formal complaints of sexual harassment

Definitions of Standards

- The clear-and-convincing-evidence standard means the decision-maker must determine whether it is “highly probable” that the alleged facts are true
- Preponderance-of-the-evidence standard means the decision-maker must determine whether alleged facts are more likely than not to be true

Recordkeeping

The educational entity must maintain for a period of seven years records of:

- Each sexual harassment investigation, including any determination regarding responsibility, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the educational entity's education program or activity
- Any appeal and the result therefrom
- Any informal resolution and the result therefrom

Recordkeeping – Training Materials

- The educational entity must maintain for 7 years:
 - All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.
 - The educational entity must make these training materials publicly available on its website, or if the educational entity does not maintain a website, the educational entity must make these materials available upon request for inspection by members of the public.

Recordkeeping

- The educational entity must create and maintain for a period of seven years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment.
- In each instance, the educational entity must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the educational entity's education program or activity.
- If the educational entity does not provide a complainant with supportive measures, then the educational entity must document the reasons why such a response was not clearly unreasonable in light of the known circumstances.
- The documentation of certain bases or measures does not limit the educational entity in the future from providing additional explanations or detailing additional measures taken.

QUESTIONS?

